

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98084; File No. SR-PHLX-2023-31)

August 8, 2023

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to a Stockholders' Agreement by and Among Nasdaq, Inc., Adenza Parent, LP, and the Other Parties Thereto

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 July 28, 2023, Nasdaq PHLX LLC (the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II, below, which Items have been prepared by the 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 Exchange is filing a proposed rule change regarding a stockholders' agreement by and among the Exchange's parent corporation, Nasdaq, Inc. ("Nasdaq"), Adenza Parent, LP, a Delaware limited partnership ("Seller"), and the other parties thereto ("Stockholders' Agreement"). The Stockholders' Agreement will be implemented upon closing under the Merger Agreement (as defined below).

The text of the proposed rule change is available on the Exchange's Website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

In its filing with the Commission, the 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 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

On June 10, 2023, Nasdaq entered into an Agreement and Plan of Merger (the “Merger Agreement”) by and among Nasdaq, Argus Merger Sub 1, Inc., a Delaware corporation and a direct wholly owned subsidiary of Nasdaq, Argus Merger Sub 2, LLC, a Delaware limited liability company and a direct wholly owned subsidiary of Nasdaq, Adenza Holdings, Inc., a Delaware corporation (“Adenza”), and Seller. Pursuant to the Merger Agreement, and upon the terms and subject to the conditions therein, Nasdaq will acquire 100% of the stock of Adenza (the “Transaction”). As a result of the Transaction, Seller is expected to hold, at closing, approximately 15% of the outstanding Nasdaq common stock based upon the outstanding shares of Nasdaq common stock as of June 9, 2023.³ The shares to be held by Seller will be subject to Article Fourth of Nasdaq’s Amended and Restated Certificate of Incorporation, which provides that no person who beneficially owns shares of common stock or preferred stock of Nasdaq in excess of 5% of the then-outstanding securities generally entitled to vote may vote the shares in

³ A copy of the Merger Agreement and a description of its terms were filed by Nasdaq on Form 8-K on June 12, 2023 and are available at: <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001120193/000119312523164839/d476077d8k.htm>.

excess of 5%. This limitation mitigates the potential for any Nasdaq shareholder to exercise undue control over the operations of Nasdaq's self-regulatory subsidiaries (including the Exchange), and facilitates the self-regulatory subsidiaries' and the Commission's ability to carry out their regulatory obligations under the Act.

Adenza and Seller are affiliates of certain funds managed by Thoma Bravo, L.P., a Delaware limited partnership ("Thoma Bravo").⁴ The Merger Agreement contemplates that, at the closing, Nasdaq, Seller and Thoma Bravo will enter into the Stockholders' Agreement. The Stockholders' Agreement provides that, among other things, Thoma Bravo will be entitled to propose one individual reasonably acceptable to Nasdaq's Nominating & Governance Committee for nomination as director for election to the Nasdaq Board ("Board Designee"), and such right will exist for so long as Thoma Bravo, together with its controlled affiliates (including Seller), continue to beneficially own at least 10% of the shares of Nasdaq common stock outstanding as of the closing date. Nasdaq will: (i) include the Board Designee as a nominee to the Nasdaq Board on each slate of nominees for election to the Nasdaq Board proposed by management of Nasdaq, (ii) recommend the election of the Board Designee to the stockholders of Nasdaq and (iii) without limiting the foregoing, otherwise use its reasonable best efforts (which shall include the solicitation of proxies) to cause the Board Designee to be elected to the Nasdaq Board.

The Stockholders' Agreement relates solely to the Nasdaq Board, and not to the boards of any of its subsidiaries, including the Exchange Board. Nevertheless, the provisions of the Stockholders' Agreement described above could be considered a proposed rule change of a

⁴ Seller owns all of the issued and outstanding capital stock of Adenza. Both Seller and Adenza are owned by Thoma Bravo.

subsidiary that is a self-regulatory organization (“SRO”), if the provisions were viewed as potentially impacting the governance of an SRO in its capacity as wholly-owned subsidiary of Nasdaq. Accordingly, the governing boards of directors of the Exchange and its affiliated SROs have each reviewed the proposed change and determined that it should be filed with the Commission.⁵

It is expected that the Board Designee, like the other directors of the Nasdaq Board, would be nominated by the Nominating & Governance Committee, the composition of which is subject to the independence requirements of the Nasdaq By-Laws and NSM Rule 5605.⁶ The Board Designee must then be elected by the stockholders of Nasdaq, like the other directors of the Nasdaq Board. The Nasdaq Board is currently composed of 11 directors and is expected to increase to 12 directors upon the closing of the Transaction. Thus, the Board Designee would represent a small percentage (approximately 8.3%) of the Nasdaq Board.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Section 6(b)(1) of the Act,⁸ in that it enables the Exchange

⁵ The Exchange, Nasdaq BX, Inc. (“BX”), Nasdaq GEMX, LLC (“GEMX”), Nasdaq ISE, LLC (“ISE”), Nasdaq MRX, LLC (“MRX”), The Nasdaq Stock Market LLC (“NSM”), Boston Stock Exchange Clearing Corporation (“BSECC”), and Stock Clearing Corporation of Philadelphia (“SCCP”) are each submitting this filing pursuant to Section 19(b)(3)(A) of the Act, 15 U.S.C. 78s(b)(3)(A)(iii).

