

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-79357; File Nos. SR-NASDAQ-2016-127; SR-BX-2016-051; SR-ISE-2016-22; SR-ISEGemini-2016-10; SR-ISEMercury-2016-16; SR-PHLX-2016-93; SR-BSECC-2016-001; SR-SCCP-2016-01)

November 18, 2016

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; NASDAQ BX, Inc.; International Securities Exchange, LLC; ISE Gemini, LLC; ISE Mercury, LLC; NASDAQ PHLX LLC; Boston Stock Exchange Clearing Corporation; Stock Clearing Corporation of Philadelphia; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 1, Amending Bylaws of Nasdaq, Inc. to Implement Proxy Access

I. Introduction

On September 15, 2016, each of The NASDAQ Stock Market LLC (“Nasdaq”), NASDAQ BX, Inc. (“BX”), International Securities Exchange, LLC (“ISE”), ISE Gemini, LLC (“ISE Gemini”), ISE Mercury, LLC (“ISE Mercury”), NASDAQ PHLX LLC (“PHLX”), Boston Stock Exchange Clearing Corporation (“BSECC”), and Stock Clearing Corporation of Philadelphia (“SCCP,” and, together with Nasdaq, BX, ISE, ISE Gemini, ISE Mercury, PHLX, and BSECC, “SROs”) filed with the Securities and Exchange Commission (“Commission”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the Bylaws (the “Bylaws”) of their parent company, Nasdaq, Inc., to implement proxy access. The proposed rule changes were published for comment in the Federal Register on October 5, 2016.<sup>3</sup> No comment letters were received in

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

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

<sup>3</sup> See Securities Exchange Act Release Nos. 78979 (Sept. 29, 2016), 81 FR 69145 (Oct. 5, 2016) (SR-NASDAQ-2016-127); 78986 (Sept. 29, 2016), 81 FR 69152 (Oct. 5, 2016) (SR-BX-2016-051); 78985 (Sept. 29, 2016), 81 FR 69102 (Oct. 5, 2016) (SR-ISE-2016-22); 78981 (Sept. 29, 2016), 81 FR 69165 (Oct. 5, 2016) (SR-ISEGemini-2016-10); 78980 (Sept. 29, 2016), 81 FR 69127 (Oct. 5, 2016) (SR-ISEMercury-2016-16); 78978 (Sept. 29, 2016), 81 FR 69133 (Oct. 5, 2016) (SR-PHLX-2016-93); 78982 (Sept. 29,

response to the proposals. On November 9, 2016, the SROs each filed Amendment No. 1 to the proposed rule changes.<sup>4</sup> This order provides notice of filing of Amendment No. 1 and approves the proposed rule changes, as modified by Amendment No. 1, on an accelerated basis.

## II. Description of the Proposed Rule Changes

By way of background, the SROs explained that the stockholders of Nasdaq, Inc. considered and approved a stockholder proposal submitted under Rule 14a-8 under the Act at

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2016), 81 FR 69159 (Oct. 5, 2016) (SR-BSECC-2016-001); and 78984 (Sept., 29, 2016), 81 FR 69093 (Oct. 5, 2016) (SR-SCCP-2016-01) (collectively, “Notices”).

<sup>4</sup> In Amendment No. 1, the SROs clarified the circumstances under which proxy access nominees may be excluded from the proxy materials. Pursuant to Proposed Rule 3.6(h)(ii), Nasdaq, Inc. may disregard and exclude from proxy materials those proxy access nominees who are not independent under the listing standards of Nasdaq, any applicable rules of the Commission, and any publicly disclosed standards used by the Board of Directors for Nasdaq, Inc. (the “Board”) in determining and disclosing the independence of Nasdaq, Inc.’s directors. Amendment No. 1 clarified that, other than the listing standards of Nasdaq and any applicable rules of the Commission, the Board has not adopted any additional publicly disclosed independence standards, as described in this provision. The SROs further represented that, if the Board adopts any such standards in the future, such standards will be in addition to, more stringent than, and not in conflict with the listing standards of Nasdaq or any applicable rules of the Commission. The SROs also represented that any such standards will be used to determine and disclose the independence of all directors, but the SROs noted that the Nominating and Governance Committee and/or the Board may still nominate a candidate who does not qualify as “independent” under these standards so long as such nomination does not cause Nasdaq, Inc. to fall out of compliance with the Bylaws, the listing standards of Nasdaq, any applicable rules of the SEC and any other applicable policies or regulations. Finally, the SROs stated that any such standards will be filed with and approved by the Commission pursuant to Section 19(b) of the Act prior to becoming effective and that any such standards will be at least referenced in the Corporate Governance Guidelines, available at: [http://files.shareholder.com/downloads/NDAQ/2006703005x0x21344/9019EBAF-60B7-4340-8AE3-F377D313AF55/Corp\\_gov\\_guide.pdf](http://files.shareholder.com/downloads/NDAQ/2006703005x0x21344/9019EBAF-60B7-4340-8AE3-F377D313AF55/Corp_gov_guide.pdf). To promote transparency of the proposed amendment, the SROs submitted Amendment No. 1 as comment letters to their filings, which the Commission posted on its website and placed in the appropriate public comment files. See, e.g., Letter from Erika Moore, Senior Associate General Counsel, Nasdaq, to Brent J. Fields, Secretary, Commission (Nov. 9, 2016), available at: <https://www.sec.gov/comments/sr-nasdaq-2016-127/nasdaq2016127-1.pdf>.

Nasdaq, Inc.'s 2016 annual meeting.<sup>5</sup> The proposal, which the SROs noted passed with 73.52% of the votes cast, requested that the Board take steps to implement a "proxy access" by-law.<sup>6</sup> Accordingly, the SROs proposed to amend the Bylaws to adopt a new Section 3.6 in order to permit stockholders to nominate director nominees for election to the Board and to require Nasdaq, Inc. to include such director nominations in its proxy materials for the next annual meeting of stockholders.<sup>7</sup>

#### Proposed Section 3.6(a) of the Bylaws

The SROs proposed to amend the Bylaws to require Nasdaq, Inc. to include in its proxy statement, its form proxy and any ballot distributed at the stockholder meeting, the name of, and certain required information<sup>8</sup> about, any person nominated for election (the "Stockholder Nominee") to the Board by a stockholder or group of stockholders (the "Eligible Stockholder") that satisfies the requirements set forth in the proxy access provision of the Bylaws.<sup>9</sup> To utilize

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<sup>5</sup> See Notices, supra note 3, at 81 FR 69146, 69152, 69103, 69166, 69127, 69134, 69159, and 69093, respectively; see also 17 CFR 240.14a-8, which establishes procedures pursuant to which stockholders of a public company may have their proposals placed alongside management's proposals in the company's proxy materials for presentation to a vote at a meeting of stockholders.

