



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91672; File No. SR-GEMX-2021-02]

### **Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Delete the Exchange Membership Rules and Incorporate by Reference the Membership Rules of The Nasdaq Stock Market LLC**

April 26, 2021.

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 April 13, 2021, 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 delete the Exchange’s membership rules currently under the General 3 title, incorporate by reference The Nasdaq Stock Market LLC’s (“Nasdaq”) rules in the General 3 Rule 1000 Series, and other related changes.

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

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

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

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

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

General 3 of the Exchange’s General Rules and Nasdaq’s General 3, Rules 1000 Series prescribe the qualifications and procedures for applying for membership, respectively, on the Exchange and Nasdaq. The Exchange proposes to delete in their entirety the rules under its General 3 title, entitled “Membership and Access,” and incorporate by reference the Nasdaq General 3, Rules 1000 Series (the “Nasdaq Rule 1000 Series” or “Nasdaq Membership Rules”) as described below.<sup>3</sup> The Exchange will also relocate the text under its rule under General 3, Section 4(b) and place it under new Exchange General 2, Section 11, as further described below.

This proposal is part of the Exchange’s plan to harmonize its membership rules with the membership rules of the Nasdaq, Nasdaq BX, Inc. (“BX”), and Nasdaq ISE, LLC (“ISE”) exchanges.<sup>4</sup> The Exchange notes that Nasdaq MRX, LLC, and Nasdaq Phlx, LLC (“Phlx”) (together with Nasdaq, BX, and ISE, the “Affiliated Exchanges”) each plan to propose similar rule changes that will render their membership rules substantially similar to those of Nasdaq, BX, and ISE. To account for any differences that may exist, the proposed introductory paragraphs list instances in which cross references in the Nasdaq Series 1000 Rules to other

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<sup>3</sup> The Exchange will separately request an exemption from the rule filing requirements of Section 19(b) of the Act for changes to General 3 to the extent such rules are effected solely by virtue of a change to the Nasdaq Rule 1000 Series. The Exchange’s proposed rule change will not become effective unless and until the Commission approves this exemption request.

<sup>4</sup> The BX membership rules were previously amended to incorporate by reference Nasdaq’s membership rules. See Securities Exchange Act Release No. 34-86425 (July 22, 2019), 84 FR 36139 (July 26, 2019) (SR-BX-2019-022). ISE has also filed a proposal to incorporate by reference Nasdaq’s membership rules. See Securities Exchange Act Release No. 90903 (January 12, 2021), 86 FR 5284 18892 (January 19, 2021) (SR-ISE-2020-43).

Nasdaq rules shall be read to refer instead to the Exchange Rules, and references to Nasdaq terms (whether or not defined) shall be read to refer to the Exchange-related meanings of those terms. For instance, references to defined terms “Exchange” or “Nasdaq” shall be read to refer to the Nasdaq GEMX Exchange; “Rule” or “Exchange Rule” shall be read to refer to the Exchange Rules; the defined term “Applicant” in the Nasdaq Rule 1000 Series shall be read to refer to an Applicant to the Nasdaq GEMX Exchange; the defined terms “Board” or “Exchange Board” in the Nasdaq Rule 1000 Series shall be read to refer to the Nasdaq GEMX Board of Directors; the defined term “Director” in the Nasdaq Rule 1000 Series shall be read to refer to a Director of the Board of the Nasdaq GEMX Exchange; the defined term “Exchange Review Council” in the Nasdaq Rule 1000 Series shall be read to refer to the Nasdaq GEMX Exchange Review Council; the defined term “Subcommittee” in the Nasdaq Rule 1000 Series shall be read to refer to a Subcommittee of the Nasdaq GEMX Exchange Review Council; the defined term “Interested Staff” in the Nasdaq Rule 1000 Series shall be read to refer to Interested Staff of Nasdaq GEMX; the defined term “Member” in the Nasdaq Rule 1000 Series shall be read to refer to a Nasdaq GEMX Member who acts in its capacity as an Electronic Access Member, a Primary Market Maker, or a Competitive Market Maker (including a “Foreign Member,” as defined under proposed GEMX General 3); the defined term “Associated Person” shall be read to refer to a Nasdaq GEMX Associated Person; the defined terms “Exchange Membership Department” or “Membership Department” shall be read to refer to the Nasdaq GEMX Membership Department; and the defined term “Exchange Regulation Department” shall be read to refer to the Nasdaq GEMX Regulation Department.

Additionally, cross references in the Nasdaq Rule 1000 Series to “General 1 and Equity 1” shall be read as references to Nasdaq GEMX General 1, Section 1; cross references in the Nasdaq Rule 1000 Series to “General 9, Section 20” shall be read as references to Nasdaq GEMX Options 10, Section 5(c)(2); cross references in the Nasdaq Rule 1000 Series to “General 9, Section 37” shall be read as references to Nasdaq GEMX Options 9, Section 21; and cross

references to the “General 4, Rule 1200 Series” shall be read as references to Nasdaq GEMX General 4, Section 1.<sup>5</sup>

Finally, as explained below, the introductory paragraph will indicate that the Nasdaq Rule 1000 Series shall also apply to Nasdaq GEMX Members who meet the requirements of a “Foreign Member.”

As compared to the Exchange’s existing General 3, by virtue of incorporating by reference the Nasdaq Membership Rules into the Exchange’s rulebook, the Exchange’s membership rules will be organized in a more logical order. The incorporated rules will eliminate unnecessary or vague provisions that exist under the current General 3 title, eliminate unnecessary complexity in the membership process, and otherwise streamline the Exchange’s existing membership rules and their associated procedures.

#### Summary of Proposed Changes

A comparison between the Exchange’s existing General 3 and the Nasdaq Membership Rules is summarized below. As a general matter, in comparison to the Exchange’s existing membership rules, the Nasdaq Membership Rules provide for more specific membership procedures and due process. Moreover, as described below, some of the Nasdaq Rule 1000 Series rules have no analogue in the existing Exchange rules. Finally, as explained later, the Exchange will also relocate the text under General 3, Section 4(b) to new Exchange General 2, Section 11.

#### *Rule 1001*

Nasdaq Rule 1001 states that Nasdaq and the Financial Industry Regulatory Authority (“FINRA”) are parties to a Regulatory Contract, pursuant to which FINRA has agreed to perform certain functions described in the Rule 1000 Series and the General 4, Rule 1200 Series on

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<sup>5</sup> The Exchange notes that its General 4 title (entitled “Regulation”) currently incorporates by reference the rules contained in Nasdaq’s General 4 title. See Securities Exchange Act Release No. 85737 (April 26, 2019), 84 FR 18897 (May 2, 2019) (SR-GEMX-2019-05).

behalf of Nasdaq.<sup>6</sup> Moreover, Nasdaq Rule 1001 provides that Nasdaq rules that refer to Nasdaq's Regulation Department, Nasdaq Regulation Department staff, Nasdaq staff, and Nasdaq departments should be understood as also referring to FINRA staff and FINRA departments acting on behalf of Nasdaq pursuant to the Regulatory Contract.

Nasdaq Rule 1001 also provides that, notwithstanding the fact that Nasdaq has entered into the Regulatory Contract with FINRA to perform some of Nasdaq's functions, Nasdaq shall retain ultimate legal responsibility for, and control of, such functions. In addition, the rule informs that Nasdaq has incorporated by reference certain FINRA rules and that Nasdaq members shall comply with those rules and interpretations as if such rules and interpretations were part of Nasdaq's Rules.

The Exchange is proposing to incorporate by reference Nasdaq Rule 1001, which currently has no analogue rule under its membership rules. The language of Nasdaq Rule 1001 is applicable to the Exchange, as the Exchange is, similarly, a signatory of a Regulatory Contract with FINRA, pursuant to which FINRA has agreed to perform certain membership functions on its behalf, and also retains the ultimate legal responsibility for the performance of said functions. The Exchange believes that the incorporation by reference to Nasdaq Rule 1001 is not a substantive amendment to the Exchange rules.

#### *Rule 1002*

Nasdaq Rule 1002, which will be incorporated by reference under the Exchange's General 3 title, describes the qualifications of Nasdaq members and associated persons, the registration of branch offices, and the designation of a Member's office of supervisory jurisdiction. The Exchange will adopt by incorporation the provisions of Nasdaq Rule 1002 and delete those under current General 3, Section 1. The Exchange believes that incorporating by

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<sup>6</sup> Nasdaq's General 4, Section 1 (Registration, Qualification and Continuing Education) is currently incorporated by reference into the Exchange's General 4 title. See supra note 5.

reference this rule will further the Exchange's objective to provide uniformity and clarity to its rules by aligning them with the membership rules of the Nasdaq, BX, and ISE exchanges.

