context of a technology migration of the Choe Affiliated Exchanges, and not as a competitive filing. As stated, the proposed changes to the rules are consistent with the shell Rulebook that will be in place come October 7, 2019 and provide clear, consistent rules for all market participants upon the completion of migration. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition because it does not in any way substantively alter the current rules of the Exchange. It merely intends to provide simplified, consolidated rules upon migration. Likewise, the Exchange does not believe the proposed rule change will impose any burden on intermarket competition because the proposed rules are substantively the same as the Exchange’s current rules, which have all been previously filed with the Commission.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder. 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 been effectively pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6) thereunder.

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. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative prior to the Exchange’s proposed system migration on October 7, 2019, in order to permit the Exchange to provide a complete Rulebook upon the completion of the migration. According to the Exchange, the proposed rule change simplifies, reorganizes, and updates its rule text and does not substantively alter any of its rules. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposal does not raise any new or novel issues and makes only non-substantive changes to the rules. Therefore, the Commission designates the proposed rule change to be operative upon filing.16

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, or for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

• Use the Commission’s internet comment form (http://www.sec.gov/rules/sro.shtml); or
• Send an email to rule-comments@sec.gov. Please include File Number SR–CBOE–2019–081 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.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.

Jill M. Peterson,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend GEMX’s Rulebook and By-Laws

October 4, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

All submissions should refer to File Number SR–CBOE–2019–081. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s internet 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–CBOE–2019–081 and should be submitted on or before October 31, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.19
I. Purpose

The Exchange proposes to amend its Rulebook and By-Laws to (i) remove obsolete provisions relating to the organization and administration of committees, (ii) modify Director categorizations, (iii) amend the Board and ROC compositional requirements, and (iv) make additional, non-substantive edits. Each change is discussed below.3

Rules 200–203

Chapter 2 of the Exchange’s Rulebook presently contains a number of rules relating to the organization and administration of committees of the Exchange. In particular, Rules 200–203 set forth provisions for the establishment of committees, removal of committee members, committee procedures and the general duties and powers of committees, all of which have been in place since the Exchange’s inception. The Exchange has since amended its committee structure and related rules to align with those of its affiliates.4 Accordingly, the Exchange proposes to delete Rules 200–203 as obsolete or duplicative because the provisions related to the organization and administration of committees are now set forth in the Exchange’s Limited Liability Company Agreement (“LLC Agreement”) and Its By-Laws.

Historically, Rules 200 and 201 authorized the Chief Executive Officer and President of the Exchange to establish committees not comprised of directors pursuant to delegated authority by the Board, and to appoint or remove any such committee members with Board approval.5 With the changes in SR–GEMX–2017–37 and SR–GEMX–2018–24, these rules have been superseded by By-Law provisions that specify the committees composed solely of Directors and committees not composed solely of Directors, including the appointment and removal of such committee members.6 In this respect, the Exchange notes that it is following the approach of its affiliates, BX, Nasdaq, and Phlx, which similarly have provisions in their respective By-Laws, instead of their rulebooks, pertaining to committees composed solely of Directors and committees not composed solely of Directors.7 The Exchange further seeks to delete Rules 202 and 203 given that similar provisions governing committee procedures and general duties and powers are now set forth in Section 9(g) of the LLC Agreement and in By-Law Article III and Article VI.

By-Law Article I

Currently, the definition of “Non-Industry Director” in the Exchange By-Laws refers to, among other individuals, an officer, director, or employee of an issuer of securities listed on the national securities exchange operated by the Exchange.8 Because only Nasdaq currently operates an equities listing market, the Exchange seeks to amend the definition of Non-Industry Director to refer to an officer, director, or employee of an issuer of securities listed on a national securities exchange operated by the Exchange or one of its affiliates. The Exchange believes that the proposed changes will bring greater clarity to the Exchange’s rules by aligning the By-Law provision to how the Exchange currently operates. The Exchange notes that the qualifications for a Non-Industry Director are not expanding under this proposal and as a practical matter, no changes to the current composition of Non-Industry Directors on the Exchange’s Board are contemplated by this rule change.

Today, a Non-Industry Director who is not designated by the Exchange as a Public Director 9 under (i) of the definition of Non-Industry Director, and that does not explicitly fall under (ii) (i.e., “an officer, director or employee of an issuer of securities listed on the national securities exchange operated by the Exchange”) would still fall under (iii) an individual who would not be an Industry Director.10 With the proposed

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changes, these Non-Industry Directors could fall under both (ii) and (iii) because they would be representative of issuers listed on the Exchange’s affiliate, Nasdaq, and at the same time, not be considered Industry Directors. The Exchange also proposes to make conforming changes to the definition of a “Non-Industry member” of a committee.¹¹

