

## Exhibit 5

New text is underlined; deleted text is in brackets.

**[CERTIFICATE OF INCORPORATION OF NASDAQ OMX PHLX, INC.]**

[FIRST: The name of the Corporation (the "Corporation") is NASDAQ OMX PHLX, Inc.

SECOND: The address of the Corporation's registered office in the State of Delaware is 1209 Orange Street, City of Wilmington, County of New Castle, Delaware, 19801. The name of the Corporation's registered agent at such address is The Corporation Trust Company.

THIRD: The nature of the business or purposes to be conducted or promoted by the Corporation is to engage in any lawful act or activity for which corporations may be organized under the Delaware General Corporation Law (the "DGCL").

FOURTH: The total number of shares of all classes of capital stock which the Corporation shall have authority to issue is: (a) 100 shares of common stock, par value \$0.01 per share (the "Common Stock"); and (b) 100 shares of Preferred Stock, par value \$0.01 per share (the "Preferred Stock"), of which one (1) share is hereby designated "Series A Preferred Stock" (the "Series A Preferred Stock").

(a) Preferred Stock

The Preferred Stock may be issued from time to time in one or more classes or series, each of which classes or series shall have such distinctive designation or title and such number of shares as shall be fixed by resolution of the Board of Governors of the Corporation (the "Board of Governors") prior to the issuance of any shares thereof. Subject to the terms of this Certificate of Incorporation (this "Certificate"), each such class or series of Preferred Stock shall have such voting powers, full or limited, or no voting powers, and such preferences and relative, participating, optional or other special rights and such qualifications, limitations or restrictions thereof, as shall be stated and expressed in the resolution or resolutions providing for the issuance of such class or series of Preferred Stock as may be adopted from time to time by the Board of Governors prior to the issuance of any shares thereof pursuant to the authority hereby expressly vested in it. The Board of Governors is further authorized to increase or decrease (but not below the number of shares outstanding) the number of shares of any class or series of Preferred Stock subsequent to the issuance of shares of that class or series. In case the number of shares of any class or series shall be so decreased, the shares constituting such decrease shall resume the status that they had prior to the adoption of the resolution originally fixing the number of shares of such class or series.

Notwithstanding the foregoing, the Corporation shall not issue Preferred Stock (other than the one (1) share of Series A Preferred Stock) unless the resolution or resolutions providing for the issuance of such Preferred Stock shall have been filed with and approved by the U.S. Securities and Exchange Commission (the "SEC") under Section 19 of the Securities Exchange Act of 1934, as amended (the "Exchange Act") and the rules promulgated thereunder.

Preferred Stock may not be transferred or assigned in whole or in part, to any entity, unless such transfer or assignment shall be filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder.

(b) Series A Preferred Stock

(i) Dividend Rights. No dividends shall be paid with respect to the Series A Preferred Stock.

(ii) Liquidation Preferences. Upon any voluntary or involuntary liquidation, dissolution or winding up of the Corporation, the holder of the Series A Preferred Stock shall be entitled to receive an amount equal to the par value of the share of Series A Preferred Stock held by such holder after the payment of, or provision for, obligations of the Corporation and any preferential amounts payable to holders of any other class or series of outstanding shares of Preferred Stock.

(iii) Voting Rights. The holder of the Series A Preferred Stock shall have one vote in respect of the share thereof held by such holder of record as of a date specified by the Board of Governors on the books of the Corporation on each matter for which the vote of the holder thereof is required. The holder of the share of Series A Preferred Stock shall have the sole right to elect the Member Governor and a number of Designated Independent Governors, which, together with the Member Governor, shall equal at least 20% of the total number of Governors (collectively, the "Designated Governors") (each as hereinafter defined) in this Article FOURTH and in the PHLX By-Laws (as in hereafter defined) and shall have no other voting rights other than in connection with the removal of Designated Governors in accordance with paragraph (b) of Article SIXTH of this Certificate.

"Designated Independent Governors" shall mean those Independent Governors, as defined herein, who are elected by the holder of Series A Preferred Stock in accordance with Article SIXTH of the Certificate of Incorporation. The term "Member Governors" shall mean a Governor who is a member or a general partner or an executive officer (vice-president and above) of a Member Organization as defined in By-Law Article I, Section 1-1.

(iv) Ownership. The one (1) authorized share of Series A Preferred stock shall be issued and outstanding, and shall initially be held by a Trust pursuant to a Trust Agreement.

(v) Transferability. The Series A Preferred Stock shall not be transferable (whether by sale, pledge, operation of law or any other disposition) without the prior written consent of the Board of Governors. If the Board of Governors determines that it is in the best interests of the Corporation or its stockholders for any holder of the share of Series A Preferred Stock to sell such share to the Corporation or any other Person (as hereinafter defined), such holder shall be required to effect such sale as directed by the Board of Governors. As used in this Certificate, "Person" shall mean an individual, partnership (general or limited), joint-stock company, corporation, limited liability company, trust or unincorporated organization, and a government or agency or political subdivision thereof. Series A Preferred Stock may not be transferred or assigned, in whole or in part, to any entity, unless such transfer or assignment shall be filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder.

(c) Common Stock

(i) General. Each share of Common Stock shall be identical in all respects and shall have equal rights and privileges.

(ii) Dividend Rights. The holder of Common Stock shall be entitled to receive dividends, when and as declared by the Board of Governors, out of funds of the Corporation legally available therefore.

(iii) Voting Rights. The holder of Common Stock shall have one vote in respect of each share of Common Stock held by such holder on the books of the Corporation on each matter on which the holder of Common Stock shall be entitled to vote. The holder of Common Stock shall have no voting rights with respect to the election of the Designated Governors.

(iv) All of the authorized shares of Common Stock initially shall be issued and outstanding, and shall initially be held by The NASDAQ OMX Group, Inc., a Delaware corporation. The NASDAQ OMX Group, Inc. may not transfer or assign any shares of Common Stock of the Corporation, in whole or in part, to any entity, unless such transfer or assignment shall be filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder.

FIFTH: The existence of this Corporation is to be perpetual.

SIXTH: The business and affairs of the Corporation shall be managed by and under the direction of the Board of Governors, which shall consist of the directors of the Corporation (each, a "Governor"), who shall meet the qualifications set forth in paragraph (a) of this Article SIXTH and in the By-Laws. The Governors shall, in managing the business and affairs of the Corporation, consider applicable requirements for registration as a national securities exchange under Section 6(b) of the Exchange Act, including, without limitation, the requirements that (a) the rules of the Corporation shall be designed to protect investors and the public interest, and (b) the Corporation shall be so organized and have the capacity to carry out the purposes of the Exchange Act and (subject to such exceptions as are set forth in the Exchange Act or the rules and regulations thereunder) to enforce compliance by its members and persons associated with its members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Corporation. The foregoing provision shall not be construed to create the basis for any cause of action against any Governor, and no Governor shall be liable, by virtue of such provision, for such Governor's consideration or failure to consider the matters referred to therein.

(a) Composition of the Board of Governors

The number and qualifications of Governors shall be fixed from time to time by the Board of Governors in accordance with the By-Laws. Except as otherwise set forth in this Article SIXTH, all Governors shall each fill only one position on the Board of Governors and shall be elected by a plurality vote of the holder of the Common Stock. Notwithstanding the foregoing, the Board of Governors shall include the following:

(i) One (1) Governor who shall be a Member Governor who meets the qualifications set forth in the By-Laws with respect to the Member Governor, who shall be elected by the holder of the Series A Preferred Stock;

(ii) One (1) Governor who shall be a Stockholder Governor who meets the qualifications set forth in the By-Laws with respect to the Stockholder Governor, who shall be elected by a plurality vote of the holder of the Common Stock;

(iii) A number of Designated Independent Governors, which, together with the Member Governor, shall equal at least 20% of the total number of Governors, and who shall be elected by the vote of the holder of the Series A Preferred Stock; and

(iv) One (1) Governor who shall be the Chief Executive Officer, and who shall be elected by a plurality vote of the holder of the Common Stock.

(v) All remaining Governors shall be Independent Governors who meet the qualifications set forth in the By-Laws with respect to Independent Governors, and shall be elected by a plurality vote of the holder of the Common Stock. "Independent Governor" shall mean a Governor who is a person affirmatively determined by the Board of Governors as having no Material Relationship as defined in By-Law, Article 1, Section 1-1 with the Exchange or any affiliate of the Exchange, any member of the Exchange or any affiliate of such member, or any issuer of securities that are listed or traded on the Exchange or a facility of the Exchange.

(vi) The "Stockholder Governor" shall be a Governor who is an officer, director (or a person in a similar position in business entities that are not corporations), designee or an employee of a holder of Common Stock or any affiliate or subsidiary of such holder.

(b) Removal of Governors.

(i) Any or all of the Governors, other than Designated Governors, may be removed from office at any time, with or without cause, by the affirmative vote of a majority of the voting power entitled to vote for the election of such Governors.

(ii) A Designated Governor may be removed with or without cause, upon the affirmative vote of the holder of the Series A Preferred Stock following a vote of the Member Organization Representatives pursuant to By-Law Article III, Section 3-3.

SEVENTH: Any action required or permitted to be taken at any annual or special meeting of stockholders may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders who have not consented in writing to the extent required by Delaware law.

EIGHTH: The stockholders of the Corporation and the Governors shall have the power to hold their meetings outside of the State of Delaware, and at such places as may be from time to time designated by the By-Laws or by resolution of the Board of Governors, except as otherwise provided by the laws of the State of Delaware.

NINTH: RESERVED

TENTH: Whenever a compromise or arrangement is proposed between this Corporation and its creditors or any class of them and/or between this Corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this Corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this Corporation under Section 291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this Corporation under the provisions of Section 279 of Title 8 of the Delaware Code order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three-fourths in value of the creditor or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this Corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders of this Corporation, as the case may be, and also on this Corporation.

ELEVENTH: No contract or transaction between the Corporation and one or more of its Governors or officers, or between the Corporation and any other Person in which one or more of its Governors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because any such Governor or officer is present at or participates in the meeting of the Board of Governors or any committee thereof which authorizes the contract or transaction, or solely because any such Governor's or officer's votes are counted for such purpose, if:

(a) The material facts as to such Governor's or officer's relationship or interest as to the contract or transaction are disclosed or are known to the Board of Governors or such committee thereof, and the Board of Governors or such committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested Governors, even though the disinterested Governors may be less than a quorum; or

(b) The material facts as to such Governor's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or

(c) The contract or transaction is fair as to the Corporation as of the time it is authorized, approved or ratified by the Board of Governors, such committee thereof or the stockholders of the Corporation.

For the avoidance of doubt, interested Governors may be counted in determining the presence of a quorum at a meeting of the Board of Governors or of any committee thereof which authorizes any such contract or transaction described in this Article ELEVENTH.

TWELFTH: The books of the Corporation shall be kept within the United States (either within or outside of the State of Delaware) at such place or places as may be designated from time to time by the Board of Governors or by the By-Laws. Elections of Governors need not be by written ballot.

THIRTEENTH: The Board of Governors shall have the authority to amend the By-Laws.

FOURTEENTH: Notwithstanding anything in this Certificate to the contrary, the Corporation reserves the right from time to time to distribute to its foreign currency options participants (as defined in the By-Laws) in the event of the complete or partial liquidation of the Corporation: (a) the amount of the Corporation's assets attributable to the unexpended amount, if any, of the sums contributed to the Corporation in connection with the purchase of foreign currency options participations; and (b) the amount of the Corporation's assets, if any, directly attributable to the Corporation's earnings from its foreign currency options market. The amount distributed to a particular foreign currency options participant pursuant to this Article FOURTEENTH shall be determined by multiplying (i) the aggregate amount available for distribution hereunder, by (ii) a fraction, (A) the numerator of which shall be the sum(s) contributed to the Corporation in connection with the purchase of the foreign currency options participation(s) then owned by such participant and (B) the denominator of which shall be the aggregate amount contributed to the Corporation in connection with the purchase of foreign currency options participations; provided, however, that the amount distributed to such participant pursuant to this Article FOURTEENTH shall not exceed the sum(s) contributed to the Corporation in connection with the purchase of the foreign currency option participation(s) then owned by such participant.

FIFTEENTH: No Governor of the Corporation shall be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a Governor, except for liability (a) for any breach of the Governor's duty of loyalty to the Corporation or its stockholders, (b) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (c) under Section 174 of the DGCL, or (d) for any transaction from which the Governor derived any improper personal benefit. If the DGCL is amended after approval by the stockholders of the provisions of this Article FIFTEENTH to authorize corporate action further eliminating or limiting the personal liability of Governors (or directors) of the Corporation, then the liability of a Governor of the Corporation shall be eliminated or limited to the fullest extent permitted by the DGCL, as so amended.

No repeal or modification of this Article FIFTEENTH shall adversely affect any right or protection of a Governor of the Corporation existing at the time of such repeal or modification.

SIXTEENTH: (a) The Corporation shall indemnify to the fullest extent permitted under and in accordance with the laws of the State of Delaware any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the Corporation) by reason of the fact that the person is or was a Governor (or director) or officer of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo contendere* or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the Corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person's conduct was unlawful.

(b) The Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Corporation to procure a judgment in its favor by reason of the fact that the person is or was a Governor (or director) or officer of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the Corporation and except that no such indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Corporation unless and only to the extent that the Court of Chancery of Delaware or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity by the Corporation for such expenses which the Court of Chancery of Delaware or such other court shall deem proper.

(c) Expenses incurred in defending a civil or criminal action, suit or proceeding shall (in the case of any action, suit or proceeding against a Governor of the Corporation) or may (in the case of any action, suit or proceeding against an officer, trustee, employee or agent of the Corporation) be paid by the Corporation in advance of the final disposition of such action, suit or proceeding as authorized by the Board of Governors upon receipt of an undertaking by or on behalf of person so indemnified to repay such amount if it shall ultimately be determined that he is not entitled to be indemnified by the Corporation as authorized in this Article SIXTEENTH.

(d) The indemnification and other rights set forth in this Article SIXTEENTH shall not be exclusive of any provisions with respect thereto in the By-Laws or any other contract or agreement between the Corporation and any Governor, officer, employee or agent of the Corporation.

(e) Neither the amendment nor repeal of this Article SIXTEENTH, nor the adoption of any provision of this Certificate inconsistent with this Article SIXTEENTH, shall eliminate or reduce the effect of this Article SIXTEENTH in respect of any matter occurring before such amendment, repeal or adoption of an inconsistent provision or in respect of any cause of action, suit or claim relating to any such matter which would have given rise to a right of indemnification or right to the reimbursement expenses pursuant to this Article SIXTEENTH if such provision had not been so amended or repealed or if a provision inconsistent therewith had not been so adopted.]

