

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * <input type="text" value="41"/>	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - <input type="text" value="2018"/> - * <input type="text" value="45"/>
		Amendment No. (req. for Amendments *) <input type="text"/>

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 checked="" type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input 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 proposed rule change to amend the Exchanges provisions for excluding a day from its volume calculations for purposes of determining pricing tiers.

**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 \*  Last Name \*

Title \*

E-mail \*

Telephone \*  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

By

(Name \*)

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 \***

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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 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 proposed rule change to amend the Exchange’s provisions for excluding a day from its volume calculations for purposes of determining pricing tiers.

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 (the “Board”) on September 26, 2018. 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:

Sun Kim  
Associate General Counsel  
Nasdaq, Inc.  
212-231-5106

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

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

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

a. Purpose

The purpose of the proposed rule change is to amend the Exchange's provisions for excluding a day from its volume calculations for purposes of determining pricing tiers. The Exchange is standardizing its practice for removing a day from volume calculations in its Pricing Schedule with its affiliated options market, Nasdaq PHLX LLC ("Phlx").<sup>3</sup> Each change is discussed below.

Background

To avoid penalizing members when aberrant low volume days result from systems or other issues at the Exchange, or where the Exchange closes early for holiday observance, the Exchange currently has language in its Pricing Schedule allowing it to exclude certain days from its average daily volume ("ADV") calculations. Currently, language in the Exchange's Pricing Schedule provides that, for purposes of determining ADV for certain incentive programs,<sup>4</sup> any day that the market is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from such calculation; provided that the Exchange will only remove the day for members that would have a lower ADV with the day included. The

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<sup>3</sup> See Phlx Pricing Schedule, Options 7, Section 1(b). The Exchange's other affiliated options markets, Nasdaq ISE, Nasdaq MRX, Nasdaq BX, and The Nasdaq Options Market will also file similar rule change proposals to conform to Phlx's rule.

<sup>4</sup> The current language in the Pricing Schedule applies to the calculations of Total Affiliated Member ADV and Priority Customer Maker ADV used to determine tiered maker rebates and taker fees for members. See Options 7, Section 3, Table 1 (Qualifying Tier Thresholds).

proviso language (hereinafter, the “better of rule”) ensures that members would only have the day removed when doing so is beneficial for the member. As such, the Exchange only applies the better of rule to ADV calculations, and not for other volume-based pricing where members would not benefit from having the day excluded (e.g., straight volume accumulations).

### Proposal

In Options 7, Section 1, the Exchange proposes to adopt subsection (a) with the title “Removal of Days for Purposes of Pricing Tiers,” and renumber the existing first paragraph (related to fee disputes) as subsection (b). The Exchange also proposes to adopt new language in subsection (a) that is substantially similar to language currently in place on Phlx.<sup>5</sup> Specifically, as proposed:

(1)(A) Any day that the Exchange announces in advance that it will not be open for trading will be excluded from the options tier calculations set forth in its Pricing Schedule; and (B) any day with a scheduled early market close (“Scheduled Early Close”) may be excluded from the options tier calculations only pursuant to paragraph (3) below.

(2) The Exchange may exclude the following days (“Unanticipated Events”) from the options tier calculations only pursuant to paragraph (3) below, specifically any day that: (A) the market is not open for the entire trading day, (B) the Exchange instructs members in writing to route their orders to other markets, (C) the Exchange is inaccessible to members during the 30-minute period before the opening of trade due to an Exchange system disruption, or (D) the Exchange’s system experiences a disruption that lasts for more than 60 minutes during regular trading hours.

(3) If a day is to be excluded as a result of paragraph (1)(B) or (2) above, the Exchange will exclude the day from any member’s monthly options tier calculations as follows:

(A) the Exchange may exclude from the ADV calculation any Scheduled Early Close or Unanticipated Event; or

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<sup>5</sup> See note 3 above.

(B) the Exchange may exclude from any other applicable options tier calculation provided for in its Pricing Schedule (together with (3)(A), “Tier Calculations”) any Scheduled Early Close or Unanticipated Event.

provided, in each case, that the Exchange will only remove the day for members that would have a lower Tier Calculation with the day included.

The proposed language: (i) applies the rule for excluding days to all volume based calculations rather than specified incentive programs,<sup>6</sup> (ii) expands upon the existing scenarios where the Exchange may remove a day to adopt two additional situations related to Exchange systems disruptions, (iii) categorizes the potential excluded days into days that are known in advance (i.e., days in proposed paragraph (1), including Scheduled Early Closes) and days that are not (i.e., Unanticipated Events in proposed paragraph (2)), (iv) clarifies how the potential excluded days proposed above would be removed from the ADV and other applicable volume based tier calculations in the Pricing Schedule, and (v) generally adds more detail to clarify the application of the better of rule. As it relates to Unanticipated Events, the Exchange will inform all members if any such day will be excluded from its Tier Calculations through a system status message disseminated to all members. The Exchange notes that it is not proposing to amend the thresholds a member must achieve to become eligible for, or the dollar amount associated with, the tiered rebates or fees.

#### *Rule Application*

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<sup>6</sup> See note 4 above. Since the proposed language will now apply to all current and future programs administered by the Exchange that are based on ADV and other applicable volume calculations, the current rule in Options 7, Section 3 will be replaced by the proposed language in Section 1(a) with the modifications described above, including language providing that the rule will apply to all Tier Calculations in its Pricing Schedule.