⁶ Section 4.13 of the Nasdaq By-Laws provide that the Nominating & Governance Committee shall be appointed annually by the Nasdaq Board and shall consist of two or more directors, each of whom shall be an independent director within the meaning of the rules of NSM. The number of Non-Industry Directors (i.e., directors without material ties to the securities industry) on the Nominating & Governance Committee shall equal or exceed the number of Industry Directors and at least two members of the committee shall be Public Directors (i.e., directors who have no material business relationship with a broker or dealer, Nasdaq or its affiliates, or FINRA). NSM Rule 5605, which governs Nasdaq as a company whose securities are listed on NSM, requires Nominating & Governance Committee members to satisfy the definition of “independence” in NSM Rule 5605 and IM-5605 and to otherwise be deemed independent by the Nasdaq Board.

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(1).

to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act and to comply, and to enforce compliance by its participants, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange.

The proposal related to the Stockholders' Agreement would not impact the Exchange's ability to be so organized as to have the capacity to be able to carry out the purposes of the Exchange Act. In particular, the proposed changes would not alter the limitations on voting and ownership set forth in Article Fourth of Nasdaq's Amended and Restated Certificate of Incorporation, and so the proposed changes would not enable a person to exercise undue control over the operations of Nasdaq's self-regulatory subsidiaries or to restrict the ability of the Commission or the Exchange to effectively carry out their regulatory oversight responsibilities under the Act. Further, as discussed above, it is expected that the Board Designee, like the other directors of the Nasdaq Board, would be nominated by the Nominating & Governance Committee, whose members are subject to the independence requirements of the Nasdaq By-Laws and NSM Rule 5605. Further, the Board Designee must then be elected by the stockholders of Nasdaq, like the other directors of the Nasdaq Board. The Nasdaq Board is currently composed of 11 directors and is expected to increase to 12 directors upon the closing of the Transaction. Thus, the Board Designee would represent a small percentage (approximately 8.3%) of the Nasdaq Board.

The Exchange also notes that the proposed rule change is substantially similar to prior proposals by the Exchange or its affiliated SROs related to Nasdaq stockholders' agreements that gave similar rights to recommend Nasdaq Board designees.⁹ As such, the Exchange does not

⁹ See Securities Exchange Act Release No. 57099 (January 4, 2008), 73 FR 1901 (January 10, 2008) (SR-NASDAQ-2008-002) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Nasdaq Stockholders' Agreement Between the Nasdaq Stock Market, Inc. and Borse Dubai Limited). See also Securities Exchange Act Release No. 63786 (January 27, 2011), 76 FR 6168 (February 3, 2011) (SR-

believe that its proposal raises any new or novel issues not already considered by the Commission.

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

Because the proposed rule change is related solely to Thoma Bravo's right to nominate the Board Designee to the Nasdaq Board pursuant to the Stockholders' Agreement and not to the operations of the Exchange, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were either solicited or received.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁰ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹¹

A proposed rule change filed under Rule 19b-4(f)(6)¹² of the Act normally does not

NASDAQ-2011-013, SR-PHLX-2011-08, SR-BX-2011-004) (Notice of Filing and Immediate Effectiveness of Proposed Rule Changes Relating to a Stockholders' Agreement Between the NASDAQ OMX Group, Inc. and Investor AB).

¹⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

¹¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹² 17 CFR 240.19b-4(f)(6).

become operative prior to 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii)¹³ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay contained in Rule 19b-4(f)(6)(iii).¹⁴ The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest as the proposal raises no new or novel issues. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.¹⁵

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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 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 email to rule-comments@sec.gov. Please include file number

¹³ 17 CFR 240.19b-4(f)(6)(iii).

¹⁴ 17 CFR 240.19b-4(f)(6)(iii).

¹⁵ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

SR-PHLX-2023-31 on the subject line.

Paper Comments:

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

All submissions should refer to file number SR-PHLX-2023-31. This file number should be included on the 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 website (<https://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 website 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection.

All submissions should refer to file number SR-PHLX-2023-31 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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

Sherry R. Haywood,

Assistant Secretary.

¹⁶ 17 CFR 200.30-3(a)(12).