

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56876; File No. SR-NASDAQ-2007-068)

November 30, 2007

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Amendment No. 2 to a Proposed Rule Change to Amend the Limited Liability Company Agreement of The NASDAQ Stock Market LLC; and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment Nos. 1 and 2

I. Introduction

On July 20, 2007, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² to amend its Limited Liability Company Agreement (“LLC Agreement”). On September 26, 2007, Nasdaq filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on October 5, 2007.³ The Commission received no comments on the proposal. On November 16, 2007, Nasdaq filed Amendment No. 2 to the proposed rule change (“Amendment No. 2”). This notice and order notices Amendment No. 2; solicits comments from interested persons on Amendment No. 2; and approves the proposed rule change, as amended, on an accelerated basis.

II. Description of the Proposal

Nasdaq proposes to amend its LLC Agreement, which includes its by-laws (“By-Laws”) to: (1) revise the process by which its directors (“Directors”) are nominated and elected; (2) amend the compositional requirements for its board of directors (“Board”) and several committees; and (3) make certain other changes as described below.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 56581 (September 28, 2007), 72 FR 57083 (“Notice”).

A. Election of Fair Representation Directors

Nasdaq proposes to amend its LLC Agreement, including its By-Laws, to revise the process by which the members of its Board are nominated and elected. Section 6(b)(3) of the Act⁴ requires a national securities exchange to establish rules that assure a fair representation of its members in the selection of its directors. Nasdaq's LLC Agreement currently provides that twenty percent of the directors on the Board will be "Member Representative Directors."⁵ The Board appoints a "Member Nominating Committee," which nominates and creates a list of candidates for each Member Representative Director position on the Board, and nominates candidates for appointment by the Board for each vacant or new position on a committee that is to be filled with a Member Representative under Nasdaq's By-Laws.⁶ Additional candidates may be added to the list of candidates for Member Representative Director positions if a Nasdaq Exchange Member submits a timely and duly executed written nomination to the Secretary of the Exchange.⁷ These candidates, together with those nominated by the Member Nominating Committee, are then presented to Exchange members for election.⁸

Under the proposal, the Board will continue to appoint a Member Nominating Committee, which will nominate candidates for each Member Representative Director position on the Board, and nominate candidates for appointment by the Board for each vacant or new position on a committee that is to be filled with a Member Representative under Nasdaq's By-

⁴ 15 U.S.C. 78f(b)(3).

⁵ "Member Representative Director" means a Director "who has been elected or appointed after having been nominated by the Member Nominating Committee or by a Nasdaq Member...." See Exchange By-Laws Article I(q).

⁶ See Nasdaq By-Laws Article II, Section 1(b) and 3, and Article III, Section 6(b).

⁷ See Nasdaq By-Laws Article II, Section 1(c).

⁸ See Nasdaq By-Laws Article II, Section 2.

Laws. In Amendment No. 2,⁹ Nasdaq proposes to add the requirement that, in appointing the Member Nominating Committee, the Board will consult with representatives of members of the Exchange.¹⁰ Also, members will continue to be able to add candidates to the list of candidates for Member Representative Director positions through the petitions process. The timing and method for the petition process will not change pursuant to the proposal. The list of candidates for Member Representative Director positions and the election date will be announced by the Exchange in a Notice to Members and in a prominent location on a publicly accessible Web site. Such announcement also will describe the procedures for Exchange members to nominate candidates for election at the next annual meeting.¹¹

If the list of candidates (comprised of those candidates nominated by the Member Nominating Committee and any candidates added through the petition process) exceeds the number of positions to be elected, a formal notice of the election date and list of candidates will be sent by the Exchange to its members as of the record date at least 10 days, but no more than 60 days prior to the election date.¹² As is currently the case, each Exchange member that is eligible to vote will have the right to cast one vote for each Member Representative Director position to be filled, and the persons on the list of candidates who receive the most votes will be elected to the Member Representative Positions.¹³ If there is only one candidate for each

⁹ The text of Amendment No. 2 is available at Nasdaq's Web site <http://nasdaq.complinet.com>, at Nasdaq, and at the Commission's Public Reference Room.

