
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, including at least one issuer representative, must equal or exceed the number

---

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 Directors\(^6\) 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.\textsuperscript{11} In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(3) of the Act,\textsuperscript{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,\textsuperscript{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.\textsuperscript{14}

\begin{flushright}
Florence E. Harmon  
Acting Secretary
\end{flushright}

\textsuperscript{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).
\textsuperscript{12} 15 U.S.C. 78f(b)(5).
\textsuperscript{14} 17 CFR 200.30-3(a)(12).