<sup>6</sup> See Notices, supra note 3, at 81 FR 69146, 69152, 69103, 69166, 69127, 69134, 69159, and 69093, respectively.

<sup>7</sup> The SROs also proposed to make conforming changes to Sections 3.1(a), 3.3(a), 3.3(c) and 3.5 of the Bylaws to provide clarifications and prevent confusion. See Notices, supra note 3, at 81 FR 69151, 69158, 69108, 69171, 69132, 69139, 69164, and 69098-99, respectively, for a description of these changes.

<sup>8</sup> The required information includes information provided to Nasdaq, Inc.'s Corporate Secretary about the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the proxy materials by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written statement, not to exceed 500 words, in support of the Stockholder Nominee(s)' candidacy (the "Statement"). See Proposed Section 3.6(a).

<sup>9</sup> See id. The SROs explained that, when Nasdaq, Inc. includes proxy access nominees in the proxy materials, such individuals will be included in addition to any persons nominated for election to the Board or any committee thereof. See Notices, supra note 3,

this provision, the Eligible Stockholder must expressly elect, at the time of providing a required notice to Nasdaq, Inc. of the proxy access nomination (the “Notice of Proxy Access Nomination”), to have its nominee included in the Company’s proxy materials.<sup>10</sup> If Nasdaq, Inc. includes proxy access nominees in the proxy materials, stockholders meeting all of the requirements outlined in proposed Section 3.6 will be eligible to submit proxy access nominations only at annual meetings of stockholders when the Board solicits proxies with respect to the election of directors.<sup>11</sup>

The proposed bylaws further state that, in calculating the number of stockholders in a group seeking to qualify as an Eligible Stockholder, two or more of the following types of funds shall be counted as one stockholder: (i) funds under common management and investment control, (ii) funds under common management and funded primarily by the same employer, or (iii) funds that are a “group of investment companies” as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended.<sup>12</sup> Moreover, in the event that the Eligible Stockholder consists of a group of stockholders, the proposed bylaws state that any and all requirements and obligations for an individual Eligible Stockholder shall apply to

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at 81 FR 69146 n.6, 69153 n.6, 69153 n.6, 69166 n.6, 69127 n.6, 69134 n.6, 69159 n.6, and 69094 n.6, respectively.

<sup>10</sup> See Proposed Section 3.6(a).

<sup>11</sup> Id.; see also Proposed Section 3.6(i)(ii) (noting that a proxy access nomination may be declared invalid if the Eligible Stockholder or a qualified representative thereof does not appear at the meeting of stockholders to present its nomination).

<sup>12</sup> See Proposed Section 3.6(a); see also 15 U.S.C. 80a-12(d)(1)(G)(ii), which defines “group of investment companies” as any two or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.

each member of the group, except that the Required Ownership Percentage (discussed further below) shall apply to the ownership of the group in the aggregate.<sup>13</sup>

Proposed Section 3.6(a) also specifically allows Nasdaq, Inc. to omit from its proxy materials any information or Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or that would violate any applicable law or regulation.<sup>14</sup> In their filing, the SROs stated that this provision allows Nasdaq, Inc. to comply with Rule 14a-9 under the Act<sup>15</sup> and to protect its stockholders from information that is materially untrue or that violates any law or regulation.<sup>16</sup> Finally, proposed Section 3.6(a) explicitly allows Nasdaq, Inc. to solicit against, and include in the proxy statement its own statement relating to, any Stockholder Nominee.<sup>17</sup>

#### Proposed Section 3.6(b) of the Bylaws

Proposed Section 3.6(b) of the Bylaws establishes the deadline for a timely Notice of Proxy Access Nomination. Under the proposed bylaws, such a notice must be addressed to, and

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<sup>13</sup> See Proposed Section 3.6(a). The applicable requirements and obligations generally relate to information that each member of the nominating group must provide to Nasdaq, Inc. about itself. The SROs asserted that it is reasonable to require each member of the nominating group to provide such information so that both Nasdaq, Inc. and its stockholders are fully informed about the entire group making the nomination. See Notices, supra note 3, at 81 FR 69146, 69153, 69103, 69166, 69128, 69134, 69160, and 69094, respectively.

<sup>14</sup> Id.

<sup>15</sup> See 17 CFR 240.14a-9, which generally prohibits proxy solicitations that contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

<sup>16</sup> See Notices, supra note 3, at 81 FR 69146-47, 69153, 69103, 69166, 69128, 69134, 69160, and 69094, respectively.

<sup>17</sup> See Proposed Section 3.6(a).

received by, Nasdaq, Inc.'s Corporate Secretary no earlier than one hundred fifty (150) days and no later than one hundred twenty (120) days before the anniversary of the date that Nasdaq, Inc. issued its proxy statement for the previous year's annual meeting of stockholders.<sup>18</sup> The SROs asserted in their filings that this notice period would provide stockholders with an adequate window to submit nominees via proxy access, while also providing Nasdaq, Inc. with adequate time to complete due diligence on a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.<sup>19</sup>

#### Proposed Section 3.6(c) of the Bylaws

Proposed Section 3.6(c) specifies that the maximum number of Stockholder Nominees that will be included in Nasdaq, Inc.'s proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two and 25% of the total number of directors in office (rounded down to the nearest whole number) as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with the proxy access provision of the Bylaws (the "Final Proxy Access Nomination Date").<sup>20</sup> In the event that one or more vacancies for any reason occurs after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the proposed bylaws state that the maximum number of Stockholder Nominees included in Nasdaq, Inc.'s proxy materials shall be calculated based on the number of directors in office as so reduced.<sup>21</sup> Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision of the Bylaws whom the

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<sup>18</sup> See Proposed Section 3.6(b).