Nasdaq Rule 1002(a) provides that any registered broker or dealer shall be eligible for membership in Nasdaq (except for those excluded under paragraph (b) of the rule); additionally, paragraph (a) provides that any person shall be eligible to become an Associated Person of a Member (except for those excluded under Rule 1002(b)). Rule 1002(a) is similar to General 3, Section 1(a) of the Exchange's membership rules to the extent that it describes that brokers or dealers may become Exchange members ("Members"), which in turn entitles them to conduct their business on the Exchange. General 3, Section 1(a) provides that the Exchange shall issue memberships conferring the ability to transact on the Exchange. Exchange General 3, Section 1(a) also provides that there is no limit on the number of memberships that may be issued by the Exchange and that, under the rule, the Exchange shall not act in a manner that does not comply with the provisions of Section 6(c)(4) of the Exchange Act. Similarly, the Nasdaq Rule 1000 Series does not establish a limit to the number of memberships issued and conducts its review of applications for membership pursuant to the Securities Exchange Act of 1934. Furthermore, General 3, Section 1(a) provides that a Member may be a corporation, partnership, or limited liability company, and must be a registered broker-dealer and meet the qualifications for Exchange membership. The Exchange believes that incorporating by reference Nasdaq Rule 1002(a) expands upon Exchange General 3, Section 1(a) by including an associated person of a Member ("Associated Person") under this threshold requirement.

The Exchange's General 3, Section 1(b) provides that a Member that does not maintain an office in the United States ("Foreign Member") that is responsible for preparing and maintaining financial and other reports required to be filed with the Commission and with the Exchange must prepare such reports in English and in U.S. dollars, reimburse the Exchange for any expense incurred in examining the Member to the extent that such expense is in excess of the cost associated with examining a Member located within the continental United States, and

ensure the availability of an individual who is fluent in English and knowledgeable in securities and financial matters to assist representatives of the Exchange during examinations. Nasdaq General 9, Section 50 is a Nasdaq rule substantially similar to the provisions in General 3, Section 1(b). In order to preserve the enumerated characteristics of a Foreign Member, which would otherwise be deleted from its Rulebook by incorporating by reference the Nasdaq Rule 1000 Series, the Exchange proposes to include the text of its General 3, Section 1(b) under the General 3's introductory paragraph and indicate that the Nasdaq Membership Rules will also apply to the members who meet the Foreign Member requirements.

Furthermore, General 3, Section 1(c) provides that every Member shall have as the principal purpose of being a Member the conduct of a securities business, and that purpose shall be deemed to exist if and so long as: (1) the Member has qualified and acts in respect of its business on the Exchange in one or more of the following capacities: (i) an Electronic Access Member; (ii) a Primary Market Maker; or (iii) a Competitive Market Maker; and (2) all transactions effected by the Member are in compliance with Section 11(a) of the Exchange Act and the rules and regulations adopted thereunder. The Exchange believes that the membership qualifications described in this section are consistent with the eligibility criteria described in Nasdaq Rule 1002 and the disclosures and information provided by Applicant pursuant to Nasdaq Rule 1013. To account for the Exchange rights referenced in Section 1(c) (Electronic Access Member, Primary Market Maker, or Competitive Market Maker), as defined under the Exchange's Options 1, Section 1 provisions, the Exchange will also indicate in the proposed General 3 introductory paragraph that the defined term "Member" in the Nasdaq Rule 1000 Series shall be read to refer to a Nasdaq GEMX Member who acts in its capacity as an Electronic Access Member, a Primary Market Maker, or a Competitive Market Maker.

Nasdaq Rule 1002(b)(1) establishes that subject to such exceptions as may be explicitly provided elsewhere in the Nasdaq rules, no registered broker or dealer shall be admitted to membership, and no Member shall be continued in membership, if such broker, dealer, or

Member fails or ceases to satisfy the qualification requirements established by Nasdaq rules, or if such broker, dealer, or Member is or becomes subject to a statutory disqualification, or if such broker, dealer, or Member fails to file such forms as may be required in accordance with such process as Nasdaq may prescribe. Nasdaq Rule 1002(b)(1) can be compared to the provision currently under Exchange's General 3, Section 2(b) that establishes that the Exchange may deny or condition the approval of a Member, or preclude or condition a person from becoming associated with a Member, for the same reasons that the Commission may deny or revoke a broker-dealer registration and for those reasons required or allowed under the Act. Furthermore, the requirement to comply with Nasdaq rules under Section (b)(1), is also consistent with the provision under Exchange General 3, Section 4(c) that states that every Member shall pledge to abide by the by-laws and rules of the Exchange, as amended from time to time, and by all Options Regulatory Alerts, notices, directives or decisions adopted pursuant to or made in accordance with the Exchange's by-laws and rules.

Nasdaq Rule 1002(b)(2) establishes that, subject to such exceptions as may be explicitly provided elsewhere in Nasdaq rules, no person shall become associated with a Member, continue to be associated with a Member, or transfer association to another Member, if such person fails or ceases to satisfy the qualification requirements established by Nasdaq rules, or if such person is or becomes subject to a statutory disqualification; and no broker or dealer shall be admitted to membership, and no Member shall be continued in membership, if any person associated with it is ineligible to be an Associated Person under Nasdaq Membership Rules. Nasdaq Rule 1002(b)(2) is similar to the requirement that applies to Associated Persons under General 3, Section 3(a) of the Exchange rules. The Exchange's General 3, Section 3 rules enumerate conditions that apply to persons associated with Members of the Exchange. Exchange General 3, Section 3(a) provides that Associated Persons are bound by the Exchange's by-laws and rules and the rules of the Clearing Corporation and describes the circumstances concerning the barring of an Associated Person in such role. Exchange General 3, Sections 2(b), 3(a), and 4(c) are,

substantially similar to the provisions of Nasdaq Rule 1002(b),<sup>7</sup> which the Exchange proposes be incorporated by reference into its membership rules. The Exchange notes that General 3, Section 3(b) requires that Members file and keep current a list of its associated persons who are its executive officers, directors, principals, shareholders, and general partners. A Member's obligation to maintain updated information for their registered representatives or principals is prescribed under Nasdaq's General 4 title which was previously incorporated by reference into the Exchange rules,<sup>8</sup> rendering Exchange General 3, Section 3(b) unnecessary.

Exchange General 3, Section 3(c) provides that a claim of any Associated Person described in the first sentence of General 3, Section 3(b) (i.e., a Member's executive officers, directors, principal shareholders, and general partners) against a Member shall be subordinate in right of payment of customers and other Members. This subordination rule was copied from ISE's then-current Rulebook at the time, but was never directly applicable to GEMX. The rule was originally approved as part of ISE's Form 1 filing on February 24, 2000.<sup>9</sup> At that time, ISE members had equity ownership interest in ISE through their memberships and the subordination language was relevant. ISE has since demutualized, with its members no longer having any equity ownership interest through their ISE memberships, and has deleted this language as obsolete.<sup>10</sup> Because GEMX members never had a similar ownership interest through their GEMX memberships, this rule did not apply to GEMX in the first place. As such, the Exchange proposes to delete this provision in its entirety.

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<sup>7</sup> The Exchange notes that it will not relocate or carve-out this duplicative provision concerning The Options Clearing Corporation ("OCC"). Pursuant to the Exchange's Options 9, Section 2 ("Adherence to Law"), Members are required to abide by the Act, the Exchange's by-laws, the rules of the Exchange, and OCC rules.

<sup>8</sup> See supra note 5.

<sup>9</sup> See Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11401 (March 2, 2000) (Order Granting Registration as a National Securities Exchange).

<sup>10</sup> See Securities Exchange Act Release No. 45803 (April 23, 2002), 67 FR 21306 (April 30, 2002) (Order Approving Proposed Rule Change and Amendment No. 1 thereto by the International Securities Exchange LLC To Restructure From a Limited Liability Company to a Corporation).

Nasdaq Rule 1002(c) establishes, as a condition to maintaining Nasdaq membership, that Members shall at all times maintain membership in a registered securities association or another registered exchange. Furthermore, the rule prescribes that Members that transact business with customers shall at all times be members of FINRA. The Exchange proposes to incorporate this rule by reference. Because the Exchange does not act in the capacity of a designated examining authority (“DEA”), like the Nasdaq, BX, and ISE, it requires that all applicants for membership have an assigned DEA in place as a condition of its membership.

