

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61582; File No. SR-NASDAQ-2010-025)

February 25, 2010

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Amend the By-Laws of The NASDAQ OMX Group, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on February 24, 2010, The NASDAQ Stock Market LLC (the “Exchange” or “NASDAQ”) filed with the Securities and Exchange Commission (“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 NASDAQ Exchange is filing this proposed rule change relating to the By-Laws of its parent corporation, The NASDAQ OMX Group, Inc. (“NASDAQ OMX”). The text of the proposed rule change is available at <http://nasdaqomx.cchwallstreet.com>, at the Exchange’s principal office, on the Commission’s Web site at <http://www.sec.gov>, 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 NASDAQ Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

examined at the places specified in Item IV below. The NASDAQ 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

NASDAQ OMX is proposing to make certain amendments to its By-Laws to make improvements in its governance. Currently, NASDAQ OMX By-Laws provide that each director receiving a plurality of the votes at any election of directors at which a quorum is present is duly elected to the Board.³ Under Corporate Governance Guidelines adopted by the Board, however, any director in an uncontested election who receives a greater number of votes "withheld" from his or her election than votes "for" such election is required to tender his or her resignation promptly following receipt of the certification of the stockholder vote. The NASDAQ OMX Nominating & Governance Committee then considers the resignation offer and recommends to the Board whether to accept it. Within 90 days after the certification of the election results, the Board will decide whether to accept or reject the resignation. Promptly thereafter, the Board will announce its decision by means of a press release. In a contested election (i.e., where the number

³ Section 216 of the General Corporation Law of the State of Delaware provides that in the absence of the specification in the certificate of incorporation or bylaws of a Delaware corporation, directors of the Delaware corporation shall be elected by a plurality of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors. Since the Certificate of Incorporation and By-Laws of NASDAQ OMX do not specify the voting standard for the election of NASDAQ OMX's directors, the Section 216 default standard applies to NASDAQ OMX and, therefore, elections of NASDAQ OMX's directors are currently governed by a plurality vote standard.

of nominees exceeds the number of directors to be elected), the unqualified plurality standard controls.

Uncontested Election

NASDAQ OMX proposes the adoption of a majority voting standard by amending Article IV, Section 4.4 of the By-Laws to provide that, in an uncontested election, directors shall be elected by holders of a majority of the votes cast at any meeting for the election of directors at which a quorum is present. Under the majority voting standard, a nominee who fails to receive the requisite vote would not be duly elected to the Board; however, because a director holds office until his or her successor is duly elected and qualified, any incumbent director-nominee who fails to receive the requisite vote does not automatically cease to be a director. Instead, such director continues as a "holdover director" until such director's death, resignation or removal, or until his or her successor is duly elected and qualified. For this reason, the majority voting standard under consideration requires that any incumbent nominee, as a condition to his or her nomination for election, must submit in writing an irrevocable resignation, the effectiveness of which is conditioned upon the director's failure to receive the requisite vote in any uncontested election and the Board's acceptance of the resignation. The resignation would be considered by the Nominating & Governance Committee and acted upon by the Board in the same manner as a resignation tendered under current rules.⁴ Acceptance of that resignation by the Board shall be in accordance with the policies and procedures adopted by the Board for such purpose. NASDAQ OMX specifies its policies and procedures pertaining to the election of its directors in its By-

⁴ See NASDAQ OMX By-Law Article IV, Section 4.5.

Laws. Specifically, the policies and procedures for the acceptance of the resignation of a director, by the Board, are proposed to be specified in By-Law Article IV, Section 4.4. There are no additional policies and procedures other than what is indicated in the By-Laws. In the event that NASDAQ OMX proposes to further amend its By-Laws with respect to the election of directors, including the adoption of any policies and procedure with respect to such election, NASDAQ OMX shall file a proposed rule change with the Commission to seek approval of those amendments.

Contested Election

The Exchange is codifying its process for a contested election. The directors shall continue to be elected by a plurality vote in a contested election. There is no change to the process for contested elections because if a majority voting standard were to apply in a contested election, the likelihood of a "failed election" (i.e., a situation in which no director receives the requisite vote) would be more pronounced. Moreover, the rationale underpinning the majority voting policy does not apply in contested elections where stockholders are offered a choice among competing candidates. Directors are currently elected by a plurality of votes present in person or represented by proxy at a meeting. The directors who receive the greatest number of votes cast for election of directors at the meeting will be elected.

General Election Requirements

The following applies to elections of directors and is not being amended. Each share of common stock has one vote⁵, subject to the voting limitation in NASDAQ OMX's certificate of incorporation that generally prohibits a holder from voting in excess

⁵ See NASDAQ OMX Certificate of Incorporation at Article IV, C.1(a).

of 5% of the total voting power of NASDAQ OMX⁶. In addition, each note holder is entitled to the number of votes equal to the number of shares of common stock into which such note could be converted on the record date, subject to the 5% voting limitation contained in the certificate of incorporation.

The presence of owners of a majority (greater than 50%) of the votes entitled to be cast by holder of NASDAQ OMX voting securities constitutes a quorum. Presence may be in person or by proxy. Any securities not voted, by abstention, will not impact the vote.

2. Statutory Basis

The NASDAQ Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁷ in general, and with Sections 6(b)(1) and (b)(5) of the Act,⁸ in particular, in that the proposal enables the NASDAQ Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance by members and persons associated with members with provisions of the Act, the rules and regulations thereunder, and self-regulatory organization rules, and is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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.

⁶ See NASDAQ OMX Certificate of Incorporation at Article IV, C.1(b)2.

⁷ 15 U.S.C. 78f.

⁸ 15 U.S.C. 78f(b)(2), (5).

For purposes of an uncontested election, the proposed amendments adopt a majority vote standard, for the NASDAQ Exchange's parent, which would enable its directors to be elected in a manner reflective of the desires of shareholders and provide a mechanism to protect against the election of directors by less than a majority vote of the shareholders. The plurality standard would continue to apply in contested elections.

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

The NASDAQ Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

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

Written comments were neither solicited nor received.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be 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, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2010-025 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2010-025. This file number should be included on the subject line if e-mail is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public

Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NASDAQ-2010-025, 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.⁹

Florence E. Harmon
Deputy Secretary

⁹ 17 CFR 200.30-3(a)(12).