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SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-77165; File Nos. SR-BSECC-2015-002; SR-SCCP-2015-02; SR-BX-2015-085; SR-NASDAQ-2015-160; SR-Phlx-2015-113)

February 17, 2016

Self-Regulatory Organizations; Boston Stock Exchange Clearing Corporation; Stock Clearing Corporation of Philadelphia; NASDAQ OMX BX, Inc.; The NASDAQ Stock Market LLC; NASDAQ OMX PHLX LLC; Order Approving Proposed Rule Changes, as Modified by Amendments Thereto, to Amend the By-Laws of NASDAQ, Inc.

I. Introduction

On December 21, 2015, each of the Boston Stock Exchange Clearing Corporation (“BSECC”), Stock Clearing Corporation of Philadelphia (“SCCP”), NASDAQ OMX BX, Inc. (“BX”), The NASDAQ Stock Market LLC (“NASDAQ”), and NASDAQ OMX PHLX LLC (“Phlx” and, together with BSECC, SCCP, BX, and NASDAQ, the “SROs”), 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> proposed rule changes with respect to the By-Laws (“By-Laws”) of NASDAQ, Inc. (“Company”), the parent company of the SROs. The proposed rule changes would revise certain requirements regarding Director<sup>3</sup> qualifications and Director disqualification procedures for the Company’s Board of Directors (“Board”). On December 29, 2015, each SRO filed Amendment No. 1 to its respective

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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> “Director” means a member of the Company’s Board of Directors. See Article I(j) of the By-Laws.

proposal.<sup>4</sup> On December 30, 2015, Phlx filed Amendment No. 2 to its proposal.<sup>5</sup> The proposed rule changes, as modified by the amendments thereto, were published for comment in the Federal Register on January 7, 2016.<sup>6</sup> The Commission did not receive any comment letters on the proposals. This order approves the proposed rule changes, as modified by the respective amendments thereto.

## II. Description of the Proposal

The Company proposes to amend certain provisions of the By-Laws that relate to the qualification of Directors.

First, the Company proposes to amend Section 4.3 of the By-Laws (Qualifications), which sets forth the compositional requirements of the Board. Currently, Section 4.3 requires that the number of Non-Industry Directors<sup>7</sup> on the Board equal or exceed the number of Industry

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<sup>4</sup> Amendment No. 1 for each of the proposals amended and replaced the original filing in its entirety. In Amendment No. 1, each SRO, among other things, clarified the operation of the current and proposed provisions of the By-Laws and how the proposed rule change would operate in conjunction with the Listing Rules (as herein defined) of NASDAQ.

<sup>5</sup> On December 30, 2015, Phlx withdrew Amendment No. 1 for technical reasons and, subsequently, filed Amendment No. 2. Amendment No. 2 amended and replaced the original filing in its entirety.

<sup>6</sup> Securities Exchange Act Release Nos. 76806 (December 31, 2015), 81 FR 838 (SR-BSCC-2015-002); 76807 (December 31, 2015), 81 FR 828 (SR-SCCP-2015-02); 76808 (December 31, 2015), 81 FR 831 (SR-BX-2015-085); 76809 (December 31, 2015), 81 FR 817 (SR-NASDAQ-2015-160); 76810 (December 31, 2015), 81 FR 841 (SR-Phlx-2015-113) (collectively, “Notices”).

<sup>7</sup> Under the By-Laws, “Non-Industry Director” or “Non-Industry committee member” means a Director (excluding any Staff Director) or committee member who is (1) a Public Director or Public committee member; (2) an Issuer Director or Issuer committee member; or (3) any other individual who would not be an Industry Director or Industry committee member. See Article I(q) of the By-Laws.

Directors,<sup>8</sup> and that the Board include (1) at least two Public Directors;<sup>9</sup> (2) at least one, but no more than two, Issuer Directors;<sup>10</sup> and (3) no more than one Staff Director,<sup>11</sup> unless the Board consists of ten or more Directors, in which case the Board shall include no more than two Staff Directors.

