

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58183; File No. SR-NASDAQ-2008-035)

July 17, 2008

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend the By-Laws of The NASDAQ OMX Group, Inc. in Connection with the Acquisitions of Boston Stock Exchange, Incorporated and Philadelphia Stock Exchange, Inc.

I. Introduction

On April 21, 2008, The NASDAQ Stock Market LLC (“Nasdaq”) 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,² a proposed rule change (“NASDAQ OMX By-Law Proposal”) to amend the by-laws (“NASDAQ OMX By-Laws”) of its parent corporation, The NASDAQ OMX Group, Inc. (“NASDAQ OMX”). The NASDAQ OMX By-Law Proposal was published for comment in the Federal Register on May 8, 2008.³ The Commission received no comment letters regarding the NASDAQ OMX By-Law Proposal. On July 3, 2008, Nasdaq filed Amendment No. 1 to the NASDAQ OMX By-Law Proposal.⁴ This order approves the NASDAQ OMX By-Law Proposal, as modified by Amendment No. 1.

II. Discussion and Commission Findings

NASDAQ OMX and the Boston Stock Exchange, Incorporated (“BSE”), a national securities exchange, have entered into an agreement pursuant to which NASDAQ OMX would

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 57761 (May 1, 2008), 73 FR 26182 (SR-NASDAQ-2008-035) (“NASDAQ OMX By-Law Proposal Notice”).

⁴ In Amendment No. 1, Nasdaq proposes to correct typographical errors in the proposed amendments to NASDAQ OMX By-Laws Sections 11.3 and 12.5. Because Amendment No. 1 is technical in nature, the Commission is not publishing it for comment.

acquire all of the outstanding membership interests in BSE (“BSE Acquisition”).⁵ Also, NASDAQ OMX and the Philadelphia Stock Exchange, Inc., (“Phlx”), a national securities exchange, have entered into an agreement pursuant to which NASDAQ OMX would acquire all of the outstanding capital stock of Phlx (“Phlx Acquisition,” together with the BSE Acquisition, the “Acquisitions”). Today, the Commission approved proposed rule changes by Phlx in connection with the Phlx Acquisition, that include, among other things, the same amended NASDAQ OMX By-Laws that are the subject of this proposal by Nasdaq.⁶

Following the Acquisitions, Nasdaq would maintain its current registration as a national securities exchange, and would maintain rules, membership rosters, and listings that would be separate and distinct from the rules, membership rosters, and listings of BSE and Phlx.⁷ As a result of the Acquisitions, NASDAQ OMX also would acquire BSE’s wholly-owned subsidiary, the Boston Stock Exchange Clearing Corporation (“BSECC”), and Phlx’s wholly-owned subsidiary, the Stock Clearing Corporation of Philadelphia (“SCCP”), both registered clearing agencies.⁸ Following the closing of the Acquisitions, NASDAQ OMX would be the sole owner of five self-regulatory organizations (“SROs”): Nasdaq, BSE, BSECC, Phlx, and SCCP (collectively, “SRO Subsidiaries”).

⁵ NASDAQ OMX would not acquire BSE’s interest in Boston Options Exchange Group, LLC, the operator of BSE’s options trading facility, the Boston Options Exchange (“BOX”).

⁶ See Securities Exchange Act Release No. 58179 (July 17, 2008) (SR-Phlx-2008-31) (order approving proposed changes relating to the acquisition of Phlx by NASDAQ OMX) (“Phlx Order”) at sections III.B and III.C.1.

⁷ See NASDAQ OMX By-Law Proposal Notice, *supra* note 3, at 26183.

⁸ See NASDAQ OMX By-Laws Proposal Notice, *supra* note 3, at 26182-26183. After the Acquisitions, Phlx would continue to operate SCCP and BSE would continue to operate BSECC. See Phlx Order, *supra* note 6, and Securities Exchange Act Release No. 57757 (May 1, 2008), 73 FR 26159 (May 8, 2008) (SR-BSE-2008-23) (notice proposing, among other things, changes to BSE’s governing documents and rules in connection with NASDAQ OMX’s acquisition of BSE).

Although NASDAQ OMX is not itself an SRO, its activities with respect to the operations of its SRO Subsidiaries must be consistent with, and must not interfere with, the self-regulatory obligations of the SRO Subsidiaries. Further, certain provisions of NASDAQ OMX's Certificate of Incorporation and By-Laws are rules of an exchange if they are stated policies, practices, or interpretations, as defined in Rule 19b-4 under the Act, of the self-regulatory organization, and must be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b-4 thereunder.⁹ Accordingly, Nasdaq has filed with the Commission proposed changes to the NASDAQ OMX By-Laws.

The changes to NASDAQ OMX By-Laws filed by Nasdaq would expand the application of certain provisions of NASDAQ OMX's Restated Certificate of Incorporation and NASDAQ OMX's By-Laws to include each of NASDAQ OMX's SRO Subsidiaries. These provisions of NASDAQ OMX's governing documents currently apply only to Nasdaq and are designed to maintain the independence of each SRO Subsidiary's self-regulatory function; enable each SRO Subsidiary to operate in a manner that complies with the federal securities laws; and facilitate the ability of each SRO Subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act.