Nasdaq Rule 1002(d) states that Nasdaq members are deemed to comply with Nasdaq’s branch office registration requirements to the extent that they keep current a Uniform Branch Office Registration Form (“Form BR”), which contains the requisite information and which is accessible electronically to Nasdaq. Members that are not FINRA members shall continue to submit to Nasdaq a Branch Office Disclosure Form, as they have done previously. The Exchange proposes to incorporate by reference this rule, which is consistent with the provisions under the Exchange’s Options 10, Section 5, entitled Branch Offices.<sup>11</sup> The Exchange proposes that the cross-reference in Nasdaq Rule 1002(d)(2) to General 9, Section 20 shall be read as a reference to Exchange Options 10, Section 5(c)(2).

#### *Rule 1011*

Nasdaq Rule 1011 contains definitions applicable to the Nasdaq Membership Rules. Nasdaq Rule 1011 has no analogue rule in the existing Exchange’s General 3 title. By incorporating by reference the Nasdaq definitions under Rule 1011, the Exchange believes it will further harmonize its rules with respect to the membership rules of Nasdaq, BX, and ISE. The Exchange notes that the defined terms in Nasdaq Rule 1011, to be incorporated by reference into the Exchange’s rules, are self-contained and have no impact on GEMX rules outside its

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<sup>11</sup> ISE Options 10 is incorporated by reference into GEMX Options 10. See Securities Exchange Act Release No. 86346 (July 10, 2019), 84 FR 33999 (July 16, 2019) (SR-GEMX-2019-08).

membership rules. The terms “Applicant,” “Department,” “Director,” “Interested Staff,” “Securities business,” “Exchange Board,” “principal place of business,” “registered broker or dealer,” “Representative,” “sales practice event,” “Subcommittee,” and “statutory disqualification” have not been defined in the Exchange’s rulebook. The Exchange notes that the term “associated person” as defined in the Exchange’s rulebook<sup>12</sup> is substantially similar to the definition in Nasdaq General 1(b)(2). Relatedly, the term “Proprietary Trading Firm” as defined in Nasdaq Rule 1011(o) is substantially similar with the definition of “proprietary trading” as defined in the Exchange’s rulebook.<sup>13</sup> The Exchange proposes to adopt by incorporation the text of Nasdaq Rule 1011 in its entirety. The Exchange believes that incorporating by reference this rule will further the Exchange’s objective to provide uniformity and clarity to its rules by aligning them with the membership rules of the Nasdaq, BX, and ISE exchanges.

#### *Rule 1012*

Nasdaq Rule 1012 (“General Application Provisions”) provides a detailed outline of the requirements that an Applicant must follow in order to file an application for membership with Nasdaq. In contrast, the Exchange membership rules contain vague provisions describing the manner in which an application shall be submitted or how service shall be performed. The Exchange believes that Nasdaq Rule 1012 provides a more detailed set of instructions for Applicants, Members, and Associated Persons to submit materials and the requirements for service of documents. The Exchange believes that incorporating Rule 1012 by reference will further the Exchange’s objective to provide uniformity and clarity to its rules by aligning them with the membership rules of the Nasdaq, BX, and ISE exchanges.

Nasdaq Rule 1012(a) provides that Applicants and Nasdaq Members may submit an application or other documents and information to Nasdaq by first-class mail, overnight courier,

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<sup>12</sup> Exchange General 1, Section 1(a)(1).

<sup>13</sup> Exchange Options 1, Section 1(a)(40)

hand delivery, or by electronic means; this section also provides that Nasdaq shall serve a notice or decision issued under the Nasdaq Membership Rules by first-class mail or electronic means on the Applicant or Member or its counsel, unless a Nasdaq rule specifies a different method of service; finally, this section also details when service by Nasdaq or an Applicant shall be deemed complete. The Exchange membership rules contain no such provision. The Exchange believes that incorporating Nasdaq 1012(a) by reference improves its membership application process by adopting specific provisions regarding the manner of submission and service of documents.

Nasdaq Rule 1012(b) provides a definition of the term “calendar days” and describes the manner in which times under the Nasdaq Membership Rule shall be computed. The Exchange membership rules contain no such provision. The Exchange believes that adopting this rule by incorporation will provide further clarity to the calculation of times under its membership rules.

Nasdaq Rule 1012(c) describes a(n) Applicant’s, Member’s, and Associated Person’s duty to ensure that the information they provide to Nasdaq at the time of the filing is accurate, complete, and current. Moreover, this provision requires that Applicant’s, Member’s, and Associated Person’s shall ensure that membership applications and supporting materials filed with Nasdaq remain accurate, complete, and current at all times by filing supplementary amendments, which must be filed within 15 business days of their learning of the facts or circumstances giving rise to the need for an amendment. Furthermore, this section requires that Applicants, Members, and Associated Persons promptly notify Nasdaq, in writing, of any material adverse change in their financial condition. The Exchange membership rules contain no such provision. The Exchange believes that incorporating Nasdaq 1012(c) by reference improves its membership rules by adopting provisions concerning a Member’s duty to ensure the accuracy, completeness, and current nature of membership information.

Exchange General 3, Section 4(b) states that every Member shall report to the Exchange all contact information required by the Exchange via the FINRA Contact System. Section 4(b) also requires Exchange Members to update their contact information promptly when necessary,

but in no event later than 30 days following any change, and within 17 business days after the end of each calendar year; furthermore, it requires members to comply with any request for such information by the Exchange within 15 days or any longer period agreed upon with Exchange staff. The Exchange proposes the relocation of this provision, with minor lettering changes, to Exchange General 2 title (“Organization and Administration”) under new Section 11, entitled Contact Information Requirements. Exchange General 3, Section 4(b) is substantially similar to the rule text in both Nasdaq’s and BX’s General 2, Section 11 and identical to the similarly numbered rule in the ISE rulebook.

As previously stated, the Exchange proposes to adopt by incorporation the text of Nasdaq Rule 1012 in its entirety, as the rule’s provisions provide clear instructions concerning the submission of membership applications and other materials; the requirements for service of documents; and the Applicants’, Members’, and Associated Persons’ duty to ensure that the information filed with the Exchange is up to date.

#### *Rule 1013*

Nasdaq Rule 1013 sets forth the procedure for filing applications for new membership on the Exchange. The Exchange proposes to incorporate Nasdaq Rule 1013 by reference under its General 3 title. The Exchange is adopting Nasdaq Rule 1013 as it expands upon and provides clarity to the procedure in the Exchange’s General 3, Section 5. The Exchange believes that incorporating Rule 1013 by reference will further the Exchange’s objective to provide uniformity and clarity to its rules by aligning them with the membership rules of the Nasdaq, BX, and ISE exchanges.

Nasdaq Rule 1013(a) describes in detail the membership application process. Subsection (a)(1) (“Where to File; Contents”), provides that an application shall include (A) a copy of the Applicant’s current Form BD, if not otherwise available to Nasdaq electronically through the Central Registration Depository (“CRD”); (B) an original Nasdaq-approved fingerprint card for each Associated Person who will be subject to SEC Rule 17f-2 and for whom a fingerprint card

has not been filed with another self-regulatory organization (SRO), if such fingerprints are not otherwise available electronically to Nasdaq through CRD; (C) payment for such fee as may be required under the Rules; (D) a description of the Applicant's proposed trading activities on Nasdaq, such as the types of securities it will trade, whether it will be a market maker, or an order entry firm, and/or engage in block trading activities, and the extent to which the Applicant is conducting such activities as a member of other SROs; (E) a copy of the Applicant's most recent audited financial statements and a description of any material changes in the Applicant's financial condition since the date of the financial statements; (F) an organizational chart; (G) the intended location of the Applicant's principal place of business and all other branch offices, if any, and the names of the persons who will be in charge of each office; (H) a description of the communications and operational systems the Applicant will employ to conduct business and the plans and procedures the Applicant will employ to ensure business continuity, including: system capacity to handle the anticipated level of usage; contingency plans in the event of systems or other technological or communications problems or failures; system redundancies; disaster recovery plans; and system security; (I) a copy of any decision or order by a federal or state authority or SRO taking permanent or temporary adverse action with respect to a registration or licensing determination regarding the Applicant or an Associated Person; (J) a statement indicating whether the Applicant or any person listed on Schedule A of the Applicant's Form BD is currently, or has been in the last ten years, the subject of any investigation or disciplinary proceeding conducted by any SRO, the foreign equivalent of a SRO, a foreign or international securities exchange, a contract market designated pursuant to the Commodity Exchange Act ("CEA") or any substantially equivalent foreign statute or regulation, a futures association registered under the CEA or any substantially similar foreign statute or regulation, the Commission or any other "appropriate regulatory agency" (as defined in the Act), the Commodity Futures Trading Commission, or any state financial regulatory agency regarding the Applicant's activities that has not been reported to the CRD, together with all relevant details,