**CERTIFICATE OF FORMATION**

**OF**

**NASDAQ OMX PHLX LLC**

This Certificate of Formation of NASDAQ OMX PHLX LLC (the "Company"), dated as of \_\_\_\_\_, 2010, has been duly executed and is being filed by the undersigned, as an authorized person, to form a limited liability company under the Delaware Limited Liability Company Act (6 Del. C. §§ 18-101, et seq.).

FIRST. The name of the limited liability company is NASDAQ OMX PHLX LLC.

SECOND. The address of the registered office of the Company in the State of Delaware is c/o The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

THIRD. The name and address of the registered agent for service of process on the Company in the State of Delaware are The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

IN WITNESS WHEREOF, the undersigned has executed this Certificate of Formation as of the date first above written.

\_\_\_\_\_  
Name: Joan C. Conley

Title: Authorized Person



**LIMITED LIABILITY COMPANY AGREEMENT**  
**OF**  
**NASDAQ OMX PHLX LLC**

This Limited Liability Company Agreement (together with the exhibits and schedules attached hereto, this "Agreement") of NASDAQ OMX PHLX LLC (the "Exchange"), is entered into by The NASDAQ OMX Group, Inc. and PHLX Member Voting Trust, each as a member of the Exchange (and collectively with each additional person admitted to the Exchange as an additional or substitute member in accordance with this Agreement, in their capacity as such, the "Stockholders" and each a "Stockholder").

WHEREAS, on the date hereof, NASDAQ OMX PHLX, Inc., a Delaware corporation (the "Corporation"), was converted to a limited liability company pursuant to Section 18-214 of the Delaware Limited Liability Company Act (6 Del. C. § 18-101, et seq.), as amended from time to time (the "LLC Act"), and Section 266 of the General Corporation Law of the State of Delaware (8 Del. C. § 101, et seq.) by causing the filing with the Secretary of State of the State of Delaware of a Certificate of Conversion to Limited Liability Company and a Certificate of Formation (the "Conversion"); and

WHEREAS, pursuant to this Agreement and the Conversion, (i) all the capital stock of the Corporation was converted into all the limited liability company interests in the Exchange, (ii) The NASDAQ OMX Group, Inc. ("NASDAQ OMX Inc."), as the sole common shareholder of the Corporation, became a member of the Exchange and the owner of all of the Common Stock (as defined below) in the Exchange, and (iii) PHLX Member Voting Trust (the "Trust"), as the sole preferred shareholder of the Corporation, became a member of the Exchange and the owner of all of the Series A Preferred Stock (as defined below) in the Exchange.

NOW, THEREFORE, in consideration of the agreements and obligations set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the parties hereto hereby agree as follows:

**Section 1. Name; Conversion.**

(a) The name of the limited liability company is NASDAQ OMX PHLX LLC.

(b) Effective as of the time of the Conversion, (i) all of the existing organizational documents of the Corporation are replaced and superseded in their entirety by this Agreement, the By-Laws (as defined below) and the Certificate of Formation of the Exchange in respect of all periods beginning on or after the Conversion, (ii) NASDAQ OMX Inc., as the sole common shareholder of the Corporation immediately prior to the Conversion, is automatically admitted to the Exchange as a member of the Exchange and is the owner of all Common Stock in

the Exchange, (iii) the Trust, as the sole preferred shareholder of the Corporation immediately prior to the Conversion, is automatically admitted to the Exchange as a member of the Exchange and is the owner of all Series A Preferred Stock in the Exchange, and (iv) all of the capital stock in the Corporation issued and outstanding immediately prior to the Conversion is converted to all the limited liability company interests in the Exchange as further described in Section 16 below. The Exchange constitutes the continued existence of the Corporation in the form of a Delaware limited liability company. As provided in Section 18-214(d) of the LLC Act, the existence of the Exchange is deemed to have commenced on January 13, 1972, the date the Corporation was originally organized under the laws of the State of Delaware.

**Section 2. Principal Business Office.**

The principal business office of the Exchange shall be located at 1900 Market Street, Philadelphia, Pennsylvania or such other location as may hereafter be determined by the Board of Governors.

**Section 3. Registered Office; Registered Agent.**

The address of the registered office of the Exchange in the State of Delaware is c/o The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, County of New Castle, Delaware 19801. The name of the registered agent of the Exchange at such address is The Corporation Trust Company.

**Section 4. Members.**

The mailing address of each Stockholder is set forth on Schedule A attached hereto. Each Stockholder was admitted to the Exchange as a member of the Exchange effective as of the time of the Conversion.

**Section 5. Certificates.**

Joan C. Conley, as an "authorized person" within the meaning of the Act, has executed, delivered and filed the Certificate of Formation of the Exchange and the Certificate of Conversion to Limited Liability Company with the Secretary of State of the State of Delaware. Upon the filing of the Certificate of Formation and the Certificate of Conversion to Limited Liability Company with the Secretary of State of the State of Delaware, her powers as an "authorized person" ceased, and each Governor and each Officer thereupon became a designated "authorized person" and hereby continues as an designated "authorized person" within the meaning of the Act. A Governor or an Officer, as an authorized person, within the meaning of the Act, shall execute, deliver and file, or cause the execution, delivery and filing of, all certificates (and any amendments and/or restatements thereof) required or permitted by the Act to be filed in with the Secretary of State of the State of Delaware. A Governor or any Officer shall execute, deliver and file, or cause the execution, delivery and filing of any certificates (and any amendments and/or restatements thereof) necessary for the Exchange to qualify to do business in any jurisdiction in which the Exchange may wish to conduct business. The existence of the Exchange as a separate legal entity shall continue until the cancellation of the Certificate of Formation as provided in the LLC Act.

**Section 6. Purpose.**

The Exchange is formed for the object and purpose of, and the nature of the business to be conducted and promoted by the Exchange is, engaging in any lawful act or activity for which limited liability companies may be formed under the LLC Act and engaging in any and all activities necessary or incidental to the foregoing.

**Section 7. Powers.**

The Exchange, and the Board of Governors and the Officers of the Exchange on behalf of the Exchange, (i) shall have and exercise all powers necessary, convenient or incidental to accomplish its purposes as set forth in Section 6, including without limitation, those powers set forth in the By-Laws, and (ii) shall have and exercise all of the powers and rights conferred upon limited liability companies formed pursuant to the LLC Act.

**Section 8. Management.**

(a) Board of Governors. The business and affairs of the Exchange shall be managed pursuant to this Agreement and the By-Laws by or under the direction of a board (the "Board" or "Board of Governors") of one or more persons appointed to the board from time to time in accordance with this Agreement and the By-Laws (each a "Governor"). To the extent not set forth herein, the composition, qualification and procedures of such Board shall be as set forth in the By-Laws. Each Governor is hereby designated as a "manager" within the meaning of the LLC Act.

(b) Exercise of Powers. The Governors shall, in managing the business and affairs of the Exchange, consider applicable requirements for registration as a national securities exchange under Section 6(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), including, without limitation, the requirements that (a) the rules of the Exchange shall be designed to protect investors and the public interest, and (b) the Exchange shall be so organized and have the capacity to carry out the purposes of the Exchange Act and (subject to such exceptions as are set forth in the Exchange Act or the rules and regulations thereunder) to enforce compliance by its exchange members and persons associated with its exchange members, with the provisions of the Exchange Act, the rules and regulations thereunder, and the rules of the Exchange. The foregoing provision shall not be construed to create the basis for any cause of action against any Governor, and no Governor shall be liable, by virtue of such provision, for such Governor's consideration or failure to consider the matters referred to therein.

(c) Composition of the Board of Governors. The number and qualifications of Governors shall be fixed from time to time by the Board of Governors in accordance with the By-Laws. Except as otherwise set forth in this Section 8, all Governors shall each fill only one position on the Board of Governors and shall be elected by a plurality vote of the holder of the Common Stock. Notwithstanding the foregoing, the Board of Governors shall include the following:

(i) One (1) Governor who shall be a Member Governor who meets the qualifications set forth in the By-Laws with respect to the Member Governor, who shall be elected by the holder of the Series A Preferred Stock;

(ii) One (1) Governor who shall be a Stockholder Governor who meets the qualifications set forth in the By-Laws with respect to the Stockholder Governor, who shall be elected by a plurality vote of the holder of the Common Stock;

(iii) A number of Designated Independent Governors, which, together with the Member Governor, shall equal at least 20% of the total number of Governors, and who shall be elected by the vote of the holder of the Series A Preferred Stock; and

(iv) One (1) Governor who shall be the Chief Executive Officer, and who shall be elected by a plurality vote of the holder of the Common Stock.

(v) All remaining Governors shall be Independent Governors who meet the qualifications set forth in the By-Laws with respect to Independent Governors, and shall be elected by a plurality vote of the holder of the Common Stock. "Independent Governor" shall mean a Governor who is a person affirmatively determined by the Board of Governors as having no Material Relationship as defined in By-Law, Article 1 with the Exchange or any affiliate of the Exchange, any member of the Exchange or any affiliate of such member, or any issuer of securities that are listed or traded on the Exchange or a facility of the Exchange.

(vi) The "Stockholder Governor" shall be a Governor who is an officer, director (or a person in a similar position in business entities that are not corporations), designee or an employee of a holder of Common Stock or any affiliate or subsidiary of such holder.

(d) By-Laws. The Exchange, the Stockholders and the Board of Governors hereby adopt the By-Laws of the Exchange in the form attached hereto as Exhibit A, as the same may be amended from time to time in accordance with the terms therein and in this Agreement (the "By-Laws"). The Board, each Officer (as defined below) and the Stockholders shall be subject to the express provisions of this Agreement and of the By-Laws. In case of any conflict between the provisions of this Agreement and any provisions of the By-Laws, the provisions of this Agreement shall control.

(e) Governors as Agents. To the extent of their powers set forth in this Agreement and the By-Laws, the Governors are agents of the Exchange for the purpose of the Exchange's business, and the actions of the Governors taken in accordance with such powers set forth in this Agreement and the By-Laws shall bind the Exchange. Notwithstanding the last sentence of Section 18-402 of the LLC Act, except as provided in this Agreement or the By-Laws or in a resolution of the Governors, a Governor may not bind the Exchange.

(f) Removal. Any or all of the Governors, other than Designated Governors, may be removed from office at any time, with or without cause, by the affirmative vote of a majority of the voting power entitled to vote for the election of such Governors. The Designated Governors may be removed only in accordance with Section 3-3 of the By-Laws.

**Section 9. Officers.**

(a) Appointment. Except as provided herein or in the By-Laws, the Board may, in accordance with the By-Laws, from time to time as it deems advisable, select natural persons who are employees or agents of the Exchange and designate them as officers of the Exchange (the "Officers") and assign titles (including, without limitation, Chief Executive Officer, Chief Operating Officer, Vice President, Secretary, Treasurer and Controller) to any such person.

(b) Officers as Agents. The Officers, to the extent of their powers set forth in this Agreement and the By-Laws or otherwise vested in them by action of the Board not inconsistent with this Agreement or the By-Laws, are agents of the Exchange for the purpose of the Exchange's business, and the actions of the Officers taken in accordance with such powers shall bind the Exchange.

(c) Duties of Board and Officers. Except to the extent otherwise modified herein or in the By-Laws, each Governor and Officer shall have a fiduciary duty of loyalty and care similar to that of directors and officers of business corporations organized under the General Corporation Law of the State of Delaware.

**Section 10. Limited Liability.**

Except as otherwise expressly provided by the LLC Act, the debts, obligations and liabilities of the Exchange, whether arising in contract, tort or otherwise, shall be the debts, obligations and liabilities solely of the Exchange, and neither the Stockholders nor any Governor shall be obligated personally for any such debt, obligation or liability of the Exchange solely by reason of being a Stockholder or Governor of the Exchange.

**Section 11. Capital Contributions.**

Each Stockholder has contributed to the Exchange the amounts set forth in the books and records of the Exchange.

**Section 12. Additional Contributions.**

Except as provided by in this Agreement or the By-Laws, no Stockholder is required to make any additional capital contribution to the Exchange. However, a Stockholder may make additional capital contributions to the Exchange at any time upon the consent of such Stockholder and the Board of Governors. To the extent that a Stockholder makes an additional capital contribution to the Exchange, the books and records of the Exchange shall be revised to reflect such additional contribution.

**Section 13. Allocation of Profits and Losses.**

The Exchange's profits and losses shall be allocated solely to NASDAQ OMX Inc.

**Section 14. Distributions.**

(a) Distributions shall be made at the times and in the aggregate amounts determined by the Board. Notwithstanding any provision to the contrary contained in this Agreement or the By-Laws, (i) the Exchange shall not be required to make a distribution to a Stockholder on account of its interest in the Exchange if such distribution would violate the LLC Act or any other applicable law, and (ii) the Exchange shall not make a distribution to a Stockholder using Regulatory Funds (as defined in the By-Laws).

(b) Subject to the LLC Act, the Exchange reserves the right from time to time to distribute to its foreign currency options participants (as defined in the By-Laws) upon the complete or partial liquidation (solely for tax purposes) of the Exchange: (a) the amount of the Exchange's assets attributable to the unexpended amount, if any, of the sums contributed to the Exchange in connection with the purchase of foreign currency options participations; and (b) the amount of the Exchange's assets, if any, directly attributable to the Exchange's earnings from its foreign currency options market. Subject to the LLC Act, the amount distributed to a particular foreign currency options participant shall be determined by multiplying (i) the aggregate amount available for distribution hereunder, by (ii) a fraction, (A) the numerator of which shall be the sum(s) contributed to the Exchange in connection with the purchase of the foreign currency options participation(s) then owned by such participant and (B) the denominator of which shall be the aggregate amount contributed to the Exchange in connection with the purchase of foreign currency options participations; provided, however, that the amount distributed to such participant shall not exceed the sum(s) contributed to the Exchange in connection with the purchase of the foreign currency option participation(s) then owned by such participant. For the avoidance of doubt, no foreign currency option participant, in its capacity as such, shall constitute a member of the Exchange for purposes of the LLC Act.

**Section 15. Books and Records.**

The books of the Exchange shall be kept within the United States (either within or outside of the State of Delaware) at such place or places as may be designated from time to time by the Board of Governors or by the By-Laws. The Board shall keep or cause to be kept complete and accurate books of account and records with respect to the Exchange's business. The books of the Exchange shall at all times be maintained by the Board in accordance with the By-Laws. Each Stockholder and its duly authorized representatives shall have the right to examine the Exchange books, records and documents during normal business hours for a purpose reasonably related to its interest in the Exchange. The Exchange's books of account shall be kept using the method of accounting determined by the Board. The Exchange's independent auditor, if any, shall be an independent public accounting firm selected by the Board. Elections of Governors shall be by written ballot.

**Section 16. Limited Liability Company Interests.**

(a) The limited liability company interests in the Exchange shall be represented by shares of the Exchange. Initially, there shall be two classes of shares, which are hereby designated as "Common Stock" and "Preferred Stock." Such shares may be evidenced by certificates in such form, and issued in such manner, as set forth in the By-Laws. The Exchange

may issue or establish such other interests in the Exchange or such other Exchange securities as the Board determines in accordance with this Agreement and the By-Laws.

