

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59908; File No. SR-BX-2009-021)

May 12, 2009

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Proposed Rule Change to Amend the Restated Certificate of Incorporation and By-Laws of NASDAQ OMX BX, Inc.

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 April 29, 2009, NASDAQ OMX BX, Inc. (“BX” 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 by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

BX is filing this proposed rule change with regard to proposed changes to its Restated Certificate of Incorporation and By-Laws. The proposed rule change will be implemented as soon as practicable following approval by the Commission. The text of the proposed rule change is available at <http://nasdaqomxbx.cchwallstreet.com>, at BX’s principal office, 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, BX 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.

¹ 15 U.S.C. 78s(b)(1).

BX 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 29, 2008, BX was acquired by NASDAQ OMX. Following that acquisition, BX – together with The NASDAQ Stock Market LLC (the “NASDAQ Exchange”) and NASDAQ OMX PHLX, Inc. (formerly the Philadelphia Stock Exchange, Inc. and also an exchange subsidiary of NASDAQ OMX, and referred to herein as “PHLX”) – has been evaluating means to realize synergies in the operations of these three exchanges while maintaining the separate identity and member representation structures of each.

In making this evaluation, BX and its sister exchanges have given consideration to the experiences of their respective boards and have reviewed the governance documents of other exchanges. In particular, BX and the other exchanges have reviewed the board structures established by NYSE Euronext and its exchange subsidiaries. In Securities Exchange Act Release No. 55293,³ the Commission approved a structure in which certain committees of the board of directors of NYSE Euronext, the public holding company, perform functions for exchange subsidiaries, which do not themselves have these committees. Specifically, the Commission’s approval order states that “the NYSE Euronext board of directors will have an

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120).

audit committee, a human resource and compensation committee, and a nominating and governance committee. Each of the audit committee, human resource and compensation committee, and nominating and governance committee of the NYSE Euronext board of directors will consist solely of directors meeting the independence requirements of NYSE Euronext. These committees also will perform relevant functions for NYSE Group,⁴ the Exchange,⁵ NYSE Market,⁶ NYSE Regulation,⁷ Archipelago,⁸ NYSE Arca,⁹ and NYSE Arca Equities,¹⁰ as well as other subsidiaries of NYSE Euronext, except that the board of directors of NYSE Regulation will continue to have its own compensation committee and nominating and governance committee.”

BX and the other exchanges owned by NASDAQ OMX have also considered the experience of the NASDAQ Exchange in operating as a subsidiary of a public company since 2006. During the period, the board of each of the NASDAQ Exchange and its parent corporation (currently NASDAQ OMX, and formerly The Nasdaq Stock Market, Inc.) has appointed its own audit committee and management compensation committee. However, these committees at the NASDAQ Exchange level have generally found themselves duplicating the work of other

⁴ NYSE Group, Inc., the former public holding company of NYSE Euronext’s U.S. exchanges.

⁵ New York Stock Exchange LLC (“NYSE”), a registered national securities exchange.

⁶ NYSE Market, Inc., a subsidiary of NYSE to which it has delegated certain operational authority.

⁷ NYSE Regulation, Inc., a subsidiary of NYSE to which it has delegated certain operational authority.

⁸ Archipelago Holdings, Inc., formerly the public holding company of the entities now known as NYSE Arca, Inc. and NYSE Arca Equities, Inc.

⁹ NYSE Arca, Inc., a registered national securities exchange.

¹⁰ NYSE Arca Equities, Inc., a subsidiary of NYSE Arca to which it has delegated certain operational authority.

committees at the exchange or holding company level. The NASDAQ OMX audit committee has broad authority to review the financial information that will be provided to shareholders and others, systems of internal controls, and audit, financial reporting and legal and compliance processes. Because NASDAQ OMX's financial statements are prepared on a consolidated basis that includes the financial results of NASDAQ OMX's subsidiaries, including BX and the other exchange subsidiaries, the NASDAQ OMX audit committee's purview necessarily includes these subsidiaries. The committee is composed of four or five directors, all of whom must be independent under the standards established by Section 10A(m) of the Act¹¹ and Rule 4200(a) of the NASDAQ Exchange. All committee members must be able to read and understand financial statements, and at least one member must have past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background that results in the individual's financial sophistication.

