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SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
Form 19b-4

File No. \* SR 2025 - \* 31

Amendment No. (req. for Amendments \*)

Filing by Nasdaq ISE, LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial *	Amendment *	Withdrawal	Section 19(b)(2) *	Section 19(b)(3)(A) *	Section 19(b)(3)(B) *
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Pilot	Extension of Time Period for Commission Action *	Date Expires *	Rule		
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	<input type="checkbox"/> 19b-4(f)(5)
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) \*

Section 806(e)(2) \*

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934  
Section 3C(b)(2) \*

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

### Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

A proposal to amend the Amended and Restated Certificate of Incorporation and By-Laws of its parent corporation, Nasdaq, Inc.

### Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name *	<input type="text"/>	Last Name *	<input type="text"/>
Title *	<input type="text"/>		
E-mail *	<input type="text"/>		
Telephone *	<input type="text"/>	Fax	<input type="text"/>

### Signature

Pursuant to the requirements of the Securities Exchange of 1934, Nasdaq ISE, LLC has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 09/26/2025

(Title \*)

By John A. Zecca

EVP and Chief Legal Officer

(Name \*)

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

 Date: 2025.09.26  
11:45:51 -04'00'

Required fields are shown with yellow backgrounds and asterisks.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

**Form 19b-4 Information \***

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SR-ISE-2025-31 19b-4docx.docx

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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SR-ISE-2025-31 Exhibit 1.docx

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2- Notices, Written Comments, Transcripts, Other Communications**

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

**Exhibit 3 - Form, Report, or Questionnaire**

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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SR-ISE-2025-31 Exhibit 5.docx

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) Nasdaq ISE, LLC (“ISE” or “Exchange”), 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> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to amend the Amended and Restated Certificate of Incorporation (“Certificate”) and By-Laws (“By-Laws”) of its parent corporation, Nasdaq, Inc. (“NASDAQ” or “Corporation”). The proposed changes would align the Certificate with certain amendments to the Delaware General Corporation Law as well as update the By-Laws to reflect recent changes in law and best practices, as discussed below.

A notice of the proposed rule change for publication in the Federal Register is attached hereto as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by the Board of Directors of NASDAQ on April 23, 2025. The Board of Directors of the Exchange approved the proposed rule change on April 30, 2025. NASDAQ held its Annual Meeting of Stockholders on June 11, 2025, during which its stockholders considered and approved amendments to the Certificate providing for limited officer exculpation. The Current Report on Form 8-K filed on June 16, 2025, reported the voting results from the Annual Meeting of Stockholders. No other action is necessary for the filing of the rule change.

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

<sup>2</sup> 17 CFR 240.19b-4.

[REDACTED]

[REDACTED] 1

[REDACTED]

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

a. Purpose

The Exchange is proposing to update the Certificate to reflect certain amendments to the Delaware General Corporation Law. The Exchange is also proposing to update the By-Laws to reflect recent changes in law and best practices as discussed below.

(i) Proposed Amendments to the Certificate

(a) Background

On April 23, 2025, NASDAQ's Board of Directors approved proposed amendments to the Certificate to provide for limited officer exculpation. On June 11, 2025, NASDAQ held its Annual Meeting of Stockholders, during which its stockholders considered and approved the Certificate amendments. In 2022, Delaware amended the Delaware General Corporation Law to enable companies incorporated in Delaware, such as NASDAQ, to limit the liability of certain of their officers in narrow circumstances. This change was made to address situations where directors would be dismissed from litigation, but the officers, who were not exculpated, had to continue in the litigation to show their actions were not grossly negligent. Generally, this issue arises in the mergers and acquisitions context and often relates to claims that a particular disclosure document was deficient.

The Certificate amendment would exculpate covered officers from monetary liability for breach of the duty of care in a manner similar to that already permitted for directors. However, it would not exculpate such officers in connection with derivative actions. Failing to adopt the

Certificate amendment could potentially expose the Company to higher litigation expenses associated with lawsuits, regardless of merit, and/or impact the Company's recruitment and retention of exceptional officer candidates who conclude that the potential exposure to liabilities, costs of defense, and other risks of proceedings exceed the benefits of serving as one of the Company's officers. The Exchange notes that amendments providing for officer exculpation are increasingly common for public companies, and that the number of shareholder proposals calling for such amendments—the majority of which have been approved by wide margins—have continued to increase since 2022 when the Delaware law was passed.<sup>3</sup>

Under NASDAQ'S Certificate and By-Laws, the Exchange must determine whether proposed amendments to the Certificate must be filed with the Commission prior to taking effect. On April 30, 2025, the Board of the Exchange determined that the proposed amendments to the Certificate must be filed with the Commission.

(b) Proposed Amendments

To effect the changes discussed above, the Exchange proposes to amend Article Sixth of NASDAQ's Amended and Restated Certificate of Incorporation as follows. Paragraph A of Article Sixth of the Certificate provides that “[a] director of Nasdaq shall not be liable to Nasdaq or its stockholders for monetary damages for breach of fiduciary duty as a director, except to the extent that such exemption from liability or limitation thereof is not permitted under the General Corporation Law of the State of Delaware as the same exists or may hereafter be amended.”

Paragraph B of Article Sixth provides that “[a]ny repeal or modification of paragraph A shall not

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<sup>3</sup> See, e.g., Andrew J. Noreuil and Andrew J. Stanger, Developments and Trends in Delaware Officer Exculpation Charter Amendments, Harv. L. Sch. F. On Corp. Governance (June 14, 2024), <https://corpgov.law.harvard.edu/2024/06/14/developments-and-trends-in-delaware-officer-exculpation-charter-amendments/>; Megan W. Shaner, Understanding Officer Exculpation Under the MBCA Amendments, Bus. L. Today (Nov. 19, 2024) <https://businesslawtoday.org/2024/11/understanding-officer-exculpation-mbca-amendments/>.

adversely affect any right or protection of a director of Nasdaq existing hereunder with respect to any act or omission occurring prior to such repeal or modification.” In each of these provisions, the Exchange proposes to add, after each instance of the word “director,” the words “or officer.”<sup>4</sup>

The Exchange believes the proposed changes to paragraphs A and B of Article Sixth of the Certificate would update the Certificate to reflect amendments to the Delaware General Corporation Law<sup>5</sup> that enable companies incorporated in Delaware, such as NASDAQ, to limit the liability of certain of their officers in narrow circumstances, as discussed above.

(ii) Proposed Amendments to the By-Laws

(a) Background

On April 23, 2025, NASDAQ’s Board of Directors approved proposed amendments to the By-Laws to reflect changes in law and best practices that have occurred since the most recent amendments to the By-Laws in 2016. As discussed above, under NASDAQ’s Certificate and By-Laws, the Exchange must determine whether proposed amendments to the By-Laws must be filed with the Commission prior to taking effect. On April 30, 2025, the Exchange determined that the proposed amendments to the By-Laws must be filed with the Commission.

(b) Proposed Amendments

To effect the changes discussed above, the Exchange proposes to amend the By-Laws as follows.

(i) Article III Meetings of Stockholders

Section 3.1(b) of Article III of the By-Laws sets forth the requirements for a stockholder’s notice to NASDAQ of nominations or other business to be considered at an annual

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<sup>4</sup> See proposed Article Sixth of the Certificate.

<sup>5</sup> See 8 Del. C. Section 102(b)(7).

meeting. Section 3.1(b)(i) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ about each person whom the stockholder proposes to nominate for election as a director. Section 3.1(b)(i) of the By-Laws provides in part that the Corporation may require any proposed nominee to furnish such other information it may reasonably require to determine the eligibility of such proposed nominee to serve as director of the Corporation or that could be material to a reasonable stockholder's understanding of the independence, or lack of independence, of such proposed nominee.<sup>6</sup> The Exchange proposes to amend Section 3.1(b)(i) to narrow the scope of information that may be requested under this provision. Specifically, the Exchange proposes to provide that the Corporation may require any proposed nominee to furnish such other information as it may reasonably require to determine whether the proposed nominee is qualified under the Restated Certificate of Incorporation, the By-Laws, the rules and regulations of any stock exchange applicable to the Corporation, or any law or regulation applicable to the Corporation to serve as a director and/or independent director of the Corporation.<sup>7</sup> The Exchange believes that the proposed changes address concerns that the current provision is unnecessarily open-ended by limiting the information that may be requested to

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<sup>6</sup> See Section 3.1(b)(1) of the By-Laws. As discussed below, the Exchange is also proposing a non-substantive change to Section 3.1(a) of the By-Laws to delete the term "shareholder" and substitute therefor the word "stockholder" to more closely track established terminology of the By-Laws and thus make them clearer and easier to understand. See proposed Section 3.1(a) of the By-Laws.

<sup>7</sup> To effect these changes, the Exchange proposes to delete, from the final sentence of Section 3.1(b)(i) the following: (1) the romanette (i); (2) the words "eligibility of such"; and (3) the phrase "or (ii) that could be material to a reasonable stockholder's understanding of the independence, or lack of independence, of such proposed nominee." Further, the Exchange proposes to amend the final sentence of Section 3.1(b)(i) of the By-Laws as follows: (1) insert, immediately after the words "to determine" the word "whether"; (2) insert, immediately after "proposed nominee, the words "is qualified under the Restated Certificate of Incorporation, these By-Laws, the rules and regulations of any stock exchange applicable to the Corporation, or any law or regulation applicable to the Corporation"; and (3) insert, immediately after the words "to serve as a director" the phrase "and/or independent director." See proposed Section 3.1(b)(i) of the By-Laws. As discussed below, the Exchange is also proposing a non-substantive change to Section 3.1(a) of the By-Laws to delete therefrom the word "shareholder" and substitute therefor the word "stockholder." See proposed Section 3.1(a) of the By-Laws.

information on the nominee’s qualifications to serve as director and/or independent director of the Corporation. The Exchange also proposes certain clarifying changes to Section 3.1(b)(i) of the By-Laws. Specifically, the Exchange proposes to insert, in its first full sentence, the word “Corporation’s” and the words “of such Proposing Person and in the accompanying proxy card.”<sup>8</sup> The Exchange believes these proposed non-substantive changes would facilitate the application of this provision by rendering it more specific and clearer to understand.

Section 3.1(b) of the By-Laws sets forth requirements for notices from a Proposing Person<sup>9</sup> to NASDAQ regarding nominations or other business to be considered at an annual meeting. Section 3.1(b)(iii) of the By-Laws sets out the information required to be provided with respect to each Proposing Person. Information required to be provided under current Section 3.1(b)(iii)(C) includes “a description of any agreement, arrangement or understanding with respect to the nomination or proposal between or among such stockholder and/or such beneficial owner, any of their respective affiliates or associates, and any others acting in concert with any of the foregoing.”<sup>10</sup> The Exchange proposes to amend Section 3.1(b)(iii)(C) to delete the reference to others “acting in concert with any of the foregoing.”<sup>11</sup> The Exchange believes this proposed change is appropriate to conform the By-Laws to current practices because the “acting in concert” language has been challenged by plaintiffs or otherwise used in search of potential

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<sup>8</sup> See proposed Section 3.1(b)(i) of the By-Laws. The Exchange also proposes a non-substantive change to Section 3.1(b)(i) to replace the term “Requesting Person” with “Proposing Person” as that term and not “Requesting Person,” is defined in the Section 3.1(c) of the By-Laws.

<sup>9</sup> The term “Proposing Person” means “(i) the stockholder providing the notice of business or the notice of the nomination, as applicable, proposed to be brought before an annual meeting, (ii) any beneficial owner or beneficial owners, if different, on whose behalf such business is proposed to be brought before the meeting or the notice of the nomination proposed to be made at the meeting is made, as applicable, and (iii) any affiliate or associate (each within the meaning of Rule 12b-2 under the Act for purposes of these By-Laws) of such stockholder or beneficial owner.” See Section 3.1(c) of the By-Laws.

<sup>10</sup> See Section 3.1(b)(iii)(C) of the By-Laws.

<sup>11</sup> See proposed Section 3.1(b)(iii)(C) of the By-Laws. The Exchange is also proposing conforming changes to express “others” in the singular “other” and to add, immediately thereafter, the word “person.”

litigation targets. The Exchange thus believes it is appropriate to delete such language from the advance notice requirements under this section of the By-Laws.<sup>12</sup>

Section 3.1(b)(iii)(I) requires that a Proposing Person describe any significant equity interest or any Synthetic Equity Interest or Short Interest in any principal competitor of the Corporation held by such Proposing Person. The Exchange proposes to add a parenthetical stating the term “principal competitor” as used in this subsection shall be “as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914.”<sup>13</sup> The Exchange believes that the proposed change would address a textual ambiguity in this subsection by providing greater clarity with respect to the scope of the term “principal competitor,” which the current subsection does not define.

Section 3.1(b)(iii)(J) further requires a Proposing Person to describe any direct or indirect interest of such Proposing Person in any contract with the Corporation, any affiliate of the Corporation, or any principal competitor of the Corporation (including, in any such case, any employment agreement, collective bargaining agreement or consulting agreement).<sup>14</sup> The Exchange proposes adding two parentheticals to this subsection. The first parenthetical would state that an “affiliate,” as that term is used in this subsection, would be “as reflected on the most recent Form 10-K of the Corporation.”<sup>15</sup> The second parenthetical would clarify that “principal competitor,” as provided in this subsection, would be “as defined for purposes of Section 8 of the

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<sup>12</sup> As proposed, Section 3.1(b)(iii)(C) would require the Proposing Person to describe “any agreement, arrangement or understanding with respect to the nomination or proposal between or among such stockholder and/or such beneficial owner, any of their respective affiliates or associates, and any other person.” See proposed Section 3.1(b)(iii)(C) of the By-Laws.

<sup>13</sup> See proposed Section 3.1(b)(iii)(I) of the By-Laws.

<sup>14</sup> See Section 3.1(b)(iii)(J) of the By-Laws

<sup>15</sup> See proposed Section 3.1(b)(iii)(J) of the By-Laws.

Clayton Antitrust Act of 1914.”<sup>16</sup> The Exchange believes that the proposed changes would address textual ambiguities in this subsection by providing greater clarity with respect to the scope of the terms “affiliate” and “principal competitor,” which terms the current subsection does not define.

Section 3.1(b)(iii)(K) further requires Proposing Persons to describe any pending or threatened litigation in which such Proposing Person is a party or material participant involving the Corporation or any of its officers or Directors, or any affiliate of the Corporation.<sup>17</sup> The Exchange proposes to add a parenthetical to clarify, consistent with proposed changes to Section 3.1(b)(iii)(J), that an “affiliate,” as used in this subsection, shall be “as reflected on the most recent Form 10-K of the Corporation.”<sup>18</sup>

Section 3.1(b)(iii)(L) of the By-Laws requires Proposing Persons to describe any material transaction occurring, in whole or in part, during the then immediately preceding 12-month period between such Proposing Person, on the one hand, and the Corporation, any affiliate of the Corporation or any principal competitor of the Corporation. Consistent with proposed changes to Section 3.1(iii)(b)(I)-(K), the Exchange proposes adding two parentheticals: the first stating that an “affiliate,” as that term is used in this subsection, would be “as reflected on the most recent Form 10-K of the Corporation;”<sup>19</sup> the second would clarify that “principal competitor,” as provided in this subsection, would be “as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914.”<sup>20</sup> The Exchange believes that these proposed changes to Section

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<sup>16</sup> See id.

<sup>17</sup> See Section 3.1(b)(iii)(K) of the By-Laws.

<sup>18</sup> See proposed Section 3.1(b)(iii)(K) of the By-Laws.

<sup>19</sup> See proposed Section 3.1(b)(iii)(I)-(K) of the By-Laws.

<sup>20</sup> See id.

3.1(b)(iii)(L) would—consistent with similarly proposed changes to Section 3.1(b)(iii)(I)-(K)—provide greater clarity with respect to the meaning of the terms “affiliate” and “principal competitor,” which terms the current Section 3.1(b)(iii)(L) does not define.

Section 3.1(b)(iii)(O) requires notice to the Corporation if a Proposing Person intends to act as part of a group to solicit or deliver proxies in support of a proposal or the election of a nominee under specified circumstances. Specifically, Section 3.1(b)(iii)(O) of the By-Laws requires a representation as to whether the Proposing Person intends or is part of a group which intends (1) to deliver a proxy statement and/or form of proxy to holders of at least the percentage of the Corporation’s outstanding capital stock required to approve or adopt the proposal or elect the nominee and/or (2) otherwise to solicit proxies from stockholders in support of such proposal or nomination.<sup>21</sup> The Exchange proposes to amend to Section 3.1(b)(iii)(O) to clarify, in Section 3.1(b)(iii)(O)(2), that the representation required to be provided under that subsection would extend to the solicitation of proxies or votes from stockholders in support of any proposal or proposed nominee.<sup>22</sup> As further proposed, new Section 3.1(b)(iii)(O)(3) would specify that the representation required under Section 3.1(b)(iii) extends to whether the Proposing Person intends or is part of a group which intends “to solicit proxies or votes in support of any proposed nominee in accordance with Rule 14a-19 promulgated under the Act.”<sup>23</sup> The Exchange believes that the proposed changes to Section 3.1(b)(iii)(O) enhance the transparency of this provision by providing greater specificity with respect to the content of representations required to be

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<sup>21</sup> See Section 3.1(b)(iii)(O) of the By-Laws.

<sup>22</sup> To effect this change, the Exchange proposes to insert, immediately after “otherwise to solicit proxies” in Section 3.1(b)(iii)(O)(2), the words “or votes.” See proposed Section 3.1(b)(iii)(O)(2).

<sup>23</sup> See proposed Section 3.1(b)(iii)(O)(3) of the By-Laws. The Exchange proposes a conforming change to insert, at the conclusion of Section 3.1(b)(iii)(O)(2) the following: “and/or.” See proposed Section 3.1(b)(iii)(O)(2) of the By-Laws.

provided under this subsection. Similarly, proposed Section 3.1(iii)(O)(3) would enhance the clarity of this provision by specifying that the representation required under this section extends to whether the stockholder intends to act as part of a group to solicit proxies under the SEC's universal proxy rule.

Section 3.1(d) of the By-Laws addresses stockholder notice requirements with respect to nominees for additional directorships if the number of directors to be elected to the Board at an annual meeting is increased effective at the annual meeting.<sup>24</sup> Section 3.1(d) provides no limitations on the number of nominees that may be nominated under such circumstances.<sup>25</sup> The Exchange proposes to amend Section 3.1(d) to set limits on the number of nominees that may be nominated in such cases to not exceed the number of directors to be elected at the subject annual meeting. Specifically, the Exchange proposes to provide, in a new final sentence to Section 3.1(d) of the By-Laws, that the number of nominees a Proposing Person may nominate for election at the annual meeting on its own behalf (or in the case of a Proposing Person giving the notice on behalf of a beneficial owner, the number of nominees a Proposing Person may nominate for election at the annual meeting on behalf of such beneficial owner) shall not exceed the number of directors to be elected at such annual meeting.<sup>26</sup>

The Exchange believes that the proposed changes to Section 3.1(d) of the By-Laws would align the By-Laws with current practices by safeguarding against the practice of proposing multiple nominees and then deciding—at the last minute—which nominees will actually stand for election. This in turn would spare the Corporation and its stockholders from needless expenditure of time and resources to vet the surplus nominees.

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<sup>24</sup> See Section 3.1(d) of the By-Laws.

<sup>25</sup> See *id.*

<sup>26</sup> See proposed Section 3.1(d) of the By-Laws.

Section 3.2(a) of the By-Laws addresses requirements for requesting a special meeting of the stockholders, including procedures for determining the requisite percentage of stockholders necessary to support a special meeting request. The Exchange proposes to amend Section 3.2(a) of the By-Laws to remove the phrase “acting in concert” and substitute therefor the words “knowingly coordinating.”<sup>27</sup> The Exchange believes this proposed change would mitigate against the potential for plaintiff’s firms to leverage the “acting in concert” requirement to find targets for potential litigation.