<sup>19</sup> See Notices, supra note 3, at 81 FR 69147, 69153, 69104, 69167, 69128, 69135, 69160, and 69094, respectively.

<sup>20</sup> See Proposed Section 3.6(c).

<sup>21</sup> See id.

Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the maximum number of Stockholder Nominees has been reached.<sup>22</sup>

Proposed Section 3.6(c) further states that any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to the proxy access provision exceeds the maximum number of nominees allowed.<sup>23</sup> In such event, the proposed bylaws state that the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the Bylaws from each Eligible Stockholder will be selected for inclusion in the proxy materials until the maximum number is reached, going in order of the amount (largest to smallest) of shares of Nasdaq, Inc.'s outstanding common stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Nasdaq, Inc.<sup>24</sup> If the maximum number is not reached after the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the Bylaws from each Eligible Stockholder has been selected, proposed Section 3.6(c) indicates that this process will continue as many times as necessary, following the same order each time, until the maximum number is

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<sup>22</sup> See id.

<sup>23</sup> See id.

<sup>24</sup> See id.

reached.<sup>25</sup> Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements thereafter is nominated by the Board, or is not included in the proxy materials or is not submitted for election as a director as a result of the Eligible Stockholder becoming ineligible or withdrawing its nomination, the Stockholder Nominee becoming unwilling or unable to serve on the Board, or the Eligible Stockholder or the Stockholder Nominee failing to comply with the proxy access provision of the Bylaws, proposed Section 3.6(c) states that no other nominee or nominees shall be included in the proxy materials or otherwise submitted for director election in substitution thereof.<sup>26</sup>

The SROs stated in their filings that it was reasonable to limit the Board seats available to proxy access nominees, to establish procedures for selecting candidates if the nominee limit is exceeded, and to exclude further proxy access nominees in the cases set forth above.<sup>27</sup> The SROs asserted that the limitation on Board seats available to proxy access nominees would ensure that proxy access cannot be used to take over the entire Board, which is not the purpose of proxy access campaigns.<sup>28</sup> The SROs further asserted that the proposed procedures establish clear and rational guidelines for an orderly nomination process that will help Nasdaq, Inc. to avoid arbitrary judgments among candidates.<sup>29</sup> Finally, the SROs argued that the exclusion of proxy access nominees where the proxy access nominee has been nominated by the Board, or

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<sup>25</sup> See id.

<sup>26</sup> See id.

<sup>27</sup> See Notices, supra note 3, at 81 FR 69147, 69154, 69104, 69167, 69128, 69135, 69160 and 69095, respectively.

<sup>28</sup> Id.

<sup>29</sup> Id., at 81 FR 69147, 69154, 69104, 69167, 69128, 69135, 69160-61, and 69095, respectively.

where the Eligible Stockholder or Stockholder Nominee has somehow failed to comply with the Bylaws, will avoid further time and expense to Nasdaq, Inc.<sup>30</sup>

Proposed Section 3.6(d) of the Bylaws

Under proposed Section 3.6(d), an Eligible Stockholder shall be deemed to “own” only those outstanding shares of Nasdaq, Inc.’s common stock as to which the stockholder possesses both: (i) the full voting and investment rights pertaining to the shares; and (ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided that the number of shares calculated in accordance with clauses (i) and (ii) shall not include any shares:

- sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, including any short sale;
- borrowed by such stockholder or any of its affiliates for any purposes or purchased by such stockholder or any of its affiliates pursuant to an agreement to resell; or
- subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar agreement entered into by such stockholder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional amount or value of shares of Nasdaq, Inc.’s outstanding common stock, in any such case which instrument or agreement has, or is intended to have, or if exercised by either party would have, the purpose or effect of:

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<sup>30</sup> Id., at 81 FR 69147, 69154, 69104, 69167, 69128-29, 69135, 69161, and 69095, respectively.

- reducing in any manner, to any extent or at any time in the future, such stockholder’s or its affiliates’ full right to vote or direct the voting of any such shares; and/or
- hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or its affiliates.<sup>31</sup>

Further, proposed Section 3.6(d) states that a stockholder shall “own” shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares.<sup>32</sup> Additionally, under the proposed bylaws, a stockholder’s ownership of shares shall be deemed to continue during any period in which the stockholder has delegated any voting power by means of a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the stockholder.<sup>33</sup> A stockholder’s ownership of shares shall also be deemed to continue during any period in which the stockholder has loaned such shares provided that the stockholder has the power to recall such loaned shares on three (3) business days’ notice, has recalled such loaned shares as of the date of the Notice of Proxy Access Nomination and holds such shares through the date of the annual meeting.<sup>34</sup> Whether outstanding shares of Nasdaq, Inc.’s common stock are “owned” for these purposes shall be determined by the Board

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<sup>31</sup> See Proposed Section 3.6(d). For purposes of the proxy access provision, the proposed bylaws state that the term “affiliate” or “affiliates” shall have the meaning ascribed thereto under the rules and regulations of the Act. Id.; see also 17 CFR 240.12b-2.

<sup>32</sup> See Proposed Section 3.6(d).

<sup>33</sup> See id.

<sup>34</sup> See id.

or any committee thereof, in each case, in its sole discretion.<sup>35</sup> Proposed Section 3.6(d) further notes that an Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of the proxy access provision of the Bylaws.<sup>36</sup>

#### Proposed Section 3.6(e) of the Bylaws

The first paragraph of proposed Section 3.6(e) establishes certain requirements for an Eligible Stockholder to make a proxy access nomination. Specifically, an Eligible Stockholder must have owned 3% or more (the “Required Ownership Percentage”) of Nasdaq’s outstanding common stock (the “Required Shares”) continuously for 3 years (the “Minimum Holding Period”) as of both the date the Notice of Proxy Access Nomination is received by Nasdaq, Inc.’s Corporate Secretary and the record date for determining the stockholders entitled to vote at the annual meeting, and an Eligible Stockholder must continue to own the Required Shares through the meeting date.<sup>37</sup>

Proposed Section 3.6(e) also sets forth the information that an Eligible Stockholder must provide to Nasdaq, Inc.’s Corporate Secretary in writing in order to submit a proxy access nomination. Under the proposed bylaws, this information includes:

- one or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access Nomination is delivered to, or mailed to and received by, Nasdaq, Inc.’s Corporate Secretary, the Eligible Stockholder

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<sup>35</sup> See id.

