

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56581; File No. SR-NASDAQ-2007-068)

September 28, 2007

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Amend the Limited Liability Company Agreement of The NASDAQ Stock Market LLC

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 July 20, 2007, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) 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 substantially by Nasdaq. On September 26, 2007, Nasdaq filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq proposes to amend its Limited Liability Company Agreement (“LLC Agreement”). Nasdaq will implement the proposed rule change immediately upon approval by the Commission. The text of the proposed rule change is available at Nasdaq’s Web site <http://nasdaq.complinet.com>, at Nasdaq, 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, 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 these statements may be examined at the places specified in Item IV

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

below. Nasdaq 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 is modifying its LLC Agreement (including its By-Laws, which are a part of the LLC Agreement) to adopt a range of enhancements and clarifications. First, Nasdaq is amending the procedures for election of Member Representative Directors. Section 6(b)(3) of the Act³ requires a national securities exchange to establish rules that assure a fair representation of its members in the selection of its directors. To address this requirement, the LLC Agreement provides that twenty percent of Nasdaq's directors are selected through direct election by Nasdaq's members. Under the current By-Laws, a slate of candidates is nominated by a Member Nominating Committee composed of registered representatives of Nasdaq members. In addition, there is a petition process through which Nasdaq members may nominate alternate candidates. The Nasdaq Board establishes a Record Date⁴ and an Election Date,⁵ and provides notice of both dates through a communication to members that also includes the List of Candidates⁶ developed through the nomination and petition process. After receiving the notice, firms that were Nasdaq

³ 15 U.S.C. 78f(b)(3).

⁴ Article I(aa) of Nasdaq's current By-Laws defines 'Record Date' as a date selected by the Board for the purpose of determining the Nasdaq Members entitled to vote for the election of Member Representative Directors on an Election Date.

⁵ Article I(j) of Nasdaq's current By-Laws defines 'Election Date' as a date selected by the Board for the election of Member Representative Directors.

⁶ Article I(o) of Nasdaq's current By-Laws defines 'List of Candidates' as the list of candidates for Member Representative Director positions to be elected by Nasdaq Members on an Election Date.

members on the Record Date are entitled to cast ballots at any time prior to 5:00 p.m. on the Election Date. The candidates receiving the most votes are then elected to the open positions.

Nasdaq held its first election of Member Representative Directors in January 2007, and although the election concluded successfully, Nasdaq faced some difficulty in educating members about the purpose of the election and the desirability of participating. Notably, many members were not interested in voting and therefore Nasdaq had to retain the services of a proxy solicitation firm to obtain a quorum, and only obtained the quorum in the days immediately prior to the Election Date. In reviewing the experience of the first election process, Nasdaq has noted that the New York Stock Exchange LLC, the primary U.S. exchange subsidiary of NYSE Euronext, has a similar nomination process for a percentage of its directors, but conducts a direct member election only if there is a contested election (i.e., if there is more than one candidate for a particular Board seat).⁷ Accordingly, Nasdaq proposes to adopt a comparable limit on the use of the direct member election.

As amended, the election process would work as follows: On an annual basis, the Member Nominating Committee would nominate a slate of candidates. Although the Member Nominating Committee would have authority to nominate a number of candidates in excess of the number of Board seats up for election, the Member Nominating Committee would likely nominate a number of candidates equal to the number of seats. At about the same time, the Nasdaq Board would determine the Election Date and the Record Date.⁸ Promptly after

⁷ See Second Amended and Restated Operating Agreement of New York Stock Exchange LLC at <http://www.nyse.com/pdfs/SecondAmendedandRestatedOperatingAgreementofNewYorkStockExchangeLLC.pdf>.

