

subject line if email 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, 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 office 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-BOX-2014-04, and should be submitted on or before February 14, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71353; File Nos. SR-BSECC-2013-001; SR-BX-2013-057; SR-NASDAQ-2013-148; SR-Phlx-2013-115; SR-SCCP-2013-01]

### 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.

January 17, 2014.

#### I. Introduction

On November 27, 2013, 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 Restated Certificate of Incorporation ("Charter") and By-Laws (the "By-Laws") of the NASDAQ OMX Group, Inc. ("NASDAQ OMX"), the parent company of the SROs.<sup>4</sup> The proposed rule changes were published for comment in the **Federal Register** on December 12, 2013.<sup>5</sup> The Commission

<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.

<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 No. 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). 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. 71019 (December 6, 2013), 78 FR 75633 (December 12, 2013) (SR-BSECC-2013-001); 71011 (December 6, 2013), 78 FR 75645 (December 12, 2013) (SR-BX-2013-057); 71013 (December 6, 2013), 78 FR 75619 (December 12, 2013) (SR-NASDAQ-2013-148) ("NASDAQ Notice"); 71010 (December 6, 2013), 78 FR 75661 (December 12, 2013) (SR-Phlx-2013-115);

received no comment letters on the proposals.

#### II. Discussion

##### A. Proposed Amendments to the Charter

##### 1. Removal and Replacement of Supermajority Voting Requirements

The SROs are proposing amendments to provisions of the Charter to replace each supermajority voting requirement in the Charter with a "majority of outstanding shares" voting requirement. The Charter currently includes the following three supermajority voting requirements pertaining to the: (1) Removal of directors;<sup>6</sup> (2) adoption, alteration, amendment or repeal of any By-Law;<sup>7</sup> and (3) amendment, repeal, or adoption of provisions inconsistent with certain charter provisions.<sup>8</sup> For each of the three foregoing provisions, the SROs are proposing to remove the requirement for an affirmative vote of at least 66⅔% of the total voting power of the Voting Stock and replace it with a voting standard requiring the affirmative vote of a majority of the outstanding Voting Stock.

The SROs state that, in developing this proposal, NASDAQ OMX considered the relative weight of the arguments for and against supermajority voting requirements.<sup>9</sup> The SROs believe

71020 (December 6, 2013), 78 FR 75598 (December 12, 2013) (SR-SCCP-2013-01) (collectively, "Notices").

<sup>6</sup> Article Fifth, Paragraph D provides that, except for the Preferred Stock Directors (as defined in Article Fifth, Paragraph B), any director, or the entire Board of Directors ("Board"), may be removed from office at any time, but only by the affirmative vote of at least 66⅔% of the total voting power of the outstanding shares of NASDAQ OMX's capital stock entitled to vote generally in the election of directors ("Voting Stock"), voting together as a single class.

<sup>7</sup> Article Eighth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the total voting power of the outstanding Voting Stock, voting together as a single class, shall be required in order for the stockholders to adopt, alter, amend or repeal any By-Law.

<sup>8</sup> Article Ninth, Paragraph A provides that the affirmative vote of the holders of at least 66⅔% of the voting power of the outstanding Voting Stock, voting together as a single class, shall be required to amend, repeal or adopt any provision inconsistent with paragraph C of Article Fourth, Article Fifth, Article Seventh, Article Eighth, or Article Ninth of the Charter.

Article Fourth, Paragraph C sets forth the 5% voting limitation, which provides that holders of NASDAQ OMX's voting securities may not cast votes in excess of 5% of NASDAQ OMX's outstanding voting securities. The SROs note that NASDAQ OMX is not proposing any change to the 5% voting limitation itself. According to the SROs, NASDAQ OMX only proposes that any future amendment of the 5% voting limitation will require the approval of stockholders holding a majority of the outstanding shares, rather than stockholders holding 66⅔% of the outstanding shares.

