

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59858; File No. SR-NASDAQ-2009-039)

May 4, 2009

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change to Amend the Certificate of Incorporation and By-Laws of The NASDAQ OMX Group, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on April 27, 2009, The NASDAQ Stock Market LLC (the “NASDAQ Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASDAQ Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The NASDAQ Exchange is filing this proposed rule change with regard to proposed changes to the Restated Certificate of Incorporation (the “Certificate”) and the By-Laws of its parent corporation, The NASDAQ OMX Group, Inc. (“NASDAQ OMX”). The proposed rule change will be implemented as soon as practicable following approval by the Commission. The text of the proposed rule change is available at <http://www.cchwallstreet.com/nasdaq>, at the NASDAQ Exchange’s principal office, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

In its filing with the Commission, the NASDAQ Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASDAQ Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ OMX is proposing to make certain amendments to its By-Laws to make improvements in its governance and update several provisions.

The proposed changes to the By-Laws are as follows:

- Article I is being amended 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.
- Article III is being amended to modify the procedures governing proposals by stockholders, including proposals by stockholders to nominate directors.

Specifically, the amendment will require a stockholder making a proposal to supply more complete information about the stockholder's background, including a description of any agreement, arrangement, or understanding between the stockholder, the beneficial owner of the stock, and any other persons acting in concert with them; a description of any agreement, arrangement or understanding (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or

similar rights, hedging transactions, and borrowed or loaned shares), the effect or intent of which is to mitigate loss to, manage risk or benefit of share price changes for, or increase or decrease the voting power of, such stockholder or such beneficial owner, with respect to shares of stock of NASDAQ OMX; and any other information regarding the stockholder and beneficial owner that would be required to be disclosed in a proxy statement under Section 14(a) of the Act. These changes are designed to provide the NASDAQ OMX Board of Directors and its stockholders with greater insight into the identity and intentions of persons presenting stockholder proposals to allow more thorough consideration of the merits of such proposals. These requirements are deemed satisfied, however, in the case of a proposal that is validly submitted under the rules and regulations promulgated under the Act (i.e., SEC Rule 14a-8) and included in NASDAQ OMX's proxy. However, compliance with the By-Laws or with SEC Rule 14a-8 provides the exclusive means for stockholders to make proposals. The amendments also provide that a representative of a stockholder qualified to appear at an annual meeting must be an officer, manager or partner of the stockholder or must have written authorization from the stockholder. The amendments also make several minor clarifying changes to the text of Article III.

- Article IV is being amended to state explicitly that the Management Compensation Committee and the Audit Committee must be composed exclusively of independent directors within the meaning of the rules of the NASDAQ Stock Market that govern NASDAQ OMX's listing (and, in the

case of the Audit Committee, Section 10A of the Act).³ Although NASDAQ OMX adheres scrupulously to the independence requirements imposed by the NASDAQ Stock Market and the Act, it believes that these requirements should be explicitly stated in the By-Laws as well. NASDAQ OMX is also removing language making its Chief Executive Officer an ex-officio, non-voting member of the Management Compensation Committee. In this regard, listing standards of the NASDAQ Stock Market require management compensation determinations regarding executive officers to be made by vote of the Board's independent directors, or by vote of or upon the recommendation of a committee composed solely of independent directors.⁴ NASDAQ OMX has satisfied this requirement by submitting compensation decisions to the vote of all of NASDAQ OMX's independent directors, but removing the Chief Executive Officer as an ex-officio director will provide it with flexibility to act upon the vote or upon the recommendation of the committee.

- Currently, NASDAQ OMX's Nominating Committee is required to be composed of persons who are not directors or who are directors not standing for re-election. This compositional requirement, which NASDAQ OMX's predecessor, The Nasdaq Stock Market, Inc., originally adopted while it was a wholly owned subsidiary of the National Association of Securities Dealers

³ 15 U.S.C. 78j-1(m). Notably, "Staff Directors," who are officers of NASDAQ OMX serving on the NASDAQ OMX Board, are not considered independent under these provisions, and are therefore ineligible for service on the Audit Committee or Management Compensation Committee, or, as discussed below, the newly constituted Nominating Committee.

⁴ NASDAQ Exchange Rule 4350(c)(3).

(“NASD”), is highly unusual for a public company such as NASDAQ OMX. In light of NASDAQ OMX’s continued evolution into a public company with global operations, NASDAQ OMX believes that it is appropriate to adopt a standard nominating committee structure in which the committee is composed exclusively of independent directors. Under the amended by-law, the nominating committee shall consist of four or five directors, each of whom shall be an independent director within the meaning [sic] the rules of the NASDAQ Exchange. In addition, 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).

