

**Duties and Obligations of NASDAQ OMX Directors:  
Prepared for the Board of Directors of  
The NASDAQ OMX Group, Inc. and Subsidiaries Therein**

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**I. INTRODUCTION**

This briefing paper is intended to provide background information to members of the Board of Directors (the "Board") of The NASDAQ OMX Group, Inc. ("NASDAQ OMX") regarding their duties and obligations as Directors. We have tried to present the information in a plain-English format, omitting most citations to statutes, regulations, and case law. Detailed information on the relevant legal authorities is available on request.

The management of NASDAQ OMX is under the direction of the Board, but the Board generally is not involved in its day-to-day operations. The Board selects a chief executive officer, who is responsible for management and administration on a day-to-day basis, and other senior managers. As discussed in greater detail below, the Board is not required to attend to the daily operations of NASDAQ OMX, and is entitled to rely on the management they have selected, as long as the Board reasonably believes that the actions and recommendations of management warrant confidence. However, the Board must remain informed and must investigate and act if there is reason to suspect that management is not vigilant, or is not acting in the corporation's best interest.

The discussion that follows is not intended to be exhaustive or to provide answers to any specific issues that may arise in a particular case. It does, however, set forth basic principles and concerns with which Directors should be generally familiar.

**II. DIRECTORS' REGULATORY OBLIGATIONS**

NASDAQ OMX's primary U.S. subsidiaries are The NASDAQ Stock Market LLC (the "NASDAQ Exchange"), NASDAQ OMX PHLX, Inc. ("PHLX"), and NASDAQ OMX BX, Inc. ("BX"), which, as self-regulatory organizations ("SROs"), have authority to develop and adopt rules, and authority to operate markets and discipline members.<sup>1</sup> Under Sections 19(g) and 19(h) of the Securities Exchange Act of 1934 (the "Exchange Act"), an SRO is required to: 1) comply with the provisions of the Exchange Act, the rules and regulations promulgated thereunder, and its own rules (collectively, the "Governing Rules"); and 2) enforce compliance with the Governing Rules by its members and persons associated with its members. If the SEC finds that the SRO has violated or is unable to comply with any of the Governing Rules, or without reasonable justification or excuse has failed to enforce compliance with

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<sup>1</sup> Although they are currently dormant, Boston Stock Exchange Clearing Corporation and Stock Clearing Corporation of Philadelphia are also registered SROs.

any of the Governing Rules, the SEC may suspend or impose limitations on the activities, functions, and operations of the SRO. Further, the SEC may remove from office or censure any SRO officer or director the SEC finds has: willfully violated any provision of the securities laws or SRO rules;<sup>2</sup> willfully abused his or her authority; or failed, without reasonable justification or excuse, to enforce compliance with the securities laws or SRO rules. Under NASDAQ OMX's by-laws, which are subject to SEC review, to the extent they are related to the activities of an SRO subsidiary, the books, records, premises, officers, Directors, and employees of NASDAQ OMX are deemed to be the books, records, premises, officers, directors, and employees of the SRO subsidiary for the purposes of, and subject to oversight pursuant to, the Exchange Act. Accordingly, NASDAQ OMX must act in a manner consistent with the provisions of the Exchange Act applicable to SROs.

Sections 19(g) and 19(h) were added to the Exchange Act in 1975 in response to regulatory lapses that occurred from 1968 through 1970, when some exchanges failed to compel strict adherence to financial responsibility requirements. In adopting Section 19(g) and 19(h), Congress sought to address SRO enforcement lapses by granting the SEC the power to compel SROs to adhere to the requirements of their rules. Congress intended that expanding the SEC's enforcement powers would increase the agency's willingness to take formal action when needed to assure adequate SRO performance.

In addition, NASDAQ OMX is the controller of controller of exchanges and other regulated entities in Sweden, Finland, Denmark, Iceland, Lithuania, Latvia, Estonia, Armenia, and the United Kingdom. Accordingly, the NASDAQ OMX Board has an obligation ensure that the structure and resources of the company enable these regulated entities to meet their license requirements.