<sup>9</sup> See, e.g., NASDAQ Notice, 78 FR at 75620. The SROs remark that, historically, supermajority voting

Continued

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

that, while it is important to protect against coercive takeover tactics, it is also critically important to obtain stockholder input and respond to stockholder concerns about corporate governance.<sup>10</sup> The SROs believe that the proposed “majority of outstanding shares” voting requirement will continue to provide some protection against proposals that are harmful to the stockholders.<sup>11</sup> The SROs therefore believe that a “majority of outstanding shares” standard is a balanced outcome that responds to stockholder feedback while appropriately maintaining NASDAQ OMX’s defensive posture against hostile takeovers.<sup>12</sup>

## 2. Non-Substantive Changes

The SROs also propose to amend and restate the Charter to make non-substantive changes, as described in greater detail in the Notices.<sup>13</sup> Generally, these changes involve the deletion of obsolete references, the correction of typographical errors, and amendments to the introductory and concluding language of the Charter as required by Delaware law. The SROs believe that the amendment and restatement of the Charter to incorporate these non-substantive changes will simplify and streamline the document.<sup>14</sup>

requirements have protected corporations against coercive takeover tactics by requiring broad stockholder support for certain types of transactions or governance changes. The SROs indicate that in recent years, corporate governance standards have evolved, and many stockholder rights advocates have argued that supermajority voting requirements limit stockholders’ participation in corporate governance.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* While the SROs note that this requirement is less difficult to satisfy than a supermajority voting requirement, they believe that it is more difficult to satisfy than a “majority of votes cast” requirement.

<sup>12</sup> *Id.*

<sup>13</sup> *See, e.g.*, NASDAQ Notice, 78 FR at 75620.

<sup>14</sup> *Id.* However, the SROs note that, after the non-substantive changes, the remaining text of Article Fourth, Paragraph C(6) of the Charter includes an obsolete cross-reference to Section 6(b) of Article Fourth, Paragraph C in the second sentence, which begins “The Board, however, may not approve an exemption under Section 6(b) . . . .” *See, e.g.*, NASDAQ Notice, 78 FR at 75620, at note 9.

The SROs note that this cross-reference, which should refer to Section 6 without further reference to a subsection (b), cannot be corrected without NASDAQ OMX seeking further approval of its stockholders, which would require NASDAQ OMX to call and hold a stockholder meeting. Generally, NASDAQ OMX holds stockholder meetings only once or twice a year. The SROs note that it is atypical for a large public company like NASDAQ OMX to submit a proposal to its stockholders solely to correct a cross-reference in its Charter. The SROs state that following consultation by NASDAQ OMX with outside counsel, it is clear, based on the drafting history of this provision, that the intent of the cross-reference is to refer to Section 6 of Article Fourth, Paragraph C of the Charter. In other words,

## B. Proposed Elimination of Certificate of Designation

The SROs propose to eliminate NASDAQ OMX’s Certificate of Designation, Preferences and Rights of Series A Convertible Preferred Stock (“Series A Convertible Preferred Stock”), and all matters set forth therein.<sup>15</sup> According to the SROs, NASDAQ OMX will file a certificate of elimination with the Secretary of State of the State of Delaware to eliminate the Series A Convertible Preferred Stock. The SROs state that, under Delaware law, a certificate of elimination is deemed to be an amendment to the Charter, but, because the amendment is limited in scope, it does not require the approval of NASDAQ OMX’s stockholders.<sup>16</sup>

## C. Proposed Amendments to the Bylaws

### 1. Special Meetings of Stockholders

Current Section 3.2 of the By-Laws provides that only NASDAQ OMX may call special meetings of its stockholders. The SROs state that, in response to feedback from NASDAQ OMX’s stockholders, this provision will be deleted and replaced with language that will allow the stockholders to call

the second sentence of Article Fourth, Paragraph C(6) should read: “The Board, however, may not approve an exemption under Section 6: (i) For 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 Exchange Act.” The SROs state that, under no circumstances will the obsolete cross-reference be read to imply that the Board could grant an exemption to the ownership limitation in Article Fourth, Paragraph C(6) of the Charter for a registered broker or dealer or an Affiliate (as defined in Article Fourth, Paragraph C(3)(a)) thereof, or an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act. The SROs remark that the proposed amendments to Section 12.5 of the By-Laws will eliminate cross-references to the now obsolete subsection (b) of Article Fourth, Paragraph C(6) of the Charter. According to the SROs, NASDAQ OMX recognizes that there are some differences in language between the second sentence of Article Fourth, Paragraph C(6) of the Charter and the second sentence of Section 12.5 of the By-Laws. To the extent that these differences would cause a difference in interpretation, the SROs state that, following consultation by NASDAQ OMX with outside counsel, the Charter language shall prevail. The SROs state that, as soon as feasible, NASDAQ OMX plans to present a proposal to the stockholders to conform this provision of the Charter to the By-Laws.

