

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-72151; File No. SR-NASDAQ-2014-048)

May 12, 2014

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Consolidate Certain Committee Functions into the NASDAQ Review Council

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 30, 2014 The NASDAQ Stock Market LLC (“NASDAQ” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a 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 the Substance of the Proposed Rule Change

NASDAQ proposes a rule change to consolidate responsibilities of certain committees of the Board of Directors and to make related changes to the Exchange By-Laws and Rules.

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

In its filing with the Commission, NASDAQ 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 those 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 parts of such statements.

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

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

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

1. Purpose

The Exchange is proposing to expand the regulatory responsibilities of the NASDAQ Review Council (the "Review Council"), a committee of the Exchange Board of Directors (the "Board") not composed solely of Directors, to include responsibilities of other Board committees not composed solely of Directors and consequently sunset those committees. The Exchange's committee structure and related Exchange By-Laws are largely based on those of NASD (now known as FINRA) and were adopted pursuant to the Exchange's approval as a national securities exchange.<sup>3</sup> The Exchange is proposing to make its committee structure more efficient and effective by vesting the Review Council, which is a committee of the Board with both adjudicatory and policy responsibilities, with the adjudicatory responsibilities of the Market Operations Review Committee ("MORC") and with the advisory role of the Market Regulation Committee.

*Review Council*

The Review Council is a Board committee charged with considering and making recommendations to the Board on policy and rule changes relating to business and sales practices of members and associated persons and enforcement policies, including policies with respect to fines and other sanctions. The Review Council is also an adjudicatory body, responsible for the review of appeals of disciplinary proceedings, statutory disqualification proceedings, or membership proceedings.<sup>4</sup> In addition, the Review Council may review offers of settlement,

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<sup>3</sup> Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006).

<sup>4</sup> Decisions issued by the Review Council may be reviewed by the Board. See, e.g., Rule 9351. If the Board does not call the proceeding for review, the proposed written decision

letters of acceptance, waiver and consent, and minor rule violation plan letters, exercises of exemptive authority, and such proceedings or actions as may be authorized by the Exchange's rules. The Review Council is comprised of no fewer than eight and no more than twelve members, whereby at least twenty percent of the members must be nominated by the Board's Member Nominating Committee.<sup>5</sup> Moreover, the Review Council must have at least three Public members,<sup>6</sup> as defined in the By-Laws, and the number of Non-Industry members<sup>7</sup> shall equal or exceed the sum of the number of Industry members<sup>8</sup> and Member Representative

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of the Review Council shall constitute the final disciplinary action of NASDAQ for purposes of Exchange Act Rule 19d-1(c)(1), unless the Review Council remands the proceeding. See, e.g., Rule 9349(c).

<sup>5</sup> Pursuant to the By-Laws, the Board's Member Nominating Committee is responsible for the nomination of candidates for each Member Representative Director position on the Board that is to be elected by Nasdaq Members or the Company Member under the terms of the LLC Agreement and the By-Laws, and shall nominate candidates for appointment by the Board for each vacant or new position on the Nasdaq Listing and Hearing Review Council, the Nasdaq Review Council, or other committee that is to be filled with a Member Representative member under the terms of the By-Laws. See Exchange By-Law, Article III (6)(b). Further provided by the By-Laws, the Member Nominating Committee shall consist of no fewer than three and no more than six members, and all members of the Member Nominating Committee shall be a current associated person of a current Nasdaq Member. See Exchange By-Law, Article III (6)(b)(iii).

<sup>6</sup> "Public member" means a Nasdaq Listing and Hearing Review Council member, Nasdaq Review Council member, or member of any other committee appointed by the Board who has no material business relationship with a broker or dealer, the Company or its affiliates, or FINRA. See Exchange By-Law, Article I (z).

<sup>7</sup> "Non-Industry member" means a Nasdaq Listing and Hearing Review Council member, Nasdaq Review Council member, or member of any other committee appointed by the Board who is (i) a Public member; (ii) an officer or employee of an issuer of securities listed on the national securities exchange operated by the Company; or (iii) any other individual who would not be an Industry member. See Exchange By-Law, Article I (w).

<sup>8</sup> "Industry member" means a Nasdaq Listing and Hearing Review Council member, Nasdaq Review Council member, or member of any other committee appointed by the Board who (i) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (ii) is an officer, director (excluding an outside director), or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross

members.<sup>9</sup> The By-Laws provide that a quorum for the transaction of business consists of a majority of the Review Council, including not less than 50 percent of the Non-Industry members of the Review Council and at least one Member Representative member.

