

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-76810; File No. SR-Phlx-2015-113)

December 31, 2015

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 2 Thereto, to Amend the By-Laws of Nasdaq, 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 December 21, 2015, NASDAQ OMX PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On December 29, 2015, the Exchange filed Amendment No. 1 to the proposal.³ On December 30, 2015, the Exchange filed Amendment No. 2 to the proposal.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing this proposed rule change with respect to amendments of the By-Laws (the “By-Laws”) of its parent corporation, Nasdaq, Inc. (“Nasdaq” or the “Company”), to revise the requirements regarding Director classifications. This Amendment No. 2 to SR-Phlx-

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On December 30, 2015, the Exchange withdrew Amendment No. 1.

⁴ Amendment No. 2 amends and replaces the original filing in its entirety. In Amendment No. 2, the Exchange, among other things, clarified the operation of the current and proposed provisions of the By-Laws of Nasdaq, Inc. and how the proposed rule change would operate in conjunction with the Listing Rules of The NASDAQ Stock Market. See infra, note 7.

2015-113 amends and replaces the original filing in its entirety.⁵ The proposed amendments will be implemented on a date designated by the Company following approval by the Commission.

The text of the proposed rule change is available on the Exchange's Website at

<http://nasdaqomxphlx.cchwallstreet.com>, 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 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

The Company is proposing amendments to certain provisions of its By-Laws that relate to Director⁶ classifications.⁷ Specifically, the Company proposes to revise Section 4.3 of the By-Laws to state that it may, rather than shall, include at least one, but no more than two, Issuer

⁵ Amendment No. 1 to SR-Phlx-2015-113 was filed on December 29, 2015 and subsequently withdrawn on December 30, 2015.

⁶ "Director" means a member of the Company's Board of Directors. See Article I(j) of the By-Laws.

⁷ The provisions of the Company's By-Laws that relate to Director classifications are completely distinct from the Listing Rules of The NASDAQ Stock Market. Therefore, the proposed amendments do not affect in any way the Company's obligation, as an issuer listed on The NASDAQ Stock Market, to comply with the Listing Rules, and the Company will continue to comply with the Listing Rules, including provisions relating to corporate governance, following the effectiveness of the proposed By-Law amendments.

Directors on its Board. In addition, the Company proposes to revise Section 4.7 of the By-Laws to clarify the procedures when a Director's classification changes between annual meetings of stockholders.

i. Section 4.3

Currently, the Company's By-Laws require that all of the Company's Directors be classified as: (i) Industry Directors;⁸ (ii) Non-Industry Directors,⁹ which are further classified as

⁸ "Industry Director" or "Industry committee member" means a Director (excluding any Staff Directors) or committee member who (1) is, or within the last year was, or has an immediate family member who is, or within the last year was, a member of a Self-Regulatory Subsidiary; (2) is, or within the last year was, employed by a member or a member organization of a Self-Regulatory Subsidiary; (3) has an immediate family member who is, or within the last year was, an executive officer of a member or a member organization of a Self-Regulatory Subsidiary; (4) has within the last year received from any member or member organization of a Self-Regulatory Subsidiary more than \$100,000 per year in direct compensation, or received from such members or member organizations in the aggregate an amount of direct compensation that in any one year is more than 10 percent of the Director's annual gross compensation for such year, excluding in each case director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service); or (5) is affiliated, directly or indirectly, with a member or member organization of a Self-Regulatory Subsidiary. See Article I(m) of the By-Laws. A "Self-Regulatory Subsidiary" is any subsidiary of the Company that is a self-regulatory organization as defined under Section 3(a)(26) of the Act. See Article I(s) of the By-Laws. Currently, the term "Self-Regulatory Subsidiary" encompasses NASDAQ OMX BX, Inc. ("BX"), The NASDAQ Stock Market LLC ("NASDAQ"), the Exchange, Boston Stock Exchange Clearing Corporation ("BSECC") and the Stock Clearing Corporation of Philadelphia ("SCCP").

⁹ "Non-Industry Director" or "Non-Industry committee member" means a Director (excluding any Staff Director) or committee member who is (1) a Public Director or Public committee member; (2) an Issuer Director or Issuer committee member; or (3) any other individual who would not be an Industry Director or Industry committee member. See Article I(q) of the By-Laws.

either Issuer Directors¹⁰ or Public Directors;¹¹ or (iii) Staff Directors.¹² Section 4.3 of the By-Laws includes composition requirements for the Board based on these classifications.

Specifically, the number of Non-Industry Directors on the Board must equal or exceed the number of Industry Directors. In addition, the Board must include at least two Public Directors and at least one, but no more than two, Issuer Directors. Finally, the Board shall include no more than one Staff Director, unless the Board consists of ten or more Directors, in which case, the Board shall include no more than two Staff Directors.