(b) The total number of shares of all classes of limited liability company interests which the Exchange shall have authority to issue is: (a) 100 shares of Common Stock, par value \$0.01 per share; and (b) 100 shares of Preferred Stock, par value \$0.01 per share, of which one (1) share is hereby designated "Series A Preferred Stock" (the "Series A Preferred Stock"). NASDAQ OMX Inc. was issued all authorized and outstanding shares of Common Stock of the Corporation, which upon the Conversion was converted to all authorized and outstanding shares of Common Stock of the Exchange, and following the Conversion, NASDAQ OMX Inc. continues as the owner of such shares. The Trust was issued the sole share of authorized and outstanding Series A Preferred Stock of the Corporation, which upon the Conversion was converted to the sole share of authorized and outstanding Series A Preferred Stock of the Exchange, and following the Conversion, the Trust continues as the owner of such share.

(c) Preferred Stock.

(i) The Preferred Stock may be issued from time to time in one or more classes or series, each of which classes or series shall have such distinctive designation or title and such number of shares as shall be fixed by resolution of the Board of Governors prior to the issuance of any shares thereof. Subject to the terms of this Agreement and the By-Laws, each such class or series of Preferred Stock shall have such voting powers, full or limited, or no voting powers, and such preferences and relative, participating, optional or other special rights and such qualifications, limitations or restrictions thereof, as shall be stated and expressed in the resolution or resolutions providing for the issuance of such class or series of Preferred Stock as may be adopted from time to time by the Board of Governors prior to the issuance of any shares thereof pursuant to the authority hereby expressly vested in it. The Board of Governors is further authorized to increase or decrease (but not below the number of shares outstanding) the number of shares of any class or series of Preferred Stock subsequent to the issuance of shares of that class or series. In case the number of shares of any class or series shall be so decreased, the shares constituting such decrease shall resume the status that they had prior to the adoption of the resolution originally fixing the number of shares of such class or series.

(ii) Notwithstanding the foregoing, the Exchange shall not issue Preferred Stock (other than the one (1) share of Series A Preferred Stock) unless the resolution or resolutions providing for the issuance of such Preferred Stock shall have been filed with and approved by the U.S. Securities and Exchange Commission (the "SEC") under Section 19 of the Exchange Act and the rules promulgated thereunder. Preferred Stock may not be transferred or assigned in whole or in part, to any entity, unless such transfer or assignment shall be filed with and approved by the SEC under Section 19 of the Exchange Act and the rules promulgated thereunder.

(iii) Series A Preferred Stock.

(A) *Distribution Rights.* No distributions shall be paid with respect to the Series A Preferred Stock.

(B) Liquidation Preferences. Subject to the LLC Act, upon any voluntary or involuntary dissolution and winding up of the Exchange, the holder of the Series A Preferred Stock shall be entitled to receive an amount equal to the par value of the share of Series A Preferred Stock held by such holder after the payment of, or provision for, obligations of the Exchange and any preferential amounts payable to holders of any other class or series of outstanding shares of Preferred Stock.

(C) Voting Rights. The holder of the Series A Preferred Stock shall have one vote in respect of the share thereof held by such holder of record as of a date specified by the Board of Governors on the books of the Exchange on each matter for which the vote of the holder thereof is required. The holder of the share of Series A Preferred Stock shall have the sole right to elect the Member Governor and a number of Designated Independent Governors as set forth in the By-Laws (each as defined in the By-Laws) and shall have no other voting rights other than in connection with the removal of Designated Governors (as defined in the By-Laws) in accordance with the By-Laws.

(D) Ownership. The one (1) authorized share of Series A Preferred Stock shall be issued and outstanding, and shall be held by the Trust pursuant to its trust agreement.

(E) Transferability. The Series A Preferred Stock shall not be transferable (whether by sale, pledge, operation of law or any other disposition) without the prior written consent of the Board of Governors. If the Board of Governors determines that it is in the best interests of the Exchange or its members for any holder of the share of Series A Preferred Stock to sell such share to the Exchange or any other person or entity, such holder shall be required to effect such sale as directed by the Board of Governors. Any transferee of such share pursuant to a transfer that complies with this Agreement and the By-Laws shall be automatically admitted to the Exchange as a member of the Exchange with respect to such share.

(d) Common Stock.

(i) General. Each share of Common Stock shall be identical in all respects and shall have equal rights and privileges.

(ii) Distribution Rights. The holder of Common Stock shall be entitled to receive distributions, when and as declared by the Board of Governors, out of funds of the Exchange legally available therefore.

(iii) Voting Rights. The holder of Common Stock shall have one vote in respect of each share of Common Stock held by such holder on the books of the Exchange on each matter on which the holder of Common Stock shall be entitled to vote. The holder of Common Stock shall have no voting rights with respect to the election of the Designated Governors.

(iv) Transferability. All of the authorized shares of Common Stock shall be issued and outstanding, and shall be held by NASDAQ OMX Inc. NASDAQ OMX Inc. may not transfer or assign any shares of Common Stock, in whole or in part, to any person or entity, unless such transfer or assignment shall be filed with and approved by the SEC under



Section 19 of the Exchange Act and the rules promulgated thereunder. Any transferee of any shares of Common Stock pursuant to a transfer that complies with this Agreement and the By-Laws shall be automatically admitted to the Exchange as a member of the Exchange with respect to such shares.

**Section 17. Other Business.**

Each Stockholder, and any Officer, Governor, employee or agent of the Exchange and any affiliate of any Stockholder may engage in or possess an interest in other business ventures (unconnected with the Exchange) of every kind and description, independently or with others. The Exchange shall not have any rights in or to such independent ventures or the income or profits therefrom by virtue of this Agreement.

**Section 18. Exculpation and Indemnification.**

(a) No Stockholder nor any employee, representative, agent or Affiliate of a Stockholder (collectively, the "Covered Persons") shall be liable to the Exchange or any other Person who is bound by this Agreement for any loss, damage or claim incurred by reason of any act or omission performed or omitted by such Covered Person if such Covered Person acted in good faith and in a manner such Covered Person reasonably believed to be in or not opposed to the best interests of the Exchange, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. To the fullest extent permitted by applicable law, a Covered Person shall be entitled to indemnification from the Exchange for any loss, damage or claim incurred by such Covered Person by reason of any act or omission performed or omitted by such Covered Person if such Covered Person acted in good faith and in a manner such Covered Person reasonably believed to be in or not opposed to the best interests of the Exchange, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful; provided, however, that any indemnity under this Section 18 by the Exchange shall be provided out of and to the extent of Company assets only, and no Member shall have personal liability on account thereof. The Exchange may provide for the indemnification of other persons or entities in accordance with, or as set forth in, the By-Laws. This Section 18 shall survive any termination of this Agreement.

**Section 19. Assignments.**

A Stockholder may assign in whole or in part its limited liability company interest in the Exchange only in accordance with this Agreement and the By-Laws.

**Section 20. Intentionally Omitted.**

**Section 21. Dissolution.**

(a) The Exchange shall be dissolved and its affairs shall be wound up upon the first to occur of the following: (i) the consent of the Stockholders, (ii) the termination of the legal existence of the last remaining member of the Exchange or the occurrence of any other event that terminates the continued membership of the last remaining member of the Exchange in the Exchange unless the Exchange is continued without dissolution in a manner permitted by this

Agreement or the LLC Act or (iii) the entry of a decree of judicial dissolution under Section 18-802 of the LLC Act.

(b) In the event of dissolution, the Exchange shall conduct only such activities as are necessary to wind up its affairs (including the sale of the assets of the Exchange in an orderly manner), and the assets of the Exchange shall be applied in the manner, and in the order of priority, set forth in Section 18-804 of the LLC Act.

**Section 22. Benefits of Agreement; No Third-Party Rights.**

None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditor of the Exchange or by any creditor of a Stockholder. Nothing in this Agreement shall be deemed to create any right in any person or entity (other than Covered Persons, and to the extent provided in Article III of the By-Laws, the Members and the Member Organizations, (each as defined in the By-Laws), and to the extent such Persons are represented thereby, the Trustee (each as defined in the By-Laws)) not a party hereto, and this Agreement shall not be construed in any respect to be a contract in whole or in part for the benefit of any third person or entity (other than the Covered Persons, and to the extent provided in Article III of the By-Laws, the Members and the Member Organizations, and to the extent such Persons are represented thereby, the Trustee).

**Section 23. Severability of Provisions.**

Each provision of this Agreement shall be considered severable and if for any reason any provision or provisions herein are determined to be invalid, unenforceable or illegal under any existing or future law, such invalidity, unenforceability or illegality shall not impair the operation of or affect those portions of this Agreement which are valid, enforceable and legal.

**Section 24. Entire Agreement.**

This Agreement, together with the By-Laws, constitutes the entire agreement of the parties with respect to the subject matter hereof, and together these documents shall constitute the limited liability company agreement of the Exchange within the meaning of the LLC Act.

**Section 25. Binding Agreement.**

Notwithstanding any other provision of this Agreement, each Stockholder agrees that this Agreement constitutes a legal, valid and binding agreement of such Stockholder and is enforceable against such Stockholder, in accordance with its terms.

**Section 26. Governing Law.**

This Agreement shall be governed by and construed under the laws of the State of Delaware (without regard to conflict of laws principles), all rights and remedies being governed by said laws.

**Section 27.** Amendments.

This Agreement may be amended by the affirmative vote of a majority of the entire Board of Governors and the affirmative vote of the holders of a majority of the shares of Common Stock then issued and outstanding, at any regular or special meeting of the Board of Governors or the Stockholders (as the case may be). Amendments to this Agreement shall not become effective until filed with, or filed with and approved by, the Commission, as required under Section 19 of the Exchange Act and the rules promulgated thereunder.

**Section 28.** Notices.

Any notices required to be delivered hereunder shall be made in accordance with the By-Laws.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the undersigned, intending to be legally bound hereby, has duly executed this Limited Liability Company Agreement as of the \_\_\_\_ day of \_\_\_\_\_, 2010.

STOCKHOLDERS:

THE NASDAQ OMX GROUP, INC.

By: \_\_\_\_\_

Name: Robert Greifeld

Title: President and Chief Executive Officer

WILMINGTON TRUST COMPANY, solely in its capacity as trustee of PHLX MEMBER VOTING TRUST

By: \_\_\_\_\_

Name: Joseph Feil

Title: Vice President

**SCHEDULE A**

<u>Stockholder Name</u>	<u>Mailing Address</u>	<u>Interest</u>
<u>THE NASDAQ OMX GROUP, INC.</u>		<u>100 shares of Common Stock</u>
<u>PHLX MEMBER VOTING TRUST</u>		<u>1 shares of Series A Preferred Stock</u>

**EXHIBIT A**

**BY-LAWS**

**[NASDAQ OMX PHLX, INC. BY-LAWS]**  
**BY-LAWS OF NASDAQ OMX PHLX, LLC**

These By-Laws have been established as the By-laws of NASDAQ OMX PHLX, LLC, a Delaware limited liability company (the "Exchange"), pursuant to the Limited Liability Company Agreement of the Exchange, dated as of \_\_\_\_\_, 2010 (as amended from time to time, the "LLC Agreement"), and, together with the LLC Agreement, constitute the limited liability company agreement of the Exchange within the meaning of the LLC Act (as defined in the LLC Agreement). In the event of any inconsistency between the LLC Agreement and these By-Laws, the provisions of the LLC Agreement shall control.

Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the LLC Agreement.

## **ARTICLE I**

### **Definitions**

#### **[Sec. 1-1. *Definitions*]**

Unless the context requires otherwise, the terms defined in this Section shall, for all purposes of these By-Laws, have the meaning herein specified:

#### **(a) Approved Lessor**

The term "approved lessor" means, with respect to a foreign currency options participation, a lessor approved by the Exchange under these By-Laws and the rules of the Exchange.

#### **(b) Certificate of [Incorporation] Formation**

The term "Certificate of [Incorporation] Formation" shall mean the Certificate of [Incorporation] Formation of the Exchange, as amended and in effect from time to time.

#### **(c) Commission**

The term "Commission" means the United States Securities and Exchange Commission.

#### **(d) Common Stock**

The term "Common Stock" shall mean the Common Stock, par value \$0.01 per share, of the Exchange.

#### **(e) Designated Governors**

The term "Designated Governors" shall mean the Member Governor and the Designated Independent Governors. The holder of the Series A Preferred Stock shall be required to elect the Designated Governors in accordance with [Article SIXTH of

the Certificate of Incorporation] these By-Laws, the LLC Agreement and the Trust Agreement.

**(f) Designated Independent Governors**

The term "Designated Independent Governors" shall mean those Independent Governors, as defined herein, who are elected by the holder of the Series A Preferred Stock in accordance with [Article SIXTH of the Certificate of Incorporation] these By-Laws, the LLC Agreement and the Trust Agreement .

**(g) [DGCL**

The term "DGCL" shall mean the Delaware General Corporation Law, as amended and in effect from time to time.] Reserved.

**(h) Exchange**

The term "Exchange" shall mean [the] NASDAQ OMX PHLX[, Inc].

**(i) Exchange Act**

The term "Exchange Act" shall mean the Securities Exchange Act of 1934, as amended.

**(j) Foreign Currency Options Participation**

The term "foreign currency options participation" means the foreign currency options participations issued from time to time by the Exchange

**(k) Foreign Currency Options Participant or Participant**

The term "foreign currency options participant" or "participant" includes a Member of the Exchange who has purchased a foreign currency options participation and a non-member who has been admitted to the Exchange as a foreign currency options participant.

**(l) Foreign Currency Options Participant Organization**

The term "foreign currency options participant organization" means a corporation, partnership (general or limited), limited liability partnership, limited liability company, business trust or similar organization, transacting business as a broker or a dealer in securities and which has the status of a foreign currency options participant organization in accordance with the rules of the Exchange and these By-Laws. References herein to officer or partner, when used in the context of a foreign currency options participant organization, shall include any person holding a similar position in any organization other than a corporation or partnership that has the status of a foreign currency options participant organization.

**(m) Governor**

The term "Governor" shall mean a Governor of the Exchange.

**(n) Inactive Nominee**



The term "inactive nominee" shall mean a natural person associated with and designated as such by a Member Organization and who has been approved for such status and is registered as such with the Membership Department. An inactive nominee shall have no rights or privileges under a permit unless and until said inactive nominee becomes admitted as a Member of the Exchange pursuant to these By-Laws and the rules of the Exchange. An inactive nominee merely stands ready to exercise rights under a permit upon notice by the Member Organization to the Membership Department on an expedited basis.

**(o) Independent**

The term "Independent" when used in the context of Governors or committee members, shall mean persons affirmatively determined by the Board as having no Material Relationship with the Exchange or any affiliate of the Exchange, any Member of the Exchange or any affiliate of such Member, or any issuer of securities that are listed or traded on the Exchange or a facility of the Exchange.