*Market Operations Review Committee*

The MORC is responsible for considering Exchange member appeals of determinations made pursuant to Exchange Rules 4612, 4619, 4620, 11890, and Exchange Options Rules Chapter V Section 6. Decisions of the MORC in these matters are not appealable, however, determinations of the MORC with respect to Rule 11890 may be arbitrated.<sup>10</sup> The By-Laws require that the MORC be comprised of a number of Member Representative members that is

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revenues received by the consolidated entity; (iii) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (iv) provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the committee member or 20 percent or more of the gross revenues received by the committee member's firm or partnership; (v) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20 percent or more of the professional revenues received by the committee member or 20 percent or more of the gross revenues received by the committee member's firm or partnership; or (vi) has a consulting or employment relationship with or provides professional services to the Company or any affiliate thereof or to FINRA (or any predecessor) or has had any such relationship or provided any such services at any time within the prior three years. See Exchange By-Law, Article I (m).

<sup>9</sup> "Member Representative member" means a Nasdaq Listing and Hearing Review Council member, Nasdaq Review Council member, or member of any other committee appointed by the Board who has been elected or appointed after having been nominated by the Member Nominating Committee pursuant to these By-Laws. See Exchange By-Law, Article I (r).

<sup>10</sup> See Rule 11890(c)(3). Unlike disciplinary proceedings under the Rule 9000 Series, speedy resolution of matters under the MORC's jurisdiction is important to ensuring fair and equitable treatment of market makers, and, with regard to clearly erroneous determinations, benefits market participants and helps ensure the accuracy of transactional information disseminated to investors.

equal to at least 20 percent of the total number of members of the MORC. Moreover, the By-Laws require that no more than 50 percent of the members of the MORC be engaged in market making activity or employed by a NASDAQ member firm whose revenues from market making exceed 10 percent of its total revenues. The By-Laws do not provide a description of what is a quorum for purposes of holding a meeting of the MORC, however, the committee has adopted a three member quorum requirement.<sup>11</sup>

#### *Market Regulation Committee*

The Market Regulation Committee (the “Regulation Committee”) is a committee of the Board, which is responsible for providing advice and guidance to the Board on regulatory proposals and industry initiatives relating to quotations, execution, trade reporting, and trading practices; advising the Board in its administration of programs and systems for the surveillance and enforcement of rules governing Exchange Members’ conduct and trading activities in the Exchange; providing a pool of attorney panelists for hearing panels under the Exchange rules; participating in the training of hearing panelists on issues relating to quotations, executions, trade reporting, and trading practices; and reviewing and recommending to the Review Council changes to the Exchange’s guidelines for sanctions to be imposed on members for violations of Exchange rules. The Regulation Committee must have at least 50 percent Non-Industry committee members and must include a broad representation of participants in the Exchange, including investors, market makers, integrated retail firms and order entry firms. The By-Laws provide that a quorum for the transaction of business consists of a majority of the Regulation

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<sup>11</sup> Rule 11890(c)(2) expressly requires a panel to consist of three or more members of the MORC, provided that no more than 50 percent of the members of any panel are directly engaged in market making activity or employed by a member firm whose revenues from market making activity exceed ten percent of its total revenues. The rule also states that in no case shall a MORC Panel include a person affiliated with a party to the trade in question.

Committee, including not less than 50 percent of the Non-Industry committee members. The requirement that not less than 50 percent of Non-Industry members be present will be waived if at least 50 percent of the Non-Industry members are present at or have filed a waiver of attendance for a meeting after receiving an agenda prior to such meeting.

#### *The New Review Council*

The Exchange is proposing to expand the responsibilities of the Review Council by merging the adjudicatory role of the MORC and the advisory role of the Regulation Committee, both as described above, into the Review Council. The Exchange is proposing to amend the By-Laws and Exchange Rules by eliminating references to the Regulation Committee and MORC, and adding the description of these roles to the Review Council's responsibilities under the By-Laws and Exchange Rules. The Exchange is also proposing to define a new type of Panelist under the rules, which will replace the Regulation Committee Panelist. The new "Special Panelist" will take on the role provided currently by Regulation Committee Panelists, which is discussed in more detail below. All of these changes taken together will ensure each function of the MORC and Regulation Committee will continue, unaltered.