The Company proposes to amend Section 4.3 of the By-Laws to state that the Board may, rather than shall, include one, but no more than two, Issuer Directors. With this change, the Company intends to give itself the option, but not the requirement, to include one or two Issuer Directors on its Board. Issuer Directors bring to the Board the perspective of an officer or employee of companies listed on The NASDAQ Stock Market. While the Company highly values the views of its listed companies, it does not believe that it is strictly necessary to have an Issuer Director on its own Board to represent those views. Within the overall governance structure of the Company and its subsidiaries, issues relating to listed companies are generally the province of NASDAQ and its Board of Directors, rather than the Company and its Board of

¹⁰ “Issuer Director” or “Issuer committee member” means a Director (excluding any Staff Director) or committee member who is an officer or employee of an issuer of securities listed on a national securities exchange operated by any Self-Regulatory Subsidiary, excluding any Director or committee member who is a director of such an issuer but is not also an officer or employee of such an issuer. See Article I(o) of the By-Laws.

¹¹ “Public Director” or “Public committee member” means a Director or committee member who (1) is not an Industry Director or Industry committee member, (2) is not an Issuer Director or Issuer committee member, and (3) has no material business relationship with a member or member organization of a Self-Regulatory Subsidiary, the Company or its affiliates, or the Financial Industry Regulatory Authority, Inc. and its affiliates. See Article I(r) of the By-Laws.

¹² “Staff Director” means an officer of the Company that is serving as a Director. See Article I(t) of the By-Laws.

Directors. The Company is a holding company for over 100 subsidiaries that provide both regulated and unregulated products and services across the globe, while NASDAQ is the Company subsidiary that, among other things, provides listing services on The NASDAQ Stock Market. The Company's Board generally focuses on the overall strategic direction of the Company, while NASDAQ's Board generally focuses on issues relevant specifically to The NASDAQ Stock Market, including issues affecting listed companies. Furthermore, NASDAQ's Board includes issuer representation, as required by its By-Laws.¹³ Finally, if the Company's Board ever does address issues relating to listed companies, its Directors are experienced and capable enough to handle those issues without specifically having an Issuer Director on the Board.¹⁴

Therefore, it is not strictly necessary to have an officer or employee of a listed company on the Company's Board of Directors, and accordingly, the Company proposes to amend its By-Laws to give itself the option, but not the requirement, to include an Issuer Director on its Board.

ii. Section 4.7

As required by Section 4.13(h)(iii) of the By-Laws, the Company's Corporate Secretary certifies to the Nominating & Governance Committee of the Company's Board on an annual basis the classification of each Director following a review of information relating to the classifications collected from the Directors. This certification usually occurs in connection with the Company's annual meeting of stockholders, and at the same time, Directors are elected to serve on various Board committees, all of which have compositional requirements relating to the

¹³ See Article III, Section 2 of NASDAQ's By-Laws.

¹⁴ Currently, three of the Company's eleven Directors are also directors of companies listed on The NASDAQ Stock Market or another national securities exchange. These Directors do not qualify as Issuer Directors because they are not specifically officers or employees of listed companies; however, as directors of such companies, they are familiar with corporate governance topics and other issues confronted by listed companies.

classifications.¹⁵ However, Directors' classifications may change from time to time following the annual meeting due to various changes in personal circumstances (e.g., a retirement or job change). Directors are required to report to the Corporate Secretary any change in the information used as the basis of their classification.¹⁶

Section 4.7 of the By-Laws addresses potential disqualifications of Directors due to a classification change. Under this section, the term of office of a Director shall terminate immediately upon a determination by the Board, by a majority vote of the remaining Directors, that: (a) the Director no longer satisfies the classification for which the Director was elected; and (b) the Director's continued service would violate the Board compositional requirements. Section 4.7 also states that if a Director position becomes vacant because of such disqualification, and the remaining term of office is not more than six months, the By-Laws do not require an immediate replacement.

The Company has observed two potential weaknesses relating to the disqualification procedures as currently drafted. First, Section 4.7 of the By-Laws does not address a situation where a Director's classification has changed, but the Board believes that it is in the best interests of the Company and its stockholders for such Director to remain on the Board. Second, the By-Laws could be read to contemplate that the Company must immediately cure any deficiencies in Board or committee composition that may occur because of a change in a Director or committee member's classification because otherwise the Board would not meet all of the compositional requirements set forth in Section 4.3 of the By-Laws.¹⁷ It would be

¹⁵ See Section 4.13 of the By-Laws.

¹⁶ See Section 4.13(h)(iii) of the By-Laws.