**(p) Independent Governor**

The term "Independent Governor" shall mean a Governor who has no [m]Material [r]Relationship with the Exchange or any affiliate of the Exchange, any Member of the Exchange or any affiliate of such Member, or any issuer of securities that are listed or traded on the Exchange or a facility of the Exchange and is duly elected to fill one of the vacancies on the Board of Governors allocated to the Independent Governors. [The term "material relationship" will be defined as a relationship, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the Governor.]

**(q) Lessee**

The term "lessee" means a foreign currency options participant who has leased legal title to his foreign currency options participation from a lessor.

**(r) Lessor**

The term "lessor" means a holder of equitable title to a foreign currency options participation, including a former foreign currency options participant, who has leased legal title to his foreign currency options participation to a lessee and has retained equitable title to such foreign currency options participation.

**(s) Material Relationship**

"Material Relationship" shall mean a relationship, compensatory or otherwise, that could reasonably affect the independent judgment or decision-making of the Governor. It is incumbent upon the Board of Governors to determine independence upon a Governor's nomination and thereafter no less frequently than annually and as often as necessary in light of a Governor's circumstances and as further outlined in By-Law Article IV Section 4-4 to ensure standards of independence as defined in these By-Laws are maintained.

**(t) Member**

The term "Member" (as used herein) means a holder of a permit which has not been terminated in accordance with these By-Laws and the rules of the Exchange. A Member, as such term is used herein, is not a member of the Company within the meaning of the LLC Act.

**(u) Member Governor**

The term "Member Governor" shall mean a Governor who is a Member or a general partner or an executive officer (vice-president and above) of a Member Organization and is duly elected to fill the one (1) vacancy on the Board of Governors allocated to the Member Governor.

**(v) Member Organization**

The term "Member Organization" means a corporation, partnership (general or limited), limited liability partnership, limited liability company, business trust or similar organization, transacting business as a broker or a dealer in securities and which has the status of a Member Organization in accordance with the rules of the Exchange and these By-Laws. References herein to officer or partner, when used in the context of a Member Organization, shall include any person holding a similar position in any organization other than a corporation or partnership that has the status of a Member Organization.

**(w) Member Organization Representative**

The term "Member Organization Representative" shall mean the officer (or person in a similar position) of a Member Organization designated by such Member Organization as such Member Organization's Member Organization Representative, who shall have the sole authority, with respect to the selection or removal of Designated Nominees as defined in Section 3-2(a) to exercise any and all rights and to take any and all actions on behalf of such Member Organization and each Member who has designated such Member Organization as his primary affiliation.

**(x) Demutualization Merger**

The term "Demutualization Merger" shall mean the merger of Phlx Merger Sub, Inc., a Delaware corporation, with and into [the Exchange] NASDAQ OMX PHLX, Inc., with [the Exchange] NASDAQ OMX PHLX, Inc. as the surviving corporation, in connection with the demutualization of [the Exchange] NASDAQ OMX PHLX, Inc. from a non-stock membership corporation.

**(y) Non-member**

The term "non-member" includes, with respect to individuals, any person who is not a Member and, with respect to entities, any organization that is not a Member Organization.

**(z) Owner**

The term "owner" shall mean any person or entity who or which is a holder of equitable title to a foreign currency options participation.

**(aa) Permit**

The term "permit" shall mean a permit of any class, series or kind established from time to time by the Board of Governors and denominated as such.

**(bb) Person**

The term "person", shall mean an individual, partnership (general or limited), joint-stock company, corporation, limited liability company, trust or unincorporated organization, and a government or agency or political subdivision thereof.

**(cc) Securities Act**

The term "Securities Act" shall mean the Securities Act of 1933, as amended.

**(dd) Trust Agreement**

The term "Trust Agreement" shall mean the Third Amended and Restated Trust Agreement, dated as of February 22, 2007, between the Exchange and the trustee under such Trust Agreement, as such agreement may be amended from time to time in accordance with its terms.

**(ee) Series A Preferred Stock**

The term "Series A Preferred Stock" shall mean the Series A Preferred Stock, par value \$0.01 per share, of the Exchange.

**(ff) Stockholder**

The term "Stockholder" shall mean a [stockholder] Person who has been admitted to the Exchange in accordance with the LLC Agreement, these By-Laws and the LLC Act as a member thereof, in its capacity as such. A Stockholder shall be a member of the Exchange within the meaning of the LLC Act.

**(gg) Stockholder Governor**

The term "Stockholder Governor" shall mean a Governor who is an officer, director (or a person in a similar position in business entities that are not corporations), designee or an employee of a holder of Common Stock or any affiliate or subsidiary of such holder of Common Stock and is duly elected to fill the one (1) vacancy on the Board of Governors allocated to the Stockholder Governor.

**(hh) NASDAQ OMX Merger**

The term "NASDAQ OMX Merger" shall mean the merger of a wholly owned subsidiary of The NASDAQ OMX Group, Inc., a Delaware corporation, with and into [the Exchange] NASDAQ OMX PHLX, Inc., with [the Exchange] NASDAQ OMX PHLX, Inc. as the surviving corporation, in connection with the acquisition of [the Exchange] NASDAQ OMX PHLX, Inc. by The NASDAQ OMX Group, Inc.

**(ii) Regulatory Funds**

The [T]term "Regulatory Funds" means fees, fines, or penalties derived from the regulatory operations of the Exchange. "Regulatory Funds" shall not be construed to include revenues derived from listing fees, market data revenues, transaction revenues,

or any other aspect of the commercial operations of the Exchange, even if a portion of such revenues are used to pay costs associated with the regulatory operations of the Exchange.

**(jj) Preferred Stock**

The term "Preferred Stock" shall mean the Preferred Stock, par value \$0.01 per share, of the Exchange.

**(kk) Trust**

The term "Trust" shall mean the Delaware statutory trust as identified in the Trust Agreement.

**(ll) Contested Vote**

The term "Contested Vote" shall mean a process for selection of one or more Designated Governors for which the number of candidates on the List of Candidates exceeds the number of positions to be elected by the holder of the Series A Preferred Stock.

**(mm) List of Candidates**

The term "List of Candidates" means the list of candidates for Designated Governor positions to be voted upon by Member Organization Representatives on a Voting Date.

**(nn) Member Voting Record Date**

The term "Member Voting Record Date" means a date selected by the Board of Governors for the purpose of determining the Member Organization Representatives entitled to vote for Designated Governors on a Voting Date in the event of a Contested Vote.

**(oo) Industry Member**

The term "Industry member" means a member of any committee appointed by the Board of Governors who (i) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (ii) is an officer, director (excluding an outside director), or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (iii) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (iv) provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the committee member or 20 percent or more of the gross revenues received by the committee member's firm or partnership; (v) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services

relate to the director's, officer's, or employee's professional capacity and constitute 20 percent or more of the professional revenues received by the committee member or 20 percent or more of the gross revenues received by the committee member's firm or partnership; or (vi) has a consulting or employment relationship with or provides professional services to the Exchange or any affiliate thereof or to FINRA (or any predecessor) or has had any such relationship or provided any such services at any time within the prior three years.

**(pp) Member Representative member**

The term "Member Representative member" means a member of any committee appointed by the Board of Governors who has been elected or appointed after having been nominated by the Member Nominating Committee pursuant to these By-Laws.

**(qq) Non-Industry Member**

The term "Non-Industry member" means a member of any committee appointed by the Board of Governors who is (i) a Public member; (ii) an officer, director, or employee of an issuer of securities listed on the Exchange; or (iii) any other individual who would not be an Industry member.

**(rr) Public Member**

The term "public member" means a member of any committee appointed by the Board of Governors who has no material business relationship with a broker or dealer, the Exchange, or its affiliates.

**(ss) Voting Date**

The term "Voting Date" means a date selected by the Board of Governors for Member Organization Representatives to vote with respect to Designated Governors in the event of a Contested Vote.

**(tt)[tt] Membership Department**

The term "Membership Department" shall mean the Membership Department located within the Exchange.

**(uu) NASDAQ OMX Conversion**

The term "NASDAQ OMX Conversion" shall mean the conversion of NASDAQ OMX PHLX, Inc., a Delaware corporation, to NASDAQ OMX PHLX, LLC, a Delaware limited liability company.

\* \* \* \* \*

**ARTICLE III**

**Member and Member Organization Nominations-Member and Member Organization Annual Elections-Member and Member Organization Meetings**

\* \* \* \* \*

**Sec. 3-2. Annual Selection of Designated Governors**

(a) The Designated Governors shall be elected to the Board of Governors on an annual basis. For each annual election of Designated Governors, the Board of Governors shall select a Member Voting Record Date and a Voting Date. The Member Voting Record Date shall be at least 10 days but not more than 60 days prior to the Voting Date. The Member Nominating Committee shall create a list of one or more candidates for each Designated Governor position (the "List of Candidates") on the Board to be elected by the holder of the Series A Preferred Stock at the annual meeting of Stockholders or special meeting in lieu thereof. Promptly after selection of the Voting Date, in a notice transmitted to Member Organization Representatives and in a prominent location on a publicly accessible website, the Exchange (i) shall announce the Voting Date and the List of Candidates, and (ii) shall describe the procedures for Member Organization Representatives to nominate candidates for election at the next annual meeting of Stockholders. In the Event of a Contested Vote, the Exchange shall also send Member Organization Representatives the formal notice described in Section 3-2(c).

(b) An additional candidate may be added to the List of Candidates by any Member Organization Representative that submits a timely and duly executed written nomination to the Secretary of the Exchange. To be timely, a Member Organization Representative's notice shall be delivered to the Secretary at the principal executive offices of the Exchange not later than the close of business on the 90th day nor earlier than the close of business on the 120th day prior to the first anniversary of the preceding year's Voting Date (provided, however, that in the event that the Voting Date is more than 30 days before or more than 70 days after such anniversary date, notice by the Member Organization Representative must be so delivered not earlier than the close of business on the 120th day prior to such Voting Date and not later than the close of business on the later of the 90th day prior to such Voting Date or the tenth day following the day on which public announcement of such Voting Date is first made by the Exchange). Such Member Organization Representative's notice shall set forth: (i) as to the person whom the Member Organization Representative proposes to nominate for election as a Designated Governor, all information relating to that person that is required to be disclosed in solicitations of proxies for election of directors in an election contest, or is otherwise required, in each case pursuant to Regulation 14A under the Exchange Act and the rules thereunder (and such person's written consent to be named in the List of Candidates as a nominee and to serving as a Governor if elected); (ii) a petition in support of the nomination duly executed by the Member Organization Representatives of 10% or more of all Member Organizations; and (iii) the name and address of the Member Organization Representative making the nomination. The Exchange may require any proposed nominee to furnish such other information as it may reasonably require to determine the eligibility of such proposed nominee to serve as a Designated Governor.

(c) If, by the date on which a Member Organization Representative may no longer submit a timely nomination under paragraph (b), there is only one candidate for each Designated Governor position to be voted upon on the Voting Date, the candidates on the List of Candidates shall be the "Designated Nominees," which the holder of the

Series A Preferred Stock shall be required to elect as Designated Governors in accordance with [Article SIXTH of the Certificate of Incorporation] these By-Laws and the Trust Agreement.

(d) In the event of a Contested Vote, the Exchange shall conduct a vote to determine the Designated Nominees in accordance with the procedures set forth in Section 3-7.

(e) Except as otherwise specifically provided by law, special meetings of the Members and Member Organizations or Member Organization Representatives may be called at any time by the Chair of the Board of Governors or by a majority of the Board of Governors or, only in the case of a special meeting of Member Organization Representatives for the purpose of voting on the removal of one or more Designated Governors in accordance with Section 3-3 of these By-Laws, by the Member Organization Representatives representing a majority of the then issued and outstanding permits, provided that, in the event that any such meeting is proposed to be called by Member Organization Representatives, such Member Organization Representatives shall provide the Chair of the Board of Governors written notice prior to calling any such meeting stating in reasonable detail the basis for, and the facts and circumstances purported to warrant, such removal. Except as provided in these By-Laws, the Exchange shall not be required to hold meetings of Members, Member Organizations, or Member Organization Representatives.

### **Sec. 3-3. Removal of Designated Governors**

At any [annual] special meeting of Member Organization Representatives called in accordance with Section 3-2(e) of these By-Laws, one or more Designated Governors may be removed with or without cause by the affirmative vote of the Member Organization Representatives representing not less than two-thirds of the then issued and outstanding permits; provided, however, that such removal, if so approved by the vote of the Member Organization Representatives, shall be effected only by the affirmative vote of the holder of the Series A Preferred Stock in accordance with [ Article SIXTH of the Certificate of Incorporation] these By-Laws.

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### **Sec. 3-11. Notice of Member and Member Organization Meetings**

Any notice of any meeting of Members and Member Organizations that is required or permitted to be given under these By-Laws shall be in writing and state the place, date, hour and purpose of such meeting and shall be given not less than ten (10) nor more than sixty (60) days before the date of such meeting to each Member Organization Representative entitled to vote at such meeting. Any such notice may be sent via mail or electronic submission. If mailed, notice is given when deposited in the United States Mail, postage prepaid, directed to the Member Organization Representative at his address as it appears on the books and records of the Exchange. If sent via electronic transmission, notice is given when sent to the e-mail address of the Member Organization Representative as it appears on the books and records of the Exchange. Such notice may be given in the name of the Board of Governors, the Chair of the Board of Governors, any Vice President, the Secretary or any Assistant Secretary. Whenever

notice is required to be given under any provision of law or of the [Certificate of Incorporation] LLC Agreement or these By-Laws, a written waiver thereof, signed by the person entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to such notice. Attendance of a person at any meeting with respect to which such person is entitled to notice shall constitute a waiver of such notice of such meeting, except when such person attends such meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any meeting of Members and Member Organizations need be specified in any written waiver of notice.

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## **ARTICLE IV**

### **BOARD OF GOVERNORS**

#### **Sec. 4-1. Number and Composition**

The management of the business and affairs of the Exchange shall be vested in the Board of Governors. The Board of Governors shall be composed of a majority of Independent Governors. The Board of Governors shall be composed of the number of Governors determined from time to time by the Board of Governors and shall include: one (1) Governor, who shall be the Chief Executive Officer; one (1) Governor who is a Member Governor who meets the qualifications set forth in By-Law Article I[, Section 1-1] with respect to the Member Governor; one (1) Governor who is a Stockholder Governor who meets the qualifications set forth in By-Law Article I[, Section 1-1] with respect to the Stockholder Governor; and such additional Governors who are Independent Governors meeting the qualifications set forth in By-Law Article I[, Section 1-1] as shall fill the remaining seats on the Board of Governors, including a number of Designated Independent Governors, which, together with the Member Governor shall equal at least 20% of the total number of Governors.

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#### **Sec. 4-3. Term**

(a) All Governors shall be elected for terms of one year.