The current composition requirements of the Review Council are as prescriptive, if not more so, than the composition requirements of the MORC and Regulation Committee. As noted above, the Review Council must have between eight and twelve members, whereas the MORC and Regulation Committee have no such minimum and maximum composition requirements. In practice, both the MORC and Regulation Committee have fewer members than eight members each. In addition, the Review Council must have at least twenty percent of its members nominated by the Member Nominating Committee. The MORC has an identical requirement, but the Regulation Committee does not. The Review Council is also required to have at least

three Public Members, which helps ensure that there is representation on the Review Council by individuals with no material relationship with a broker or dealer, the Exchange, its affiliates, or FINRA, whereas neither the MORC nor the Regulation Committee has such a representation requirement. Similarly, the Review Council is required to have a number of Non-Industry Members that is greater than or equal to the total number of Industry and Member Nominating Committee Members, which is another means of ensuring independent members of the Review Council. The Regulation Committee has a similar requirement that Non-Industry Members must be greater than or equal to at least 50 percent of the total number of members, however, the MORC has no such requirement.

Under the Exchange's By-Laws, the MORC has a unique composition requirement that limits its membership to no more than 50 percent of members that are engaged in market making activity or employed by a NASDAQ member firm whose revenues from market making exceed 10 percent of its total revenues. This requirement ensures that the composition of the MORC is never overrepresented by market making members. The Exchange is proposing to adopt this requirement for the new Review Council under the By-Laws.

The By-Laws limit the members of the Review Council to a maximum of two consecutive three-year terms. The By-Laws further require that membership of the Review Council is divided into three classes of members, whose terms expire in different years, thus ensuring that the Review Council is not completely reconstituted in any given year. Neither the MORC nor the Regulation Committee has such requirements. Last, although the By-Laws are silent on what constitutes a quorum for the conduct of business of the MORC, the committee has adopted a three member quorum requirement. Accordingly, NASDAQ is proposing to adopt a

three Review Council member quorum requirement, solely applicable to the conduct of business formerly within the scope of the MORC.

In terms of the functions of the MORC, the Review Council will now be responsible for determinations pursuant to Exchange Rules 4612, 4619, 4620, 11890, and Exchange Options Rules Chapter V Section 6.<sup>12</sup> As noted above, the current Review Council is an adjudicatory body charged with the review of disciplinary, statutory disqualification and membership proceedings. In this regard, members of the Review Council are called upon to preside over matters, apply Exchange rules and render decisions that represent disposition of the matter for the parties. As such, it is well-positioned to take on the additional adjudicatory responsibilities of the MORC, which likewise requires its members to preside over matters, apply Exchange rules and render decisions. Moreover, the Exchange believes that given the diverse composition of the Review Council, which includes both Member Representative Members, and Industry and Non-Industry members, it has an adequately broad representation of Exchange constituents and independent members that are well suited to make determinations concerning the rules within the current jurisdiction of the MORC. In this regard, the Exchange notes that the Review Council is currently constituted with members who are compliance officers at member firms, associated persons of member firms, academics, and attorneys. The MORC is constituted with a similar mix of members.<sup>13</sup>

In terms of the policy role of the Regulation Committee, under the proposed changes, the Board will continue to be able to solicit advice and guidance on regulatory proposals and

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<sup>12</sup> Unlike decisions of the Review Council issued pursuant to proceedings concerning disciplinary, statutory disqualification and membership proceedings, decisions made by the new Review Council with regard to Exchange Rules 4612, 4619, 4620, 11890, and Exchange Options Rules Chapter V Section 6 are not eligible for Board review or appeal to the SEC, but rather will represent the final resolution of such matters.

<sup>13</sup> In fact, one individual serves on both the Review Council and MORC.



industry initiatives relating to quotations, execution, trade reporting, and trading practices from the Review Council, when the Board determines to do so, much as it can under the current By-Law provisions on policies concerning member sales practices, enforcement policies, fines and sanctions.

The Exchange notes that it is only transferring the advisory role of the Market Regulation Committee to the Review Council. The Exchange is not proposing to draw upon the Review Council as a source of attorney panelists for hearing panels or the training thereof on issues relating to quotations, executions, trade reporting, and trading practices. Rather, the Exchange is proposing to delete the definition of Market Regulation Committee under Rule 9120(u) and adopt a new definition of a “Special Panelist” thereunder. A Special Panelist will take the role of the Market Regulation Committee panelists in NASDAQ’s rules and will be drawn from FINRA’s pool of Hearing Panelists provided by their Market Regulation Committee and from other sources the Board deems appropriate given the responsibilities of such Hearing Panelists. All Special Panelists must be approved by the Board, at least annually.

*Changes to Rule 9231(b)*

The Exchange is proposing minor technical changes to Rule 9231(b), which concerns the composition of Hearing Panels. NASDAQ is eliminating references to NASD and replacing them with the correct acronym for the Financial Industry Regulatory Authority, FINRA. When NASDAQ originally adopted the rule, FINRA was still the NASD and NASDAQ did not amend Rule 9231(b) to reflect the name change. NASDAQ is replacing references to the Market Regulation Committee in Rule 9231(b)(2) with references to Special Panelists, as described above.