including any sanctions imposed; (K) a statement indicating whether any person listed on Schedule A of the Applicant's Form BD is currently, or has been in the last ten years, the subject of any investigation or disciplinary proceeding conducted by any SRO, the foreign equivalent of an SRO, a foreign or international securities exchange, a contract market designated pursuant to the CEA or any substantially equivalent foreign statute or regulation, a futures association registered under the CEA or any substantially similar foreign statute or regulation, the Commission or any other "appropriate regulatory agency", the CFTC, or any state financial regulatory agency regarding the Applicant's activities that has not been reported to the CRD, together with all relevant details, including any sanctions imposed; (L) a copy of any contract or agreement with another broker-dealer, a bank, a clearing entity, a service bureau or a similar entity to provide the Applicant with services regarding the execution or clearance and settlement of transactions effected on Nasdaq; (M) if the Applicant proposes to make markets on Nasdaq, a description of the source and amount of Applicant's capital to support its market making activities on Nasdaq, and the source of any additional capital that may become necessary; (N) a description of the financial controls to be employed by the Applicant with respect to anti-money laundering compliance rules as set forth in General 9, Section 37; (O) a copy of the Applicant's written supervisory procedures with respect to the activities identified in paragraph (a)(1)(D); (P) a list of the persons conducting the Applicant's market making and other trading activities, and a list of the persons responsible for such persons' supervision, together with the CRD numbers; (R) a copy of the Applicant's most recent "FOCUS Report" (Form X-17A-5) filed with the SEC pursuant to SEC Rule 17a-5; (S) all examination reports and corresponding responses regarding the Applicant for the previous two years from the SROs of which it is a member; (T) a copy of Nasdaq's Membership Agreement, duly executed by the Applicant, which includes, among other things: (1) an agreement to comply with the federal securities laws, the rules and regulations thereunder, Nasdaq rules, and all rulings, orders, directions, and decisions issued and sanctions imposed under Nasdaq rules; (2) an agreement to pay such dues, assessments, and other charges

in the manner and amount as from time to time shall be fixed pursuant to Nasdaq rules; and (U) such other reasonable information with respect to the Applicant as Nasdaq may require.

In contrast, current General 3, Section 2(a) states simply that to become a Member of the Exchange an Applicant must seek approval in the form and manner prescribed by the Exchange. Relatedly, General 3, Section 4(a) provides a short list of documents that Applicants and Members may submit with their application for membership with the Exchange. Section 4(a) states that Members and Applicants shall file with (and be subject to review by) the Exchange, at a minimum, their partnership agreements and any subsequent amendments, in the case of partnerships; articles of incorporation, by-laws and their amendments, in the case of corporations; the articles of organization and operating agreements and their respective amendments, in the case of limited liability companies. The paragraph further provides that no action or failure by the Exchange to act shall be construed to mean that the Exchange has in any way passed on the investment merits of or approved the submitted document. The Exchange believes that deleting General 3, Section 4(a) is appropriate because the Exchange's current rule is ambiguous while Nasdaq Rule 1013(a)(1), which will be incorporated by reference, lists in detail all of the supplementary application materials required for submission by an Applicant. Incorporating this provision by reference will further standardize the Exchange's membership application process.

The Exchange's General 3, Section 5(a) provides that ISE members in good standing are eligible for Exchange membership in the same category of membership previously approved for on ISE. General 3, Section 5(b) states that applicants for Exchange membership who are not already ISE approved members must submit an application to the Exchange in accordance with Exchange procedures. The Exchange is proposing to delete General 3, Section 5(a) and (b) and to incorporate by reference Nasdaq Rule 1013 (b)(1) and (2), Special Application Procedures, which outlines the criteria for a waive-in application when seeking membership with the Exchange, as further discussed below.

The Exchange proposes to delete the language in General 3, Section 5(b) which provides non-ISE members with at least sixty (60) days advance written notice of the date upon which the Exchange shall allocate options classes and appoint market makers pursuant to Exchange Options 2, Section 3 in order to ensure non-ISE Members have a reasonable opportunity to participate in those processes. The allocation process currently governed by Exchange Options 2, Section 3 requires a member to be an approved market maker in order to be appointed as such in options classes. The Exchange has aligned its options allocations process with those of its Affiliated Exchanges and, therefore, proposes to delete the aforementioned text as it no longer applies to applicants for Membership.

Exchange General 3, Section 5(b)(i) provides that to become a Member of the Exchange an Applicant shall file an application, which must be accompanied by a nonrefundable application fee. The Exchange proposes to delete Section 5(b)(i) because the provisions in this section are already included in Nasdaq Rule 1013, New Member Application which is being incorporated by reference.

The Exchange also believes that the provision under General 3, Section 5(b)(iii) that indicates that an applicant must be approved by the Exchange to perform in at least one of the recognized capacities of a Member as stated in General 3, Section 1(c) (discussed above when describing the incorporation by reference of Nasdaq Rule 1002) is substantially similar to the language contained in Nasdaq Rule 1013(a)(1)(D).

Nasdaq Rule 1013(a)(2) provides that the Membership Department will deem an application to be filed on the date when it is substantially complete, meaning the date on which the Membership Department receives from the Applicant all material documentation and information required under Rule 1013. This rule also provides that Nasdaq will notify the Applicant in writing when it deems the Applicant's application to be substantially complete. The Exchange's General 3, Section 5(b)(iv) contains a parallel, although brief, provision when describing the completion of the application process ("Upon completion of the application

process, the Exchange shall consider whether to approve the application, unless there is just cause for delay”).

Nasdaq Rule 1013(a)(3) provides the procedure concerning incomplete applications (including the conditions necessary for the refund of application fees); and the request for additional documents or supporting information. Specifically, Nasdaq Rule 1013(a)(3)(A) (“Lapse of Applications that are not Substantially Complete”) provides that if an application that was initiated under 1013 is not deemed to be substantially complete by the Membership Department within 90 calendar days after an Applicant initiates it, then absent a showing of good cause by the Applicant, the Membership Department may, at its discretion, deem the application to have lapsed without filing, and the Membership Department will take no action in furtherance of the application. If the Membership Department deems an application to have lapsed, then the Membership Department shall serve a written notice of that determination on the Applicant. If an Applicant still wishes to apply for membership on Nasdaq after receiving notice of a lapse in its application, then the Applicant will be required to submit a new application pursuant to Nasdaq Membership Rules and pay a new application fee for doing so, if applicable. The Membership Department will refund fees that an Applicant has paid to the Nasdaq in connection with a lapsed application, in accordance with Nasdaq rules regarding fees, provided that the Nasdaq has not proceeded to process the application at the time it lapses. The rule also provides that, for purposes of Rule 1013(a)(3)(A), the Membership Department will deem an application to be not “substantially complete” if the Applicant fails to submit to the Membership Department materially important information or documentation that is required or requested under these Rules.

Nasdaq Rule 1013(a)(3)(B) (“Rejection of Filed Applications that Remain or Become Incomplete After Filing”) provides that if an application that was initiated under Rule 1013 is substantially complete and thus is deemed to be filed with Nasdaq under Rule 1013(a)(2), but the application nevertheless remains or becomes incomplete with respect to any required or

requested information or documentation, then the Membership Department shall serve written notice to the Applicant of such incompleteness and describe the missing information or documentation. If the Applicant fails to submit to Nasdaq the missing information or documentation within a reasonable period after it receives a notice of incompleteness, then absent a showing of good cause by the Applicant, the Membership Department may, at its discretion, reject the application. If the Membership Department rejects an application on the basis of incompleteness, then the Membership Department shall serve a written notice on the Applicant of the Membership Department's determination and the reasons therefor. Nasdaq shall not refund the application fees that an Applicant has paid to Nasdaq in connection with an application that Nasdaq rejects. If the Applicant determines to continue to seek membership on Nasdaq, then the Applicant shall submit a new application and pay a new application fee in accordance with Nasdaq rules.

The Exchange currently contains a provision related to the lapsing of membership applications. Pursuant to General 3, Section 5(b)(vi), if the membership application process is not completed within six (6) months of the filing of the application form and payment of the appropriate fee, the application shall be deemed to be automatically withdrawn. The Exchange plans to replace General 3, Section 5(b)(vi) by incorporating by reference Rule 1013(a)(3) which provides well-defined processes for the treatment of applications that become stale or result in the Applicant's failure to pursue membership by not responding to requests for additional information.