<sup>15</sup> *See, e.g.*, NASDAQ Notice, 78 FR at 75620. As described in the Notices, the Series A Convertible Preferred Stock was created in 2009 to facilitate the conversion of certain notes into common stock. In 2010, following stockholder approval, all issued shares of the Series A Convertible Preferred Stock were converted into common stock. The SROs represent that, since then, no shares of the Series A Convertible Preferred Stock have been outstanding, and NASDAQ OMX has no intention to issue further shares of this series.

<sup>16</sup> *See, e.g.*, NASDAQ Notice, 78 FR at 75620–21 (citing Section 151(g) of the DGCL).

special meetings, subject to certain procedures. The SROs note that, similar to the elimination of the supermajority voting requirements, the implementation of the right of stockholders to call a special meeting has received recent attention from investor and corporate governance advocates.<sup>17</sup> The SROs remark that these advocates argue that such a right will enable stockholders to raise and act on matters that arise between annual meetings.<sup>18</sup> According to the SROs, NASDAQ OMX believes that it is appropriate to allow stockholders who meet certain procedural requirements to call a special meeting.<sup>19</sup> The SROs explained that, by incorporating these procedural requirements, NASDAQ OMX intends to ensure timely notice of a meeting request and to gather sufficient information about the proposing stockholder(s) and the proposal.<sup>20</sup> The SROs state that, among other things, this information will ensure that NASDAQ OMX is able to comply with its disclosure and other requirements under applicable law and that NASDAQ OMX, its Board and its stockholders are able to assess the proposal adequately.<sup>21</sup> The proposed procedural requirements are described in greater detail in the Notices.<sup>22</sup>

### 2. Annual Meetings of Stockholders

Section 3.1 of NASDAQ OMX’s By-Laws, which is the “advance notice” provision,<sup>23</sup> requires stockholders to notify NASDAQ OMX, during a specified period in advance of an annual meeting, of their intention to nominate one or more persons for election to the Board or to present a business proposal for consideration by the stockholders at the meeting. The SROs explain that, while designing the proposed procedural requirements for stockholders to call a special meeting, as noted generally above and described in greater detail in the Notices, NASDAQ OMX evaluated the existing procedural requirements for stockholders to bring business before an annual meeting.<sup>24</sup>

<sup>17</sup> *See, e.g.*, NASDAQ Notice, 78 FR at 75621.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g.*, NASDAQ Notice, 78 FR at 75621–22.

<sup>23</sup> “Advance notice” provisions allow stockholder(s) to bring business before an annual meeting of stockholders, but set forth procedural requirements to ensure that companies and boards have sufficient information about the proposal and the proposing stockholder(s), as well as adequate time to consider the proposal, by requiring the proposing stockholder(s) to give advance notice of the intention to bring the proposal before the annual meeting.

<sup>24</sup> *See, e.g.*, NASDAQ Notice, 78 FR at 75622–23.

According to the SROs, the proposed changes to some of these procedures are intended to enhance and conform them, in some cases, to the procedures relating to special meetings.<sup>25</sup> The SROs state that generally the proposed amendments add requirements for extensive disclosures by proposing stockholders about themselves, any proposed nominees for director and any proposed items of business to be brought before a meeting.<sup>26</sup> The specific amendments are described in greater detail in the Notices.<sup>27</sup>