The Exchange further proposes to amend Section 3.2(a) to remove a reference to the binding nature of the Board’s determination with respect to whether the special meeting request is in proper form.<sup>28</sup> Specifically, the Exchange proposes to delete from the final sentence in Section 3.2(a) the words “and such determination shall be binding on the Corporation and the stockholders.”<sup>29</sup> The Exchange believes that the proposed changes would align the By-Laws with current practices because it would remove all references to the binding or final nature of Board actions, which language has been challenged on the basis that it purports to limit or foreclose judicial review by Delaware courts.

Section 3.3 of the By-Laws governs determinations regarding nominations or business eligible to be considered at annual or special meetings. Section 3.3(a) provides, in part, that the chairman of the meeting has the power and duty to determine whether a nomination or business proposed to be brought before the meeting was made or proposed in accordance with the By-

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<sup>27</sup> See proposed Section 3.2 of the By-Laws.

<sup>28</sup> See Section 3.2(a) of the By-Laws.

<sup>29</sup> See proposed Section 3.2(a) of the By-Laws. The Exchange further proposes to make a non-substantive change to Section 3.2(a) of the By-Laws to capitalize the word “secretary” to conform to other usages of such word in the By-Laws. The Exchange also proposes to correct a typographical error in Section 3.2(c) of the By-Laws to express the word “Business” therein in the singular as “business” is not a defined term. See proposed Section 3.2(c) of the By-Laws.

Laws and, if not so made or proposed, to declare that such nomination or business shall be disregarded.<sup>30</sup> The Exchange proposes to amend that provision of Section 3.3(a) to add a parenthetical stating that, in advance of any meeting of stockholders, the Board of Directors or an authorized committee thereof shall have the same powers and duties, including the power to declare that a particular nomination or business shall be disregarded.<sup>31</sup> The Exchange believes the proposed changes align the By-Laws with current practices because plaintiffs have argued that a determination to disregard a matter from consideration at a meeting should be subject to fiduciary duties. The proposed changes clarify that the chair of a meeting must be a director or officer whose decisions, in turn, are subject to fiduciary duties.

The Exchange further proposes to amend Section 3.3(a) to clarify that the Corporation may disregard nominees proposed by a stockholder under the Commission's universal proxy rule if the shareholder has failed to comply with that rule. To effect that change, the Exchange proposes to insert, at the conclusion of current Section 3.3(a), new text providing as follows:

Notwithstanding anything to the contrary in these By-Laws, unless otherwise required by law, if any Proposing Person (i) provides notice pursuant to Rule 14a-19(b) promulgated under the Act with respect to any proposed nominee and (ii) subsequently fails to comply with the requirements of Rule 14a-19(a)(2) or Rule 14a-19(a)(3) promulgated under the Act (or fails to timely provide reasonable evidence sufficient to satisfy the Corporation that such Proposing Person has met the requirements of Rule 14a-19(a)(3) promulgated under the Act in accordance with the following sentence), then the nomination of each such proposed nominee shall be disregarded, notwithstanding that proxies or votes in respect of the election of such proposed nominees may have been received by the Corporation (which proxies and votes shall be disregarded). Upon request by the Corporation, if any Proposing Person provides notice pursuant to Rule 14a-19(b) promulgated

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<sup>30</sup> See Section 3.3(a) of the By-Laws.

<sup>31</sup> See proposed Section 3.3 of the By-Laws. To effect this change, the Exchange proposes to insert, immediately after the words "Except as otherwise provided by law, the chairman of the meeting" a parenthetical to read as follows: "(or, in advance of any meeting of stockholders, the Board of Directors or an authorized committee thereof)." The Exchange also proposes to make a non-substantive conforming change to Section 3.3(a) to insert, immediately after the word "proxies" in the second full sentence of Section 3.3(a) the words "or votes," consistent with changes proposed for Section 3.1(b)(iii)(O) of the By-Laws.

under the Act, such Proposing Person shall deliver to the Corporation, no later than five (5) business days prior to the applicable meeting, reasonable evidence that it has met the requirements of Rule 14a-19(a)(3) promulgated under the Act.

This proposed change to Section 3.3(a) would align the By-Laws with current practices by specifying that failure to comply with requirements of the Commission's universal proxy rule would constitute grounds for the Corporation to disregard a stockholder's proposed nomination, as well as setting out redress procedures for stockholders seeking to demonstrate that such requirements have been met.

Section 3.4 of the By-Laws governs the conduct of meetings. Section 3.4 provides in part that the date and time of the opening and closing of the polls for each matter to be voted upon at a meeting must be announced at the meeting by the person presiding over the meeting. The Exchange proposes to amend Section 3.4 to clarify, consistent with the advance notice provisions in Section 3.1 of the By-Laws, that the person presiding over a meeting must be a chairman of the meeting who shall be an officer or director of the Corporation.<sup>32</sup> The Exchange believes this proposed change enhances the clarity of Section 3.4 by specifying, consistent with the advance notice provisions under Section 3.1 of the By-Laws, that the chairman and presiding person of the meeting must be an officer or director of the Corporation. Section 3.4 also provides in part that the person presiding over a meeting shall have the right to, among other things, convene and adjourn the meeting.<sup>33</sup> The Exchange proposes to clarify that the presiding person also shall have the right to recess the meeting for any or no reason.<sup>34</sup> The Exchange believes this proposed

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<sup>32</sup> See proposed Section 3.4 of the By-Laws. To effect this change, the Exchange proposes to insert, in the first full sentence of Section 3.4 and immediately after "shall be announced at the meeting by the" the words "chairman of the meeting who shall be an officer or director of the Corporation and who shall be the." See id.

<sup>33</sup> See Section 3.4 of the By-Laws.

<sup>34</sup> See proposed Section 3.4 of the By-Laws.

change will make explicit that the presiding person's rights with respect to the conduct of the meeting includes the right to recess the meeting for any or no reason, thereby enhancing the clarity and transparency of this rule.

Section 3.6(d) of the By-Laws governs the amount of shares that a stockholder must own to invoke proxy access. Section 3.6(d) provides in part that “[w]hether outstanding shares of the common stock of the Corporation are ‘owned’ for these purposes shall be determined by the Board or any committee thereof, in each case, in its sole discretion.”<sup>35</sup> The Exchange proposes to amend Section 3.6(d) to delete therefrom the words “in each case, in its sole discretion.”<sup>36</sup> The Exchange further proposes to remove from Section 3.6(h)(ii), Section 3.6(h)(viii), Section 3.6(i)(i), and Section 3.6(k) of the By-Laws similar references to the finality or “binding” nature of decisions by the Board (or persons authorized by the Board), any committee thereof, or the chairman of a meeting of stockholders.<sup>37</sup> These proposed changes align the By-Laws with current practice because provisions that purport to assign a binding effect to or otherwise finality to the decisions of the Board--such as those proposed to be deleted-- are likely targets by litigants who argue that such provisions unlawfully purport to foreclose judicial review.

Finally, Section 3.6(m) provides that Section 3.6 shall be the exclusive method for stockholders to include nominees for director in the Corporation's proxy materials. The Exchange proposes to amend Section 3.6(m) to provide an exception for nominees for director in the Corporation's proxy materials submitted pursuant to, and in compliance with, the

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<sup>35</sup> See Section 3.6(d) of the By-Laws.

<sup>36</sup> See proposed Section 3.6(d) of the By-Laws.

<sup>37</sup> See proposed Section 3.6(h)(ii), Section 3.6(h)(viii), Section 3.6(i)(i), and Section 3.6(k) of the By-Laws.

Commission's universal proxy rule.<sup>38</sup> The proposed changes to Section 3.6(m) align the By-Laws with current practice by providing that, in addition to the exclusive method set out in Section 3.6 of the By-Laws, stockholders may also include nominees for such purposes pursuant to and consistent with requirements under the SEC's universal proxy rule.<sup>39</sup>

(ii) Article IV Board of Directors

Section 4.3 of Article IV of the By-Laws governs qualifications for Directors of the Corporation. This section currently provides in part the Board may include at least one, but not more than two, Issuer Directors. The Exchange proposes to amend Section 4.3 to remove limitations on the number Issuers Directors on the Board.<sup>40</sup> The proposed change would provide the Corporation with greater flexibility with respect to the number of Issuer Directors that may be members of the Board, as NASDAQ is frequently in search of officers of NASDAQ-listed companies to join the Board.

Section 4.9 of the By-Laws governs quorum and voting. Section 4.9 provides in part that, in general, a quorum for the transaction of all business at all meetings of the Board shall consist of a majority of the Board.<sup>41</sup> The Exchange proposes to make a clarifying change to specify that for purposes of this section, a majority of the Board, means a majority of the total numbers of directors constituting the Board.<sup>42</sup> The Exchange believes this proposed change would provide greater clarity to and facilitate the application of this provision. The Exchange further proposes

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<sup>38</sup> To effect this proposed change, the Exchange proposes to add immediately after the conclusion of current Section 3.6(m) the words "other than nominees included pursuant to, and in compliance with, Section 14a-19 of the Act." See proposed Section 3.6(m) of the By-Laws.

<sup>39</sup> See proposed Section 3.6(m) of the By-Laws.

<sup>40</sup> To effect this change, the Exchange proposes to delete from Section 4.3 of the By-Laws the words "at least one, but no more than two." See proposed Section 4.3 of the By-Laws.

<sup>41</sup> See Section 4.9 of the By-Laws.

<sup>42</sup> See proposed Section 4.9 of the By-Laws.

to amend Section 4.9 to clarify the process through which notice of meetings adjourned to another time and place may be given to each member of the Board.<sup>43</sup> Specifically, the Exchange proposes to clarify in Section 4.9 that in the absence of a quorum, a majority of the Directors present may adjourn the meeting to another time and place, and that notice of the time, place and purposes of any such adjourned meeting will be given in accordance with the By-Laws.<sup>44</sup> The Exchange further proposes to clarify that, if the notice of such adjourned meeting is announced at the meeting at which the adjournment is taken, notice need only be given to the Directors not present at such meeting.<sup>45</sup> The Exchange believes this proposed change would provide greater clarity to the By-Laws by providing a clear and practical process for giving notices of adjournments to members of the Board.

Section 4.12 of the By-Laws governs the process for providing notice of any meeting to Directors of the Board as well as related waivers of such notice. The Exchange proposes to amend Section 4.12 to remove obsolete references to certain modes of communication (both for transmission and confirmation of receipt) other than facsimile, email, or other means of electronic transmission.<sup>46</sup> The Exchange believes this proposed change would provide greater clarity to and facilitate the application of this provision by eliminating modes of communications, such as telegram, telefax, cable, and radio, that are no longer in use. In addition, the proposed amendments reflect current practices, as a substantial amount of

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<sup>43</sup> See proposed Section 4.9 of the By-Laws.

<sup>44</sup> See proposed Section 4.9 of the By-Laws.

<sup>45</sup> See proposed Section 4.9 of the By-Laws. The Exchange proposes to make a conforming change to Section 4.9 to delete from the second full sentence thereof the words “until a quorum be present.” See *id.*

<sup>46</sup> See proposed Section 4.12(a)-(b) of the By-Laws. To effect this change, the Exchange proposes to (1) delete from Section 4.12(a)(ii) the words “telegraph, telefax, cable, radio, wireless” and substitute therefor the word “facsimile”; (2) delete from Section 4.12(a)(ii) the word “written”; and (3) delete from Section 4.12(b) the parenthetical “(or by telegram, telefax, cable, radio, wireless, e-mail or other means of written electronic transmission and subsequently confirmed in writing or by electronic transmission).” See *id.*

communications between NASDAQ and its directors outside of Board meetings occurs in electronic form.

Section 4.13 of the By-Laws governs matters relating to committees of the Board. The Exchange proposes to amend Section 4.13(a) of the By-Laws to specify that the Corporation has opted into Section 141(c)(2) of Delaware law.<sup>47</sup> Section 141(c) of Delaware law describes the formation and powers of board committees. Opting into Section 141(c)(2) of Delaware law is a common and recommended practice for Delaware corporations such as NASDAQ, in part because it provides corporations with greater flexibility with respect to the formation and powers of board committees, such as by allowing greater delegations of authority, including as it relates to setting terms of stock. The Exchange believes that opting into Section 141(c)(2) is appropriate to provide the Corporation with greater flexibility with respect to the functions and powers of committees of the Board.

The Exchange further proposes to amend Section 4.13 of the By-Laws to remove from Section 4.13(c) limitations on the ability of committees to take certain actions, such as the authorization of preferred stock designations. As a substitute for that limiting language, the Exchange proposes to insert new text in Section 4.13(c) of the By-Laws that would conform this subsection with the Delaware General Corporation Law, which removes limitations on the ability of committees to take certain actions, such as the authorization of preferred stock designations, as it relates to the powers of committees of the Board.<sup>48</sup> Consistent with proposed changes for

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<sup>47</sup> See proposed Section 4.13(a) of the By-Laws. To effect this change, the Exchange proposes to insert, as the first full sentence in Section 4.13(a) the words “The Corporation has opted into Section 141(c)(2) of Delaware law.” See id.

<sup>48</sup> See proposed Section 4.13(c) of the By-Laws. To effect this change, the Exchange proposes to delete from Section 4.13(c) the words “amending the Restated Certificate of Incorporation or the By-Laws of the Corporation; adopting an agreement of merger or consolidation; recommending to the stockholders the sale, lease, or exchange of all or substantially all the Corporation’s property and assets; or recommending to the stockholders a dissolution of the Corporation or a revocation of a dissolution. Unless the resolution of the Board expressly so provides, no committee shall have the power or authority to authorize the

Section 4.13(a), the Exchange believes this proposed change to Section 4.13(c) of the By-Laws would align this provision with current Delaware General Corporation Law, thereby updating the By-Laws as well as providing the Corporation with greater flexibility with respect to committees of the Board.

The Exchange proposes to amend Section 4.13(d)-(g) of the By-Laws to remove all references to limitations on the terms of committee members.<sup>49</sup> To effect that change, the Exchange proposes to (1) remove from Section 4.13(d) of the By-Laws the words “[a]n Executive Committee member shall hold office for a term of one year”;<sup>50</sup> (2) remove from Section 4.13(e) of the By-Laws the words “[a] Finance Committee member shall hold office for a term of one year”;<sup>51</sup> (3) remove from Section 4.13(f) of the By-Laws the words “[a] Management Compensation Committee member shall hold office for a term of one year”;<sup>52</sup> and (4) remove from Section 4.13(g) of By-Laws the words “an Audit Committee member shall hold office for a term of one year.”<sup>53</sup> The Exchange believes that deleting all references to committee members having a limited term is appropriate because term limits are not customary in by-laws as they create unnecessary administrative burdens for and limit the flexibility of a board. The Exchange notes that the proposed changes also align the By-Laws with current practice as the typical practice of the Board is to provide, in the annual resolutions regarding committee

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issuance of stock.” The Exchange further proposes to amend Section 4.13(c) to insert, immediately after the words “no committee shall have the power or authority of the Board with regard to:” the following: “(a) approving or adopting, or recommending to the stockholders, any action or matter (other than the election or removal of directors) expressly required by Delaware law to be submitted to stockholders for approval or (b) adopting, amending or repealing any By-Law of the Corporation.” See id.

<sup>49</sup> See Section 4.13(d)-(g) of By-Laws.

<sup>50</sup> See proposed Section 4.13(d) of By-Laws.

<sup>51</sup> See proposed Section 4.13(e) of the By-Laws.

<sup>52</sup> See proposed Section 4.13(f) of the By-Laws.

<sup>53</sup> See proposed Section 4.13(g) of the By-Laws.

appointments, that committee members are appointed for one year or until their successors are duly elected.

The Exchange further proposes to amend Section 4.13(g) of the By-Laws to delete language specifying the Chair of the Audit Committee must be a Public Director.<sup>54</sup> The Exchange believes that this proposed change would eliminate unnecessary restrictions regarding, as well as provide the Corporation with greater flexibility with respect to, those who may serve as Audit Committee Chair since the Chair of the Audit Committee must in any event satisfy the independence standards in SEC as well as NASDAQ rules.<sup>55</sup> The proposed change would, for example, allow an issuer representative to be appointed as Chair of the Audit Committee. Finally, the Exchange proposes a non-substantive, clarifying change to Section 4.13(g) to provide that the Audit and Risk Committee (or such committee as the same may be renamed from time to time or any successor of such committee delegated with similar duties) shall be known as the “Audit Committee.”<sup>56</sup> The Exchange believes these proposed changes to Section 4.13(g) would provide greater flexibility to the Corporation with respect to those that may serve as Chair of the Audit Committee as well as enhance the clarity of and thus facilitate the application of the By-Laws by making the term “Audit Committee” a more clearly defined term.

The Exchange proposes to amend Section 4.13(h)(ii) of the By-Laws to remove language providing that a “majority vote of” the Board is required to remove a member of the Nominating

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<sup>54</sup> See proposed Section 4.13(g) of the By-Laws.

<sup>55</sup> See proposed Section 4.13(g) of the By-Laws. To effect this change, the Exchange proposes to insert in the first full sentence of Section 4.13(g) of the By-Laws and immediately after the words “[t]he Audit” the words and symbol “& Risk” and further insert, immediately following the word “Committee” a parenthetical reading as follows: “(such committee as the same may be renamed from time to time or any successor of such committee delegated with similar duties, the “Audit Committee”).” The Exchange also proposes to renumber Section 4.13(g)(i) to delete the “(i)” and subsume the text of Section 4.13(g)(i) with that of proposed Section 4.13(g). See proposed Section 4.13(g) of the By-Laws.

<sup>56</sup> See proposed Section 4.13(g) of the By-Laws.

& Governance Committee.<sup>57</sup> This change removes duplicative language and reduces potential confusion since the voting standards for all decisions of the board are set forth separately in Section 4.9(b) of the By-Laws.

Section 4.13(j) of the By-Laws provides that, in general, a majority of a committee shall constitute a quorum for the transaction of business.<sup>58</sup> The Exchange proposes to amend Section 4.13(j) to specify that a majority of the members of a committee then serving in office (rather than a majority of total directors on the committee as Section 4.13(j) currently provides) shall constitute a quorum for the transactions of business.<sup>59</sup> The Exchange believes this proposed change would remove barriers to and facilitate the work of Board committees since a vacancy in a committee would not be a barrier to action, as the quorum would be based on the directors then serving rather than the total number of directors on the committee.

(iii) Article VII Officers, Agents, and Employees

Article VII of the By-Laws governs matters relating to the officers, agents, and employees of the Corporation. The Exchange proposes to amend certain provisions in Article VII to delete references to a corporate structure that no longer reflects the structure at NASDAQ. Specifically, Article VII generally envisions a corporate structure where a President is a director and/or has executive authority over the entire company. The Exchange proposes to amend certain sections of Article VII to delete references to such a structure and replace them with language suited for a corporate structure with multiple presidents, such as the current structure of NASDAQ. To effect these changes, the Exchange proposes to amend several provisions of Article VII as follows.

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<sup>57</sup> See Section 4.13(h) of the By-Laws.

<sup>58</sup> See Section 4.13(j) of the By-Laws.

<sup>59</sup> See proposed Section 4.13(j) of the By-Laws.

Section 7.1 of the By-Laws governs matters relating to the principal officers of the Corporation. Section 7.1 specifies the principal officers to be elected by the Board, including, among others, a Chair and a President. The Exchange proposes to amend Section 7.1 to provide that the principal officers to be elected by the Board may—rather than must—include the roles set out in Section 7.1. The Exchange further proposes to amend Section 7.1 to provide that one or more Presidents, rather than only a President, may be elected by the Board, among other principal officers. Section 7.1 further provides that in part that one person may not hold the offices and perform the duties of both President and Vice President or of President and Secretary. The Exchange proposes to amend Section 7.1 of the By-Laws to delete references to “President and Vice President or of President” and substitute therefor the words “Chief Executive Officer.”<sup>60</sup> As thus proposed, one person could not hold the offices and perform the duties of both Chief Executive Officer and Secretary (rather than of President and Vice President or of President and Secretary).<sup>61</sup>

For the reasons discussed above in connection with Article VII of the By-Laws more broadly, the Exchange further proposes to amend Section 7.3 (Subordinate Officers, Agents, or Employees), Section 7.5 (Resignation and Removal of Officers), Section 7.9 (President), Section 7.10 (Vice President), Section 7.11 (Secretary), and Section 7.13 (Treasurer) of the By-Laws as follows.

