

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57911; File No. SR-NASDAQ-2008-043)

June 3, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto to Amend the Definition of “Non-Industry Director” in the By-Laws of The NASDAQ OMX Group, Inc. and 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 May 12, 2008, The NASDAQ Stock Market LLC (the “NASDAQ 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 substantially prepared by the NASDAQ Exchange. On May 28, 2008, the NASDAQ Exchange filed Amendment No. 1.³ 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 the Substance of the Proposed Rule Change

The NASDAQ Exchange is filing this proposed rule change relating to the amendment of its By-Laws and the By-Laws of its parent corporation, The NASDAQ OMX Group, Inc. (“NASDAQ OMX”). The proposed rule change will be implemented upon approval by the Commission. The text of the proposed rule change is below. Proposed new language is underlined.⁴

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 replaces and supersedes the original filing.

⁴ Changes are marked to the rule text that appears in the electronic Nasdaq Manual found at <http://nasdaq.complinet.com> and also reflects amendments to the NASDAQ OMX By-Laws proposed in Securities Exchange Act Release No. 57761 (May 1, 2008), 73 FR 26182 (May 8, 2008) (SR-NASDAQ-2008-035) (the “Prior By-Law Filing”).

By-Laws of The NASDAQ OMX Group, Inc.

Article I Definitions

When used in these By-Laws, unless the context otherwise requires, the term:

(a) – (l) No change.

(m) “Non-Industry Director” or “Non-Industry committee member” means a Director (excluding the Staff Directors) or committee member who is (1) a Public Director or Public committee member; (2) an officer, director, or employee of an issuer of securities listed on a national securities exchange operated by any Self-Regulatory Subsidiary; or (3) any other individual who would not be an Industry Director or Industry committee member;

(n) – (o) No change.

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By-Laws of The NASDAQ Stock Market LLC

These By-Laws have been established as the By-laws of The NASDAQ Stock Market LLC, a Delaware limited liability company (the “Company”), pursuant to the First Amended Limited Liability Company Agreement of the Company, dated as of November 30, 2007 (as amended from time to time, the “LLC Agreement”), and, together with the LLC Agreement, constitute the limited liability company agreement of the Company within the meaning of the LLC Act (as defined in the LLC Agreement). In the event of any inconsistency between the LLC Agreement and these By-Laws, the provision of the LLC Agreement shall control.

Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the LLC Agreement.

Article I Definitions

When used in these By-Laws, unless the context otherwise requires, the terms set forth below shall have the following meanings:

(a) – (u) No change.

(v) “Non-Industry Director” means a Director (excluding Staff Directors) who is (i) a Public Director; (ii) an officer, director, or employee of an issuer of securities listed on the national securities exchange operated by the Company; or (iii) any other individual who would not be an Industry Director.

(w) - (ee) No change.

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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 NASDAQ 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 NASDAQ 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 NASDAQ Exchange and NASDAQ OMX are proposing to amend their respective By-Laws to clarify that a director of an issuer of securities may appropriately be considered an “issuer representative” for purposes of provisions of the By-Laws that require issuer representation on the respective Boards of Directors of the companies. Specifically, Section 4.3 of the NASDAQ OMX By-Laws provides that “[t]he number of Non-Industry Directors, including at least one Public Director and at least one issuer representative, shall equal or exceed

the number of Industry Directors, unless the Board consists of ten or more Directors. In such case at least two Directors shall be issuer representatives.” Similarly, Article III, Section 2(a) of the NASDAQ Exchange By-Laws provides that “[t]he number of Non-Industry Directors, including at least one Public Director and at least one issuer representative (or if the Board consists of ten or more Directors, at least two issuer representatives), shall equal or exceed the sum of the number of Industry Directors and Member Representative Directors to be elected under the terms of the LLC Agreement. A Director may not be subject to a statutory disqualification.”

The term “issuer representative” is not defined by the By-Laws of either company. Article I of the NASDAQ OMX By-Laws, however, will provide (assuming approval of the Prior By-Law Filing) that “‘Non-Industry Director’ or ‘Non-Industry committee member’ means a Director (excluding the Staff Directors)⁵ or committee member who is (1) a Public Director or Public committee member;⁶ (2) an officer or employee of an issuer of securities listed on a national securities exchange operated by any Self-Regulatory Subsidiary;⁷ or (3) any other

⁵ A “Staff Director” is defined as a NASDAQ OMX officer who is serving as a Director of NASDAQ OMX.