### 3. Questionnaire, Representation and Agreement for Director-Nominees

The SROs propose to add new Section 3.5 to the By-laws to require nominees for director to deliver to NASDAQ OMX, in accordance with the time periods prescribed for delivery of a stockholder's notice: (i) A written questionnaire with respect to the background and qualifications of the nominee; and (ii) a written representation and agreement as to certain matters. The provisions of the specific written representation and agreement are discussed in greater detail in the Notices.<sup>28</sup> The SROs believe that the requirements of proposed Section 3.5 of the By-Laws, which will apply to both NASDAQ OMX's and stockholders' nominees for director positions, will ensure that NASDAQ OMX has the necessary information about nominees to fulfill its public disclosure requirements.<sup>29</sup> The SROs state that the requirements also will ensure that nominees will comply with the legal obligations, policies, and procedures applicable to all NASDAQ OMX directors.<sup>30</sup>

### 4. Removal and Replacement of Supermajority Voting Provisions

The SROs propose to amend each provision of the By-Laws that currently requires a supermajority vote of stockholders to instead require a "majority of votes outstanding." The By-Laws currently include the following two supermajority voting requirements, each of which conforms to an analogous provision in the Charter. The SROs propose conforming replacements to the supermajority voting requirements in Section 4.6 (pertaining to removal of directors) and Section 11.1 (pertaining to adoption, alteration, amendment or repeal of the By-Laws) with a voting

standard requiring the affirmative vote of a majority of the outstanding Voting Stock.<sup>31</sup> As discussed above with respect to the analogous Charter amendments, the SROs believe that a "majority of outstanding shares" standard reflects a balanced approach that responds to stockholder feedback while appropriately maintaining NASDAQ OMX's defensive posture against hostile takeovers.<sup>32</sup>

### 5. Procedure for Filling Board Vacancies

Section 4.8 of the By-Laws sets forth the procedures to fill a director position that has become vacant, whether because of death, disability, disqualification, removal or resignation. Under the current provisions, if such a vacancy occurs, the Nominating & Governance Committee of the Board shall nominate, and the Board shall elect by majority vote, a person to fill the vacancy. In light of the addition of a right for stockholders to call a special meeting, as discussed above, the SROs propose amendments to Section 4.8 to state explicitly that vacancies on the Board are to be filled by a majority vote of the Board, and not by stockholders.<sup>33</sup> In addition, to prescribe procedures in case multiple Board vacancies occur at the same time, the proposed amendments state that a Board vacancy shall be filled by the majority of the directors, even if there is less than a quorum, or by the sole remaining director, if there is only one director remaining on the Board.<sup>34</sup> The SROs note that the proposed amendments do not change any of the other procedures for filling Board vacancies.<sup>35</sup>

### 6. Use of Electronic Means for Certain Notices and Related Waivers

The SROs propose amendments to Sections 4.12(a) and (b) of the By-Laws to provide that both notices of meetings of the Board, and waivers of such notices, can be given by email or other means of written electronic transmission.<sup>36</sup> The SROs state that these amendments are intended merely

to expand the means through which notices of meetings and waivers of notices may be given, and the amendments do not affect any of the other procedural requirements of Sections 4.12(a) and (b).<sup>37</sup> In addition, the SROs state that the proposed amendments reflect current practices, as a substantial amount of communications between NASDAQ OMX and its directors, outside of Board meetings, occurs through electronic means.<sup>38</sup>

### 7. Composition of Management Compensation Committee

The SROs propose amendments to Section 4.13(f) of the By-Laws, which relate to the composition of the Management Compensation Committee of NASDAQ OMX's Board, to conform to the recent amendments to NASDAQ's listing rules. Specifically, the SROs propose to state that NASDAQ OMX's Management Compensation Committee must consist of at least two members and that each member shall meet the eligibility requirements set forth in the NASDAQ Stock Market Rules ("Rules"). As explained in the Notices, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act and Rule 10C-1 under the Exchange Act,<sup>39</sup> NASDAQ recently amended its listing rules relating to compensation committees.<sup>40</sup> The SROs note that, because NASDAQ OMX is listed on NASDAQ, it must comply with these listing rules just like any other listed company.