NASDAQ is also adding an additional category of person eligible to be a Panelist on a Hearing Panel. NASDAQ may currently draw upon a person who: previously served on the Review Council; previously served on a disciplinary subcommittee of the Review Council, including a Subcommittee, an Extended Proceeding Committee, or their predecessor subcommittees; previously served as a Director, but does not serve currently in that position; or served on the FINRA National Adjudicatory Council or on a disciplinary subcommittee of the FINRA National Adjudicatory Council prior to the date that NASDAQ commenced operating as a national securities exchange.<sup>14</sup> NASDAQ is proposing to include a FINRA Panelist as a person authorized to be a Panelist in a NASDAQ proceeding, if the Panelist is approved by the Board at least annually.

The Exchange notes that FINRA's rule concerning the selection criteria for its Panelists is substantially similar to that of the Exchange. Specifically, FINRA Rule 9231(b)(1) provides that a Panelist be a person who: currently serves or previously served on a District Committee; previously served on the National Adjudicatory Council; previously served on a disciplinary subcommittee of the National Adjudicatory Council or the National Business Conduct Committee, including a Subcommittee, an Extended Proceeding Committee, or their predecessor subcommittees; or, previously served as a Director or a Governor, but does not serve currently in any of these positions. NASDAQ believes that drawing from FINRA's pool of Panelists will provide the Exchange with individuals that have adequate experience and expertise to be NASDAQ Panelists, and will provide a larger pool from which to draw Panelists. NASDAQ notes that, by requiring the Board to approve a FINRA Panelist as a precondition to that Panelist

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<sup>14</sup> See Rule 9231(b).

participating in a NASDAQ matter, NASDAQ is ensuring that the Panelists that review NASDAQ matters are adequately qualified to adjudicate such matters.

#### *Other Technical Changes*

Lastly, NASDAQ is making two minor technical corrections to its rules. NASDAQ is deleting an extraneous “and” from the definition of “Hearing Officer” under Rule 9120(r). NASDAQ is also adding the word “to” to Rule 11890(c)(1), which was erroneously omitted.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>15</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>16</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, and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers. The Exchange also believes that the proposed rule is consistent with Section 6(b)(6) of the Act,<sup>17</sup> which requires the rules of an exchange provide that its members be appropriately disciplined for violations of the Act as well as the rules and regulations thereunder, or the rules of the Exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

The Exchange believes that the proposed changes are consistent with these requirements because they bring efficiency to the committee process, by vesting a single Board committee with responsibilities currently spread across multiple committees, while ensuring that such

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

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> 15 U.S.C. 78f(b)(6).

responsibilities are performed to a high regulatory standard. In this regard, the new Review Council is, by every measure, a more diverse body than the committees that it replaces. The broad membership of the new Review Council will ensure that decisions made with respect to the MORC's former responsibilities are made fairly. In this regard, the Exchange notes that the Review Council will adopt the MORC requirement that not more than 50 percent of the committee's members be engaged in market making activity or employed by a NASDAQ member firm whose revenues from market making exceed 10 percent of its total revenues.

As discussed above, the By-Laws limit Review Council members to a maximum of two consecutive three-year terms, unlike the MORC and Regulation Committee. This requirement ensures that there is a consistent influx of new members to the Review Council. The By-Laws further require that membership of the Review Council is divided into three classes of members, whose terms expire in different years, thus ensuring that the Review Council is not completely reconstituted in any given year. The Exchange notes that the expansion of the Review Council's responsibilities is an extension of the functions that it already performs. As discussed above, the Review Council is currently an adjudicatory body under NASDAQ's rules, as well as an advisory committee to the Board. Accordingly, the Exchange believes that the proposed changes will serve to protect the public interest and promote appropriate discipline of members for violations of securities laws and rules of the Exchange.

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

The 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. Specifically, the Exchange believes that this change will bring efficiency and consistency in application of the investigative and adjudicatory processes by consolidating Board

committee functions. Consequently, the changes will not impact competition among brokers or dealers, nor will they impact competition among the Exchange and its peers.

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

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)(ii) of the Act<sup>18</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>19</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>18</sup> 15 U.S.C. 78s(b)(3)(a)(ii) [sic].

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

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-NASDAQ-2014-048 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-NASDAQ-2014-048. 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 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-2014-048, 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>20</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>20</sup> 17 CFR 200.30-3(a)(12).