

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60183; File No. SR-NASDAQ-2009-039)

June 26, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Amend the By-Laws of The NASDAQ OMX Group, Inc.

On April 27, 2009, The NASDAQ Stock Market LLC (“NASDAQ 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,² a proposed rule change to amend the By-Laws of The NASDAQ OMX Group, Inc. (“NASDAQ OMX”). The proposed rule change was published for comment in the Federal Register on May 12, 2009.³ On June 2, 2009, the NASDAQ Exchange filed Amendment No. 1 to the proposed rule change.⁴ The Commission received no comments regarding the proposal. This order approves the proposed rule change.

I. Description of the Proposal

As provided in Article XI of the NASDAQ OMX By-Laws, proposed amendments to the By-Laws are to be reviewed by the Board of Directors of each self-regulatory subsidiary of NASDAQ OMX, and if any such proposed amendment must,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59858 (May 4, 2009), 74 FR 22191 (“Notice”).

⁴ Amendment No. 1 modified the original rule proposal to indicate that the Board of Directors of NASDAQ OMX approved the proposed rule change on May 28, 2009, in addition to December 17, 2008, and to revise the proposed rule change with respect to “Extension of Time Period for Commission Action.” Because these are technical modifications, the Commission is not publishing Amendment No. 1 for comment.

under Section 19 of the Act and the rules promulgated thereunder, be filed with, or filed with and approved by, the Commission before such amendment may be effective, then such amendment shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be. Consistent with such requirement, the NASDAQ Exchange has filed proposed amendments to the NASDAQ OMX By-Laws.⁵ As described more fully in the Notice, the NASDAQ Exchange proposed the following amendments to the By-Laws.

1. Amend Article I to reflect the recent name changes of the Philadelphia Stock Exchange and the Boston Stock Exchange to NASDAQ OMX PHLX, Inc. and NASDAQ OMX BX, Inc., respectively;
2. Amend Article III to require a stockholder making a proposal to supply more complete information about the stockholder's background.
3. Amend Article IV to state that both the NASDAQ OMX Audit and Management Compensation Committees shall be composed of independent directors within the meaning of the rules of the NASDAQ Exchange that govern NASDAQ OMX's listing (and, in the case of the Audit Committee, Section 10A of the Act).
4. Amend Article IV to revise the compositional requirements of the NASDAQ OMX Nominating Committee.

⁵ Although there is a reference in the Notice to a proposed amendment to the Certificate of Incorporation of NASDAQ OMX ("NASDAQ OMX Certificate"), this proposal does not in fact amend the NASDAQ OMX Certificate. The Exchange recently amended the NASDAQ OMX Certificate pursuant to a separate filing with the Commission. See Securities Exchange Act Release No. 59460 (February 26, 2009), 74 FR 9841 (March 6, 2009).

5. Amend Article VIII to: (a) require NASDAQ OMX to provide indemnification against liability, advancement of expenses, and the power to purchase and maintain insurance on behalf of persons serving as a director, officer, or employee of any wholly owned subsidiary of NASDAQ OMX to the same extent as indemnification, advancement of expenses, and the power to maintain insurance is provided for directors, officers, or employees of NASDAQ OMX; (b) extend the discretionary authority of NASDAQ OMX under Section 8.1(c) of the By-Laws to provide indemnification to persons serving as an agent of NASDAQ OMX to persons serving as an agent of any wholly owned subsidiary of NASDAQ OMX; and (c) clarify that any repeal, modification or amendment of, or adoption of any provision inconsistent with, the indemnification and advancement of expenses provided for in Article VIII will not adversely affect the right of any person covered by the provision if the act or omission that any proceeding arises out of or is related to had occurred prior to the time for the repeal, amendment, adoption or modification.
6. Amend Article IX to revise the language of the provisions dealing with capital stock to reflect possible participation in the Direct Registration System (“DRS”).
7. Amend Article XII to conform certain provisions applicable to NASDAQ OMX’s directors, officers, employees, and/or agents more closely to

corresponding provisions in the Amended and Restated By-Laws of NYSE Euronext (“NYSE Euronext By-Laws”).

II. Discussion and Commission’s Findings

After careful review, 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.⁶ In particular, for the reasons discussed below, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,⁷ which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, and Section 6(b)(5) of the Act,⁸ 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.

The NASDAQ Exchange proposes to revise the structure of the NASDAQ OMX Nominating Committee. Currently, the NASDAQ OMX Nominating Committee is required to be composed solely of persons who are not directors, or who are directors not standing for re-election. Under the amended By-Laws, the NASDAQ OMX Nominating Committee would be composed of four or five directors, all of whom must be

⁶ In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁷ 15 U.S.C. 78(b)(1).

⁸ 15 U.S.C. 78f(b)(5).

independent within the meaning the rules of the NASDAQ Exchange.⁹ Further, the number of Non-Industry Directors (i.e., Directors without material ties to the securities industry) must equal or exceed the number of Industry Directors, and at least two members of the committee must be Public Directors (i.e., directors who have no material business relationship with a broker or dealer, NASDAQ OMX or its affiliates, or FINRA).¹⁰

The Commission believes that it is appropriate for NASDAQ OMX to revise the composition of its Nominating Committee so that it is composed exclusively of directors that would be considered independent within the meaning of the listing rules of the NASDAQ Exchange,¹¹ to provide for a compositional balance between Industry Directors, Non-Industry Directors, and to specify that at least two Nominating Committee members must be Public Directors. The Commission further believes that it is appropriate for the By-Laws to be amended to specify that the NASDAQ OMX Management Compensation Committee and the Audit Committee must be composed exclusively of independent directors members within the meaning of the listing rules of the NASDAQ Exchange (and, in the case of the Audit Committee, Section 10A of the Act).¹² The NASDAQ Exchange has represented that NASDAQ OMX adheres to the director independence requirements in the NASDAQ Exchange's listing rules and, in the

⁹ See NASDAQ Exchange Rule 5605(a)(2). Rule 5605(a)(2) was formerly designated Rule 4200(a)(15). See Securities Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009) (SR-NASDAQ-2009-018).

¹⁰ See NASDAQ OMX By-laws, Article I (j), (m), and (n) for the definitions of Industry Director, Non-Industry Director, and Public Director, respectively.

¹¹ Id.

¹² See NASDAQ Exchange Rule 5605(a)(2). 15 U.S.C. 78j-1(m).

case the of the Audit Committee) Section 10A of the Act, but believed that such requirements should be set forth expressly in the By-Laws.

Currently, NASDAQ OMX directors, officers, and employees, as well as agents, are required by the By-Laws to give due regard to the preservation of the independence of each self-regulatory subsidiary of NASDAQ OMX, not to take any actions that would interfere with each self-regulatory subsidiary's regulatory functions, to cooperate with the Commission, to consent to U.S. jurisdiction, and to consent in writing to the applicability of these provisions. As more fully described in the Notice, the proposed rule change would conform Article XII of the By-Laws more closely to corresponding provisions in the NYSE Euronext By-Laws, which the Commission previously approved.¹³

III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁴ that

¹³ See NYSE Euronext Bylaws, Article III, Section 9.3; NYSE Euronext Bylaws, Article VII, Section 7.1. See also Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120).

¹⁴ 15 U.S.C. 78s(b)(2).

the proposed rule change (SR-NASDAQ-2009-039) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Florence E. Harmon
Deputy Secretary

¹⁵ 17 CFR 200.30-3(a)(12).