¹⁰ See Proposed Nasdaq By-Laws Article III, Section 6(b)(iii).

¹¹ See Proposed Nasdaq By-Laws Article II, Section 1(a).

¹² See Proposed Nasdaq By-Laws Article II, Section 1(a) and (c).

¹³ See Proposed Nasdaq By-Laws Article II, Section 2. Nasdaq is also amending By-Laws Article II, Section 2 to provide that votes may be cast until 11:59 p.m. (rather than 5 p.m.) on the election date. Id.

Member Representative position to be filled, the Member Representative Directors will be elected from the list of candidates by The Nasdaq Stock Market, Inc., Nasdaq’s parent company.¹⁴

B. Board and Committee Compositional Requirements

Nasdaq proposes to make several changes to its By-Laws pertaining to the compositional requirements of its Board and committees thereof.

First, Nasdaq’s By-Laws currently require that twenty percent of its directors shall be Member Representative Directors.¹⁵ Nasdaq proposes to amend the LLC Agreement to require that at least twenty percent of Nasdaq’s directors shall be Member Representative Directors.¹⁶ Thus, Nasdaq would not be required to remove a previously elected Member Representative Director if the Board’s size was reduced.

Second, Nasdaq proposes to amend the compositional requirements of its Quality of Markets Committee (“QMC”). Currently,¹⁷ Nasdaq’s QMC must be comprised of an equal number of Industry¹⁸ and Non-Industry Directors.¹⁹ Nasdaq proposes to amend this provision

¹⁴ See Proposed Nasdaq By-Laws Article II, Section (c).

¹⁵ See Nasdaq LLC Agreement, Section 9.

¹⁶ See Proposed Nasdaq LLC Agreement, Section 9.

¹⁷ See Nasdaq By-Laws Article III, Section 6(c)(ii).

¹⁸ Generally, an “Industry Director” is, among other things, a Director that is or has been an officer, director, employee, or owner of a broker-dealer. In addition, persons who have a consulting or employment relationship with the Exchange, its affiliates, or the National Association of Securities Dealers, Inc (“NASD”) (n/k/a Financial Industry Regulatory Authority, Inc. or FINRA) are considered “Industry.” See Nasdaq By-Laws Article I(i).

¹⁹ “Non-Industry Director” means a “Director (excluding Staff Directors) who is (i) a Public Director; (ii) and officer or employee of an issuer of securities listed on the national securities exchange operated by the [Exchange]; or (iii) any other individual who would not be an Industry Director.” See Nasdaq By-Laws Article I(v).

“Public Director” means a “Director who has no material business relationship with a broker or dealer, the [Exchange] or its affiliates, or the NASD.” See Nasdaq By-Laws

such that the number of Non-Industry members on the QMC must equal or exceed the number of Industry members and Member Representative members.²⁰ The Exchange represents that this change is consistent with certain undertakings made by Nasdaq with regard to the composition of this committee.²¹

Third, Nasdaq proposes to amend the compositional requirements applicable to its Arbitration and Mediation Committee (“Arbitration Committee”), which currently provide that the committee shall consist of no fewer than 10 and no more than 25 members.²² As amended, Nasdaq’s By-Laws would require the committee consist of no fewer than 3 and no more than 10 members.²³ The balance requirements applicable to this committee will remain unchanged, consistent with the 1996 Settlement Order.²⁴ Nasdaq believes that a reduction in the size of this committee is appropriate because FINRA manages an arbitration and mediation program for use of Nasdaq members pursuant to a regulatory services agreement with FINRA, and because

Article I(y).

²⁰ See Proposed Nasdaq By-Laws Article III, Section 6(c)(ii).