### 8. No Amendment or Repeal of Certain By-Law Amendments

The SROs propose to add a proviso to Section 11.2 of the Bylaws to state that no By-Law adopted by the stockholders shall be amended or repealed by the Board if the By-Law so adopted so provides. The SROs state that this is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholder

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., NASDAQ Notice, 78 FR at 75626. Currently, Section 4.12(a) of the By-Laws provides that notice of any meeting of the Board shall be deemed duly given to a director if, among other methods, the notice is sent to the director at the address last made known in writing to NASDAQ OMX by telegraph, telefax, cable, radio or wireless. Section 4.12(b) of the By-Laws provides that such notice of a board meeting need not be given to any director if waived by the director in writing or by electronic transmission (or by telegram, telefax, cable, radio or wireless and subsequently confirmed in writing or by electronic transmission).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See Public Law 111-203, 124 Stat. 1376 (2010) and 17 CFR 240.10C-1.

<sup>40</sup> See Securities Exchange Act Release Nos. 68640 (January 11, 2013), 78 FR 4554 (January 22, 2013) (SR-NASDAQ-2012-109); 71037 (December 11, 2013), 78 FR 76179 (December 16, 2013) (SR-NASDAQ-2013-147). Among other things, the Rules related to listing require each NASDAQ-listed company, with certain exceptions, to have a compensation committee of its board of directors, consisting of a minimum of two independent directors who meet additional eligibility requirements relating to compensatory fees and affiliation. See NASDAQ Rule 5605(d)(2), which sets forth requirements for compensation committee composition, and NASDAQ IM 5605-6.

<sup>25</sup> See, e.g., NASDAQ Notice, 78 FR at 75623.

<sup>26</sup> *Id.*

<sup>27</sup> See, e.g., NASDAQ Notice, 78 FR at 75623-25.

<sup>28</sup> See, e.g., NASDAQ Notice, 78 FR at 75625.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

action to amend or repeal the By-Laws.<sup>41</sup>

### 9. Non-Substantive Changes

Finally, the SROs propose additional non-substantive changes, as described in greater detail in the Notices,<sup>42</sup> which the SROs believe will simplify and streamline the By-Laws.

### 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>43</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>44</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>45</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 of the Act,<sup>46</sup> which, among other things, requires that the rules of a clearing agency be designed to facilitate the prompt and accurate clearance and settlement of securities transactions

and, to the extent applicable, derivative agreements, contracts, and transactions, to assure the safeguarding of securities and funds in its custody or control or for which it is responsible, and to protect investors and the public interest. In particular, the Commission finds that the proposed rule changes contained in the BSECC and SCCP proposals are consistent with Section 17A(b)(3)(C) of the Act,<sup>47</sup> which requires that the rules of the clearing agency assure a fair representation of its shareholders (or members) and participants in the selection of its directors and administration of its affairs.

The Commission discusses below certain proposed revisions to the Charter and the By-Laws.

#### Majority Shares Voting Requirement and Special Meetings

Specifically, the Commission believes that the proposed rule changes to adopt a “majority of outstanding shares” standard for changes to NASDAQ OMX’s Charter and By-Laws and to implement a stockholder right to call a special meeting are consistent with the Act. The Commission notes that the SROs have represented that these proposed changes are responsive to individual stockholder proposals that were either approved or had significant support from stockholders at the most recent annual meeting for NASDAQ OMX. The Commission notes that the change to a “majority of outstanding shares” standard is designed to allow certain corporate changes to occur in a manner that closely reflects the desires of NASDAQ OMX’s shareholders.<sup>48</sup>

The SROs also have proposed to prevent the Board from amending or repealing By-Law amendments approved by the stockholders. The SROs have stated that the prohibition on the NASDAQ OMX Board amending or repealing By-Law amendments approved by the stockholders is a stockholder-friendly provision that is intended to prevent the Board from subsequently overriding stockholders’ wishes. The Commission notes that, pursuant to Section 11.3 of the By-laws, for so long as NASDAQ OMX shall control, directly or indirectly, any SRO, any proposed adoption, alteration, amendment, change or repeal of any By-Law shall be submitted to the Board of

each SRO, and if any such proposed amendment must, 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.

#### Enhanced Procedures for Stockholder Meetings

The SROs have also proposed to amend the NASDAQ OMX By-Laws: (i) To enhance the “advance notice” procedures; (ii) to require certain information and agreements from director-nominees; (iii) to clarify the procedures for filling Board vacancies; and (iv) to allow the use of electronic means for certain notices and waivers.