First, the Exchange proposes to delete from Sections 7.3 and 7.5(a) of the By-Laws the following: “, the President.”

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<sup>60</sup> See proposed Section 7.1 of the By-Laws.

<sup>61</sup> See proposed Section 7.1 of the By-Laws.

With respect to Section 7.9 of the By-Laws, the Exchange proposes to (1) delete the words “[t]he President shall, in the absence of the Chair of the Board and the Chief Executive Officer, preside at all meetings of the Board and stockholders at which the President is present. The President shall have general supervision over the business and affairs of the Corporation,” substituting therefor the words “The Board or the Chief Executive Officer may appoint one or more Presidents and each.” The Exchange would further amend Section 7.9 to (1) delete from its final sentence the word “The” replacing it with “Each”; (2) delete also from that final sentence the word “the” and replacing it with “such”; and (3) insert, also in that final sentence and immediately after “the Board” the words “or the Chief Executive Officer.”

With respect to Section 7.11 and Section 7.13 of the By-Laws, the Exchange proposes to amend these two sections to delete, from their respective final sentences, the words “or the President,” substituting therefore the words “or any other person delegated such power by the Board or Chief Executive Officer.” Consistent with similarly proposed changes to Article VII of the By-Laws, the Exchange believes that the proposed changes to Sections 7.11 and Section 7.13 of the By-Laws would remove impediments to the proper administration of the By-Laws as they would more closely align such By-Laws with the current corporate structure at NASDAQ as well as provide the Corporation with greater flexibility in the application of these provisions.

The Exchange believes the proposed changes to these provisions of Article VII of the By-Laws would enhance the transparency of and facilitate the application of the By-Laws because they replace obsolete or inaccurate textual references to an outdated corporate structure with updated text designed to more closely reflect the current structure of NASDAQ.

Section 7.10 of the By-Laws governs the selection of Vice Presidents. The Exchange proposes to amend Section 7.10 of the By-Laws to provide greater clarity with respect to the

duties of as well as the process for selecting Vice Presidents of the Corporation. Specifically, the Exchange proposes to amend Section 7.10 of the By-Laws to provide that the Board, the Chief Executive Officer or any other person delegated such power by the Board or Chief Executive Officer, may appoint one or more Vice Presidents. The Exchange further proposes to clarify that, any Vice President may have such additional designations in such Vice President's title as the Board, the Chief Executive Officer, or the authorized person appointing such Vice President may determine.<sup>62</sup> As proposed, each Vice President would have all powers and duties usually incident to the office of a Vice President, except as specifically limited by the Board, the Chief Executive Officer or the authorized person appointing such Vice President.<sup>63</sup> The Exchange also proposes to clarify in the next to final sentence of Section 7.10 that, in addition to the Board and the Chief Executive, as provided under this section, the authorized person appointing such Vice President may also assign such Vice President other duties and powers as the Vice Presidents shall be authorized to exercise and perform pursuant to the By-Laws.<sup>64</sup> The Exchange believes that the proposed changes to Section 7.10 of the By-Laws would provide greater clarity with respect to

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<sup>62</sup> See proposed Section 7.10 of the By-Laws.

<sup>63</sup> See proposed Section 7.10 of the By-Laws.

<sup>64</sup> See proposed Section 7.10 of the By-Laws. To effect the proposed changes to Section 7.10, the Exchange proposes to (1) delete therefrom the words "The Board shall elect" and substitute therefor the words "The Board, the Chief Executive Officer or any other person delegated such power by the Board or Chief Executive Officer, may appoint"; (2) delete, from the second sentence of Section 7.10 the words "[i]n the absence or disability of the President or if the office of President becomes vacant, the Vice Presidents in the order determined by the Board, or if no such determination has been made, in the order of their seniority, shall perform the duties and exercise the powers of the President, subject to the right of the Board at any time to extend or restrict such powers and duties or to assign them to others"; (3) insert, in the third sentence of Section 7.10 of the By-Laws and immediately following the words "as the Board" the words "the Chief Executive Officer, or the authorized person appointing such Vice President"; (4) delete, from the fourth sentence of Section 7.10 the words "The Vice Presidents shall generally assist the President in such manner as the President shall direct" substituting therefor the words "Each Vice President shall have all powers and duties usually incident to the office of a Vice President, except as specifically limited by the Board, the Chief Executive Officer or the authorized person appointing such Vice President."; and (5) insert in the final sentence of Section 7.10 of the By-Laws and immediately after the words "the Chief Executive Officer or the" the words "authorized person appointing such Vice." See *id.*

the duties of and the process for selecting the Vice Presidents, thereby facilitating the application of the By-Laws with respect to Vice Presidents of the Corporation.

(iv) Article VIII Indemnification

Section 8.1 of Article VIII of the By-Laws governs indemnification of Directors, officers, employees, and agents of the Corporation. Subsection (j) of Section 8.1 addresses circumstances in which a claim for indemnification or advancement of expenses is not paid in full within 60 days after a written claim under this provision has been received by the Corporation. The Exchange proposes to amend Section 8.1(j) to clarify that the Corporation will not be required to pay claims or expenses under this provision if prohibited by law. To effect this change, the Exchange proposes to insert within the first full sentence and immediately after “[the indemnified person] shall be entitled to be paid the expense of prosecuting such claim” the words “to the fullest extent permitted by law.”<sup>65</sup> The Exchange believes this proposed change is appropriate as it would enhance the clarity of this provision by specifying that the extent of the Corporation’s obligation to pay claims or expenses under this provision is limited to those claims or expenses not prohibited by law.

(v) IX Capital Stock

Section 9.2(a) of Article IX of the By-Laws governs requirements for signatures on stock certificates of the Corporation. Section 9.2(a) provides in part that shares of capital stock of the Corporation represented by certificates shall be signed in the name of the Corporation by two officers, with one being the Chair of the Board, the Chief Executive Officer, the President, or a Vice President, and the other being the Secretary, the Treasurer, or such other officer that may be authorized by the Board.

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<sup>65</sup> See proposed Section 8.1(j) of the By-Laws.

The Exchange proposes to amend Section 9.2(a) to broaden the scope of officers authorized to sign stock certificates. Specifically, the Exchange proposes to provide that Shares of capital stock of the Corporation represented by certificates shall be signed in the name of the Corporation by two authorized officers which shall include, without limitation, the Chair of the Board, the Chief Executive Officer, the President, any Vice President, the Secretary, and the Treasurer.<sup>66</sup> The Exchange believes the proposed changes to Section 9.2(a) would remove unnecessary limitations on officers authorized to sign stock certificates thereby providing greater flexibility in the By-Laws with respect to officers authorized to perform this important function.

Section 9.3 of the By-Laws governs matters relating to holders of record as shown on the stock ledger of the Corporation. Section 9.3(b) of the By-Laws provides that the Corporation shall be entitled to treat the holder of record of shares of capital stock as shown on the stock ledger as the owner thereof and as the person entitled to vote such shares and to receive notice of meetings, and for all other purposes. That subsection further provides that the Corporation shall not be bound to recognize any equitable or other claim to or interest in any share of capital stock on the part of any other person, whether or not the Corporation shall have express or other notice thereof.<sup>67</sup> The Exchange proposes to amend Section 9.3(b) to provide for the possibility that applicable law might require a different outcome. Specifically, the Exchange proposes to provide that the Corporation shall, to the fullest extent permitted by law, be entitled to treat the holder of record of shares of capital stock as shown on the stock ledger as the owner thereof and as the

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<sup>66</sup> See proposed Section 9.2 of the By-Laws. To effect this change as well as make conforming changes to Section 9.2 of the By-Laws, the Exchange proposes to (1) insert, immediately after “certificates shall be signed in the name of the Corporation by two” the word “authorized”; (2) insert, immediately after “officers” the words “which shall include, without limitation,; and (3) delete the words “with one being,” as well as “or a,” “and the other being,” and “, or such other officer that may be authorized by the Board.” See id.

<sup>67</sup> See Section 9.3(b) of the By-Laws.

person entitled to vote such shares and to receive notice of meetings, and for all other purposes. As further proposed, Section 9.3 would provide that the Corporation shall not be bound to recognize any equitable or other claim to or interest in any share of capital stock on the part of any other person, whether or not the Corporation shall have express or other notice thereof, except as required by law.<sup>68</sup> The Exchange believes the proposed changes to Section 9.3 of the By-Laws would ensure the enforceability of this provision by recognizing that there may be circumstances where its application would be subject to and possibly limited or otherwise affected by applicable law.

Section 9.6 of the By-Laws governs matters relating to lost, stolen, destroyed, and mutilated certificates for shares of stock of the Corporation. Section 9.6 sets out procedures for addressing the issuance of a new certificate or uncertified shares in the event that any certificate for stock of the Corporation becomes mutilated, lost, stolen, or destroyed. The Exchange proposes to amend Section 9.6 to delete language providing that the Board or a committee thereof is authorized to take action to address each such instance of lost, stolen, destroyed, or mutilated certificates and in its place provide that the Corporation (rather than solely the Board) shall have the authority to do so.<sup>69</sup> The Exchange believes this proposed change would remove obstacles to and facilitate the reissuance of new certificates under the specified circumstances by providing that the Corporation is authorized to act under those circumstances and by removing unnecessary requirements for the Board to take action in each and every instance that a new certificate to replace a mutilated, lost, stolen, or destroyed certificate is sought.

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<sup>68</sup> See proposed Section 9.3(b) of the By-Laws.

<sup>69</sup> See proposed Section 9.6 of the By-Laws. To effect his change, the Exchange proposes to (1) delete from the fourth sentence of Section 9.6 the words “Board or such committee” and substitute therefor the word “Corporation” and (2) delete from the fifth sentence the word “Board,” substituting therefor the word “Corporation.” See id.

(vi) Article X Miscellaneous Provisions

Section 10.4 of Article X of the By-Laws governs procedures relating to the execution of instruments, contracts, and the like. The Exchange proposes to delete Section 10.4 in its entirety and provide new text to better align the provisions of this section with NASDAQ's policies and procedures on signature authority. Specifically, the Exchange proposes to provide that, except as otherwise provided by law, all contracts and other documents requiring signature entered into by or on behalf of the Corporation, including, without limitation, all (i) checks, drafts, bills of exchange, notes, or other obligations or orders for the payment of money, (ii) deeds, bonds, mortgages, contracts, and other obligations or instruments, and (iii) applications, instruments, and papers required by any department of the United States Government or by any state, county, municipal, or other governmental authority, shall, in each case, be executed by such officer(s), employee(s), agent(s), or other person(s) as the Board, a duly authorized committee thereof, or the Chief Executive Officer may designate from time to time. As further proposed, the authority to execute any contract or document in the name and on behalf of the Corporation granted in accordance with this Section may (1) be general or confined to specific instances, (2) be designated by name, title, or role, (3) include the power to delegate signature authority further to one or more other persons, whether by name, title, or role, to the extent authorized by the Board, a duly authorized committee thereof, or the Chief Executive Officer, and (4) be revoked at any time by the Board, any committee thereof, or the Chief Executive Officer.<sup>70</sup> The Exchange believes that the proposed changes to Section 10.4 of the By-Laws would enhance clarity and facilitate the application of the By-Laws by removing language that has become obsolete and

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<sup>70</sup> See proposed Section 10.4 of the By-Laws.

replacing it with provisions that more closely reflect NASDAQ's current policies and procedures on signature authority.

Section 10.5 of the By-Laws governs the form of records of the Corporation. The Exchange proposes to delete Section 10.5 in its entirety and insert in its place new text that would conform this provision with the updated Delaware statute governing signature authority. Specifically, the Exchange proposes to provide that any records administered by or on behalf of the Corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or by means of, or be in the form of, any information storage device, method, or one or more electronic networks or databases (including one or more distributed electronic networks or databases), provided that the records so kept can be converted into clearly legible paper form within a reasonable time and otherwise comply with applicable law.<sup>71</sup>

(vii) Article XI Amendments; Emergency By-Laws

Section 11.4 of Article XI of the By-Laws addresses the adoption of emergency by-laws. The Exchange proposes to update Section 11.4 to reflect amendments to the emergency by-law provision of the Delaware General Corporation Law. Specifically, the Exchange proposes to provide that as provided in Section 11.4, the Board may adopt emergency by-laws which shall be operative during any emergency resulting from "any emergency resulting from an attack on the United States or on a locality in which the Corporation conducts its business or customarily holds meetings of its Board of Directors or its stockholders, or during any nuclear or atomic disaster or during the existence of any catastrophe, including, but not limited to, an epidemic or pandemic, and a declaration of a national emergency by the United States government, or other

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<sup>71</sup> See proposed Section 10.5 of the By-Laws.

similar emergency condition, irrespective of whether a quorum of the Board of Directors or a standing committee thereof can be readily convened for action.”<sup>72</sup> In addition, and consistent with Delaware General Corporation Law, the Exchange proposes to update Section 11.4 to provide, in a final sentence to Section 11.4 of the By-Laws, that “[n]othing contained in this Section 11.4 shall be deemed exclusive of any other provisions for emergency powers consistent with other sections of Delaware law which have been or may be adopted by corporations created under Delaware law.”<sup>73</sup>

(viii) Article XIII Forum Selection

The Exchange proposes to adopt new language to provide the By-Laws with a customary forum selection provision. To effect this change, the Exchange proposes to add a new Article XIII titled “Forum Selection” providing as follows:<sup>74</sup>

Unless the Corporation consents in writing to the selection of an alternative forum, (A) (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any current or former director, officer, other employee or stockholder of the Corporation to the Corporation or the Corporation’s stockholders, (iii) any action asserting a claim arising pursuant to any provision of Delaware law, the Restated Certificate of Incorporation or these By-Laws (as either may be amended or restated) or as to which Delaware law confers jurisdiction on the Court of Chancery of the State of Delaware or (iv) any action asserting a claim governed by the internal affairs doctrine of the law of the State of Delaware shall, to the fullest extent permitted by law, be exclusively brought in the Court of Chancery of the State of Delaware or, if such court does not have subject matter jurisdiction thereof, the federal district court of the State of Delaware; and (B) the federal district courts of the United States shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933, as amended. Notwithstanding the foregoing, This Section 13.1 shall not apply to claims seeking

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<sup>72</sup> See proposed Section 11.4 of the By-Laws.

<sup>73</sup> See proposed Section 11.4 of the By-Laws. The Exchange further proposes to delete from Section 11.4 the following language as it has become obsolete: “nuclear or atomic disaster, an attack on the United States or on a locality in which the Corporation conducts its business or customarily holds meetings of the Board or the stockholders, any catastrophe, or other emergency condition, as a result of which a quorum of the Board or a committee thereof cannot readily be convened for action.” See id.

<sup>74</sup> See proposed Article XIII of the By-Laws.

to enforce any liability or duty created by the Act. To the fullest extent permitted by law, any person or entity purchasing or otherwise acquiring or holding any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Section 13.1.

The Exchange believes that this proposed addition of Article XIII to the By-Laws is appropriate as it would provide the Corporation as well as litigants with greater certainty with respect to the applicable judicial forum for addressing claims or actions involving the Corporation.<sup>75</sup>

(ix) Non-Substantive Changes

The remaining proposed amendments to the By-Laws are non-substantive changes designed to simplify and streamline the document. Specifically, the Exchange proposes to (1) amend Article I(k) and Article I(m) to correct typographical errors by deleting a period and substituting in its place a semicolon and by inserting a missing parenthesis respectively; (2) make non-substantive clarifying changes to subparagraph (p) of Article I; (3) amend Article I(s) to correct a typographical error by removing a period after “and”; and (4) delete from Section 3.1(a) the term “shareholder” and substitute therefor the word “stockholder.” the latter which more closely reflects established terminology of the By-Laws. The Exchange believes the proposed non-substantive changes are either administrative or clarifying in nature, and that, as such, they are in the public interest as they are designed to avoid confusion with respect to the operation of the By-Laws thus facilitating their use.

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<sup>75</sup> The Exchange notes that the bylaws of Cboe Global Markets, Inc. as well as those of CME Group, Inc., contain forum selection provisions similar to those proposed by the Exchange. See Article 11 (“Forum for Adjudication of Disputes”) of the Eight Amended and Restated Bylaws of Cboe Global Markets, Inc. (2024) [https://s202.q4cdn.com/174824971/files/doc\\_governance/2024/Dec/04/Cboe-Global-Markets-Eighth-AR-Bylaws-2ffa4c.pdf](https://s202.q4cdn.com/174824971/files/doc_governance/2024/Dec/04/Cboe-Global-Markets-Eighth-AR-Bylaws-2ffa4c.pdf); Article IX, Section 9.1 (“Forum for Adjudication of Certain Disputes”) of the Seventeenth Amended and Restated Bylaws of CME Group, Inc. (2022) <https://www.sec.gov/Archives/edgar/data/1156375/000119312522301477/d412380dex31.htm>.

b. Statutory Basis

The Exchange believes that the proposed changes are consistent with Section 6(b) of the Act,<sup>76</sup> in general, and furthers the objectives of Section 6(b)(1) of the Act,<sup>77</sup> in particular, in that they enable the Exchange to be so organized so as to have the capacity to be able to carry out the purposes of the Act and to comply, and to 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. The Exchange also believes that the proposed changes are consistent with Section 6(b) of the Act,<sup>78</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>79</sup> in particular, in that they are designed 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.

(i) Proposed Changes to the Certificate

The Exchange believes the proposed changes to paragraphs A and B of Article Sixth of the Certificate are in the public interest as they would update the Certificate, consistent with developments in Delaware General Corporation Law that enable companies incorporated in Delaware, such as NASDAQ, to limit the liability of certain of their officers in narrow circumstances, as discussed above. The Exchange notes that amendments providing for officer exculpation are increasingly common for public companies, and that the number of shareholder

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<sup>76</sup> 15 U.S.C. 78f(b).

<sup>77</sup> 15 U.S.C. 78f(b)(1).

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

<sup>79</sup> 15 U.S.C. 78f(b)(5).

proposals calling for such amendments have continued to increase since 2022 when the Delaware law was passed.<sup>80</sup>

(ii) Proposed Changes to the By-Laws

The Exchange believes that changes proposed for Article III of the By-Laws are in the public interest as they would update the By-Laws and conform them to current practices and developments in the law with respect to corporate matters such as procedures governing the annual and special meetings of stockholders, the conduct of such meetings, and the invocation of proxy access. The proposed changes to Article IV of the By-Laws are either clarifying in nature or otherwise purport to refine governance practices by providing the Corporation with greater flexibility with respect to such matters as the qualifications of Directors, quorum and voting, or otherwise update such provisions to make them more consistent with current governance practices as well as the policies and procedures of NASDAQ. The Exchange believes that proposed changes to Articles VII through XIII are in the public interest and consistent with the protection of investors as they are designed to accomplish several objectives, including updating the By-Laws to conform with current practices or recent developments in Delaware General Corporation Law, aligning the By-Laws with current NASDAQ policies and procedures, and enhancing the clarity of the By-Laws thus facilitating their proper application and use. Finally, the remaining changes can be characterized as non-substantive, because they are designed to either correct typographical errors, conform NASDAQ governance documents to terminology in the By-Laws, remove obsolete text, or otherwise make non-substantive revisions to the By-Laws to make them clearer and easier to use.

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<sup>80</sup> See supra note 3 and accompanying text.

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

Because the proposed rule change relates to the governance of NASDAQ 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.

5. 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.