Currently, the Exchange's rule for removing a day from its ADV calculations applies to specific ADV calculations of Total Affiliated Member ADV<sup>7</sup> and Priority Customer Maker ADV.<sup>8</sup> As applied, the Exchange can remove a day from tier calculations for the maker rebates<sup>9</sup> and taker fees<sup>10</sup> assessed to members.<sup>11</sup> The Exchange now believes it is appropriate to expand this provision to cover all volume based calculations including ADV rather than limit it to specific enumerated programs. Applying this rule to all volume based calculations will benefit members by permitting the Exchange to exclude atypical low volume days from its volume calculations

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<sup>7</sup> The Total Affiliated Member ADV category includes all volume in all symbols and order types, including both maker and taker volume and volume executed in the PIM, Facilitation, Solicitation, and QCC mechanisms. For purposes of determining a member's eligibility for the volume-based tiers in the Total Affiliated Member ADV category, the Exchange uses either numeric thresholds that measure a member's absolute volume or, as an alternative, a percentage-based calculation that considers a member's volume relative to total customer industry volume (i.e., the "Customer Total Consolidated Volume"). For purposes of measuring Total Affiliated Member ADV, Customer Total Consolidated Volume means the total volume cleared at The Options Clearing Corporation in the Customer range in equity and ETF options in that month.

<sup>8</sup> The Priority Customer Maker ADV category includes all Priority Customer volume that adds liquidity in all symbols.

<sup>9</sup> The Exchange provides tiered maker rebates to Market Maker and Priority Customer orders in Penny Symbols and SPY, as well as in Non-Penny Symbols (excluding index options), all of which are based on Total Affiliated Member ADV and Priority Customer Maker ADV. See Option 7, Section 3.

<sup>10</sup> Members are charged tiered taker fees in Penny Symbols and SPY, as well as in Non-Penny Symbols (excluding index options), all of which are based on Total Affiliated Member ADV and Priority Customer Maker ADV. See Option 7, Section 3.

<sup>11</sup> All eligible volume from affiliated Members will be aggregated in determining applicable tiers, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A. The highest tier threshold attained applies retroactively in a given month to all eligible traded contracts and applies to all eligible market participants.

regardless of the specific pricing program impacted. As is the case today, the Exchange would only remove the day for members that would have a lower volume calculation with the day included. This change will standardize the Exchange's practice with Phlx, which currently applies its rule to cover all ADV and other volume calculations set forth in its pricing schedule rather than specified programs.<sup>12</sup>

*Exchange Systems Disruptions*

The Exchange proposes to adopt two additional scenarios as "Unanticipated Events" that the Exchange may determine to exclude from its Tier Calculations. First, the Exchange proposes to exclude days where the Exchange is inaccessible to members during the 30-minute period before the opening of trade (i.e., between 9:00 a.m. to 9:30 a.m. Eastern Time) due to an Exchange system disruption, even if the Exchange does not instruct members to route away to other markets. As discussed above, the Exchange's current ability to remove days is limited to days where the market is not open for the entire trading day, and where the Exchange instructs members to route away to other markets. This allows the Exchange to exclude days, for example, where the Exchange honors a market-wide trading halt declared by another market, closes early for holiday observance, or instructs members to route away to other markets because of a systems issue in the morning, which ultimately does not carry over into the trading day. The Exchange notes, however, that it may not always instruct members to route away. For instance, the Exchange may be inaccessible to members in the morning due to a systems disruption but the Exchange resolves the issue shortly before 9:30 a.m. and as a result, the Exchange does not instruct members to route away. In such cases, the Exchange is not

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<sup>12</sup> See note 3 above.



permitted to exclude the day from its ADV calculations. The Exchange generally experiences a high volume of member participation within the 30-minute window leading up to the opening of trade from members who submit eligible interest be included in the Exchange's opening process. As a result, days where members are precluded from submitting eligible interest during this 30-minute time period due to an Exchange systems disruption, even if the issue is ultimately resolved by the Exchange before the market opens (and members therefore are not instructed to route away), are likely to have lower trading volume. Including such days in calculations of ADV will therefore make it more difficult for members to achieve particular pricing tiers for that month. Accordingly, excluding such days will diminish the likelihood of a cost increase occurring because a member is not able to reach a pricing tier on that date that it would reach on other trading days during the month. Phlx currently has identical language allowing it to remove such days from its volume based tiers.<sup>13</sup>

Second, the Exchange proposes to exclude days where there is an Exchange system disruption that lasts for more than 60 minutes during regular trading hours (i.e., 9:30 a.m. to 4:00 p.m. Eastern Time), even if such disruption would not be categorized as a complete outage of the Exchange's system. Such a disruption may occur where a certain options series traded on the Exchange is unavailable for trading due to an Exchange systems issue, or where the Exchange may be able to perform certain functions with respect to accepting and processing orders, but may have a failure to another significant process, such as routing to other market centers, that would lead members who rely on such processes to avoid using the Exchange until the Exchange's entire

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<sup>13</sup> See id. at paragraph 2(C).

system was operational. The Exchange believes that certain system disruptions that are not complete system outages could preclude some members from submitting orders to the Exchange. The Exchange notes that this proposal is consistent with the rules of Phlx and other options exchanges.<sup>14</sup>

The Exchange believes that the two scenarios proposed above are reasonable and equitable because the intent of the current rule has always been to avoid penalizing members that might otherwise qualify for certain tiered pricing but that because of aberrant low volume days resulting, for instance, from Exchange systems disruptions, did not participate on the Exchange to the extent they might have otherwise participated.

In addition, to avoid penalizing members that step up and trade on a day with artificially low volume, the Exchange currently only removes days for members that would have a lower ADV calculation with the day included (i.e., the better of rule). The Exchange believes that applying the better of rule to the proposed system disruption-related scenarios would be similarly helpful as it would ensure that members that continue to execute a large volume of contracts on such days are not inadvertently disadvantaged when the Exchange removes a systems disruption-related day from its calculations of ADV. This is consistent with the treatment of such days on Phlx.<sup>15</sup>

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<sup>14</sup> See id. at paragraph 2(D). See also BATS BZX Options Exchange Fee Schedule (defining an “Exchange System Disruption” as any day that the exchange’s system experiences a disruption that lasts for more than 60 minutes during regular trading hours); and NYSE Arca Options Fee Schedule (defining an “Exchange System Disruption” as a disruption affects an Exchange system that lasts for more than 60 minutes during regular trading hours).

<sup>15</sup> See note 3 above at paragraph 3.