⁸ As amended, Article I(aa) of Nasdaq's By-Laws would define 'Record Date' as a date selected by the Board for the purpose of determining the Nasdaq Members entitled to vote for the election of Member Representative Directors on an Election Date in the event of a Contested Election.

selection of the Election Date, Nasdaq would distribute (via regular mail and/or email) and post on its Web site a Notice to Members (i) announcing the Election Date and the List of Candidates, and (ii) describing the procedures for Nasdaq Members to nominate candidates for election at the next annual meeting. The process and timeframes for members to nominate additional candidates for election would be the same as provided under the current By-Laws. If, by the date on which a Nasdaq member may no longer submit a timely nomination, there is only one candidate for each Member Representative Director seat, the Member Representative Directors would be elected by The Nasdaq Stock Market, Inc., Nasdaq's sole "member" within the meaning of the Delaware Limited Liability Company Act, directly from the list of candidates nominated by the Member Nominating Committee. If, however, there is more than one candidate for a seat (i.e., if there is a contested election), the full list of candidates will be submitted for a member vote, just as it is under the current By-Laws. These proposed changes will be effected through amendments to Articles I and II of the By-Laws of the LLC Agreement.⁹ Nasdaq is also amending Article II, Section 2 to provide that in the event of a contested election, votes may be cast until 11:59 p.m. (rather than 5 p.m.) on the Election Date.

Second, Nasdaq proposes to amend the LLC Agreement to remove out-of-date references to its initial directors and officers and to its transition to commencing operations as a national securities exchange. Specifically, Nasdaq is amending Sections 9(a) and 10 of the LLC Agreement and Article I of the By-Laws to remove references to initial officers and directors; deleting Schedules C and D of the LLC Agreement, which listed the initial officers and directors; and deleting Section 29, which governed the transitional period between the formation of Nasdaq

⁹ A portion of the LLC Agreement is denominated as the "By-Laws" because of the similarity of its subject matter to corporate by-laws. Under Delaware law, however, the By-Laws are part of the same governing document as the rest of the LLC Agreement.

and its commencing operations as a national securities exchange.¹⁰ Nasdaq also proposes to amend Section 9(a) of the LLC Agreement to clarify that at least 20% of Nasdaq's directors shall be Member Representative Directors. The change serves to clarify that in a circumstance where the Board opted to reduce its size after the resignation of a Director other than a Member Representative Director, it would not be required to remove previously elected Member Representative Directors in order to maintain the percentage of Member Representative Directors at precisely 20%.

Third, Nasdaq proposes to amend Section 27 of the LLC Agreement and Article VIII, Section 1 of the By-Laws in the LLC Agreement to provide that amendments to the LLC Agreement (including the By-Laws) must be approved by the Nasdaq Board and also reflected in a written agreement executed by The Nasdaq Stock Market, Inc., as sole member of Nasdaq within the meaning of the Delaware Limited Liability Company Act. The former requirement reflects the LLC Agreement's status as a rule of Nasdaq, while the latter requirement reflects Delaware law.¹¹

Fourth, Nasdaq proposes to amend the compositional requirements of the Quality of Markets Committee (the "QMC") in Article III, Section 6 of the By-Laws to provide that the number of Non-Industry members of the QMC must equal or exceed the number of Industry members. The current By-Law requires that QMC must be equally balanced between Industry

¹⁰ Up-to-date information regarding the current directors of Nasdaq and its parent corporation, The Nasdaq Stock Market, Inc., is maintained at <http://ir.nasdaq.com/directors.cfm> (with a link provided from www.nasdaq.com). As provided by Rule 6a-2 under the Act, 17 C.F.R. 240.6a-2, Nasdaq certifies that information regarding the officers of Nasdaq is kept up to date and is available to the Commission and the public upon request, and is filed with the Commission as an amendment to Form 1 every three years.