6. Extension of Time Period for Commission Action

The Exchange does not consent to an extension of the time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of proposed rule for publication in the Federal Register.

5. Text of the proposed rule change.

**EXHIBIT 1****SECURITIES AND EXCHANGE COMMISSION****[Release No. 34- ; File No. SR-ISE-2025-31]****Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing of Proposed Rule****Change to Amend the Amended and Restated Certificate of Incorporation and By-Laws of  
its Parent Corporation, Nasdaq, Inc.**

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> notice is hereby given that on September 26, 2025, Nasdaq ISE, LLC (“ISE” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, 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 proposes to amend the Amended and Restated Certificate of Incorporation (“Certificate”) and By-Laws (“By-Laws”) of its parent corporation, Nasdaq, Inc. (“NASDAQ” or “Corporation”). The proposed changes would align the Certificate with certain amendments to the Delaware General Corporation Law as well as update the By-Laws to reflect recent changes in law and best practices, as discussed below.

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

<sup>2</sup> 17 CFR 240.19b-4.

The text of the proposed rule change is available on the Exchange's Website at <https://listingcenter.nasdaq.com/rulebook/ise/rulefilings>, and at the principal office of the Exchange.

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

The Exchange is proposing to update the Certificate to reflect certain amendments to the Delaware General Corporation Law. The Exchange is also proposing to update the By-Laws to reflect recent changes in law and best practices as discussed below.

(a) Proposed Amendments to the Certificate

(1) Background

On April 23, 2025, NASDAQ's Board of Directors approved proposed amendments to the Certificate to provide for limited officer exculpation. On June 11, 2025, NASDAQ held its Annual Meeting of Stockholders, during which its stockholders considered and approved the Certificate amendments. In 2022, Delaware amended the Delaware General Corporation Law to enable companies incorporated in Delaware, such as NASDAQ, to limit the liability of certain of their officers in narrow circumstances. This change was made to address situations where directors would be dismissed from litigation, but the officers, who were not exculpated, had to

continue in the litigation to show their actions were not grossly negligent. Generally, this issue arises in the mergers and acquisitions context and often relates to claims that a particular disclosure document was deficient.

The Certificate amendment would exculpate covered officers from monetary liability for breach of the duty of care in a manner similar to that already permitted for directors. However, it would not exculpate such officers in connection with derivative actions. Failing to adopt the Certificate amendment could potentially expose the Company to higher litigation expenses associated with lawsuits, regardless of merit, and/or impact the Company's recruitment and retention of exceptional officer candidates who conclude that the potential exposure to liabilities, costs of defense, and other risks of proceedings exceed the benefits of serving as one of the Company's officers. The Exchange notes that amendments providing for officer exculpation are increasingly common for public companies, and that the number of shareholder proposals calling for such amendments—the majority of which have been approved by wide margins—have continued to increase since 2022 when the Delaware law was passed.<sup>3</sup>

Under NASDAQ'S Certificate and By-Laws, the Exchange must determine whether proposed amendments to the Certificate must be filed with the Commission prior to taking effect. On April 30, 2025, the Board of the Exchange determined that the proposed amendments to the Certificate must be filed with the Commission.

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<sup>3</sup> See, e.g., Andrew J. Noreuil and Andrew J. Stanger, Developments and Trends in Delaware Officer Exculpation Charter Amendments, Harv. L. Sch. F. On Corp. Governance (June 14, 2024), <https://corpgov.law.harvard.edu/2024/06/14/developments-and-trends-in-delaware-officer-exculpation-charter-amendments/>; Megan W. Shaner, Understanding Officer Exculpation Under the MBCA Amendments, Bus. L. Today (Nov. 19, 2024) <https://businesslawtoday.org/2024/11/understanding-officer-exculpation-mbca-amendments/>.

(2) Proposed Amendments

To effect the changes discussed above, the Exchange proposes to amend Article Sixth of NASDAQ's Amended and Restated Certificate of Incorporation as follows. Paragraph A of Article Sixth of the Certificate provides that “[a] director of Nasdaq shall not be liable to Nasdaq or its stockholders for monetary damages for breach of fiduciary duty as a director, except to the extent that such exemption from liability or limitation thereof is not permitted under the General Corporation Law of the State of Delaware as the same exists or may hereafter be amended.” Paragraph B of Article Sixth provides that “[a]ny repeal or modification of paragraph A shall not adversely affect any right or protection of a director of Nasdaq existing hereunder with respect to any act or omission occurring prior to such repeal or modification.” In each of these provisions, the Exchange proposes to add, after each instance of the word “director,” the words “or officer.”<sup>4</sup>

The Exchange believes the proposed changes to paragraphs A and B of Article Sixth of the Certificate would update the Certificate to reflect amendments to the Delaware General Corporation Law<sup>5</sup> that enable companies incorporated in Delaware, such as NASDAQ, to limit the liability of certain of their officers in narrow circumstances, as discussed above.

(b) Proposed Amendments to the By-Laws

(1) Background

On April 23, 2025, NASDAQ's Board of Directors approved proposed amendments to the By-Laws to reflect changes in law and best practices that have occurred since the most recent amendments to the By-Laws in 2016. As discussed above, under NASDAQ's Certificate and By-Laws, the Exchange must determine whether proposed amendments to the By-Laws must be

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<sup>4</sup> See proposed Article Sixth of the Certificate.

<sup>5</sup> See 8 Del. C. Section 102(b)(7).

filed with the Commission prior to taking effect. On April 30, 2025, the Exchange determined that the proposed amendments to the By-Laws must be filed with the Commission.

(2) Proposed Amendments

To effect the changes discussed above, the Exchange proposes to amend the By-Laws as follows.

(i) Article III Meetings of Stockholders

Section 3.1(b) of Article III of the By-Laws sets forth the requirements for a stockholder's notice to NASDAQ of nominations or other business to be considered at an annual meeting. Section 3.1(b)(i) of the By-Laws currently sets forth the information that a stockholder must provide to NASDAQ about each person whom the stockholder proposes to nominate for election as a director. Section 3.1(b)(i) of the By-Laws provides in part that the Corporation may require any proposed nominee to furnish such other information it may reasonably require to determine the eligibility of such proposed nominee to serve as director of the Corporation or that could be material to a reasonable stockholder's understanding of the independence, or lack of independence, of such proposed nominee.<sup>6</sup> The Exchange proposes to amend Section 3.1(b)(i) to narrow the scope of information that may be requested under this provision. Specifically, the Exchange proposes to provide that the Corporation may require any proposed nominee to furnish such other information as it may reasonably require to determine whether the proposed nominee is qualified under the Restated Certificate of Incorporation, the By-Laws, the rules and regulations of any stock exchange applicable to the Corporation, or any law or regulation applicable to the Corporation to serve as a director and/or independent director of the

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<sup>6</sup> See Section 3.1(b)(1) of the By-Laws. As discussed below, the Exchange is also proposing a non-substantive change to Section 3.1(a) of the By-Laws to delete the term "shareholder" and substitute therefor the word "stockholder" to more closely track established terminology of the By-Laws and thus make them clearer and easier to understand. See proposed Section 3.1(a) of the By-Laws.

Corporation.<sup>7</sup> The Exchange believes that the proposed changes address concerns that the current provision is unnecessarily open-ended by limiting the information that may be requested to information on the nominee’s qualifications to serve as director and/or independent director of the Corporation. The Exchange also proposes certain clarifying changes to Section 3.1(b)(i) of the By-Laws. Specifically, the Exchange proposes to insert, in its first full sentence, the word “Corporation’s” and the words “of such Proposing Person and in the accompanying proxy card.”<sup>8</sup> The Exchange believes these proposed non-substantive changes would facilitate the application of this provision by rendering it more specific and clearer to understand.

Section 3.1(b) of the By-Laws sets forth requirements for notices from a Proposing Person<sup>9</sup> to NASDAQ regarding nominations or other business to be considered at an annual meeting. Section 3.1(b)(iii) of the By-Laws sets out the information required to be provided with respect to each Proposing Person. Information required to be provided under current Section 3.1(b)(iii)(C) includes “a description of any agreement, arrangement or understanding with

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<sup>7</sup> To effect these changes, the Exchange proposes to delete, from the final sentence of Section 3.1(b)(i) the following: (1) the romanette (i); (2) the words “eligibility of such”; and (3) the phrase “or (ii) that could be material to a reasonable stockholder’s understanding of the independence, or lack of independence, of such proposed nominee.” Further, the Exchange proposes to amend the final sentence of Section 3.1(b)(i) of the By-Laws as follows: (1) insert, immediately after the words “to determine” the word “whether”; (2) insert, immediately after “proposed nominee, the words “is qualified under the Restated Certificate of Incorporation, these By-Laws, the rules and regulations of any stock exchange applicable to the Corporation, or any law or regulation applicable to the Corporation”; and (3) insert, immediately after the words “to serve as a director” the phrase “and/or independent director.” See proposed Section 3.1(b)(i) of the By-Laws. As discussed below, the Exchange is also proposing a non-substantive change to Section 3.1(a) of the By-Laws to delete therefrom the word “shareholder” and substitute therefor the word “stockholder.” See proposed Section 3.1(a) of the By-Laws.

<sup>8</sup> See proposed Section 3.1(b)(i) of the By-Laws. The Exchange also proposes a non-substantive change to Section 3.1(b)(i) to replace the term “Requesting Person” with “Proposing Person” as that term and not “Requesting Person,” is defined in the Section 3.1(c) of the By-Laws.

<sup>9</sup> The term “ Proposing Person” means “(i) the stockholder providing the notice of business or the notice of the nomination, as applicable, proposed to be brought before an annual meeting, (ii) any beneficial owner or beneficial owners, if different, on whose behalf such business is proposed to be brought before the meeting or the notice of the nomination proposed to be made at the meeting is made, as applicable, and (iii) any affiliate or associate (each within the meaning of Rule 12b-2 under the Act for purposes of these By-Laws) of such stockholder or beneficial owner.” See Section 3.1(c) of the By-Laws.

respect to the nomination or proposal between or among such stockholder and/or such beneficial owner, any of their respective affiliates or associates, and any others acting in concert with any of the foregoing.”<sup>10</sup> The Exchange proposes to amend Section 3.1(b)(iii)(C) to delete the reference to others “acting in concert with any of the foregoing.”<sup>11</sup> The Exchange believes this proposed change is appropriate to conform the By-Laws to current practices because the “acting in concert” language has been challenged by plaintiffs or otherwise used in search of potential litigation targets. The Exchange thus believes it is appropriate to delete such language from the advance notice requirements under this section of the By-Laws.<sup>12</sup>

Section 3.1(b)(iii)(I) requires that a Proposing Person describe any significant equity interest or any Synthetic Equity Interest or Short Interest in any principal competitor of the Corporation held by such Proposing Person. The Exchange proposes to add a parenthetical stating the term “principal competitor” as used in this subsection shall be “as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914.”<sup>13</sup> The Exchange believes that the proposed change would address a textual ambiguity in this subsection by providing greater clarity with respect to the scope of the term “principal competitor,” which the current subsection does not define.

Section 3.1(b)(iii)(J) further requires a Proposing Person to describe any direct or indirect interest of such Proposing Person in any contract with the Corporation, any affiliate of the

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<sup>10</sup> See Section 3.1(b)(iii)(C) of the By-Laws.

<sup>11</sup> See proposed Section 3.1(b)(iii)(C) of the By-Laws. The Exchange is also proposing conforming changes to express “others” in the singular “other” and to add, immediately thereafter, the word “person.”

<sup>12</sup> As proposed, Section 3.1(b)(iii)(C) would require the Proposing Person to describe “any agreement, arrangement or understanding with respect to the nomination or proposal between or among such stockholder and/or such beneficial owner, any of their respective affiliates or associates, and any other person.” See proposed Section 3.1(b)(iii)(C) of the By-Laws.

<sup>13</sup> See proposed Section 3.1(b)(iii)(I) of the By-Laws.

Corporation, or any principal competitor of the Corporation (including, in any such case, any employment agreement, collective bargaining agreement or consulting agreement.<sup>14</sup> The Exchange proposes adding two parentheticals to this subsection. The first parenthetical would state that an “affiliate,” as that term is used in this subsection, would be “as reflected on the most recent Form 10-K of the Corporation.”<sup>15</sup> The second parenthetical would clarify that “principal competitor,” as provided in this subsection, would be “as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914.”<sup>16</sup> The Exchange believes that the proposed changes would address textual ambiguities in this subsection by providing greater clarity with respect to the scope of the terms “affiliate” and “principal competitor,” which terms the current subsection does not define.

Section 3.1(b)(iii)(K) further requires Proposing Persons to describe any pending or threatened litigation in which such Proposing Person is a party or material participant involving the Corporation or any of its officers or Directors, or any affiliate of the Corporation.<sup>17</sup> The Exchange proposes to add a parenthetical to clarify, consistent with proposed changes to Section 3.1(b)(iii)(J), that an “affiliate,” as used in this subsection, shall be “as reflected on the most recent Form 10-K of the Corporation.”<sup>18</sup>

Section 3.1(b)(iii)(L) of the By-Laws requires Proposing Persons to describe any material transaction occurring, in whole or in part, during the then immediately preceding 12-month period between such Proposing Person, on the one hand, and the Corporation, any affiliate of the

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<sup>14</sup> See Section 3.1(b)(iii)(J) of the By-Laws

<sup>15</sup> See proposed Section 3.1(b)(iii)(J) of the By-Laws.

<sup>16</sup> See *id.*

<sup>17</sup> See Section 3.1(b)(iii)(K) of the By-Laws.

<sup>18</sup> See proposed Section 3.1(b)(iii)(K) of the By-Laws.

Corporation or any principal competitor of the Corporation. Consistent with proposed changes to Section 3.1(iii)(b)(I)-(K), the Exchange proposes adding two parentheticals: the first stating that an “affiliate,” as that term is used in this subsection, would be “as reflected on the most recent Form 10-K of the Corporation;”<sup>19</sup> the second would clarify that “principal competitor,” as provided in this subsection, would be “as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914.”<sup>20</sup> The Exchange believes that these proposed changes to Section 3.1(b)(iii)(L) would—consistent with similarly proposed changes to Section 3.1(b)(iii)(I)-(K)—provide greater clarity with respect to the meaning of the terms “affiliate” and “principal competitor,” which terms the current Section 3.1(b)(iii)(L) does not define.

Section 3.1(b)(iii)(O) requires notice to the Corporation if a Proposing Person intends to act as part of a group to solicit or deliver proxies in support of a proposal or the election of a nominee under specified circumstances. Specifically, Section 3.1(b)(iii)(O) of the By-Laws requires a representation as to whether the Proposing Person intends or is part of a group which intends (1) to deliver a proxy statement and/or form of proxy to holders of at least the percentage of the Corporation’s outstanding capital stock required to approve or adopt the proposal or elect the nominee and/or (2) otherwise to solicit proxies from stockholders in support of such proposal or nomination.<sup>21</sup> The Exchange proposes to amend to Section 3.1(b)(iii)(O) to clarify, in Section 3.1(b)(iii)(O)(2), that the representation required to be provided under that subsection would extend to the solicitation of proxies or votes from stockholders in support of any proposal or proposed nominee.<sup>22</sup> As further proposed, new Section 3.1(b)(iii)(O)(3) would specify that the

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<sup>19</sup> See proposed Section 3.1(b)(iii)(I)-(K) of the By-Laws.

<sup>20</sup> See id.

<sup>21</sup> See Section 3.1(b)(iii)(O) of the By-Laws.

<sup>22</sup> To effect this change, the Exchange proposes to insert, immediately after “otherwise to solicit proxies” in Section 3.1(b)(iii)(O)(2), the words “or votes.” See proposed Section 3.1(b)(iii)(O)(2).

representation required under Section 3.1(b)(iii) extends to whether the Proposing Person intends or is part of a group which intends “to solicit proxies or votes in support of any proposed nominee in accordance with Rule 14a-19 promulgated under the Act.”<sup>23</sup> The Exchange believes that the proposed changes to Section 3.1(iii)(O) enhance the transparency of this provision by providing greater specificity with respect to the content of representations required to be provided under this subsection. Similarly, proposed Section 3.1(iii)(O)(3) would enhance the clarity of this provision by specifying that the representation required under this section extends to whether the stockholder intends to act as part of a group to solicit proxies under the SEC’s universal proxy rule.

Section 3.1(d) of the By-Laws addresses stockholder notice requirements with respect to nominees for additional directorships if the number of directors to be elected to the Board at an annual meeting is increased effective at the annual meeting.<sup>24</sup> Section 3.1(d) provides no limitations on the number of nominees that may be nominated under such circumstances.<sup>25</sup> The Exchange proposes to amend Section 3.1(d) to set limits on the number of nominees that may be nominated in such cases to not exceed the number of directors to be elected at the subject annual meeting. Specifically, the Exchange proposes to provide, in a new final sentence to Section 3.1(d) of the By-Laws, that the number of nominees a Proposing Person may nominate for election at the annual meeting on its own behalf (or in the case of a Proposing Person giving the notice on behalf of a beneficial owner, the number of nominees a Proposing Person may

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<sup>23</sup> See proposed Section 3.1(b)(iii)(O)(3) of the By-Laws. The Exchange proposes a conforming change to insert, at the conclusion of Section 3.1(b)(iii)(O)(2) the following: “and/or.” See proposed Section 3.1(b)(iii)(O)(2) of the By-Laws.

<sup>24</sup> See Section 3.1(d) of the By-Laws.

<sup>25</sup> See *id.*

nominate for election at the annual meeting on behalf of such beneficial owner) shall not exceed the number of directors to be elected at such annual meeting.<sup>26</sup>

The Exchange believes that the proposed changes to Section 3.1(d) of the By-Laws would align the By-Laws with current practices by safeguarding against the practice of proposing multiple nominees and then deciding—at the last minute—which nominees will actually stand for election. This in turn would spare the Corporation and its stockholders from needless expenditure of time and resources to vet the surplus nominees.

Section 3.2(a) of the By-Laws addresses requirements for requesting a special meeting of the stockholders, including procedures for determining the requisite percentage of stockholders necessary to support a special meeting request. The Exchange proposes to amend Section 3.2(a) of the By-Laws to remove the phrase “acting in concert” and substitute therefor the words “knowingly coordinating.”<sup>27</sup> The Exchange believes this proposed change would mitigate against the potential for plaintiff’s firms to leverage the “acting in concert” requirement to find targets for potential litigation.

The Exchange further proposes to amend Section 3.2(a) to remove a reference to the binding nature of the Board’s determination with respect to whether the special meeting request is in proper form.<sup>28</sup> Specifically, the Exchange proposes to delete from the final sentence in Section 3.2(a) the words “and such determination shall be binding on the Corporation and the stockholders.”<sup>29</sup> The Exchange believes that the proposed changes would align the By-Laws

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<sup>26</sup> See proposed Section 3.1(d) of the By-Laws.

<sup>27</sup> See proposed Section 3.2 of the By-Laws.

<sup>28</sup> See Section 3.2(a) of the By-Laws.

<sup>29</sup> See proposed Section 3.2(a) of the By-Laws. The Exchange further proposes to make a non-substantive change to Section 3.2(a) of the By-Laws to capitalize the word “secretary” to conform to other usages of such word in the By-Laws. The Exchange also proposes to correct a typographical error in Section 3.2(c) of

with current practices because it would remove all references to the binding or final nature of Board actions, which language has been the challenged on the basis that it purports to limit or foreclose judicial review by Delaware courts.

Section 3.3 of the By-Laws governs determinations regarding nominations or business eligible to be considered at annual or special meetings. Section 3.3(a) provides, in part, that the chairman of the meeting has the power and duty to determine whether a nomination or business proposed to be brought before the meeting was made or proposed in accordance with the By-Laws and, if not so made or proposed, to declare that such nomination or business shall be disregarded.<sup>30</sup> The Exchange proposes to amend that provision of Section 3.3(a) to add a parenthetical stating that, in advance of any meeting of stockholders, the Board of Directors or an authorized committee thereof shall have the same powers and duties, including the power to declare that a particular nomination or business shall be disregarded.<sup>31</sup> The Exchange believes the proposed changes align the By-Laws with current practices because plaintiffs have argued that a determination to disregard a matter from consideration at a meeting should be subject to fiduciary duties. The proposed changes clarify that the chair of a meeting must be a director or officer whose decisions, in turn, are subject to fiduciary duties.