(b) The Governors of the Exchange serving immediately [after] prior to the effective time of the NASDAQ OMX [Merger shall be the directors of the wholly owned subsidiary of The NASDAQ OMX Group, Inc., (the "Merger Subsidiary"), which will be merged with and into the Exchange through the NASDAQ OMX Merger and which directors shall]Conversion shall continue as the Governors of the Exchange for the remaining portion of such Governors' terms. All such Governors satisfy the compositional requirements of the Exchange Board of Governors contained in these By-Laws. [The Designated Governors serving immediately after the effective time of the NASDAQ OMX Merger shall be



directors of the Merger Subsidiary who have also been serving as Designated Governors of the Exchange immediately before the effective time of the NASDAQ OMX Merger.]

#### **Sec. 4-4. Duties and Powers**

(a) The Board of Governors shall be vested with all the powers necessary for the management of the business and affairs of the Exchange, the regulation of the business conduct of Members, participants, Member Organizations, and participant organizations, and persons associated with such organizations and for the promotion of the welfare, objects and purposes of the Exchange, and in addition to the power and authority conferred by these By-Laws, may exercise all powers of the Exchange and do all such lawful acts and things as are not by statute, these By-Laws or the [Certificate of Incorporation] LLC Agreement directed or required to be exercised or done by the Stockholders.

[(a)] (b) In the exercise of its powers it may adopt such rules, issue such orders and directions and make such decisions as it may deem appropriate.

[b] (c) *Specific Powers.* Without limiting the general powers conferred by the last preceding clause and the powers conferred by the [Certificate of Incorporation] LLC Agreement and these By-Laws, it is hereby expressly declared that the Board of Governors shall have the following powers:

(i) *Holidays.* The Board of Governors shall have power to determine whether the Exchange shall be open or closed for business on any day or days, including holidays or partial holidays, and shall have the right to fix by rule or otherwise the time for opening and closing the Exchange. Provided always, however, that in times of emergency the powers conferred by this Section may be exercised by the Chair of the Board of Governors.

(ii) *Removal of Officers.* The Board of Governors, by the affirmative vote of a majority of Governors then in office, may remove any officer who was either directly appointed by it or is serving with its approval and declare the office vacant whenever such officer shall fail to discharge his duties to the satisfaction of the Board of Governors.

(iii) *Procedure.* The Board of Governors shall determine the manner and form by which its proceedings shall be conducted. It may dissolve all Standing and other Committees, define, alter and regulate their jurisdiction, and have original and supervisory jurisdiction over any and all subjects and matters referred to said Committees and may direct and control their actions and proceedings at any stage thereof.

(iv) *Trials.* It may try charges against Stockholders, Members, participants, Member Organizations and participant organizations and persons associated with Member or participant organizations, and may punish such persons and organizations as may be found guilty.

(v) *Control of property and finances.* It shall have control of the property and finances of the Exchange and it shall approve the compensation to be paid to officers of the Exchange.

(vi) Annual Independence Review. The Board of Governors shall, no less frequently than annually and as often as necessary in light of a Governor's circumstances, review the incumbent Independent Governors to ensure no Material Relationship has developed that would cause an Independent Governor to fall outside of the definition of "Independent" set forth in By-Law I[, Section 1-1]. It will be incumbent upon each Governor to promptly inform the Chair or a member of the Executive Committee of any development that may affect such Governor's status as an Independent Governor.

(vii) Appoint and dismiss employees. It may appoint and dismiss employees of the Exchange and fix their duties and compensation, and may delegate such powers to Standing Committees or officers of the Exchange.

(viii) Finances. It shall pass upon the report of estimated income and expenses of the Exchange as presented to it by the Finance Committee in December of each year.

(ix) Bonds for faithful performance. It may require officers or employees of the Exchange to give good and sufficient bonds for the faithful performance of their duties.

[iv] (x) Violation of Rules. The Board of Governors may prescribe penalties for the violation of rules adopted pursuant to these By-Laws and for neglect or refusal to comply with orders, directions or decisions of the Board of Governors or any Standing or Special Committee, or for any offense against the Exchange the penalty for which is not specifically prescribed by these By-Laws or such rules.

[v] (xi) Rules for Dealing-Insolvency. The Board of Governors shall prescribe rules for dealing on the Exchange. It shall prescribe rules as to insolvency and as to Exchange Contracts, the performance thereof, and default thereon, and it may extend or postpone the time for the performance of Exchange Contracts whenever in its opinion such action is called for by the public interest or by just and equitable principles of trade.

(xii) Members' contracts. It may adopt such rules as it may deem necessary or proper with respect to Members' Contracts.

[vi] (xiii) Organizations, Offices, and Employees of Members. The Board of Governors may adopt such rules as it may deem necessary or proper with respect to the formation of Member Organizations, the continuance thereof and the interest of Members and other persons therein, the offices of Members and such organizations and the employees thereof, the business connections of Members and such organizations and their association with or domination by or over corporations or other persons engaged in the securities business.

(xiv) Member Organizations. The Board of Governors may adopt rules prescribing the terms and conditions under which a Member may qualify a Member Organization and a Member Organization may register as a Member Organization of the Exchange; and may impose further terms and conditions in connection with such qualification or registration whenever it may deem it advisable.

[vii] (xv) The List. The Board of Governors may list or admit to unlisted trading privileges upon the Exchange securities, "rights" and similar privileges pertaining to securities,

and securities on a "when issued" and "when distributed" basis, and may in its discretion at any time and without notice, suspend dealings therein and may remove the same from listing or unlisted trading.

[viii] (xvi) Corners—Deliveries Postponed—Settlement Price. Whenever in the opinion of the Board of Governors a corner has been created in a security admitted to dealings on the Exchange, or a single interest or group has acquired such control of a security so admitted that the same cannot be obtained for delivery on existing contracts except at prices and on terms arbitrarily dictated by such interest or group, the Board of Governors may postpone the time for deliveries on exchange contracts therein, and may from time to time further postpone such time or may postpone deliveries until further action by the Board of Governors, and may at any time by resolution declare that if such security is not delivered on any contract calling for delivery thereof at or before the time to which delivery has been postponed or which has been fixed by the Board of Governors for such delivery, such contract shall be settled by the payment to the party entitled to receive such security or by the credit to such party of a fair settlement price as agreed by the parties to the contract, or if the parties to any contract which is to be settled on the basis of such fair settlement price do not agree with respect thereto, such fair settlement price and the date for the payment of the same may be fixed by the Board of Governors. The Board of Governors, before fixing the same, shall give the parties to the contract which is to be settled on the basis thereof an opportunity to be heard either before the Board of Governors or before a Special Committee appointed for the purpose. Any such Special Committee shall report the testimony together with its conclusions thereon to the Board of Governors which may act upon such report without further hearing or may accord the parties a further hearing before acting thereon.

(xvii) Qualification and [r]Registration of Member Organizations. The Board of Governors (or its designee) shall receive and act upon the application of a Member to qualify a Member Organization and the application of a Member Organization to register with the Exchange; and upon the application to terminate such qualification or registration.

[ix] (xviii) Applications for Permits and Reinstatement. The Board of Governors may receive reports of the Membership Department in connection with applications for permits, applications by non-members for admission as foreign currency options participants, and applications for reinstatement of suspended permits or privileges.

(xix) Removal of [g]Governors for cause. In the event of the refusal or failure of any Governor to discharge his duties or for any reason deemed sufficient by the Board of Governors, the Board of Governors may, by the affirmative vote of a majority of Governors then in office, recommend to the Stockholders (and, in the case of a Designated Governor, the Members) that such Governor be removed and call a special meeting of Stockholders (and, in the case of a Designated Governor, a special meeting of the Members and Member Organizations and subsequently a special meeting of the holder of the Series A Preferred Stock, who shall be required to vote in accordance with [Article SIXTH of the Certificate of Incorporation] these By-Laws and the Trust Agreement) for the purpose of voting on such removal.

[x] (xx) Removal of Governors for Absence. If a Governor shall have been absent from three (3) regular meetings of the Board of Governors within a twelve-month period, the

Executive Committee shall conduct a review of such Governor's attendance and may make a recommendation to the full Board of Governors which may, by a majority vote of the Governors then in office, recommend to the Stockholders (and, in the case of a Designated Governor, the Members) that such Governor be removed and call a special meeting of Stockholders (and, in the case of a Designated Governor, a special meeting of the Members and Member Organizations and subsequently a special meeting of the holder of the Series A Preferred Stock, who shall be required to vote in accordance with [Article SIXTH of the Certificate of Incorporation] these By-Laws and the Trust Agreement) for the purpose of voting on such removal.

[xi] (xxi) The Board of Governors shall have the power to confer upon any officer or officers of the Exchange the power to choose, remove or suspend assistant officers, agents or servants.

[xii] (xxii) The Board of Governors shall have the power to appoint any person, firm or corporation to accept and hold in trust for the Exchange any property belonging to the Exchange or in which it is interested, and to authorize any such person, firm or corporation to execute any documents and perform any duties that may be requisite in relation to any such trust.

[xiii] (xxiii) The Board of Governors shall have the power to appoint a person or persons to vote shares of another corporation held and owned by the Exchange.

[xiv] (xxiv) The Board of Governors shall have the power to purchase or otherwise acquire for the Exchange any property, rights or privileges which the Exchange is authorized to acquire, at such prices, on such terms and conditions and for such consideration as it shall from time to time see fit, and, at its discretion, to pay for any property or rights acquired by the Exchange, either wholly or partly in money or in bonds, debentures or other securities of the Exchange.

[xv] (xxv) The Board of Governors shall have the power to create, make and issue mortgages, bonds, deeds of trust, trust agreements and negotiable or transferable instruments and securities, secured by mortgage or otherwise, and to do every other act and thing necessary to effectuate the same.

[xvi] (xxvi) The Board of Governors shall have the power to appoint and remove or suspend such subordinate officers, agents or servants, permanently or temporarily, as it may from time to time think fit, and to determine their duties, and fix, and from time to time change, their salaries or emoluments, and to require security in such instances and in such amounts as it thinks fit.

[xvii] (xxvii) The Board of Governors shall have the power to determine who shall be authorized on the Exchange's behalf to sign bills, notes, receipts, acceptances, endorsements, checks, releases, contracts and documents.

[xviii] (xxviii) The Board of Governors shall have the power, by resolution passed by a majority of the whole Board of Governors, to designate one (1) or more ad hoc or special committees, each to consist of two (2) or more Governors, to have such duties, powers and authority as the Board of Governors shall determine. All such committees of the Board of Governors shall have the authority to adopt their own rules of procedure. Absent the adoption of

specific procedures, the procedures applicable to the Board of Governors shall also apply to such committees and standing committees of the Board of Governors.

[xix] (~~xxix~~) The Board of Governors shall have the power, by resolution, to adopt, amend or repeal such rules as it may deem necessary with respect to the initiation of disciplinary action, the procedure and conduct for disciplinary hearings and reviews therefrom, and the imposition of disciplinary sanctions, as such matters may apply to any Member, participant, Member Organization or participant organization or any partner, officer, director (or persons in similar positions) or person associated with any Member, participant, Member Organization or participant organization.

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#### **Sec. 4-18. Indemnification**

(a) Right to Indemnification. Each person who was or is made a party or is threatened to be made a party to or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (for the purposes of this Section 4-18, a "proceeding"), by reason of the fact that he or she is or was a Governor, officer, committee member or in-house legal counsel of the Exchange or is or was serving at the request of the Exchange as an officer, director (or person in a similar position), employee or agent of another corporation or of a partnership (general or limited), limited liability company, joint venture, trust or other enterprise or business entity, including, without limitation, such service with respect to an employee benefit plan (each, hereinafter an "indemnitee"), whether the basis of such action, suit or proceeding is alleged action in an official capacity as a Governor, officer, committee member, in-house legal counsel, director (or person in a similar position), employee or agent or in any other capacity while serving as a Governor, officer, committee member, in-house legal counsel, director (or a person in a similar position), employee or agent, shall be indemnified and held harmless by the Exchange to the fullest extent authorized by [the DGCL] applicable law (but, in the case of any such amendment, only to the extent that such amendment permits the Exchange to provide broader indemnification rights than permitted prior thereto), from and against all expense, liability and loss (including reasonable attorneys' fees, judgments, fines, excise taxes or penalties under the Employee Retirement Income Security Act of 1974, as amended, and in each case any amounts paid in settlement thereof) reasonably incurred or suffered by such indemnitee in connection therewith and such indemnification shall continue as to an indemnitee who has ceased to be a Governor, officer, committee member, in-house legal counsel, director (or person in a similar position), employee or agent and shall inure to the benefit of the indemnitee's heirs, executors, administrators and representatives if such indemnitee acted in good faith and in a manner such indemnitee reasonably believed to be in or not opposed to the best interests of the Exchange, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful; provided, however, that, except as provided in paragraph (c) of this Section 4-18 with respect to actions, suits or proceedings to enforce rights to indemnification, the Exchange shall indemnify any such indemnitee in connection with an action, suit or proceeding (or part thereof) initiated by such indemnitee only if such action, suit or proceeding (or part thereof) was authorized by the Board of Governors. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo contendere* or its equivalent, shall not, of itself, create a presumption that the person did not act

in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the Exchange, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person's conduct was unlawful.

(b) Right to Advancement of Expenses. The right to indemnification conferred in paragraph (a) of this Section 4-18 shall include the right to be paid by the Exchange the expenses incurred in defending any action, suit or proceeding for which such right to indemnification is applicable in advance of its final disposition (hereinafter an "advancement of expenses"); provided, however, that[, if the DGCL requires] an advancement of expenses incurred by an indemnitee in his or her capacity as a Governor, officer or committee member (and not in any other capacity in which service was or is rendered by such indemnitee, including, without limitation, service to an employee benefit plan) shall be made only upon delivery to the Exchange of an undertaking (hereinafter an "undertaking"), by or on behalf of such indemnitee, to repay all amounts so advanced if it shall ultimately be determined by final judicial decision from which there is no further right to appeal (hereinafter a "final adjudication") that such indemnitee is not entitled to be indemnified for such expenses under this Section or otherwise.