¹¹ Changes to the LLC Agreement also require a filing pursuant to Section 19(b) of the Act.

and Non-Industry members. This change is consistent with certain undertakings made by Nasdaq with regard to the composition of this committee.¹²

Fifth, Nasdaq proposes to amend the compositional requirements of the Arbitration and Mediation Committee (the“Arbitration Committee”) in Article III, Section 6 of the By-Laws to provide that the size of the committee shall be between 3 and 10 members (rather than 10 to 25 members, as currently required). Because NASD manages an arbitration and mediation program for use of Nasdaq members pursuant to a regulatory services agreement between Nasdaq and NASD, Nasdaq has appointed the members of NASD’s Arbitration and Mediation Committee also to serve on Nasdaq’s committee. Because the role of Nasdaq’s committee is minimized by the overlap between Nasdaq’s and NASD’s arbitration rules and the role of NASD in administering the program, Nasdaq believes that a smaller Nasdaq committee would be more appropriate. Nasdaq would still expect to designate members of the NASD committee for service on its committee, and the committee would continue to comply with the balance requirements in the current By-Laws.¹³

Sixth, Nasdaq proposes to amend the compositional requirements of the Nasdaq Review Council (the“NRC”) in Article VI of the By-Laws to provide that the size of the NRC shall be between 8 and 12 members (rather than 12 to 14). The NRC is an appellate body empowered to

¹² See Letter from Edward S. Knight, Executive Vice President, General Counsel, and Chief Regulatory Officer, Nasdaq, to Robert L.D. Colby, Acting Director, Division of Market Regulation, Commission (January 11, 2006) (affirming that Nasdaq shall comply with certain undertakings in a 1996 Order of the Commission); In the Matter of National Association of Securities Dealers, Inc., Order Instituting Public Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions, Securities Exchange Act Release No. 37538 (August 8, 1996) (the “NASD Order”) (requiring “at least fifty percent independent public and non-industry membership” in the QMC) (emphasis added).

¹³ See NASD Order, supra note 12, (requiring “at least fifty percent independent public and non-industry membership” in the Arbitration Committee).

review disciplinary decisions under Nasdaq rules. Because Nasdaq and NASD are parties to an agreement under Rule 17d-2 of the Act¹⁴ that allocates responsibility to NASD for enforcing a wide range of common rules with respect to common members, the caseload of the NRC is likely to be considerably lower than that of the NASD's comparable committee, the National Adjudicatory Council. Accordingly, Nasdaq believes that a smaller size for the NRC will be consistent with the efficient discharge of its responsibilities. Nasdaq is also proposing an amendment to allow NRC members to serve two consecutive three-year terms. A comparable provision is in effect for Nasdaq's other appellate review body, the Nasdaq Listing and Hearing Review Council.

Seventh, pursuant to requests made by Commission staff at the end of Nasdaq's exchange registration process, Nasdaq is amending Article IX, Section 1 of the By-Laws (i) to include an explicit reference to the authority of the Nasdaq Board to adopt rules relating to arbitration between members and between members and customers or others, and (ii) to delete a sentence that might be construed to contain an excessively broad description of the authority of the Nasdaq Board with respect to the operation of Nasdaq rules.¹⁵

Finally, Nasdaq is amending Article III, Sections 2 and 5, and Article VIII, Section 2 of the By-Laws to correct typographical errors.

¹⁴ 17 C.F.R. 240.17d-2.

¹⁵ Nasdaq notes that the deletion of a reference to the Board's authority to issue exemptions from Nasdaq rules should not be construed to limit Nasdaq's authority under rules that, by their terms, explicitly authorize waivers or exemptions. See, e.g., Nasdaq Rules 1070 and 4510.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁶ in general, and with Section 6(b)(3) and (b)(5) of the Act,¹⁷ in particular, in that the proposal is designed to assure a fair representation of Nasdaq members in the selection of its directors, and 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. Nasdaq believes that the changes will materially enhance the efficiency of its governance processes while continuing to ensure a fair representation of its members in the selection of its directors.

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

Nasdaq 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

¹⁶ 15 U.S.C. 78f.

¹⁷ 15 U.S.C. 78f(b)(3) and (5).

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 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-2007-068 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASDAQ-2007-068. 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. 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-2007-068 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁸

Florence E. Harmon
Deputy Secretary

¹⁸ 17 CFR 200.30-3(a)(12).