<sup>36</sup> See Proposed Section 3.6(d).

<sup>37</sup> See Proposed Section 3.6(e).

owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five (5) business days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date;<sup>38</sup>

- a copy of the Schedule 14N that has been filed with the Commission as required by Rule 14a-18 under the Act;<sup>39</sup>
- the information, representations and agreements with respect to the Eligible Stockholder that are the same as those that would be required to be set forth in a stockholder's notice of nomination with respect to a "Proposing Person" pursuant to the "advance notice" provisions of Section 3.1(b)(i) and Section 3.1(b)(iii) of the Bylaws;<sup>40</sup>
- the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected;<sup>41</sup>
- a representation that the Eligible Stockholder:

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<sup>38</sup> See Proposed Section 3.6(e)(i).

<sup>39</sup> See Proposed Section 3.6(e)(ii); see also 17 CFR 240.14n-101 and 17 CFR 240.14a-18, which generally require a Nominating Stockholder to provide notice to Nasdaq, Inc. of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to Nasdaq, Inc.

<sup>40</sup> See proposed Section 3.6(e)(iii). The "advance notice" provisions of Sections 3.1(b)(i) and 3.1(b)(iii) of the Bylaws provide another method by which a stockholder may nominate a person for election to the Board. The proxy access provisions proposed by the SROs are in addition to these "advance notice" provisions.

<sup>41</sup> See Proposed Section 3.6(e)(iv).

- acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of Nasdaq, Inc., and does not presently have such intent;<sup>42</sup>
- presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting;<sup>43</sup>
- has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s);<sup>44</sup>
- has not engaged and will not engage in, and has not and will not be a participant in another person's, "solicitation" within the meaning of Rule 14a-1(l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board;<sup>45</sup>
- agrees to comply with all applicable laws and regulations with respect to any solicitation in connection with the meeting or applicable to the filing and use, if any, of soliciting material;<sup>46</sup>
- will provide facts, statements and other information in all communications with Nasdaq, Inc. and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact

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<sup>42</sup> See Proposed Section 3.6(e)(v)(A).

<sup>43</sup> See Proposed Section 3.6(e)(v)(B).

<sup>44</sup> See Proposed Section 3.6(e)(v)(C).

<sup>45</sup> See Proposed Section 3.6(e)(v)(D); see also 17 CFR 240.14a-1(l), which defines the related terms "solicit" and "solicitation."

<sup>46</sup> See Proposed Section 3.6(e)(v)(E).

necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;<sup>47</sup> and

- as to any two or more funds whose shares are aggregated to count as one stockholder for the purpose of constituting an Eligible Stockholder, within five business days after the date of the Notice of Proxy Access Nomination, will provide to Nasdaq, Inc. reasonably satisfactory documentation that demonstrates that the funds satisfy the requirements in the Bylaws for the funds to qualify as one Eligible Stockholder;<sup>48</sup>
- a representation as to the Eligible Stockholder's intentions with respect to maintaining qualifying ownership of the Required Shares for at least one year following the annual meeting;<sup>49</sup>
- an undertaking that the Eligible Stockholder agrees to:
  - assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications with Nasdaq, Inc.'s stockholders or out of the information that the Eligible Stockholder provided to Nasdaq, Inc.;<sup>50</sup>
  - indemnify and hold harmless Nasdaq, Inc. and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against Nasdaq, Inc. or any

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<sup>47</sup> See Proposed Section 3.6(e)(v)(F).

<sup>48</sup> See Proposed Section 3.6(e)(v)(G).

<sup>49</sup> See Proposed Section 3.6(e)(vi).

<sup>50</sup> See Proposed Section 3.6(e)(vii)(A).

of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to the proxy access provision;<sup>51</sup> and

- file with the Commission any solicitation or other communication with Nasdaq, Inc.'s stockholders relating to the meeting at which the Stockholder Nominee will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available thereunder;<sup>52</sup> and
- in the case of a nomination by a group of stockholders that together is an Eligible Stockholder, the designation by all group members of one group member that is authorized to act on behalf of all such members with respect to the nomination and matters related thereto, including withdrawal of the nomination.<sup>53</sup>

In proposing the Required Ownership Percentage and the Minimum Holding Period, the SROs explained that they seek to ensure that the Eligible Stockholder has had a sufficient stake in Nasdaq, Inc. for a sufficient amount of time and is not pursuing a short-term agenda.<sup>54</sup> In proposing the informational requirements for the Eligible Stockholder, the SROs stated that their goal is to gather sufficient information about the Eligible Stockholder for Nasdaq, Inc. and its stockholders.<sup>55</sup> Among other things, the SROs stated that this information would ensure that

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<sup>51</sup> See Proposed Section 3.6(e)(vii)(B).

<sup>52</sup> See Proposed Section 3.6(e)(vii)(C); see also 17 CFR 240.14a-1 – 14b-2, which governs solicitations of proxies.

<sup>53</sup> See Proposed Section 3.6(e)(viii).

<sup>54</sup> See Notices, supra note 3, at 81 FR 69149, 69155, 69106, 69169, 69130, 69137, 69162, and 69096, respectively.

<sup>55</sup> Id.

Nasdaq, Inc. is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, Inc., its Board and its stockholders would be able to assess the proxy access nomination adequately.<sup>56</sup>

Proposed Section 3.6(f) of the Bylaws

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

- the information required with respect to persons whom a stockholder proposes to nominate for election or reelection as a director pursuant to the “advance notice” provisions of Section 3.1(b)(i) of the Bylaws including, but not limited to, the signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D) of the Bylaws;<sup>57</sup> and
- a written representation and agreement that such person:
  - will act as a representative of all of Nasdaq, Inc.'s stockholders while serving as a director; and
  - will provide facts, statements and other information in all communications with Nasdaq, Inc. and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading).<sup>58</sup>

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<sup>56</sup> Id., at 81 FR 69149, 69155-56, 69106, 69169, 69130, 69137, 69162, and 69096, respectively.

<sup>57</sup> See Proposed Section 3.6(f)(i).

<sup>58</sup> See Proposed Section 3.6(f)(ii).