The Exchange further proposes to amend Section 3.3(a) to clarify that the Corporation may disregard nominees proposed by a stockholder under the Commission's universal proxy rule

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the By-Laws to express the word "Business" therein in the singular as "business" is not a defined term. See proposed Section 3.2(c) of the By-Laws.

<sup>30</sup> See Section 3.3(a) of the By-Laws.

<sup>31</sup> See proposed Section 3.3 of the By-Laws. To effect this change, the Exchange proposes to insert, immediately after the words "Except as otherwise provided by law, the chairman of the meeting" a parenthetical to read as follows: "(or, in advance of any meeting of stockholders, the Board of Directors or an authorized committee thereof)." The Exchange also proposes to make a non-substantive conforming change to Section 3.3(a) to insert, immediately after the word "proxies" in the second full sentence of Section 3.3(a) the words "or votes," consistent with changes proposed for Section 3.1(b)(iii)(O) of the By-Laws.

if the shareholder has failed to comply with that rule. To effect that change, the Exchange proposes to insert, at the conclusion of current Section 3.3(a), new text providing as follows:

Notwithstanding anything to the contrary in these By-Laws, unless otherwise required by law, if any Proposing Person (i) provides notice pursuant to Rule 14a-19(b) promulgated under the Act with respect to any proposed nominee and (ii) subsequently fails to comply with the requirements of Rule 14a-19(a)(2) or Rule 14a-19(a)(3) promulgated under the Act (or fails to timely provide reasonable evidence sufficient to satisfy the Corporation that such Proposing Person has met the requirements of Rule 14a-19(a)(3) promulgated under the Act in accordance with the following sentence), then the nomination of each such proposed nominee shall be disregarded, notwithstanding that proxies or votes in respect of the election of such proposed nominees may have been received by the Corporation (which proxies and votes shall be disregarded). Upon request by the Corporation, if any Proposing Person provides notice pursuant to Rule 14a-19(b) promulgated under the Act, such Proposing Person shall deliver to the Corporation, no later than five (5) business days prior to the applicable meeting, reasonable evidence that it has met the requirements of Rule 14a-19(a)(3) promulgated under the Act.

This proposed change to Section 3.3(a) would align the By-Laws with current practices by specifying that failure to comply with requirements of the Commission's universal proxy rule would constitute grounds for the Corporation to disregard a stockholder's proposed nomination, as well as setting out redress procedures for stockholders seeking to demonstrate that such requirements have been met.

Section 3.4 of the By-Laws governs the conduct of meetings. Section 3.4 provides in part that the date and time of the opening and closing of the polls for each matter to be voted upon at a meeting must be announced at the meeting by the person presiding over the meeting. The Exchange proposes to amend Section 3.4 to clarify, consistent with the advance notice provisions in Section 3.1 of the By-Laws, that the person presiding over a meeting must be a chairman of the meeting who shall be an officer or director of the Corporation.<sup>32</sup> The Exchange believes this

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See proposed Section 3.4 of the By-Laws. To effect this change, the Exchange proposes to insert, in the first full sentence of Section 3.4 and immediately after "shall be announced at the meeting by the" the words "chairman of the meeting who shall be an officer or director of the Corporation and who shall be the." See id.

proposed change enhances the clarity of Section 3.4 by specifying, consistent with the advance notice provisions under Section 3.1 of the By-Laws, that the chairman and presiding person of the meeting must be an officer or director of the Corporation. Section 3.4 also provides in part that the person presiding over a meeting shall have the right to, among other things, convene and adjourn the meeting.<sup>33</sup> The Exchange proposes to clarify that the presiding person also shall have the right to recess the meeting for any or no reason.<sup>34</sup> The Exchange believes this proposed change will make explicit that the presiding person's rights with respect to the conduct of the meeting includes the right to recess the meeting for any or no reason, thereby enhancing the clarity and transparency of this rule.

Section 3.6(d) of the By-Laws governs the amount of shares that a stockholder must own to invoke proxy access. Section 3.6(d) provides in part that “[w]hether outstanding shares of the common stock of the Corporation are ‘owned’ for these purposes shall be determined by the Board or any committee thereof, in each case, in its sole discretion.”<sup>35</sup> The Exchange proposes to amend Section 3.6(d) to delete therefrom the words “in each case, in its sole discretion.”<sup>36</sup> The Exchange further proposes to remove from Section 3.6(h)(ii), Section 3.6(h)(viii), Section 3.6(i)(i), and Section 3.6(k) of the By-Laws similar references to the finality or “binding” nature of decisions by the Board (or persons authorized by the Board), any committee thereof, or the chairman of a meeting of stockholders.<sup>37</sup> These proposed changes align the By-Laws with current practice because provisions that purport to assign a binding effect to or otherwise finality

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<sup>33</sup> See Section 3.4 of the By-Laws.

<sup>34</sup> See proposed Section 3.4 of the By-Laws.

<sup>35</sup> See Section 3.6(d) of the By-Laws.

<sup>36</sup> See proposed Section 3.6(d) of the By-Laws.

<sup>37</sup> See proposed Section 3.6(h)(ii), Section 3.6(h)(viii), Section 3.6(i)(i), and Section 3.6(k) of the By-Laws.

to the decisions of the Board--such as those proposed to be deleted-- are likely targets by litigants who argue that such provisions unlawfully purport to foreclose judicial review.

Finally, Section 3.6(m) provides that Section 3.6 shall be the exclusive method for stockholders to include nominees for director in the Corporation's proxy materials. The Exchange proposes to amend Section 3.6(m) to provide an exception for nominees for director in the Corporation's proxy materials submitted pursuant to, and in compliance with, the Commission's universal proxy rule.<sup>38</sup> The proposed changes to Section 3.6(m) align the By-Laws with current practice by providing that, in addition to the exclusive method set out in Section 3.6 of the By-Laws, stockholders may also include nominees for such purposes pursuant to and consistent with requirements under the SEC's universal proxy rule.<sup>39</sup>

(ii) Article IV Board of Directors

Section 4.3 of Article IV of the By-Laws governs qualifications for Directors of the Corporation. This section currently provides in part the Board may include at least one, but not more than two, Issuer Directors. The Exchange proposes to amend Section 4.3 to remove limitations on the number Issuers Directors on the Board.<sup>40</sup> The proposed change would provide the Corporation with greater flexibility with respect to the number of Issuer Directors that may be members of the Board, as NASDAQ is frequently in search of officers of NASDAQ-listed companies to join the Board.

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<sup>38</sup> To effect this proposed change, the Exchange proposes to add immediately after the conclusion of current Section 3.6(m) the words "other than nominees included pursuant to, and in compliance with, Section 14a-19 of the Act." See proposed Section 3.6(m) of the By-Laws.

<sup>39</sup> See proposed Section 3.6(m) of the By-Laws.

<sup>40</sup> To effect this change, the Exchange proposes to delete from Section 4.3 of the By-Laws the words "at least one, but no more than two." See proposed Section 4.3 of the By-Laws.

Section 4.9 of the By-Laws governs quorum and voting. Section 4.9 provides in part that, in general, a quorum for the transaction of all business at all meetings of the Board shall consist of a majority of the Board.<sup>41</sup> The Exchange proposes to make a clarifying change to specify that for purposes of this section, a majority of the Board, means a majority of the total numbers of directors constituting the Board.<sup>42</sup> The Exchange believes this proposed change would provide greater clarity to and facilitate the application of this provision. The Exchange further proposes to amend Section 4.9 to clarify the process through which notice of meetings adjourned to another time and place may be given to each member of the Board.<sup>43</sup> Specifically, the Exchange proposes to clarify in Section 4.9 that in the absence of a quorum, a majority of the Directors present may adjourn the meeting to another time and place, and that notice of the time, place and purposes of any such adjourned meeting will be given in accordance with the By-Laws.<sup>44</sup> The Exchange further proposes to clarify that, if the notice of such adjourned meeting is announced at the meeting at which the adjournment is taken, notice need only be given to the Directors not present at such meeting.<sup>45</sup> The Exchange believes this proposed change would provide greater clarity to the By-Laws by providing a clear and practical process for giving notices of adjournments to members of the Board.

Section 4.12 of the By-Laws governs the process for providing notice of any meeting to Directors of the Board as well as related waivers of such notice. The Exchange proposes to amend Section 4.12 to remove obsolete references to certain modes of communication (both for

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<sup>41</sup> See Section 4.9 of the By-Laws.

<sup>42</sup> See proposed Section 4.9 of the By-Laws.

<sup>43</sup> See proposed Section 4.9 of the By-Laws.

<sup>44</sup> See proposed Section 4.9 of the By-Laws.

<sup>45</sup> See proposed Section 4.9 of the By-Laws. The Exchange proposes to make a conforming change to Section 4.9 to delete from the second full sentence thereof the words “until a quorum be present.” See *id.*

transmission and confirmation of receipt) other than facsimile, email, or other means of electronic transmission.<sup>46</sup> The Exchange believes this proposed change would provide greater clarity to and facilitate the application of this provision by eliminating modes of communications, such as telegram, telefax, cable, and radio, that are no longer in use. In addition, the proposed amendments reflect current practices, as a substantial amount of communications between NASDAQ and its directors outside of Board meetings occurs in electronic form.

Section 4.13 of the By-Laws governs matters relating to committees of the Board. The Exchange proposes to amend Section 4.13(a) of the By-Laws to specify that the Corporation has opted into Section 141(c)(2) of Delaware law.<sup>47</sup> Section 141(c) of Delaware law describes the formation and powers of board committees. Opting into Section 141(c)(2) of Delaware law is a common and recommended practice for Delaware corporations such as NASDAQ, in part because it provides corporations with greater flexibility with respect to the formation and powers of board committees, such as by allowing greater delegations of authority, including as it relates to setting terms of stock. The Exchange believes that opting into Section 141(c)(2) is appropriate to provide the Corporation with greater flexibility with respect to the functions and powers of committees of the Board.

The Exchange further proposes to amend Section 4.13 of the By-Laws to remove from Section 4.13(c) limitations on the ability of committees to take certain actions, such as the

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<sup>46</sup> See proposed Section 4.12(a)-(b) of the By-Laws. To effect this change, the Exchange proposes to (1) delete from Section 4.12(a)(ii) the words “telegraph, telefax, cable, radio, wireless” and substitute therefor the word “facsimile”; (2) delete from Section 4.12(a)(ii) the word “written”; and (3) delete from Section 4.12(b) the parenthetical “(or by telegram, telefax, cable, radio, wireless, e-mail or other means of written electronic transmission and subsequently confirmed in writing or by electronic transmission).” See id.

<sup>47</sup> See proposed Section 4.13(a) of the By-Laws. To effect this change, the Exchange proposes to insert, as the first full sentence in Section 4.13(a) the words “The Corporation has opted into Section 141(c)(2) of Delaware law.” See id.

authorization of preferred stock designations. As a substitute for that limiting language, the Exchange proposes to insert new text in Section 4.13(c) of the By-Laws that would conform this subsection with the Delaware General Corporation Law, which removes limitations on the ability of committees to take certain actions, such as the authorization of preferred stock designations, as it relates to the powers of committees of the Board.<sup>48</sup> Consistent with proposed changes for Section 4.13(a), the Exchange believes this proposed change to Section 4.13(c) of the By-Laws would align this provision with current Delaware General Corporation Law, thereby updating the By-Laws as well as providing the Corporation with greater flexibility with respect to committees of the Board.

The Exchange proposes to amend Section 4.13(d)-(g) of the By-Laws to remove all references to limitations on the terms of committee members.<sup>49</sup> To effect that change, the Exchange proposes to (1) remove from Section 4.13(d) of the By-Laws the words “[a]n Executive Committee member shall hold office for a term of one year”;<sup>50</sup> (2) remove from Section 4.13(e) of the By-Laws the words “[a] Finance Committee member shall hold office for a term of one year”;<sup>51</sup> (3) remove from Section 4.13(f) of the By-Laws the words “[a]

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<sup>48</sup> See proposed Section 4.13(c) of the By-Laws. To effect this change, the Exchange proposes to delete from Section 4.13( c) the words “amending the Restated Certificate of Incorporation or the By-Laws of the Corporation; adopting an agreement of merger or consolidation; recommending to the stockholders the sale, lease, or exchange of all or substantially all the Corporation’s property and assets; or recommending to the stockholders a dissolution of the Corporation or a revocation of a dissolution. Unless the resolution of the Board expressly so provides, no committee shall have the power or authority to authorize the issuance of stock.” The Exchange further proposes to amend Section 4.13( c) to insert, immediately after the words “no committee shall have the power or authority of the Board with regard to:” the following: “(a) approving or adopting, or recommending to the stockholders, any action or matter (other than the election or removal of directors) expressly required by Delaware law to be submitted to stockholders for approval or (b) adopting, amending or repealing any By-Law of the Corporation.” See id.

<sup>49</sup> See Section 4.13(d)-(g) of By-Laws.

<sup>50</sup> See proposed Section 4.13(d) of By-Laws.

<sup>51</sup> See proposed Section 4.13(e) of the By-Laws.

Management Compensation Committee member shall hold office for a term of one year”;<sup>52</sup> and (4) remove from Section 4.13(g) of By-Laws the words “an Audit Committee member shall hold office for a term of one year.”<sup>53</sup> The Exchange believes that deleting all references to committee members having a limited term is appropriate because term limits are not customary in by-laws as they create unnecessary administrative burdens for and limit the flexibility of a board. The Exchange notes that the proposed changes also align the By-Laws with current practice as the typical practice of the Board is to provide, in the annual resolutions regarding committee appointments, that committee members are appointed for one year or until their successors are duly elected.

The Exchange further proposes to amend Section 4.13(g) of the By-Laws to delete language specifying the Chair of the Audit Committee must be a Public Director.<sup>54</sup> The Exchange believes that this proposed change would eliminate unnecessary restrictions regarding, as well as provide the Corporation with greater flexibility with respect to, those who may serve as Audit Committee Chair since the Chair of the Audit Committee must in any event satisfy the independence standards in SEC as well as NASDAQ rules.<sup>55</sup> The proposed change would, for example, allow an issuer representative to be appointed as Chair of the Audit Committee. Finally, the Exchange proposes a non-substantive, clarifying change to Section 4.13(g) to

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<sup>52</sup> See proposed Section 4.13(f) of the By-Laws.

<sup>53</sup> See proposed Section 4.13(g) of the By-Laws.

<sup>54</sup> See proposed Section 4.13(g) of the By-Laws.

<sup>55</sup> See proposed Section 4.13(g) of the By-Laws. To effect this change, the Exchange proposes to insert in the first full sentence of Section 4.13(g) of the By-Laws and immediately after the words “[t]he Audit” the words and symbol “& Risk” and further insert, immediately following the word “Committee” a parenthetical reading as follows: “(such committee as the same may be renamed from time to time or any successor of such committee delegated with similar duties, the “Audit Committee”).” The Exchange also proposes to renumber Section 4.13(g)(i) to delete the “(i)” and subsume the text of Section 4.13(g)(i) with that of proposed Section 4.13(g). See proposed Section 4.13(g) of the By-Laws.

provide that the Audit and Risk Committee (or such committee as the same may be renamed from time to time or any successor of such committee delegated with similar duties) shall be known as the “Audit Committee.”<sup>56</sup> The Exchange believes these proposed changes to Section 4.13(g) would provide greater flexibility to the Corporation with respect to those that may serve as Chair of the Audit Committee as well as enhance the clarity of and thus facilitate the application of the By-Laws by making the term “Audit Committee” a more clearly defined term.

The Exchange proposes to amend Section 4.13(h)(ii) of the By-Laws to remove language providing that a “majority vote of” the Board is required to remove a member of the Nominating & Governance Committee.<sup>57</sup> This change removes duplicative language and reduces potential confusion since the voting standards for all decisions of the board are set forth separately in Section 4.9(b) of the By-Laws.

Section 4.13(j) of the By-Laws provides that, in general, a majority of a committee shall constitute a quorum for the transaction of business.<sup>58</sup> The Exchange proposes to amend Section 4.13(j) to specify that a majority of the members of a committee then serving in office (rather than a majority of total directors on the committee as Section 4.13(j) currently provides) shall constitute a quorum for the transactions of business.<sup>59</sup> The Exchange believes this proposed change would remove barriers to and facilitate the work of Board committees since a vacancy in a committee would not be a barrier to action, as the quorum would be based on the directors then serving rather than the total number of directors on the committee.

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<sup>56</sup> See proposed Section 4.13(g) of the By-Laws.

<sup>57</sup> See Section 4.13(h) of the By-Laws.

<sup>58</sup> See Section 4.13(j) of the By-Laws.

<sup>59</sup> See proposed Section 4.13(j) of the By-Laws.

(iii) Article VII Officers, Agents, and Employees

Article VII of the By-Laws governs matters relating to the officers, agents, and employees of the Corporation. The Exchange proposes to amend certain provisions in Article VII to delete references to a corporate structure that no longer reflects the structure at NASDAQ. Specifically, Article VII generally envisions a corporate structure where a President is a director and/or has executive authority over the entire company. The Exchange proposes to amend certain sections of Article VII to delete references to such a structure and replace them with language suited for a corporate structure with multiple presidents, such as the current structure of NASDAQ. To effect these changes, the Exchange proposes to amend several provisions of Article VII as follows.

Section 7.1 of the By-Laws governs matters relating to the principal officers of the Corporation. Section 7.1 specifies the principal officers to be elected by the Board, including, among others, a Chair and a President. The Exchange proposes to amend Section 7.1 to provide that the principal officers to be elected by the Board may—rather than must—include the roles set out in Section 7.1. The Exchange further proposes to amend Section 7.1 to provide that one or more Presidents, rather than only a President, may be elected by the Board, among other principal officers. Section 7.1 further provides that in part that one person may not hold the offices and perform the duties of both President and Vice President or of President and Secretary. The Exchange proposes to amend Section 7.1 of the By-Laws to delete references to “President and Vice President or of President” and substitute therefor the words “Chief Executive Officer.”<sup>60</sup> As thus proposed, one person could not hold the offices and perform the duties of both Chief

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<sup>60</sup> See proposed Section 7.1 of the By-Laws.

Executive Officer and Secretary (rather than of President and Vice President or of President and Secretary).<sup>61</sup>

For the reasons discussed above in connection with Article VII of the By-Laws more broadly, the Exchange further proposes to amend Section 7.3 (Subordinate Officers, Agents, or Employees), Section 7.5 (Resignation and Removal of Officers), Section 7.9 (President), Section 7.10 (Vice President), Section 7.11 (Secretary), and Section 7.13 (Treasurer) of the By-Laws as follows.

First, the Exchange proposes to delete from Sections 7.3 and 7.5(a) of the By-Laws the following: “, the President.”

With respect to Section 7.9 of the By-Laws, the Exchange proposes to (1) delete the words “[t]he President shall, in the absence of the Chair of the Board and the Chief Executive Officer, preside at all meetings of the Board and stockholders at which the President is present. The President shall have general supervision over the business and affairs of the Corporation,” substituting therefor the words “The Board or the Chief Executive Officer may appoint one or more Presidents and each.” The Exchange would further amend Section 7.9 to (1) delete from its final sentence the word “The” replacing it with “Each”; (2) delete also from that final sentence the word “the” and replacing it with “such”; and (3) insert, also in that final sentence and immediately after “the Board” the words “or the Chief Executive Officer.”

