

Required fields are shown with yellow backgrounds and asterisks.

Filing by NASDAQ PHLX LLC  
 Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

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

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|--|---|
| <b>Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010</b> | <b>Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934</b> |
| <b>Section 806(e)(1) *</b>   | <b>Section 806(e)(2) *</b>  |
| <input type="checkbox"/>   | <input type="checkbox"/>  |
|  | <b>Section 3C(b)(2) *</b>   |
|  | <input type="checkbox"/>  |

|   |   |
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| <b>Exhibit 2 Sent As Paper Document</b> | <b>Exhibit 3 Sent As Paper Document</b> |
| <input type="checkbox"/>                | <input type="checkbox"/>                |

**Description**

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

Proposed rule change with respect to amendments of the By-Laws of Nasdaq, Inc. to implement proxy access.

**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 \* Erika Last Name \* Moore

Title \* Senior Associate General Counsel

E-mail \* Erika.Moore@nasdaq.com

Telephone \* (301) 978-8490 Fax

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title \*)

Date 09/15/2016 Executive Vice President and General Counsel

By Edward S. Knight

(Name \*)

edward.knight@nasdaq.com

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

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

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

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

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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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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 Advance 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, security-based swap submission, or advance notice 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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Exhibit Sent As Paper Document

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 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

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 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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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 PHLX LLC (“Phlx” 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 with respect to amendments of the By-Laws (the “By-Laws”) of its parent corporation, Nasdaq, Inc. (“Nasdaq” or the “Company”), to implement proxy access.

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

Nasdaq’s Board of Directors approved the proposed rule change on August 3, 2016. The proposed amendments to the By-Laws do not require approval by the Company’s stockholders.<sup>3</sup>

As provided in Nasdaq’s Amended and Restated Certificate of Incorporation and By-Laws, proposed amendments to the By-Laws are to be reviewed by the Board of Directors of each self-regulatory subsidiary of Nasdaq, and if any such proposed

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

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

<sup>3</sup> See Article Eighth, Paragraph A of Nasdaq’s Amended and Restated Certificate of Incorporation and Section 11.2 of the By-Laws, which provide that the By-Laws may be amended by Nasdaq’s Board without stockholder approval.

amendment must, under Section 19 of the Act and the rules promulgated thereunder, be filed with, or filed with and approved by, the Commission before such amendment may be effective, then such amendment shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.<sup>4</sup> Accordingly, the Boards of Directors of International Securities Exchange, LLC, ISE Gemini, LLC, ISE Mercury, LLC, NASDAQ BX, Inc., NASDAQ PHLX LLC and The NASDAQ Stock Market LLC approved the proposed rule change on August 12, 2016, and the Boards of Directors of the Boston Stock Exchange Clearing Corporation and the Stock Clearing Corporation of Philadelphia approved the proposed rule change on August 15, 2016. Each such board has determined that the proposed rule change should be filed with the Commission.

No other action is necessary for the filing of the rule change. The proposed amendments will be implemented on a date designated by the Company following approval by the Commission.

Questions and comments on the proposed rule change may be directed to:

Erika J. Moore  
Senior Associate General Counsel  
Nasdaq, Inc.  
(301) 978-8490

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<sup>4</sup> See Article Eighth, Paragraph B of Nasdaq's Amended and Restated Certificate of Incorporation and Section 11.3 of the By-Laws.

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

a. Purpose

Background

At Nasdaq's 2016 annual meeting held on May 5, 2016, Nasdaq's stockholders considered a stockholder proposal submitted under Rule 14a-8 under the Act.<sup>5</sup> The proposal, which passed with 73.52% of the votes cast, requested that Nasdaq's Board of Directors (the "Board") take steps to implement a "proxy access" by-law. Proxy access by-laws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company's proxy materials. Such provisions allow stockholders to nominate candidates without undertaking the expense of a proxy solicitation.

Following the 2016 annual meeting, the Nominating & Governance Committee (the "Committee") of the Board and the Board reviewed the voting results on the stockholder proposal and discussed proxy access generally. The Committee ultimately recommended to the Board, and the Board approved, certain changes to Nasdaq's By-Laws to implement proxy access. Nasdaq now proposes to make these changes by adopting new Section 3.6 of the By-Laws and making certain conforming changes to current Sections 3.1, 3.3 and 3.5 of the By-Laws, all of which are described further below.

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<sup>5</sup> See 17 CFR 240.14a-8, which establishes procedures pursuant to which stockholders of a public company may have their proposals placed alongside management's proposals in the company's proxy materials for presentation to a vote at a meeting of stockholders.

In developing its proposal, Nasdaq has generally tried to balance the relative weight of arguments for and against proxy access provisions. On the one hand, Nasdaq recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are presented in a company's proxy statement. On the other hand, Nasdaq's proposed proxy access provision includes certain procedural requirements that ensure, among other things, that the Company and its stockholders will have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees will comply with applicable laws, regulations and other requirements.

Proposed Section 3.6(a) of the By-Laws

To respond to feedback from its stockholders, Nasdaq proposes to amend its By-Laws to, as set forth in the first sentence of proposed Section 3.6(a), require the Company to include in its proxy statement, its form proxy and any ballot distributed at the stockholder meeting, the name of, and certain Required Information<sup>6</sup> about, any person nominated for election (the "Stockholder Nominee") to the Board by a stockholder or group of stockholders (the "Eligible Stockholder")<sup>7</sup> that satisfies the requirements set

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<sup>6</sup> The Required Information is the information provided to Nasdaq's Corporate Secretary about the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Company's proxy statement by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written statement, not to exceed 500 words, in support of the Stockholder Nominee(s)' candidacy (the "Statement").

<sup>7</sup> As used throughout Nasdaq's By-Laws, the term "Eligible Stockholder" includes each member of a stockholder group that submits a proxy access nomination to the extent the context requires.

forth in the proxy access provision of Nasdaq's By-Laws.<sup>8</sup> To utilize this provision, the Eligible Stockholder must expressly elect at the time of providing a required notice to the Company of the proxy access nomination (the "Notice of Proxy Access Nomination") to have its nominee included in the Company's proxy materials. Stockholders will be eligible to submit proxy access nominations only at annual meetings of stockholders when the Board solicits proxies with respect to the election of directors.

The next two sentences of Section 3.6(a) provide some additional clarification on the term "Eligible Stockholder." First, in calculating the number of stockholders in a group seeking to qualify as an Eligible Stockholder, two or more of the following types of funds shall be counted as one stockholder: (i) funds under common management and investment control, (ii) funds under common management and funded primarily by the same employer, or (iii) funds that are a "group of investment companies" as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended.<sup>9</sup> Nasdaq views this as a stockholder-friendly provision that will make it easier for such funds to participate in a proxy access nomination since they will not have to comply with the procedural requirements in the proxy access provision multiple times. Second, in the event that the Eligible Stockholder consists of a group of stockholders, any and all requirements and obligations for an individual Eligible Stockholder shall apply to each member of the group, except that the Required Ownership Percentage (discussed further

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<sup>8</sup> When the Company includes proxy access nominees in the proxy materials, such individuals will be included in addition to any persons nominated for election to the Board or any committee thereof.

<sup>9</sup> See 15 U.S.C. 80a-12(d)(1)(G)(ii), which defines "group of investment companies" as any two or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.

below) shall apply to the ownership of the group in the aggregate. Generally, the applicable requirements and obligations relate to information that each member of the nominating group must provide to Nasdaq about itself, as discussed further below. Nasdaq believes it is reasonable to require each member of the nominating group to provide such information so that both the Company and its stockholders are fully informed about the entire group making the proxy access nomination.

The final sentence of proposed Section 3.6(a) allows Nasdaq to omit from its proxy materials any information or Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law or regulation. This provision allows Nasdaq to comply with Rule 14a-9 under the Act<sup>10</sup> and to protect its stockholders from information that is materially untrue or that violates any law or regulation. The final sentence of proposed Section 3.6(a) also explicitly allows Nasdaq to solicit against, and include in the proxy statement its own statement relating to, any Stockholder Nominee. This provision merely clarifies that just because Nasdaq must include a proxy access nominee in its proxy materials if the proxy access provisions are satisfied, Nasdaq does not necessarily have to support that nominee.

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<sup>10</sup> See 17 CFR 240.14a-9, which generally prohibits proxy solicitations that contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

Proposed Section 3.6(b) of the By-Laws

Proposed Section 3.6(b) of the By-Laws establishes the deadline for a timely Notice of Proxy Access Nomination. Specifically, such a notice must be addressed to, and received by, Nasdaq's Corporate Secretary no earlier than one hundred fifty (150) days and no later than one hundred twenty (120) days before the anniversary of the date that Nasdaq issued its proxy statement for the previous year's annual meeting of stockholders. The Company believes this notice period will provide stockholders an adequate window to submit nominees via proxy access, while also providing the Company adequate time to diligence a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.

Proposed Section 3.6(c) of the By-Laws

Proposed Section 3.6(c) specifies that the maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in Nasdaq's proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two and 25% of the total number of directors in office (rounded down to the nearest whole number) as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with the proxy access provision of the By-Laws (the "Final Proxy Access Nomination Date"). In the event that one or more vacancies for any reason occurs after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the maximum number of Stockholder Nominees included in Nasdaq's proxy materials shall be calculated based on the number of directors in office as so reduced. Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials

pursuant to the proxy access provision of the By-Laws whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the maximum number of Stockholder Nominees has been reached.

Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to the proxy access provision exceeds the maximum number of nominees allowed. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders exceeds the maximum number of nominees allowed, the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder will be selected for inclusion in the proxy materials until the maximum number is reached, going in order of the amount (largest to smallest) of shares of Nasdaq's outstanding common stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Nasdaq. If the maximum number is not reached after the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder has been selected, this process will continue as many times as necessary, following the same order each time, until the maximum number is reached. Following

such determination, if any Stockholder Nominee who satisfies the eligibility requirements thereafter is nominated by the Board, or is not included in the proxy materials or is not submitted for election as a director, in either case, as a result of the Eligible Stockholder becoming ineligible or withdrawing its nomination, the Stockholder Nominee becoming unwilling or unable to serve on the Board or the Eligible Stockholder or the Stockholder Nominee failing to comply with the proxy access provision of the By-Laws, no other nominee or nominees shall be included in the proxy materials or otherwise submitted for director election in substitution thereof.

The Company believes it is reasonable to limit the Board seats available to proxy access nominees, to establish procedures for selecting candidates if the nominee limit is exceeded and to exclude further proxy access nominees in the cases set forth above. The limitation on Board seats available to proxy access nominees ensures that proxy access cannot be used to take over the entire Board, which is not the stated purpose of proxy access campaigns. The procedures for selecting candidates if the nominee limit is exceeded establish clear and rational guidelines for an orderly nomination process to avoid the Company having to make arbitrary judgments among candidates. Finally, the exclusion of further proxy access nominees in certain cases will avoid further time and expense to the Company when the proxy access nominee has been nominated by the Board, in which case the goal of the proxy access nomination has been achieved, or in certain cases when the Eligible Stockholder or Stockholder Nominee is at fault.

Proposed Section 3.6(d) of the By-Laws

Proposed Section 3.6(d) clarifies, for the avoidance of doubt, how “ownership” will be defined for purposes of meeting the Required Ownership Percentage (discussed

further below). Specifically, an Eligible Stockholder shall be deemed to “own” only those outstanding shares of Nasdaq’s common stock 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:

- sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, including any short sale;
- 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
- 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 Nasdaq’s outstanding common stock, 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:
  - 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

- o 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.

Further, 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 Nasdaq’s common stock 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 the proxy access provision of the By-Laws, the term “affiliate” or “affiliates” shall have the meaning ascribed thereto under the rules and regulations of the Act.<sup>11</sup> An Eligible

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<sup>11</sup> Pursuant to Rule 12b-2 under the Act, “[a]n ‘affiliate’ of, or a person ‘affiliated’ with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.” 17 CFR 240.12b-2. Further, “[t]he term ‘control’ (including the terms ‘controlling,’ ‘controlled by’ and ‘under common control with’) means the possession, direct or indirect, of the power to direct or cause the

Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of the proxy access provision of the By-Laws.

Proposed Section 3.6(e) of the By-Laws

The first paragraph of proposed Section 3.6(e) establishes certain requirements for an Eligible Stockholder to make a proxy access nomination. Specifically, an Eligible Stockholder must have owned (defined as discussed above) 3% or more (the “Required Ownership Percentage”) of Nasdaq’s outstanding common stock (the “Required Shares”) continuously for 3 years (the “Minimum Holding Period”) as of both the date the Notice of Proxy Access Nomination is received by Nasdaq’s Corporate Secretary and the record date for determining the stockholders entitled to vote at the annual meeting and must continue to own the Required Shares through the meeting date.

Proposed Section 3.6(e) also sets forth the information that an Eligible Stockholder must provide to Nasdaq’s Corporate Secretary in writing within the deadline discussed above in order to make a proxy access nomination. This information includes:

- one or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access Nomination is delivered to, or mailed to and received by, Nasdaq’s Corporate Secretary, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder’s agreement to provide, within five (5) business

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direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” 17 CFR 240.12b-2.

days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date;<sup>12</sup>

- a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a-18 under the Act;<sup>13</sup>
- the information, representations and agreements with respect to the Eligible Stockholder that are the same as those that would be required to be set forth in a stockholder's notice of nomination with respect to a "Proposing Person" pursuant to Section 3.1(b)(i) and Section 3.1(b)(iii) of the By-Laws;<sup>14</sup>
- the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected;<sup>15</sup>
- a representation that the Eligible Stockholder:
  - acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of Nasdaq, and does not presently have such intent;<sup>16</sup>

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<sup>12</sup> See proposed Section 3.6(e)(i) of the By-Laws.

<sup>13</sup> See proposed Section 3.6(e)(ii) of the By-Laws; see also 17 CFR 240.14n-101 and 17 CFR 240.14a-18, which generally require a Nominating Stockholder to provide notice to the Company of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to the Company.

<sup>14</sup> See proposed Section 3.6(e)(iii) of the By-Laws; see also Sections 3.1(b)(i) and 3.1(b)(iii) of the By-Laws, which constitute part of Nasdaq's "advance notice" provision under which a "Proposing Person" may, among other things, nominate a person for election to the Board.

<sup>15</sup> See proposed Section 3.6(e)(iv) of the By-Laws.

- presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting;<sup>17</sup>
- has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s);<sup>18</sup>
- has not engaged and will not engage in, and has not and will not be a participant in another person's, "solicitation" within the meaning of Rule 14a-1(l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board;<sup>19</sup>
- agrees to comply with all applicable laws and regulations with respect to any solicitation in connection with the meeting or applicable to the filing and use, if any, of soliciting material;<sup>20</sup>
- will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the

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<sup>16</sup> See proposed Section 3.6(e)(v)(A) of the By-Laws.

<sup>17</sup> See proposed Section 3.6(e)(v)(B) of the By-Laws.

<sup>18</sup> See proposed Section 3.6(e)(v)(C) of the By-Laws.

<sup>19</sup> See proposed Section 3.6(e)(v)(D) of the By-Laws; see also 17 CFR 240.14a-1(l), which defines the related terms "solicit" and "solicitation."

<sup>20</sup> See proposed Section 3.6(e)(v)(E) of the By-Laws.

statements made, in light of the circumstances under which they were made, not misleading;<sup>21</sup> and

- as to any two or more funds whose shares are aggregated to count as one stockholder for the purpose of constituting an Eligible Stockholder, within five business days after the date of the Notice of Proxy Access Nomination, will provide to Nasdaq documentation reasonably satisfactory to Nasdaq that demonstrates that the funds satisfy the requirements in the By-Laws, which were discussed above, for the funds to qualify as one Eligible Stockholder;<sup>22</sup>

- a representation as to the Eligible Stockholder's intentions with respect to maintaining qualifying ownership of the Required Shares for at least one year following the annual meeting;<sup>23</sup>
- an undertaking that the Eligible Stockholder agrees to:
  - assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications with Nasdaq's stockholders or out of the information that the Eligible Stockholder provided to Nasdaq;<sup>24</sup>

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<sup>21</sup> See proposed Section 3.6(e)(v)(F) of the By-Laws.

<sup>22</sup> See proposed Section 3.6(e)(v)(G) of the By-Laws.

<sup>23</sup> See proposed Section 3.6(e)(vi) of the By-Laws.

<sup>24</sup> See proposed Section 3.6(e)(vii)(A) of the By-Laws.

- indemnify and hold harmless Nasdaq and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against Nasdaq or any of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to the proxy access provision;<sup>25</sup> and
- file with the SEC any solicitation or other communication with Nasdaq's stockholders relating to the meeting at which the Stockholder Nominee will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available thereunder;<sup>26</sup> and
- in the case of a nomination by a group of stockholders that together is an Eligible Stockholder, the designation by all group members of one group member that is authorized to act on behalf of all such members with respect to the nomination and matters related thereto, including withdrawal of the nomination.<sup>27</sup>

In proposing the Required Ownership Percentage and the Minimum Holding Period, Nasdaq seeks to ensure that the Eligible Stockholder has had a sufficient stake in the Company for a sufficient amount of time and is not pursuing a short-term agenda. In

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<sup>25</sup> See proposed Section 3.6(e)(vii)(B) of the By-Laws.

<sup>26</sup> See proposed Section 3.6(e)(vii)(C) of the By-Laws; see also 17 CFR 240.14a-1 – 14b-2, which governs solicitations of proxies.

<sup>27</sup> See proposed Section 3.6(e)(viii) of the By-Laws.

proposing the informational requirements for the Eligible Stockholder, Nasdaq's goal is to gather sufficient information about the Eligible Stockholder for both itself and its stockholders. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(f) of the By-Laws

Proposed Section 3.6(f) establishes the information the Stockholder Nominee must deliver to Nasdaq's Corporate Secretary within the time period specified for delivering the Notice of Proxy Access Nomination. This information includes:

- the information required with respect to persons whom a stockholder proposes to nominate for election or reelection as a director by Section 3.1(b)(i) of the By-Laws<sup>28</sup> including, but not limited to, the signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D) of the By-Laws;<sup>29</sup> and
- a written representation and agreement that such person:
  - will act as a representative of all of Nasdaq's stockholders while serving as a director; and

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<sup>28</sup> Section 3.1(b)(i) of the By-Laws describes the information that a proposing stockholder must provide about an individual the stockholder proposes to nominate for election or reelection as a director pursuant to the "advance notice" provision of the By-Laws.

