

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60276; File No. SR-NASDAQ-2009-042)

July 9, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change to Amend its Limited Liability Agreement and By-Laws

On April 29, 2009, The NASDAQ Stock Market LLC (“NASDAQ Exchange” 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,² a proposed rule change to amend its Limited Liability Agreement (“Agreement”) and By-Laws.³ The proposed rule change was published for comment in the Federal Register on May 20, 2009.⁴ The Commission received no comments regarding the proposal. This order approves the proposed rule change.

I. Description of the Proposed Rule Change

Currently, the NASDAQ Exchange board and the board of its parent company, NASDAQ OMX Group, Inc. (“NASDAQ OMX”), maintain their own audit committee and management compensation committees. As more fully discussed in the Notice, the Exchange states that it has found the work of these committees to overlap substantially.⁵ As a result, the Exchange proposes to revise its Agreement to allow for the elimination of its audit and management compensation committees.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Agreement includes and incorporates an exhibit designated as the By-Laws of the NASDAQ Stock Market LLC. Accordingly, the By-Laws are part of the Agreement. See Securities Exchange Act Release No. 59907 (May 12, 2009), 74 FR 23761 (“Notice”), 23761 n.3.

⁴ See Notice, supra note 3.

⁵ See Notice, 74 FR at 23761.

The Exchange also proposes to amend the Agreement to allow for the elimination of its arbitration and mediation committee, provided that the NASDAQ Exchange's arbitration and mediation program is operated by the Financial Industry Regulatory Authority ("FINRA"), which the NASDAQ Exchange states is currently the case.

In addition, as discussed in the Notice, the Exchange proposes changes to its rules governing the selection of Member Representative Directors, as well as to update certain aspects of its Agreement.⁶

II. Discussion and Commission 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.⁷ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,⁸ which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act. The Commission also finds that the proposed rule change is consistent with Section 6(b)(3) of the Act,⁹

⁶ Specifically, the Exchange would: reflect the name change of The Nasdaq Stock Market, Inc. to The NASDAQ OMX Group, Inc.; reflect the name change of National Association of Securities Dealers, Inc. to FINRA; correct typographical errors in the definition of "Industry member" in Article I of the By-Laws and in Section 6 of the Agreement; and redesignate the Agreement as the "Second Amended Limited Liability Company Agreement of The NASDAQ Stock Market LLC."

⁷ 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).

⁸ 15 U.S.C. 78f(b)(1).

⁹ 15 U.S.C. 78f(b)(3).

which requires that the rules of a national securities 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 further finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁰ 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 Commission previously approved a structure in which certain committees of the board of directors of NYSE Euronext, including the audit and compensation committees, were authorized to perform functions for various subsidiaries, including the New York Stock Exchange, LLC (“NYSE”).¹¹

A. Elimination of the Exchange’s Audit and Management Compensation Committees

Currently, the NASDAQ Exchange audit committee is primarily charged with: (1) oversight of the NASDAQ Exchange’s financial reporting; (2) oversight of the systems of internal controls established by management and the NASDAQ Exchange board, as well as the legal and compliance process; (3) selection and evaluation of independent auditors; and (4) direction and oversight of the internal audit function. The Exchange states that the responsibilities of the NASDAQ Exchange’s audit committee

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120).

are fully duplicated¹² by the responsibilities of the NASDAQ OMX audit committee.¹³ In addition, the NASDAQ Exchange states that its regulatory oversight committee has broad authority to oversee the adequacy and effectiveness of its regulatory and self-regulatory organization responsibilities, and therefore is able to maintain oversight over internal controls in tandem with the NASDAQ OMX audit committee. Further, the NASDAQ Exchange states that the practice of NASDAQ OMX's Internal Audit Department ("Department"),¹⁴ which performs internal audit functions for all NASDAQ OMX subsidiaries, is to report to the NASDAQ Exchange regulatory oversight committee on all internal audit matters relating to the NASDAQ Exchange will be formally reflected in the Department's written procedures. The Exchange also represents that, to ensure that its board retains authority to direct the Department's activities with respect to the NASDAQ

¹² Specifically the NASDAQ Exchange states the NASDAQ OMX audit committee, described infra at n.13, 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 and, because NASDAQ OMX's financial statements are prepared on a consolidated basis that includes the financial results of NASDAQ OMX's subsidiaries, including the Exchange, the NASDAQ OMX audit committee's purview necessarily includes these subsidiaries. In addition, the NASDAQ OMX audit committee currently is charged with providing oversight over financial reporting and independent auditor selection for NASDAQ OMX and all of its subsidiaries, including the Exchange; and 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. See Notice, 74 FR at 23761, 23762.

¹³ The NASDAQ OMX audit committee is composed of four or five directors, all of whom must be independent under the standards established by Section 10A(m) of the Act and the listing rules 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.

¹⁴ See Notice, 74 FR at 23762.