Nasdaq Rule 1013(a)(4) ("Requests by the Department for Additional Documents or Information from the Applicant or from Third Parties") establishes that (A) at any time before the Membership Department serves its decision as to an application for new membership in Nasdaq, the Membership Department may serve a written request for additional information or documentation, from the Applicant or from a third party, if the Membership Department deems such information or documentation to be necessary to clarify, verify, or supplement the

application materials. The Membership Department may, at its discretion, request that the Applicant or the third party provide the requested information or documentation in writing or through an in-person or telephonic interview. In the written request, the Membership Department shall afford the Applicant or the third party a reasonable period of time within which to respond to the request; moreover, (B) in the event that the Membership Department obtains information or documentation about an Applicant from a third party that the Membership Department reasonably believes could adversely impact its decision on an application, then the Membership Department shall promptly inform the Applicant in writing and provide the Applicant with a description of the information or a copy of the documentation that the Membership Department obtained, where appropriate under the circumstances. Prior to rendering an application decision on the basis of information or documentation obtained from a third party source, the Membership Department shall afford the Applicant with a reasonable opportunity to discuss or to otherwise address the information or documentation that the Membership Department obtained from the third party.

The provisions under the Nasdaq Rule 1013(a)(4) are similar to the Exchange's General 3, Section 4(a), to the extent that they describe the Exchange's authority to request additional documents or information from the Applicant or Member. Relatedly, General 3, Section (d) also provides the Exchange with authority to request Associated Persons to provide additional information or testimony. The Exchange believes that incorporating by reference Nasdaq Rule 1013(a)(4) into its membership rules will provide a greater degree of detail concerning the Exchange's discretion and authority to request additional information.

Nasdaq Rule 1013(b)(1) sets forth the procedure that allows an Applicant who is a FINRA member to "waive-in" to become an Exchange Member and to register with the Exchange all persons associated with it whose registrations FINRA has approved (in categories recognized by the Exchange's rules). This section defines the term "waive-in" to mean that the Membership Department will rely substantially upon FINRA's prior determination to approve

the Applicant for FINRA membership when the Membership Department evaluates the Applicant for Exchange membership. That is, the Membership Department will normally permit a FINRA member to waive-into Exchange membership without conducting an independent examination of the Applicant's qualifications for membership on the Exchange, provided that the Membership Department is not otherwise aware of any basis set forth in Nasdaq Rule 1014 to deny or condition approval of the application.

The second special application process, which is set forth in Nasdaq 1013(b)(2), permits Applicants for Nasdaq membership that are already approved members of one or more of the affiliated exchanges to waive-into Nasdaq. In this context, "waive-in" means that the Membership Department will rely substantially upon an affiliated exchange's prior determination to approve the Applicant for Nasdaq membership. The procedures in Nasdaq Rule 1013(b)(2) for an Applicant to submit a waive-in application under this provision and for the Membership Department to issue a decision based upon such an application are identical to the procedures described above for FINRA members that seek to waive-into Nasdaq membership. Applicants who meet the criteria for this waive-in review process have already demonstrated their ability to meet membership standards on one or more of the affiliated exchanges which eliminates the need for a full review.

Nasdaq Rule 1013(b) ("Special Application Procedures") was adopted by Nasdaq to expedite the membership application process of Applicants who were already members of FINRA or members of one of the affiliated exchanges. The Special Application Procedures also include updated provisions requiring compliance with Nasdaq's anti-money laundering rules.<sup>14</sup> The Exchange proposes to adopt by incorporation these same provisions to facilitate Applicants who meet the rule requirements. The adoption of this rule will offer members of FINRA,

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<sup>14</sup> See Securities Exchange Act Release No. 34-85513 (April 4, 2019), 84 FR 14429 (April 10, 2019) (SR-NASDAQ-2019-022).

Nasdaq, BX, and ISE the option to apply for membership on the Exchange through an expedited membership application process.

Current Exchange rules do not allow this expedited process. However, today, this concept does exist in both the Exchange's and MRX General 3, Section 5. Both the Exchange and MRX rules afford an ISE Exchange member in good standing the ability to become an Exchange or MRX member of the same category without application. The Exchange believes that incorporating by reference Nasdaq's waive-in provisions will further the Exchange's objective to provide uniformity and clarity to its rules by aligning its membership application process with the Nasdaq, BX, and ISE exchanges. The current Exchange rule limits waive-in treatment to ISE members in good standing. Incorporating the substantially similar Nasdaq rule extends this same treatment equally across the Affiliated Exchanges by allowing waive-in treatment on the Exchange for not only ISE members but also for members of FINRA, Nasdaq, BX, and Phlx.<sup>15</sup>

The Exchange also proposes to delete current General 3, Section 5(d), as its placement under the membership rules is unnecessary. Exchange General 3, Section 5(d) contains declarative statements concerning the payments of fees and charges that Members are currently required to pay pursuant to the Exchange's General 2, Section 2 rule ("Fees, Dues and Other Charges") and the Options 7 title ("Pricing Schedule").

Similarly, the Exchange proposes to delete current General 3, Section 5(e). This rule provides that Exchange Members shall be subject to the regulatory jurisdiction of the Exchange under the Exchange Act and the Exchange rules, including without limitation the Exchange's disciplinary jurisdiction under General 5, Section 1. This provision is duplicative as it is substantially similar to existing Exchange General 5, Section 1 ("Disciplinary Jurisdiction").

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<sup>15</sup> Currently Exchange members cannot waive-in to Phlx. Phlx will submit a separate proposal to amend its membership application rules to extend reciprocal waive-in treatment for Exchange members.

### *Rule 1014*

Nasdaq Rule 1014 (“Department Decision”) describes the Membership Department’s process for the issuance of a decision. The Exchange proposes to incorporate by reference Nasdaq Rule 1014 in its entirety as it provides a more organized, detailed, and logical description of the procedure currently described in General 3, Section 2 (in addition to the grounds for approval or disapproval referenced in General 3, Section 5(b)(iv) and (b)(v)). Incorporating Nasdaq Rule 1014 by reference in the Exchange’s rules will improve the membership application and decision making process by better defining the Membership Department’s authority and obligations, describing the basis for approval, conditional approval or denial of an application. Further, the Exchange believes that this proposed change provides consistency in the treatment of Exchange Applicants. Nasdaq Rule 1014(a) describes the Membership Department’s authority to act on an application by approving it, denying it, or approving it subject to restrictions: (1) that are reasonably designed to address a specific (financial, operational, supervisory, disciplinary, investor protection, or other regulatory) concern; or (2) that mirror a restriction placed upon the Applicant by FINRA or an affiliated exchange.

Nasdaq Rule 1014(b), entitled “Bases for Approval, Conditional Approval, or Denial,” provides that the Membership Department will approve, grant conditional approval, or deny a membership application filed under Nasdaq Rules 1013 and 1017 by an Applicant that is not, and is not required to become, a FINRA member. Nasdaq Rule 1014(b)(1) indicates that the Membership Department may deny or condition membership approval for the same reasons that the Commission may deny or revoke a broker or dealer’s registration; this Nasdaq Rule parallels existing General 3, Section 2(b), which describes the Exchange’s authority to deny an application for the same reasons that the SEC may deny or revoke a broker-dealer registration and for those reasons required or allowed under the Act.

Nasdaq Rule 1014(b)(2) enumerates the reasons for denial or conditional approval of a membership application in the cases when the Applicant (A) is unable to satisfactorily

demonstrate its capacity to adhere to the Exchange and Commission rules; (B) has previously violated, and there is a reasonable likelihood that such Applicant will again engage in violative acts or practices, of any Exchange or Commission policies, rules, and regulations; (C) has engaged in acts or practices inconsistent with just and equitable principles of trade, and there is a reasonable likelihood that such Applicant will again engage in violative acts or practices, of any Exchange or Commission policies, rules, and regulations; (D) is not in compliance with the Commission's net capital rule or has financial difficulties greater than 5% of their net worth; (E) has been itself, or is the successor to an entity subject to a bankruptcy, proceeding, receivership, or arrangement for the benefit of creditors within the past 3 years; (F) has engaged in an established pattern of failure to pay just debts; (G) does not hold required licenses or registrations; or (H) is unable to satisfactorily demonstrate reasonably adequate systems capacity and capability.

The Exchange notes that the basis for denial listed under its General 3, Section 2(c)(1), regarding an Applicant who has a negative net worth, has financial difficulties involving an amount that is more than five percent (5%) of the applicant's net worth, or has a pattern of failure to pay just debts (whether or not such debts have been the subject of a bankruptcy action), is parallel to Nasdaq Rule 1014(b)(2)(D). Similarly, the Exchange's basis for denial under General 3, Section 2(c)(2), regarding an Applicant unable satisfactorily to demonstrate a capacity to adhere to all applicable Exchange, SEC, the Clearing Corporation and Federal Reserve Board policies, rules and regulations, including those concerning record-keeping, reporting, finance and trading procedures, is parallel to Nasdaq Rule 1014(b)(2)(A). Finally, the provision under General 3, Section 2(c)(3), regarding an Applicant unable satisfactorily to demonstrate reasonably adequate systems capability and capacity, is parallel to Nasdaq Rule 1014(b)(2)(H).