Proposed Section 3.6(f) additionally states that, at the request of Nasdaq, Inc., the Stockholder Nominee(s) must submit all completed and signed questionnaires required of Nasdaq, Inc.'s directors and officers. Nasdaq, Inc. may also request such additional information as necessary to permit the Board to determine if each Stockholder Nominee satisfies the requirements of the proxy access provision of the Bylaws or if each Stockholder Nominee is independent under the listing standards of Nasdaq, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing the independence of Nasdaq, Inc.'s directors<sup>59</sup> and/or permit Nasdaq, Inc.'s Corporate Secretary to determine the classification of such nominee as an Industry, Non-Industry, Issuer or Public Director, if applicable, in order to make the certification referenced in Section 4.13(h)(iii) of the Bylaws.<sup>60</sup>

In their filings, the SROs represented that the informational requirements for the Stockholder Nominee ensure that both Nasdaq, Inc. and its stockholders will have sufficient information about the Stockholder Nominee.<sup>61</sup> Among other things, the SROs stated that this

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<sup>59</sup> Currently, the independence of Nasdaq, Inc.'s directors is determined pursuant to the definition of "Independent Director" in Listing Rule 5605(a)(2) of The NASDAQ Stock Market, under which certain categories of individuals cannot be deemed independent and with respect to other individuals, the Board must make an affirmative determination that such individual has no relationship that, in the opinion of the Board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Other independence standards under the SEC rules and the Listing Rules of The NASDAQ Stock Market apply to members of certain of the Board's committees. To date, the Board has not adopted any additional standards, in compliance with Amendment No. 1. See note 4, supra; see also note 68, infra.

<sup>60</sup> Section 4.13(h)(iii) of the Bylaws requires Nasdaq, Inc.'s Corporate Secretary to collect from each nominee for director such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, Issuer, or Public Director, if applicable, and to certify to the Committee each nominee's classification, if applicable. Detailed definitions of the terms "Industry Director," "Non-Industry Director," "Issuer Director" and "Public Director" are included in Article I of the Bylaws.

<sup>61</sup> See Notices, supra note 3, at 81 FR 69149, 69156, 69106, 69169, 69131, 69137, 69163, and 69097, respectively.

information will ensure that Nasdaq, Inc. is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, Inc., its Board and its stockholders are able to assess the proxy access nomination adequately.<sup>62</sup>

Proposed Section 3.6(g) of the Bylaws

Pursuant to proposed Section 3.6(g), each Eligible Stockholder or Stockholder Nominee must promptly notify Nasdaq, Inc.'s Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee to Nasdaq, Inc. or its stockholders that ceases to be true and correct in all material respects or omits a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading and of the information that is required to correct any such defect.<sup>63</sup> This provision further states that providing any such notification shall not be deemed to cure any defect, or, with respect to any defect that Nasdaq, Inc. determines is material, limit Nasdaq, Inc.'s rights to omit a Stockholder Nominee from its proxy materials.<sup>64</sup> The SROs asserted that this provision is intended to protect Nasdaq, Inc.'s stockholders from information previously provided that may be materially untrue.<sup>65</sup>

Proposed Section 3.6(h) of the Bylaws

Proposed Section 3.6(h) provides that Nasdaq, Inc. shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the proxy access nomination shall be disregarded and no vote

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<sup>62</sup>

Id.

<sup>63</sup>

See Proposed Section 3.6(g).

<sup>64</sup>

See id.

<sup>65</sup>

See Notices, supra note 3, at 81 FR 69150, 69156, 69106-07, 69169, 69131, 69137, 69163, and 69097, respectively.

on such Stockholder Nominee will occur, even if Nasdaq, Inc. has received proxies in respect of the vote.<sup>66</sup> These circumstances occur when the Stockholder Nominee:

- has been nominated by an Eligible Stockholder who has engaged in or is currently engaged in, or has been or is a participant in another person's, "solicitation" within the meaning of Rule 14a-1(l) under the Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board;<sup>67</sup>
- is not independent under the listing standards of Nasdaq, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing independence of Nasdaq's directors, in each case as determined by the Board in its sole discretion;<sup>68</sup>
- would, if elected as a member of the Board, cause Nasdaq, Inc. to be in violation of the Bylaws (including but not limited to the compositional requirements of the

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<sup>66</sup> See Proposed Section 3.6(h).

<sup>67</sup> See Proposed Section 3.6(h)(i); see also 17 CFR 240.14a-1(l), which defines the related terms "solicit" and "solicitation."

<sup>68</sup> See Proposed Section 3.6(h)(ii); see also note 59, supra. In Amendment No. 1, the SROs made clear that the Board does not currently use any "publicly disclosed standards" to determine and disclose the independence of Nasdaq, Inc.'s directors, other than the listing standards of Nasdaq and any applicable rules of the Commission. If the Board adopts any such standards in the future, the SROs further represented that such standards will be in addition to, more stringent than, and not in conflict with the listing standards of Nasdaq or any applicable rules of the Commission. The SROs stated that any such standards will be used to determine and disclose the independence of all of Nasdaq, Inc.'s directors. However, the SROs noted that the Committee and/or Board may nominate a candidate who does not qualify as "independent" under any such standards, provided that such nomination does not cause Nasdaq, Inc. to fall out of compliance with the Bylaws, the listing standards of Nasdaq, and any other applicable policies and regulations. The SROs asserted that any "publicly disclosed standards" will be filed with and approved by the Commission prior to becoming effective. Moreover, the SROs stated that any such standards will be at least referenced in Nasdaq, Inc.'s Corporate Governance Guidelines following implementation. See Amendment No. 1, supra note 4.

Board set forth in Section 4.3 of the Bylaws), its Amended and Restated Certificate of Incorporation, the rules and listing standards of Nasdaq, or any applicable state or federal law, rule or regulation;<sup>69</sup>

- is or has been, within the past three (3) years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914;<sup>70</sup>
- is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past ten (10) years;<sup>71</sup>
- is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended;<sup>72</sup>
- is subject to “statutory disqualification” under Section 3(a)(39) of the Act;<sup>73</sup>

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<sup>69</sup> See Proposed Section 3.6(h)(iii); see also Section 4.3 of the Bylaws, which provides that the number of Non-Industry Directors on the Board must equal or exceed the number of Industry Directors. In addition, the Board must include at least two Public Directors and may include at least one, but no more than two, Issuer Directors. Finally, the Board shall include no more than one Staff Director, unless the Board consists of ten or more directors, in which case, the Board shall include no more than two Staff Directors. Detailed definitions of the terms “Non-Industry Director,” “Industry Director,” “Public Director,” “Issuer Director” and “Staff Director” are included in Article I of the Bylaws.