*Categories of Excluded Days*

Similar to Phlx, the Exchange seeks to restructure the existing rule by separating out the different scenarios between days that are known in paragraph (1) and days that are not in paragraph (2), and define the latter as Unanticipated Events.

For planned days, the Exchange proposes to further distinguish between days that the Exchange announces in advance that it will not be open for trading in paragraph (1)(A) (e.g., Thanksgiving), and Scheduled Early Closes in paragraph (1)(B) (e.g., the trading day after Thanksgiving). The Exchange notes that it currently considers Scheduled Early Closes as a subset of days that the market is not open for the entire trading day. The Exchange believes it would be more clear to distinguish Scheduled Early Closes in paragraph (1) as a day that is planned for in advance, and separately consider days that are not open for the entire trading day as Unanticipated Events in paragraph (2)(A). As proposed, (2)(A) would continue to cover unplanned days where the Exchange declares a trading halt in all securities or honors a market-wide trading halt declared by another market. The other scenarios that will be categorized as Unanticipated Events in paragraph (2) are the two systems-related disruptions proposed above, and days that the Exchange instructs members in writing to route their orders to other markets, which is an existing scenario covered under the current rule as described above.

*Exclusion of Days by Tier Calculation*

The Exchange proposes to further amend the existing rule to align with the Phlx rule by specifying how the days in paragraphs (1) and (2) will be excluded from its Tier Calculations. As it relates to days where the Exchange announces in advance that it will not be open for trading, the Exchange notes that it will exclude those days from all

options tier calculations set forth in its Pricing Schedule.<sup>16</sup> This is also the case today since no trading activity occurs on those days, and the Exchange is only clarifying its current practice within the proposed rule text in paragraph (1)(A).

As discussed above, the Exchange currently removes Scheduled Early Closes as provided in paragraph (1)(B), and the Unanticipated Events in paragraphs (2)(A) and (2)(B), from its calculations of ADV only for members that would have a lower ADV with the day included. The Exchange is not changing how it currently excludes these days from the ADV calculations. And as further discussed above, the Exchange is proposing to adopt the same principle-based approach for excluding the two Unanticipated Events related to Exchange system disruptions as provided in paragraphs (2)(C) and (2)(D). Accordingly, the proposed language in paragraph (3)(A) will clarify for the ADV calculation that the Exchange may exclude any Scheduled Early Close or Unanticipated Event, subject to the better of rule.<sup>17</sup>

Similar to Phlx, the proposal also adds a “catch-all” provision in paragraph (3)(B) that would apply to other applicable volume based tier calculations that are set forth in its Pricing Schedule, but are not specified within paragraph (3)(A) (i.e., not an ADV calculation).<sup>18</sup> This catch-all provision will provide the Exchange with flexibility to apply the better of rule going forward to all pricing programs administered by the Exchange that are based on volume calculations. The Exchange believes that adopting a similar principle-based approach for its options volume calculations would ensure that

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<sup>16</sup> See id. at paragraph (1)(A) for similar language on Phlx.

<sup>17</sup> See id. at paragraph (3)(A) for similar language on Phlx.

<sup>18</sup> See id. at paragraph (3)(C) for similar language on Phlx.

days are removed from such calculations only if doing so would be beneficial for the member. Accordingly, the proposed language will not apply to straight volume accumulations, as is the case today, and the Exchange will continue to not exclude days from such calculations as members do not benefit when volume executed on an excluded day is removed from straight volume accumulations.

*Clarifying Changes*

The Exchange proposes to add further details similar to Phlx's rule to bring greater transparency as to how the Exchange will apply the better of rule when removing days from its Tier Calculations. In particular, the Exchange proposes to make clear that it will only remove days pursuant to the better of rule by specifying in paragraphs (1)(B) and (2) that such days may be excluded from the Tier Calculations only pursuant to paragraph (3).<sup>19</sup> Paragraph (3) will then provide that if a day is to be excluded as a result of paragraph (1)(B) or (2), the Exchange will be required to exclude the day from any member's monthly options volume tier calculations as detailed within paragraph (3).<sup>20</sup> With the proposed changes, the Exchange seeks to clarify that it will exclude days from any member's Tier Calculations in a uniform manner to ensure that days are removed only in situations where the member benefits. The Exchange will look at each potential excluded day in a month and determine for every member their ADV or other applicable volume calculation based on their trading volume on that day. If any member would have a lower Tier Calculation with the particular day included, the Exchange will exclude that day for that member. This is how the Exchange applies the better of rule today for

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<sup>19</sup> See id. at paragraphs (1)(B) and (2) for similar language on Phlx.

<sup>20</sup> See id. at paragraph (3) for similar language on Phlx.

ADV calculations. As such, the proposed changes are intended to make clear that the Exchange will apply the better of rule in a uniform manner for all members, and that there is no arbitrary selection of “winners” or “losers” when the Exchange excludes days. In addition, the Exchange proposes to make two technical changes within the better of rule; first, to clarify that the rule applies in each case of the tier calculations specified in paragraph (3), and second, to use the defined term Tier Calculations instead of ADV to reflect the changes proposed herein.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>21</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>22</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change is reasonable and equitable as it provides a new framework for removing days from the Exchange’s volume calculations that the Exchange believes is beneficial to members and consistent with similar provisions already in place on Phlx. The proposed rule change would permit the Exchange to remove a day from its pricing tiers in more circumstances, and ensures that the Exchange will only do so in circumstances where beneficial for the member because the member would have a lower volume calculation the with the day included.

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<sup>21</sup> 15 U.S.C. 78f(b).

<sup>22</sup> 15 U.S.C. 78f(b)(4) and (5).

By applying the rule to all volume based calculations rather than specified incentive programs based on Total Affiliated Member ADV and Priority Customer Maker ADV, the Exchange believes that members will be further protected if the Exchange experiences a systems or other issue that results in a day being excluded from the Exchange's volume calculations. Without this change, members would only have the day excluded for the specific ADV based pricing programs described above, and would not get the benefit for other un-enumerated programs.