Furthermore, the Exchange believes that the provisions under Nasdaq Rule 1014(b)(2)(A), (B), and (C), which describe the basis for a decision regarding the Applicant's inability to satisfy the Exchange and securities rules, previous violative conduct, and past or

potential conduct inconsistent with just and equitable principles of trade, provide the Exchange with greater authority than the one described under General 3, Section 2(d), which provides that when an Applicant is a subject of an investigation conducted by any SRO or government agency involving its fitness for becoming a Member, the Exchange need not act on the application until the matter has been resolved.

The Exchange notes that current General 3, Section 2(e) and (f), which refer to the basis for membership denial as it relates to statutory disqualification, are substantially similar to Nasdaq Rule 1002(b)(1) and (2), which describe an Applicant's ineligibility of certain persons for membership or association due to statutory disqualification. As stated above, the Exchange proposes to incorporate Nasdaq Rule 1002 in its entirety.

Nasdaq Rule 1014(b)(3) provides that the Membership Department will not approve an Applicant unless the Applicant is a member of another registered securities exchange or association that is not registered solely under Section 6(g) or Section 15A(k) of the Act. This rule also provides that an Applicant that will transact business with the public must be a member of FINRA. This requirement exists in the Exchange's rulebook in Options 10, Section 1 ("Exchange Approval"); however, to maintain harmonization of the rules, the Exchange proposes to incorporate by reference this same parallel rule. There are no proposed changes to rule text found in Exchange Options 10, Section 1 at this time.

The Exchange proposes to incorporate by reference Nasdaq Rule 1014(c) to establish the time and content of a decision and the recourse available to an Applicant if the Membership Department fails to timely issue a decision on a membership application. Current Exchange General 3, Section 5(b)(iv)), broadly prescribes that the Exchange will consider approval of the membership application, "unless there is just cause for delay." Nasdaq Rule 1014(c) outlines this process in greater detail. The Nasdaq rule requires the Membership Department to serve a decision on the membership application within a reasonable time period, not to exceed 45 (calendar) days after the Applicant files and provides to the Exchange all required and requested

information or documents in connection with the application. Additionally, the rule allows the Membership Department and the Applicant the ability to agree to further extensions of the decision deadlines. Nasdaq Rule 1014(c) also provides that the decision will detail the reason(s) for the denial of membership or the approval of the application subject to restrictions. This provision is similar to General 3, Section 5(b)(v), which currently establishes that the Exchange will inform the Applicant of the grounds for disapproval of a membership application. Moreover, if the Membership Department fails to timely issue a decision, the rule prescribes that the Applicant may request the Exchange Board to direct the Membership Department to issue a decision. The rule further provides that the Exchange Board, within seven days, will direct the Membership Department to serve its decision or to show good cause for a time extension. If the Membership Department shows good cause, the Exchange Board may grant the Membership Department up to 45 days to issue the decision.

Nasdaq Rule 1014(e) prescribes that service of the Membership Department's decision shall be made pursuant to Nasdaq Rule 1012. Further, the rule provides that the decision shall become effective upon service and shall remain in effect during the pendency of any review until a decision constituting final action of the Exchange is issued under Rule 1015 or 1016, unless otherwise directed by the Exchange Review Council, the Exchange Board, or the Commission. Current Exchange General 3, Section 5(b)(v) prescribes that a notice of the Exchange's decision shall be provided to the Applicant but does not specify the manner of such notification. In addition, Exchange General 3, Section 5(b)(vii) indicates that once an Applicant's membership becomes effective, the Exchange will promptly notify the Applicant of such decision. The Exchange believes that incorporating this rule by reference clarifies the process for serving the Membership Department's decision on applications.

Nasdaq Rules 1014(f) and (g), respectively, provide for the effectiveness of restrictions on an approved application and what constitutes final action in the Membership Department's decision. Rule 1014(f) establishes that a restriction imposed under Rule 1014 shall remain in

effect and bind the Applicant and all successors to the ownership or control of the Applicant unless (1) it is removed or modified by a decision constituting final action of the Exchange issued under Nasdaq Rules 1015, 1016, or 1017; or (2) stayed by the Exchange Review Council, the Exchange Board, or the Commission. Rule 1014(g) provides that unless the Applicant files a written request for a review under Rule 1015, the Membership Department’s decision shall constitute final action by Nasdaq.

#### *Rule 1015*

The Exchange proposes to incorporate by reference Nasdaq Rule 1015 in its entirety under its General 3 title. Nasdaq Rule 1015, subsections (a) through (j) are substantially similar to the current provisions concerning a review by the Exchange Review Council detailed in Exchange General 3, Section 2(g).<sup>16</sup>

Current Exchange General 3, Section 2(g) (formerly Exchange Rule 302(g)) was amended in 2019<sup>17</sup> to base the Exchange’s procedures on those set forth in Nasdaq and BX Rules 1015 and 1016 (which were identical to Nasdaq’s and now incorporate by reference the Nasdaq Membership rules<sup>18</sup>). The Exchange believes that incorporating by reference Nasdaq Rule 1015 it will further the Exchange’s objective to provide uniformity and clarity to its rules by aligning them with the membership rules of the Nasdaq, BX, and ISE exchanges.

The Exchange proposes also to incorporate by reference Nasdaq Rule 1015(k) and (l) (respectively, “Ex Parte Communications” and “Recusal or Disqualification”). Both paragraphs (k) and (l) were, respectively, previously located under Nasdaq Rule 1012(c) and (d) but were

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<sup>16</sup> The Exchange notes that, recently, Nasdaq adopted Rule 1015(f)(5) which provides for the Exchange Review Council to conduct its hearings via video conferencing. See Securities Exchange Act Release No. 34-90390 (November 10, 2020), 85 FR 73302 (November 17, 2020) (SR-NASDAQ-2020-076). The Exchange has adopted an identical provision under General 3, Section 2(g)(6)(E). See Securities Exchange Act Release No. 34-90755 (December 21, 2020), 85 FR 85819 (December 29, 2020) (SR-GEMX-2020-21).

<sup>17</sup> See Securities Exchange Act Release No. 34-86346 (July 10, 2019), 84 FR 33999 (July 16, 2019) (SR-GEMX-2019-08).

<sup>18</sup> See supra note 4.

moved to their current location in the Nasdaq rulebook as the two provisions logically fit within the section of the membership rules that govern appeals of membership decisions.<sup>19</sup> Nasdaq Rule 1015(k) prohibits ex parte communications involving membership decisions subject to review among certain Exchange staff, members of the Exchange Review Council, members of a Subcommittee of the Council, and the Board of Directors. Nasdaq Rule 1015(l) governs the recusal and disqualification of a member of the Exchange Review Council, a Subcommittee thereof, or the Board of Directors from participating in a review of a membership decision. The Exchange has no parallel provisions in its rulebook to Nasdaq Rule 1015(k) and (l). The Exchange believes that incorporating Rule 1015(k) and (l) by reference enhances the Exchange Review Council's procedures and is in line with the Exchange's goal of harmonizing its rules with those of the Nasdaq, BX, and ISE exchanges.

#### *Rule 1016*

Aside from their respective internal cross-references, the text in Nasdaq Rule 1016 and Exchange General 3, Section 2(h) (both entitled "Discretionary Review by the Exchange Board") are identical. The Exchange proposes to incorporate by reference Nasdaq Rule 1016 under its General 3 title. The Exchange believes that incorporating by reference this rule will further the Exchange's objective to provide uniformity and clarity to its rules by aligning them with the membership rules of the Nasdaq, BX, and ISE exchanges.

#### *Rule 1017*

Nasdaq Rule 1017, "Application for Approval of Change in Ownership, Control, or Material Business Operations," has no analogue rule in the Exchange's current General 3 title. Incorporating Nasdaq Rule 1017 by reference in its entirety in the Exchange's rules will enhance the Exchange's ongoing regulatory oversight capabilities by clearly identifying events that would trigger the requirement for an approved Member to file an application with the Exchange. As stated below, Nasdaq Rule 1017 outlines in detail the circumstances that trigger the filing of an

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<sup>19</sup> See supra note 14.

application pursuant to this rule. While the Exchange has no corresponding rule, it does have a similar process in place that it administers procedurally. For example, if an existing Electronic Access Member of the Exchange is seeking market maker status for the first time, the current Exchange process is to require that the Member submit an amended Exchange application along with relevant supplementary material. The Exchange believes that incorporating Nasdaq Rule 1017 by reference and harmonizing its process with that of Nasdaq, BX, and ISE will improve its current practice by further streamlining its current practices. As stated previously, the objective is to eventually harmonize membership rules across all Affiliated Exchanges in order to advance uniformity within the membership rules and procedures.