<sup>70</sup> See Proposed Section 3.6(h)(iv); see also 15 U.S.C. 19(a)(1), which generally provides that “[n]o person shall, at the same time, serve as a director or officer in any two corporations” that are “competitors” such that “the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.”

<sup>71</sup> See Proposed Section 3.6(h)(v).

<sup>72</sup> See Proposed Section 3.6(h)(vi); see also 17 CFR 230.506(d), which generally disqualifies offerings involving certain felons and other bad actors from relying on the “safe harbor” in Rule 506 of Regulation D from registration under the Securities Act of 1933, as amended.

<sup>73</sup> See Proposed Section 3.6(h)(vii); see also 15 U.S.C. 78c(a)(39), which disqualifies certain categories of individuals who generally have engaged in misconduct from

- has, or the applicable Eligible Stockholder has, provided information to Nasdaq, Inc. in respect of the proxy access nomination that was untrue in any material respect or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, as determined by the Board or any committee thereof, in each case, in its sole discretion;<sup>74</sup> or
- breaches or fails, or the applicable Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the Bylaws, including, but not limited to, the proxy access provisions and any agreement, representation or undertaking required by the proxy access provisions.<sup>75</sup>

The SROs stated their belief that these provisions will protect Nasdaq, Inc. and its stockholders by allowing it to exclude Stockholder Nominees that they view as objectionable from the proxy statement.<sup>76</sup>

Proposed Section 3.6(i) of the Bylaws

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

- the Stockholder Nominee(s) and/or the applicable Eligible Stockholder have breached its or their obligations under the proxy access provision of the Bylaws,

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membership or participation in, or association with a member of, a self-regulatory organization.

<sup>74</sup> See Proposed Section 3.6(h)(viii).

<sup>75</sup> See Proposed Section 3.6(h)(ix).

<sup>76</sup> See Notices, supra note 3, at 81 FR 69150, 69157, 69107, 69169, 69131, 69138, 69163, and 69098, respectively.

as determined by the Board or the chairman of the meeting of stockholders, in each case, in its or his sole discretion; or

- the Eligible Stockholder (or a qualified representative thereof) does not appear at the meeting of stockholders to present the proxy access nomination.<sup>77</sup>

The SROs stated in their filings that this provision protects Nasdaq, Inc. and its stockholders by providing the Board or the chairman of the stockholder meeting limited authority to disqualify a proxy access nominee when that nominee or the sponsoring stockholder(s) have breached an obligation under the proxy access provision, including the obligation to appear at the stockholder meeting to present the proxy access nomination.<sup>78</sup>

Proposed Section 3.6(j) of the Bylaws

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

- a Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or
- a Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election.<sup>79</sup>

The SROs asserted that this provision will save Nasdaq, Inc. and its stockholders the time and expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but

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<sup>77</sup> See Proposed Section 3.6(i).

<sup>78</sup> See Notices, supra note 3, at 81 FR 69150, 69157, 69107, 69170, 69132, 69138, 69164, and 69098, respectively.

<sup>79</sup> See Proposed Section 3.6(j).

ultimately did not stand for election or receive a substantial amount of votes.<sup>80</sup> Under the proposed bylaws, Stockholder Nominees excluded under this provision would again be eligible for nomination through the proxy access provisions after the next two annual meetings.<sup>81</sup>

Proposed Section 3.6(k) of the Bylaws

Proposed Section 3.6(k) states that the Board (or any other person or body authorized by the Board) shall have exclusive power and authority to interpret the proxy access provisions of the Bylaws and to make all determinations deemed necessary or advisable as to any person, facts or circumstances.<sup>82</sup> In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be final, conclusive and binding on Nasdaq, Inc., the stockholders and all other parties.<sup>83</sup> In their filings, the SROs noted that they have attempted to implement a clear, detailed and thorough proxy access provision, but acknowledged there may be matters about future proxy access nominations that are open to interpretation.<sup>84</sup> In these cases, the SROs stated that, in their view, it is reasonable and necessary to designate an arbiter to make final decisions on these points and that they believed the Board is best-suited to act as that arbiter.<sup>85</sup>

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<sup>80</sup> See Notices, supra note 3, at 81 FR 69150-51, 69157, 69107, 69170, 69132, 69138, 69164, and 69098, respectively.

<sup>81</sup> See Proposed Section 3.6(j); see also Notices, supra note 3, at 81 FR 69151, 69157, 69107, 69170, 69132, 69138, 69164, and 69098, respectively.

<sup>82</sup> See Proposed Section 3.6(k).

<sup>83</sup> Id.

<sup>84</sup> See Notices, supra note 3, at 81 FR 69151, 69157, 69108, 69171, 69132, 69139, 69164, and 69098, respectively.

<sup>85</sup> Id.

### Proposed Section 3.6(l) of the Bylaws

Proposed Section 3.6(l) prohibits a stockholder from joining more than one group of stockholders to become an Eligible Stockholder for purposes of submitting a proxy access nomination for each annual meeting of stockholders.<sup>86</sup> The SROs analogized this provision to Article IV, Paragraph C(1) of Nasdaq, Inc.'s Amended and Restated Certificate of Incorporation, under which each holder of Nasdaq, Inc.'s common stock shall be entitled to one vote per share on all matters presented to the stockholders for a vote.<sup>87</sup> In light of that provision, the SROs believed it was reasonable for each share to count only once in submitting a proxy access nomination.<sup>88</sup>

### Proposed Section 3.6(m) of the Bylaws

Proposed Section 3.6(m) states that the proxy access provisions outlined in the proposal shall be the exclusive means for stockholders to include nominees in Nasdaq, Inc.'s proxy materials.<sup>89</sup> The SROs noted that stockholders may continue to propose nominees to the Committee and Board through other means, but that the Committee and Board will have final authority to determine whether to include those nominees in Nasdaq, Inc.'s proxy materials.<sup>90</sup>

### III. Discussion and Commission Findings

The Commission finds, after careful review, that the proposed rule changes, as modified

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<sup>86</sup> See Proposed Section 3.6(l).