With respect to Section 7.11 and Section 7.13 of the By-Laws, the Exchange proposes to amend these two sections to delete, from their respective final sentences, the words “or the President,” substituting therefore the words “or any other person delegated such power by the Board or Chief Executive Officer.” Consistent with similarly proposed changes to Article VII of

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<sup>61</sup> See proposed Section 7.1 of the By-Laws.

the By-Laws, the Exchange believes that the proposed changes to Sections 7.11 and Section 7.13 of the By-Laws would remove impediments to the proper administration of the By-Laws as they would more closely align such By-Laws with the current corporate structure at NASDAQ as well as provide the Corporation with greater flexibility in the application of these provisions.

The Exchange believes the proposed changes to these provisions of Article VII of the By-Laws would enhance the transparency of and facilitate the application of the By-Laws because they replace obsolete or inaccurate textual references to an outdated corporate structure with updated text designed to more closely reflect the current structure of NASDAQ.

Section 7.10 of the By-Laws governs the selection of Vice Presidents. The Exchange proposes to amend Section 7.10 of the By-Laws to provide greater clarity with respect to the duties of as well as the process for selecting Vice Presidents of the Corporation. Specifically, the Exchange proposes to amend Section 7.10 of the By-Laws to provide that the Board, the Chief Executive Officer or any other person delegated such power by the Board or Chief Executive Officer, may appoint one or more Vice Presidents. The Exchange further proposes to clarify that, any Vice President may have such additional designations in such Vice President's title as the Board, the Chief Executive Officer, or the authorized person appointing such Vice President may determine.<sup>62</sup> As proposed, each Vice President would have all powers and duties usually incident to the office of a Vice President, except as specifically limited by the Board, the Chief Executive Officer or the authorized person appointing such Vice President.<sup>63</sup> The Exchange also proposes to clarify in the next to final sentence of Section 7.10 that, in addition to the Board and the Chief Executive, as provided under this section, the authorized person appointing such Vice President

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<sup>62</sup> See proposed Section 7.10 of the By-Laws.

<sup>63</sup> See proposed Section 7.10 of the By-Laws.

may also assign such Vice President other duties and powers as the Vice Presidents shall be authorized to exercise and perform pursuant to the By-Laws.<sup>64</sup> The Exchange believes that the proposed changes to Section 7.10 of the By-Laws would provide greater clarity with respect to the duties of and the process for selecting the Vice Presidents, thereby facilitating the application of the By-Laws with respect to Vice Presidents of the Corporation.

(iv) Article VIII Indemnification

Section 8.1 of Article VIII of the By-Laws governs indemnification of Directors, officers, employees, and agents of the Corporation. Subsection (j) of Section 8.1 addresses circumstances in which a claim for indemnification or advancement of expenses is not paid in full within 60 days after a written claim under this provision has been received by the Corporation. The Exchange proposes to amend Section 8.1(j) to clarify that the Corporation will not be required to pay claims or expenses under this provision if prohibited by law. To effect this change, the Exchange proposes to insert within the first full sentence and immediately after “[the indemnified person] shall be entitled to be paid the expense of prosecuting such claim” the words “to the fullest extent permitted by law.”<sup>65</sup> The Exchange believes this proposed change is

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<sup>64</sup> See proposed Section 7.10 of the By-Laws. To effect the proposed changes to Section 7.10, the Exchange proposes to (1) delete therefrom the words “The Board shall elect” and substitute therefor the words “The Board, the Chief Executive Officer or any other person delegated such power by the Board or Chief Executive Officer, may appoint”; (2) delete, from the second sentence of Section 7.10 the words “[i]n the absence or disability of the President or if the office of President becomes vacant, the Vice Presidents in the order determined by the Board, or if no such determination has been made, in the order of their seniority, shall perform the duties and exercise the powers of the President, subject to the right of the Board at any time to extend or restrict such powers and duties or to assign them to others”; (3) insert, in the third sentence of Section 7.10 of the By-Laws and immediately following the words “as the Board” the words “the Chief Executive Officer, or the authorized person appointing such Vice President”; (4) delete, from the fourth sentence of Section 7.10 the words “The Vice Presidents shall generally assist the President in such manner as the President shall direct” substituting therefor the words “Each Vice President shall have all powers and duties usually incident to the office of a Vice President, except as specifically limited by the Board, the Chief Executive Officer or the authorized person appointing such Vice President.”; and (5) insert in the final sentence of Section 7.10 of the By-Laws and immediately after the words “the Chief Executive Officer or the” the words “authorized person appointing such Vice.” See id.

<sup>65</sup> See proposed Section 8.1(j) of the By-Laws.

appropriate as it would enhance the clarity of this provision by specifying that the extent of the Corporation's obligation to pay claims or expenses under this provision is limited to those claims or expenses not prohibited by law.

(v) IX Capital Stock

Section 9.2(a) of Article IX of the By-Laws governs requirements for signatures on stock certificates of the Corporation. Section 9.2(a) provides in part that shares of capital stock of the Corporation represented by certificates shall be signed in the name of the Corporation by two officers, with one being the Chair of the Board, the Chief Executive Officer, the President, or a Vice President, and the other being the Secretary, the Treasurer, or such other officer that may be authorized by the Board.

The Exchange proposes to amend Section 9.2(a) to broaden the scope of officers authorized to sign stock certificates. Specifically, the Exchange proposes to provide that Shares of capital stock of the Corporation represented by certificates shall be signed in the name of the Corporation by two authorized officers which shall include, without limitation, the Chair of the Board, the Chief Executive Officer, the President, any Vice President, the Secretary, and the Treasurer.<sup>66</sup> The Exchange believes the proposed changes to Section 9.2(a) would remove unnecessary limitations on officers authorized to sign stock certificates thereby providing greater flexibility in the By-Laws with respect to officers authorized to perform this important function.

Section 9.3 of the By-Laws governs matters relating to holders of record as shown on the stock ledger of the Corporation. Section 9.3(b) of the By-Laws provides that the Corporation

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<sup>66</sup> See proposed Section 9.2 of the By-Laws. To effect this change as well as make conforming changes to Section 9.2 of the By-Laws, the Exchange proposes to (1) insert, immediately after "certificates shall be signed in the name of the Corporation by two" the word "authorized"; (2) insert, immediately after "officers" the words "which shall include, without limitation,"; and (3) delete the words "with one being," as well as "or a," "and the other being," and "or such other officer that may be authorized by the Board." See id.

shall be entitled to treat the holder of record of shares of capital stock as shown on the stock ledger as the owner thereof and as the person entitled to vote such shares and to receive notice of meetings, and for all other purposes. That subsection further provides that the Corporation shall not be bound to recognize any equitable or other claim to or interest in any share of capital stock on the part of any other person, whether or not the Corporation shall have express or other notice thereof.<sup>67</sup> The Exchange proposes to amend Section 9.3(b) to provide for the possibility that applicable law might require a different outcome. Specifically, the Exchange proposes to provide that the Corporation shall, to the fullest extent permitted by law, be entitled to treat the holder of record of shares of capital stock as shown on the stock ledger as the owner thereof and as the person entitled to vote such shares and to receive notice of meetings, and for all other purposes. As further proposed, Section 9.3 would provide that the Corporation shall not be bound to recognize any equitable or other claim to or interest in any share of capital stock on the part of any other person, whether or not the Corporation shall have express or other notice thereof, except as required by law.<sup>68</sup> The Exchange believes the proposed changes to Section 9.3 of the By-Laws would ensure the enforceability of this provision by recognizing that there may be circumstances where its application would be subject to and possibly limited or otherwise affected by applicable law.

Section 9.6 of the By-Laws governs matters relating to lost, stolen, destroyed, and mutilated certificates for shares of stock of the Corporation. Section 9.6 sets out procedures for addressing the issuance of a new certificate or uncertified shares in the event that any certificate for stock of the Corporation becomes mutilated, lost, stolen, or destroyed. The Exchange

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<sup>67</sup> See Section 9.3(b) of the By-Laws.

<sup>68</sup> See proposed Section 9.3(b) of the By-Laws.

proposes to amend Section 9.6 to delete language providing that the Board or a committee thereof is authorized to take action to address each such instance of lost, stolen, destroyed, or mutilated certificates and in its place provide that the Corporation (rather than solely the Board) shall have the authority to do so.<sup>69</sup> The Exchange believes this proposed change would remove obstacles to and facilitate the reissuance of new certificates under the specified circumstances by providing that the Corporation is authorized to act under those circumstances and by removing unnecessary requirements for the Board to take action in each and every instance that a new certificate to replace a mutilated, lost, stolen, or destroyed certificate is sought.

(vi) Article X Miscellaneous Provisions

Section 10.4 of Article X of the By-Laws governs procedures relating to the execution of instruments, contracts, and the like. The Exchange proposes to delete Section 10.4 in its entirety and provide new text to better align the provisions of this section with NASDAQ's policies and procedures on signature authority. Specifically, the Exchange proposes to provide that, except as otherwise provided by law, all contracts and other documents requiring signature entered into by or on behalf of the Corporation, including, without limitation, all (i) checks, drafts, bills of exchange, notes, or other obligations or orders for the payment of money, (ii) deeds, bonds, mortgages, contracts, and other obligations or instruments, and (iii) applications, instruments, and papers required by any department of the United States Government or by any state, county, municipal, or other governmental authority, shall, in each case, be executed by such officer(s), employee(s), agent(s), or other person(s) as the Board, a duly authorized committee thereof, or the Chief Executive Officer may designate from time to time. As further proposed, the authority

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<sup>69</sup> See proposed Section 9.6 of the By-Laws. To effect his change, the Exchange proposes to (1) delete from the fourth sentence of Section 9.6 the words "Board or such committee" and substitute therefor the word "Corporation" and (2) delete from the fifth sentence the word "Board," substituting therefor the word "Corporation." See id.

to execute any contract or document in the name and on behalf of the Corporation granted in accordance with this Section may (1) be general or confined to specific instances, (2) be designated by name, title, or role, (3) include the power to delegate signature authority further to one or more other persons, whether by name, title, or role, to the extent authorized by the Board, a duly authorized committee thereof, or the Chief Executive Officer, and (4) be revoked at any time by the Board, any committee thereof, or the Chief Executive Officer.<sup>70</sup> The Exchange believes that the proposed changes to Section 10.4 of the By-Laws would enhance clarity and facilitate the application of the By-Laws by removing language that has become obsolete and replacing it with provisions that more closely reflect NASDAQ's current policies and procedures on signature authority.

Section 10.5 of the By-Laws governs the form of records of the Corporation. The Exchange proposes to delete Section 10.5 in its entirety and insert in its place new text that would conform this provision with the updated Delaware statute governing signature authority. Specifically, the Exchange proposes to provide that any records administered by or on behalf of the Corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or by means of, or be in the form of, any information storage device, method, or one or more electronic networks or databases (including one or more distributed electronic networks or databases), provided that the records so kept can be converted into clearly legible paper form within a reasonable time and otherwise comply with applicable law.<sup>71</sup>

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<sup>70</sup> See proposed Section 10.4 of the By-Laws.

<sup>71</sup> See proposed Section 10.5 of the By-Laws.

(vii) Article XI Amendments; Emergency By-Laws

Section 11.4 of Article XI of the By-Laws addresses the adoption of emergency by-laws.

The Exchange proposes to update Section 11.4 to reflect amendments to the emergency by-law provision of the Delaware General Corporation Law. Specifically, the Exchange proposes to provide that as provided in Section 11.4, the Board may adopt emergency by-laws which shall be operative during any emergency resulting from “any emergency resulting from an attack on the United States or on a locality in which the Corporation conducts its business or customarily holds meetings of its Board of Directors or its stockholders, or during any nuclear or atomic disaster or during the existence of any catastrophe, including, but not limited to, an epidemic or pandemic, and a declaration of a national emergency by the United States government, or other similar emergency condition, irrespective of whether a quorum of the Board of Directors or a standing committee thereof can be readily convened for action.”<sup>72</sup> In addition, and consistent with Delaware General Corporation Law, the Exchange proposes to update Section 11.4 to provide, in a final sentence to Section 11.4 of the By-Laws, that “[n]othing contained in this Section 11.4 shall be deemed exclusive of any other provisions for emergency powers consistent with other sections of Delaware law which have been or may be adopted by corporations created under Delaware law.”<sup>73</sup>

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<sup>72</sup> See proposed Section 11.4 of the By-Laws.

<sup>73</sup> See proposed Section 11.4 of the By-Laws. The Exchange further proposes to delete from Section 11.4 the following language as it has become obsolete: “nuclear or atomic disaster, an attack on the United States or on a locality in which the Corporation conducts its business or customarily holds meetings of the Board or the stockholders, any catastrophe, or other emergency condition, as a result of which a quorum of the Board or a committee thereof cannot readily be convened for action.” See *id.*

(viii) Article XIII Forum Selection

The Exchange proposes to adopt new language to provide the By-Laws with a customary forum selection provision. To effect this change, the Exchange proposes to add a new Article XIII titled “Forum Selection” providing as follows:<sup>74</sup>

Unless the Corporation consents in writing to the selection of an alternative forum, (A) (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any current or former director, officer, other employee or stockholder of the Corporation to the Corporation or the Corporation’s stockholders, (iii) any action asserting a claim arising pursuant to any provision of Delaware law, the Restated Certificate of Incorporation or these By-Laws (as either may be amended or restated) or as to which Delaware law confers jurisdiction on the Court of Chancery of the State of Delaware or (iv) any action asserting a claim governed by the internal affairs doctrine of the law of the State of Delaware shall, to the fullest extent permitted by law, be exclusively brought in the Court of Chancery of the State of Delaware or, if such court does not have subject matter jurisdiction thereof, the federal district court of the State of Delaware; and (B) the federal district courts of the United States shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933, as amended. Notwithstanding the foregoing, This Section 13.1 shall not apply to claims seeking to enforce any liability or duty created by the Act. To the fullest extent permitted by law, any person or entity purchasing or otherwise acquiring or holding any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Section 13.1.

The Exchange believes that this proposed addition of Article XIII to the By-Laws is appropriate as it would provide the Corporation as well as litigants with greater certainty with respect to the applicable judicial forum for addressing claims or actions involving the Corporation.<sup>75</sup>

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<sup>74</sup> See proposed Article XIII of the By-Laws.

<sup>75</sup> The Exchange notes that the bylaws of Cboe Global Markets, Inc. as well as those of CME Group, Inc., contain forum selection provisions similar to those proposed by the Exchange. See Article 11 (“Forum for Adjudication of Disputes”) of the Eight Amended and Restated Bylaws of Cboe Global Markets, Inc. (2024) [https://s202.q4cdn.com/174824971/files/doc\\_governance/2024/Dec/04/Cboe-Global-Markets-Eighth-AR-Bylaws-2ffa4c.pdf](https://s202.q4cdn.com/174824971/files/doc_governance/2024/Dec/04/Cboe-Global-Markets-Eighth-AR-Bylaws-2ffa4c.pdf); Article IX, Section 9.1 (“Forum for Adjudication of Certain Disputes”) of the Seventeenth Amended and Restated Bylaws of CME Group, Inc. (2022) <https://www.sec.gov/Archives/edgar/data/1156375/000119312522301477/d412380dex31.htm>.

(ix) Non-Substantive Changes

The remaining proposed amendments to the By-Laws are non-substantive changes designed to simplify and streamline the document. Specifically, the Exchange proposes to (1) amend Article I(k) and Article I(m) to correct typographical errors by deleting a period and substituting in its place a semicolon and by inserting a missing parenthesis respectively; (2) make non-substantive clarifying changes to subparagraph (p) of Article I; (3) amend Article I(s) to correct a typographical error by removing a period after “and”; and (4) delete from Section 3.1(a) the term “shareholder” and substitute therefor the word “stockholder.” the latter which more closely reflects established terminology of the By-Laws. The Exchange believes the proposed non-substantive changes are either administrative or clarifying in nature, and that, as such, they are in the public interest as they are designed to avoid confusion with respect to the operation of the By-Laws thus facilitating their use.

2. Statutory Basis

The Exchange believes that the proposed changes are consistent with Section 6(b) of the Act,<sup>76</sup> in general, and furthers the objectives of Section 6(b)(1) of the Act,<sup>77</sup> in particular, in that they enable the Exchange to be so organized so as to have the capacity to be able to carry out the purposes of the Act and to comply, and to 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. The Exchange also believes that the proposed changes are consistent with Section 6(b) of the Act,<sup>78</sup> in general, and furthers the objectives of Section

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<sup>76</sup> 15 U.S.C. 78f(b).

<sup>77</sup> 15 U.S.C. 78f(b)(1).

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

6(b)(5) of the Act,<sup>79</sup> in particular, in that they are designed 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.

(a) Proposed Changes to the Certificate

The Exchange believes the proposed changes to paragraphs A and B of Article Sixth of the Certificate are in the public interest as they would update the Certificate, consistent with developments in Delaware General Corporation Law that enable companies incorporated in Delaware, such as NASDAQ, to limit the liability of certain of their officers in narrow circumstances, as discussed above. The Exchange notes that amendments providing for officer exculpation are increasingly common for public companies, and that the number of shareholder proposals calling for such amendments have continued to increase since 2022 when the Delaware law was passed.<sup>80</sup>

(b) Proposed Changes to the By-Laws

The Exchange believes that changes proposed for Article III of the By-Laws are in the public interest as they would update the By-Laws and conform them to current practices and developments in the law with respect to corporate matters such as procedures governing the annual and special meetings of stockholders, the conduct of such meetings, and the invocation of proxy access. The proposed changes to Article IV of the By-Laws are either clarifying in nature or otherwise purport to refine governance practices by providing the Corporation with greater flexibility with respect to such matters as the qualifications of Directors, quorum and voting, or otherwise update such provisions to make them more consistent with current governance

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<sup>79</sup> 15 U.S.C. 78f(b)(5).

<sup>80</sup> See supra note 3 and accompanying text.

practices as well as the policies and procedures of NASDAQ. The Exchange believes that proposed changes to Articles VII through XIII are in the public interest and consistent with the protection of investors as they are designed to accomplish several objectives, including updating the By-Laws to conform with current practices or recent developments in Delaware General Corporation Law, aligning the By-Laws with current NASDAQ policies and procedures, and enhancing the clarity of the By-Laws thus facilitating their proper application and use. Finally, the remaining changes can be characterized as non-substantive, because they are designed to either correct typographical errors, conform NASDAQ governance documents to terminology in the By-Laws, remove obsolete text, or otherwise make non-substantive revisions to the By-Laws to make them clearer and easier to use.

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

Because the proposed rule change relates to the governance of NASDAQ 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

Within 45 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 Exchange consents, the Commission shall: (a) by order approve or disapprove 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 is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-ISE-2025-31 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-ISE-2025-31. 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 filing 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-ISE-2025-31 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.<sup>81</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>81</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

Deleted text is [bracketed]. New text is underlined.

\* \* \* \* \*

**AMENDED AND RESTATED CERTIFICATE OF INCORPORATION  
OF THE NASDAQ OMX GROUP, INC.**

\* \* \* \* \*

Article Sixth

- A. A director or officer of Nasdaq shall not be liable to Nasdaq or its stockholders for monetary damages for breach of fiduciary duty as a director or officer, except to the extent that such exemption from liability or limitation thereof is not permitted under the General Corporation Law of the State of Delaware as the same exists or may hereafter be amended.
- B. Any repeal or modification of paragraph A shall not adversely affect any right or protection of a director or officer of Nasdaq existing hereunder with respect to any act or omission occurring prior to such repeal or modification.

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**BY-LAWS OF NASDAQ, INC.**

**Article I Definitions**

When used in these By-Laws, unless the context otherwise requires, the term:

**(a)–(j)** No change.

**(k)** An “Executive Officer” of a member or member organization means those officers covered in Rule 16a1(f) under the Act, as if the member or member organization were an issuer within the meaning of such Rule[.];

**(l)** No change.

**(m)** “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;

**(n)–(o)** No change.

**(p)** "Nominating & Governance Committee" means the Nominating & Governance Committee appointed pursuant to these By-Laws as the same may be renamed from time to time or any successor of such committee delegated with similar duties;

**(q)–(r)** No change.

**(s)** "Self-Regulatory Subsidiary" means any subsidiary of the Corporation that is a self-regulatory organization as defined under Section 3(a)(26) of the Act; and[.]