Currently, the Exchange’s Board compositional requirements require at least one Public Director and at least one issuer representative (or if the Board consists of ten or more Directors, at least two issuer representatives).¹² As set forth in Article I, Section (z), a “Public Director” is defined as a Director who has no material business relationship with a broker or dealer, the Exchange or its affiliates, or FINRA. “Issuer representative” is not defined specifically in the Exchange’s By-Laws, but is implicitly defined in the term Non-Industry Director as “an officer, director, or employee or an issuer of securities listed on the national securities exchange operated by the Exchange.”¹³ The Exchange now proposes to clarify in the definition of Public Director that, for the avoidance of doubt, a director of an issuer of securities listed on a national securities exchange operated by the Exchange or one of its affiliates shall not be considered a Public Director solely on the basis of such directorship. The Exchange believes that a director of a listed company can adequately represent the interests of listed companies on the Board and therefore be considered an issuer representative. At the same time, the Exchange does not believe that such a directorship always constitutes a material business relationship with a broker or dealer, the Exchange or its affiliates, or FINRA, which would prohibit the individual from being considered a Public Director.¹⁴ Of course, such issuer representative must still meet the requirements of a Public Director and not have such material business relationships by definition. Thus in limited circumstances, the Exchange believes that it is feasible for directors of listed companies to be considered both Public Directors and issuer representatives. In light of the foregoing, the Exchange also proposes to make conforming changes to the definition of a “Public member” of a committee.¹⁵

The Exchange notes that with the proposed changes, the composition of the Board would still be required to reflect a balance among Non-Industry Directors (including Public Directors and issuer representatives), Industry Directors, and Member Representative Directors.¹⁶ Accordingly, current Board qualification requirements such as the number of Non-Industry Directors equaling or exceeding the sum of the number of Industry Directors and Member Representative Directors would continue to apply.¹⁷

¹³ This is consistent with the longstanding best practice of the Exchange’s ultimate parent, Nasdaq, Inc., having the Chairman of the Audit Committee of the board of directors of Nasdaq, Inc. serve as the Chairman of the Exchange Board’s Regulatory Oversight Committee, which is required to be comprised of Public Directors who are also considered “independent directors” as defined in Nasdaq Rule 5605. See By-Law Article III, Section 5(c). Because Nasdaq, Inc. is a listed company, this Exchange Director could be considered both an issuer representative and a Public Director.

¹⁴ See By-Law Article I, Section (aa).

¹⁵ The term “Member Representative Director” means a Director who has been elected or appointed after having been nominated by the Member Nominating Committee or by an Exchange Member pursuant to the Exchange’s By-Laws. A Member Representative Director may, but is not required to be, an officer, director, employee, or agent of an Exchange Member. See By-Law Article I, Section (r). Member Representative Directors are directors that meet the fair representation requirement in Section 6(b)(3) of the Act, which requires that the “rules of the Exchange assure a fair representation of its members in the selection of its directors and administration of its affairs . . . ”

¹⁶ This is consistent with the longstanding best practice of the Exchange’s ultimate parent, Nasdaq, Inc., having the Chairman of the Audit Committee of the board of directors of Nasdaq, Inc. serve as the Chairman of the Exchange Board’s Regulatory Oversight Committee, which is required to be comprised of Public Directors who are also considered “independent directors” as defined in Nasdaq Rule 5605. See By-Law Article III, Section 5(c). Because Nasdaq, Inc. is a listed company, this Exchange Director could be considered both an issuer representative and a Public Director.

¹⁷ By-Law Article III, Section 2(a). The Exchange proposes to amend By-Law Article III, Section 2(a) to revise the qualifications for any position on the Board required to be representative of issuers. As discussed above, Article III, Section 2(a) requires that the Board be composed of at least one Public Director and at least one issuer representative (or if the Board consists of ten or more Directors, at least two issuer representatives).¹⁸ The Exchange adopted this provision when it conformed its By-Laws to those of Nasdaq as part of its effort to harmonize corporate governance processes with its affiliated exchanges.¹⁹ As noted above, unlike Nasdaq, the Exchange does not currently operate an equities listing market and therefore believes it is more appropriate to align its Board composition requirements on this point with the By-Laws of BX and Phlx, which both currently require only one Director representative of issuers and investors, regardless of Board size.²⁰ The Exchange’s proposal would also change the Board composition requirement to more closely track the statutory language included in Section 6(b)(3) of the Act, which requires one or more directors to be “representative of issuers and investors.”

By-Law Article III, Section 5(c)

Currently, By-Law Article III, Section 5(c) requires that the Regulatory Oversight Committee (“ROC”) be comprised of three members, each of whom shall be a Public Director and an “independent director” as defined in Nasdaq Rule 5605. The Exchange proposes to amend Section 5(c) to provide that the ROC shall be comprised of at least three members, as is currently set forth in the ROC Charter.²¹ All members of the ROC will continue to be Public Directors and “independent directors” as defined in Nasdaq Rule at least 20% of the Directors be Member Representative Directors will continue to apply. See LLC Agreement Section 9(a).

²⁰ See By-Law Article III, Section 2(a) also requires that the number of Non-Industry Directors (which includes Public Directors and issuer representatives) shall equal or exceed the sum of the number of Industry Directors and Member Representative Directors. Furthermore, Section 9(a) of the LLC Agreement requires that at least 20% of the Directors be Member Representative Directors. These Board qualifications are not being amended. See Securities Exchange Act Release No. 81802 (October 3, 2017), 82 FR 47055 (October 10, 2017) (SR–GEMX–2017–37).