<sup>29</sup> Section 3.1(b)(i)(D) of the By-Laws requires a completed and signed questionnaire, representation and agreement, each containing certain information, from each individual proposed to be nominated for election or reelection as a director pursuant to the "advance notice" provision of the By-Laws.

- will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects (and shall not omit 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).

In addition, at the request of Nasdaq, the Stockholder Nominee(s) must submit all completed and signed questionnaires required of Nasdaq's directors and officers. Nasdaq may request such additional information as necessary to (y) permit the Board to determine if each Stockholder Nominee satisfies the requirements of the proxy access provision of the By-Laws or if each Stockholder Nominee is 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 the independence of Nasdaq's directors<sup>30</sup> and/or (z) permit Nasdaq's Corporate Secretary to determine the classification of such nominee as an Industry, Non-Industry, Issuer or Public Director, if applicable, in order to make the certification referenced in Section 4.13(h)(iii) of the By-Laws.<sup>31</sup>

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<sup>30</sup> Currently, the independence of Nasdaq's directors is determined pursuant to the definition of "Independent Director" in Listing Rule 5605(a)(2) of The NASDAQ Stock Market, under which certain categories of individuals cannot be deemed independent and with respect to other individuals, the Board must make an affirmative determination that such individual has no relationship that, in the opinion of the Board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Other independence standards under the SEC rules and the Listing Rules of The NASDAQ Stock Market apply to members of certain of the Board's committees.

<sup>31</sup> Section 4.13(h)(iii) of the By-Laws requires Nasdaq's Corporate Secretary to collect from each nominee for director such information as is reasonably

Like the informational requirements for an Eligible Stockholder, which are set forth above, the informational requirements for the Stockholder Nominee ensure that both Nasdaq and its stockholders will have sufficient information about the Stockholder Nominee. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(g) of the By-Laws

Pursuant to proposed Section 3.6(g), each Eligible Stockholder or Stockholder Nominee must promptly notify Nasdaq's Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee to Nasdaq or its stockholders that ceases to be true and correct in all material respects or omits a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading and of the information that is required to correct any such defect. This provision further states that providing any such notification shall not be deemed to cure any defect or, with respect to any defect that Nasdaq determines is material, limit Nasdaq's rights to omit a Stockholder Nominee from its proxy materials. This provision is intended to protect Nasdaq's stockholders by requiring an Eligible Stockholder or Stockholder Nominee to give Nasdaq notice of information previously provided that is materially untrue. Nasdaq may then decide what action to take with

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necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, Issuer, or Public Director, if applicable, and to certify to the Committee each nominee's classification, if applicable. Detailed definitions of the terms "Industry Director," "Non-Industry Director," "Issuer Director" and "Public Director" are included in Article I of the By-Laws.

respect to such defect, which may include, with respect to a material defect, omitting the relevant Stockholder Nominee from its proxy materials.

Proposed Section 3.6(h) of the By-Laws

Proposed Section 3.6(h) provides that Nasdaq shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the proxy access nomination shall be disregarded and no vote on such Stockholder Nominee will occur, even if Nasdaq has received proxies in respect of the vote. These circumstances occur when the Stockholder Nominee:

- has been nominated by an Eligible Stockholder who has engaged in or is currently engaged in, or has been or is a participant in another person's, "solicitation" within the meaning of Rule 14a-1(l) under the Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board;<sup>32</sup>
- 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 Nasdaq's directors, in each case as determined by the Board in its sole discretion;<sup>33</sup>
- would, if elected as a member of the Board, cause Nasdaq to be in violation of the By-Laws (including but not limited to the compositional requirements of the Board set forth in Section 4.3 of the By-Laws), its

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<sup>32</sup> See proposed Section 3.6(h)(i) of the By-Laws; see also 17 CFR 240.14a-1(l), which defines the related terms "solicit" and "solicitation."

<sup>33</sup> See proposed Section 3.6(h)(ii) of the By-Laws; see also footnote 30, *supra*.

Amended and Restated Certificate of Incorporation, the rules and listing standards of The NASDAQ Stock Market, or any applicable state or federal law, rule or regulation;<sup>34</sup>

- is or has been, within the past three (3) years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914;<sup>35</sup>
- is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past ten (10) years;<sup>36</sup>
- is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended;<sup>37</sup>

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<sup>34</sup> See proposed Section 3.6(h)(iii) of the By-Laws; see also Section 4.3 of the By-Laws, which provides that the number of Non-Industry Directors on the Board must equal or exceed the number of Industry Directors. In addition, the Board must include at least two Public Directors and may include at least one, but no more than two, Issuer Directors. Finally, the Board shall include no more than one Staff Director, unless the Board consists of ten or more directors, in which case, the Board shall include no more than two Staff Directors. Detailed definitions of the terms “Non-Industry Director,” “Industry Director,” “Public Director,” “Issuer Director” and “Staff Director” are included in Article I of the By-Laws.

<sup>35</sup> See proposed Section 3.6(h)(iv) of the By-Laws; see also 15 U.S.C. 19(a)(1), which generally provides that “[n]o person shall, at the same time, serve as a director or officer in any two corporations” that are “competitors” such that “the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.”

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

<sup>37</sup> See proposed Section 3.6(h)(vi) of the By-Laws; see also 17 CFR 230.506(d), which generally disqualifies offerings involving certain felons and other bad actors from relying on the “safe harbor” in Rule 506 of Regulation D from registration under the Securities Act of 1933, as amended.

- is subject to “statutory disqualification” under Section 3(a)(39) of the Act;<sup>38</sup>
- has, or the applicable Eligible Stockholder has, provided information to Nasdaq in respect of the proxy access 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;<sup>39</sup> or
- breaches or fails, or the applicable Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the By-Laws, including, but not limited to, the proxy access provisions and any agreement, representation or undertaking required by the proxy access provisions.<sup>40</sup>

Nasdaq believes these provisions will protect the Company and its stockholders by allowing it to exclude certain categories of objectionable Stockholder Nominees from the proxy statement.

Proposed Section 3.6(i) of the By-Laws

Under proposed Section 3.6(i), the Board or the chairman of the meeting of stockholders shall declare a proxy access nomination invalid, and such nomination shall

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<sup>38</sup> See proposed Section 3.6(h)(vii) of the By-Laws; see also 15 U.S.C. 78c(a)(39), which disqualifies certain categories of individuals who generally have engaged in misconduct from membership or participation in, or association with a member of, a self-regulatory organization.

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

<sup>40</sup> See proposed Section 3.6(h)(ix) of the By-Laws.

be disregarded even if proxies in respect of such nomination have been received by the Company, if:

- the Stockholder Nominee(s) and/or the applicable Eligible Stockholder have breached its or their obligations under the proxy access provision of the By-Laws, as determined by the Board or the chairman of the meeting of stockholders, in each case, in its or his sole discretion; or
- the Eligible Stockholder (or a qualified representative thereof) does not appear at the meeting of stockholders to present the proxy access nomination.

Nasdaq believes this provision protects the Company and its stockholders by providing the Board or the chairman of the stockholder meeting limited authority to disqualify a proxy access nominee when that nominee or the sponsoring stockholder(s) have breached an obligation under the proxy access provision, including the obligation to appear at the stockholder meeting to present the proxy access nomination.

Proposed Section 3.6(j) of the By-Laws

Proposed Section 3.6(j) states that the following Stockholder Nominees who are included in the Company's proxy materials for a particular annual meeting of stockholders will be ineligible to be a Stockholder Nominee for the next two annual meetings:

- a Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or
- a Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election.

This provision will save the Company and its stockholders the time and expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but ultimately did not stand for election or receive a substantial amount of votes. After the next two annual meetings, these Stockholder Nominees would again be eligible for nomination through the proxy access provisions of the By-Laws.

Proposed Section 3.6(k) of the By-Laws

In case there are matters involving a proxy access nomination that are open to interpretation, proposed Section 3.6(k) states that the Board (or any other person or body authorized by the Board) shall have exclusive power and authority to interpret the proxy access provisions of the By-Laws and make all determinations deemed necessary or advisable as to any person, facts or circumstances. In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be final, conclusive and binding on the Company, the stockholders and all other parties. While Nasdaq has attempted to implement a clear, detailed and thorough proxy access provision, there may be matters about future proxy access nominations that are open to interpretation. In these cases, Nasdaq believes it is reasonable and necessary to designate an arbiter to make final decisions on these points and that the Board is best-suited to act as that arbiter.

Proposed Section 3.6(l) of the By-Laws

Proposed Section 3.6(l) prohibits a stockholder from joining more than one group of stockholders to become an Eligible Stockholder for purposes of submitting a proxy access nomination for each annual meeting of stockholders. Nasdaq analogizes this

provision to Article IV, Paragraph C(1) of its Amended and Restated Certificate of Incorporation, under which each holder of Nasdaq's common stock shall be entitled to one vote per share on all matters presented to the stockholders for a vote. Similar to that provision, Nasdaq believes it is reasonable for each share to count only once in submitting a proxy access nomination.

#### Proposed Section 3.6(m) of the By-Laws

For the avoidance of doubt, proposed Section 3.6(m) states that the proxy access provisions outlined in Section 3.6 of the By-Laws shall be the exclusive means for stockholders to include nominees in the Company's proxy materials. Stockholders may, of course, continue to propose nominees to the Committee and Board through other means, but the Committee and Board will have final authority to determine whether to include those nominees in the Company's proxy materials.