Nasdaq Rule 1017(a) prescribes the events that require Members to file applications with the Exchange. Paragraph (a) provides that a Member shall file an application for approval prior to effecting the following changes: (1) a merger of the Member with another Member; (2) a direct or indirect acquisition by the Member of another Member; (3) direct or indirect acquisitions or transfers of 25% or more in the aggregate of the Member's assets or any asset, business line or line of operations that generates revenues comprising 25% or more in the aggregate of the Member's earnings measured on a rolling 36 month basis; (4) a change in the equity ownership or partnership capital of the Member that results in one person or entity directly or indirectly owning or controlling 25% or more of the equity or partnership capital; or (5) a material change in business operations, which consist of (A) removing or modifying a membership restriction; (B) acting as a dealer or a market maker for the first time; (C) adding business activities that require a higher minimum net capital under SEC Rule 15c3-1; or (D) adding business activities that would cause a proprietary trading firm no longer to meet the definition of that term contained in the Rule 1000 Series.

Nasdaq Rule 1017(b), governs the filing and content of applications filed under Nasdaq Rule 1017. This Rule provides that the application should be filed with the Membership Department; if the Applicant seeks approval of change of ownership or control or a material

change in the Member's business operations, the application should (A) provide a detailed description of the proposed change, (B) provide a business plan, pro forma financials, an organizational chart, and written supervisory procedures reflecting the proposed change; and (C) if the application requests approval of a change in ownership or control, the application also shall include the names of the new owners, their percentage of ownership, and the sources of their funding for the purchase and recapitalization of the member.

Furthermore, Nasdaq Rule 1017(b) provides that if the application requests the removal or modification of a membership restriction, the application also shall, (A) present facts showing that the circumstances that gave rise to the restriction have changed; and (B) state with specificity why the restriction should be modified or removed in light of the applicable bases for denial or standards for approval set forth in Nasdaq Rules 1014 or 1017 and the articulated rationale for the imposition of the restriction. Moreover, the Rule indicates that if the application requests approval of an increase in Associated Persons involved in sales, offices, or markets made, the application shall set forth the increases in such areas during the preceding 12 months.

Nasdaq Rule 1017(c) indicates when an application shall or may be filed. Specifically, the Rule provides that (1) an application for approval of a change in ownership or control shall be filed at least 30 days prior to such change; (2) that an application to remove or modify a membership restriction may be filed at any time (clarifying that an existing restriction shall remain in effect during the pendency of the proceeding); and that (3) an application for approval of a material change in business operations, other than the modification or removal of a restriction, may be filed at any time, but the Member may not effect such change until the conclusion of the proceeding, unless the Membership Department and the Member otherwise agree.

Nasdaq Rule 1017(d) prescribes that an application will be deemed to be filed on the date when it is substantially complete, meaning the date on which the Membership Department receives from the Applicant all material documentation and information required under this Rule,

and that the Membership Department will notify the Applicant in writing when the Membership Department deems the Applicant's application to be substantially complete.

Nasdaq Rule 1017(e) indicates that, pursuant to Nasdaq Rule 1013(a)(3), the Membership Department may treat an application filed under this Rule as having lapsed or it may reject such an application, except that the Membership Department may treat an application as having lapsed if it is not substantially complete for 30 days or more after the Applicant initiates it.

Nasdaq Rule 1017(f) provides that the Membership Department, at any time before it serves its decision, may request additional information or documentation from the Applicant or from a third party in accordance with Nasdaq Rule 1013(a)(4).

Nasdaq Rule 1017(g) establishes that a Membership Department's decision shall be issued in accordance with Nasdaq Rule 1014, except that (1) In rendering a decision on an application submitted under the Rule that requests the modification or removal of a membership restriction, the Membership Department shall consider whether maintenance of the restriction is appropriate in light of: (A) the applicable bases for denial or standards for approval set forth in Nasdaq Rule 1014; (B) the circumstances that gave rise to the imposition of the restriction; (C) the Applicant's operations since the restriction was imposed; (D) any change in ownership or control or supervisors and principals; and (E) any new evidence submitted in connection with the application. Furthermore, this Rule provides that the Membership Department shall serve a written decision on an application filed under this Rule in accordance with Nasdaq Rule 1013(c). Moreover, the Rule provides that in the event that a proposed change in ownership, control, or business operations by a Member requires such Member to become a member of FINRA, the Membership Department shall not be required to serve a written decision under this Rule until 10 business days after the Member becomes a FINRA member.

Nasdaq Rule 1017(h) provides that service of the decision on the Applicant in accordance with Nasdaq Rule 1012. Moreover, the Rule indicates that the decision shall become effective upon service and shall remain in effect during the pendency of any review until a decision

constituting final action of the Exchange is issued under Rules 1015 or 1016, unless otherwise directed by the Exchange Review Council, the Exchange Board, or the Commission.

Nasdaq Rule 1017(i) indicates that an Applicant may file a written request for review of the Membership Department's decision with the Exchange Review Council pursuant to Nasdaq Rule 1015, the rule further clarifies that the procedures set forth in Nasdaq Rule 1015 shall apply to such review, and the Exchange Review Council's decision shall be subject to discretionary review by the Exchange Board pursuant to Nasdaq Rule 1016. If the Applicant does not file a request for a review, the Membership Department's decision shall constitute final action by Nasdaq.

Nasdaq Rule 1017(j) prescribes that the Membership Department shall modify or remove a restriction on its own initiative if the Membership Department determines such action is appropriate in light of the considerations set forth in paragraph (g)(1) of the Rule. The Membership Department shall notify the member in writing of the Membership Department's determination and inform the member that it may apply for further modification or removal of a restriction by filing an application under paragraph Rule 1017(a).

#### *Rule 1018*

Nasdaq Rule 1018, "Resignation, Reinstatement, Termination, and Transfer of Membership," has no analogue rule in the Exchange's current General 3 title, with the exception of Exchange General 3, Section 5(c). The Exchange proposes to incorporate the rule by reference under its General 3 title. Nasdaq Rule 1018 outlines the process for resignation, reinstatement, termination, and transfers of memberships. Incorporating Nasdaq Rule 1018 by reference will eventually allow the Exchange to standardize the processing of these requests across all the Affiliated Exchanges.

Nasdaq Rule 1018(a) provides that membership in Nasdaq may be voluntarily terminated only by formal resignation. Resignations of Members must be filed via electronic process or such other process as the Exchange may prescribe. Any Member may resign from Nasdaq at any

time. Such resignation shall not take effect until all indebtedness due to Nasdaq from such Member shall have been paid in full and so long as any complaint or action is pending against the Member under the Rules. Nasdaq, however, may in its discretion declare a resignation effective at any time.

Nasdaq Rule 1018(b) indicates that no Member may transfer its membership or any right arising therefrom; the membership of a corporation, partnership, or any other business organization that is a Member shall terminate upon its liquidation, dissolution, or winding up; and the membership of a sole proprietorship that is a Member shall terminate at death, provided that all obligations of membership under the Rules have been fulfilled. The Exchange proposes to incorporate Nasdaq Rule 1018(b) by reference and to delete Exchange General 3, Section 5(c), which is substantially similar to this provision. Moreover, the Rule provides that the consolidation, reorganization, merger, change of name, or similar change in any corporate Member shall not terminate the membership of such corporate Member, provided that the Exchange Member or surviving corporation, if any, shall be deemed a successor to the business of the corporate Member, and the Member or the surviving organization shall continue in the securities business, and shall possess the qualifications for membership in the Exchange. Furthermore, the death, change of name, withdrawal of any partner, the addition of any new partner, reorganization, consolidation, or any change in the legal structure of a partnership Member shall not terminate the membership of such partnership Member, provided that the Member or surviving organization, if any, shall be deemed a successor to the business of the partnership Member, and the Member or surviving organization shall possess the qualifications for membership in the Exchange. If the business of any predecessor Member is to be carried on by an organization deemed to be a successor organization by the Exchange, the membership of such predecessor Member shall be extended to the successor organization subject to the notice and application requirements of the Rules and the right of the Exchange to place restrictions on

the successor organization pursuant to the Rules; otherwise, any surviving organization shall be required to satisfy all of the membership application requirements of the Exchange's Rules.

Nasdaq Rule 1018(c) establishes that any membership or registration suspended or canceled under the Rules may be reinstated by the Exchange upon such terms and conditions as are permitted under the Act and the Exchange rules; provided, however, that any applicant for reinstatement of membership or registration shall possess the qualifications required for membership or registration in the Exchange.

