

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-64285; File No. SR-NASDAQ-2011-025)

April 8, 2011

Self-Regulatory Organizations; NASDAQ Stock Market, LLC; Order Approving Proposed Rule Change to Amend The NASDAQ OMX Group, Inc. By-Laws

I. Introduction

On February 8, 2011, The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the By-Laws of its parent corporation, The NASDAQ OMX Group, Inc. (“NASDAQ OMX”). The proposed rule change was published for comment in the Federal Register on February 24, 2011.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

NASDAQ proposes amending the By-Laws of NASDAQ OMX to: (i) amend the name of the Nominating Committee to the Nominating & Governance Committee; (ii) amend the NASDAQ OMX PHLX, Inc. reference to reflect a recent conversion to a limited liability company; and (iii) clarify By-Law Article IV, Section 4.4 that broker nonvotes are not counted as a vote cast either “for” or “against” a Director.

Currently, NASDAQ OMX By-Laws provide for a Nominating Committee that is appointed pursuant to the By-Laws. In addition to the responsibilities listed in By-Law Article

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 63925 (February 17, 2011), 76 FR 10418 (February 24, 2011) (“Notice”).

IV, Section 4.13(h), NASDAQ states that the Nominating Committee also conducts certain governance functions such as consulting with the Board and the management to determine the characteristics, skills and experience desired for the Board as a whole and for its individual members, overseeing the annual director evaluation, and reviewing the overall effectiveness of the Board.

Accordingly, the Exchange proposes to rename and change all references to the “Nominating Committee” in the By-Laws, to the “Nominating & Governance Committee” so that the title of the committee accurately reflects all of its current functions, including those that are deemed governance functions. NASDAQ’s proposal to rename the Nominating Committee would not change the function of the committee, but is intended to clarify the current functions and its governance role with respect to the Board selection process.

Additionally, NASDAQ proposes to amend Article 1, Section (o) of NASDAQ OMX’s By-Laws to change the reference to “NASDAQ OMX PHLX, Inc.” to “NASDAQ OMX PHLX LLC” to reflect a recently filed rule change to NASDAQ OMX PHLX, Inc. from a Delaware corporation to a Delaware limited liability company.⁴

Finally, NASDAQ proposes to add the words “and broker nonvotes” to NASDAQ OMX’s By-Law Article IV, Section 4.4 to make clear that broker nonvotes will not be counted as a vote cast either “for” or “against” that director’s election. In its filing, NASDAQ noted that NASDAQ OMX’s past practice has been to not count a broker nonvote as a vote cast either for or against a director’s election. Accordingly, this change would clarify this practice by codifying it into the By-Laws.

⁴ See Securities Exchange Act Release No. 62783 (August 27, 2010), 75 FR 54204 (September 3, 2010) (SR-Phlx-2010-104).

NASDAQ also stated that in 2010, NASDAQ OMX amended its By-Laws to state that in an uncontested election, a majority voting standard would apply to the election of its directors, requiring directors to be elected by the holders of a majority of the votes cast at any meeting for the election of directors at which a quorum is present in an uncontested election.⁵ A plurality standard would still remain in a contested election. In its filing, NASDAQ noted that, the practice of not counting a broker nonvote as a vote cast either for or against a director's election will remain unchanged by the amendment to a majority vote standard. In support of this change, in its filing NASDAQ states that under Delaware case law, broker nonvotes are not considered as votes cast for or against a proposal or director nominee.⁶

III. Discussion and Commission's Findings

After carefully reviewing the proposed rule change, 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.⁷ In particular, the Commission finds that the proposal is consistent with Section 6(b) of the Act,⁸ in general, and furthers the objectives of Sections 6(b)(1)⁹ of the Act, in particular, in that it is designed to enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act. In addition, the Commission finds that the proposal is consistent with Section 6(b)(5)¹⁰ of the Act in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable

⁵ See Securities Exchange Act Release No. 61876 (April 8, 2010), 75 FR 19436 (April 14, 2010) (SR-NASDAQ-2010-025).

⁶ See *Berlin v. Emerald Partners*, 552 A.2d 482 494 (Del Supr. 1988).

⁷ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78f.

⁹ 15 U.S.C. 78f(b)(1).

¹⁰ 15 U.S.C. 78f(b)(5).

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.

The Commission believes that the proposed amendments to NASDAQ OMX's By-Laws by changing the name of the Nominating Committee to the Nominating and Governance Committee, and amending references to an exchange name to reflect a corporate change to a limited liability company, are both clarifying in nature. The Nominating Committee name change will ensure that the committee's title accurately reflects its functions, which, according to NASDAQ, includes governance through its general review of the overall effectiveness of the Board and other similar duties. Similarly, the change in NASDAQ OMX's By-Laws to reflect a previously approved change of NASDAQ OMX PHLX, Inc. to a Delaware limited liability company will ensure that the By-Laws are accurate and properly reflect an exchange entity name.

Finally, as to the part of the proposal that will specifically set forth in NASDAQ OMX's By-Laws that broker nonvotes will not be counted as a vote cast either for or against in director elections, the Commission believes that this change should help to provide transparency to the election of directors process, especially in light of NASDAQ OMX's recent change to a majority vote standard in the uncontested election of directors. While in its filing NASDAQ notes that it has always been NASDAQ OMX's practice to not count broker nonvotes for or against in director elections, the impact of the broker nonvotes and how such votes are counted will take on added significance under NASDAQ OMX's newly adopted majority vote standard for director elections. Accordingly, the Commission believes it is important that the NASDAQ OMX By-

Laws provide clarity on this issue, even though, according to NASDAQ, Delaware case law would dictate the same result.

Based on the above, the Commission believes that the changes being proposed by NASDAQ to amend the By-Laws of its parent corporation, NASDAQ OMX, is consistent with investor protection and the public interest pursuant to Section 6(b)(5) of the Act since the changes will ensure the accuracy of the NASDAQ OMX By-Laws, as well as clarify for shareholders how broker nonvotes will be counted in director elections.¹¹

IV. Conclusion

IT IS THEREFORE ORDERED, that pursuant to Section 19(b)(2) of the Act,¹² that the proposed rule change (SR-NASDAQ-2011-025), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Cathy H. Ahn
Deputy Secretary

¹¹ As noted by NASDAQ in its filing, the other Boards of Directors of the regulatory subsidiaries of NASDAQ OMX have approved the changes to NASDAQ OMX's By-Laws. The Commission expects such regulatory subsidiaries to file these changes shortly pursuant to Section 19(b) of the Act.

¹² 15 U.S.C. 78s(b)(2).

¹³ 17 CFR 200.30-3(a)(12).