#### Revisions to Other Sections of the By-Laws

Nasdaq also proposes to make conforming changes to Sections 3.1(a), 3.3(a), 3.3(c) and 3.5 of the By-Laws to provide clarifications and prevent confusion. Specifically, current Section 3.1(a) enumerates the methods by which nominations of persons for election to the Board may be made at an annual meeting of stockholders; Nasdaq proposes to add proxy access nominations to the list of methods. Current Section 3.3(a) specifies that, among other things, only such persons who are nominated in accordance with the procedures set forth in Article III of the By-Laws<sup>41</sup> shall be eligible to be elected at an annual or special meeting of Nasdaq's stockholders to serve as directors; for the avoidance of doubt, Nasdaq proposes to clarify that the reference to

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<sup>41</sup> Article III of the By-Laws relates to stockholder meetings.

Article III includes the proxy access provision in Section 3.6 of the By-Laws with respect to director nominations in connection with annual meetings. Current Section 3.3(c) states, among other things, that compliance with Section 3.1(a)(iii) and (b)<sup>42</sup> shall be the exclusive means for a stockholder to make a director nomination; Nasdaq proposes to add proxy access as an additional means for a stockholder to make a director nomination. Finally, current Section 3.5 requires Nasdaq's director nominees to submit to Nasdaq's Corporate Secretary a questionnaire, representation and agreement within certain time periods; Nasdaq proposes to clarify that proxy access nominees must submit these materials within the time periods prescribed for delivery of a Notice of Proxy Access Nomination, as described above.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>43</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>44</sup> in particular, in that it is 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.

In response to feedback from its investors, Nasdaq is proposing changes to its By-Laws to implement proxy access. The Exchange believes that, by permitting an Eligible Stockholder of Nasdaq that meets the stated requirements to nominate directors and have

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<sup>42</sup> As part of Nasdaq's "advance notice" provision, Sections 3.1(a)(iii) and (b) of the By-Laws describe certain procedures that a stockholder must follow to, among other things, nominate a person for election to the Board.

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

<sup>44</sup> 15 U.S.C. 78f(b)(5).

its nominees included in Nasdaq's annual meeting proxy statement, the proposed rule change strengthens the corporate governance of the Exchange's ultimate parent company, which is beneficial to both investors and the public interest.

In drafting its proxy access provision, Nasdaq has attempted to strike an appropriate balance between responding to investor feedback and including certain procedural and informational requirements for the protection of the Company and its investors. Specifically, the procedural requirements will protect investors by stating clearly and explicitly the procedures stockholders must follow in order to submit a proper proxy access nomination. The informational requirements will enhance investor protection by ensuring, among other things, that the Company and its stockholders have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees comply with applicable laws, regulations and other requirements.

Finally, the remaining changes are clarifying in nature, and they enhance investor protection and the public interest by preventing confusion with respect to the operation of the By-Law provisions.

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

Because the proposed rule change relates to the governance of the Company 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

While Nasdaq's proposed proxy access provision is not based on the rules of another self-regulatory organization or of the Commission, Nasdaq notes that Intercontinental Exchange, Inc., which is the holding company for three national securities exchanges, including the New York Stock Exchange, recently amended its Bylaws to adopt a proxy access provision.<sup>45</sup> While Nasdaq has drafted its own proxy access provision reflecting its own approach, it notes that many of the procedural and informational requirements in its proposed provision are the same as or similar to those in Intercontinental Exchange, Inc.'s proxy access provision. To provide just one example, the deadline for a timely notice of a proxy access nomination in both provisions is no earlier than 150 days and no later than 120 days before the anniversary of the date the company issued its proxy statement for the previous year's annual meeting of stockholders.<sup>46</sup>

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<sup>45</sup> See Section 2.15 of the Sixth Amended and Restated Bylaws of Intercontinental Exchange, Inc. ("Ice Bylaws"); see also Securities Exchange Act Release No. 77782 (May 6, 2016), 81 FR 29600 (May 12, 2016) (SR-NYSE-2016-14, SR-NYSEArca-2016-25 and SR-NYSEMKT-2016-20).

<sup>46</sup> See proposed Section 3.6(b) of the By-Laws; see also Section 2.15(d) of the Ice Bylaws.

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. \_\_\_\_\_ ; File No. SR-Phlx-2016-93)

September \_\_, 2016

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing of Proposed Rule Change to Amend the By-Laws of Nasdaq, Inc. to Implement Proxy Access

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 15, 2016, NASDAQ PHLX LLC (“Phlx” 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 is filing this proposed rule change with respect to amendments of the By-Laws (the “By-Laws”) of its parent corporation, Nasdaq, Inc. (“Nasdaq” or the “Company”), to implement proxy access. The proposed amendments will be implemented on a date designated by the Company following approval by the Commission. The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaqphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

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

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Background

At Nasdaq's 2016 annual meeting held on May 5, 2016, Nasdaq's stockholders considered a stockholder proposal submitted under Rule 14a-8 under the Act.<sup>3</sup> The proposal, which passed with 73.52% of the votes cast, requested that Nasdaq's Board of Directors (the "Board") take steps to implement a "proxy access" by-law. Proxy access by-laws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company's proxy materials. Such provisions allow stockholders to nominate candidates without undertaking the expense of a proxy solicitation.

Following the 2016 annual meeting, the Nominating & Governance Committee (the "Committee") of the Board and the Board reviewed the voting results on the stockholder proposal and discussed proxy access generally. The Committee ultimately

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<sup>3</sup> See 17 CFR 240.14a-8, which establishes procedures pursuant to which stockholders of a public company may have their proposals placed alongside management's proposals in the company's proxy materials for presentation to a vote at a meeting of stockholders.

recommended to the Board, and the Board approved, certain changes to Nasdaq's By-Laws to implement proxy access. Nasdaq now proposes to make these changes by adopting new Section 3.6 of the By-Laws and making certain conforming changes to current Sections 3.1, 3.3 and 3.5 of the By-Laws, all of which are described further below.

In developing its proposal, Nasdaq has generally tried to balance the relative weight of arguments for and against proxy access provisions. On the one hand, Nasdaq recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are presented in a company's proxy statement. On the other hand, Nasdaq's proposed proxy access provision includes certain procedural requirements that ensure, among other things, that the Company and its stockholders will have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees will comply with applicable laws, regulations and other requirements.

Proposed Section 3.6(a) of the By-Laws

To respond to feedback from its stockholders, Nasdaq proposes to amend its By-Laws to, as set forth in the first sentence of proposed Section 3.6(a), require the Company to include in its proxy statement, its form proxy and any ballot distributed at the stockholder meeting, the name of, and certain Required Information<sup>4</sup> about, any person

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<sup>4</sup> The Required Information is the information provided to Nasdaq's Corporate Secretary about the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Company's proxy statement by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written

nominated for election (the “Stockholder Nominee”) to the Board by a stockholder or group of stockholders (the “Eligible Stockholder”)<sup>5</sup> that satisfies the requirements set forth in the proxy access provision of Nasdaq’s By-Laws.<sup>6</sup> To utilize this provision, the Eligible Stockholder must expressly elect at the time of providing a required notice to the Company of the proxy access nomination (the “Notice of Proxy Access Nomination”) to have its nominee included in the Company’s proxy materials. Stockholders will be eligible to submit proxy access nominations only at annual meetings of stockholders when the Board solicits proxies with respect to the election of directors.

The next two sentences of Section 3.6(a) provide some additional clarification on the term “Eligible Stockholder.” First, in calculating the number of stockholders in a group seeking to qualify as an Eligible Stockholder, two or more of the following types of funds shall be counted as one stockholder: (i) funds under common management and investment control, (ii) funds under common management and funded primarily by the same employer, or (iii) funds that are a “group of investment companies” as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended.<sup>7</sup>

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statement, not to exceed 500 words, in support of the Stockholder Nominee(s)’ candidacy (the “Statement”).

<sup>5</sup> As used throughout Nasdaq’s By-Laws, the term “Eligible Stockholder” includes each member of a stockholder group that submits a proxy access nomination to the extent the context requires.

<sup>6</sup> When the Company includes proxy access nominees in the proxy materials, such individuals will be included in addition to any persons nominated for election to the Board or any committee thereof.

<sup>7</sup> See 15 U.S.C. 80a-12(d)(1)(G)(ii), which defines “group of investment companies” as any two or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.

Nasdaq views this as a stockholder-friendly provision that will make it easier for such funds to participate in a proxy access nomination since they will not have to comply with the procedural requirements in the proxy access provision multiple times. Second, in the event that the Eligible Stockholder consists of a group of stockholders, any and all requirements and obligations for an individual Eligible Stockholder shall apply to each member of the group, except that the Required Ownership Percentage (discussed further below) shall apply to the ownership of the group in the aggregate. Generally, the applicable requirements and obligations relate to information that each member of the nominating group must provide to Nasdaq about itself, as discussed further below. Nasdaq believes it is reasonable to require each member of the nominating group to provide such information so that both the Company and its stockholders are fully informed about the entire group making the proxy access nomination.