The Commission notes that the SROs have stated that the additional procedural requirements relating to special and annual meetings by NASDAQ OMX are designed protect investors by stating clearly and explicitly the procedures stockholders must follow to propose business at such meetings. The SROs have further stated that the requirement for certain information and agreements from director-nominees will enhance investor protection by ensuring that nominees provide adequate information about themselves and comply with applicable law and certain NASDAQ OMX policies and procedures relating to the Board. The remaining procedural changes relating to stockholder meetings appear to be clarifying in nature. The Commission believes that these proposed changes should provide stockholders with adequate notice and information for special and annual meetings of NASDAQ OMX.

#### Elimination of Certificate of Designation and Certain Other Changes

The SROs have proposed certain changes to: (i) Eliminate the Certificate of Designation relating to the Series A Convertible Preferred Stock, which is no longer outstanding; (ii) to conform the composition requirements for the Management Compensation Committee of the Board with the NASDAQ listing rules;<sup>49</sup> and (iii) to make other non-

<sup>49</sup>The Commission notes that the proposed rule changes will not alter NASDAQ OMX’s obligations under Section 10C of the Act and Rule 10C-1 thereunder, 15 U.S.C. 78j-3 and 17 CFR 240.10C-1, which relate to compensation committee requirements of listed issuers. According to the SROs, the NASDAQ OMX Compensation Committee must consist of at least two members and each member must meet the eligibility requirements set forth in the Rules. Under NASDAQ Rule 5605(d), the NASDAQ OMX

<sup>41</sup> See, e.g., NASDAQ Notice, 78 FR at 75626.

<sup>42</sup> See, e.g., NASDAQ Notice, 78 FR at 75626.

<sup>43</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>44</sup> 15 U.S.C. 78f(b)(1).

<sup>45</sup> 15 U.S.C. 78f(b)(5).

<sup>46</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>47</sup> 15 U.S.C. 78q-1(b)(3)(C).

<sup>48</sup> See Securities Exchange Act Release No. 61947 (April 20, 2010), 75 FR 22169 (April 27, 2010) (Order Approving Proposed Rule Change To Amend the Bylaws of NYSE Euronext To Adopt a Majority Voting Standard in Uncontested Elections of Directors). The Commission notes that the proposed rule changes would not affect the 5% voting limitation contained in Article Fourth, Paragraph C of the Charter. See *supra* note 8.

substantive changes. The Commission believes that these proposed changes should better conform NASDAQ OMX's Charter and By-Laws with current practice and legal requirements. Further, the proposed non-substantive clarifying changes should help to make the Charter and By-Laws more current and concise.<sup>50</sup>

#### 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>51</sup> that the proposed rule changes (SR-BSECC-2013-001; SR-BX-2013-057; SR-NASDAQ-2013-148; SR-Phlx-2013-115; SR-SCCP-2013-01) are approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>52</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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**BILLING CODE 8011-01-P**

Compensation Committee is required to be comprised of Independent Directors (as defined in NASDAQ Rule 5605(a)(2)) and meet the additional compensation committee requirements as set forth in NASDAQ Rule 5605(d)(2). *See also* NASDAQ IM 5605-6, and Section 10C of the Act and Rule 10C-1 thereunder.

<sup>50</sup> As noted above, however, after the non-substantive changes, the SROs acknowledge that remaining text of Article Fourth, Paragraph C(6) of the Charter includes an obsolete cross-reference to Section 6(b) of Article Fourth, Paragraph C in the second sentence, which begins "The Board, however, may not approve an exemption under Section 6(b). . . ." *See, e.g.,* NASDAQ Notice, 78 FR at 75620, at note 9. The Commission notes that the SROs have committed that: (i) Under no circumstances will NASDAQ OMX read the obsolete cross-reference to imply that the Board could grant an exemption to the ownership limitation in Article Fourth, Paragraph C(6) of the Charter for a registered broker or dealer or an Affiliate thereof, or an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act; and (ii) as soon as feasible, NASDAQ OMX plans to present a proposal to the stockholders to conform this provision of the Charter to the correct language in Section 12.5 of the By-Laws.

<sup>51</sup> 15 U.S.C. 78s(b)(2).

<sup>52</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71341; File No. SR-FINRA-2013-042]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Require Alternative Trading Systems To Report Volume Information to FINRA and Use Unique Market Participant Identifiers

January 17, 2014.