²¹ 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) (Administrative Proceeding File No. 3-9056) (“1996 Settlement Order”) (requiring “at least fifty percent independent public and non-industry membership” in the QMC). Nasdaq was previously bound by the 1996 Settlement Order due to its status as a subsidiary of the NASD, and in connection with Nasdaq’s Exchange application, Nasdaq submitted a letter to the Commission affirming that it would comply with the 1996 Settlement Order, except as specified. See Letter to Robert L.D. Colby, Acting Director, Division of Market Regulation, Commission, from Edward S. Knight, Executive Vice President, General Counsel, and Chief Regulatory Officer, Nasdaq, dated January 11, 2006).

²² See Nasdaq By-Laws Article III, Section 6(e)(iii).

²³ See Proposed Nasdaq By-Laws Article III, Section 6(e)(iii).

²⁴ See 1996 Settlement Order, supra note 21, (requiring “at least fifty percent independent public and non-industry membership” in the Arbitration Committee).

Nasdaq has appointed the members of FINRA’s Arbitration and Mediation Committee to also serve on Nasdaq’s Arbitration Committee.²⁵

Fourth, Nasdaq proposes to amend the compositional requirements of the Nasdaq Review Council (“NRC”), which currently require this committee to be comprised of no fewer than 12 and no more than 14 members.²⁶ As amended, Nasdaq’s By-Laws would require the NRC to be comprised of no fewer than 8 and no more than 12 members.²⁷ The Exchange believes that because Nasdaq and FINRA are parties to an agreement under Rule 17d-2 of the Act²⁸ that allocates responsibility to FINRA 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 FINRA’s comparable committee, the National Adjudicatory Council. Therefore, Nasdaq believes that reducing the size of this committee will be consistent with the efficient discharge of its responsibilities.²⁹ Nasdaq is also proposing an amendment to allow NRC members to serve two consecutive three-year terms,³⁰ consistent with Nasdaq’s other appellate review body, the Nasdaq Listing and Hearing Review Council.³¹

C. Other Changes

Nasdaq is proposing to make various other changes to its LLC Agreement. Specifically, the proposal would remove out of date references to the Exchange’s initial directors and officers, and provisions that were applicable to the transitional period between the formation of Nasdaq

²⁵ See Notice, supra note 3, at Section II.A.1.

²⁶ See Nasdaq By-Laws Article VI, Section 2.

²⁷ See Proposed Nasdaq By-Laws Article VI, Section 2.

²⁸ 17 CFR 240.17d-2.

²⁹ See Notice, supra note 3, at Section II.A.1.

³⁰ See Proposed Nasdaq By-Laws Article VI, Section 4(c).

³¹ See Proposed Nasdaq By-Laws Article VI, Section 4(c)

and when it commenced operations as a national securities exchange.³² The proposed rule change also amends Nasdaq's LLC Agreement to provide that amendments to the LLC Agreement (including the By-Laws) must be approved by the 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. Changes to the LLC Agreement must also be filed with the Commission pursuant to Section 19(b) of the Act.³³ Further, Nasdaq is amending Article IX, Section 1 of its By-Laws (i) to make explicit that Nasdaq's Board is authorized to adopt and amend rules for the required or voluntary arbitration of controversies between members and between members and customers or others, and (ii) to delete from the list of the Board's specified authorities the authority to issue exemptions from, suspend, or cancel Exchange rules.³⁴

Finally, the proposal amends Nasdaq's By-Laws to correct typographical errors.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

³² Nasdaq represents that 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). The Exchange also 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 its Form 1 every three years, as required by Rule 6a-2 under the Act, 17 CFR 240.6a-2. See Notice, supra note 3, at note 10.

³³ 15 U.S.C. 78s(b).

³⁴ 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 Notice, supra note 3, at note 15 and accompanying text.

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, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to Amendment No. 2 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 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 Amendment No. 2 to File Number SR-NASDAQ-2007-068 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Discussion

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.³⁵ In particular, the Commission finds that the proposal is consistent with Section 6(b)(3) of the Act,³⁶ which requires, among other things, that the rules of an exchange assure a fair representation of its members in the selection of its directors and administration of its affairs. The Commission also finds that the proposal is consistent with Section 6(b)(1) of the Act,³⁷ which requires, among other things, that an exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulation thereunder, and the rules of the exchange.