The final sentence of proposed Section 3.6(a) allows Nasdaq to omit from its proxy materials any information or Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law or regulation. This provision allows Nasdaq to comply with Rule 14a-9 under the Act<sup>8</sup> and to protect its stockholders from information that is materially untrue or that violates any law or regulation. The final sentence of proposed Section 3.6(a) also explicitly allows Nasdaq to solicit against,

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<sup>8</sup> See 17 CFR 240.14a-9, which generally prohibits proxy solicitations that contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

and include in the proxy statement its own statement relating to, any Stockholder Nominee. This provision merely clarifies that just because Nasdaq must include a proxy access nominee in its proxy materials if the proxy access provisions are satisfied, Nasdaq does not necessarily have to support that nominee.

Proposed Section 3.6(b) of the By-Laws

Proposed Section 3.6(b) of the By-Laws establishes the deadline for a timely Notice of Proxy Access Nomination. Specifically, such a notice must be addressed to, and received by, Nasdaq's Corporate Secretary no earlier than one hundred fifty (150) days and no later than one hundred twenty (120) days before the anniversary of the date that Nasdaq issued its proxy statement for the previous year's annual meeting of stockholders. The Company believes this notice period will provide stockholders an adequate window to submit nominees via proxy access, while also providing the Company adequate time to diligence a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.

Proposed Section 3.6(c) of the By-Laws

Proposed Section 3.6(c) specifies that the maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in Nasdaq's proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two and 25% of the total number of directors in office (rounded down to the nearest whole number) as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with the proxy access provision of the By-Laws (the "Final Proxy Access Nomination Date"). In the event that one or more vacancies for any reason occurs after the Final Proxy Access Nomination Date but before the date of

the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the maximum number of Stockholder Nominees included in Nasdaq's proxy materials shall be calculated based on the number of directors in office as so reduced. Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision of the By-Laws whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the maximum number of Stockholder Nominees has been reached.

Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to the proxy access provision exceeds the maximum number of nominees allowed. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders exceeds the maximum number of nominees allowed, the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder will be selected for inclusion in the proxy materials until the maximum number is reached, going in order of the amount (largest to smallest) of shares of Nasdaq's outstanding common stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Nasdaq. If the maximum

number is not reached after the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder has been selected, this process will continue as many times as necessary, following the same order each time, until the maximum number is reached. Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements thereafter is nominated by the Board, or is not included in the proxy materials or is not submitted for election as a director, in either case, as a result of the Eligible Stockholder becoming ineligible or withdrawing its nomination, the Stockholder Nominee becoming unwilling or unable to serve on the Board or the Eligible Stockholder or the Stockholder Nominee failing to comply with the proxy access provision of the By-Laws, no other nominee or nominees shall be included in the proxy materials or otherwise submitted for director election in substitution thereof.

The Company believes it is reasonable to limit the Board seats available to proxy access nominees, to establish procedures for selecting candidates if the nominee limit is exceeded and to exclude further proxy access nominees in the cases set forth above. The limitation on Board seats available to proxy access nominees ensures that proxy access cannot be used to take over the entire Board, which is not the stated purpose of proxy access campaigns. The procedures for selecting candidates if the nominee limit is exceeded establish clear and rational guidelines for an orderly nomination process to avoid the Company having to make arbitrary judgments among candidates. Finally, the exclusion of further proxy access nominees in certain cases will avoid further time and expense to the Company when the proxy access nominee has been nominated by the

Board, in which case the goal of the proxy access nomination has been achieved, or in certain cases when the Eligible Stockholder or Stockholder Nominee is at fault.

Proposed Section 3.6(d) of the By-Laws

Proposed Section 3.6(d) clarifies, for the avoidance of doubt, how “ownership” will be defined for purposes of meeting the Required Ownership Percentage (discussed further below). Specifically, an Eligible Stockholder shall be deemed to “own” only those outstanding shares of Nasdaq’s common stock 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:

- sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, including any short sale;
- 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
- 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 Nasdaq’s outstanding common stock, 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:

- 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
- 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.

Further, 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 Nasdaq's common stock 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 the proxy access provision of the By-Laws, the term "affiliate" or "affiliates" shall have

the meaning ascribed thereto under the rules and regulations of the Act.<sup>9</sup> 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 the proxy access provision of the By-Laws.

Proposed Section 3.6(e) of the By-Laws

The first paragraph of proposed Section 3.6(e) establishes certain requirements for an Eligible Stockholder to make a proxy access nomination. Specifically, an Eligible Stockholder must have owned (defined as discussed above) 3% or more (the “Required Ownership Percentage”) of Nasdaq’s outstanding common stock (the “Required Shares”) continuously for 3 years (the “Minimum Holding Period”) as of both the date the Notice of Proxy Access Nomination is received by Nasdaq’s Corporate Secretary and the record date for determining the stockholders entitled to vote at the annual meeting and must continue to own the Required Shares through the meeting date.

Proposed Section 3.6(e) also sets forth the information that an Eligible Stockholder must provide to Nasdaq’s Corporate Secretary in writing within the deadline discussed above in order to make a proxy access nomination. This information includes:

- one or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access

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<sup>9</sup> Pursuant to Rule 12b-2 under the Act, “[a]n ‘affiliate’ of, or a person ‘affiliated’ with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.” 17 CFR 240.12b-2. Further, “[t]he term ‘control’ (including the terms ‘controlling,’ ‘controlled by’ and ‘under common control with’) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.” 17 CFR 240.12b-2.

Nomination is delivered to, or mailed to and received by, Nasdaq's Corporate Secretary, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five (5) business days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date;<sup>10</sup>

- a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a-18 under the Act;<sup>11</sup>
- the information, representations and agreements with respect to the Eligible Stockholder that are the same as those that would be required to be set forth in a stockholder's notice of nomination with respect to a "Proposing Person" pursuant to Section 3.1(b)(i) and Section 3.1(b)(iii) of the By-Laws;<sup>12</sup>
- the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected;<sup>13</sup>

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<sup>10</sup> See proposed Section 3.6(e)(i) of the By-Laws.

<sup>11</sup> See proposed Section 3.6(e)(ii) of the By-Laws; see also 17 CFR 240.14n-101 and 17 CFR 240.14a-18, which generally require a Nominating Stockholder to provide notice to the Company of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to the Company.

<sup>12</sup> See proposed Section 3.6(e)(iii) of the By-Laws; see also Sections 3.1(b)(i) and 3.1(b)(iii) of the By-Laws, which constitute part of Nasdaq's "advance notice" provision under which a "Proposing Person" may, among other things, nominate a person for election to the Board.

<sup>13</sup> See proposed Section 3.6(e)(iv) of the By-Laws.

- a representation that the Eligible Stockholder:
  - acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of Nasdaq, and does not presently have such intent;<sup>14</sup>
  - presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting;<sup>15</sup>
  - has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s);<sup>16</sup>
  - has not engaged and will not engage in, and has not and will not be a participant in another person's, "solicitation" within the meaning of Rule 14a-1(l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board;<sup>17</sup>
  - agrees to comply with all applicable laws and regulations with respect to any solicitation in connection with the meeting or applicable to the filing and use, if any, of soliciting material;<sup>18</sup>

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<sup>14</sup> See proposed Section 3.6(e)(v)(A) of the By-Laws.

<sup>15</sup> See proposed Section 3.6(e)(v)(B) of the By-Laws.

<sup>16</sup> See proposed Section 3.6(e)(v)(C) of the By-Laws.

<sup>17</sup> See proposed Section 3.6(e)(v)(D) of the By-Laws; see also 17 CFR 240.14a-1(l), which defines the related terms "solicit" and "solicitation."

<sup>18</sup> See proposed Section 3.6(e)(v)(E) of the By-Laws.

- will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects and do not and will not omit 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;<sup>19</sup> and
- as to any two or more funds whose shares are aggregated to count as one stockholder for the purpose of constituting an Eligible Stockholder, within five business days after the date of the Notice of Proxy Access Nomination, will provide to Nasdaq documentation reasonably satisfactory to Nasdaq that demonstrates that the funds satisfy the requirements in the By-Laws, which were discussed above, for the funds to qualify as one Eligible Stockholder;<sup>20</sup>
- a representation as to the Eligible Stockholder's intentions with respect to maintaining qualifying ownership of the Required Shares for at least one year following the annual meeting;<sup>21</sup>
- an undertaking that the Eligible Stockholder agrees to:
  - assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications

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<sup>19</sup> See proposed Section 3.6(e)(v)(F) of the By-Laws.

<sup>20</sup> See proposed Section 3.6(e)(v)(G) of the By-Laws.

<sup>21</sup> See proposed Section 3.6(e)(vi) of the By-Laws.

- with Nasdaq's stockholders or out of the information that the Eligible Stockholder provided to Nasdaq;<sup>22</sup>
- indemnify and hold harmless Nasdaq and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against Nasdaq or any of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to the proxy access provision;<sup>23</sup> and
  - file with the SEC any solicitation or other communication with Nasdaq's stockholders relating to the meeting at which the Stockholder Nominee will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available thereunder;<sup>24</sup> and
  - in the case of a nomination by a group of stockholders that together is an Eligible Stockholder, the designation by all group members of one group member that is authorized to act on behalf of all such members with respect to the nomination and matters related thereto, including withdrawal of the nomination.<sup>25</sup>

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<sup>22</sup> See proposed Section 3.6(e)(vii)(A) of the By-Laws.