By contrast, the audit committee of the NASDAQ Exchange has a more limited role, focused solely on the exchange entity and its subsidiaries that operate as facilities of the NASDAQ Exchange. As described in the current By-Laws of the NASDAQ Exchange (which are, in this respect, virtually identical to the current By-Laws of BX), the primary functions of the audit committee are (i) oversight over financial reporting, (ii) oversight over the systems of internal controls established by management and the Board and the legal and compliance process, (iii) selection and evaluation of independent auditors, and (iv) direction and oversight of the internal audit function. However, to the extent that the committee reviews financial and accounting matters, its activities are duplicative of the activities of the NASDAQ OMX audit committee, which is also charged with providing oversight over financial reporting and

¹¹ 15 U.S.C. 78j-1(m).

independent auditor selection for NASDAQ OMX and all of its subsidiaries, including the NASDAQ Exchange, BX, and PHLX and their subsidiaries. Similarly, the NASDAQ OMX audit committee has general responsibility for oversight over internal controls and direction and oversight over the internal audit function for NASDAQ OMX and all of its subsidiaries. Thus, the responsibilities of the exchanges' audit committees are fully duplicated by the responsibilities of the NASDAQ OMX audit committee. Accordingly, the NASDAQ Exchange is proposing to allow the elimination of its audit committee by amending Article III, Section 5 of the By-Laws.¹² Similarly, drawing upon the model established by NYSE Euronext and the experience of the NASDAQ Exchange, BX is likewise proposing to allow the elimination of its audit committee by amending Section 4.13 of its By-Laws.

BX believes, however, that even in light of the NASDAQ OMX audit committee's overall responsibilities for internal controls and the internal audit function, it is nevertheless important for the BX Board to maintain its own independent oversight over BX's controls and internal audit matters relating to BX's operations. In this regard, BX notes that its regulatory oversight committee currently has broad authority to oversee the adequacy and effectiveness of BX's regulatory and self-regulatory organization responsibilities, and is therefore able to maintain oversight over controls in tandem with the NASDAQ OMX audit committee's overall control oversight responsibilities. Similarly, it is already the practice of NASDAQ OMX's Internal Audit Department ("Department"),¹³ which performs internal audit functions for all NASDAQ OMX subsidiaries, to report to the BX regulatory oversight committee on all internal

¹² SR-NASDAQ-2009-042 (April 29, 2009). PHLX expects to file a similar proposed rule change in the near future.

audit matters relating to BX. This practice will be formally reflected in the Department's written procedures. In addition, to ensure that the BX Board retains authority to direct the Department's activities with respect to BX, the Department's written procedures will be amended to stipulate that the BX regulatory oversight committee may, at any time, direct the Department to conduct an audit of a matter of concern to it and report the results of the audit both to the BX regulatory oversight committee and the NASDAQ OMX audit committee.

BX also proposes to amend Section 4.13 of the By-Laws in order to follow the NYSE Euronext model with respect to allowing the elimination of its compensation committee and the performance of its function by the NASDAQ OMX compensation committee and/or subsidiary boards. The NASDAQ OMX By-Laws provide that its compensation committee considers and recommends compensation policies, programs, and practices for employees of NASDAQ OMX. Because many employees performing work for BX are also employees of NASDAQ OMX, its compensation committee already performs these functions for such employees. Moreover, certain of its senior officers are also officers of NASDAQ OMX and other NASDAQ OMX subsidiaries because their responsibilities relate to multiple entities within the NASDAQ OMX corporate structure. Accordingly, NASDAQ OMX pays these individuals and establishes compensation policy for them. Most notably, the former Chief Executive Officer of BX was also an "executive officer" of NASDAQ OMX within the meaning of NASDAQ Exchange Rule 4350.¹⁴ Under that rule, the compensation of executive officers of an issuer of securities, such as the common stock of NASDAQ OMX, that is listed on the NASDAQ Exchange, must be

