

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-90755; File No. SR-GEMX-2020-21)

December 21, 2020

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Harmonize Exchange Rule General 3, Section 2 with Recent Changes by the Financial Industry Regulatory Authority, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 11, 2020, 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 substantially 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 Exchange Rule General 3, Section 2 with recent changes by the Financial Industry Regulatory Authority, Inc. (“FINRA”). This amendment would temporarily grant the Exchange Review Council (“ERC”) authority<sup>3</sup> to conduct hearings in connection with appeals of Membership Application Program decisions by video conference, if warranted by the current COVID-19-related public health risks posed by an in-person hearing. As proposed, the temporary amendment would be in effect through April 30, 2021.<sup>4</sup>

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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> For ERC hearings under Exchange Rule General 3, Section 2(g), this temporary authority is granted to the ERC or relevant Subcommittee.

<sup>4</sup> If the Exchange requires temporary relief from the rule requirements identified in this proposal beyond April 30, 2021, the Exchange may submit a separate rule filing to extend the expiration date of the temporary amendments under these rules. The amended

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 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 Exchange Rule General 3, Section 2 with recent changes to FINRA Rule 1015 in order to temporarily grant the ERC authority to conduct hearings in connection with appeals of Membership Application Program decisions by video conference, if warranted by the current COVID-19-related public health risks posed by an in-person hearing.<sup>5</sup> As proposed, these temporary amendments would be in effect through April 30, 2021.

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Exchange rules will revert back to their original state at the conclusion of the temporary relief period and any extension thereof.

<sup>5</sup> See Exchange Act Release No. 89737 (September 2, 2020), 85 FR 55712 (September 9, 2020) (SR-FINRA-2020-027) ("FINRA Filing"). See also Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (SR-FINRA-2020-042) (extending the relief in the FINRA Filing through April 30, 2021). The Exchange notes that the FINRA Filing also proposed to temporarily amend FINRA Rules 9261, 9524, and 9830, which govern hearings in connection with appeals of disciplinary actions, eligibility proceedings, and temporary and permanent cease and desist orders. The

## Background

The Exchange's rule regarding the hearing and evidentiary process for appeals of Membership Application Program decisions as set forth in Rule General 3, Section 2(g) is based on FINRA's Rule 1015. As adopted, the text of Exchange Rule General 3, Section 2(g) is substantially the same as FINRA Rule 1015, with the exception of conforming and technical differences.

In view of the ongoing spread of COVID-19 and its effect on FINRA's adjudicatory functions nationwide, FINRA recently filed a temporary rule change to grant the National Adjudicatory Council ("NAC") the authority to conduct certain hearings by video conference, if warranted by the current COVID-19-related public health risks posed by in-person hearings.<sup>6</sup> Accordingly, the Exchange proposes to file this temporary rule change to align with the temporary rule change filed by FINRA.

Mirroring FINRA's NAC, the ERC is the Exchange's appellate body, which reviews initial decisions issued by FINRA's Office of Hearing Officers ("OHO") and – through Subcommittees – holds evidentiary hearings for Membership Application Program decision appeals and eligibility proceedings under Exchange Rule General 3, Section 2(g). This temporary proposed rule change will allow the ERC or relevant Subcommittee to make an assessment as to whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference.

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Exchange's Rules 9261, 9524, and 9830 incorporate by reference The Nasdaq Stock Market LLC rules, which are the subject of a separate filing. See SR-NASDAQ-2020-076 (November 5, 2020). Therefore, the Exchange is not proposing to adopt that aspect of the FINRA Filing.

<sup>6</sup> See FINRA Filing, 85 FR at 55712.

### Proposed Rule Change

Consistent with FINRA's temporary amendment to FINRA Rule 1015, the Exchange proposes to temporarily grant the ERC authority to conduct hearings in connection with appeals of Membership Application Program decisions by video conference, if warranted by the current COVID-19-related public health risks posed by an in-person hearing. The proposed change will permit the ERC to make an assessment, based on critical COVID-19 data and criteria, as to whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference. The Exchange believes that this is a reasonable procedure to follow in hearings under Rule General 3, Section 2(g).

To effectuate these changes, the Exchange proposes to add the following sentence to General 3, Section 2(g)(6):

Upon consideration of the current public health risks presented by an in-person hearing, the Exchange Review Council or Subcommittee may, on a temporary basis, determine that the hearing shall be conducted, in whole or in part, by video conference.

The proposed text is substantially the same as the language adopted by FINRA, excepting conforming and technical differences.<sup>7</sup>

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>8</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>9</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect

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<sup>7</sup> See *id.* at 55712.

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

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

the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by providing greater harmonization between the Exchange rules and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance.

As previously noted, the text of Exchange Rule General 3, Section 2(g) is substantially the same as FINRA's rule. As such, the proposed rule change will foster cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the proposed temporary rule change will permit the Exchange to effectively conduct hearings during the COVID-19 pandemic in situations where in-person hearings present likely public health risks. The ability to conduct hearings by video conference will thereby permit the Exchange's adjudicatory functions to continue unabated, thereby avoiding protracted delays. Conducting hearings via video conference will give the parties and adjudicators simultaneous visual and oral communication without the risks inherent in physical proximity during a pandemic.

The Exchange believes that the temporary proposed rule change strikes an appropriate balance between providing fair process and enabling the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets while accounting for the significant health and safety risks of in-person hearings stemming from the outbreak of COVID-19.

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

The Exchange does not believe that the temporary proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The proposed rule change is not intended to address competitive issues but is rather intended solely to provide temporary relief given the impacts of the COVID-19 pandemic. In its filing, FINRA provides an abbreviated economic impact assessment maintaining that the changes are necessary to temporarily rebalance the attendant benefits and costs of the obligations under FINRA Rule 1015 in response to the impacts of the COVID-19 pandemic that is equally applicable to the changes the Exchange proposes.<sup>10</sup> The Exchange accordingly incorporates FINRA's abbreviated economic impact assessment by reference.

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>11</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>12</sup>

The Exchange believes that this filing is non-controversial and eligible to become effective immediately because the proposal promotes uniformity in rules across self-regulatory

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<sup>10</sup> FINRA Filing, 85 FR at 55716.

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of 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.

organizations thereby enabling the Exchange to conduct hearings during the COVID-19 pandemic by video conference where the health risks of in-person hearings are significant. The proposed rule change is based on, and similar to, recent changes made to FINRA Rule 1015 that addressed the issue of balancing public health risks with conducting hearings during the COVID-19 pandemic. The Exchange proposes to adopt the rule change in substantially the same form as it was adopted by FINRA. The Exchange further believes that the proposed rule change would not significantly affect the protection of investors or the public interest or impose any significant burden on competition because the changes are based on the rules of FINRA. Moreover, the proposed rule change is not intended to address competitive issues but rather is concerned solely with providing temporary relief given the impacts of the COVID-19 pandemic.

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](mailto:rule-comments@sec.gov). Please include File Number SR-GEMX-2020-21 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-2020-21. 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-2020-21 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>13</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).