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For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-73516; File Nos. SR-BSECC-2014-001; SR-BX-2014-045; SR-NASDAQ-2014-093; SR-Phlx-2014-61; SR-SCCP-2014-01]

### Self-Regulatory Organizations; Boston Stock Exchange Clearing Corporation; NASDAQ OMX BX, Inc.; the NASDAQ Stock Market LLC; NASDAQ OMX PHLX LLC; Stock Clearing Corporation of Philadelphia; Order Approving Proposed Rule Changes To Amend the Restated Certificate of Incorporation and By-Laws of the NASDAQ OMX Group, Inc.

November 5, 2014.

#### I. Introduction

On September 10, 2014, Boston Stock Exchange Clearing Corporation (“BSECC”), NASDAQ OMX BX, Inc. (“BX”), the NASDAQ Stock Market LLC (“NASDAQ”), NASDAQ OMX PHLX LLC (“Phlx”), and the Stock Clearing Corporation of Philadelphia (“SCCP” and, together with BSECC, BX, NASDAQ and Phlx, the “SROs” or “Self-Regulatory Subsidiaries”), filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> proposed rule changes with respect to amendments to the Amended and Restated Certificate of Incorporation (“Charter”) and By-Laws

(“By-Laws”) of the NASDAQ OMX Group, Inc. (“NASDAQ OMX”), the parent company of the SROs.<sup>4</sup> The proposed rule changes by BSECC and SCCP were published for comment in the **Federal Register** on September 25, 2014<sup>5</sup> and the proposed rule changes by BX, NASDAQ and Phlx were published for comment in the **Federal Register** on September 29, 2014.<sup>6</sup> The Commission received no comment letters on the proposals.

#### II. Discussion

##### A. Background

Article Fourth, Paragraph C of NASDAQ OMX's Charter includes a voting limitation that generally prohibits a stockholder from voting shares beneficially owned, directly or indirectly, by such stockholder in excess of 5% of the then-outstanding shares of capital stock of NASDAQ OMX entitled to vote as of the record date in respect of any matter. Pursuant to Article Fourth, Paragraph C(6) of the Charter, NASDAQ OMX's Board may grant exemptions to this limitation prior to the time a stockholder beneficially owns more than 5% of the outstanding shares of stock entitled to vote on the election of a majority of directors at such time. Article Fourth, Paragraph C(6) of the Charter and Section 12.5 of the By-Laws limit the Board's authority to grant the exemption. The SROs note that these provisions, which are intended to be substantively identical, currently contain some language differences. Therefore, the SROs

<sup>4</sup> Certain provisions of NASDAQ OMX's Charter and By-Laws are rules of a self-regulatory organization if they are stated policies, practices, or interpretations, as defined in Rule 19b-4 under the Act, of the self-regulatory organization, and must be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b-4 thereunder. See Securities Exchange Act Release Nos. 58183 (July 17, 2008), 73 FR 42850 (July 23, 2008) (File No. SR-NASDAQ-2008-035); 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (File Nos. SR-BSE-2008-02; SR-BSE-2008-23; SR-BSE-2008-25; SR-BSECC-2008-01); and 58180 (July 17, 2008), 73 FR 42890 (July 23, 2008) (File No. SR-SCCP-2008-01) (Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the By-Laws of the NASDAQ OMX Group, Inc. in Connection With the Acquisitions of Boston Stock Exchange, Incorporated and Philadelphia Stock Exchange, Inc.). Accordingly, the SROs have filed with the Commission proposed changes to the NASDAQ OMX Charter and By-Laws.

<sup>5</sup> See Securities Exchange Act Release Nos. 73144 (September 19, 2014), 79 FR 57624 (September 25, 2014) (SR-BSECC-2014-001) and 73145 (September 19, 2014), 79 FR 57648 (September 25, 2014) (SR-SCCP-2014-01).

<sup>6</sup> See Securities Exchange Act Release Nos. 73195 (September 23, 2014), 79 FR 58397 (September 29, 2014) (SR-BX-2014-045); 73193 (September 23, 2014), 79 FR 58388 (September 29, 2014) (SR-NASDAQ-2014-093); and 73194 (September 23, 2014), 79 FR 58393 (September 29, 2014) (SR-Phlx-2014-61).

propose that NASDAQ OMX adopt the amendments described below to the Charter and By-Laws to conform these provisions and remove any ambiguity that may exist.

##### B. Proposed Amendments to the Charter

First, the SROs propose to add a statement to Article Fourth, Paragraph C(6) of the Charter that for so long as NASDAQ OMX shall control, directly or indirectly, any Self-Regulatory Subsidiary, a resolution of the Board to approve an exemption for any person under Article Fourth, Paragraph C(6) of the Charter shall not be permitted to become effective until such resolution has been filed with and approved by the SEC under Section 19 of the Act. In addition, the SROs propose to define “Self-Regulatory Subsidiary,” which is currently not a defined term in the Charter, as any subsidiary of NASDAQ OMX that is a “self-regulatory organization” as defined under Section 3(a)(26) of the Act.<sup>7</sup> These changes would conform the Charter to language currently in the By-Laws.

Second, the SROs propose to add an additional language to the current provision in Article Fourth, Paragraph C(6) of the Charter that states the Board may not approve an exemption to the 5% voting limitation for: (i) A registered broker or dealer or an affiliate thereof or (ii) an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Act. Specifically, the SROs propose to add a proviso to Article Fourth, Paragraph C(6) of the Charter stating that for these purposes, an “affiliate” shall not be deemed to include an entity that either owns 10% or less of the equity of a broker or dealer, or receives 1% or less of its consolidated gross revenues from a broker or dealer. This change would conform the Charter to language currently in the By-Laws.