#### I. Introduction

On September 30, 2013, the Financial Industry Regulatory Authority, Inc. ("FINRA") 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 require each alternative trading system ("ATS") to report transaction volume information to FINRA and to obtain and use a unique market participant identifier ("MPID") when reporting trade information to FINRA. The proposed rule change was published for comment in the **Federal Register** on October 22, 2013.<sup>3</sup> The Commission received ten comments on the proposal.<sup>4</sup>

On December 4, 2013, FINRA granted the Commission an extension of time to act on the proposal until January 20, 2014. On January 15, 2014, FINRA filed Amendment No. 1 with the Commission to respond to the comment letters and

<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. 70676 (October 11, 2013), 78 FR 62862 (October 22, 2013) ("Notice of Original Proposal").

<sup>4</sup> *See* Letters to the Commission from William White, Head of Electronic Trading, Barclays Capital Inc., dated November 12, 2013 ("Barclays Letter"); Scott C. Goebel, Senior Vice President & Deputy General Counsel, Fidelity Investments, dated November 12, 2013 ("Fidelity Letter"); Manisha Kimmel, Executive Director, Financial Information Forum, dated November 12, 2013 ("FIF Letter"); Donald Bollerman, Head of Market Operations, IEX Services, LLC, dated November 11, 2013 ("IEX Letter"); Ari Burstein, Senior Counsel, Investment Company Institute, dated November 12, 2013 ("ICI Letter"); Elizabeth K. King, Global Head of Regulatory Affairs, KCG Holdings, Inc., dated November 12, 2013 ("KCG Letter"); Howard Meyerson, General Counsel, Liquidnet, dated November 12, 2013 ("Liquidnet Letter"); Janet McGinness, EVP & Corporate Secretary, NYSE Euronext, dated November 15, 2013 ("NYSE Letter"); Theodore R. Lazo, Managing Director & Associate General Counsel, Securities Industry and Financial Markets Association, dated November 11, 2013 ("SIFMA Letter"); and James Toes, President & CEO, Securities Traders Association, dated November 12, 2013 ("STA Letter").

to propose additional clarifying guidance, including the addition of supplementary material to one of the proposed rules.<sup>5</sup> The Commission is publishing this notice and order to solicit comments on Amendment No. 1 and to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

#### II. Description of the Proposal

##### Overview

FINRA filed the proposed rule change to impose certain reporting requirements on trading venues that have filed a Form ATS with the Commission.<sup>6</sup> The purpose of the proposal is to make information about ATS trading volume publicly available and thus more transparent. The proposal is also meant to enhance FINRA's ability to monitor ATSs to determine whether they are complying with the requirements of Regulation ATS.

Specifically, FINRA states that the proposal would allow it to better determine whether an ATS is subject to the provisions of Regulation ATS that are triggered by exceeding certain volume thresholds. For instance, Regulation ATS requires an ATS to provide to a national securities exchange or association for display the prices and sizes of orders at the ATS's highest buy price and lowest sell price for any NMS stock, displayed to more than one person in the ATS, with respect to which the ATS has had an average daily trading volume of 5% or more of the aggregate average daily share volume for such NMS stock during at least four of the preceding six calendar months.<sup>7</sup> Regulation ATS also requires any such ATS to provide broker-dealers with fair access to the

<sup>5</sup> *See* Letter to the Commission from Brant K. Brown, Associate General Counsel, FINRA, dated January 15, 2014 ("FINRA Response Letter"). The FINRA Response Letter was submitted into the public comment file for SR-FINRA-2013-042.

<sup>6</sup> Under Regulation ATS, an alternative trading system is defined as "any organization, association, person, group of persons, or system: (1) That constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of [Exchange Act Rule 3b-16]; and (2) That does not: (i) Set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or (ii) Discipline subscribers other than by exclusion from trading." 17 CFR 242.300(a). FINRA stated in its Notice of Original Proposal that the proposed rule change would apply to any alternative trading system, as that term is defined in Regulation ATS, that has filed a Form ATS with the Commission.

<sup>7</sup> *See* 17 CFR 242.301(b)(3).