#### *Rule 1019*

Nasdaq Rule 1019 ("Application to Commission for Review") has no analogue rule in the Exchange's current General 3 title. Nasdaq Rule 1019 allows Applicants to request the Commission to review an Exchange final action, as provided under the Nasdaq Rule 1010 Series. Incorporating Nasdaq Rule 1019 by reference standardizes the process by which an Applicant may dispute any final action of the Exchange.

Nasdaq Rule 1019 provides that a person aggrieved by a Nasdaq's final action under Nasdaq Membership Rules may apply for review by the Commission pursuant to Section 19(d)(2) of the Act. The filing of an application for review shall not stay the effectiveness of a decision constituting final action of the Exchange, unless the Commission otherwise orders.

#### Revised Membership Application

As part of the harmonization of its membership rules and procedures with those of Nasdaq, BX, and ISE, the Exchange is adopting a standardized Broker-Dealer Membership Application ("Membership Application"). The Membership Application is submitted as Exhibit 3A of this proposed rule change with underlined changes concerning the GEMX market. Each Exchange Membership Application will be accompanied by a "Membership Agreement" (submitted as Exhibit 3B of the attached), which should be signed by all applicants to membership with the Exchange.

### *Conclusion*

The changes proposed herein will allow the Exchange to harmonize its membership rules and processes with those of Nasdaq, BX, and ISE, and ultimately, with the other Affiliated Exchanges, which will eventually provide a uniform criteria across the Affiliated Exchanges for membership qualifications and a consistent process across the Affiliated Exchanges for processing membership applications. The proposal will also provide for full membership reciprocity between Nasdaq, BX, ISE, and the Exchange – and hopefully, in time, across all of the Affiliated Exchanges – so that a member of one Affiliated Exchange would receive expedited treatment in applying for membership on any other Affiliated Exchange. Similarly, harmonized membership rules and processes will benefit Exchange Applicants and Members by establishing consistent membership requirements and processes that must be followed to apply for membership on the Exchange.

Moreover, as to the Exchange itself, the proposed changes described herein will render the Exchange's membership rules and processes clearer, better organized, simpler, and easier to comply with. Again, such changes will provide benefits both to the Exchange's Membership Department and to Exchange Applicants.

The proposed membership rules and processes are substantially similar to the existing rules and process, and where there are differences between the new and old processes, the Exchange believes that the new process does not disadvantage its Members or Associated Persons. To the contrary, the Exchange believes that the new rules and processes will benefit all parties as it again provides greater clarity, simplicity, and efficiency than the retired rules and processes.

### *Implementation*

To facilitate an orderly transition from the existing rules under the General 3 title and the Nasdaq Membership Rules to be incorporated by reference, the Exchange is proposing to apply the existing Rules to all applications which have been submitted to the Exchange (including

applications that are not yet complete) and are pending approval prior to the operative date. The Exchange also will apply the existing Rules to any appeal of an Exchange membership decision or any request for the Board to direct action on an application pending before the Exchange Review Council, the Board, or the Commission, as applicable. As a consequence of this transition process, the Exchange will retain the existing processes during the transition period until such time that there are no longer any applications or matters proceeding under the existing rules. To facilitate this transition process, the Exchange will retain a transitional rulebook that will contain the Exchange's membership rules as they are at the time that this proposal is filed with the Commission. This transitional rulebook will apply only to matters initiated prior to the operational date of the changes proposed herein and it will be posted to the Exchange's public rules website. When the transition is complete, the Exchange will remove the transitional rulebook from its public rules website.

The Exchange will announce and explain this transition process in a regulatory alert.

The Exchange notes that Nasdaq and BX applied the same process described above to govern its transition to its amended membership rules.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>20</sup> in general, and furthers the objectives of Section 6(b)(5) and of the Act,<sup>21</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. It is also consistent with Section 6(b)(7) of the Act in that it provides for a fair procedure for denying Exchange membership to any person who seeks it, barring any person from becoming associated with an Exchange Member, and prohibiting or

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<sup>20</sup> 15 U.S.C. 78f(b).

<sup>21</sup> 15 U.S.C. 78f(b)(5).

limiting any person with respect to access to services offered by the Exchange or a Member thereof.<sup>22</sup>

As a general matter, the Exchange believes that its proposal to delete its existing membership rules, incorporate by reference the Nasdaq Membership Rules, and other related changes will promote a free and open market, and will benefit investors, the public, and the markets, because the new rules will be clearer, better organized, and simpler.

The proposal is just and equitable because it will render the Exchange's membership rules easier for Applicants and Members to read and understand, including by doing the following:

- Establishing a “roadmap” paragraph as shown in Nasdaq Rule 1014(a) that sets forth the basic authority of the Membership Department to approve, approve with conditions, or deny applications for membership before the Rule goes on to enumerate criteria for the Membership Department to apply when taking each of those actions;
- Making the titles of the rules more accurate and descriptive (e.g., Nasdaq Rule 1014(b));
- Grouping logically-related provisions together in the rules (e.g., provisions governing resignation, termination, transfer, and reinstatement of membership) and recusals and disqualifications;
- Clarifying when the Membership Department will deem an application to be filed (when the application is “substantially complete,” as set forth in Nasdaq Rule 1013(a)(2)) and by requiring the Membership Department to notify an Applicant in writing of the filing date;

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<sup>22</sup> 15 U.S.C. 78f(b)(7).

- Clarifying what the Exchange means when it states that an Applicant may “waive-in” to Exchange membership (as set forth in Nasdaq Rule 1013(b)); and

The proposal will also make compliance with the membership rules simpler and less burdensome for Applicants and Members by, for example, doing the following:

- Eliminating obsolete requirements to submit paper copies of Forms U-4 and BD or explain information listed on the forms where the Membership Department already has electronic access to the Forms and the information contained therein;
- Permitting electronic filing of applications (Nasdaq Rule 1012(a)(1));
- Allowing payment of application fees by means other than paper check (Nasdaq Rule 1013(a)(1)(C));
- Harmonizing disparate procedures under Nasdaq Rules 1013 and 1017 for filing, evaluating, and responding to initial membership applications and applications for approval of business changes;
- Detailing the circumstances in which an Applicant may waive-into Exchange membership to include the Applicant’s membership in any of the affiliated exchanges and defining procedures for processing and responding to waive-in applications (Nasdaq Rule 1013(b));

In sum, the foregoing changes will update, rationalize, and streamline the Exchange’s membership rules and processes, all to the benefit of Applicants and Members. Moreover, these changes will not adversely impact the rights of Applicants or Members to appeal adverse Membership Department decisions under these Rules or to request Board action to compel the Membership Department to render decisions on applications.

Last, the Exchange believes that its proposal to phase-in the implementation of the new membership rules and processes is consistent with Section 6(b)(7) of the Act<sup>23</sup> because both the

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<sup>23</sup> 15 U.S.C. 78f(b)(7).

current and proposed processes provide fair procedures for granting and denying applications for becoming an Exchange Member, becoming an Associated Person, and making material changes to the business operations of a Member. The Exchange is proposing to provide advanced notice of the implementation date of the new processes, and will apply the new processes to new applications, appeals, and requests for Board action that are initiated on or after that implementation date. Any application, appeal, or request for Board action initiated prior to the implementation date will be completed using the current processes. As a consequence, the Exchange will maintain a transitional rulebook on the Exchange's public rules website which will contain the Exchange Rules as they are at the time of filing this rule change. These transitional rules will apply exclusively to applications, appeals, and requests for Board action initiated prior to the implementation date. Upon conclusion of the last decision on a matter to which the transitional rules apply, the Exchange will remove the defunct transitional rules from its public rules website. Thus, the transition will be conducted in a fair, orderly, and transparent manner. Lastly, the proposed transition process is the same process that Nasdaq and BX implemented during its transition to new membership rules.

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 Exchange does not expect that its proposed changes to the membership rules will have any competitive impact on its existing or prospective membership. The proposed changes will apply equally to all similarly situated Applicants and Members and they will confer no relative advantage or disadvantage upon any category of Exchange Applicant or Member. Moreover, the Exchange does not expect that its proposal will have an adverse impact on competition among exchanges for members; to the contrary, the Exchange hopes that by clarifying, reorganizing, and streamlining its membership rules, the Exchange's membership process will be less burdensome

for Applicants and Members and the Exchange will improve its competitive standing relative to other exchanges.

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

No written comments were either solicited or received.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>24</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>25</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 necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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

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

<sup>25</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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-2021-02 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-2021-02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying

information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-GEMX-2021-02 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>26</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>26</sup> 17 CFR 200.30-3(a)(12).