### **SEC Actions Against SROs**

The SEC has found SROs to have engaged in violations of Section 19(g) on several occasions, and have also found SRO officers to have violated Section 19(h). The types of conduct that have prompted the SEC to take action are varied, as indicated below. In general, however, the cases were brought in response to ongoing patterns of conduct or because the SRO's procedures were inadequate to permit prompt detection of misconduct. In some cases, SRO disciplinary bodies failed to take disciplinary action when warranted, or members of the SRO's disciplinary decisional body were tainted or otherwise subject to improper influences.

- In 1980, the SEC brought a proceeding against the Philadelphia Stock Exchange for failing to enforce compliance with SEC and exchange quotation rules, as well as various exchange rules governing options position limits,

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<sup>2</sup>In this context, "willfully" means intentionally committing the violative act. The person committing the violative act need not be aware that the action is unlawful.

option spread parameters, and options traders. The violations had occurred on an ongoing basis for several months, with the knowledge of exchange staff. Although staff undertook some efforts to bring about compliance, these efforts were not pursued vigorously, and the exchange delayed bringing disciplinary action despite evidence of ongoing violations.

- In 1980, the SEC brought a proceeding against the Boston Stock Exchange ("BSE") and its clearing corporation for failing to employ adequate surveillance procedures and to timely identify practices that resulted in violations of margin, net capital, and record-keeping requirements. The conduct occurred on an ongoing basis for approximately 13 months. When exchange officials became aware of the violations, the exchange conducted an investigation, took disciplinary action, and undertook enhanced surveillance procedures. Although the exchange ultimately sanctioned three members of the BSE Board of Governors, each of the sanctioned Governors was thereafter reelected to the BSE Board, and served on BSE committees.
- In 1989, the SEC brought a proceeding against the Chicago Board Options Exchange ("CBOE") for failing to enforce compliance with CBOE rules. The SEC's action stemmed from the failure of the CBOE's Business Conduct Committee ("BCC") to initiate disciplinary action in response to evidence that certain options trading had been conducted to create the appearance of activity. Evidence that CBOE staff presented to the BCC indicated a pattern of trading abuses by 12 market makers, including the CBOE's Vice Chairman. The conduct had occurred over a protracted period, and apparently had been undertaken for competitive reasons (*i.e.*, to induce the purchase and sale of dually traded options on the CBOE rather than at a competing marketplace).
- In 1996, the SEC initiated a proceeding against the NASD for failing to take adequate action in response to various abusive practices by certain NASDAQ market makers, and failing to apply membership criteria in an even-handed manner. The allegations that formed the basis for the SEC's action against the NASD were detailed in a lengthy report that was issued pursuant to Section 21(a) of the Exchange Act. The NASD settled the action by agreeing to comply with 14 undertakings that set forth detailed requirements governing the NASD's corporate structure and operations. The NASD also agreed to spend \$100 million dollars over five years to enhance its systems for market surveillance, including the development and implementation of enhanced audit trail, surveillance, enforcement, and internal audit functions.
- In 1997, the SEC initiated proceedings against Stock Clearing Corporation of Philadelphia ("SCCP") and Philadelphia Depository Trust Corporation ("Philadep"). Also named were two officers of SCCP and Philadep. The proceedings concerned several instances in which SCCP and/or Philadep, without SEC approval, had implemented operational modifications that constituted rule amendments. Because SRO rule amendments must be

approved by the SEC, SCCP and Philadep had violated the Exchange Act in failing to seek SEC approval for the rule amendments. In addition, because SCCP and Philadep's actual practices deviated from their existing rules (which had been approved by the SEC), the SROs had violated the Exchange Act by failing to comply with those existing rules. The SEC charged that officers had known of the SROs' noncompliance, possessed authority to ensure compliance, and thus had caused the SROs' violations.

