

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58201; File No. SR-NASDAQ-2008-043)

July 21, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval of a Proposed Rule Change, as Modified by 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

On May 12, 2008, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder, a proposed rule change to amend the definition of “Non-Industry Director” in The NASDAQ OMX Group, Inc.’s by-laws (“NASDAQ OMX By-Laws”) and Nasdaq’s by-laws (“Nasdaq By-Laws”). On May 28, 2008, Nasdaq filed Amendment No. 1. The proposed rule change was published for comment in the Federal Register on June 9, 2008.² The Commission received no comments regarding the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

Nasdaq proposes to amend NASDAQ OMX By-Laws and Nasdaq By-Laws to clarify that a director of an issuer of securities may be considered an “issuer representative” for purposes of provisions in these by-laws that require issuer representation on NASDAQ OMX’s board of directors (“NASDAQ OMX Board”) and Nasdaq’s board of directors (“Nasdaq Board”), respectively.

Section 4.3 of the NASDAQ OMX By-Laws currently provides that the number of Non-Industry Directors,³ including at least one issuer representative, must equal or exceed the number

¹ 15 U.S.C. 78s(b)(1).

² See Securities Exchange Act Release No. 57911 (June 3, 2008), 73 FR 32615.

³ See Article I(m), NASDAQ OMX By-Laws.

of Industry Directors,⁴ unless the NASDAQ OMX Board consists of ten or more directors, in which case at least two directors must be issuer representatives. Likewise, Article III, Section 2(a) of the Nasdaq By-Laws provides that the number of Non-Industry Directors,⁵ including at least one issuer representative, must equal or exceed the number of Industry Directors⁶ and Member Representative Directors,⁷ unless the Nasdaq Board consists of ten or more directors, in which case at least two directors shall be issuer representatives.

The term “issuer representative,” however, is not defined in either the NASDAQ OMX By-Laws or the Nasdaq By-Laws. Instead, NASDAQ OMX By-Laws provide that “Non-Industry Director” means a director who is a Public Director,⁸ an officer or employee of an issuer of securities listed on a national securities exchange operated by any Self-Regulatory Subsidiary,⁹ or any other individual who would not be an Industry Director or Industry committee member. Similarly, Nasdaq By-Laws provide that “Non-Industry Director” means a director who is a Public Director,¹⁰ an officer or employee of an issuer of securities listed on the national securities exchange operated by Nasdaq, or any other individual who would not be an Industry Director.

Because these definitions of Non-Industry Director could be construed to require that an issuer representative must be an officer or employee of an issuer but not a director, Nasdaq proposes to clarify the NASDAQ OMX By-Laws’ and Nasdaq By-Laws’ definitions of Non-

⁴ See Article I(j), NASDAQ OMX By-Laws.

⁵ See Article I(v), Nasdaq By-Laws.

⁶ See Article I(l), Nasdaq By-Laws.

⁷ See Article I(q), Nasdaq By-Laws.

⁸ See Article I(n), NASDAQ OMX By-Laws.

⁹ See Article I(o), NASDAQ OMX By-Laws.

¹⁰ See Article I(y), Nasdaq By-Laws.

Industry Director to include a reference to “director” so that these definitions could not preclude a director of an issuer from serving as an issuer representative.

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.¹¹ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(3) of the Act,¹² which requires that the rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer. The Commission believes that the proposed rule change is appropriate, because it would clarify that the director of a Nasdaq issuer could serve as an issuer representative on the NASDAQ OMX Board and Nasdaq Board.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-NASDAQ-2008-043), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Florence E. Harmon
Acting Secretary

¹¹ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² 15 U.S.C. 78f(b)(5).

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).