After careful review and for the reasons discussed more fully below, the Commission finds that the NASDAQ OMX By-Law Proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁰

Specifically, the Commission finds that the proposed rule change is consistent with Section

⁹ 15 U.S.C. 78s(b) and 17 CFR 240.19b-4, respectively.

¹⁰ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

6(b)(1) of the Act,¹¹ which requires, among other things, that a national securities 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 regulations thereunder, and the rules of the exchange.

A. Self-Regulatory Function of the SRO Subsidiaries; Relationship between NASDAQ OMX and the SRO Subsidiaries; Jurisdiction over NASDAQ OMX

Although NASDAQ OMX does not itself carry out regulatory functions for Nasdaq and will not carry out regulatory functions for its other SRO Subsidiaries, its activities with respect to the operation of its SRO Subsidiaries, including Nasdaq, must be consistent and not interfere with their respective self-regulatory obligations. The NASDAQ OMX Certificate and the NASDAQ OMX By-Laws include certain provisions, approved by the Commission in the context of Nasdaq's registration as a national securities exchange,¹² that are designed to maintain the independence of Nasdaq's self-regulatory function from NASDAQ OMX, enable Nasdaq to operate in a manner that complies with the federal securities laws, including the objectives of Sections 6(b) and 19(g) of the Act;¹³ and facilitate the ability of Nasdaq and the Commission to fulfill their regulatory and oversight obligations under the Act.¹⁴ Nasdaq's proposed rule change would make these provisions applicable to all of NASDAQ OMX's SRO Subsidiaries.¹⁵

¹¹ 15 U.S.C. 78f(b)(1).

¹² See Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) ("Nasdaq Exchange Registration Approval Order") at notes 27-34 and accompanying text.

¹³ 15 U.S.C. 78f(b) and 15 U.S.C. 78s(g).

¹⁴ See Sections 11.3 and 12.1-12.5, NASDAQ OMX By-Laws.

¹⁵ Nasdaq proposes to add a definition of "Self-Regulatory Subsidiary" that includes each SRO Subsidiary. Self-Regulatory Subsidiary would mean each of (i) Nasdaq; (ii) upon the closing of their acquisition by NASDAQ OMX, BSE and BSECC; and (iii) upon the closing of their acquisition by NASDAQ OMX, Phlx and SCCP. See proposed Article I(o), NASDAQ OMX By-Laws. The proposed rule change would expand the

In particular, as amended, the By-Laws of NASDAQ OMX specify that NASDAQ OMX and its officers, directors, employees, and agents irrevocably submit to the jurisdiction of the United States federal courts, the Commission, and each self-regulatory subsidiary of NASDAQ OMX for the purposes of any suit, action or proceeding pursuant to the United States federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, the activities of any self-regulatory subsidiary.¹⁶ Further, NASDAQ OMX agreed to provide the Commission with access to its books and records.¹⁷ NASDAQ OMX also agreed to keep confidential non-public information relating to the self-regulatory function¹⁸ of each SRO Subsidiary, including Nasdaq, and not to use such information for any non-regulatory purpose. In addition, the board of directors of NASDAQ OMX (“NASDAQ OMX Board”), as well as NASDAQ OMX’s officers, employees, and agents, are required to give due regard to the preservation of the independence of each SRO Subsidiary’s, including Nasdaq’s, self-regulatory function.¹⁹ Similarly, the NASDAQ OMX Board, when evaluating any issue, would be required

applicability of the Section 11.3 and each section of Article XII of the NASDAQ OMX By-Laws, currently applicable only to Nasdaq, to also include BSE, BSECC, Phlx and SCCP.

¹⁶ See proposed Section 12.3, NASDAQ OMX By-Laws.

¹⁷ See proposed Section 12.1(c), NASDAQ OMX By-Laws. To the extent that they relate to the activities of Nasdaq, all books, records, premises, officers, directors, and employees of NASDAQ OMX would be deemed to be those of the Nasdaq. See id.

¹⁸ This requirement to keep confidential non-public information relating to the self-regulatory function shall not limit the Commission’s ability to access and examine such information or limit the ability of directors, officers, or employees of the NASDAQ OMX from disclosing such information to the Commission. See proposed Section 12.1(b), NASDAQ OMX By-Laws. Other holding companies with SRO subsidiaries have undertaken similar commitments. See, e.g., Securities Exchange Act Release No. 56955 (December 13, 2007), 72 FR 71979, 71983 (December 19, 2007) (SR-ISE-2007-101) (order approving the acquisition of International Securities Exchange, LLC’s parent, International Securities Exchange Holdings, Inc., by Eurex Frankfurt AG).