The Exchange believes it is reasonable and equitable to exclude a day from its volume based calculations when the Exchange's system experiences a disruption during the 30-minute period prior to the opening of trade that renders the Exchange inaccessible to members as this preserves the Exchange's intent behind adopting volume-based pricing. Without this change, members that are precluded from submitting eligible interest during the 30-minute window before the opening of trade may be negatively impacted, even if the Exchange resolves the issue before the market opens and as a result, does not instruct members to route away. The proposed change to exclude such days will diminish the likelihood of a cost increase occurring because a member is not able to reach a volume tier calculation on that date that it would reach on other trading days during the month.

Similarly, excluding a day where the Exchange's system experiences a disruption that lasts for more than 60 minutes intra-day is reasonable and equitable because the proposal seeks to avoid penalizing members that might otherwise qualify for certain tiered pricing but that, because of an Exchange systems disruption, did not participate on the Exchange to the extent they might have otherwise participated. The Exchange

believes that certain systems disruptions could preclude some members from sending order flow to the Exchange even if such issue is not actually a complete systems outage.

In addition, the Exchange believes that it is reasonable and equitable to apply the better of rule to both systems disruption-related scenarios. Without these changes, members that step up and trade significant volume on excluded trading days may be negatively impacted, resulting in an effective cost increase for those members. The proposal would align the Exchange's approach to how it applies this rule today for days where the market is not open for the entire trading day or where the Exchange instructs members to route away.

Furthermore, the Exchange believes that categorizing the potential excluded days is reasonable and equitable because it will bring greater transparency to the application of its rule. Specifically, the Exchange is distinguishing between planned and unplanned days in paragraphs (1) and (2), defining the latter as Unanticipated Events, and stipulating how the Exchange will exclude such days pursuant to this rule. Categorizing days in this manner will clarify the application of its rule in light of the Exchange's proposal to expand the rule to adopt additional days that may be excluded from its tier calculations. Providing in paragraph (1)(A) that the Exchange will always exclude from its tier calculations days that it announces in advance it will not be open for trading will clarify current practice. Furthermore, the Exchange believes that the proposed changes to specify how days in paragraphs (1) and (2) may be excluded from its tier calculations will bring greater transparency by delineating the various circumstances in which the better of rule will apply. Providing in paragraph (3) that the Exchange may exclude any Scheduled Early Close or Unanticipated Event from the ADV and other Tier



Calculations, subject to the better of rule, will make clear that the Exchange will take a consistent approach when excluding days for purposes of its volume based pricing tiers. In addition, having a catch-all in paragraph (3)(B) so that the better of rule applies to other options volume calculations than ADV to allow the Exchange to apply the rule going forward to all pricing programs based on volume calculations will further protect members. The Exchange notes that aberrant low volume days resulting from, for instance, an Unanticipated Event, impacts all volume-based calculations, and allowing the Exchange to exclude such days from any Tier Calculation if the member would have a lower Tier Calculation with the day included will further protect members from being inadvertently penalized.

Furthermore, the proposed changes specifying that the days in paragraphs (1)(B) and (2) may be excluded only pursuant to paragraph (3), and requiring the Exchange to exclude such days pursuant to the specifications in paragraph (3) will likewise make clear that the Exchange will take a consistent approach with respect to excluding days from its volume calculations. As discussed above, these modifications will clarify that the Exchange will apply the better of rule in a uniform manner to all members, and that there is no arbitrary selection of “winners” or “losers.” The Exchange also believes that the two technical changes proposed in the better of rule to reflect the changes proposed herein will likewise bring greater clarity to its rule.

Finally, the Exchange further believes that the proposed rule change is not unfairly discriminatory because it will apply equally to all members. While the Exchange currently has rules in place for removing a day from its pricing, the Exchange believes that the proposed changes will benefit all members by providing more circumstances to

remove a day, and ensuring that such days are removed only in situations where the member benefits.

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 rule change is designed to protect members from the possibility of a cost increase by excluding days when overall member participation might be significantly lower than a typical trading day. The Exchange believes that the proposed modifications to its tier calculations are pro-competitive and will result in lower total costs to end users, a positive outcome of competitive markets. Furthermore, other options exchanges have adopted rules that are substantially similar to the Exchange's proposal.<sup>23</sup>

The Exchange operates in a highly competitive market in which market participants can readily direct their order flow to competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fee changes reflect this competitive environment.

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.

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<sup>23</sup> See notes 3 and 14 above.

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

Pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>24</sup> the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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.

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

The proposed rule change is based on the language in Phlx's Pricing Schedule.<sup>25</sup> In addition, the proposal with respect to the Exchange systems disruption that lasts for more than 60 minutes during regular trading hours is similar to language in the fee schedules of BATS BZX Options and NYSE Arca Options.<sup>26</sup>

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

Not applicable.

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<sup>24</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>25</sup> See note 3 above.

<sup>26</sup> See note 14 above.

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-2018-45)

December \_\_, 2018

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Provisions for Excluding a Day from Its Volume Calculations

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 December 21, 2018, 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 the Exchange's provisions for excluding a day from its volume calculations for purposes of determining pricing tiers.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqgemx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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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 purpose of the proposed rule change is to amend the Exchange's provisions for excluding a day from its volume calculations for purposes of determining pricing tiers. The Exchange is standardizing its practice for removing a day from volume calculations in its Pricing Schedule with its affiliated options market, Nasdaq PHLX LLC ("Phlx").<sup>3</sup> Each change is discussed below.

Background

To avoid penalizing members when aberrant low volume days result from systems or other issues at the Exchange, or where the Exchange closes early for holiday observance, the Exchange currently has language in its Pricing Schedule allowing it to exclude certain days from its average daily volume ("ADV") calculations. Currently, language in the Exchange's Pricing Schedule provides that, for purposes of determining

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<sup>3</sup> See Phlx Pricing Schedule, Options 7, Section 1(b). The Exchange's other affiliated options markets, Nasdaq ISE, Nasdaq MRX, Nasdaq BX, and The Nasdaq Options Market will also file similar rule change proposals to conform to Phlx's rule.