<sup>87</sup> See Notices, supra note 3, at 81 FR 69151, 69157, 69108, 69171, 69132, 69139, 69164, and 69098, respectively.

<sup>88</sup> Id.

<sup>89</sup> See Proposed Section 3.6(m).

<sup>90</sup> See Notices, supra note 3, at 81 FR 69151, 69157, 69108, 69171, 69132, 69139, 69164, and 69098, respectively.

by Amendment No. 1, are consistent with the requirements of Section 6 of the Act<sup>91</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>92</sup> In particular, the Commission finds that the proposed rule changes, as modified by Amendment No. 1, are consistent with the requirements of Section 6(b)(5) of the Act, which requires, among other things, that an exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.<sup>93</sup>

A stockholder who wishes to nominate his or her own candidate for director may initiate a proxy contest in order to solicit proxies from fellow shareholders, but doing so requires the preparation and dissemination of separate proxy materials and entails substantial cost. Proposed Section 3.6 of the Bylaws provides Nasdaq, Inc. stockholders an alternative path for having their nominees considered through the proxy process. This proposal is intended to respond to a stockholder proposal, submitted under Rule 14a-8 of the Act and approved by Nasdaq, Inc. stockholders, requesting that the Board take steps to implement a proxy access bylaw.<sup>94</sup>

The SROs stated that the proposal, by providing a process for certain stockholders to nominate directors to be included in Nasdaq, Inc.'s proxy materials,<sup>95</sup> should help to strengthen

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<sup>91</sup> 15 U.S.C. 78f(b).

<sup>92</sup> In approving these proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>93</sup> 15 U.S.C. 78f(b)(5).

<sup>94</sup> See note 5-7, supra, and accompanying text.

<sup>95</sup> As discussed above, however, the number of permitted director nominees under Section 3.6 may constitute less than twenty-five percent of the number of directors currently

the corporate governance of Nasdaq, Inc., thereby protecting investors and the public interest.<sup>96</sup> The Commission believes that the proposal to provide a process for stockholder proxy access in the Bylaws should help to provide the stockholders of Nasdaq, Inc. that meet the stated requirements of proposed Section 3.6 with an alternative opportunity to exercise their right to nominate directors for the Board, consistent with the Act.

The proposed rule changes will require Nasdaq, Inc. to include in its proxy materials information regarding a director nominee nominated pursuant to proposed Section 3.6, including disclosures regarding the nominee and nominating stockholder(s), any statement in support of the nominee provided by the nominating stockholder(s), and any other information that Nasdaq, Inc. or the Board determines to include relating to the nomination.<sup>97</sup> The Commission believes that the provision of such information could help stockholders to assess whether a nominee submitted pursuant to proposed Section 3.6 possesses the necessary qualifications and experience to serve as a director.

The proposed rule changes to Nasdaq, Inc.'s Bylaws limit the availability of proxy access in certain circumstances. For example, in order to be eligible to submit a nomination to be included in the proxy materials pursuant to proposed Section 3.6, a stockholder (or group of stockholders) is required to own at least three percent of Nasdaq, Inc.'s outstanding shares of common stock continuously for at least three years.<sup>98</sup> Furthermore, a stockholder may only nominate a director to be included in the proxy materials pursuant to proposed Section 3.6 if he

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serving on the Board and, under certain circumstances, could be less than two nominees. See notes 20-26, supra, and accompanying text; see also Proposed Section 3.6(c).

<sup>96</sup> See Notices, supra note 3, at 81 FR 69151, 69158, 69108, 69171, 69132, 69164, and 69069, respectively.

<sup>97</sup> See, e.g., Proposed Section 3.6(a).

<sup>98</sup> See Proposed Section 3.6(e).

or she represents that he or she did not acquire and is not holding Nasdaq, Inc.'s securities with the intent of effecting a change of control of Nasdaq, Inc.<sup>99</sup> The proposed rule changes also limit the number of director nominees submitted pursuant to proposed Section 3.6 that may be included in the proxy materials to twenty-five percent of the total number of directors of the Board.<sup>100</sup> The proposed rule changes would allow Nasdaq, Inc. to disregard or omit nominees submitted pursuant to proposed Section 3.6 from the proxy materials in certain circumstances, including where there is a material defect in the information provided by the Stockholder Nominee or Eligible Stockholder to the Board.<sup>101</sup> Such limitations on proxy access seem designed to balance the ability of Nasdaq, Inc. stockholders to participate more fully in the nomination and election process against the potential cost and practical difficulties of requiring inclusion of stockholder nominations in proxy materials.

As noted above, the proposed proxy access provisions include safeguards that will help to ensure that any director nominees submitted pursuant to proposed Section 3.6 would qualify as independent directors and that the nominating shareholder's nomination of the nominee, and the nominee's membership on the Board, if elected, would not violate any applicable laws, rules or regulations of any government entity or relevant self-regulatory organization. Specifically, the proposed rule changes permit Nasdaq, Inc. to disregard and omit from the proxy materials any candidate whose election to the Board would cause Nasdaq, Inc. to be in violation of the Bylaws, the Certificate of Incorporation, the rules and listing standards of Nasdaq, or any applicable state or federal law, rule or regulation.<sup>102</sup>

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<sup>99</sup> See Proposed Section 3.6(e)(v)(A).

<sup>100</sup> See Proposed Section 3.6(c).

<sup>101</sup> See Proposed Section 3.6(h)(viii).

<sup>102</sup> See Proposed Section 3.6(h)(iii).