- In 2000, the SEC brought a proceeding against the American Stock Exchange, the CBOE, the Pacific Exchange, and the Philadelphia Stock Exchange (collectively, the "Options Exchanges") for engaging in conduct that impeded multiple listings of stock options and for failing to enforce members' compliance with exchange rules relating to, among other things, the handling of customer orders and the reporting of trades. The Options Exchanges settled the action by agreeing to comply with detailed undertakings relating to audit trails, listing requirements, order handling, trade reporting, and other matters.
- In 2005, the SEC initiated proceedings against the New York Stock Exchange (the "NYSE") for failure to monitor and police specialist trading activity, thereby allowing the NYSE specialists to engage in unlawful interpositioning and trading ahead. As a result, the NYSE has agreed to subject its regulatory activities to an independent regulatory auditor until 2011, at a cost of \$20 million and to adopt numerous enhancements to its surveillance systems, the cost of which are not specified in the SEC's Order.
- In 2005, the SEC initiated proceedings against the National Stock Exchange ("NSX") for failure to enforce a rule requiring NSX dealers to offer price improvement to customer orders in certain circumstances. The NSX agreed to a range of remedial measures, including agreeing to subject its regulatory activities to an independent auditor and to eliminate any involvement in regulatory matters on the part of its President and CEO. The SEC also censured the President and CEO.
- In 2005, the SEC issued a 21(a) Report regarding NASDAQ OMX's predecessor, The NASDAQ Stock Market, Inc., and its oversight by the NASD. Although the SEC did not take any enforcement action in connection with the Report, the Report emphasized the obligations of all persons associated with an SRO to fulfill regulatory obligations by referring potential regulatory violations to the Office of General Counsel for further referral to the NASD or the SEC.
- In 2007, the SEC initiated and settled proceedings against the American Stock Exchange ("Amex") and one of its compliance officers for failure to enforce a range of rules relating to its specialists. As a result, Amex has undertaken to retain an independent auditor to review and report on its

surveillance functions for the next three years. The SEC has also initiated an ongoing proceeding against the former CEO of Amex.

Sanctions imposed in the above-described actions have typically included requirements that the SROs make extensive revisions to their organizational structure, resource commitments, programs, policies, and procedures. In recent years, the trend has been to require settling SROs to commit to detailed undertakings that typically include a commitment to expend large sums for corrective action. For example, in 1996 the NASD agreed to spend up to \$100 million over five years, in 1997 the Philadelphia Stock Exchange agreed to spend \$5 million over three years, and in 2000, the Options Exchanges agreed to spend \$77 million over two years.

When the SEC believed that corporate governance problems existed, settlement terms have focused on the membership and functioning of the SRO board and corporate governance issues. For example, as part of the BSE settlement, the BSE agreed to form a Special Management Review Committee to review and report its findings regarding procedures for nominating members of the BSE Board, the Board of Governors' oversight of BSE management to determine whether the BSE was fully discharging its SRO responsibilities, deficiencies in the nomination and oversight functions, and the process by which the three members of the Board of Governors who had been sanctioned in the exchange's disciplinary action were subsequently renominated and reelected to the BSE Board.

Similarly, when it has appeared that an SRO's disciplinary process was flawed, the SEC has required changes. For example, in settling the CBOE proceeding, the CBOE agreed to changes in its disciplinary process that included prohibiting *ex parte* contacts between members of the BCC and any CBOE member or associated person concerning any pending disciplinary matter, and eliminating the authority of the Chairman of the CBOE Executive Committee to appoint to CBOE committees exchange members who appeared likely to become party to an exchange proceeding. The settlement also required that the CBOE Board be allowed to review BCC decisions that disciplinary charges should not be initiated.

### **III. SUMMARY OF RELEVANT DELAWARE CORPORATE LAW**

#### **Statutory Provisions**

Because it is incorporated in the State of Delaware, the General Corporation Law of the State of Delaware ("General Corporation Law") is applicable to NASDAQ OMX.

