

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60247; File No. SR-BX-2009-021)

July 6, 2009

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving Proposed Rule Change to Amend the Restated Certificate of Incorporation and By-Laws of NASDAQ OMX BX, Inc.

On April 29, 2009, NASDAQ OMX BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) 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> a proposed rule change to amend its Restated Certificate of Incorporation (“Certificate”) and by-laws (“By-Laws”). The proposed rule change was published for comment in the Federal Register on May 19, 2009.<sup>3</sup> The Commission received no comments regarding the proposal. This order approves the proposed rule change.

I. Description of the Proposed Rule Change

On August 29, 2008, The NASDAQ OMX Group, Inc. (“NASDAQ OMX”) acquired BX. Since then, the boards of BX and its parent company, NASDAQ OMX, have maintained their own audit committee and management compensation committee. As more fully discussed in the Notice, the Exchange states that it has found the work of these committees to overlap substantially.<sup>4</sup> As a result, BX proposes to revise its By-Laws to allow for the elimination of its audit and management compensation committees. In addition, BX proposes to amend its Certificate and By-Laws to reflect the name

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

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

<sup>3</sup> See Securities Exchange Act Release No. 59908 (May 12, 2009), 74 FR 23459 (“Notice”).

<sup>4</sup> See Notice, supra note 3, 74 FR at 23460.

change of The Nasdaq Stock Market, Inc. to The NASDAQ OMX Group, Inc. II.

Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>5</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>6</sup> which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act. The Commission also finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>7</sup> in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices, 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. The Commission previously approved a structure in which certain committees of the board of directors of NYSE Euronext, including the audit and compensation committees, were authorized to perform functions for various subsidiaries, including the New York Stock Exchange, LLC (“NYSE”).<sup>8</sup>

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<sup>5</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>6</sup> 15 U.S.C. 78(b)(1).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120).

The BX Audit Committee. Currently, the BX audit committee is primarily charged with: (1) overseeing BX's financial reporting process; (2) overseeing the systems of internal controls established by management and the BX board, as well as the legal and compliance process; (3) selection and evaluation of independent auditors; and (4) direction and oversight of the internal audit function. BX states that the NASDAQ OMX audit committee<sup>9</sup> will assume the duties currently performed by the BX audit committee once that committee is eliminated. The Exchange states that the responsibilities of BX's audit committee are fully duplicated by the responsibilities of the NASDAQ OMX audit committee.<sup>10</sup> In addition, BX states that its regulatory oversight committee has broad authority to oversee the adequacy and effectiveness of BX's regulatory and self-regulatory organization responsibilities, and therefore is able to maintain oversight over internal controls in tandem with the NASDAQ OMX audit

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<sup>9</sup> The NASDAQ OMX audit committee is composed of four or five directors, all of whom must be independent under the standards established by Section 10A(m) of the Act and the listing rules of The NASDAQ Stock Market LLC. All committee members must be able to read and understand financial statements, and at least one member must have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background that results in the individual's financial sophistication.

<sup>10</sup> Specifically, BX states that: the NASDAQ OMX audit committee has broad authority to review the financial information that will be provided to shareholders and others, systems of internal controls, and audit, financial reporting and legal and compliance processes and, because NASDAQ OMX's financial statements are prepared on a consolidated basis that includes the financial results of NASDAQ OMX's subsidiaries, including BX, the NASDAQ OMX audit committee's purview necessarily includes these subsidiaries. In addition, BX states that the NASDAQ OMX audit committee currently is charged with providing oversight over financial reporting and independent auditor selection for NASDAQ OMX and all of its subsidiaries, including BX, and the NASDAQ OMX audit committee has general responsibility for oversight over internal controls and direction and oversight over the internal audit function for NASDAQ OMX and all of its subsidiaries. See Notice, 74 FR at 23460.

committee. Further, BX states that the practice of NASDAQ OMX's Internal Audit Department ("Department"),<sup>11</sup> which performs internal audit functions for all NASDAQ OMX subsidiaries, is to report to the BX regulatory oversight committee on all internal audit matters relating to BX will be formally reflected in the Department's written procedures. BX also represents that, to ensure that the BX board retains authority to direct the Department's activities with respect to BX, the Department's written procedures will be amended to stipulate that the BX regulatory oversight committee may, at any time, direct the Department to conduct an audit of a matter of concern to it and report the results of the audit both to the BX regulatory oversight committee and the NASDAQ OMX audit committee.<sup>12</sup>

BX Management Compensation Committee. BX also proposes to eliminate its compensation committee, and to prescribe that the functions of that committee be performed by the NASDAQ OMX compensation committee or the full BX board, when required. The NASDAQ OMX By-Laws provide that its compensation committee considers and recommends compensation policies, programs, and practices for employees of NASDAQ OMX. According to BX, many employees performing work for BX are also employees of NASDAQ OMX, and certain senior officers of BX are also officers of NASDAQ OMX and other NASDAQ OMX subsidiaries because their responsibilities relate to multiple entities within the NASDAQ OMX corporate structure.<sup>13</sup> As a result, NASDAQ OMX establishes compensation and compensation policy for these employees.

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<sup>11</sup> See Notice, 74 FR at 23460-61.

<sup>12</sup> See Notice, 74 FR at 23461.

<sup>13</sup> Id.

To the extent that policies, programs, and practices must be established for any BX officers or employees who are not also NASDAQ OMX officers or employees, BX states that the BX Board will perform such actions without the use of a compensation committee, subject to recusal by Staff Directors,<sup>14</sup> unless the persons in question are also employees of Boston Options Exchange Regulation LLC (“BOXR”).<sup>15</sup>

The Commission notes that the proposed elimination of the BX audit and management compensation committees is comparable to a structure for the NYSE that the Commission previously considered and approved.<sup>16</sup> The Commission finds that the proposed elimination of the BX’s audit and management compensation committees is consistent with the Exchange Act.

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<sup>14</sup> See BX By-Laws Article I(t). Staff Directors are directors of BX that are also serving as officers. Because the BX board would not be responsible for setting the compensation of any Staff Directors who are also officers of NASDAQ OMX, these directors would be permitted to participate in discussions concerning compensation of BX employees, but BX states that they must recuse themselves from a vote on the subject to allow the determination to be made by directors that are not officers or employees of BX. BX also states that, if a Staff Director is not also an employee of NASDAQ OMX, that Staff Director must also absent himself or herself from any deliberations regarding his or her compensation.

<sup>15</sup> BOXR is the subsidiary of BX that has been delegated responsibility to regulate the market operated by Boston Options Exchange Group LLC (“BOX”), an options exchange that is a facility of BX but in which neither BX nor any of its affiliates has a financial interest. Section 17 of the By-Laws of BOXR (which are part of its Limited Liability Company Agreement) provides that the compensation of BOXR’s officers shall be determined by the BOXR Board. Because of BOXR’s special status as a regulatory subsidiary, this provision will remain operative following the implementation of the rule change proposed by this filing. The Commission notes that, under the By-Laws, BX’s regulatory oversight committee must be informed about the compensation and promotion or termination of the BX chief regulatory officer and the reasons therefor, to allow it to provide oversight over decisions affecting this key officer. See BX By-Laws Section 4.13(e).

<sup>16</sup> See supra note 8.

II. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change (SR-BX-2009-021) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

Elizabeth M. Murphy  
Secretary

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<sup>17</sup> 15 U.S.C. 78s(b)(2).

<sup>18</sup> 17 CFR 200.30-3(a)(12).