¹⁹ See Section 12.1(a), NASDAQ OMX By-Laws. Also, NASDAQ OMX’s officers,

to take into account the potential impact on the integrity, continuity, and stability of the SRO Subsidiaries.²⁰ Finally, the NASDAQ OMX By-Laws require that any changes to the NASDAQ OMX Certificate and By-Laws be submitted to the Board of Directors of each of its SRO subsidiaries, including Nasdaq, and, if such amendment is required to be filed with the Commission pursuant to Section 19(b) of the Act, such change shall not be effective until filed with, or filed with and approved by, the Commission.²¹

The Commission believes that the NASDAQ OMX By-Laws, as amended to accommodate the Acquisitions, are designed to continue to facilitate Nasdaq's ability to fulfill its self-regulatory obligations and are, therefore, consistent with the Act. In particular, the Commission believes these changes are consistent with Section 6(b)(1) of the Act,²² which requires, among other things, that a national securities 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 regulations thereunder, and the rules of the exchange.

The Commission also believes that under Section 20(a) of the Act²³ any person with a controlling interest in NASDAQ OMX would be jointly and severally liable with and to the

directors, agents and employees agree to cooperate with the Commission and each SRO Subsidiary in respect of their respective regulatory responsibilities. See proposed Section 12.2, NASDAQ OMX By-Laws.

Further, pursuant to proposed Section 12.4 of the NASDAQ OMX By-Laws, NASDAQ OMX agreed to take such action as is necessary to insure that its officers, directors, employees and agents consent in writing to the applicability of Sections 12.1, 12.1 and 12.3 of the NASDAQ OMX By-Laws with respect to activities related to each SRO Subsidiary.

²⁰ See proposed Section 12.7, NASDAQ OMX By-Laws.

²¹ See proposed Sections 11.3 and 12.6, NASDAQ OMX By-Laws.

²² 15 U.S.C. 78f(b)(1).

²³ 15 U.S.C. 78t(a).

same extent that NASDAQ OMX is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act²⁴ creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder. Further, Section 21C of the Act²⁵ authorizes the Commission to enter a cease-and-desist order against any person who has been “a cause of” a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

B. Exemptions from Voting Limitations

The NASDAQ OMX Certificate imposes limits on direct and indirect changes in control, which are designed to prevent any shareholder from exercising undue control over the operation of Nasdaq and to ensure that Nasdaq and the Commission are able to carry out their regulatory obligations under the Act.²⁶ Specifically, no person who beneficially owns shares of common stock, preferred stock, or notes of NASDAQ OMX in excess of 5% of the securities generally entitled to vote may vote the shares in excess of 5%.²⁷ No changes to these limitations are proposed.

The NASDAQ OMX Board may approve exemptions from the 5% voting limitations for any person that is not a broker-dealer, an affiliate of a broker-dealer, or a person subject to a statutory disqualification under Section 3(a)(39) of the Act,²⁸ so long as the NASDAQ OMX

²⁴ 15 U.S.C. 78t(e).

²⁵ 15 U.S.C. 78u-3.

²⁶ See Nasdaq Exchange Registration Approval Order, supra note 12, at 3552.

²⁷ See Article Fourth.C, NASDAQ OMX Certificate.

²⁸ 15 U.S.C. 78c(a)(39). See Article Fourth.C.6, NASDAQ OMX Certificate.

Board also determines that granting such exemption would be consistent with the self-regulatory obligations of Nasdaq.²⁹ Further, any such exemption from the 5% voting limitations would not be effective until approved by the Commission pursuant to Section 19 of the Act.³⁰ Nasdaq's proposed rule change reflects an amendment to the NASDAQ OMX By-Laws to require the NASDAQ OMX Board, prior to approving any exemption from the 5% voting limitations, to determine that granting such exemption would be consistent with the self-regulatory obligations of each SRO Subsidiary, including Nasdaq.³¹ Therefore, there is no change in the application of this provision to Nasdaq.

The Commission finds that the foregoing change to the NASDAQ OMX By-Laws to reflect NASDAQ OMX's ownership of multiple SRO Subsidiaries is consistent with the Act.

²⁹ Specifically, the NASDAQ OMX Board must determine that granting such exemption would (1) not reasonably be expected to diminish the quality of, or public confidence in, NASDAQ OMX or the other operations of NASDAQ OMX, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and (2) promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to an facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system. See Article Fourth.C.6, NASDAQ OMX Certificate.

³⁰ See Section 12.5, NASDAQ OMX By-Laws.

³¹ See proposed Section 12.5, NASDAQ OMX By-Laws. These provisions would apply for so long as NASDAQ OMX controls, directly or indirectly, any SRO Subsidiary. Id. See also supra note 20 and accompanying text.

III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³² that the NASDAQ OMX By-Law Proposal (SR-NASDAQ-2008-035), as modified by Amendment No. 1 thereto, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

Florence E. Harmon
Acting Secretary

³² 15 U.S.C. 78s(b)(2).

³³ 17 CFR 200.30-3(a)(12).