(c) Right of Indemnitee to Bring Suit. The rights to indemnification and to the advancement of expenses conferred in paragraphs (a) and (b) of this Section 4-18 shall be contract rights. If a claim under either paragraph (a) or (b) of this Section is not paid in full by the Exchange within sixty (60) days after a written claim therefor has been received by the Exchange from an indemnitee, except in the case of a claim for an advancement of expenses, in which case the applicable period shall be twenty (20) days, such indemnitee may at any time thereafter bring suit against the Exchange to recover the unpaid amount of such claim. If successful in whole or in part in any such suit, or in a suit brought by the Exchange to recover an advancement of expenses pursuant to the terms of an undertaking, the indemnitee shall be entitled to be paid also the expense of prosecuting or defending such suit. In (i) any suit brought by the indemnitee to enforce a right to indemnification hereunder (but not in a suit brought by the indemnitee to enforce a right to an advancement of expenses) it shall be a defense that, and (ii) in any suit by the Exchange to recover an advancement of expenses pursuant to the terms of the undertaking the Exchange shall be entitled to recover such expenses upon a final adjudication that, the indemnitee has not met any applicable standard for indemnification [ set forth in the DGCL]. Neither the failure of the Exchange (including its Board of Governors or independent legal counsel or any of its Stockholders) to have made a determination prior to the commencement of such suit that indemnification of the indemnitee is proper in the circumstances because the indemnitee has met the applicable standard of conduct set forth [in the DGCL] herein, nor an actual determination by the Exchange (including its Board of Governors or independent legal counsel or any of its Stockholders) that the indemnitee has not met such applicable standard of conduct, shall create a presumption that the indemnitee has not met the applicable standard of conduct or, in the case of such a suit brought by the indemnitee, be a defense to such suit. In any suit brought by the indemnitee to enforce a right to indemnification or to an advancement of expenses hereunder, or by the Exchange to recover an advancement of expenses pursuant to the terms of an undertaking, the burden of proving that the indemnitee is not entitled to be indemnified, or to such advancement of expenses, under this Section or otherwise shall be on the Exchange.

(d) Non-Exclusivity of Rights. The rights to indemnification and to the advancement of expenses conferred in this Section shall not be exclusive of any other right which any person may have or hereafter acquire under the [Certificate of Incorporation] LLC Agreement or these By-Laws or any statute, agreement, vote of the Stockholders or of disinterested Governors or otherwise.

(e) Insurance. The Exchange may maintain insurance, at its expense, to protect itself and any Governor, officer, committee member, director (or person in a similar position), employee or agent of the Exchange or another corporation, partnership (general or limited), limited liability company, joint venture, trust or other enterprise or business entity against any expense, liability or loss, whether or not the Exchange would have the power to indemnify such person against such expense, liability or loss under [ the DGCL] applicable law.

(f) Indemnification of Employees and Agents of the Exchange. To the fullest extent permitted by law, [T] the Exchange may, to the extent authorized from time to time by the Board of Governors, grant rights to indemnification, and to the advancement of expenses to any employee or agent of the Exchange to the fullest extent of the provisions of this Section with respect to the indemnification and advancement of expenses of Governors, officers and committee members of the Exchange.

(g) No Governor of the Exchange shall be personally liable to the Exchange or its Stockholders for monetary damages for breach of fiduciary duty as a Governor, except for liability (a) for any breach of the Governor's duty of loyalty to the Exchange or its Stockholders, (b) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, or (c) for any transaction from which the Governor derived any improper personal benefit. The Stockholders may approve and authorize corporate action to further eliminate or limit the personal liability of Governors (or directors) of the Exchange.

(h) Neither the amendment nor repeal of this Section 4-18, nor the adoption of any provision of these By-Laws or the LLC Agreement inconsistent with this Section 4-18, shall eliminate or reduce the effect of this Section 4-18 in respect of any matter occurring before such amendment, repeal or adoption of an inconsistent provision or in respect of any cause of action, suit or claim relating to any such matter which would have given rise to a right of indemnification or right to the reimbursement expenses pursuant to this Section 4-18 if such provision had not been so amended or repealed or if a provision inconsistent therewith had not been so adopted.

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#### **Sec. 4-21. Annual Financial Report**

Annual financial reports shall be kept on file at the Exchange and shall be subject to the inspection of any Stockholder, Member, participant, Member Organization and participant organization upon reasonable request being made to the Secretary of the Exchange for a purpose reasonably related to their respective interest in the Exchange.

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### **Sec. 4-24. Interested Transactions**

No contract or transaction between the Exchange and one or more of its Governors or officers, or between the Exchange and any other Person in which one or more of its Governors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because any such Governor or officer is present at or participates in the meeting of the Board of Governors or any committee thereof which authorizes the contract or transaction, or solely because any such Governor's or officer's votes are counted for such purpose, if:

(a) The material facts as to such Governor's or officer's relationship or interest as to the contract or transaction are disclosed or are known to the Board of Governors or such committee thereof, and the Board of Governors or such committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested Governors, even though the disinterested Governors may be less than a quorum; or

(b) The material facts as to such Governor's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the Stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the Stockholders; or

(c) The contract or transaction is fair as to the Exchange as of the time it is authorized, approved or ratified by the Board of Governors, such committee thereof or the Stockholders.

For the avoidance of doubt, interested Governors may be counted in determining the presence of a quorum at a meeting of the Board of Governors or of any committee thereof which authorizes any such contract or transaction described in this Section 4-24.

## **ARTICLE V Chair and Officers of the Exchange**

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### **Sec. 5-8. Powers and Duties of the Secretary**

Unless otherwise determined by the Board of Governors, the Secretary of the Exchange shall record all proceedings of the meetings of the Exchange, the Board of Governors and all committees thereof and the Stockholders, in books to be kept for that purpose, and shall attend to the giving and serving of all notices for the Exchange and the Board of Governors. He shall have charge of the [corporate] seal, the certificate books, transfer books and list of permit holders, as compiled by the Membership Department of the Exchange, and Stockholders and such other books and papers as the Board of Governors may direct. He may appoint a transfer agent of the Exchange, subject to the approval of the Board of Governors. He shall perform all other duties ordinarily incident to the office of Secretary and shall have such other powers and perform such other duties as may be assigned to him by the Board of Governors.

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## ARTICLE VIII Presiding Officials of the Exchange

### Sec. 8-1. *Presiding Exchange Officials*

(a) The President of the Exchange and his designated staff shall have general supervision over the options trading floor as well as general supervision of the dealings of Members on the trading floor and on Exchange trading systems, and of the premises of the Exchange immediately adjacent thereto.

(b) The President of the Exchange and his designated staff [They] shall have supervision over the activities of specialists, registered option traders, floor brokers, or other types of market makers and shall establish standards and procedures for the training and qualification of Members active on the trading floor. The President of the Exchange and his designated staff [They] shall have supervision over all trading floor employees of Members, and shall make and enforce such rules with respect to such employees as it may deem necessary. The staff shall make or recommend for adoption, and administer, such rules as it may deem necessary for the convenient and orderly transaction of business on the Exchange.

(c) The President and his designated staff shall have supervision of all connections or means of communications with the options trading floor and may require the discontinuance of any such connection or means of communication when, in the opinion of the President or his designee, it is contrary to the welfare or interest of the Exchange. The President of the Exchange and his designated staff [They] shall also have supervision over the location of equipment and the assignment and use of space on the options trading floor. The President and his designated staff shall have supervision over relations with other options exchanges.

(d) The Exchange shall make and enforce rules and regulations relating to order, decorum, health, safety and welfare on the options trading floor and the immediately adjacent premises of the Exchange and shall be empowered to impose penalties for violations thereof. For breaches of order, the President and his designated staff may exclude Members, participants and Member Organizations and participant organizations (as applicable) and employees from the trading floor and the immediately adjacent premises, or may impose fines consistent with Exchange rules, or both. The President of the Exchange and his designated staff [They] shall administer the provisions of these By-Laws and the Rules of the Exchange pertaining to the trading floor and the immediately adjacent premises of the Exchange.

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**ARTICLE X**  
**STANDING COMMITTEES**

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**Sec. 10-3. Proceedings of Special and Standing Committees**

(a) Except as herein otherwise prescribed, and subject always to the control and supervision of the Board of Governors, each Standing Committee and Special Committee shall determine the manner and form in which its proceedings shall be conducted, and shall make such regulations for its government as it shall deem proper and may act at a meeting or without a meeting, and through a quorum composed of a majority of all its members then in office. Except as otherwise specifically provided in these By-Laws or the rules of the Exchange, the decision of a majority of those members of any Committee voting at a meeting at which a quorum is present, provided at least two (2) such members vote, shall be the decision of the Committee.

(b) Each Standing and Special Committee may appoint such subcommittees as it may deem necessary for the efficient discharge of its duties. Each such subcommittee shall consist of at least one (1) member of the Committee appointing it and such other persons as such Committee may designate but shall be smaller in size than the Committee to which it reports. Each such subcommittee shall report to the Committee appointing it. Any statement made to such a subcommittee shall for all purposes be deemed to be a statement made to the Standing or Special Committee which appointed such subcommittee.

(c) One or more [g] Governors may be appointed on a temporary basis to any Standing Committee by its Chair to effect a quorum when one is lacking for a meeting of such Committee.

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**Sec. 10-7. Reserved[.]**

**Sec. 10-8. Reserved[.]**

**Sec. 10-9. Regulatory Oversight Committee**

(a) The Regulatory Oversight Committee shall oversee the adequacy and effectiveness of the Exchange's regulatory and self-regulatory organization responsibilities; assess the Exchange's regulatory performance; and assist the Board and Standing Committees in reviewing the regulatory plan and the overall effectiveness of the Exchange's regulatory functions. In furtherance of its functions, the Regulatory Oversight Committee shall (a) review the Exchange's regulatory budget and specifically inquire into the adequacy of resources available in the budget for regulatory activities; (b) meet regularly with the Chief Regulatory Officer in executive session; and (c) be informed about the compensation and promotion or termination of the Chief Regulatory Officer and the reasons therefor. The Regulatory Oversight

Committee shall consist of three members, each of whom shall be an Independent Governor and each of whom shall also meet the definition of "independent director" in NASDAQ Rule 4200.

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#### **Sec. 10-14. Executive Committee**

(a) The Executive Committee shall be appointed by the Board of Governors, which shall determine the size of the Executive Committee. The Executive Committee shall consist of the Chair of the Board of Governors, who shall be the Chair of the Committee, the Stockholder Governor, and a number of Designated Governors equal to at least 20% of the total number of Governors on the Executive Committee, and such other Governors as the Board of Governors may appoint.

(b) When the Board of Governors is not in session, the Executive Committee shall have and may exercise all the powers and authority of the Board of Governors which may lawfully be delegated to it by the Board of Governors under [the DGCL ] applicable law and which are not in conflict with limitations created by the Board of Governors, the [Certificate of Incorporation] LLC Agreement, or these By-Laws. All actions of the Executive Committee shall be reported to the Board of Governors within ten (10) days thereof but not later than the start of the next meeting of the Board of Governors

(c) Reserved.

(d) Arbitration. As of October 1, 1998, every Member, participant or Member Organization or participant organization (as defined by Exchange rules and hereinafter referred to in this subsection as "members") shall be subject to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc. ("NASD") (or, following its effective date, the Code of Arbitration Procedure of the Financial Industry Regulatory Authority ("FINRA")) for every claim, dispute, or controversy, arising out of or in connection with the securities business of any member of the Exchange, including disputes outlined in Section 1, Section 6 and Section 8 of Rule 950. For the purposes of Rule 950, each member shall be subject to, and shall abide by, the NASD Code of Arbitration Procedure (or, following its effective date, the FINRA Code of Arbitration Procedure) as if such member were a "member" of FINRA. With respect to claims, disputes, or controversies filed with the Exchange prior to October 1, 1998, the Executive Committee shall establish and review proposed arbitration policies, procedures and rule change filings including the method of selecting panels.

(e) With respect to claims, disputes, or controversies filed with the Exchange prior to October 1, 1998, the following remains in effect:

- (i) Member Controversies: Any dispute, claim or controversy between or among parties who are Members, participants, Member Organizations, participant organizations or persons associated with a Member Organization or a participant organization, arising in connection with the securities business of such Member, participant, Member Organization, participant

organization and/or associated person in his/her capacity as an associated person shall be administered pursuant to Rule 950 of the Rules of the Board of Governors.

(ii) Public Customer Controversies: Any dispute, claim or controversy between a public customer(s), in his/her capacity as such, and a Member, participant, Member Organization, participant organization and/or associated person in connection with the securities business of such Member, Member Organization, participant and/or associated person in connection with his/her activities as an associated person shall be administered pursuant to Rule 950, Section 44 of the Rules of the Board of Governors.

(iii) It may be deemed conduct inconsistent with just and equitable principles of trade for a Member, participant, Member Organization, participant organization, or person associated with a Member Organization or participant organization to fail to submit to arbitration on demand under the provisions of this By-Law, or to fail to provide any document properly requested pursuant to discovery or to fail to honor an award of the arbitration panel.

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#### **Sec. 10-17. Reserved[.]**

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#### **Sec. 10-19. Nominating Committees**

The Board of Governors shall appoint a Nominating Committee and a Member Nominating Committee. The Member Nominating Committee shall nominate candidates for each Designated Governor position on the Board, and shall nominate candidates for appointment by the Board for each vacant or new position on any committee that is to be filled with a Member Representative member under the terms of these By-Laws. The Nominating Committee shall nominate candidates for all other vacant or new Governor positions on the Board.

(a) The Nominating Committee shall consist of no fewer than six and no more than nine members. The number of Non-Industry members on the Nominating Committee shall equal or exceed the number of Industry members on the Nominating Committee. If the Nominating Committee consists of six members, at least two shall be Public members. If the Nominating Committee consists of seven or more members, at least three shall be Public members. No officer or employee of the [Company] Exchange shall serve as a member of the Nominating Committee in any voting or non-voting capacity. No more than three of the Nominating Committee members and no more than two of the Industry members shall be current Governors.

(b) A Nominating Committee member may not simultaneously serve on the Nominating Committee and the Board of Governors, unless such member is in his or her final year of service on the Board of Governors, and following that year, that member may not stand for

election to the Board of Governors until such time as he or she is no longer a member of the Nominating Committee.

(c) The Member Nominating Committee shall consist of no fewer than three and no more than six members. All members of the Member Nominating Committee shall be a current associated person of a current Member Organization. The Board will appoint such individuals after appropriate consultation with Member Organization Representatives.

(d) Members of the Nominating Committee and the Member Nominating Committee shall be appointed annually by the Board and may be removed by a majority vote of the Board.

(e) The Secretary shall collect from each nominee for Governor such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification a Member Governor, Stockholder Governor, or Independent Governor, or Designated Governor, if applicable, and the Secretary shall certify to the Nominating Committee or the Member Nominating Committee each nominee's classification, if applicable. Governors shall update the information submitted under this subsection at least annually and upon request of the Secretary, and shall report immediately to the Secretary.

(f) A person is not eligible for an independent nomination for a position on the Board of Governors, nor shall the Member Nominating Committee nominate any person for a position on the Board of Governors if one or more other persons associated with such person's Member Organization or participant organization would be serving an unexpired term or terms on the Board of Governors upon the commencement of such nominee's term of office in the event of such nominee's election. The Member Nominating Committee shall nominate no more than one person associated with the same Member Organization or participant organization to fill vacancies on the Board of Governors and regardless of the number of vacancies to be filled. For purposes of these By-Laws, the term "person associated with the same Member Organization or participant organization" means, with respect to any person associated with a Member Organization or participant organization, any other person who is a partner, officer, director (or person in a similar position), or holder of ten percent (10%) or more of the outstanding shares of the same Member or participant organization or of a Member Organization or participant organization that directly controls, is controlled by or is under common control with such Member Organization or participant organization. Participation in a joint account does not per se constitute an association with the same Member Organization or participant organization.

