

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94444; File No. SR-GEMX-2022-05)

March 17, 2022

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Harmonize Various Processes Under Options 3, Section 20 Across the Affiliated Nasdaq Options Exchanges

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 March 8, 2022, 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 Harmonize various processes under Options 3, Section 20 across the affiliated Nasdaq options exchanges.

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/gemx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 harmonize its existing processes with those of its affiliate Nasdaq Phlx LLC ("Phlx") concerning the review of decisions on appeal under Options 3, Section 20. The Exchange also proposes a number of non-substantive changes. Each change is discussed in detail below.

Appeal

Today, Options 3, Section 20(k) governs the appeal process for determinations by Exchange staff made under this Rule, including obvious error determinations. Specifically, if a Member affected by a determination under this Rule so requests within the permitted time period, an Exchange Review Council panel will review decisions made by the Official under Options 3, Section 20, including whether an obvious error occurred and whether the correct determination was made. A request for review on appeal must be made in writing via e-mail or other electronic means specified from time to time by the Exchange in an Options Trader Alert distributed to Members within thirty (30) minutes after the party making the appeal is given notification of the initial determination being appealed. The Exchange Review Council panel shall review the facts and render a decision as soon as practicable, but generally on the same trading day as the execution(s) under review. On requests for appeal received after 3:00 p.m. Eastern Time, a decision will be rendered as soon as practicable, but in no case later than the trading day following the date of the execution under review. Furthermore, if the Exchange

Review Council panel votes to uphold the decision made under this Rule, the Exchange will assess a fee (“Appeal Fee”) of \$5,000 against the Member(s) who initiated the request for appeal.

The Exchange proposes generally to maintain its current appeal process with certain adjustments to harmonize its process with that of its affiliate, Phlx. First, while Phlx similarly requires the parties to submit a request for review within thirty (30) minutes of being notified of the determination being appealed, Phlx also provides parties with additional time to submit their request if the notification occurs later in the trading day. In particular, if the notification is made after 3:30 p.m. Eastern Time, either party has until 9:30 a.m. Eastern Time on the next trading day to submit a request for review.³ Similar to Phlx, the Exchange believes that this flexibility will be helpful for Members in submitting their appeal requests in a timely manner, particularly where notification of the Official’s decision was received later in the trading day, and therefore proposes to adopt this provision in Options 3, Section 20(k)(2).

Second, the Exchange proposes to amend its provisions for when the Exchange Review Council panel must render a decision on requests for appeal by harmonizing to Phlx’s process. Specifically, the Exchange proposes in Options 3, Section 20(k)(2) that the Exchange Review Council panel shall review the facts and render a decision on the day of the transaction, or the next trade day in the case where a request is properly made after 3:30 p.m. on the day of the transaction or where the request is properly made the next trade day.⁴ The proposed language modifies the current process by extending the current cutoff time from 3:00 to 3:30 p.m. Eastern Time for the Exchange Review Council panel to render a decision on the next trading day, and

³ See Phlx Options 3, Section 20(l).

⁴ See Phlx Options 3, Section 20(l) for analogous language.

by accommodating situations where parties properly bring an appeal request on the next trading day.

Third, the Exchange proposes to decrease the Appeal Fee from \$5,000 to \$500 to align to Phlx's Appeal Fee.⁵

Non-Substantive Changes

In Options 3, Section 20(b)(1), the Exchange proposes a non-substantive, clarifying change to replace the reference to "opening rotation" to "Opening Process," and specify that the Opening Process is defined in Options 3, Section 8. The Exchange will also correct a punctuation error in this section.

The Exchange also proposes non-substantive changes to replace references to "Market Control" with "Official"⁶ throughout Options 3, Section 20. At the time of adoption, the term Market Control referred to designated personnel in the Exchange's market control center that were responsible for administering the provisions of the Rule.⁷ The Exchange has since updated the terminology for such personnel as Officials,⁸ and therefore proposes to update the old

⁵ See Phlx Options 3, Section 20(l). The Nasdaq Options Market ("NOM") and BX Options ("BX") also have identical \$500 Appeal Fees. See NOM and BX Options 3, Section 20(k)(4).

⁶ For purposes of Options 3, Section 20, an Official is an Officer of the Exchange or such other employee designee of the Exchange that is trained in the application of this Rule. See Options 3, Section 20(a)(3).

⁷ The Exchange's application for registration as a national securities exchange, as approved by the Commission, incorporated this provision. See Securities Exchange Act Release No. 70050 (July 26, 2013), 78 FR 46622 (August 1, 2013).