**(t)** No change

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## **Article II Offices**

### **Sec. 2.1 Location**

No change.

### **Sec. 2.2 Change of Location**

No change.

## **Article III Meetings of Stockholders**

### **Sec. 3.1 Annual Meetings of Stockholders**

**(a)** Nominations of persons for election to the Board and the proposal of other business to be considered by the stockholders may be made at an annual meeting of stockholders only (i) pursuant to the Corporation's notice of meeting (or any supplement thereto), (ii) by or at the direction of the Board or the Nominating & Governance Committee, (iii) by any stockholder of the Corporation who (A) is a stockholder of record of the Corporation (and, with respect to any beneficial owner, if such person is different from the[shareholder] stockholder of record, on whose behalf such nomination or other business is made or proposed to be brought, only if such beneficial owner was the beneficial owner of shares of the Corporation) both at the time the notice provided for in this Section 3.1 is delivered to the Secretary of the Corporation and at the time of the meeting, (B) is entitled to vote at the meeting and (C) complies with the notice procedures set forth in this Section 3.1 or (iv) with respect to nominations of persons for election to the Board, pursuant to Section 3.6 of these By-Laws.

**(b)** For nominations or other business to be properly brought before an annual meeting by a stockholder pursuant to Section 3.1(a)(iii), the stockholder must have given timely notice thereof (including, in the case of a nomination, timely delivery of the completed and signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D)), and timely updates or supplements to such notice, in writing and in proper form to the Secretary of the Corporation and any such proposed business other than the nominations of persons for election to the Board must constitute a proper matter for stockholder action. To be timely, a stockholder's notice shall be delivered to the Secretary at the principal executive offices of the Corporation not later than the close of business on the ninetieth day nor earlier than the close of business on the one hundred twentieth day prior to the first anniversary of the preceding year's annual meeting (provided, however, that in the event that the date of the annual meeting is more than thirty days before or more than seventy days after such anniversary date, notice by the stockholder must be so delivered not earlier than the close of business on the one hundred twentieth day prior to such annual meeting and not later than the close of business on the later of the ninetieth day prior to such annual meeting or the tenth day following the day on which public announcement of the date of such meeting is first made by the Corporation). In no event shall the public announcement of an adjournment or postponement of an annual meeting commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above. In addition, to be timely, a stockholder's notice shall further be updated and supplemented, if necessary, so that the information provided or required to be provided in such notice shall be true and correct as of the record date for the annual meeting and as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof, and such update and supplement shall be delivered in writing to the Secretary at the principal executive offices of the Corporation not later than the fifth business day after the record date for the annual meeting (in the case of the update and supplement required to be made as of the record date), and not later than the eighth business day prior to the date for the annual meeting or, if practicable, any adjournment or postponement thereof and, if not practicable, on the first practicable date prior to the date to which the annual meeting has been adjourned or postponed (in the case of the update and supplement required to be made as of the 10th business day prior to the annual meeting or any adjournment or postponement thereof). Such stockholder's notice shall set forth:

(i) as to each person, if any, whom a Proposing Person proposes to nominate for election or reelection as a director, (A) all information with respect to such proposed nominee that would be required to be disclosed pursuant to clause (iii) of this Section 3.1(b) if such proposed nominee were a Proposing Person, (B) all information relating to such proposed nominee that is required to be disclosed in solicitations of proxies for election of directors in an election contest, or is otherwise required, in each case pursuant to Section 14(a) under the Act and the rules thereunder (including such proposed nominee's written consent to being named in the Corporation's proxy statement as a nominee of such Proposing Person and in the accompanying proxy card and to serving as a director if elected), (C) a description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships, between or among any Proposing Person, on the one hand, and such proposed nominee and any of his or her respective affiliates and

associates, on the other hand, including, without limitation, all information that would be required to be disclosed pursuant to Item 404 under Regulation S-K if such [Requesting]Proposing Person were the “Registrant” for purposes of such rule and the proposed nominee were a director or executive officer of such Registrant, and (D) a completed and signed questionnaire, representation and agreement in accordance with Section 3.5. The Corporation may require any proposed nominee to furnish such other information [(i)] as it may reasonably require to determine whether the [eligibility of such]proposed nominee is qualified under the Restated Certificate of Incorporation, these By-Laws, the rules and regulations of any stock exchange applicable to the Corporation, or any law or regulation applicable to the Corporation to serve as a director and/or independent director of the Corporation[ or (ii) that could be material to a reasonable stockholder’s understanding of the independence, or lack of independence, of such proposed nominee];

(ii) No change.

(iii) as to each Proposing Person

(A)–(B) No change.

(C) a description of any agreement, arrangement or understanding with respect to the nomination or proposal between or among such stockholder and/or such beneficial owner, any of their respective affiliates or associates, and any other[s acting in concert with any of the foregoing] person;

(D)–(H) No change.

(I) any significant equity interest or any Synthetic Equity Interest or Short Interest in any principal competitor of the Corporation (as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914) held by such Proposing Person;

(J) any direct or indirect interest of such Proposing Person in any contract with the Corporation, any affiliate of the Corporation (as reflected on the most recent Form 10-K of the Corporation) or any principal competitor of the Corporation (as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914) (including, in any such case, any employment agreement, collective bargaining agreement or consulting agreement);

(K) any pending or threatened litigation in which such Proposing Person is a party or material participant involving the Corporation or any of its officers or Directors, or any affiliate of the Corporation (as reflected on the most recent Form 10-K of the Corporation);

(L) any material transaction occurring, in whole or in part, during the then immediately preceding 12-month period between such Proposing Person, on the one hand, and the Corporation, any affiliate of the Corporation (as reflected on the most recent Form 10-K of the Corporation), or any principal competitor of the

Corporation as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914), on the other hand;  
(M)-(N) No change.

(O) a representation whether the Proposing Person intends or is part of a group which intends (1) to deliver a proxy statement and/or form of proxy to holders of at least the percentage of the Corporation's outstanding capital stock required to approve or adopt the proposal or elect the nominee and/or (2) otherwise to solicit proxies or votes from stockholders in support of such proposal or nomination and/or (3) to solicit proxies or votes in support of any proposed nominee in accordance with Rule 14a-19 promulgated under the Act.

\* \* \* \* \*

(c) No change.

(d) Notwithstanding anything in the second sentence of Section 3.1(b) to the contrary, in the event that the number of directors to be elected to the Board at an annual meeting is increased effective at the annual meeting and there is no public announcement by the Corporation naming the nominees for the additional directorships at least one hundred days prior to the first anniversary of the preceding year's annual meeting, a stockholder's notice required by this Section 3.1 shall also be considered timely, but only with respect to nominees for the additional directorships, if it shall be delivered to the Secretary at the principal executive offices of the Corporation not later than the close of business on the tenth day following the day on which such public announcement is first made by the Corporation. The number of nominees a Proposing Person may nominate for election at the annual meeting on its own behalf (or in the case of a Proposing Person giving the notice on behalf of a beneficial owner, the number of nominees a Proposing Person may nominate for election at the annual meeting on behalf of such beneficial owner) shall not exceed the number of directors to be elected at such annual meeting.

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### **Sec. 3.2 Special Meetings of Stockholders**

(a) Special meetings of the stockholders of the Corporation may only be called (i) at any time by the Board pursuant to a resolution adopted by a majority of the total number of directors the Corporation would have if there were no vacancies and (ii) by the Secretary following his or her receipt of a written request in proper form for a special meeting (a "Special Meeting Request") by one or more stockholders holding of record, in the aggregate, at least 15 percent of the outstanding shares of capital stock of the Corporation entitled to vote on the matter or matters to be brought before the proposed special meeting (the "Requisite Percentage"), which shares are determined to be "Net Long Shares" in accordance with this Section 3.2, and having held such Net Long Shares continuously for at least one year as of the date of such request (the "Requisite Holders"). For purposes of determining Requisite Holders under this Section 3.2, "Net Long Shares" shall be limited to the number of shares beneficially owned, directly or indirectly, by any stockholder or beneficial owner that constitute such person's "net long position" as defined in Rule 14e-4 under the Act, provided that (A) for the purposes of such

definition, references in such Rule to “the date the tender offer is first publicly announced or otherwise made known by the bidder to the holders of the security to be acquired” shall be the date of the relevant Special Meeting Request and all dates in the one year period prior thereto, the “highest tender offer price or stated amount of the consideration offered for the subject security” shall refer to the closing sales price of the Corporation’s capital stock on the NASDAQ Stock Market on such date (or, if such date is not a trading day, the next succeeding trading day), the “person whose securities are the subject of the offer” shall refer to the Corporation, a “subject security” shall refer to the issued and outstanding voting stock of the Corporation; and (B) the net long position of such stockholder shall be reduced by any shares as to which such person does not have the right to vote or direct the vote at the proposed special meeting or as to which such person has entered into a derivative or other agreement, arrangement or understanding that hedges or transfers, in whole or in part, directly or indirectly, any of the economic consequences of ownership of such shares. In addition, to the extent any affiliates of the stockholder or beneficial owner are knowingly [acting in concert]coordinating with the stockholder or beneficial owner with respect to the calling of the special meeting, the determination of Net Long Shares may include the effect of aggregating the Net Long Shares (including any negative number) of such affiliate or affiliates. Whether shares constitute Net Long Shares shall ultimately be decided by the Board in its reasonable determination. In determining whether a special meeting of stockholders has been requested by the Requisite Holders representing in the aggregate at least the Requisite Percentage, multiple Special Meeting Requests delivered to the Secretary will be considered together only if (i) each Special Meeting Request identifies substantially the same purpose or purposes of the special meeting and substantially the same matters proposed to be acted on at the requested special meeting (in each case as determined in good faith by the Board) and (ii) such Special Meeting Requests have been dated and delivered to the [s]Secretary within 60 days of the earliest dated Special Meeting Request. To be in proper form, a Special Meeting Request must comply with this Section 3.2. The Board shall determine whether a Special Meeting Request is in proper form[ and such determination shall be binding on the Corporation and the stockholders].

**(b)** No change.

**(c)** Notwithstanding anything in these By-Laws to the contrary, a Special Meeting Request shall not be valid and the special meeting requested in such Special Meeting Request shall not be called by the Secretary if (i) such Special Meeting Request relates to an item of business that is not a proper subject for stockholder action under applicable law, (ii) such Special Meeting Request is delivered to the Secretary during the period commencing 90 days prior to the one-year anniversary of the date of the immediately preceding annual meeting and ending on the date of the next annual meeting, (iii) a Similar Item was presented at any meeting of stockholders held within 120 days prior to the date on which such Special Meeting Request was delivered to the Secretary or (iv) a Similar Item is included in the Corporation’s notice of meeting as an item of [B]business to be presented at a stockholder’s meeting that has been called but not yet held. The Board may adjourn or reschedule any previously scheduled special meeting of the stockholders.

**(d)-(i)** No change.

\* \* \* \* \*

### Sec. 3.3 General

**(a)** Only such persons who are nominated in accordance with the procedures set forth in this Article III (including, with respect to annual meetings, Section 3.6 of these By-Laws) shall be eligible to be elected at an annual or special meeting of stockholders of the Corporation to serve as directors and only such business shall be conducted at a meeting of stockholders as shall have been brought before the meeting in accordance with the procedures set forth in this Article III. Except as otherwise provided by law, the chairman of the meeting (or, in advance of any meeting of stockholders, the Board of Directors or an authorized committee thereof) shall have the power and duty (i) to determine whether a nomination or any business proposed to be brought before the meeting was made or proposed, as the case may be, in accordance with the procedures set forth in this Article III (including whether the Proposing Person solicited (or is part of a group which solicited) or did not so solicit, as the case may be, proxies or votes in support of such nomination or proposal in compliance with such Proposing Person's representation as required by Section 3.1(b)(iii)(O)) and (ii) if any proposed nomination or business was not made or proposed in compliance with this Article III, to declare that such nomination shall be disregarded or that such proposed business shall not be transacted.

Notwithstanding the foregoing provisions of this Article III, if the stockholder (or a qualified representative of the stockholder) does not appear at the annual or special meeting of stockholders of the Corporation to present a nomination or business, such nomination shall be disregarded and such proposed business shall not be transacted, notwithstanding that proxies in respect of such vote may have been received by the Corporation. For purposes of this Section 3.3, to be considered a qualified representative of the stockholder, a person must be a duly authorized officer, manager or partner of such stockholder or must be authorized by a writing executed by such stockholder or an electronic transmission delivered by such stockholder to act for such stockholder as proxy at the meeting of stockholders and such person must produce such writing or electronic transmission, or a reliable reproduction of the writing or electronic transmission, at the meeting of stockholders. Notwithstanding anything to the contrary in these Bylaws, unless otherwise required by law, if any Proposing Person (i) provides notice pursuant to Rule 14a-19(b) promulgated under the Act with respect to any proposed nominee and (ii) subsequently fails to comply with the requirements of Rule 14a-19(a)(2) or Rule 14a-19(a)(3) promulgated under the Act (or fails to timely provide reasonable evidence sufficient to satisfy the Corporation that such Proposing Person has met the requirements of Rule 14a-19(a)(3) promulgated under the Act in accordance with the following sentence), then the nomination of each such proposed nominee shall be disregarded, notwithstanding that proxies or votes in respect of the election of such proposed nominees may have been received by the Corporation (which proxies and votes shall be disregarded). Upon request by the Corporation, if any Proposing Person provides notice pursuant to Rule 14a-19(b) promulgated under the Act, such Proposing Person shall deliver to the Corporation, no later than five (5) business days prior to the applicable meeting, reasonable evidence that it has met the requirements of Rule 14a-19(a)(3) promulgated under the Act.

**(b)-(c)** No change.

\* \* \* \* \*

#### **Sec. 3.4 Conduct of Meetings**

The date and time of the opening and the closing of the polls for each matter upon which the stockholders will vote at a meeting shall be announced at the meeting by the chairman of the meeting who shall be an officer or director of the Corporation and who shall be the person presiding over the meeting. The Board may adopt by resolution such rules and regulations for the conduct of the meeting of stockholders as it shall deem appropriate. Except to the extent inconsistent with such rules and regulations as adopted by the Board, the person presiding over any meeting of stockholders shall have the right and authority to convene and (for any or no reason) to recess and/or to adjourn the meeting, to prescribe such rules, regulations and procedures and to do all such acts as, in the judgment of such chairman, are appropriate for the proper conduct of the meeting. Such rules, regulations or procedures, whether adopted by the Board or prescribed by the presiding officer of the meeting, may include, without limitation, the following: (a) the establishment of an agenda or order of business for the meeting; (b) rules and procedures for maintaining order at the meeting and the safety of those present; (c) limitations on attendance at or participation in the meeting to stockholders of record of the Corporation, their duly authorized and constituted proxies or such other persons as the chairman of the meeting shall determine; (d) restrictions on entry to the meeting after the time fixed for the commencement thereof; and (e) limitations on the time allotted to questions or comments by participants. Unless and to the extent determined by the Board or the person presiding over the meeting, meetings of stockholders shall not be required to be held in accordance with the rules of parliamentary procedure.

\* \* \* \* \*

#### **Sec. 3.5 Submission of Questionnaire, Representation and Agreement**

No change.

#### **Sec. 3.6 Proxy Access**

**(a)-(c)** No change.

**(d)** For purposes of this Section 3.6, an Eligible Stockholder shall be deemed to "own" only those outstanding shares of common stock of the Corporation as to which the stockholder possesses both:

- (i) the full voting and investment rights pertaining to the shares; and
- (ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided that the number of shares calculated in accordance with clauses (i) and (ii) shall not include any shares:
  - (x) sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, including any short sale;

(y) borrowed by such stockholder or any of its affiliates for any purposes or purchased by such stockholder or any of its affiliates pursuant to an agreement to resell; or

(z) subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar agreement entered into by such stockholder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional amount or value of shares of outstanding common stock of the Corporation, in any such case which instrument or agreement has, or is intended to have, or if exercised by either party would have, the purpose or effect of:

(1) reducing in any manner, to any extent or at any time in the future, such stockholder's or its affiliates' full right to vote or direct the voting of any such shares; and/or

(2) hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or its affiliates.

A stockholder shall “own” shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has delegated any voting power by means of a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the stockholder. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has loaned such shares provided that the stockholder has the power to recall such loaned shares on three (3) business days' notice, has recalled such loaned shares as of the date of the Notice of Proxy Access Nomination and holds such shares through the date of the annual meeting. The terms “owned,” “owning” and other variations of the word “own” shall have correlative meanings. Whether outstanding shares of the common stock of the Corporation are “owned” for these purposes shall be determined by the Board or any committee thereof[*, in each case, in its sole discretion*]. For purposes of this Section 3.6, the term “affiliate” or “affiliates” shall have the meaning ascribed thereto under the rules and regulations of the Act. An Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of this Section 3.6.

**(e)-(g)** No change.

**(h)** The Corporation shall not be required to include, pursuant to this Section 3.6, a Stockholder Nominee in its proxy materials for any meeting of stockholders, any such nomination shall be disregarded and no vote on such Stockholder Nominee will occur, notwithstanding that proxies in respect of such vote may have been received by the Corporation:

(i) No change.

(ii) who is not independent under the listing standards of the NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing independence of the Corporation's directors, in each case as determined by the Board[ in its sole discretion];

(iii-vii) No change.

(viii) if such Stockholder Nominee or the applicable Eligible Stockholder shall have provided information to the Corporation in respect to such nomination that was untrue in any material respect or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, as determined by the Board or any committee thereof[, in each case, in its sole discretion]; or

(ix) No change.

**(i)** Notwithstanding anything to the contrary set forth herein, the Board or the chairman of the meeting of stockholders shall declare a nomination by an Eligible Stockholder to be invalid, and such nomination shall be disregarded notwithstanding that proxies in respect of such vote may have been received by the Corporation, if:

(i) the Stockholder Nominee(s) and/or the applicable Eligible Stockholder shall have breached its or their obligations under this Section 3.6, as determined by the Board or the chairman of the meeting of stockholders[, in each case, in its or his sole discretion]; or (ii) the Eligible Stockholder (or a qualified representative thereof) does not appear at the meeting of stockholders to present any nomination pursuant to this Section 3.6.

**(j)** No change.

**(k)** The Board (or any other person or body authorized by the Board) shall have the exclusive power and authority to interpret the provisions of this Section 3.6 of these By-Laws and make all determinations deemed necessary or advisable in connection with this Section 3.6 as to any person, facts or circumstances.[ All such actions, interpretations and determinations that are done or made by the Board (or any other person or body authorized by the Board) shall be final, conclusive and binding on the Corporation, the stockholders and all other parties].

**(l)** No change.

**(m)** This Section 3.6 shall be the exclusive method for stockholders to include nominees for director in the Corporation's proxy materials other than nominees included pursuant to, and in compliance with, Section 14a-19 of the Act.

\* \* \* \* \*

## Article IV Board of Directors

### Sec. 4.1 General Powers

No change.

#### **Sec. 4.2 Number of Directors**

No change.

#### **Sec. 4.3 Qualifications**

Directors need not be stockholders of the Corporation. The number of Non-Industry Directors shall equal or exceed the number of Industry Directors. The Board shall include at least two Public Directors. The Board may include[ at least one, but no more than two,] Issuer Directors. The Board shall include no more than one Staff Director, unless the Board consists of ten or more Directors. In such case, the Board shall include no more than two Staff Directors.

\* \* \* \* \*

#### **Sec. 4.4 – Sec. 4.8**

No change.