The Company proposes to amend Section 4.3 to state that the Board may, rather than shall, include at least one, but no more than two, Issuer Directors. Thus, the proposal would

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<sup>8</sup> Under the By-Laws, “Industry Director” or “Industry committee member” means a Director (excluding any Staff Directors) or committee member who (1) is, or within the last year was, or has an immediate family member who is, or within the last year was, a member of a Self-Regulatory Subsidiary; (2) is, or within the last year was, employed by a member or a member organization of a Self-Regulatory Subsidiary; (3) has an immediate family member who is, or within the last year was, an executive officer of a member or a member organization of a Self-Regulatory Subsidiary; (4) has within the last year received from any member or member organization of a Self-Regulatory Subsidiary more than \$100,000 per year in direct compensation, or received from such members or member organizations in the aggregate an amount of direct compensation that in any one year is more than 10 percent of the Director’s annual gross compensation for such year, excluding in each case director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service); or (5) is affiliated, directly or indirectly, with a member or member organization of a Self-Regulatory Subsidiary. See Article I(m) of the By-Laws. A “Self-Regulatory Subsidiary” is any subsidiary of the Company that is a self-regulatory organization as defined under Section 3(a)(26) of the Act. See Article I(s) of the By-Laws.

<sup>9</sup> Under the By-Laws, “Public Director” or “Public committee member” means a Director or committee member who (1) is not an Industry Director or Industry committee member, (2) is not an Issuer Director or Issuer committee member, and (3) has no material business relationship with a member or member organization of a Self-Regulatory Subsidiary, the Company or its affiliates, or the Financial Industry Regulatory Authority, Inc. See Article I(r) of the By-Laws.

<sup>10</sup> Under the By-Laws, “Issuer Director” or “Issuer committee member” means a Director (excluding any Staff Director) or committee member who is an officer or employee of an issuer of securities listed on a national securities exchange operated by any Self-Regulatory Subsidiary, excluding any Director or committee member who is a director of such an issuer but is not also an officer or employee of such an issuer. See Article I(o) of the By-Laws.

<sup>11</sup> Under the By-Laws, “Staff Director” means an officer of the Company that is serving as a Director. See Article I(t) of the By-Laws.

allow, but no longer would mandate, that the Board include an Issuer Director. The SROs state that, while the Company highly values the views of its listed companies, the Company does not believe that it is necessary to have an Issuer Director on its own Board to represent those views.<sup>12</sup> The SROs state that issues relating to listed companies are generally the province of NASDAQ and its board of directors, rather than the Company and its Directors, and that NASDAQ's board includes issuer representation, as mandated by NASDAQ's by-laws.<sup>13</sup> Additionally, the SROs state that the Company's Directors are experienced and capable enough to handle issues relating to listed companies that may arise without specifically having an Issuer Director on the Board.<sup>14</sup>

Second, the Company proposes to amend Section 4.7 of the By-Laws (Disqualification), which addresses the disqualification of a Director due to a change in that Director's classification. Specifically, Section 4.7 provides that the term of office of a Director shall terminate immediately upon a determination by the Board, by a majority vote of the remaining Directors, that: (a) the Director no longer satisfies the classification for which the Director was elected; and (b) the Director's continued service as such would violate the compositional requirements of the Board set forth in Section 4.3 of the By-Laws.<sup>15</sup>

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<sup>12</sup> See Notices, supra note 6.

<sup>13</sup> See Notices, supra note 6, citing to Article III, Section 2 of NASDAQ's by-laws.

<sup>14</sup> See Notices, supra note 6. The SROs represent that currently three of the Company's eleven Directors are also directors of companies listed on NASDAQ or another national securities exchange. See Notices, supra note 6. The SROs state that these Directors do not qualify as Issuer Directors because they are not specifically officers or employees of listed companies. However, as directors of such companies, the SROs believe that the Directors are familiar with corporate governance topics and other issues confronted by listed companies. See Notices, supra note 6.