⁸ See Securities Exchange Act Release No. 74897 (May 7, 2015), 80 FR 27415 (May 13, 2015) (SR-ISEGemini-2015-11).

references accordingly.⁹ The Exchange notes that its affiliated options exchanges similarly reference Officials as the persons responsible for administering their obvious error rules.¹⁰

Lastly, the Exchange proposes non-substantive, conforming amendments to Options 3, Section 1 (Days and Hours of Business). The Exchange first proposes to amend the title from “Days and Hours of Business” to “Hours of Business.” The Exchange recently filed to establish General 3, Section 1030, which governs the days the Exchange will be open for business.¹¹ At this time, the Exchange also proposes to amend the first paragraph of Options 3, Section 1 which provides, “The Board shall determine the days the Exchange shall be open for business (referred to as “business days”) and the hours of such days during which transactions may be made on the Exchange.” The Exchange proposes to remove this sentence and instead provide as new paragraph (a):

“The Exchange shall be open for business as provided within General 3, Rule 1030.”

This proposed text will make clear that while General 3, Section 1030 governs the days the Exchange will be open for business, the remainder of the rule addresses the hours of operation of the System and specific products. The Exchange also proposes to remove paragraph (e) as

⁹ In particular, the Exchange proposes to update the following subparagraphs in Options 3, Section 20: (c)(2), (d)(2), (g), (h), (i), (l)(1)(A), (l)(1)(B), (l)(1)(C), and (l)(2)(A). The Exchange also proposes to update Supplementary Material .03 to Options 3, Section 20.

¹⁰ See BX, NOM, and Phlx Options 3, Section 20.

¹¹ See Securities Exchange Act Release No. 93675 (November 29, 2021), 86 FR 68714 (December 3, 2021) (SR-NASDAQ-2021-69) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Include Juneteenth National Independence Day as a Holiday). The Exchange’s General 3 rules incorporate by reference The Nasdaq Stock Market LLC’s General 3 Rules. Rule 1030 of General 3 memorialized all current Exchange holidays and added a provision to permit the Exchange the authority to halt or suspend trading or close Exchange facilities for certain unanticipated closures.

holidays are addressed within General 3, Section 1030. The remainder of the paragraphs are proposed to be re-lettered.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹² in general, and furthers the objectives of Section 6(b)(5) of the Act,¹³ 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange further believes that its proposal to amend the current appeal process to harmonize with Phlx's appeal process is consistent with the Act because it will continue to afford Members with due process in connection with decisions made by Officials under Options 3, Section 20 that the Member may feel warrants review. As discussed above, the proposal would allow either party until 9:30 a.m. the next trading to submit a request for review if notification is made after 3:30 p.m., which the Exchange believes will be helpful for Members in submitting their appeal requests in a timely manner. Furthermore, the proposal provides the Exchange Review Council panel additional time and flexibility to render decisions on requests for appeal in cases where a request is properly made after 3:30 p.m. on the day of the transaction or where the request is properly made the next trade day, and is designed to reduce administrative burden on the Exchange. As it relates to the Appeal Fee, the Exchange believes that the proposed reduction of the fee from \$5,000 to \$500 is reasonable, equitable and not unfairly discriminatory because it

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

aligns to the Appeal Fee assessed by its affiliates¹⁴ and by other options exchanges,¹⁵ and will be applied uniformly to all Members.

Ultimately, the proposed changes to the appeal process are intended to align certain time frames and the Appeal Fee with those of its affiliates in order to provide more consistent rules and procedures across the affiliated options exchanges owned by Nasdaq, Inc. Consistent rules and procedures, in turn, would simplify and streamline the regulatory requirements and increase the understanding of the Exchange's operations for Members of the Exchange that are also members on the Exchange's affiliated options exchanges. Greater harmonization across the affiliated options exchanges will result in greater uniformity, rules that are easier to follow and understand, and more efficient regulatory compliance, thereby contributing to the protection of investors and the public interest. As such, the proposed rule change would foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange further believes that the proposed non-substantive changes in Options 3, Section 20 to replace all instances of Market Control with Official, and to replace opening rotation with Opening Process, will add clarity, transparency, and consistency to the Exchange's rules. Lastly, the Exchange's proposal to amend Options 3, Section 1 (Days and Hours of Business) as described above will bring greater clarity, and ensure that this Rule conforms to the changes made in the recent filing to establish General 3, Section 1030, which governs the days

¹⁴ See supra note 5.

¹⁵ See, e.g., Cboe BZX Exchange Rule 20.6(1)(5) and MIAX Options Exchange Rule 521(1)(2).

the Exchange will be open for business.¹⁶ The Exchange believes that market participants would benefit from the increased clarity, thereby reducing potential confusion, and ensuring that market participants and investors can more easily navigate and understand the Exchange's rules.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

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 changes are designed to provide greater harmonization among similar rules and processes across the Exchange's affiliated options exchanges, resulting in more efficient regulatory compliance for common 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

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 Act¹⁷ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁸

¹⁶ See supra note 11.

¹⁷ 15 U.S.C. 78s(b)(3)(A)(iii).

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

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission 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-2022-05 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-2022-05. 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 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-2022-05 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.¹⁹

J. Matthew DeLesDernier
Assistant Secretary

¹⁹ 17 CFR 200.30-3(a)(12).