#### **A. The Business Judgment Rule**

The business judgment rule is the fundamental precept of director conduct that forms the principal defense in any litigation that seeks to challenge the

prudence or wisdom of director action. The rule presumes that, in making a business decision, corporate directors acted on an informed basis, in good faith, and in the honest belief that the action taken was in the corporation's best interests. Under the rule, a court will not substitute its judgment for that of the board if the latter's decision can be attributed to any rational business purpose. Whether the decision is the best decision, or even a reasonable decision, is beyond the scope of the court's consideration.

For the business judgment rule to apply, three conditions must be met: care, loyalty, and independence. The basic standards of conduct applicable to directors flow from judicial interpretations of these three requirements.

The protections of the business judgment rule are unavailable if, among other circumstances, a board has abdicated its functions or has failed to act. When the business judgment rule is unavailable, the board will bear the burden of demonstrating that its decision was entirely fair to shareholders.

## **B. The Duty of Care**

The duty of care requires that a director be informed and exercise independent judgment. As a general matter, the duty requires directors to be reasonably informed, and to participate in decisions in good faith and with the care of an ordinarily prudent person in similar circumstances. The elements of the duty of care generally include:

- Informed and independent judgment -- a director should regularly attend board meetings. Each director, no matter how selected, shares all of the responsibilities and powers of the directors. Even if a director is viewed as representing a particular group or interest, the director's duties are to the entire organization, and are identical to those of other directors. A director must have adequate sources of information. In general, directors may rely on information provided by corporation staff. If, however, the director believes that staff-supplied information is inadequate in any respect, the director should request further information.
- Reliance -- directors may, in the ordinary course of business, act in reliance on information and reports received from regular sources the director reasonably regards as trustworthy. A director may rely on the information received from another director, a committee, or corporate officers, employees, or agents the director reasonably believes to be reliable and competent. However, a director may not rely on such information if he or she has knowledge about a matter that would make such reliance unreasonable.
- Delegation -- the board of directors does not operate the day-to-day business of the corporation. In delegating that function to others, the board sets

policies and oversees the corporate agents. Although the board as a whole may delegate functions to others (for example, staff or board committees), individual directors may not delegate to others their responsibilities as directors, and may not vote by proxy.

Much of the recent Delaware law on the duty of care has been developed in change-of-control cases. In the majority of cases in which the issue has been raised, corporate directors have been found to have satisfied their duty of care. However, Delaware case law does underscore that time for reflection and adequate information are cornerstones of the duty of care. For example, there have been cases in which directors were held liable for approving a merger during a relatively short board meeting, without advice from an investment bank, without adequate understanding of the terms of the agreement or whether the sale price reflected the full value of the corporation. In another case, directors were found to have breached their duty of care in approving a merger when most of the directors had little or no knowledge of the transaction before the board meeting, and the board did not take reasonable steps to be adequately informed before it acted.

The Board should ensure that they take time, consider information provided to them or brought to their attention and, when good business judgment warrants, should request further information. The Board should take reasonable steps to ensure that management is competent, informed, and acting appropriately on information it receives. The Board should meet their duty of care if the Board behaves as a reasonable person could be expected to behave, remain involved and informed, and act when warranted.

As discussed above, the status of certain of NASDAQ OMX's subsidiaries as SROs imposes upon NASDAQ OMX regulatory obligations that do not apply to other types of corporations. These regulatory obligations significantly affect the scope of the duty of care required by Directors. In particular, these duties relate to broker-dealers' compliance with the Exchange Act, the Exchange Act Rules, or the rules of the NASDAQ Exchange. The Board of SROs must ensure that adequate policies and procedures are in place to ensure that members comply with the rules, and that appropriate action is taken in the event of noncompliance. NASDAQ OMX Directors should be aware of these obligations and ensure that the NASDAQ Exchange also acts in a manner consistent with these obligations. The interplay between these regulatory obligations and Delaware fiduciary duties is discussed in more detail below.