<sup>15</sup> Section 4.7 of the By-Laws further provides that, if a Director's term of office terminates because of such disqualification and the remaining term of office for that Director at the time of termination is not more than six months, during the period of vacancy, the Board shall not be deemed to be in violation of Section 4.3 of the By-Laws by virtue of such vacancy. See Section 4.7 of the By-Laws.

The Company proposes to amend Section 4.7 to allow the Board to elect to defer determinations under Section 4.7 regarding Director disqualification until the next annual meeting of stockholders. In addition, the proposals would amend Section 4.7 to provide that, if the Board elects to defer such determinations, neither the Board nor any committee of the Board would be deemed to be in violation of Section 4.3 or 4.13<sup>16</sup> of the By-Laws as a result of such deferral. The SROs state that the nominee selection process for Directors is long and complex and the Board cannot act quickly to replace a Director whose classification has changed.<sup>17</sup> The SROs state that the proposed amendment to Section 4.7 would allow the Board to continue to make informed, deliberate decisions regarding Director nominees, rather than require it to act quickly in a way that is not in the best interest of the Company's stockholders.<sup>18</sup> In addition, the SROs state that the proposed rule changes would provide the Board with the option to retain Directors whose classification has changed but whose continued service is otherwise beneficial to the Board, the Company, and its stockholders.<sup>19</sup> Further, the SROs state that the proposed amendment to Section 4.7 is designed to prevent the significant disruption that the SROs believe would occur if the Board had to replace a Director between annual meetings of stockholders.<sup>20</sup>

The SROs represent that the provisions of the Company's By-Laws that relate to Director classifications are completely distinct from the listing rules of NASDAQ ("Listing Rules") and

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<sup>16</sup> Section 4.13(h)(iii) of the By-Laws requires the Company's Corporate Secretary to certify to the Nominating & Governance Committee of the Company's Board the classification of each Director after collecting from each nominee for Director information as is reasonably necessary to serve as the basis for a determination of the nominee's classifications. See Section 4.13(h)(iii) of the By-Laws.

<sup>17</sup> See Notices, supra note 6.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

that the proposed rule changes do not affect in any way the Company's obligation, as an issuer listed on NASDAQ, to comply with the Listing Rules, and that the Company will continue to comply with the Listing Rules, including provisions relating to corporate governance, following the effectiveness of the proposed By-Law amendments.<sup>21</sup>

### III. Discussion and Commission's 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 (collectively, the "Exchanges"), and to a clearing agency, in the case of the proposals by BSECC and SCCP.<sup>22</sup>

The Commission finds that the proposed rule changes by the Exchanges to amend the By-Laws are consistent with the requirements of Section 6 of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>23</sup> In particular, the Commission finds that the proposed rule changes by the Exchanges are consistent with the requirements of Section 6(b)(5) of the Act, which requires, among other things, that an exchange's rules be designed 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.<sup>24</sup>

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<sup>21</sup> Id.

<sup>22</sup> Additionally, in approving these proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>23</sup> Certain provisions of the Company's By-Laws are considered rules of BX, NASDAQ, and Phlx if they are stated policies, practices, or interpretations, as defined in Rule 19b-4 under the Act, of BX, NASDAQ, and Phlx, and must be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b-4 thereunder. 15 U.S.C. 78s(b); 17 CFR 240.19b-4.

<sup>24</sup> 15 U.S.C. 78f(b)(5).

The proposed amendment to Section 4.3 of the By-Laws would allow, but no longer require, that the Board include an Issuer Director. The Exchanges state that the Company's Directors are sufficiently experienced and capable to handle issues relating to listed companies without requiring the explicit participation of an Issuer Director.<sup>25</sup> Further, the Exchanges state that issues relating to listed companies are generally the province of NASDAQ, as NASDAQ is the Company subsidiary that provides listing services.<sup>26</sup> The Exchanges represent that NASDAQ's board includes issuer representation, as mandated by NASDAQ's by-laws.<sup>27</sup> Under the proposals, the Company would still retain the option to include one or more Issuer Director on the Board.