⁶ A “Public Director” or “Public committee member” means “a Director or committee member who has no material business relationship with a broker or dealer, [NASDAQ OMX] or its affiliates, or [the Financial Industry Regulatory Authority, Inc. (“FINRA”)].”

⁷ Currently, this provision refers to the NASDAQ Exchange rather than “any Self-Regulatory Subsidiary” but is otherwise substantively identical. The term “Self-Regulatory Subsidiary” anticipates the acquisition by NASDAQ OMX of several additional self-regulatory organizations and is therefore defined as “each of (i) [the NASDAQ Exchange]; (ii) upon the closing of their acquisition by [NASDAQ OMX], Boston Stock Exchange, Incorporated and Boston Stock Exchange Clearing Corporation; and (iii) upon the closing of their acquisition by [NASDAQ OMX], Philadelphia Stock Exchange, Inc. and Stock Clearing Corporation of Philadelphia.”

individual who would not be an Industry Director or Industry committee member.”⁸ Similarly, the NASDAQ Exchange By-Laws define “Non-Industry Director” to mean “a Director (excluding Staff Directors) who is (i) a Public Director; (ii) an officer or employee of an issuer of securities listed on the national securities exchange operated by the Company; or (iii) any other individual who would not be an Industry Director.”⁹

In light of these definitions, it might be contended that the definition of Non-Industry Director should inform the interpretation of the issuer representative requirement and that therefore an issuer representative must be an officer or employee of an issuer listed on a particular exchange. The NASDAQ Exchange does not believe that such a constrained interpretation is warranted, however, in light of either the existing language of the By-Laws or the policies underlying them. Rather, the NASDAQ Exchange believes that a director of an issuer who is not also its officer or employee would be fully familiar with the concerns of public companies and could therefore adequately represent the issuer community in the deliberations of the NASDAQ Exchange and NASDAQ OMX Boards. Moreover, with regard to the NASDAQ Exchange Board, the NASDAQ Exchange notes that Section 6(b)(3) of the Act¹⁰ requires the inclusion on the NASDAQ Exchange Board of at least one director “representative of issuers and investors” but does not define this requirement and that other self-regulatory organizations appear to satisfy this requirement through election of persons that may serve as directors on other boards. Indeed, the NASDAQ Exchange believes that the requirement of a director to represent

⁸ The NASDAQ Exchange believes it is not necessary to quote the lengthy definitions of “Industry Director” and “Industry committee member” here. In general, the definition covers directors or committee members with material ties to broker-dealers.

⁹ The capitalized terms used in the definition are defined in a manner similar to the comparable terms in the NASDAQ OMX By-Laws.

¹⁰ 15 U.S.C. 78f(b)(3).

issuers and investors implies that a director of a public company would be well suited to fit this role, because the business of the issuer is managed under the direction of its board and because the director is the fiduciary of investors in the issuer.

Nevertheless, to make it clear that the definition of Non-Industry Director does not serve as an impediment to a director of an issuer serving as an issuer representative, NASDAQ OMX and the NASDAQ Exchange propose to amend the definitions of Non-Industry Director to insert appropriate references to the director of an issuer.

2. Statutory Basis

The NASDAQ Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹¹ in general, and with Sections 6(b)(1) and (b)(3) of the Act,¹² in particular, in that the proposal enables the NASDAQ Exchange and NASDAQ OMX to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance by members and persons associated with members with provisions of the Act, the rules and regulations thereunder, and the rules of the exchange, and is designed to provide that one or more directors of the NASDAQ Exchange shall be representative of issuers and investors and not associated with a member of the exchange, broker, or dealer.

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

The NASDAQ Exchange 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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

¹¹ 15 U.S.C. 78f.

¹² 15 U.S.C. 78f(b)(1) and (3).

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 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-2008-043 on the subject line.

Paper comments:

- Send paper comments in triplicate to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2008-043. 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 NASDAQ 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-NASDAQ-2008-043 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.¹³

Florence E. Harmon
Acting Secretary

¹³ 17 CFR 200.30-3(a)(12).