

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61876; File No. SR-NASDAQ-2010-025)

April 8, 2010

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

On February 24, 2010, 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”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the By-Laws of its parent corporation, The NASDAQ OMX Group, Inc. (“NASDAQ OMX”). The proposed rule change was published for comment in the Federal Register on March 4, 2010.<sup>3</sup> The Commission received no comment letters on the proposed rule change. On March 24, 2010, Nasdaq filed Amendment No. 1 to the proposed rule change. Because Amendment No. 1 is technical in nature, the Commission is not publishing it for comment.<sup>4</sup> This order approves the proposed rule change, as modified by Amendment No. 1.

On behalf of its parent company, Nasdaq proposed to make certain amendments to the NASDAQ OMX By-Laws to modify its direct election procedures set forth in Article IV, Section 4.4 of the NASDAQ OMX By-Laws. Under the existing NASDAQ OMX By-Laws, each director receiving a plurality of the votes at any election of directors at which a quorum is

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 61582 (February 25, 2010), 75 FR 9985 (“Notice”).

<sup>4</sup> In Amendment No. 1, Nasdaq noted that the Board of Directors (“Board”) of NASDAQ OMX originally approved the proposed rule change on December 16, 2009 and, on March 23, 2010 approved a portion of the proposed rule change that had not been previously approved.

present is duly elected to the Board.<sup>5</sup> The NASDAQ OMX Corporate Governance Guidelines, however, provide a different standard for uncontested elections and also set forth additional election procedures and practices.<sup>6</sup> Nasdaq proposed to amend the NASDAQ OMX's By-Laws to codify the majority voting standard for uncontested elections contained in the Corporate Governance Guidelines; contested elections would remain subject to the plurality standard.

For uncontested elections, Nasdaq proposed to amend Article IV, Section 4.4 of the NASDAQ OMX By-Laws to impose a majority voting standard, instead of the plurality voting standard, that would require directors to be elected by the holders of a majority of the votes cast at any meeting for the election of directors at which a quorum is present. However, because a director holds office until his or her successor is duly elected and qualified, any incumbent director-nominee who fails to receive the requisite vote would not automatically cease to be a director. Instead, NASDAQ OMX would have such director continue as a "holdover director" until such director's death, resignation or removal, or until his or her successor is duly elected and qualified. To this end, the proposal also includes a provision that would require any incumbent nominee, as a condition to his or her nomination for election, to submit in writing an irrevocable resignation, the effectiveness of which would be conditioned upon the director's failure to receive the requisite vote in any uncontested election and the Board's acceptance of the resignation. The resignation would be considered by the Nominating & Governance Committee

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<sup>5</sup> In the Notice, Nasdaq stated that this is derived from Section 216 of the General Corporation Law of the State of Delaware, which provides that in the absence of the specification in the certificate of incorporation or bylaws of a Delaware corporation (as is the case with NASDAQ OMX), the directors of a Delaware corporation shall be elected by a plurality of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors. See Notice, supra note 3.

<sup>6</sup> The proposed rule change incorporates a modified version of the election procedures and practices contained in the NASDAQ OMX Corporate Governance Guidelines.

and acted upon by the Board in the same manner as a resignation tendered under current rules.<sup>7</sup>

Acceptance of that resignation by the Board would be in accordance with the policies and procedures adopted by the Board for such purpose.<sup>8</sup>

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.<sup>9</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>10</sup> which requires an 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 Act. The Commission also finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>11</sup> which requires that the rules of the exchange be 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 believes that the proposed rule change to amend the NASDAQ OMX By-Laws to adopt a majority vote standard for uncontested elections is consistent with the Act.

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<sup>7</sup> See NASDAQ OMX By-Law Article IV, Section 4.5.

<sup>8</sup> In the Notice, Nasdaq stated that NASDAQ OMX's policies and procedures pertaining to the acceptance of the resignation of its directors are specified in By-Law Article IV, Section 4.4, and that there are no additional policies and procedures other than the provisions in the By-Laws. See Notice, *supra* note 3.

<sup>9</sup> 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).

<sup>10</sup> 15 U.S.C. 78(b)(1).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

The Commission believes that the proposed rule change is designed to allow the members of NASDAQ OMX's Board of Directors to be elected in a manner that closely reflects the desires of its shareholders, while also providing a process for addressing the circumstance when a director fails to receive a majority of votes in an uncontested election.<sup>12</sup> The Commission notes that Nasdaq explained that the process for contested elections is to remain unchanged because if a majority voting standard were to apply in a contested election, the likelihood of a "failed election" (i.e., a situation in which no director receives the requisite vote) would be more pronounced.

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

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<sup>12</sup> The Commission notes that Nasdaq represented that the proposed change would not affect NASDAQ OMX's general election requirements, specifically the voting limitations contained in NASDAQ OMX's certificate of incorporation. The Commission also notes that Nasdaq represented that if NASDAQ OMX seeks to further amend its By-Laws with respect to director elections, including the adoption of any policies and procedure with respect to such elections, it will file a proposed rule change with the Commission

proposed rule change (SR-NASDAQ-2010-025), 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.<sup>13</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).