ADV for certain incentive programs,<sup>4</sup> any day that the market is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from such calculation; provided that the Exchange will only remove the day for members that would have a lower ADV with the day included. The proviso language (hereinafter, the “better of rule”) ensures that members would only have the day removed when doing so is beneficial for the member. As such, the Exchange only applies the better of rule to ADV calculations, and not for other volume-based pricing where members would not benefit from having the day excluded (e.g., straight volume accumulations).

#### Proposal

In Options 7, Section 1, the Exchange proposes to adopt subsection (a) with the title “Removal of Days for Purposes of Pricing Tiers,” and renumber the existing first paragraph (related to fee disputes) as subsection (b). The Exchange also proposes to adopt new language in subsection (a) that is substantially similar to language currently in place on Phlx.<sup>5</sup> Specifically, as proposed:

(1)(A) Any day that the Exchange announces in advance that it will not be open for trading will be excluded from the options tier calculations set forth in its Pricing Schedule; and (B) any day with a scheduled early market close (“Scheduled Early Close”) may be excluded from the options tier calculations only pursuant to paragraph (3) below.

(2) The Exchange may exclude the following days (“Unanticipated Events”) from the options tier calculations only pursuant to paragraph (3) below, specifically any day that: (A) the market is not open for the entire trading day, (B) the Exchange

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<sup>4</sup> The current language in the Pricing Schedule applies to the calculations of Total Affiliated Member ADV and Priority Customer Maker ADV used to determine tiered maker rebates and taker fees for members. See Options 7, Section 3, Table 1 (Qualifying Tier Thresholds).

<sup>5</sup> See note 3 above.

instructs members in writing to route their orders to other markets, (C) the Exchange is inaccessible to members during the 30-minute period before the opening of trade due to an Exchange system disruption, or (D) the Exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours.

(3) If a day is to be excluded as a result of paragraph (1)(B) or (2) above, the Exchange will exclude the day from any member's monthly options tier calculations as follows:

(A) the Exchange may exclude from the ADV calculation any Scheduled Early Close or Unanticipated Event; or

(B) the Exchange may exclude from any other applicable options tier calculation provided for in its Pricing Schedule (together with (3)(A), "Tier Calculations") any Scheduled Early Close or Unanticipated Event.

provided, in each case, that the Exchange will only remove the day for members that would have a lower Tier Calculation with the day included.

The proposed language: (i) applies the rule for excluding days to all volume based calculations rather than specified incentive programs,<sup>6</sup> (ii) expands upon the existing scenarios where the Exchange may remove a day to adopt two additional situations related to Exchange systems disruptions, (iii) categorizes the potential excluded days into days that are known in advance (i.e., days in proposed paragraph (1), including Scheduled Early Closes) and days that are not (i.e., Unanticipated Events in proposed paragraph (2)), (iv) clarifies how the potential excluded days proposed above would be removed from the ADV and other applicable volume based tier calculations in the Pricing Schedule, and (v) generally adds more detail to clarify the application of the better of rule. As it relates to Unanticipated Events, the Exchange will inform all members if any

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<sup>6</sup> See note 4 above. Since the proposed language will now apply to all current and future programs administered by the Exchange that are based on ADV and other applicable volume calculations, the current rule in Options 7, Section 3 will be replaced by the proposed language in Section 1(a) with the modifications described above, including language providing that the rule will apply to all Tier Calculations in its Pricing Schedule.



such day will be excluded from its Tier Calculations through a system status message disseminated to all members. The Exchange notes that it is not proposing to amend the thresholds a member must achieve to become eligible for, or the dollar amount associated with, the tiered rebates or fees.

*Rule Application*

Currently, the Exchange's rule for removing a day from its ADV calculations applies to specific ADV calculations of Total Affiliated Member ADV<sup>7</sup> and Priority Customer Maker ADV.<sup>8</sup> As applied, the Exchange can remove a day from tier calculations for the maker rebates<sup>9</sup> and taker fees<sup>10</sup> assessed to members.<sup>11</sup> The

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<sup>7</sup> The Total Affiliated Member ADV category includes all volume in all symbols and order types, including both maker and taker volume and volume executed in the PIM, Facilitation, Solicitation, and QCC mechanisms. For purposes of determining a member's eligibility for the volume-based tiers in the Total Affiliated Member ADV category, the Exchange uses either numeric thresholds that measure a member's absolute volume or, as an alternative, a percentage-based calculation that considers a member's volume relative to total customer industry volume (i.e., the "Customer Total Consolidated Volume"). For purposes of measuring Total Affiliated Member ADV, Customer Total Consolidated Volume means the total volume cleared at The Options Clearing Corporation in the Customer range in equity and ETF options in that month.

<sup>8</sup> The Priority Customer Maker ADV category includes all Priority Customer volume that adds liquidity in all symbols.

<sup>9</sup> The Exchange provides tiered maker rebates to Market Maker and Priority Customer orders in Penny Symbols and SPY, as well as in Non-Penny Symbols (excluding index options), all of which are based on Total Affiliated Member ADV and Priority Customer Maker ADV. See Option 7, Section 3.

<sup>10</sup> Members are charged tiered taker fees in Penny Symbols and SPY, as well as in Non-Penny Symbols (excluding index options), all of which are based on Total Affiliated Member ADV and Priority Customer Maker ADV. See Option 7, Section 3.