(g) A candidate may run for only one of the vacancies for Governor in any election.

(h) No more than one (1) person associated with the same Member Organization or participant organization shall be nominated by a Member Organization Representative for independent nomination to a position on the Board of Governors. In the event more than one such nomination is received, the Board of Governors shall not certify any such candidate. A person who has previously accepted nomination by the Nominating Committee

or Member Nominating Committee for one (1) category of Governor pursuant to these By-Laws is not eligible to qualify as an independently nominated candidate in any category.

(i) The names of all Designated Nominees, together with the names of the nominees to be elected as the Stockholder Governor and Independent Governors, whose nominations conform with the requirements of these By-Laws, shall be sent to the Stockholders of the Exchange by the Secretary of the Exchange.

**Sec. 10-20. Reserved[.]**

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**Sec. 10-21. Quality of Markets Committee**

(a) There shall be a Quality of Markets Committee. [(a)] The Quality of Markets Committee shall have the following functions respecting index, foreign currency, and equity options as well as equities: (i) to provide advice and guidance to the Board of Governors on issues relating to the fairness, integrity, efficiency, and competitiveness of the information, order handling, and execution mechanisms of the Exchange from the perspective of investors, both individual and institutional, retail firms, specialist and registered options trader firms, and other participants of the Exchange; and (ii) to advise the Board of Governors with respect to national market system plans and linkages between the facilities of the Exchange and other markets.

(b) The Quality of Markets Committee shall include broad representation of participants in the Exchange, including investors, specialist and registered options trader firms, retail firms, and order entry firms. The Quality of Markets Committee shall include a number of Member Representative members that is equal to at least 20 percent of the total number of members of the Quality of Markets Committee. The number of Non-Industry members of the Quality of Markets Committee shall equal the sum of the number of Industry members and Member Representative members.

(c) At all meetings of the Quality of Markets Committee, a quorum for the transaction of business shall consist of a majority of the Quality of Markets Committee, including not less than 50 percent of the Non-Industry members. If at least 50 percent of the Non-Industry members (i) are present at or (ii) have filed a waiver of attendance for a meeting after receiving an agenda prior to such meeting, the requirement that not less than 50 percent of the Non-Industry members be present to constitute the quorum shall be waived.

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**ARTICLE XII *Permits—Eligibility—Election—Initiation Fee***

**Sec. 12-1. Right to Issue Permits and Non-Transferability**

(a) In addition to all other powers granted to the Board of Governors by law, the [Certificate of Incorporation] LLC Agreement, these By-Laws or otherwise, the Board of Governors shall have the power to issue permits in one or more classes or series and, unless otherwise provided in the resolution of the Board of Governors or the rules of the Exchange establishing such class or series, in unlimited number to conduct business on the Exchange or on specific facilities of, or operated by, the Exchange, and to adopt by resolution or to set forth in the rules of the Exchange such rules with respect to such permits as the Board of Governors may from time to time determine in its sole discretion to be advisable, including, without limitation, the rules governing the terms and conditions of such permits and the number, types and attributes thereof at any time authorized for issuance, the transferability or non-transferability of such permits, the termination and/or suspension of rights and privileges appertaining to permits, the qualifications that must be met for a person to be issued any such permit, and the dues, fees and other charges to be paid to the Exchange in connection with such permits and by persons applying for, using, holding or (if allowed) transferring such permits, and for firms and organizations with which such persons are affiliated or associated in any manner. Such permits do not represent an equity interest in the Exchange and shall confer upon any person only such rights, privileges and obligations as are expressly set forth in these By-Laws, the rules of the Exchange and any resolution of the Board of Governors. The Board of Governors may authorize any committee thereof or the Chair of the Board of Governors to exercise any powers of the Board of Governors with respect to such permits.

(b) Except as otherwise set forth in the rules of the Exchange or any resolution of the Board of Governors authorizing a specific class or series of permits, a permit will confer upon and subject the holder thereof to all the privileges and obligations of a Member pursuant to these By-Laws and the rules of the Exchange, including, without limitation, the right to vote (exclusively through the Member Organization Representative of the Member Organization identified by such holder as its primary affiliation) and to conduct business on the Exchange as provided in these By-Laws and such rules. Except as otherwise provided in the rules of the Exchange or any resolution of the Board of Governors authorizing a specific class or series of permits, no permit may be sold, transferred (by operation of law or otherwise), leased or otherwise encumbered by any person to whom such permit is issued by the Exchange.

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**Sec. 12-4. Admission of Corporation**

A corporation may be issued a permit by the Exchange, provided such corporation is incorporated under the laws of the Commonwealth of Pennsylvania, and all of its [capital stock] shares [is]are owned by the Exchange.

**Sec. 12-5. Reserved[.]**

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**Sec. 12-9. Acceptance of [Certificate of Incorporation] LLC Agreement, By-Laws and Rules**

(a) No person issued a permit or nonmember admitted as a foreign currency options participant shall be entitled to the rights and privileges thereof until he has pledged in writing to abide by the [Certificate of Incorporation] LLC Agreement (to the extent applicable), these By-Laws and all rules and regulations of the Exchange (which, for all purposes under these By-Laws, shall be deemed to include any dues, fees and other charges imposed by the Exchange), in each case as they have been or shall be from time to time amended. This Section shall not apply to a corporation issued a permit under the provisions of Section 12-4 of these By-Laws, except that such corporation, upon receipt of a permit, shall be bound by the provisions of the [Certificate of Incorporation] LLC Agreement (to the extent applicable), these By-Laws and all rules and regulations of the Exchange, in each case as they have been or shall be from time to time amended, unless specifically exempted therefrom.

(b) No Member Organization or participant organization shall be entitled to the rights and privileges thereof until it has pledged in writing to abide by the [Certificate of Incorporation] LLC Agreement, these By-Laws and all rules and regulations of the Exchange, in each case as they have been or shall be from time to time amended.

(c) No registration as an approved lessor shall become effective or entitle such person or entity to the privileges thereof, until such person or a designated representative of such entity has pledged to abide by the [Certificate of Incorporation] LLC Agreement, these By-Laws and all rules and regulations of the Exchange, in each case as they have been or shall be from time to time amended.

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**Sec. 12-12. Certain Transitional Rules**

(a) The rules of the Exchange may specify such transitional provisions concerning, without limitation: (i) the status, rights and obligations following the Demutualization Merger of persons who were lessors and lessees in respect of Exchange memberships, parties to A-B-C Agreements, Members, Member Organizations, Inactive Nominees and equitable titleholders prior to the Demutualization Merger; (ii) the procedures to be



followed, forms to be submitted and other requirements to be satisfied by Members, Inactive Nominees and Member Organizations at the time of the Demutualization Merger in respect of the issuance of permits and the continuation of such Members', Inactive Nominees' and organizations' status as Members, Inactive Nominees and Member Organizations (and the penalties and other consequences for failing to comply with such procedures or to submit such forms); (iii) the designation and replacement of Member Organization Representatives; and (iv) other appropriate matters concerning the transition and continuity of the Exchange and its Members and Member Organizations. In the event of any conflict between such transitional provisions and any otherwise applicable provision of these By-Laws or the rules of the Exchange, such transitional provisions shall govern.

(b) No person shall be relieved of any monetary or other obligations to the Exchange or any responsibility in relation to any matter within the disciplinary jurisdiction of the Exchange as a consequence of the Demutualization Merger or the NASDAQ OMX Merger. Without limiting the generality of the foregoing, no person shall, by virtue of the Demutualization Merger or the NASDAQ OMX Merger, be relieved of any obligation in respect of any pledge or other document submitted under or pursuant to Section 12-9 of these By-Laws (or any predecessor provision), and any such pledge or other document entered into prior to the Demutualization Merger or the NASDAQ OMX Merger shall remain in full force and effect.

(c) Any person who was a Member, Inactive Nominee, participant or Member Organization or participant organization or approved lessor of a foreign currency options participation immediately before the time that the Demutualization Merger became effective and who received a permit or which has continued to be an Inactive Nominee, participant, Member Organization or participant organization or approved lessor of a foreign currency options participation in connection with such Demutualization Merger shall be deemed to have pledged to abide by the [Certificate of Incorporation] LLC Agreement, these By-Laws and all rules and regulations of the Exchange (which, for all purposes under these By-Laws, shall be deemed to include any dues, fees and other charges imposed by the Exchange), in each case as they have been or shall be from time to time amended.

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## **ARTICLE XV**

### **TRANSFER OF FOREIGN CURRENCY OPTIONS PARTICIPATIONS**

#### **Sec. 15-1. Transfer of Foreign Currency Options Participations**

(a) Transfer of Equitable Title. A transfer of equitable title only to a foreign currency options participation shall be made upon submission of the name of the transferor and the transferee thereof to the Membership Department. A transfer may not be effected pursuant to a lease agreement.

(b) Lease of Foreign Currency Options Participation.

[(a) (i)] A foreign currency options participant may lease the legal title to his foreign currency options participation to a person approved by the Exchange in accordance with these By-Laws and such rules as the Board of Governors may adopt.

[b] (ii) A foreign currency options participant shall notify the Exchange in writing prior to any lease of his foreign currency options participation and shall register with the Exchange as an "approved person" of a lessee. An approved person shall be required to file such information and applications as the Exchange may prescribe.

[c] (iii) If a foreign currency options participant proposing to lease legal title to his foreign currency options participation holds such foreign currency options participation subject to an A-B-C Agreement, the foreign currency options participant shall obtain the consent of the organization party thereto in writing prior to the transfer. The A-B-C Agreement shall provide for such leasing arrangement. A foreign currency options participant organization may not enter into a lease of a foreign currency options participation with any of its associated persons.

[d] (iv) Upon termination of the lease for any reason, the legal title to the foreign currency options participation subject to this lease shall not be considered for transfer to any person unless and until the lessor, or his legal representative, has provided the Exchange with written notice of the name of the person applying to hold legal title to the foreign currency options participation and such person has made application. Such written notice shall be provided to the Exchange (i) within sixty (60) days of the date of termination of the lease or (ii) at any time prior to termination of the lease. The failure to provide such notice or for such person to make application within thirty (30) days of such notice shall authorize the Membership Department to dispose of the foreign currency options participation formerly subject to this lease, including the lessor's interest therein.

## **Sec. 15-2. Contracts of Transferor**

(a) A foreign currency options participant proposing to transfer his foreign currency options participation shall not make any contracts on the floor of the exchange facility unless the contract is expressly made on behalf of another foreign currency options participant or on behalf of a foreign currency options participant organization which will continue to be a foreign currency options participant organization notwithstanding the completion of such transfer or unless the foreign currency options participant is also a Member (who does not also hold a foreign currency options permit) and is proposing to transfer only his foreign currency options participation (in which case the Member shall be prevented only from making any foreign currency option contracts on the floor of the exchange facility unless either of the exceptions set forth above applies).

(b) No contract made by a foreign currency options participant proposing to transfer his foreign currency options participation or by his foreign currency options participant organization be the basis of a claim against the proceeds of the transfer thereof under Section 15-3 of these By-Laws, but may, if the transfer is to another partner in the foreign currency options participant organization in which the transferring foreign currency options participant is a partner or officer, constitute the basis of a claim under said Section 15-3 of these By-Laws, against the proceeds of

the subsequent transfer of such foreign currency options participation by the partner or officer to whom it is transferred.

(c) All exchange contracts of the foreign currency options participant proposing to make the transfer and of his foreign currency options participant organization, unless such organization will continue to be a foreign currency options participant organization notwithstanding the completion of such transfer, shall mature and if not settled shall be closed out as in the case of an insolvency, unless the same are assumed or taken over by another foreign currency options participant or foreign currency options participant organization; provided, however, that, in the case of a foreign currency options participant who is also a Member (and does not hold a foreign currency options permit) proposing to transfer only his foreign currency options participation, the provisions of this sentence shall apply only to the foreign currency option contracts of such foreign currency options participant and of his foreign currency options participant organization (and shall not apply even to the latter contracts if such organization will continue to be a foreign currency options participant organization notwithstanding the completion of such transfer).

(d) Effect of Involuntary Transfers. A transfer to be made pursuant to a sale of a foreign currency options participation by the Membership Department shall have the same effect in respect to open contracts and unmatured debts and obligations of the foreign currency options participant or former foreign currency options participant as in the case of a voluntary transfer.

### **Sec. 15-3. Disposition of Proceeds of Sale of Foreign Currency Options Participation**

(a) Upon any transfer of a foreign currency options participation other than the transfer of legal title pursuant to a lease or any reversion thereof, or the transfer of legal title only to a foreign currency options participation subject to an A-B-C Agreement, whether made by a foreign currency options participant voluntarily or pursuant to a sale by the Membership Department, the proceeds thereof shall be applied to the following purposes and in the following order of seniority, viz.:

(i) Claims of Exchange. [First.] The payment of such sums as the Board of Governors or their designee shall determine are or may become due to the Exchange by the foreign currency options participant whose foreign currency options participation is transferred or by the foreign currency options participant organization (that is not a corporation) in which such foreign currency options participant is a general partner;

(ii) Claims of Stock Clearing Corporation. [Second] The payment of such sums as the Board of Governors or their designee shall determine are or may become due to Stock Clearing Corporation or of the Options Clearing Corporation by such foreign currency options participant or such organization

(iii) Certain Claims.

(1) [Third] The payment to creditors who are Members, foreign currency options participants or Member Organizations or participant organizations of all filed claims as follows:

([a]A) Claims arising in the ordinary course of business from exchange contracts for the purchase, sale, borrowing or loaning of securities entered into on the Floor of the Exchange;

([b]B) Claims arising from exchange contracts entered into in the ordinary course of business other than those included in the preceding subsection;

([c]C) Claims arising from exchange contracts other than those included in the two preceding subsections, except those made for non-business purposes; and

([d]D) Claims arising from Members' contracts other than exchange contracts.

(2) Pro Rata Payments of Claims. If the proceeds of the transfer of a foreign currency options participation are insufficient to pay all filed claims allowed by the Board of Governors or their designee of creditors who are Members, participants or Member Organizations or participant organizations, then so far as possible each of the above classes of claims shall be paid in full in the order of priority set forth and whenever said proceeds are insufficient to pay all claims in any class, the claims in such class shall be paid pro rata except as provided in Sections 15-4 and 15-5 of these By-Laws.

(3) Unmatured Contracts. All contracts which do not, pursuant to Section 15-2 of these By-Laws, mature by reason of the transfer of the foreign currency options participation may for purposes hereof be treated as though they had matured pursuant to said Section, and the amount due thereon may be fixed and determined by the Board of Governors or their designee on the basis of market values or such other basis as shall be deemed fair and equitable by the Board of Governors.

(4) Contingent Claims. If a claim based on a contract is contingent or the amount that will be ultimately due thereon cannot for any reasons be immediately ascertained and determined, the Board of Governors or their designee may out of the proceeds of the foreign currency options participation reserve and retain such amount as it may deem appropriate pending the determination of the amount due on such claim.