<sup>23</sup> See proposed Section 3.6(e)(vii)(B) of the By-Laws.

<sup>24</sup> See proposed Section 3.6(e)(vii)(C) of the By-Laws; see also 17 CFR 240.14a-1 – 14b-2, which governs solicitations of proxies.

<sup>25</sup> See proposed Section 3.6(e)(viii) of the By-Laws.

In proposing the Required Ownership Percentage and the Minimum Holding Period, Nasdaq seeks to ensure that the Eligible Stockholder has had a sufficient stake in the Company for a sufficient amount of time and is not pursuing a short-term agenda. In proposing the informational requirements for the Eligible Stockholder, Nasdaq's goal is to gather sufficient information about the Eligible Stockholder for both itself and its stockholders. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(f) of the By-Laws

Proposed Section 3.6(f) establishes the information the Stockholder Nominee must deliver to Nasdaq's Corporate Secretary within the time period specified for delivering the Notice of Proxy Access Nomination. This information includes:

- the information required with respect to persons whom a stockholder proposes to nominate for election or reelection as a director by Section 3.1(b)(i) of the By-Laws<sup>26</sup> including, but not limited to, the signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D) of the By-Laws;<sup>27</sup> and
- a written representation and agreement that such person:

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<sup>26</sup> Section 3.1(b)(i) of the By-Laws describes the information that a proposing stockholder must provide about an individual the stockholder proposes to nominate for election or reelection as a director pursuant to the "advance notice" provision of the By-Laws.

<sup>27</sup> Section 3.1(b)(i)(D) of the By-Laws requires a completed and signed questionnaire, representation and agreement, each containing certain information, from each individual proposed to be nominated for election or reelection as a director pursuant to the "advance notice" provision of the By-Laws.

- will act as a representative of all of Nasdaq's stockholders while serving as a director; and
- will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects (and shall not omit 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).

In addition, at the request of Nasdaq, the Stockholder Nominee(s) must submit all completed and signed questionnaires required of Nasdaq's directors and officers. Nasdaq may request such additional information as necessary to (y) permit the Board to determine if each Stockholder Nominee satisfies the requirements of the proxy access provision of the By-Laws or if each Stockholder Nominee is 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 the independence of Nasdaq's directors<sup>28</sup> and/or (z) permit Nasdaq's Corporate Secretary to determine the classification of such nominee as an Industry, Non-Industry, Issuer or

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<sup>28</sup> Currently, the independence of Nasdaq's directors is determined pursuant to the definition of "Independent Director" in Listing Rule 5605(a)(2) of The NASDAQ Stock Market, under which certain categories of individuals cannot be deemed independent and with respect to other individuals, the Board must make an affirmative determination that such individual has no relationship that, in the opinion of the Board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Other independence standards under the SEC rules and the Listing Rules of The NASDAQ Stock Market apply to members of certain of the Board's committees.

Public Director, if applicable, in order to make the certification referenced in Section 4.13(h)(iii) of the By-Laws.<sup>29</sup>

Like the informational requirements for an Eligible Stockholder, which are set forth above, the informational requirements for the Stockholder Nominee ensure that both Nasdaq and its stockholders will have sufficient information about the Stockholder Nominee. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(g) of the By-Laws

Pursuant to proposed Section 3.6(g), each Eligible Stockholder or Stockholder Nominee must promptly notify Nasdaq's Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee to Nasdaq or its stockholders that ceases to be true and correct in all material respects or omits a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading and of the information that is required to correct any such defect. This provision further states that providing any such notification shall not be deemed to cure any defect or, with respect to any defect that Nasdaq determines is material, limit Nasdaq's rights to omit a Stockholder Nominee from its proxy materials. This provision is intended to protect Nasdaq's stockholders by requiring an Eligible

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<sup>29</sup> Section 4.13(h)(iii) of the By-Laws requires Nasdaq's Corporate Secretary to collect from each nominee for director such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, Issuer, or Public Director, if applicable, and to certify to the Committee each nominee's classification, if applicable. Detailed definitions of the terms "Industry Director," "Non-Industry Director," "Issuer Director" and "Public Director" are included in Article I of the By-Laws.

Stockholder or Stockholder Nominee to give Nasdaq notice of information previously provided that is materially untrue. Nasdaq may then decide what action to take with respect to such defect, which may include, with respect to a material defect, omitting the relevant Stockholder Nominee from its proxy materials.

Proposed Section 3.6(h) of the By-Laws

Proposed Section 3.6(h) provides that Nasdaq shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the proxy access nomination shall be disregarded and no vote on such Stockholder Nominee will occur, even if Nasdaq has received proxies in respect of the vote. These circumstances occur when the Stockholder Nominee:

- has been nominated by an Eligible Stockholder who has engaged in or is currently engaged in, or has been or is a participant in another person's, "solicitation" within the meaning of Rule 14a-1(l) under the Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board;<sup>30</sup>
- 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 Nasdaq's directors, in each case as determined by the Board in its sole discretion;<sup>31</sup>

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<sup>30</sup> See proposed Section 3.6(h)(i) of the By-Laws; see also 17 CFR 240.14a-1(l), which defines the related terms "solicit" and "solicitation."

<sup>31</sup> See proposed Section 3.6(h)(ii) of the By-Laws; see also footnote 28, *supra*.

- would, if elected as a member of the Board, cause Nasdaq to be in violation of the By-Laws (including but not limited to the compositional requirements of the Board set forth in Section 4.3 of the By-Laws), its Amended and Restated Certificate of Incorporation, the rules and listing standards of The NASDAQ Stock Market, or any applicable state or federal law, rule or regulation;<sup>32</sup>
- is or has been, within the past three (3) years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914;<sup>33</sup>
- is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past ten (10) years;<sup>34</sup>
- is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended;<sup>35</sup>

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<sup>32</sup> See proposed Section 3.6(h)(iii) of the By-Laws; see also Section 4.3 of the By-Laws, which provides that the number of Non-Industry Directors on the Board must equal or exceed the number of Industry Directors. In addition, the Board must include at least two Public Directors and may include at least one, but no more than two, Issuer Directors. Finally, the Board shall include no more than one Staff Director, unless the Board consists of ten or more directors, in which case, the Board shall include no more than two Staff Directors. Detailed definitions of the terms “Non-Industry Director,” “Industry Director,” “Public Director,” “Issuer Director” and “Staff Director” are included in Article I of the By-Laws.

<sup>33</sup> See proposed Section 3.6(h)(iv) of the By-Laws; see also 15 U.S.C. 19(a)(1), which generally provides that “[n]o person shall, at the same time, serve as a director or officer in any two corporations” that are “competitors” such that “the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.”

<sup>34</sup> See proposed Section 3.6(h)(v) of the By-Laws.

- is subject to “statutory disqualification” under Section 3(a)(39) of the Act;<sup>36</sup>
- has, or the applicable Eligible Stockholder has, provided information to Nasdaq in respect of the proxy access 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;<sup>37</sup> or
- breaches or fails, or the applicable Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the By-Laws, including, but not limited to, the proxy access provisions and any agreement, representation or undertaking required by the proxy access provisions.<sup>38</sup>

Nasdaq believes these provisions will protect the Company and its stockholders by allowing it to exclude certain categories of objectionable Stockholder Nominees from the proxy statement.

Proposed Section 3.6(i) of the By-Laws

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<sup>35</sup> See proposed Section 3.6(h)(vi) of the By-Laws; see also 17 CFR 230.506(d), which generally disqualifies offerings involving certain felons and other bad actors from relying on the “safe harbor” in Rule 506 of Regulation D from registration under the Securities Act of 1933, as amended.

<sup>36</sup> See proposed Section 3.6(h)(vii) of the By-Laws; see also 15 U.S.C. 78c(a)(39), which disqualifies certain categories of individuals who generally have engaged in misconduct from membership or participation in, or association with a member of, a self-regulatory organization.

<sup>37</sup> See proposed Section 3.6(h)(viii) of the By-Laws.

<sup>38</sup> See proposed Section 3.6(h)(ix) of the By-Laws.

Under proposed Section 3.6(i), the Board or the chairman of the meeting of stockholders shall declare a proxy access nomination invalid, and such nomination shall be disregarded even if proxies in respect of such nomination have been received by the Company, if:

- the Stockholder Nominee(s) and/or the applicable Eligible Stockholder have breached its or their obligations under the proxy access provision of the By-Laws, as determined by the Board or the chairman of the meeting of stockholders, in each case, in its or his sole discretion; or
- the Eligible Stockholder (or a qualified representative thereof) does not appear at the meeting of stockholders to present the proxy access nomination.

Nasdaq believes this provision protects the Company and its stockholders by providing the Board or the chairman of the stockholder meeting limited authority to disqualify a proxy access nominee when that nominee or the sponsoring stockholder(s) have breached an obligation under the proxy access provision, including the obligation to appear at the stockholder meeting to present the proxy access nomination.

Proposed Section 3.6(j) of the By-Laws

Proposed Section 3.6(j) states that the following Stockholder Nominees who are included in the Company's proxy materials for a particular annual meeting of stockholders will be ineligible to be a Stockholder Nominee for the next two annual meetings:

- a Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or

- a Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election.

This provision will save the Company and its stockholders the time and expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but ultimately did not stand for election or receive a substantial amount of votes. After the next two annual meetings, these Stockholder Nominees would again be eligible for nomination through the proxy access provisions of the By-Laws.