In addition, Nasdaq, Inc. may disregard or omit from the proxy materials any candidate who does not qualify as independent under the listing standards of Nasdaq, any applicable rules of the Commission, and any publicly disclosed independence standards used by the Board to determine and disclose the independence of Nasdaq, Inc.'s directors.<sup>103</sup> Aside from the independence listing standards of Nasdaq and any applicable rules of the Commission, Nasdaq, Inc. does not currently use any other standards to evaluate the independence of its directors.<sup>104</sup>

The SROs have represented, however, that any such standards adopted in the future will be in addition to, more stringent than, and not in conflict with the listing standards of Nasdaq or any applicable rules of the Commission.<sup>105</sup> The SROs have also represented that any such standards adopted by the Board will be used to determine and disclose the independence of all of Nasdaq, Inc.'s director nominees, including proxy access nominees and Board nominees.<sup>106</sup> However, while stockholder nominees could be omitted from the proxy materials if they do not meet any such future independence standards, a candidate submitted by the Committee and/or the Board would not have to meet these standards, and could remain on the ballot, provided that the election of such candidate would not cause Nasdaq, Inc. to fall out of compliance with the listing standards of Nasdaq, any applicable rules of the Commission, the Bylaws, or any other applicable policies or regulations.<sup>107</sup> The Commission notes that this difference seems acceptable because, while the proxy access candidates must meet all applicable independence

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<sup>103</sup> See Proposed Section 3.6(h)(ii).

<sup>104</sup> See Amendment No. 1, supra note 4. If such standards were to be adopted in the future, the SROs have represented that they will be filed with an approved by the Commission prior to becoming effective and, following implementation, that such standards will be at least referenced in Nasdaq, Inc.'s Corporate Governance Guidelines.

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

requirements – including any future standards adopted by Nasdaq, Inc. – in order to be a proxy access nominee for the Board, a candidate submitted by the Committee and/or the Board could potentially be a nominee and Board member if that does not cause the Board to fall out of compliance with the Bylaws or the above-listed standards, rules, policies or regulations.<sup>108</sup>

The Commission believes that the safeguards and limitations described above should help to ensure that Nasdaq, Inc. can comply with its Bylaws and any applicable laws, rules, regulations, including, among others, exchange listing standards on independent directors, consistent with Section 6(b)(5) of the Act. Based on the foregoing, the Commission finds that the proposed rule changes, as modified by Amendment No. 1, are consistent with the Act.

The Commission also finds that the proposed rule changes by BSECC and SCCP are consistent with the requirements of the Act and the rules and regulations thereunder applicable to clearing agencies. Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to protect investors and the public interest.<sup>109</sup> In addition, Rule 17Ad-22(d)(8) under the Act requires registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to have governance arrangements that are clear and transparent.<sup>110</sup> Here, BSECC and SCCP filed proposed rule

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<sup>108</sup> While a Board-nominated candidate's compliance with any applicable independence standards would be disclosed, that candidate would not necessarily be excluded if filling a non-independent Board seat. See, e.g., Nasdaq, Inc. Corporate Governance Guidelines, available at: [http://files.shareholder.com/downloads/NDAQ/2006703005x0x21344/9019EBAF-60B7-4340-8AE3-F377D313AF55/Corp\\_gov\\_guide.pdf](http://files.shareholder.com/downloads/NDAQ/2006703005x0x21344/9019EBAF-60B7-4340-8AE3-F377D313AF55/Corp_gov_guide.pdf).

<sup>109</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>110</sup> 17 CFR 240.17Ad-22(d)(8).

changes to highlight changes being made to the Bylaws of Nasdaq, Inc.,<sup>111</sup> which indirectly owns BSECC and SCCP. Therefore, the proposed rule changes by BSECC and SCCP help make clear and transparent the governance arrangements of Nasdaq, Inc. and, thus, BSECC and SCCP, which helps ensure investor protection and the public interest.

Finally, the Commission finds that the proposed conforming changes to Sections 3.1(a), 3.3(a), 3.3(c), and 3.5 of the Bylaws are consistent with the Act because these changes prevent stockholder confusion by clarifying the operation of the proposed proxy access provision and other provisions by which stockholders may nominate directors to the Board.

#### IV. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the filings, as modified by Amendment No. 1, are consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Nos. SR-NASDAQ-2016-127; SR-BX-2016-051; SR-ISE-2016-22; SR-ISEGemini-2016-10; SR-ISEMercury-2016-16; SR-PHLX-2016-93; SR-BSECC-2016-001; SR-SCCP-2016-01 on the subject line.

##### Paper comments:

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

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<sup>111</sup> Certain provisions of the Bylaws are considered rules of BSECC and SCCP if they are stated policies, practices, or interpretations, as defined in Rule 19b-4 under the Act, of BSECC and SCCP, and must be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b-4 thereunder. 15 U.S.C. 78q-1(b); 17 CFR 40.19b-4.

All submissions should refer to File Nos. SR-NASDAQ-2016-127; SR-BX-2016-051; SR-ISE-2016-22; SR-ISEGemini-2016-10; SR-ISEMercury-2016-16; SR-PHLX-2016-93; SR-BSECC-2016-001; SR-SCCP-2016-01. These file numbers should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Nos. SR-NASDAQ-2016-127; SR-BX-2016-051; SR-ISE-2016-22; SR-ISEGemini-2016-10; SR-ISEMercury-2016-16; SR-PHLX-2016-93; SR-BSECC-2016-001; SR-SCCP-2016-01, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Changes, as Modified by Amendment No. 1

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act, to approve the proposed rule changes, as modified by Amendment No. 1, prior to the 30<sup>th</sup> day after the date of publication of Amendment No. 1 in the Federal Register. As discussed above, Amendment

No. 1 clarifies the circumstances under which proxy access nominees may be excluded from the proxy materials and clarifies that the Board does not currently have in place the publicly disclosed independence standards described in this provision.<sup>112</sup> The Commission believes that these revisions provide needed clarity to the proposed rule changes.

Accordingly, the Commission finds good cause for approving the proposed rule changes, as modified by Amendment No. 1, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.<sup>113</sup>

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<sup>112</sup> See *supra*, note 4.  
<sup>113</sup> 15 U.S.C. 78s(b)(2).

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>114</sup> that the proposed rule changes (SR-NASDAQ-2016-127; SR-BX-2016-051; SR-ISE-2016-22; SR-ISEGemini-2016-10; SR-ISEMercury-2016-16; SR-PHLX-2016-93; SR-BSECC-2016-001; SR-SCCP-2016-01), as modified by Amendment No. 1, be, and hereby are, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>115</sup>

Brent J. Fields  
Secretary

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<sup>114</sup> 15 U.S.C. 78s(b)(2).

<sup>115</sup> 17 CFR 200.30-3(a)(12).