\* \* \* \* \*

#### **Sec. 4.9 Quorum and Voting**

**(a)** At all meetings of the Board, unless otherwise set forth in these By-Laws or required by law, a quorum for the transaction of business shall consist of a majority of the total number of directors constituting the Board. In the absence of a quorum, a majority of the Directors present may adjourn the meeting to another time and place[until a quorum be present]. Notice of the time, place and purpose(s) of any such adjourned meeting shall be given in accordance with these Bylaws; provided that to the extent notice of the time, place and purpose(s) of such adjourned meeting is announced at the meeting at which the adjournment is taken, notice need only be given to the Directors not present thereat.

**(b)** No change.

\* \* \* \* \*

#### **Sec. 4.10 Regulation**

No change.

#### **Sec. 4.11 Meetings**

No change.

#### **Sec. 4.12 Notice of Meetings; Waiver of Notice**

**(a)** Notice of any meeting of the Board shall be deemed to be duly given to a Director if: (i) mailed to the address last made known in writing to the Corporation by such Director as the address to which such notices are to be sent, at least seven days before the day on which such meeting is to be held; (ii) sent to the Director at such address by [telegraph,

telefax, cable, radio, wireless]facsimile, e-mail or other means of [written ]electronic transmission, not later than the day before the day on which such meeting is to be held; or (iii) delivered to the Director personally or orally, by telephone or otherwise, not later than the day before the day on which such meeting is to be held. Each notice shall state the time and place of the meeting and the purpose(s) thereof.

**(b)** Notice of any meeting of the Board need not be given to any Director if waived by that Director in writing or by electronic transmission [(or by telegram, telefax, cable, radio, wireless, e-mail or other means of written electronic transmission and subsequently confirmed in writing or by electronic transmission) ]whether before or after the holding of such meeting, or if such Director is present at such meeting, subject to Article X, Section 10.3(b).

**(c)** No change.

\*\*\*\*\*

#### **Sec. 4.13 Committees**

**(a)** The Corporation has opted into Section 141(c)(2) of Delaware law. The Board may, by resolution or resolutions adopted by the Board, appoint one or more committees. Except as herein provided, vacancies in membership of any committee shall be filled by the Board. The Board may designate one or more Directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of any member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not such member or members constitute a quorum, may unanimously appoint another Director to act at the meeting in the place of any such absent or disqualified member. Members of a committee shall hold office for such period as may be fixed by a resolution adopted by the Board. Any member of a committee may be removed from such committee only by the Board, after appropriate notice.

**(b)** No change.

**(c)** Except as otherwise provided by applicable law, no committee shall have the power or authority of the Board with regard to: (a) approving or adopting, or recommending to the stockholders, any action or matter (other than the election or removal of directors) expressly required by Delaware law to be submitted to stockholders for approval or (b) adopting, amending or repealing any By-Law of the Corporation[amending the Restated Certificate of Incorporation or the By-Laws of the Corporation; adopting an agreement of merger or consolidation; recommending to the stockholders the sale, lease, or exchange of all or substantially all the Corporation's property and assets; or recommending to the stockholders a dissolution of the Corporation or a revocation of a dissolution. Unless the resolution of the Board expressly so provides, no committee shall have the power or authority to authorize the issuance of stock].

**(d)** The Board may appoint an Executive Committee, which shall, to the fullest extent permitted by Delaware law and other applicable law, have and be permitted to exercise all the powers and authority of the Board in the management of the business and affairs

of the Corporation between meetings of the Board, and which may authorize the seal of the Corporation to be affixed to all papers that may require it. The number of Non-Industry Directors on the Executive Committee shall equal or exceed the number of Industry Directors on the Executive Committee. The Executive Committee shall include at least two Public Directors.[ An Executive Committee member shall hold office for a term of one year.]

**(e)** The Board may appoint a Finance Committee. The Finance Committee shall advise the Board with respect to the oversight of the financial operations and conditions of the Corporation, including recommendations for the Corporation's annual operating and capital budgets and proposed changes to the rates and fees charged by the Corporation.[ A Finance Committee member shall hold office for a term of one year.]

**(f)** The Board shall appoint a Management Compensation Committee consisting of at least two members. The Management Compensation Committee shall consider and recommend compensation policies, programs, and practices for employees of the Corporation. The number of Non-Industry Directors on the Management Compensation Committee shall equal or exceed the number of Industry Directors on the Management Compensation Committee. [ A Management Compensation Committee member shall hold office for a term of one year. ] Each member of the Management Compensation Committee shall be an independent director within the meaning of, and shall meet the eligibility requirements set forth in, the rules of the NASDAQ Stock Market.

**(g)** The Board shall appoint an Audit Committee.[( i)]The Audit & Risk Committee (such committee as the same may be renamed from time to time or any successor of such committee delegated with similar duties, the "Audit Committee") shall consist of three or more Directors, each of whom shall be an independent director within the meaning of the rules of the NASDAQ Stock Market and Section 10A of the Act. The number of Non-Industry Directors on the Audit Committee shall equal or exceed the number of Industry Directors on the Audit Committee. The Audit Committee shall include two Public Directors.[ A Public Director shall serve as Chair of the Audit Committee. An Audit Committee member shall hold office for a term of one year.]

**(h)** The Board may appoint a Nominating & Governance Committee. The Nominating & Governance Committee shall nominate Directors for each vacant or new Director position on the Board.

(i) No change.

(ii) Members of the Nominating & Governance Committee shall be appointed annually by the Board and may be removed by [majority vote of ]the Board.

(iii) No change.

**(i)** No change.

**(j)** Unless otherwise provided by these By-Laws, a majority of the members of a committee then in office shall constitute a quorum for the transaction of business, and the vote of a majority of the members of such committee present at a meeting at which a quorum is present shall be an act of such committee.

\* \* \* \* \*

#### **Sec. 4.14 Conflicts of Interest; Contracts and Transactions Involving Directors**

No change.

\* \* \* \* \*

#### **Sec. 4.15 Action Without Meeting**

No change.

### **Article V Reserved**

No Change.

### **Article VI Compensation**

No change.

### **Article VII Officers, Agents, and Employees**

#### **Sec. 7.1 Principal Officers**

The principal officers of the Corporation shall be elected by the Board and [shall ]may include a Chairof the Board, a Chief Executive Officer, one or more[a] Presidents, a Secretary, a Treasurer, and such other officers as may be designated by the Board. One person may hold the offices and perform the duties of any two or more of said principal offices, except the offices and duties of [President and Vice President or of President]Chief Executive Officer and Secretary. None of the principal officers, except the Chair of the Board, need be Directors of the Corporation.

\* \* \* \* \*

#### **Sec. 7.2 No change.**

#### **Sec. 7.3 Subordinate Officers, Agents, or Employees**

In addition to the principal officers, the Corporation may have one or more subordinate officers, agents, and employees as the Board may deem necessary, each of whom shall hold office for such period and exercise such authority and perform such duties as the Board, the Chief Executive Officer[, the President], or any officer designated by the Board, may from time to time determine. Agents and employees of the Corporation shall be under the supervision and control of the officers of the Corporation, unless the Board, by resolution, provides that an agent or employee shall be under the supervision and control of the Board.

\* \* \* \* \*

#### **Sec. 7.4 Delegation of Duties of Officers**

No change.

#### **Sec. 7.5 Resignation and Removal of Officers**

**(a)** Any officer may resign at any time upon notice of resignation to the Board, the Chief Executive Officer[, the President,] or the Secretary. Any such resignation shall take effect upon receipt of such notice or at any later time specified therein. The acceptance of a resignation shall not be necessary to make the resignation effective.

**(b)** No change.

\* \* \* \* \*

#### **Sec. 7.6 Bond**

No change.

#### **Sec. 7.7 Chair of the Board**

No change.

#### **Sec. 7.8 Chief Executive Officer**

No change.

#### **Sec. 7.9 President**

[The President shall, in the absence of the Chair of the Board and the Chief Executive Officer, preside at all meetings of the Board and stockholders at which the President is present. The President shall have general supervision over the business and affairs of the Corporation. ]The Board or the Chief Executive Officer may appoint one or more Presidents and each[The] President shall have all powers and duties usually incident to the office of the President, except as specifically limited by a resolution of the Board. [The]Each President shall exercise such other powers and perform such other duties as may be assigned to[ the] such President from time to time by the Board or the Chief Executive Officer.

#### **Sec. 7.10 Vice President**

[The Board shall elect]The Board, the Chief Executive Officer or any other person delegated such power by the Board or Chief Executive Officer, may appoint one or more Vice Presidents. [In the absence or disability of the President or if the office of President becomes vacant, the Vice Presidents in the order determined by the Board, or if no such determination has been made, in the order of their seniority, shall perform the duties and exercise the powers of the President, subject to the right of the Board at any time to extend or restrict such powers and duties or to assign them to others. ]Any Vice President

may have such additional designations in such Vice President's title as the Board, the Chief Executive Officer, or the authorized person appointing such Vice President may determine. [The Vice Presidents shall generally assist the President in such manner as the President shall direct. ]Each Vice President shall have all powers and duties usually incident to the office of a Vice President, except as specifically limited by the Board, the Chief Executive Officer or the authorized person appointing such Vice President. Each Vice President shall exercise such other powers and perform such other duties as may be assigned to such Vice President from time to time by the Board, the Chief Executive Officer or the authorized person appointing such Vice President. The term "Vice President" used in this Section shall include the positions of Executive Vice President, Senior Vice President, and Vice President.

\* \* \* \* \*

### **Sec. 7.11 Secretary**

The Secretary shall act as Secretary of all meetings of the stockholders and of the Board at which the Secretary is present, shall record all the proceedings of all such meetings in a book to be kept for that purpose, shall have supervision over the giving and service of notices of the Corporation, and shall have supervision over the care and custody of the corporate records and the corporate seal of the Corporation. The Secretary shall be empowered to affix the corporate seal to documents, the execution of which on behalf of the Corporation under its seal, is duly authorized, and when so affixed, may attest the same. The Secretary shall have all powers and duties usually incident to the office of Secretary, except as specifically limited by a resolution of the Board. The Secretary shall exercise such other powers and perform such other duties as may be assigned to the Secretary from time to time by the Board, the Chief Executive Officer or any other person delegated such power by the Board or Chief Executive Officer[or the President].

\* \* \* \* \*

### **Sec. 7.12 Assistant Secretary**

No change.

### **Sec. 7.13 Treasurer**

The Treasurer shall have general supervision over the care and custody of the funds and over the receipts and disbursements of the Corporation and shall cause the funds of the Corporation to be deposited in the name of the Corporation in such banks or other depositories as the Board may designate. The Treasurer shall have supervision over the care and safekeeping of the securities of the Corporation. The Treasurer shall have all powers and duties usually incident to the office of Treasurer except as specifically limited by a resolution of the Board. The Treasurer shall exercise such other powers and perform such other duties as may be assigned to the Treasurer from time to time by the Board, the Chief Executive Officer or any other person delegated such power by the Board or Chief Executive Officer[or the President].

\* \* \* \* \*

### **Sec. 7.14 Assistant Treasurer**

No change.

## **Article VIII Indemnification**

### **Sec. 8.1 Indemnification of Directors, Officers, Employees, and Agents**

**(a)-(h)** No change.

**(j)** If a claim for indemnification or advancement of expenses under this Article is not paid in full within 60 days after a written claim therefor by an indemnified person has been received by the Corporation, the indemnified person may file suit to recover the unpaid amount of such claim and, if successful in whole or in part, shall be entitled to be paid the expense of prosecuting such claim to the fullest extent permitted by law. In any such action, the Corporation shall have the burden of proving that the indemnified person is not entitled to the requested indemnification or advancement of expenses under Delaware law.

\* \* \* \* \*

### **Sec. 8.2 Indemnification Insurance**

No change.

## **Article IX Capital Stock**

### **Sec. 9.1 Certificates**

No change.

### **Sec. 9.2 Signatures**

**(a)** Shares of capital stock of the Corporation represented by certificates shall be signed in the name of the Corporation by two authorized officers which shall include, without limitation, [with one being ]the Chair of the Board, the Chief Executive Officer, the President, any[or a] Vice President, [and the other being ]the Secretary, the Treasurer[, or such other officer that may be authorized by the Board]. Such certificates may be sealed with the corporate seal of the Corporation or a facsimile thereof.

**(b)** No change.

\* \* \* \* \*

### **Sec. 9.3 Stock Ledger**

**(a)** No change.

**(b)** The Corporation shall, to the fullest extent permitted by law, be entitled to treat the holder of record of shares of capital stock as shown on the stock ledger as the owner thereof and as the person entitled to vote such shares and to receive notice of meetings, and for all other purposes. The Corporation shall not be bound to recognize any equitable

or other claim to or interest in any share of capital stock on the part of any other person, whether or not the Corporation shall have express or other notice thereof, except as required by law.

\* \* \* \* \*

#### **Sec. 9.4 Transfers of Stock**

No change.

#### **Sec. 9.5 Cancellation**

No change.

#### **Sec. 9.6 Lost, Stolen, Destroyed, and Mutilated Certificates**

In the event that any certificate for shares of capital stock of the Corporation shall be mutilated, the Corporation shall issue a new certificate or uncertificated shares in place of such mutilated certificate. In the event that any such certificate shall be lost, stolen, or destroyed, the Corporation may, in the discretion of the Board or a committee appointed thereby with power so to act, issue a new certificate for capital stock or uncertificated shares in the place of any such lost, stolen, or destroyed certificate. The applicant for any substituted certificate or certificates shall surrender any mutilated certificate or, in the case of any lost, stolen, or destroyed certificate, furnish satisfactory proof of such loss, theft, or destruction of such certificate and of the ownership thereof. The Corporation[Board or such committee] may, in its discretion, require the owner of a lost or destroyed certificate, or the owner's representatives, to furnish to the Corporation a bond with an acceptable surety or sureties and in such sum as will be sufficient to indemnify the Corporation against any claim that may be made against it on account of the lost, stolen, or destroyed certificate or the issuance of such new certificate or uncertificated shares. A new certificate or uncertificated shares may be issued without requiring a bond when, in the judgment of the Corporation[ Board], it is proper to do so.

\* \* \* \* \*

#### **Sec. 9.7 Fixing of Record Date**

No change.

### **Article X Miscellaneous Provisions**

#### **Sec. 10.1 Corporate Seal**

No change.

#### **Sec. 10.2 Fiscal Year**

No change.

**Sec. 10.3 Waiver of Notice**

No change.

**Sec. 10.4 Execution of Instruments, Contracts, Etc.**

Except as otherwise provided by law, all contracts and other documents requiring signature entered into by or on behalf of the Corporation, including, without limitation, all (i) checks, drafts, bills of exchange, notes, or other obligations or orders for the payment of money, (ii) deeds, bonds, mortgages, contracts, and other obligations or instruments, and (iii) applications, instruments, and papers required by any department of the United States Government or by any state, county, municipal, or other governmental authority, shall, in each case, be executed by such officer(s), employee(s), agent(s), or other person(s) as the Board, a duly authorized committee thereof, or the Chief Executive Officer may designate from time to time. The authority to execute any contract or document in the name and on behalf of the Corporation granted in accordance with this Section may (1) be general or confined to specific instances, (2) be designated by name, title, or role, (3) include the power to delegate signature authority further to one or more other persons, whether by name, title, or role, to the extent authorized by the Board, a duly authorized committee thereof, or the Chief Executive Officer, and (4) be revoked at any time by the Board, any committee thereof, or the Chief Executive Officer. [ (a) All checks, drafts, bills of exchange, notes, or other obligations or orders for the payment of money shall be signed in the name of the Corporation by such officer or officers or person or persons as the Board, or a duly authorized committee thereof, may from time to time designate. Except as otherwise provided by law, the Board, any committee given specific authority in the premises by the Board, or any committee given authority to exercise generally the powers of the Board during intervals between meetings of the Board, may authorize any officer, employee, or agent, in the name of and on behalf of the Corporation, to enter into or execute and deliver deeds, bonds, mortgages, contracts, and other obligations or instruments, and such authority may be general or confined to specific instances. (b) All applications, written instruments, and papers required by any department of the United States Government or by any state, county, municipal, or other governmental authority, may be executed in the name of the Corporation by any principal officer or subordinate officer of the Corporation, or, to the extent designated for such purpose from time to time by the Board, by an employee or agent of the Corporation. Such designation may contain the power to substitute, in the discretion of the person named, one or more other persons. ]

\* \* \* \* \*

**Sec. 10.5 Form of Records**

Any records administered by or on behalf of the Corporation in the regular course of its business, including its stock ledger, books of account, and minute books, may be kept on, or by means of, or be in the form of, any information storage device, method, or one or more electronic networks or databases (including one or more distributed electronic networks or databases), provided that the records so kept can be converted into clearly legible paper form within a reasonable time and otherwise comply with applicable law.

[Any records maintained by the Corporation in the regular course of business, including its stock ledger, books of account, and minute books, may be kept on, or be in the form of, magnetic tape, computer disk, or any other information storage device, provided that the records so kept can be converted into clearly legible form within a reasonable time.]

\* \* \* \* \*

## **Article XI Amendments; Emergency By-Laws**

### **Sec. 11.1 By Stockholders**

No change.

### **Sec. 11.2 By Directors**

No change.

### **Sec. 11.3 Review by Self-Regulatory Subsidiaries**

No change.

### **Sec. 11.4 Emergency By-Laws**

The Board may adopt emergency By-Laws subject to repeal or change by action of the stockholders which shall, notwithstanding any different provision of law, the Restated Certificate of Incorporation, or these By-Laws, be operative during any emergency resulting from any emergency resulting from an attack on the United States or on a locality in which the Corporation conducts its business or customarily holds meetings of its Board of Directors or its stockholders, or during any nuclear or atomic disaster or during the existence of any catastrophe, including, but not limited to, an epidemic or pandemic, and a declaration of a national emergency by the United States government, or other similar emergency condition, irrespective of whether a quorum of the Board of Directors or a standing committee thereof can be readily convened for action[nuclear or atomic disaster, an attack on the United States or on a locality in which the Corporation conducts its business or customarily holds meetings of the Board or the stockholders, any catastrophe, or other emergency condition, as a result of which a quorum of the Board or a committee thereof cannot readily be convened for action]. Such emergency By-Laws may make any provision that may be practicable and necessary under the circumstances of the emergency. Nothing contained in this Section 11.4 shall be deemed exclusive of any other provisions for emergency powers consistent with other sections of Delaware law which have been or may be adopted by corporations created under Delaware law.

\* \* \* \* \*

**Article XII The Self-Regulatory Subsidiaries****Sec. 12.1 Self-Regulatory Organization Functions of the Self-Regulatory Subsidiaries**

No change.

**Sec. 12.2 Cooperation with the Commission**

No change.

**Sec. 12.3 Consent to Jurisdiction**

No change.

**Sec. 12.4 Further Assurances**

No change.

**Sec. 12.5 Board Action with Respect to Voting Limitations of the Certificate of Incorporation**

No change.

**Sec. 12.6 Amendments to the Certificate of Incorporation**

No change.

**Sec. 12.7 Self-Regulatory Subsidiaries**

No change.

**Article XIII Forum Selection**

Unless the Corporation consents in writing to the selection of an alternative forum, (A) (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any current or former director, officer, other employee or stockholder of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of Delaware law, the Restated Certificate of Incorporation or these By-Laws (as either may be amended or restated) or as to which Delaware law confers jurisdiction on the Court of Chancery of the State of Delaware or (iv) any action asserting a claim governed by the internal affairs doctrine of the law of the State of Delaware shall, to the fullest extent permitted by law, be exclusively brought in the Court of Chancery of the State of Delaware or, if such court does not have subject matter jurisdiction thereof, the federal district court of the State of Delaware; and (B) the federal district courts of the United States shall be the exclusive forum for the resolution of any complaint asserting a

cause of action arising under the Securities Act of 1933, as amended. Notwithstanding the foregoing, This Section 13.1 shall not apply to claims seeking to enforce any liability or duty created by the Act. To the fullest extent permitted by law, any person or entity purchasing or otherwise acquiring or holding any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Section 13.1.

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