### **C. The Duty of Loyalty**

Generally, directors owe a duty of loyalty to the corporation and its stockholders. The duty of loyalty requires that directors act in the best interests of the corporation and refrain from actions that would harm the corporation and its stockholders or deprive them of an advantage.

A key component of the duty of loyalty is the independence of the director. When a director is not independent -- that is, when conflicts actually exist between the interest of the director and the interest of the corporation -- the director's loyalty is called into question and measures must be taken to ensure that the conflict is fully disclosed and the decision made is in the best interests of the corporation.

Directors of NASDAQ OMX must act at all times in the best interests of NASDAQ OMX and its stockholders and not compromise those interests due to personal considerations. The Directors cannot act to benefit their personal interest or to protect themselves at the expense of NASDAQ OMX or its stockholders.

#### **D. The Duty of Good Faith**

For directors to fulfill their fiduciary duties they must also act in good faith. While the duty of good faith is viewed by some as a subsidiary requirement of the duty of loyalty or even its equivalent, the exact contours of the duty are not clear. Some decisions suggest that the duty of good faith is lacking where there is evidence of a disloyal "motive," such as self-dealing or other self-interested behavior. Others decisions suggest that a decision would be lacking in good faith if it were "indifferent" to or in "reckless disregard" of the interests of a corporation and its stockholders. The Delaware Court of Chancery also has taken the position that performance of the good faith component of the duty of loyalty requires corporate directors to act with a rational business purpose.

It has also been suggested that the exercise of the duty to act in good faith requires processes similar to the exercise of duty of care -- informed, deliberate decision-making. More recently, in In re The Walt Disney Company Derivative Litigation, 825 A.2d 275 (Del. Ch. 2003), in addressing plaintiffs' challenge to the hiring and compensation package of Michael Ovitz, the Court held that the complaint alleged more than merely negligent or grossly negligent conduct; it alleged facts to "suggest that the Disney directors failed to exercise any business judgment and failed to make any good faith attempt to fulfill their fiduciary duties to Disney or its stockholders." Id. at 278 (emphasis in original). The Court further held that:

plaintiffs' claims are based on an alleged knowing and deliberate indifference to a potential risk of harm to the corporation. Where a director consciously ignores his or her duties to the corporation, thereby causing economic injury to its stockholders, the directors' actions are either "not in good faith" or "involve intentional misconduct." Thus, plaintiffs' allegations support claims that fall outside the liability waiver provided under Disney's certificate of incorporation. Id. at 290 (emphasis in original).

The Delaware Court of Chancery, however, has subsequently recognized a distinction between an allegation of no deliberations, versus an allegation of not enough deliberations.

### **Regulatory Obligations and Fiduciary Duties**

It is important to note that the regulatory obligations of the Directors of NASDAQ OMX are complementary to, and not in conflict with, the fiduciary obligations of the Directors. In considering what is in the best interests of the corporation and its stockholders, a Director can consider many issues besides short-term maximization of stockholder value. These issues include many factors such as long term growth, strategic investments, enhanced reputation and legal compliance that might not maximize stockholder value, at least in the short term. Unless the corporation has put itself up for sale, "a board of directors, while always required to act in an informed manner, is not under any per se duty to maximize shareholder value in the short term..." *Paramount Communications v. Time, Inc.*, 571 A.2d 1140, 1150, 1154 (Del. 1989) ("Directors are not obligated to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.").

As a result, the Board has discretion, after informed deliberation, to take an action that may cost money in the short-term, but serves a longer-term goal. For example, the Board's decisions to fund and operate market surveillance systems would be shielded by the presumptions of the business judgment rule even though such systems do not generate revenue for stockholders. The cases cited above suggest that Delaware law would recognize that such systems are integral to maintaining the integrity of markets operated by NASDAQ OMX, which is crucial to the long-term economic interests of NASDAQ OMX and to the maintenance of needed regulatory approvals.

Delaware law also requires that directors comply with applicable law. The General Corporation Law allows corporations to engage only in lawful business. Section 102(b)(7) prohibits corporations from shielding directors from liability for "intentional misconduct and knowing violations of law." As a result, Delaware law requires that the Board comply with any law applicable to NASDAQ OMX and its subsidiaries.