¹⁷ But see Kurz v. Holbrook, 989 A.2d 140, 156-57 (Del.Ch. 2010) (holding that a by-law cannot disqualify a director who was duly qualified at the time of election during the middle of his or her term), rev'd on other grounds sub nom Crown EMAK P'ners, LLC v.

extremely disruptive to the Board, its committees and the Company to add, remove, disqualify or replace a Director between annual meetings of stockholders simply because the Director no longer has the same classification he or she had at the time of the annual meeting. In addition, the selection of nominees to the Company's Board is an extremely complex process, managed by the Board's Nominating & Governance Committee, that takes almost the full year between annual meetings of stockholders. The Nominating & Governance Committee considers possible candidates suggested by Board members, industry groups, stockholders, senior management and/or a third-party search firm engaged from time-to-time to assist in identifying and evaluating qualified candidates. In evaluating candidates for nomination to the Board, the Nominating & Governance Committee reviews the skills, qualifications, characteristics and experience desired for the Board as a whole and for its individual members, with the objective of having a Board that reflects diverse backgrounds and senior level experience in the areas of global business, finance, legal and regulatory, technology and marketing. The Nominating & Governance Committee evaluates each individual candidate in the context of the Board as a whole, with the objective of maintaining a group of Directors that can further the success of Nasdaq's business, while representing the interests of stockholders, employees and the communities in which the company operates. Because the nominee selection process is so long and complex, the Board cannot act quickly to replace a Director whose classification has changed, and it is not in the best interests of the Company's stockholders for the Board to be forced to take such an action when the Director otherwise provides valuable service to the Board.

Kurz, 992 A.2d 377 (Del. 2010); see also Klaassen v. Allegro Development Corp., 2013 WL 5739680, at *23 (Del. Ch. Oct. 11, 2013) (noting that director qualifications are applied at the front-end of the director's term when such director is elected and qualified), aff'd 106 A.3d 1035 (Del. 2014).

The Company therefore proposes to amend Section 4.7 of the By-Laws to provide that the Board may elect to defer until the next annual meeting of stockholders a determination regarding a change in a Director's classification and such Director's continued service on the Board.¹⁸ Further, if the Board makes such an election, neither the Board nor any committee shall be deemed to be in violation of Section 4.3 of the By-Laws, which relates to Board composition, or Section 4.13 of the By-Laws, which relates to committee composition. This will give the Board the option to retain Directors whose classification has changed, but whose continued service is otherwise beneficial to the Board, the Company and its stockholders. This also will prevent the significant disruption that would occur if the Board had to replace a Director between annual meetings of stockholders and allow the Board to continue to make informed, deliberate decisions regarding Director nominees, rather than force it to act quickly in a way that is not in the best interest of the Company's stockholders.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁰ 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.

¹⁸ The intent of the amendment is to allow the Board a deferral until the next annual meeting when it can nominate a slate of directors with classifications sufficient to satisfy the requirements of Section 4.3 of the By-Laws for election by the Company's stockholders. Assuming due election of the Board's nominees, the Board therefore will comply with Section 4.3 of the By-Laws immediately after the next annual meeting.

¹⁹ 15 U.S.C. 78f(b).

²⁰ 15 U.S.C. 78f(b)(5).

First, the Company is proposing an amendment to Section 4.3 of the By-Laws to state that it may, rather than shall, include at least one, but no more than two, Issuer Directors on its Board. The Exchange believes that this change will protect investors and the public interest by allowing the Company's Nominating & Governance Committee to select nominees for the Company's Board based on the overall strategic needs of the Board, the Company and its stockholders without forcing the Board to fill one slot with an officer or director of a listed company (i.e., an Issuer Director). The Exchange notes that the Company would still have the option to include Issuer Directors on the Board, and the Exchange believes the views of listed companies are well-represented on the Board without the explicit participation of an Issuer Director.²¹

Second, the Company is proposing an amendment to Section 4.7 of the By-Laws to provide that the Board may elect to defer until the next annual meeting of stockholders a determination regarding a change in a Director's classification and such Director's continued service on the Board. Further, if the Board makes such an election, neither the Board nor any committee shall be deemed to be in violation of Section 4.3 of the By-Laws, which relates to Board composition, or Section 4.13 of the By-Laws, which relates to committee composition. The Exchange believes that this change will protect investors and the public interest by clarifying the disqualification provisions in the Company's By-Laws, which are currently ambiguous. In addition, the change will prevent the significant disruption that would occur if the Board were forced to replace an otherwise valuable director between annual meetings.

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

Because the proposed rule change relates to the governance of the Company and not to

²¹ See note 14, supra.

the operations of the Exchange, 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.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days of such date (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove 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 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-Phlx-2015-113 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-Phlx-2015-113. 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-Phlx-2015-113, 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.²²

Jill M. Peterson
Assistant Secretary

²² 17 CFR 200.30-3(a)(12).