

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59839; File No. SR-BSECC-2009-02)

April 28, 2008

Self-Regulatory Organizations; Boston Stock Exchange Clearing Corporation; Order Granting Approval of a Proposed Rule Change to Amend the Articles of Organization and By-Laws of Boston Stock Exchange Clearing Corporation

I. Introduction

On February 20, 2009, Boston Stock Exchange Clearing Corporation (“BSECC”) filed with the Securities and Exchange Commission (“Commission”) proposed rule change SR-BSECC-2009-02 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”).<sup>1</sup> Notice of the proposal was published in the Federal Register on March 20, 2009.<sup>2</sup> No comment letters were received. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

The proposed rule change amends BSECC’s Articles of Organization and By-Laws to increase BSECC’s authorized shares and to reflect a transfer in ownership of five percent of BSECC’s shares. The proposed rule change also amends BSECC’s Articles of Organization and By-Laws to change its name to the NASDAQ Clearing Corporation and to make other miscellaneous changes.

On August 29, 2008, The NASDAQ OMX Group, Inc. (“NASDAQ OMX”) completed its acquisition of the Boston Stock Exchange, Incorporated (recently renamed NASDAQ OMX BX, Inc.) and several of its wholly owned subsidiaries, including BSECC. As a result, BSECC

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

<sup>2</sup> Securities Exchange Act Release No. 59571 (March 12, 2009), 74 FR 11983.

has become an indirect wholly owned subsidiary of NASDAQ OMX. On January 5, 2009, OMX AB, which is another indirect wholly owned subsidiary of NASDAQ OMX, entered into agreements with Fortis Bank Global Clearing N.V. (“Fortis”) and European Multilateral Clearing Facility N.V. (“EMCF”), pursuant to which, among other things, OMX AB (i) has acquired a 22% equity stake in EMCF and (ii) has agreed to acquire a 5% equity stake in BSECC from NASDAQ OMX BX, Inc. and in turn to transfer this stake to EMCF.

The Articles of BSECC provide that:

All of the authorized shares of Common Stock of [BSECC] shall be issued and outstanding, and shall be held by Boston Stock Exchange, Incorporated, a Delaware corporation. Boston Stock Exchange, Incorporated may not transfer or assign any shares of stock of BSECC, in whole or in part, to any entity, unless such transfer or assignment shall be filed with and approved by the U.S. Securities and Exchange Commission under Section 19 of the Securities Exchange Act of 1934, as amended, and the rules promulgated thereunder.

Accordingly, in order to complete the transfer of shares of BSECC contemplated by the agreements, BSECC must amend its Articles to specify an additional stockholder in BSECC and must obtain Commission approval for the transfer of stock. In addition, BSECC is proposing to amend its Articles and its By-Laws to change its name to NASDAQ Clearing Corporation and to adopt other miscellaneous changes.

EMCF is a central counterparty clearinghouse for European equity trading on exchanges and multilateral trading facilities, including NASDAQ OMX Europe Ltd., Chi-X Europe Ltd., and BATS Trading Europe Ltd. In addition, EMCF has agreed to provide central counterparty

clearing services to NASDAQ OMX exchanges in Stockholm, Helsinki, Copenhagen, and Iceland. EMCF clears stocks traded on multiple European markets, including stocks comprising the AEX, DAX, FTSE100, CAC40, and SMI20 indexes. Services offered by EMCF include novation, gross trade netting, settlement, margining, and fails and buy-in management. EMCF is headquartered in the Netherlands and is subject to voluntary supervision by De Nederlandsche Bank and Autoriteit Financiële Markten. In addition to OMX AB, EMCF's stockholders are Fortis Bank Nederland (Holding) N.V. and Fortis Bank Global Clearing N.V. NASDAQ OMX and EMCF's other stockholders will seek to further broaden EMCF's ownership structure to include order flow providers and financial institutions. It is expected that this will increase the commitment of banks and flow providers towards EMCF, decrease EMCF's dependence on one shareholder, and demonstrate to the market that EMCF is a solid company with firm backing of shareholders with high standing and is a company that looks after the interests of all its interested parties. Also, a key purpose of the diversified shareholders' base is to facilitate the further development of EMCF into becoming the leading central counterparty services provider for European cash equities.

Under the Share Transfer Agreement dated January 5, 2009, among Fortis, OMX AB, and EMCF, OMX AB has agreed, subject to Commission approval, to transfer a 5% stake in BSECC to EMCF. The transfer of BSECC's shares is a portion of the consideration to be paid by OMX AB for obtaining a 22% stake in EMCF. Accordingly, OMX AB must obtain the shares from NASDAQ OMX BX, Inc. prior to transferring them to EMCF. OMX AB has agreed to undertake to use reasonable endeavors to obtain Commission approval for the transfer as soon as possible and in any event by July 5, 2009.

Currently, the authorized share capital of BSECC is 150 shares, each with a par value of \$100. Because 5% of the 150 BSECC shares is 7.5 shares, BSECC must increase its authorized share capital and pay a 2 for 1 stock dividend to NASDAQ OMX BX, Inc. so that NASDAQ OMX BX, Inc. will own 300 shares of BSECC and be able to transfer 15 of them. Accordingly, BSECC proposes to amend its Articles in order to increase its authorized share capital to 300 shares. BSECC proposes to amend its Articles to reflect either OMX AB or EMCF as one of its stockholders and to reflect the name change of the Boston Stock Exchange to NASDAQ OMX BX, Inc.