Proposed Section 3.6(k) of the By-Laws

In case there are matters involving a proxy access nomination that are open to interpretation, proposed Section 3.6(k) states that the Board (or any other person or body authorized by the Board) shall have exclusive power and authority to interpret the proxy access provisions of the By-Laws and make all determinations deemed necessary or advisable as to any person, facts or circumstances. In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be final, conclusive and binding on the Company, the stockholders and all other parties. While Nasdaq has attempted to implement a clear, detailed and thorough proxy access provision, there may be matters about future proxy access nominations that are open to interpretation. In these cases, Nasdaq believes it is reasonable and necessary to designate an arbiter to make final decisions on these points and that the Board is best-suited to act as that arbiter.

Proposed Section 3.6(l) of the By-Laws

Proposed Section 3.6(l) prohibits a stockholder from joining more than one group of stockholders to become an Eligible Stockholder for purposes of submitting a proxy access nomination for each annual meeting of stockholders. Nasdaq analogizes this provision to Article IV, Paragraph C(1) of its Amended and Restated Certificate of Incorporation, under which each holder of Nasdaq's common stock shall be entitled to one vote per share on all matters presented to the stockholders for a vote. Similar to that provision, Nasdaq believes it is reasonable for each share to count only once in submitting a proxy access nomination.

Proposed Section 3.6(m) of the By-Laws

For the avoidance of doubt, proposed Section 3.6(m) states that the proxy access provisions outlined in Section 3.6 of the By-Laws shall be the exclusive means for stockholders to include nominees in the Company's proxy materials. Stockholders may, of course, continue to propose nominees to the Committee and Board through other means, but the Committee and Board will have final authority to determine whether to include those nominees in the Company's proxy materials.

Revisions to Other Sections of the By-Laws

Nasdaq also proposes to make conforming changes to Sections 3.1(a), 3.3(a), 3.3(c) and 3.5 of the By-Laws to provide clarifications and prevent confusion. Specifically, current Section 3.1(a) enumerates the methods by which nominations of persons for election to the Board may be made at an annual meeting of stockholders; Nasdaq proposes to add proxy access nominations to the list of methods. Current Section 3.3(a) specifies that, among other things, only such persons who are nominated in

accordance with the procedures set forth in Article III of the By-Laws<sup>39</sup> shall be eligible to be elected at an annual or special meeting of Nasdaq's stockholders to serve as directors; for the avoidance of doubt, Nasdaq proposes to clarify that the reference to Article III includes the proxy access provision in Section 3.6 of the By-Laws with respect to director nominations in connection with annual meetings. Current Section 3.3(c) states, among other things, that compliance with Section 3.1(a)(iii) and (b)<sup>40</sup> shall be the exclusive means for a stockholder to make a director nomination; Nasdaq proposes to add proxy access as an additional means for a stockholder to make a director nomination. Finally, current Section 3.5 requires Nasdaq's director nominees to submit to Nasdaq's Corporate Secretary a questionnaire, representation and agreement within certain time periods; Nasdaq proposes to clarify that proxy access nominees must submit these materials within the time periods prescribed for delivery of a Notice of Proxy Access Nomination, as described above.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>41</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>42</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove

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<sup>39</sup> Article III of the By-Laws relates to stockholder meetings.

<sup>40</sup> As part of Nasdaq's "advance notice" provision, Sections 3.1(a)(iii) and (b) of the By-Laws describe certain procedures that a stockholder must follow to, among other things, nominate a person for election to the Board.

<sup>41</sup> 15 U.S.C. 78f(b).

<sup>42</sup> 15 U.S.C. 78f(b)(5).

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.

In response to feedback from its investors, Nasdaq is proposing changes to its By-Laws to implement proxy access. The Exchange believes that, by permitting an Eligible Stockholder of Nasdaq that meets the stated requirements to nominate directors and have its nominees included in Nasdaq's annual meeting proxy statement, the proposed rule change strengthens the corporate governance of the Exchange's ultimate parent company, which is beneficial to both investors and the public interest.

In drafting its proxy access provision, Nasdaq has attempted to strike an appropriate balance between responding to investor feedback and including certain procedural and informational requirements for the protection of the Company and its investors. Specifically, the procedural requirements will protect investors by stating clearly and explicitly the procedures stockholders must follow in order to submit a proper proxy access nomination. The informational requirements will enhance investor protection by ensuring, among other things, that the Company and its stockholders have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees comply with applicable laws, regulations and other requirements.

Finally, the remaining changes are clarifying in nature, and they enhance investor protection and the public interest by preventing confusion with respect to the operation of the By-Law provisions.

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

Because the proposed rule change relates to the governance of the Company 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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2016-93 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-Phlx-2016-93. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-Phlx-2016-93 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>43</sup>

Robert W. Errett  
Deputy Secretary

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<sup>43</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

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

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

\* \* \* \* \*

**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[ or] (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 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) – (d) 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 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 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.

(b) No change.

(c) Notwithstanding the foregoing provisions of this Article III, a stockholder shall also comply with all applicable requirements of the Act and the rules and regulations thereunder with respect to the matters set forth in this Article III; provided however, that any references in these By-Laws to the Act or the rules and regulations promulgated thereunder are not intended to and shall not limit any requirements applicable to nominations or proposals as to any other business to be considered pursuant to this Article III (including Section 3.1(a)(iii) and (b) hereof), and compliance with Section 3.1(a)(iii) and (b) and Section 3.6 of this Article III shall be the exclusive means for a stockholder to make nominations[ or] and compliance with Section 3.1(a)(iii) and (b) of this Article III shall be the exclusive means for a stockholder to submit other business (other than, as provided in the last sentence of Section 3.1(b), matters brought properly under and in compliance with Rule 14a-8 of the Act, as may be amended from time to time). Nothing in Article III shall be deemed to affect any rights (i) of stockholders to request inclusion of proposals in the Corporation's proxy statement pursuant to Rule 14a-8 under the Act or (ii) of the holders of any series of Preferred Stock to elect directors pursuant to any applicable provisions of the Restated Certificate of Incorporation.

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

To be eligible to be a nominee for election or reelection as a director of the Corporation, a proposed nominee must deliver (in accordance with the time periods prescribed for delivery of a stockholder's notice under Section 3.1(b) or Section 3.2(i) or a Notice of Proxy Access Nomination under Section 3.6, as applicable), to the Secretary at the principal executive offices of the Corporation a written questionnaire with respect to the background and qualification of such proposed nominee (which questionnaire shall be provided by the Secretary upon written request), and a written representation and agreement (in form provided by the Secretary upon written request) that such proposed nominee (i) is not and will not become a party to (A) any agreement, arrangement or understanding with, and has not given any commitment or assurance to, any person as to how such proposed nominee, if elected as a director of the Corporation, will act or vote on any issue or question (a "Voting Commitment") that has not been fully disclosed to the Corporation or (B) any Voting Commitment that could limit or interfere with such

proposed nominee's ability to comply, if elected as a director of the Corporation, with such proposed nominee's fiduciary duties under applicable law, (ii) is not, and will not become a party to, any agreement, arrangement or understanding with any person other than the Corporation with respect to any direct or indirect compensation, reimbursement or indemnification in connection with service or action as a director of the Corporation that has not been fully disclosed to the Corporation, (iii) would be in compliance, if elected as a director of the Corporation, and will comply, with Section 4.3 and Section 4.14, and (iv) in such proposed nominee's individual capacity and on behalf of any person on whose behalf the nomination is made, would be in compliance, if elected as a director of the Corporation, and will comply, with the Corporation's Corporate Governance Guidelines, Board of Director Code of Conduct and Code of Ethics, including all applicable, publicly disclosed conflict of interest, confidentiality, stock ownership and insider trading policies and guidelines of the Corporation.

\* \* \* \* \*

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

(a) Whenever the Board solicits proxies with respect to the election of directors at an annual meeting of stockholders, subject to the provisions of this Section 3.6, the Corporation shall include in its proxy statement, on its form proxy and on any ballot distributed at such annual meeting, in addition to any persons nominated for election by the Board or any committee thereof, the name, together with the Required Information (defined below), of any person nominated for election (the "Stockholder Nominee") to the Board by a stockholder or group of stockholders that satisfies the requirements of this Section 3.6 (such stockholder or stockholder group, including each member thereof to the extent the context requires, the "Eligible Stockholder"), and who expressly elects at the time of providing the notice required by this Section 3.6 (the "Notice of Proxy Access Nomination") to have its nominee included in the Corporation's proxy materials pursuant to this Section 3.6. For purposes of this Section 3.6, in calculating the number of stockholders in a group seeking to qualify as an Eligible Stockholder, two or more funds that are (i) under common management and investment control, (ii) under common management and funded primarily by the same employer, or (iii) a "group of investment companies" as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended, shall be counted as one stockholder. In the event that the Eligible Stockholder consists of a group of stockholders, any and all requirements and obligations for an individual Eligible Stockholder that are set forth in these By-Laws, including the Minimum Holding Period, shall apply to each member of such group; provided, however, that the Required Ownership Percentage shall apply to the ownership of the group in the aggregate. For purposes of this Section 3.6, the "Required Information" that the Corporation will include in its proxy statement is the information provided to the Secretary of the Corporation concerning the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Corporation's proxy statement by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written statement of the Eligible Stockholder (or, in the case of a group, a written statement of the group), not to exceed 500 words, in support of the Stockholder Nominee(s)' candidacy (the "Statement"). Notwithstanding anything to the contrary contained in this Section 3.6, the Corporation may omit from its proxy materials any

information or Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law or regulation, and the Corporation may solicit against, and include in the proxy statement its own statement relating to, any Stockholder Nominee.