<sup>11</sup> All eligible volume from affiliated Members will be aggregated in determining applicable tiers, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A. The highest tier

Exchange now believes it is appropriate to expand this provision to cover all volume based calculations including ADV rather than limit it to specific enumerated programs. Applying this rule to all volume based calculations will benefit members by permitting the Exchange to exclude atypical low volume days from its volume calculations regardless of the specific pricing program impacted. As is the case today, the Exchange would only remove the day for members that would have a lower volume calculation with the day included. This change will standardize the Exchange's practice with Phlx, which currently applies its rule to cover all ADV and other volume calculations set forth in its pricing schedule rather than specified programs.<sup>12</sup>

#### *Exchange Systems Disruptions*

The Exchange proposes to adopt two additional scenarios as "Unanticipated Events" that the Exchange may determine to exclude from its Tier Calculations. First, the Exchange proposes to exclude days where the Exchange is inaccessible to members during the 30-minute period before the opening of trade (i.e., between 9:00 a.m. to 9:30 a.m. Eastern Time) due to an Exchange system disruption, even if the Exchange does not instruct members to route away to other markets. As discussed above, the Exchange's current ability to remove days is limited to days where the market is not open for the entire trading day, and where the Exchange instructs members to route away to other markets. This allows the Exchange to exclude days, for example, where the Exchange honors a market-wide trading halt declared by another market, closes early for holiday observance, or instructs members to route away to other markets because of a systems

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threshold attained applies retroactively in a given month to all eligible traded contracts and applies to all eligible market participants.

<sup>12</sup> See note 3 above.

issue in the morning, which ultimately does not carry over into the trading day. The Exchange notes, however, that it may not always instruct members to route away. For instance, the Exchange may be inaccessible to members in the morning due to a systems disruption but the Exchange resolves the issue shortly before 9:30 a.m. and as a result, the Exchange does not instruct members to route away. In such cases, the Exchange is not permitted to exclude the day from its ADV calculations. The Exchange generally experiences a high volume of member participation within the 30-minute window leading up to the opening of trade from members who submit eligible interest be included in the Exchange's opening process. As a result, days where members are precluded from submitting eligible interest during this 30-minute time period due to an Exchange systems disruption, even if the issue is ultimately resolved by the Exchange before the market opens (and members therefore are not instructed to route away), are likely to have lower trading volume. Including such days in calculations of ADV will therefore make it more difficult for members to achieve particular pricing tiers for that month. Accordingly, excluding such days will diminish the likelihood of a cost increase occurring because a member is not able to reach a pricing tier on that date that it would reach on other trading days during the month. Phlx currently has identical language allowing it to remove such days from its volume based tiers.<sup>13</sup>

Second, the Exchange proposes to exclude days where there is an Exchange system disruption that lasts for more than 60 minutes during regular trading hours (i.e., 9:30 a.m. to 4:00 p.m. Eastern Time), even if such disruption would not be categorized as a complete outage of the Exchange's system. Such a disruption may occur where a

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<sup>13</sup> See id. at paragraph 2(C).

certain options series traded on the Exchange is unavailable for trading due to an Exchange systems issue, or where the Exchange may be able to perform certain functions with respect to accepting and processing orders, but may have a failure to another significant process, such as routing to other market centers, that would lead members who rely on such processes to avoid using the Exchange until the Exchange's entire system was operational. The Exchange believes that certain system disruptions that are not complete system outages could preclude some members from submitting orders to the Exchange. The Exchange notes that this proposal is consistent with the rules of Phlx and other options exchanges.<sup>14</sup>

The Exchange believes that the two scenarios proposed above are reasonable and equitable because the intent of the current rule has always been to avoid penalizing members that might otherwise qualify for certain tiered pricing but that because of aberrant low volume days resulting, for instance, from Exchange systems disruptions, did not participate on the Exchange to the extent they might have otherwise participated.

In addition, to avoid penalizing members that step up and trade on a day with artificially low volume, the Exchange currently only removes days for members that would have a lower ADV calculation with the day included (i.e., the better of rule). The Exchange believes that applying the better of rule to the proposed system disruption-related scenarios would be similarly helpful as it would ensure that members that continue to execute a large volume of contracts on such days are not inadvertently

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<sup>14</sup> See *id.* at paragraph 2(D). See also BATS BZX Options Exchange Fee Schedule (defining an "Exchange System Disruption" as any day that the exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours); and NYSE Arca Options Fee Schedule (defining an "Exchange System Disruption" as a disruption affects an Exchange system that lasts for more than 60 minutes during regular trading hours).

disadvantaged when the Exchange removes a systems disruption-related day from its calculations of ADV. This is consistent with the treatment of such days on Phlx.<sup>15</sup>

*Categories of Excluded Days*

Similar to Phlx, the Exchange seeks to restructure the existing rule by separating out the different scenarios between days that are known in paragraph (1) and days that are not in paragraph (2), and define the latter as Unanticipated Events.

For planned days, the Exchange proposes to further distinguish between days that the Exchange announces in advance that it will not be open for trading in paragraph (1)(A) (e.g., Thanksgiving), and Scheduled Early Closes in paragraph (1)(B) (e.g., the trading day after Thanksgiving). The Exchange notes that it currently considers Scheduled Early Closes as a subset of days that the market is not open for the entire trading day. The Exchange believes it would be more clear to distinguish Scheduled Early Closes in paragraph (1) as a day that is planned for in advance, and separately consider days that are not open for the entire trading day as Unanticipated Events in paragraph (2)(A). As proposed, (2)(A) would continue to cover unplanned days where the Exchange declares a trading halt in all securities or honors a market-wide trading halt declared by another market. The other scenarios that will be categorized as Unanticipated Events in paragraph (2) are the two systems-related disruptions proposed above, and days that the Exchange instructs members in writing to route their orders to other markets, which is an existing scenario covered under the current rule as described above.

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<sup>15</sup> See note 3 above at paragraph 3.

*Exclusion of Days by Tier Calculation*

The Exchange proposes to further amend the existing rule to align with the Phlx rule by specifying how the days in paragraphs (1) and (2) will be excluded from its Tier Calculations. As it relates to days where the Exchange announces in advance that it will not be open for trading, the Exchange notes that it will exclude those days from all options tier calculations set forth in its Pricing Schedule.<sup>16</sup> This is also the case today since no trading activity occurs on those days, and the Exchange is only clarifying its current practice within the proposed rule text in paragraph (1)(A).