Exchange, the Department's written procedures will be amended to stipulate that the NASDAQ Exchange 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 NASDAQ Exchange regulatory oversight committee and the NASDAQ OMX audit committee.¹⁵

The Exchange also proposes to allow the elimination of its compensation committee, and to prescribe that the functions of that committee be performed by the NASDAQ OMX compensation committee or by the full NASDAQ Exchange board, when required. The NASDAQ OMX By-Laws provide that its compensation committee considers and recommends compensation policies, programs, and practices for employees of NASDAQ OMX. Many employees performing work for the NASDAQ Exchange are also employees of NASDAQ OMX, and certain senior officers of the NASDAQ Exchange are also officers of NASDAQ OMX and other NASDAQ OMX subsidiaries because their responsibilities relate to multiple entities within the NASDAQ OMX corporate structure.¹⁶ As a result, NASDAQ OMX establishes compensation and compensation policy for these employees.

To the extent that policies, programs, and practices must be established for any NASDAQ Exchange officers or employees who are not also NASDAQ OMX officers or employees, the Exchange states that its board will perform such actions without the use of a compensation committee, subject to recusal by Staff Directors.¹⁷

¹⁵ See id.

¹⁶ Id.

¹⁷ See NASDAQ Exchange By-Laws, Article I(j). Staff Directors are directors of the Exchange that are also serving as officers. Because the NASDAQ Exchange

The Commission notes that the proposed elimination of the NASDAQ Exchange audit and management compensation committees is comparable to a structure for the NYSE that the Commission previously considered and approved.¹⁸ The Commission finds that the proposed elimination of the NASDAQ Exchange's audit and management compensation committees is consistent with the Act.

B. Elimination of the NASDAQ Exchange's Arbitration and Mediation Committee.

As provided in the Agreement, the arbitration and mediation committee is to advise the Board on the development and maintenance of an equitable and efficient system of dispute resolution that will equally serve the needs of public investors and NASDAQ Exchange members, to monitor rules and procedures governing the conduct of dispute resolution, and to have such other powers and authority as are necessary to effectuate the purposes of the NASDAQ Exchange rules. The Exchange states that, at this time, there is no meaningful role for this committee to play because the NASDAQ Exchange's arbitration and mediation program presently is operated by FINRA. All information needed by the NASDAQ Exchange board or staff to evaluate the effectiveness of FINRA's administration of the program is obtained through the

board would not be responsible for setting the compensation of any Staff Directors who are also officers of NASDAQ OMX, these directors would be permitted to participate in discussions concerning compensation of Exchange employees, but the Exchange states that they must recuse themselves from a vote on the subject to allow the determination to be made by directors that are not officers or employees of the Exchange. The NASDAQ Exchange also states that, if a Staff Director is not also an employee of NASDAQ OMX, that Staff Director also must absent himself or herself from any deliberations regarding his or her compensation.

¹⁸ See Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120).

Exchange's oversight of FINRA's performance through its authority under its regulatory services agreement to obtain reports from FINRA and to conduct audits.

The Commission notes that neither the Exchange nor its predecessor (The Nasdaq Stock Market, Inc.) has ever operated a dispute resolution program that was not administered by FINRA or its predecessor (the National Association of Securities Dealers, Inc.).¹⁹ Therefore, no ongoing dispute will be affected by the elimination of this committee. In the addition, the Agreement, as revised, would continue to provide for the establishment of such a committee in the event that the NASDAQ Exchange in the future opts to establish an arbitration or mediation program that is not operated by FINRA in accordance with FINRA rules. The Commission therefore finds that the proposed rule change is consistent with the Act, as the Exchange will continue to be organized and have the capacity to carry out the purposes of the Act and to comply with 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.

C. Selection of Member Representative Directors

Under the Agreement, 20% of the Exchange's directors are selected through a process in which the Exchange's member nominating committee nominates a slate of candidates but members also have the opportunity to nominate alternative candidates. If no alternative candidates are nominated by members, the candidates recommended by the member nominating committee are elected. Alternatively, if alternative candidates are nominated, there is a "Contested Election" in which members cast ballots in order to determine who fills the vacancies. The Exchange proposes to prohibit a member, either

¹⁹ See Notice, 72 FR at 23762, n.16.

alone or together with its affiliates, from casting votes representing more than 20% of the votes cast for a candidate, and to provide that any votes cast by the member, either alone or together with its affiliates in excess of the 20%, limit shall be disregarded. The Exchange also proposes to amend its By-Laws to provide that an Election Date is selected by the Exchange's board on an annual basis, and that members only cast votes on such date if there is a Contested Election. The Commission finds that these changes are consistent with the Act, including Section 6(b)(3) of the Act,²⁰ which requires that a national securities exchange assure the fair representation of its members in the selection of its directors and administration of its affairs. The Commission recently approved similar changes proposed by NASDAQ OMX BX, Inc.²¹

²⁰ 15 U.S.C. 78f(b)(3).

²¹ See Securities Exchange Act Release Nos. 58324 (August 7, 2008), 73 FR 46936, 46940-41 (August 12, 2008) (SR-BSE-2008-02, -23, -25, SR-BSECC-2001-01) and 58864 (October 27, 2008), 73 FR65430 (November 3, 2009) (SR-BSE-2008-45).

III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²² that the proposed rule change (SR-NASDAQ-2009-042) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

Elizabeth M. Murphy
Secretary

²² 15 U.S.C. 78s(b)(2).

²³ 17 CFR 200.30-3(a)(12).