The proposed amendment to Section 4.7 of the By-Laws would allow the Board to elect to defer determinations under Section 4.7 regarding Director disqualification until the next annual meeting of stockholders, and to do so without being in violation of the By-Laws. The By-Laws currently are silent regarding the required timeframe within which the Board must make Director disqualification determinations under Section 4.7. The Exchanges represent that the proposal would aid the Board to act in the best interests of the Company and its stockholders as it would allow the Board to continue to make informed, deliberate decisions regarding Director nominees and prevent the significant disruption that the SROs believe would occur if the Board were forced to replace a Director between annual meetings.<sup>28</sup>

Based on the foregoing, the Commission finds that the proposed rule changes filed by BX, NASDAQ, and Phlx are consistent with the Act.

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<sup>25</sup> See Notices, supra note 6.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id.

The Commission also finds that the proposed rule changes by BSECC and SCCP are consistent with the requirements of the Act and the rules and regulations thereunder applicable to clearing agencies. Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to protect investors and the public interest.<sup>29</sup> In addition, Rule 17Ad-22(d)(8) under the Act requires registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to have governance arrangements that are clear and transparent.<sup>30</sup> Here, BSECC and SCCP filed proposed rule changes to highlight changes being made to the By-Laws of the Company,<sup>31</sup> which indirectly owns BSECC and SCCP. Therefore, the proposed rule changes by BSECC and SCCP help make clear and transparent the governance arrangements of the Company and, thus, BSECC and SCCP, which helps ensure investor protection and the public interest.

The Commission notes that the Company, as an issuer listed on NASDAQ, will continue to be required to comply with NASDAQ's Listing Rules, including the provisions in the Listing Rules relating to Corporate Governance Requirements, which requirements may differ from the By-Laws. The SROs have represented that the Company will continue to comply with the Listing Rules following the effectiveness of the proposed By-Law amendments.<sup>32</sup> The Commission further notes that the Listing Rules provide generally that a majority of the directors of a listed issuer must be "independent" as defined in those rules and that a listed issuer's audit,

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<sup>29</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>30</sup> 17 CFR 240.17Ad-22(d)(8).

<sup>31</sup> Certain provisions of the Company's By-Laws are considered rules of BSECC and SCCP if they are stated policies, practices, or interpretations, as defined in Rule 19b-4 under the Act, of BSECC and SCCP, and must be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b-4 thereunder. 15 U.S.C. 78q-1(b); 17 CFR 240.19b-4. See supra note 23.

<sup>32</sup> See Notices, supra note 6.

compensation, and nominations committees must be composed solely of directors who are “independent.”<sup>33</sup> Because the Company’s securities are listed on NASDAQ, the Commission notes that, when deferring determinations regarding Director disqualification pursuant to revised Section 4.7 of the By-Laws, the Company also must take into account the Listing Rules, including the “cure periods” contained therein, if the Director is serving in the capacity of an “independent director” within the meaning of the Listing Rules.

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<sup>33</sup> See NASDAQ Rules 5605(b)(1), (c)(2), (d)(2), and (e).

#### IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule changes, as modified by the amendments thereto, 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>34</sup> that the proposed rule changes (SR-BSECC-2015-002; SR-SCCP-2015-02; SR-BX-2015-085; SR-NASDAQ-2015-160; SR-Phlx-2015-113), as modified by the amendments thereto, be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>35</sup>

Robert W. Errett  
Deputy Secretary

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<sup>34</sup> 15 U.S.C. 78s(b)(2).

<sup>35</sup> 17 CFR 200.30-3(a)(12).