(5) Collateral. A claim shall be allowed by the Board of Governors or their designee only for the amount due thereon after the proceeds of the sale of all collateral held therefor or the fair value of such collateral as determined by the Board of Governors or their designee has been credited thereon and the Board of Governors or their designee may require that any such collateral shall be disposed of before passing on the claim.

#### **[Balance of Proceeds ]**

[Fourth. The surplus, if any, of the proceeds of the transfer of a foreign currency options participation shall be paid to the person whose foreign currency options participation is transferred, or to his legal representatives, upon the execution by him or them of a release or releases satisfactory to the Board of Governors or their designee, unless the Board of Governors or their designee shall determine either (a) that the protection of the creditors of

the foreign currency options participant organization in which said foreign currency options participant is a general or limited partner or officer requires the use of said surplus or any part thereof or (b) that said foreign currency options participant has expressly agreed that said surplus shall be paid to such organization, in either of which events said surplus shall be paid over to such organization upon the execution by said foreign currency options participant of such organization of a release or releases satisfactory to the Board of Governors or their designee.

In the case of a foreign currency options participation subject to a lease, such surplus, if any, shall be paid to the lessor upon execution by him of the appropriate release or releases, subject, however to any determination by the Exchange, as provided above, that such surplus should be paid to the foreign currency options participant organization or former foreign currency options participant organization with which the lessee of such foreign currency options participation is or was associated.]

(6) Determination of Claims. An Advisory Committee that has three (3) members shall be appointed by the Chair of the Board of Governors or their designee to examine the validity of claims asserted against the Members or the foreign currency options participants and give an advisory opinion to the Board of Governors or their designee thereon. The examination of the validity of the claims shall be made upon written submission of claimants and respondents with provision for these parties to request oral argument before the Advisory Committee. The Board of Governors or their designee, based upon the written record before the Advisory Committee, shall determine the payment of such sums that are or may become due to the claimants pursuant to these By-Laws and the rules of the Exchange. The decision of the Board of Governors or their designee shall be in writing and sent to the parties to the proceeding respecting the determination of claims.

(iv) Balance of Proceeds. The surplus, if any, of the proceeds of the transfer of a foreign currency options participation shall be paid to the person whose foreign currency options participation is transferred, or to his legal representatives, upon the execution by him or them of a release or releases satisfactory to the Board of Governors or their designee, unless the Board of Governors or their designee shall determine either (a) that the protection of the creditors of the foreign currency options participant organization in which said foreign currency options participant is a general or limited partner or officer requires the use of said surplus or any part thereof or (b) that said foreign currency options participant has expressly agreed that said surplus shall be paid to such organization, in either of which events said surplus shall be paid over to such organization upon the execution by said foreign currency options participant of such organization of a release or releases satisfactory to the Board of Governors or their designee. In the case of a foreign currency options participation subject to a lease, such surplus, if any, shall be paid to the lessor upon execution by him of the appropriate release or releases, subject, however to any determination by the Exchange, as provided above, that such surplus should be paid to the foreign currency options participant organization or former foreign currency options participant organization with which the lessee of such foreign currency options participation is or was associated.

(b) Assignment of Foreign Currency Options Participation.

The Exchange shall not recognize or give effect, except as may be permitted by these By-Laws and the rules, to any agreement or to any instrument entered into, or executed by a foreign currency options participant or his legal representative purporting to transfer or to assign the interest of the foreign currency options participant in the foreign currency options participation, or in the proceeds or any part thereof, or purporting in any manner to provide for the disposition of the foreign currency options participation, nor shall payment of such proceeds be made by the Exchange on the order of such foreign currency options participant.

(c) Sale of Foreign Currency Options Participation Pursuant to a Collateral Agreement.

The Exchange shall recognize and give effect to a valid instrument entered into, or executed by, a foreign currency options participant or his legal representative by which a foreign currency options participant, in consideration of a loan or guarantee of a loan by another person for the purpose of purchasing a foreign currency options participation, has authorized the lender or guarantor to sell the foreign currency options participation in specified circumstances; provided, however, that such sale shall be subject to the order of priorities set forth in this Article with respect to the disposition of the proceeds of a sale of the foreign currency options participation.

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**ARTICLE XVII****INSOLVENCY—SUSPENSION—REINSTATEMENT**

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**Sec. 17-4. Time for Settlement of Insolvent Member or Participant**

(a) If a Member or foreign currency options participant whose permit or rights and privileges have been suspended under the provisions of this Article fails to settle with his creditors and apply for reinstatement within six (6) months from the time of such suspension, or within such further time as the Board of Governors or their designee may grant, or fails to obtain reinstatement as hereinafter provided, his permit or participation may be terminated by the Membership Department.

(b) Extension. The Board of Governors or their designee may, by the affirmative vote of a majority, extend the time of settlement for periods not exceeding one (1) year each.

**Sec. 17-5. Reinstatement of Insolvent Member or Participant**

(a) When a Member or foreign currency options participant whose permit or rights and privileges have been suspended under the provisions of this Article applies for reinstatement thereof, the applicant shall furnish to the Membership Department a list of his creditors, a statement of the amounts originally owing and the nature of the settlement in each case. If he

furnishes satisfactory proof of settlement with all his creditors, said Department may approve such reinstatement.

(b) Appeal to Board of Governors. If the application for reinstatement is denied by the Membership Department, the applicant may appeal within ten (10) days thereafter to the Board of Governors, which may act on such reinstatement.

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## **ARTICLE XXIV Seal of the Exchange**

### **Sec. 24-1. Seal**

The Exchange shall have such [corporate] seal as the Board of Governors may from time to time adopt as the corporate seal of the Exchange. The corporate seal of the Exchange shall be in such form as approved by the Board of Governors and may be altered at its pleasure. The [corporate] seal of the Exchange may be used by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise.

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## **ARTICLE XXVIII *Stockholder Nominations—Stockholder Annual Elections—Stockholder Meetings***

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### **Sec. 28-5. Votes Required**

When a quorum is present at any meeting of the Stockholders, the vote of the holders of a majority of the outstanding [capital stock] shares of the Exchange entitled to vote at such meeting, present in person or represented by proxy, shall decide any question brought before such meeting, unless the question is one upon which by any express provision of applicable law [or the Certificate of Incorporation] the LLC Agreement or these By-Laws, a different vote is required, in which case such express provision shall govern and control the decision of such question. The nominees receiving, at a meeting of Stockholders held for the purpose of such election, the highest number of votes for the category of Governor for which they were respectively nominated as candidates shall be declared elected as Governors of those offices. In the case of a tie, the names of the nominees involved in such tie shall be referred to the Board of Governors, which shall make the selection as to who among such tying nominees shall serve as Governor.

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**Sec. 28-7. Notice of Stockholders Meetings**

(a) Except as otherwise provided in Section 28-7(b) of these By-Laws, any notice of any annual or special meeting of Stockholders that is required or permitted to be given under these By-Laws shall be in writing and state the place, date, hour and purpose of such meeting and shall be given not less than ten (10) nor more than fifty (50) days before the date of such meeting to each Stockholder entitled to vote at such meeting. If mailed, notice is given when deposited in the United States Mail, postage prepaid, directed to the Stockholder at his or its address as it appears on the books and records of the Exchange. Such notice may be given in the name of the Board of Governors, the Chair of the Board of Governors, any Vice President, the Secretary or any Assistant Secretary. Whenever notice is required to be given under any provision of law or of the [Certificate of Incorporation] LLC Agreement or these By-Laws, a written waiver thereof, signed by the person entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to such notice. Attendance of a person at any meeting with respect to which such person is entitled to notice under any provision of law, the [Certificate of Incorporation] LLC Agreement or these By-Laws shall constitute a waiver of such notice of such meeting, except when such person attends such meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any annual or special meeting of Stockholders need be specified in any written waiver of notice unless so required by the [Certificate of Incorporation] LLC Agreement or these By-Laws.

(b) An Exchange Representative shall deliver a Member Vote Notice to the Trustee (as each such term is defined in the Trust Agreement) in accordance with the Trust Agreement.

**Sec. 28-8. Vote of Stockholders**

Except as otherwise provided by law [or the Certificate of Incorporation] the LLC Agreement or these By-Laws, at every meeting of the Stockholders each Stockholder shall be entitled to one vote in person or by proxy for each share [of the capital stock] of the Exchange owned by such Stockholder entitled to vote at such meeting. All elections by the Stockholders shall be by written ballot unless otherwise provided in [the Certificate of Incorporation] these By-Laws or the LLC Agreement. Except as otherwise specifically provided by law, all other votes may be taken by voice unless the Board of Governors determines that it be taken by ballot, in which latter event the vote shall be taken by secret written ballot.

**Sec. 28-9. Quorum of Stockholders—Proxies**

At all meetings of the Stockholders, the holders of a majority of the outstanding [capital stock] shares of the Exchange entitled to vote at any such meeting, present in person or represented by proxy, shall constitute a quorum for the transaction of business, except as otherwise provided by applicable law [or by the Certificate of Incorporation] these By-Laws or the LLC Agreement. The Stockholders present at a duly organized meeting thereof can



continue to do business until adjournment, notwithstanding the withdrawal of enough votes of such Stockholders to leave less than a quorum. If a meeting (including any adjourned meeting) cannot be organized because of the absence of a quorum, those Stockholders entitled to vote at such meeting and present in person or represented by proxy may, except as otherwise provided by law, adjourn the meeting to such time and place as they may determine, without notice other than announcement at such meeting, until a quorum shall be present or represented. All proxies shall be executed in writing and shall be filed with the Secretary of the Exchange not later than the day on which exercised. No proxy shall be voted or acted upon after three (3) years from its date, unless the proxy provides for a longer period.

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### **Sec. 28-13. Action Without Meeting**

Unless otherwise provided [by the Certificate of Incorporation of the Exchange] in these By-Laws or the LLC Agreement, any action required or permitted to be taken at any annual or special meeting of Stockholders may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, shall be signed by the holders of outstanding [stock] shares having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Prompt notice of the taking of such action without a meeting by less than unanimous written consent shall be given to those Stockholders who have not consented in writing to the extent required by Delaware law.

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## **ARTICLE XXIX [*Capital Stock*] SHARES**

### **Sec. 29-1. Certificates**

Each Stockholder shall be entitled to a certificate or certificates in such form as shall be approved by the Board, certifying the number of shares of [capital stock in] the Exchange owned by such Stockholder

### **Sec. 29-2. Signatures**

Certificates for shares of [capital stock of] the Exchange shall be signed in the name of the Exchange by two officers with one being the Chair of the Board, the Chief Executive Officer, the President, or a Vice President, and the other being the Secretary, the Treasurer, or such other officer that may be authorized by the Board. Such certificates may be sealed with the [corporate] seal of the Exchange or a facsimile thereof.

**Sec. 29-3. [Stock] Share Ledger**

(a) A record of all certificates for [capital stock] shares issued by the Exchange shall be kept by the Secretary or any other officer, employee, or agent designated by Board. Such record shall show the name and address of the person, firm, or corporation in which certificates for [capital stock] shares are registered, the number of shares represented by each such certificate, the date of each such certificate, and in the case of certificates which have been canceled, the date of cancellation thereof.

(b) The Exchange shall be entitled to treat the holder of record of shares [of capital stock] as shown on the stock ledger as the owner thereof and as the person entitled to vote such shares and to receive notice of meetings, and for all other purposes. The Exchange shall not be bound to recognize any equitable or other claim to or interest in any share [of capital stock] on the part of any other person, whether or not the Exchange shall have express or other notice thereof.

**Sec. 29-4. Transfers of [Stock] Shares**

(a) The Board may make such rules and regulations as it may deem expedient, not inconsistent with law, the [Certificate of Incorporation] LLC Agreement, or these By-Laws, concerning the issuance, transfer, and registration of certificates for shares [of capital stock] of the Exchange.

(b) Transfers of [capital stock] shares shall be made on the books of the Exchange only upon delivery to the Exchange or its agent of: (i) a written direction of the registered holder named in the certificate or such holder's attorney lawfully constituted in writing; (ii) the certificate for the shares [of capital stock] being transferred; [and] (iii) a written assignment of the shares [of capital stock] evidenced thereby; and (iv) the written agreement of such transferee of its agreement to be bound by the LLC Agreement and these By-Laws. The transferee shall be automatically admitted to the Exchange as a member of the Exchange (within the meaning of the LLC Act) upon compliance with this Section 29-4 and the LLC Agreement. If a Stockholder transfers all of its shares in the Exchange pursuant to these By-Laws and the LLC Agreement, such admission shall be deemed effective immediately prior to the transfer and, immediately following such admission, the transferor Stockholder shall cease to be a member of the Exchange.

(c) All of the authorized shares of Common Stock[ initially shall be] have been issued and are outstanding[,] and are [shall initially be] held by The NASDAQ OMX Group, Inc., a Delaware corporation. The NASDAQ OMX Group, Inc. may not transfer or assign any shares of Common Stock of the Exchange, in whole or in part, to any entity, unless such transfer or assignment shall be filed with and approved by the Commission under Section 19 of the Exchange Act, [and] the rules promulgated thereunder, and is made in accordance with these By-Laws and the LLC Agreement.

(d) Except for the one (1) share of Series A Preferred Stock, the remaining authorized shares of Preferred Stock shall not be issued. The one (1) authorized share of Series A Preferred stock[ shall be] has been issued and is outstanding, and is [shall initially be] held

by the Trust pursuant to the Trust Agreement. The Exchange shall not issue Preferred Stock (other than the one (1) share of Series A Preferred Stock) unless the resolution or resolutions providing for the issuance of such Preferred Stock shall have been filed with and approved by the Commission under the Exchange Act. Preferred Stock, including the Series A Preferred Stock, may not be transferred or assigned in whole or in part, to any entity, unless such transfer or assignment shall be filed with and approved by the Commission under Section 19 of the Exchange Act, [and] the rules promulgated thereunder, and is made in accordance with these By-Laws and the LLC Agreement.

#### **Sec. 29-5. Cancellation**

Each certificate [for capital stock] representing shares of the Exchange surrendered to the Exchange for exchange or transfer shall be canceled and no new certificate or certificates shall be issued in exchange for any existing certificate other than pursuant to Section 29.6 until such existing certificate shall have been canceled.

#### **Sec. 29-6. Lost, Stolen, Destroyed, and Mutilated Certificates**

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

#### **Sec. 29-7. Fixing of Record Date**

The Board may fix a record date in accordance with Delaware law

#### **Sec. 29-8. [Dividends] Distributions**

Subject to the provisions of the [Certificate of Incorporation] LLC Agreement, the Board may, out of funds legally available therefor at any regular or special meeting, declare [dividends] distributions upon [stock] shares of the Exchange as and when they deem appropriate. Notwithstanding the foregoing, [dividends] distributions shall not be paid using Regulatory Funds.

**[ARTICLE XXX Reserved]**

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