As discussed above, the Exchange currently removes Scheduled Early Closes as provided in paragraph (1)(B), and the Unanticipated Events in paragraphs (2)(A) and (2)(B), from its calculations of ADV only for members that would have a lower ADV with the day included. The Exchange is not changing how it currently excludes these days from the ADV calculations. And as further discussed above, the Exchange is proposing to adopt the same principle-based approach for excluding the two Unanticipated Events related to Exchange system disruptions as provided in paragraphs (2)(C) and (2)(D). Accordingly, the proposed language in paragraph (3)(A) will clarify for the ADV calculation that the Exchange may exclude any Scheduled Early Close or Unanticipated Event, subject to the better of rule.<sup>17</sup>

Similar to Phlx, the proposal also adds a “catch-all” provision in paragraph (3)(B) that would apply to other applicable volume based tier calculations that are set forth in its Pricing Schedule, but are not specified within paragraph (3)(A) (i.e., not an ADV

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<sup>16</sup> See id. at paragraph (1)(A) for similar language on Phlx.

<sup>17</sup> See id. at paragraph (3)(A) for similar language on Phlx.

calculation).<sup>18</sup> This catch-all provision will provide the Exchange with flexibility to apply the better of rule going forward to all pricing programs administered by the Exchange that are based on volume calculations. The Exchange believes that adopting a similar principle-based approach for its options volume calculations would ensure that days are removed from such calculations only if doing so would be beneficial for the member. Accordingly, the proposed language will not apply to straight volume accumulations, as is the case today, and the Exchange will continue to not exclude days from such calculations as members do not benefit when volume executed on an excluded day is removed from straight volume accumulations.

#### *Clarifying Changes*

The Exchange proposes to add further details similar to Phlx's rule to bring greater transparency as to how the Exchange will apply the better of rule when removing days from its Tier Calculations. In particular, the Exchange proposes to make clear that it will only remove days pursuant to the better of rule by specifying in paragraphs (1)(B) and (2) that such days may be excluded from the Tier Calculations only pursuant to paragraph (3).<sup>19</sup> Paragraph (3) will then provide that if a day is to be excluded as a result of paragraph (1)(B) or (2), the Exchange will be required to exclude the day from any member's monthly options volume tier calculations as detailed within paragraph (3).<sup>20</sup> With the proposed changes, the Exchange seeks to clarify that it will exclude days from any member's Tier Calculations in a uniform manner to ensure that days are removed

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<sup>18</sup> See id. at paragraph (3)(C) for similar language on Phlx.

<sup>19</sup> See id. at paragraphs (1)(B) and (2) for similar language on Phlx.

<sup>20</sup> See id. at paragraph (3) for similar language on Phlx.

only in situations where the member benefits. The Exchange will look at each potential excluded day in a month and determine for every member their ADV or other applicable volume calculation based on their trading volume on that day. If any member would have a lower Tier Calculation with the particular day included, the Exchange will exclude that day for that member. This is how the Exchange applies the better of rule today for ADV calculations. As such, the proposed changes are intended to make clear that the Exchange will apply the better of rule in a uniform manner for all members, and that there is no arbitrary selection of “winners” or “losers” when the Exchange excludes days. In addition, the Exchange proposes to make two technical changes within the better of rule; first, to clarify that the rule applies in each case of the tier calculations specified in paragraph (3), and second, to use the defined term Tier Calculations instead of ADV to reflect the changes proposed herein.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>21</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>22</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed rule change is reasonable and equitable as it provides a new framework for removing days from the Exchange’s volume calculations that the Exchange believes is beneficial to members and consistent with

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<sup>21</sup> 15 U.S.C. 78f(b).

<sup>22</sup> 15 U.S.C. 78f(b)(4) and (5).



similar provisions already in place on Phlx. The proposed rule change would permit the Exchange to remove a day from its pricing tiers in more circumstances, and ensures that the Exchange will only do so in circumstances where beneficial for the member because the member would have a lower volume calculation the with the day included.

By applying the rule to all volume based calculations rather than specified incentive programs based on Total Affiliated Member ADV and Priority Customer Maker ADV, the Exchange believes that members will be further protected if the Exchange experiences a systems or other issue that results in a day being excluded from the Exchange's volume calculations. Without this change, members would only have the day excluded for the specific ADV based pricing programs described above, and would not get the benefit for other un-enumerated programs.

The Exchange believes it is reasonable and equitable to exclude a day from its volume based calculations when the Exchange's system experiences a disruption during the 30-minute period prior to the opening of trade that renders the Exchange inaccessible to members as this preserves the Exchange's intent behind adopting volume-based pricing. Without this change, members that are precluded from submitting eligible interest during the 30-minute window before the opening of trade may be negatively impacted, even if the Exchange resolves the issue before the market opens and as a result, does not instruct members to route away. The proposed change to exclude such days will diminish the likelihood of a cost increase occurring because a member is not able to reach a volume tier calculation on that date that it would reach on other trading days during the month.

Similarly, excluding a day where the Exchange's system experiences a disruption that lasts for more than 60 minutes intra-day is reasonable and equitable because the proposal seeks to avoid penalizing members that might otherwise qualify for certain tiered pricing but that, because of an Exchange systems disruption, did not participate on the Exchange to the extent they might have otherwise participated. The Exchange believes that certain systems disruptions could preclude some members from sending order flow to the Exchange even if such issue is not actually a complete systems outage.

In addition, the Exchange believes that it is reasonable and equitable to apply the better of rule to both systems disruption-related scenarios. Without these changes, members that step up and trade significant volume on excluded trading days may be negatively impacted, resulting in an effective cost increase for those members. The proposal would align the Exchange's approach to how it applies this rule today for days where the market is not open for the entire trading day or where the Exchange instructs members to route away.