Third, the SROs propose to change a reference in Article Fourth, Paragraph C(6) of the Charter from The NASDAQ Stock Market LLC to “the Self-Regulatory Subsidiaries.” This change would conform the Charter to language currently in the By-laws and would also include the other Self-Regulatory Subsidiaries in addition to the NASDAQ Stock Market LLC.

Fourth, the SROs propose to add a requirement to Article Fourth,

<sup>7</sup> Under Section 3(a)(26) of the Act, a “self-regulatory organization” is defined as “any national securities exchange, registered securities association, or registered clearing agency . . . .” 15 U.S.C. 78c(a)(26). At present, this defined term would include NASDAQ, BX and Phlx, which are national securities exchanges, and BSECC and SCCP, which are registered clearing agencies that are currently dormant.

<sup>16</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

Paragraph C(6) of the Charter to state that, prior to granting an exemption from the 5% voting limitation, the Board must also determine that granting the exemption would promote the prompt and accurate clearance and settlement of securities transactions (and to the extent applicable, derivative agreements, contracts and transactions), assure the safeguarding of securities and funds in the custody or control of the self-regulatory subsidiaries that are clearing agencies or securities and funds for which they are responsible, foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, and remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions. This change would confirm the Charter to language currently in the By-Laws.

Finally, the SROs propose that Article Fourth, Paragraph C(6) of the Charter be amended to correct a cross-reference to subparagraph 6(b), which no longer exists.

#### *C. Proposed Amendments to the By-Laws*

The SROs propose to amend the definition of “Self-Regulatory Subsidiary” in Article I(s) of the By-Laws to refer to any subsidiary of NASDAQ OMX that is a self-regulatory organization as defined under Section 3(a)(26) of the Act, rather than list specific subsidiaries that would fall within this category. The proposed definition is the same definition proposed for purposes of the Charter and would capture NASDAQ OMX’s current self-regulatory subsidiaries as well as any subsidiaries that in the future would meet the definition of “self-regulatory organization” under the Act.

The SROs also propose to correct a typographical error in Article I and make minor edits to Section 12.5 of the Bylaws to conform the language regarding the 5% voting limitation to the language in the analogous provision of the Charter.<sup>8</sup>

### **III. Commission Findings**

After careful review, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, in the case of the proposals by BX, NASDAQ and Phlx,

and to a clearing agency, in the case of the proposals by BSECC and SCCP.<sup>9</sup> In particular, the Commission finds that the proposed rule changes by BX, NASDAQ and Phlx are consistent with Section 6(b)(1) of the Act,<sup>10</sup> which, among other things, requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to comply, 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. In addition, the Commission finds that the proposed rule changes by BX, NASDAQ and Phlx are consistent with Section 6(b)(5) of the Act,<sup>11</sup> which, among other things, requires that the rules of the exchange be 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 Commission also finds that the proposed rule changes by BSECC and SCCP are consistent with Section 17A(b)(3)(C) of the Act,<sup>12</sup> because the proposals assure a fair representation of shareholders and participants in the selection of directors and administration of their affairs. While the proposals relate to the organizational documents of NASDAQ OMX, rather than BSECC and SCCP, BSECC and SCCP are indirectly owned by NASDAQ OMX, and therefore, NASDAQ OMX’s stockholders have an indirect stake in BSECC and SCCP. In addition, the participants in BSECC and SCCP, to the extent any exist, could purchase stock in NASDAQ OMX in the open market, just like any other stockholder. The proposals ensure that NASDAQ OMX stockholders have clarity about the existing voting limitation in NASDAQ OMX’s Charter and By-Laws. As a result, the proposals assure a fair representation of NASDAQ OMX’s stockholders in the selection of directors and administration of NASDAQ OMX’s

affairs, as well as the affairs of BSECC and SCCP.

The SROs have proposed certain changes to conform the provisions in the Charter and the By-Laws relating to the procedures by which NASDAQ OMX’s Board may grant an exemption to the prohibition on any NASDAQ OMX stockholder voting shares in excess of 5% of the Company’s then-outstanding shares of capital stock. The Commission believes that these proposed changes will eliminate confusion that may exist because of the current language differences between the two documents. In addition, the proposed definition of “Self-Regulatory Subsidiary” will ensure that any NASDAQ OMX subsidiary that meets the definition of “self-regulatory organization” under the Act will be subject to the Charter and By-Law provisions relating to Self-Regulatory Subsidiaries. Further, the remaining proposed non-substantive clarifying changes are clarifying in nature, and thus should help make the Charter and By-Laws clearer and easier to understand.

### **IV. Conclusion**

For the foregoing reasons, the Commission finds that the proposed rule changes are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, in the case of BX, NASDAQ and Phlx, and to a registered clearing agency, in the case of BSECC and SCCP.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act<sup>13</sup> that the proposed rule changes (SR-BSECC-2014-001; SR-BX-2014-045; SR-NASDAQ-2014-093; SR-Phlx-2014-61; SR-SCCP-2014-01) are approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Kevin M. O’Neill,**

*Deputy Secretary.*

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<sup>8</sup> See Securities Exchange Act Release No. 71353 (January 17, 2014), 79 FR 4209 (January 24, 2014) (SR-BSECC-2013-001, SR-BX-2013-057, SR-NASDAQ-2013-148, SR-Phlx-2013-115, SR-SCCP-2013-01), at note 14.

<sup>9</sup> In approving the proposed rule changes, the Commission notes that it has considered the proposed rule changes’ impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

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

<sup>12</sup> 15 U.S.C. 78q-1(b)(3)(C).

<sup>13</sup> 15 U.S.C. 78f(b)(2).

<sup>14</sup> 17 CFR 200.30-3(a)(12).