- Article VIII is being amended to provide that NASDAQ OMX shall 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. Thus, for example, a director of one of NASDAQ OMX’s US or Nordic exchanges would be entitled to indemnification (and advancement of expenses) by NASDAQ OMX if made a party to a lawsuit to the same extent as a director of NASDAQ OMX. Similarly, 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 is being extended to persons serving as an agent of any wholly owned subsidiary of NASDAQ OMX. Article VIII is also amended to 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.

- Article IX is being amended to modernize the language of the provisions dealing with capital stock to reflect possible participation in the Direct Registration System (the “DRS”). The DRS provides for the electronic registration of eligible securities in an investor's name on the books of the transfer agent or corporation, eliminating the need for physical stock certificates or shares held in book-entry form by the beneficial owner's broker. Although under the Delaware General Corporation Law, NASDAQ OMX can authorize participation in the program through a resolution, the various amendments to Article IX track more closely the language of Section 158 of the Delaware General Corporation Law, as recently revised, to explicitly reference the possibility of capital stock in uncertificated form. The amendments, however, do not require NASDAQ OMX to participate in the DRS or to eliminate stock certificates.

Article XII is being amended to conform certain of its provisions more closely to corresponding provisions in the Amended and Restated By-Laws of NYSE Euronext (the “NYSE Euronext By-Laws”). Article XII contains provisions that govern the relationship between NASDAQ OMX and each of its subsidiaries that is a self-regulatory organization. First, the article requires NASDAQ OMX’s “[d]irectors, officers, employees, and agents” (emphasis added) to give due regard to the preservation of the independence of each self-regulatory subsidiary, 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. Corresponding provisions of Articles VII, VIII, and IX of the NYSE Euronext By-Laws, however, do not include the ambiguous and potentially expansive word “agent.” NASDAQ OMX is concerned that a broad construction of the term – to include not only parties with which it establishes an explicit contractual agency relationship, but also other service providers such as law firms and financial advisors that may act on NASDAQ OMX’s behalf on certain occasions – may deter some parties from providing services to NASDAQ OMX. However, in lieu of the requirement to obtain specific consents from agents, NASDAQ OMX proposes to adopt a provision from the NYSE Euronext By-Laws providing that NASDAQ OMX shall comply with the U.S. federal securities laws and the rules and regulations thereunder and shall cooperate with the SEC and the Self-Regulatory Subsidiaries pursuant to and to the extent of their respective regulatory authority, and shall take reasonable steps necessary to cause its agents to cooperate, with the SEC and, where applicable, the Self-Regulatory Subsidiaries pursuant to their regulatory authority. Second, Article XII provides that

NASDAQ OMX and its officers, directors and employees⁵ agree to maintain an agent for service of process in the U.S. By contrast, Article VII of the NYSE Euronext By-Laws includes a statement that officers, directors and employees shall be deemed to agree that the Corporation may serve as the U.S. agent for service of process. Accordingly, NASDAQ OMX proposes to adopt this more self-executing version. Finally, while the NASDAQ OMX By-Laws provide that NASDAQ OMX shall take such action as is necessary to insure that officers, directors and employees consent in writing to the applicability of these provisions, Article IX of the NYSE Euronext By-Laws requires only that NYSE Euronext take reasonable steps necessary to cause officers, directors, and employees to consent. Although NASDAQ OMX has begun the process of collecting written consents from current officers, directors, and employees, it believes that the current language may be unreasonably demanding as applied to a multinational exchange operator with over 2,000 employees in over 20 countries. Accordingly, NASDAQ OMX proposes to adopt a version of NYSE Euronext's language, which will require reasonable steps to obtain consent from both current officers, directors, and employees, as well as prospective officers, directors, and employees prior to their acceptance of a position.

2. Statutory Basis

The NASDAQ Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁶ in general, and with Sections 6(b)(1) and (b)(5) of the Act,⁷ in particular, in that the proposal enables the NASDAQ Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to

⁵ The existing reference to "agents" in the sentence is proposed to be deleted.

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(1), (5).

comply with and enforce compliance by members and persons associated with members with provisions of the Act, the rules and regulations thereunder, and self-regulatory organization rules, and is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 proposed changes will enhance the clarity of NASDAQ OMX's governance documents and improve its Board committee structures.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASDAQ Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2009-039 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2009-039. This file number should be included on the subject line if e-mail is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C.

552, will be available for inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NASDAQ-2009-039, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Florence E. Harmon
Deputy Secretary

⁸ 17 CFR 200.30-3(a)(12).