Furthermore, the Exchange believes that categorizing the potential excluded days is reasonable and equitable because it will bring greater transparency to the application of its rule. Specifically, the Exchange is distinguishing between planned and unplanned days in paragraphs (1) and (2), defining the latter as Unanticipated Events, and stipulating how the Exchange will exclude such days pursuant to this rule. Categorizing days in this manner will clarify the application of its rule in light of the Exchange's proposal to expand the rule to adopt additional days that may be excluded from its tier calculations. Providing in paragraph (1)(A) that the Exchange will always exclude from its tier calculations days that it announces in advance it will not be open for trading will clarify

current practice. Furthermore, the Exchange believes that the proposed changes to specify how days in paragraphs (1) and (2) may be excluded from its tier calculations will bring greater transparency by delineating the various circumstances in which the better of rule will apply. Providing in paragraph (3) that the Exchange may exclude any Scheduled Early Close or Unanticipated Event from the ADV and other Tier Calculations, subject to the better of rule, will make clear that the Exchange will take a consistent approach when excluding days for purposes of its volume based pricing tiers. In addition, having a catch-all in paragraph (3)(B) so that the better of rule applies to other options volume calculations than ADV to allow the Exchange to apply the rule going forward to all pricing programs based on volume calculations will further protect members. The Exchange notes that aberrant low volume days resulting from, for instance, an Unanticipated Event, impacts all volume-based calculations, and allowing the Exchange to exclude such days from any Tier Calculation if the member would have a lower Tier Calculation with the day included will further protect members from being inadvertently penalized.

Furthermore, the proposed changes specifying that the days in paragraphs (1)(B) and (2) may be excluded only pursuant to paragraph (3), and requiring the Exchange to exclude such days pursuant to the specifications in paragraph (3) will likewise make clear that the Exchange will take a consistent approach with respect to excluding days from its volume calculations. As discussed above, these modifications will clarify that the Exchange will apply the better of rule in a uniform manner to all members, and that there is no arbitrary selection of “winners” or “losers.” The Exchange also believes that the

two technical changes proposed in the better of rule to reflect the changes proposed herein will likewise bring greater clarity to its rule.

Finally, the Exchange further believes that the proposed rule change is not unfairly discriminatory because it will apply equally to all members. While the Exchange currently has rules in place for removing a day from its pricing, the Exchange believes that the proposed changes will benefit all members by providing more circumstances to remove a day, and ensuring that such days are removed only in situations where the member benefits.

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 rule change is designed to protect members from the possibility of a cost increase by excluding days when overall member participation might be significantly lower than a typical trading day. The Exchange believes that the proposed modifications to its tier calculations are pro-competitive and will result in lower total costs to end users, a positive outcome of competitive markets. Furthermore, other options exchanges have adopted rules that are substantially similar to the Exchange's proposal.<sup>23</sup>

The Exchange operates in a highly competitive market in which market participants can readily direct their order flow to competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fee changes reflect this competitive environment.

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<sup>23</sup> See notes 3 and 14 above.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>24</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.

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-2018-45 on the subject line.

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<sup>24</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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-2018-45. 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 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-2018-45 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>25</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>25</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

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

**Nasdaq GEMX Rules**

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**Options 7 Pricing Schedule****Section 1. General Provisions****(a) Removal of Days for Purposes of Pricing Tiers:**

(1) (A) Any day that the Exchange announces in advance that it will not be open for trading will be excluded from the options tier calculations set forth in its Pricing Schedule; and (B) any day with a scheduled early market close (“Scheduled Early Close”) may be excluded from the options tier calculations only pursuant to paragraph (3) below.

(2) The Exchange may exclude the following days (“Unanticipated Events”) from the options tier calculations only pursuant to paragraph (3) below, specifically any day that: (A) the market is not open for the entire trading day, (B) the Exchange instructs members in writing to route their orders to other markets, (C) the Exchange is inaccessible to members during the 30-minute period before the opening of trade due to an Exchange system disruption, or (D) the Exchange’s system experiences a disruption that lasts for more than 60 minutes during regular trading hours.

(3) If a day is to be excluded as a result of paragraph (1)(B) or (2) above, the Exchange will exclude the day from any member’s monthly options tier calculations as follows:

(A) the Exchange may exclude from the ADV calculation any Scheduled Early Close or Unanticipated Event; and

(B) the Exchange may exclude from any other applicable options tier calculation provided for in its Pricing Schedule (together with (3)(A), “Tier Calculations”) any Scheduled Early Close or Unanticipated Event.

provided, in each case, that the Exchange will only remove the day for members that would have a lower Tier Calculation with the day included.

**(b)** All fee disputes concerning fees which are billed by the Exchange must be submitted to the Exchange in writing and must be accompanied by supporting documentation. All fee disputes must be submitted no later than sixty (60) calendar days after receipt of a billing invoice.

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**Section 3. Regular Order Fees and Rebates**



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**Qualifying Tier Thresholds**

Table 1

<b>Tier</b>	<b>Total Affiliated Member ADV</b>	<b>Priority Customer Maker ADV</b>
<b>Tier 1</b>	0-99,999	0-19,999
<b>Tier 2</b>	100,000-224,999, or executes 1% to less than 2% of Customer Total Consolidated Volume	20,000-99,999
<b>Tier 3</b>	225,000-349,999, or executes 2% to less than 3% of Customer Total Consolidated Volume	100,000-149,999
<b>Tier 4</b>	350,000 or more, or executes 3% or greater of Customer Total Consolidated Volume	150,000 or more

- For purposes of measuring Total Affiliated Member ADV, Customer Total Consolidated Volume means the total volume cleared at The Options Clearing Corporation in the Customer range in equity and ETF options in that month.

[• Any day that the market is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from the ADV calculation; provided that the Exchange will only remove the day for members that would have a lower ADV with the day included.]

- The highest tier threshold attained above applies retroactively in a given month to all eligible traded contracts and applies to all eligible market participants.
- All eligible volume from affiliated Members will be aggregated in determining applicable tiers, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A.
- The Total Affiliated Member ADV category includes all volume in all symbols and order types, including both maker and taker volume and volume executed in the PIM, Facilitation, Solicitation, and QCC mechanisms.
- The Priority Customer Maker ADV category includes all Priority Customer volume that adds liquidity in all symbols.

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