6(b)(3), and Section 6(b)(5) of the Act,\(^\text{23}\) and the Exchange believes that the proposed rule change in By-Law Article III, Section 5(c) to provide that the ROC shall be comprised of at least three members is consistent with the Act because it will promote transparency to the Exchange’s current practices by conforming the By-Law language to the ROC Charter. As discussed above, the composition requirements that all ROC members be Public Directors and “independent directors” as defined in Nasdaq Rule 5605 will remain unchanged with this proposal, thereby ensuring that an independent Board committee will continue to be responsible for the regulatory oversight of the Exchange. Lastly, the proposed technical changes in Section 5(c) to correct a typographical error and to update Nasdaq’s name.

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,\(^\text{22}\) in general, and furthers the objectives of Section 6(b)(1), Section 6(b)(3), and Section 6(b)(5) of the Act,\(^\text{23}\) in particular, which require, among other things, an exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act; that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer; and that the rules of an exchange be 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.

Rules 200–203

As discussed above, the Exchange proposes to delete Rules 200–203 as obsolete or duplicative because the provisions related to the organization and administration of committees are now set forth in the Exchange’s LLC Agreement and By-Laws. The Exchange believes that deleting rules that no longer apply to the Exchange’s current committee structure will more clearly identify currently applicable rules, which will remove impediments to and perfect the mechanism of a free and open market. The Exchange further believes that the proposed rule change will eliminate potential confusion regarding which rules apply to the organization and administration of committees, which ultimately protects investors and the public interest.

By-Law Article I

The Exchange believes that changes to the definitions of Non-Industry Director and Non-Industry member proposed above will enhance the clarity of these provisions given that only the Exchange’s affiliate (Nasdaq) currently operates an equities listing market. Accordingly, the proposed changes should more accurately reflect how the Exchange currently operates. The Exchange also believes that the proposed changes to the definitions of Public Director and Public member are consistent with the Act as these modifications are intended to make clear that a Director is not barred from being considered a Public Director merely because the Director serves as a director of an issuer of securities listed on a national securities exchange operated by the Exchange or one of its affiliates, and are consistent with current corporate governance practices.\(^\text{24}\) Furthermore, as discussed above, the requirement that the number of Non-Industry Directors (including at least one Public Director and at least one Director representative of issuers and investors) equal or exceed the sum of the number of Industry Directors and Member Representative Directors, and at least 20% of the Directors be Member Representative Directors, would continue to apply.\(^\text{25}\) Accordingly, the Exchange believes that the proposed changes will more accurately reflect the Exchange’s current operations and governance practices while continuing to comport with the Exchange’s statutory obligations regarding fair representation under Section 6(b)(3) of the Act.

By-Law Article III, Section 2(a)

The Exchange believes that its proposal to expand the Board qualifications from an issuer representative to a representative of issuers and investors, and eliminate the requirement that the Board have two such representatives if the Board consists of ten or more Directors is consistent with the Act. The Exchange notes that the proposed changes track the statutory language included in Section 6(b)(3) of the Act, which requires one or more directors to be “representative of issuers and investors.” The Exchange also notes that the elimination of the requirement to have at least two Director positions representative of issuers if the Board consists of ten or more Directors is consistent with Section 6(b)(3) of the Act, which only requires the Board to have one such representative. Furthermore, the Exchange will continue to require the Board composition to reflect a balance among Non-Industry Directors (including Public Directors and Director representatives of issuers and investors), Industry Directors, and Member Representative Directors (with the latter continuing to constitute 20% of the Board).\(^\text{26}\) Accordingly, the Exchange believes that the changes to the Board qualifications proposed herein will more accurately reflect current Exchange operations while continuing to meet the statutory requirements under Section 6(b)(3) of the Act. In addition, the proposed amendments will have the additional benefit of bringing the Exchange’s Board qualifications on this point into greater conformity with those of BX and Phlx, thereby creating more consistent standards among the affiliated exchanges owned by Nasdaq, Inc.\(^\text{27}\)

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

Because the proposed rule change relates to the corporate governance of the Exchange and not to the Exchange’s operations, 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.

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

\(^{22}\) See supra note 14.


\(^{24}\) 15 U.S.C. 78f(b)(1), (b)(3), and (b)(5).

\(^{25}\) See supra note 16, with accompanying text.

\(^{26}\) See supra note 18.

\(^{27}\) See supra note 20.
A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Commission notes that waiver of the operative delay would allow the Exchange to effect the changes to its Rulebook and By-Laws, which would eliminate obsolete provisions in the Exchange’s Rulebook and better align provisions in the Exchange’s By-Laws with those in the By-Laws of its affiliates, in time for the Exchange Board meeting on September 25, 2019. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay. The 30-day operative delay is consistent with the protection of investors and the public interest.

Comments may be submitted by any of the following methods:

Electronic Comments
- Use the Commission’s internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-GEMX-2019-14 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-2019-14. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s internet 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-2019-14 and should be submitted on or before October 31, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority. 33

Jill M. Peterson,
Assistant Secretary.

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