(b) To be timely, the Notice of Proxy Access Nomination must be addressed to the Secretary of the Corporation and received by, the Secretary of the Corporation no earlier than one hundred fifty (150) days and no later than one hundred twenty (120) days before the anniversary of the date that the Corporation issued its proxy statement for the previous year's annual meeting of stockholders.

(c) The maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in the Corporation's proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two and 25% of the total number of directors in office (rounded down to the nearest whole number) as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with this Section 3.6 (the "Final Proxy Access Nomination Date"). In the event that one or more vacancies for any reason occurs after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the maximum number of Stockholder Nominees included in the Corporation's proxy materials shall be calculated based on the number of directors in office as so reduced. Any individual nominated by an Eligible Stockholder for inclusion in the Corporation's proxy materials pursuant to this Section 3.6 whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the Corporation's proxy materials pursuant to this Section 3.6 but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the maximum number of Stockholder Nominees provided for in this Section 3.6 has been reached. Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the Corporation's proxy materials pursuant to this Section 3.6 shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the Corporation's proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to this Section 3.6 exceeds the maximum number of nominees provided for in this Section 3.6. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders pursuant to this Section 3.6 exceeds the maximum number of nominees provided for in this Section 3.6, the highest ranking Stockholder Nominee who meets the requirements of this Section 3.6 from each Eligible Stockholder will be selected for inclusion in the Corporation's proxy materials until the maximum number is reached, going in order of the amount (largest to smallest) of shares of the Corporation's outstanding common stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to the Corporation. If the maximum number is not reached after the highest ranking Stockholder Nominee who meets the requirements of this Section 3.6 from each Eligible Stockholder has been selected, this process will continue as many times as necessary, following the same order each time, until the maximum number is reached. Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements of this Section 3.6 (y)

thereafter is nominated by the Board or (z) thereafter is not included in the Corporation's proxy materials or is not submitted for election as a director, in either case, as a result of the Eligible Stockholder becoming ineligible or withdrawing its nomination, the Stockholder Nominee becoming unwilling or unable to serve on the Board or the Eligible Stockholder or the Stockholder Nominee failing to comply with the provisions of this Section 3.6, no other nominee or nominees shall be included in the Corporation's proxy materials or otherwise submitted for director election in substitution thereof.

(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) In order to make a nomination pursuant to this Section 3.6, an Eligible Stockholder must have owned (as defined above) the Required Ownership Percentage (as defined below) of the Corporation's outstanding common stock (the "Required Shares") continuously for the Minimum Holding Period (as defined below) as of both the date the Notice of Proxy Access Nomination is received by, the Secretary of the Corporation in accordance with this Section 3.6 and the record date for determining the stockholders entitled to vote at the annual meeting and must continue to own the Required Shares through the meeting date. For purposes of this Section 3.6, the "Required Ownership Percentage" shall be 3% or more. For purposes of this Section 3.6, the "Minimum Holding Period" is 3 years. Within the time period specified in this Section 3.6 for delivering the Notice of Proxy Access Nomination, an Eligible Stockholder must provide the following information in writing to the Secretary of the Corporation:

(i) one or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access Nomination is delivered to, or mailed to and received by, the Secretary of the Corporation, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five (5) business days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date;

(ii) a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a-18 under the Act;

(iii) the information, representations and agreements that are the same as those that would be required to be set forth in a stockholder's notice of nomination pursuant to Section 3.1(b)(i) and Section 3.1(b)(iii) of these By-Laws (except that, for purposes of this Section 3.6(e)(iii), the term "Eligible Stockholder" shall be substituted for the term "Proposing Person" in all places it appears in Section 3.1(b)(i) and Section 3.1(b)(iii));

(iv) the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected;

(v) a representation that the Eligible Stockholder:

(A) acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control at the Corporation, and does not presently have such intent,

(B) presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting,

(C) has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s),

(D) has not engaged and will not engage in, and has not and will not be a “participant” in another person’s, “solicitation” within the meaning of Rule 14a-1(l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board,

(E) agrees to comply with all applicable laws and regulations with respect to any solicitation in connection with the meeting or applicable to the filing and use, if any, of soliciting material,

(F) will provide facts, statements and other information in all communications with the Corporation and its stockholders that are or will be true and correct in all material respects and do not and will not omit 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, and

(G) as to any two or more funds whose shares are aggregated to count as one stockholder for the purpose of constituting an Eligible Stockholder, within five business days after the date of the Notice of Proxy Access Nomination, will provide to the Corporation documentation reasonably satisfactory to the Corporation that demonstrates that the funds satisfy the requirements of the second sentence of subsection (a) of this Section 3.6;

(vi) a representation as to the Eligible Stockholder’s intentions with respect to maintaining qualifying ownership of the Required Shares for at least one year following the annual meeting;

(vii) an undertaking that the Eligible Stockholder agrees to:

(A) assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder’s communications with the stockholders of the Corporation or out of the information that the Eligible Stockholder provided to the Corporation;

(B) indemnify and hold harmless the Corporation and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against the Corporation or any of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to this Section 3.6; and

(C) file with the SEC any solicitation or other communication with the Corporation's stockholders relating to the meeting at which the Stockholder Nominee will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available thereunder; and

(viii) in the case of a nomination by a group of stockholders that together is an Eligible Stockholder, the designation by all group members of one group member that is authorized to act on behalf of all such members with respect to the nomination and matters related thereto, including withdrawal of the nomination.

(f) Within the time period specified in this Section 3.6 for delivering the Notice of Proxy Access Nomination, a Stockholder Nominee must deliver to the Secretary of the Corporation (which shall be deemed to be part of the Stockholder Notice for purposes of this Section 3.6):

(i) the information required with respect to persons whom a stockholder proposes to nominate for election or reelection as a director by Section 3.1(b)(i) of these By-Laws including, but not limited to, the signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D) of these By-Laws;

(ii) a written representation and agreement that such person:

(A) will act as a representative of all of the stockholders of the Corporation while serving as a director; and

(B) will provide facts, statements and other information in all communications with the Corporation and its stockholders that are or will be true and correct in all material respects (and shall not omit 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).

At the request of the Corporation, the Stockholder Nominee(s) must submit all completed and signed questionnaires required of directors and officers of the Corporation. The Corporation may request such additional information as necessary to (y) permit the Board to determine if each Stockholder Nominee satisfies the requirements of this Section 3.6 or if each Stockholder Nominee is 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 the independence of the Corporation's directors and/or (z) permit the Secretary of the Corporation to determine the classification of such nominee as an Industry, Non-Industry, Issuer or Public Director, if applicable, in order to make the certification referenced in Section 4.13(h)(iii) of these By-Laws.

(g) In the event that any information or communications provided by the Eligible Stockholder or the Stockholder Nominee to the Corporation or its stockholders ceases to be true and correct in all material respects or omits a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, each Eligible Stockholder or Stockholder Nominee, as the case may be, shall promptly notify the Secretary of the Corporation of any defect in such previously

provided information and of the information that is required to correct any such defect; it being understood that providing any such notification shall not be deemed to cure any defect or, with respect to any defect that the Corporation determines is material, limit the Corporation's rights to omit a Stockholder Nominee from its proxy materials as provided in this Section 3.6.

(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) if the Eligible Stockholder who has nominated such Stockholder Nominee has engaged in or is currently engaged in, or has been or is a "participant" in another person's, "solicitation" within the meaning of Rule 14a-1(l) under the Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board;

(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) whose election as a member of the Board would cause the Corporation to be in violation of these By-Laws (including but not limited to the compositional requirements of the Board as set forth in Section 4.3 hereof), the Certificate of Incorporation, the rules and listing standards of the NASDAQ Stock Market, or any applicable state or federal law, rule or regulation;

(iv) who is or has been, within the past three (3) years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914;

(v) who is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past ten (10) years;

(vi) who is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended;

(vii) who is subject to "statutory disqualification" under Section 3(a)(39) of the Act;

(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) the Eligible Stockholder or applicable Stockholder Nominee breaches or fails to comply with its obligations pursuant to these By-Laws, including, but not limited to, this Section 3.6 and any agreement, representation or undertaking required by this Section 3.6.

(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) Any Stockholder Nominee who is included in the Corporation's proxy materials for a particular annual meeting of stockholders but either:

(i) withdraws from or becomes ineligible or unavailable for election at the annual meeting; or

(ii) does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election

will be ineligible to be a Stockholder Nominee pursuant to this Section 3.6 for the next two annual meetings.

For the avoidance of doubt, this Section 3.6(j) shall not prevent any stockholder from nominating any person to the Board pursuant to and in accordance with Section 3.1 of these By-Laws.

(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 stockholder shall be permitted to join more than one group of stockholders to become an Eligible Stockholder for purposes of nominations pursuant to this Section 3.6 per each annual meeting of stockholders.

(m) This Section 3.6 shall be the exclusive method for stockholders to include nominees for director in the Corporation's proxy materials.