The Commission notes that although the Exchange will no longer hold a member election for Member Representative Directors if the number of candidates for election does not exceed the number of vacancies, members will continue to be able to petition to have candidates added to the list of candidates, as is currently the case. Also, the Commission notes that should the number of candidates exceed the number of vacancies, Exchange members will have the opportunity to elect the candidates to fill the open Member Representative Director positions. If no such election is required (i.e., the number of candidates equals the number of position to be filled), The Nasdaq Stock Market, Inc. will elect the candidates on the list of candidates prepared by the Member Nominating Committee. Additionally, the Exchange's Board will now be

³⁵ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³⁶ 15 U.S.C. 78f(b)(3).

³⁷ 15 U.S.C. 78f(b)(1).

obligated to consult with Exchange members when appointing individuals to the Member Nominating Committee. The Commission previously considered and approved rules of another Exchange that provide a similar structure for the selection of directors.³⁸ In addition, the Commission believes that the requirement that at least twenty percent of the directors be Member Representative Directors, and the means by which Member Representative Directors are to be nominated and elected, provides for the fair representation of the Exchange's members in the selection of its directors and administration of its affairs, consistent with the requirements of Section 6(b)(3) of the Act.³⁹

Pursuant to the proposal, the Exchange's By-Laws will provide that that the number of Non-Industry members of the Exchange's QMC must equal or exceed the number of Industry members. The proposal also will reduce the size of the Exchange's Arbitration Committee and the NRC, but will not otherwise alter the compositional requirements of, or method for designating, these committees. The Commission notes that the proposed compositional balance for the QMC and Arbitration Committee is consistent with the 1996 Settlement Order requirement that such committees maintain at least fifty percent independent public and non-industry membership. The Commission therefore believes that the proposal is designed to assure that the Exchange be organized and have the capacity to carry out the purposes of the Act.

For the foregoing reasons, the Commission finds that the proposed rule is consistent with the Act.

³⁸ See Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2007) (SR-NYSE-2005-77) ("Release No. 34-53382") (order granting approval of proposed rule change relating to NYSE's business combination with Archipelago Holdings, Inc., which included the bylaws of NYSE Market, Inc.).

³⁹ 15 U.S.C. 78f(b)(3).

V. Accelerated Approval

The Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 2, prior to the thirtieth day after publishing notice of Amendment No. 2 in the Federal Register pursuant to Section 19(b)(2) of the Act.⁴⁰ In Amendment No. 2, Nasdaq added the that requirement the Board will appoint individuals to the Member Nominating Committee after appropriate consultation with Exchange members.⁴¹ The Commission believes that such a requirement is consistent with the requirement under Section 6(b)(3) of the Act⁴² that the rules of an exchange assure a fair representation of its members in the selection of its directors. The Commission also notes that such a requirement is consistent with the rules of another exchange, which were approved by the Commission,⁴³ and therefore believes that Amendment No. 2 raises no new issues. The Commission therefore finds good cause exists to accelerate approval of the proposed change, as modified by Amendment No. 2, pursuant to Section 19(b)(2) of the Act.

⁴⁰ 15 U.S.C. 78s(b)(2). Pursuant to Section 19(b)(2) of the Act, the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission finds good cause for so doing.

⁴¹ The changes pursuant to Amendment No. 2 are discussed more fully in Section II.A. See supra notes 9 and 10 and accompanying text.

⁴² 15 U.S.C. 78f(b)(3).

⁴³ See Article III, Section 5 of the Amended and Restated Bylaws of NYSE Market, Inc. See also Release No. 34-53382, supra note 38.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁴⁴ that the proposed rule change (SR-NASDAQ-2007-068) as modified by Amendment Nos. 1 and 2, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁵

Florence E. Harmon
Deputy Secretary

⁴⁴ 15 U.S.C. 78s(b)(2).

⁴⁵ 17 CFR 200.30-3(a)(12).