The amended provisions would state:

All of the authorized shares of Common Stock of [BSECC] shall be issued and outstanding, and shall be held by NASDAQ OMX BX, Inc., a Delaware corporation, and either OMX AB, a corporation organized under the laws of Sweden, or European Multilateral Clearing Facility, N.V., a public company with limited liability incorporated under the laws of the Netherlands.

The language in the Articles providing that a stockholder may not transfer or assign shares of stock of BSECC without approval of the Commission would remain in place so that all of the stockholders of BSECC would be bound by that restriction.

The Share Transfer Agreement also provides that under certain circumstances, EMCF may transfer the shares of BSECC back to OMX AB or NASDAQ OMX BX, Inc., thereby unwinding this aspect of the transaction. In order to avoid the need to seek approval for such an unwinding in the future, BSECC requests that the Commission approve at this time both the initial transfer and any future unwinding.

Finally, at the time of the transfer EMCF and NASDAQ OMX BX, Inc. will enter into a Shareholders Agreement to govern their relationship with respect to BSECC. The key provisions of the Shareholders Agreement are as follows. First, EMCF will grant BSECC a right of first refusal to purchase all or any portion of its shares that EMCF may propose to transfer. Second, if NASDAQ OMX BX, Inc. proposes to transfer any of its shares of BSECC to any person, it must provide EMCF with the right to substitute EMCF's shares in such transfer in proportion to EMCF's percentage share of ownership in BSECC. Third, if NASDAQ OMX BX, Inc. proposes to enter into a transaction under which it would no longer own a majority of BSECC's outstanding shares or a sale of all or substantially all of the assets of BSECC ("Sale Transaction"), EMCF will in most circumstances take such actions as are necessary to support the consummation of the Sale Transaction. Fourth, if BSECC issues new securities it must first offer them to NASDAQ OMX BX, Inc. and EMCF. Finally, the Shareholders Agreement provides for rights of the stockholders to obtain information from BSECC about its financial performance and operations.

Because the share transfers described by the Shareholders Agreement would require Commission approval under the Articles, the Agreement also provides that "[n]othing in the Agreement shall be construed to authorize [BSECC] or any stockholder of [BSECC] to transfer any share or other interests in [BSECC] unless such transfer is approved in accordance with the restrictions contained in the [Articles] of [BSECC] and such other restrictions as may be imposed by the ... Commission or other governmental authority having jurisdiction over [BSECC]."

BSECC is also changing its name from Boston Stock Exchange Clearing Corporation to NASDAQ Clearing Corporation. The change reflects BSECC's changed status as a subsidiary of NASDAQ OMX. In addition, BSECC is making the following miscellaneous changes to its Articles and By-Laws. First, BSECC is restating its Articles to consolidate prior amendments into a single document. Under Massachusetts law, the form for restatement of the Articles necessitates nonsubstantive changes to citations to Massachusetts statutes in the title of the Articles, changes to prefatory language in Article IV of the Articles, and the addition of nonsubstantive language regarding date of effectiveness as a new Article VII. Second, BSECC is amending the Articles and By-Laws to reflect the change in the name of Boston Stock Exchange, Incorporated to NASDAQ OMX BX, Inc. Finally, BSECC is correcting several typographical errors in Article X of the By-Laws.

### III. Discussion

Section 17A(b)(3)(C) of the Act requires, among other things, that a clearing agency's rules assure the fair representation of its shareholders (or members) and participants in the selection of its directors and administration of its affairs.<sup>3</sup> The Commission previously determined that Nasdaq OMX's acquisition of BSECC as an indirect wholly-owned subsidiary would not affect BSECC's ability to meet the requirements of Section 17A(b)(3)(C) because BSECC's By-Laws relating to the selection, composition, powers, and duties of the BSECC Board, committees, and officers of BSECC would remain essentially unchanged after the

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<sup>3</sup> 15 U.S.C. 78q-1(b)(3)(C).

acquisition.<sup>4</sup> Similarly, the proposal to transfer a 5% interest in BSECC to EMCF does not require modification to BSECC's By-Laws, other than to include EMCF as an authorized shareholder and to make other minor changes discussed above, and should not alter the effectiveness of the By-Laws to assure fair representation of BSECC's shareholders and participants. Furthermore, we note that the proposed rule change does not alter the provisions of NASDAQ OMX's Certificate and NASDAQ OMX's By-Laws that are designed to maintain the independence of each of its SRO subsidiaries' self-regulatory functions, enable each SRO subsidiary to operate in a manner that complies with the federal securities laws, and facilitate the ability of each SRO subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act. For these reasons, we find that the proposed rule change is designed to allow BSECC to continue to meet the requirement under Section 17A(b)(3)(C) that it assure the fair representation of its shareholders and participants in the selection of its directors and administration of its affairs.<sup>5</sup> In addition, the amendments to the BSECC's Articles and By-Laws to change the name of BSECC, consolidate prior amendments, and correct certain errors are non-substantive amendments which should not affect BSECC's obligations under Section 17A.

#### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is

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<sup>4</sup> Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR-BSE-2008-02; SR-BSE-2008-23; SR-BSE-2008-25; SR-BSECC-2008-01).

<sup>5</sup> This order grants approval to the current transfer of ownership from BSECC to EMCF only. It does not as requested by BSECC in its filing approve potential unwinds of the transfer of ownership that may occur in the future.

consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.<sup>6</sup>

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<sup>6</sup> In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).



IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-BSECC-2009-02) be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

Elizabeth M. Murphy  
Secretary

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<sup>7</sup> 17 CFR 200.30-3(a)(12).