¹³ See e-mail from John Yetter, Vice President and Deputy General Counsel, NASDAQ OMX Group, Inc., to Christopher W. Chow, Special Counsel, Commission, dated May 5, 2009.

determined by, or recommended to the board of directors for determination by, a majority of independent directors or a compensation committee comprised solely of independent directors. Accordingly, the NASDAQ OMX board of directors and/or its compensation committee was legally required to establish the compensation for this individual. Although the individual recently resigned his positions with NASDAQ OMX and its subsidiaries in order to pursue another opportunity, it is likely that his successor as Chief Executive Officer of BX will serve in a similar position at NASDAQ OMX and therefore be subject to comparable compensation requirements.

To the extent that policies, programs, and practices must also be established for any BX officers or employees who are not also NASDAQ OMX officers or employees, the BX Board will perform such actions without the use of a compensation committee (but subject to the recusal of Staff Directors)¹⁵ unless the persons in question are also employees of Boston Options Exchange Regulation LLC (“BOXR”). BOXR is the subsidiary of BX that has been delegated responsibility to regulate the market operated by Boston Options Exchange Group LLC (“BOX”), an options exchange that is a facility of BX but in which neither BX nor any of its affiliates has a financial interest. Section 17 of the By-Laws of BOXR (which are part of its Limited Liability Company Agreement) provides that the compensation of BOXR’s officers

¹⁴ The position of Chief Executive Officer of BX is currently vacant, pending selection of a successor.

¹⁵ Staff Directors are directors of BX that are also serving as officers. Since the BX Board would not be responsible for setting the compensation of any Staff Directors who are also officers of NASDAQ OMX, they would be permitted to participate in discussions concerning compensation of BX employees, but would recuse themselves from a vote on the subject to allow the determination to be made by directors that are not officers or employees of BX. If a Staff Director was not also an employee of NASDAQ OMX, that Staff Director would also absent himself or herself from any deliberations regarding his or her compensation.

shall be determined by the BOXR Board. Because of BOXR's special status as a regulatory subsidiary, this provision will remain operative following the implementation of the rule change proposed by this filing. Finally, it should be noted that as already provided in the By-Laws, the regulatory oversight committee of the BX Board must be informed about the compensation and promotion or termination of the BX chief regulatory officer and the reasons therefor, to allow it to provide oversight over decisions affecting this key officer.¹⁶

2. Statutory Basis

BX believes that its proposal is consistent with Section 6(b) of the Act¹⁷ in general, and furthers the objectives of: (1) Section 6(b)(1) of the Act,¹⁸ which requires a national securities exchange to be so organized and have the capacity to carry out purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act; and (2) Section 6(b)(5) of the Act,¹⁹ in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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. Specifically, the proposed rule change will allow BX to eliminate two Board committees whose roles are limited by BX's status as a wholly owned subsidiary of NASDAQ OMX, thereby allowing directors to focus greater attention on matters falling directly within the purview of the Board,

¹⁶ In this filing, BX is also amending its Restated Certificate of Incorporation and By-laws to reflect the name change of The Nasdaq Stock Market, Inc. to The NASDAQ OMX Group, Inc. See Article Fourth of Restated Certificate of Incorporation; Section 9.4 of the By-Laws.

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78(b)(1).

¹⁹ 15 U.S.C. 78f(b)(5).

including regulatory quality, market structure, new product initiatives, and review of proposed rule changes. The filing also updates the corporate name of NASDAQ OMX in the Restated Certificate of Incorporation and By-Laws.

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

BX 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

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 the 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-BX-2009-

021 on the subject line.

Paper comments

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

All submissions should refer to File Number SR-BX-2009-021. 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 a.m. and 3:00 p.m. Copies of the 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 File Number SR-BX-2009-021 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.²⁰

Florence E. Harmon
Deputy Secretary

²⁰ 17 CFR 200.30-3(a)(12).