In fact, directors of Delaware corporations risk breaching their fiduciary duties if they do not take steps to ensure that the corporation complies with state and federal law. In *Caremark International Inc.*, 698 A.2d 959 (Del. Ch. 1996), the Delaware court indicated that directors could in theory breach their fiduciary duties by failing to implement an information and reporting system reasonably designed to detect violations of state and federal law. The *Caremark* decision shows that Delaware law incentivizes directors and management to comply with state and federal law and to design monitoring systems to ensure that their subordinates also comply with law.

## Provisions of NASDAQ OMX Corporate Documents

The importance of regulatory obligations is highlighted in NASDAQ OMX's Certificate of Incorporation and By-laws. Article Eleventh of the Certificate of NASDAQ OMX reads in part:

the Board of Directors, when evaluating ... any ... issue, shall... take into account all factors that the Board of Directors deems relevant, including, ... the potential impact thereof on the integrity, continuity and stability of The NASDAQ Stock Market and the other operations of NASDAQ, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public....

The By-Laws of NASDAQ OMX provide that the Directors of NASDAQ OMX

shall give due regard to the preservation of the independence of the self-regulatory function of each ... Self-Regulatory Subsidiary and to its obligations to investors and the general public and shall not take any actions which would interfere with the effectuation of any decisions by the Board of Directors of any Self-Regulatory Subsidiary relating to its regulatory functions (including disciplinary matters) or the market structures or clearing systems which it regulates or which would interfere with the ability of any Self-Regulatory Subsidiary to carry out its responsibilities under the [Exchange] Act.

The NASDAQ OMX By-Laws also provide that the Directors of NASDAQ OMX will be deemed Directors of each SRO subsidiary for purposes of SEC oversight pursuant to the Exchange Act, and are obligated to cooperate with the SEC in respect of its oversight responsibilities.

In addition, NASDAQ OMX's corporate documents contain provisions that in most respects provide Directors with all of the protections allowable under Delaware law. These include provisions in the Restated Certificate of Incorporation of NASDAQ OMX that are allowed by Delaware Law and that relieve Directors from liability for monetary damages to NASDAQ OMX or its stockholders to the extent that such relief is not specifically prohibited by Delaware law. The general effect of these provisions is to afford relief from monetary damages for breach of the duty of care. The General Corporation Law prohibits such relief for breaches of the duty of loyalty, for acts or omissions not taken in good faith or involving intentional misconduct (including where the director had reasonable cause to believe the actions were illegal), and for transactions in which a Director derives an improper personal benefit.

The By-Laws of NASDAQ OMX provide that Directors shall be indemnified

against judgments, fines, amounts paid in settlement and expenses (including attorneys fees and other costs), and that costs shall be advanced in each case to the fullest extent permitted by Delaware Law. In addition, NASDAQ OMX has procured insurance policies providing aggregate coverage for directors' and officers' liability of \$100 million, professional liability of \$15 million, employment practices liability of \$20 million, and fiduciary liability of \$10 million. These policies protect Board members from liability arising from lawsuits brought against NASDAQ OMX and its Board.

#### **IV. SARBANES-OXLEY ACT OF 2002**

The Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") increased corporate governance duties and oversight responsibilities of corporate Board of public companies, including NASDAQ OMX, and their committees. Some of the key areas of concern for Board members are:

- SEC Reporting. Sarbanes-Oxley gives the Board, and more particularly the Audit Committee, increased responsibility for overseeing the accuracy of NASDAQ OMX's financial statements, disclosure controls and procedures, and internal controls. The responsibility of Board members includes assessing the reasonableness of management's accounting judgments and estimates and reviewing key regulatory filings. The Audit Committee is directly responsible for the appointment, compensation, and oversight of an issuer's public auditor and must also determine whether engaging independent counsel and other advisors is necessary.
- Whistle-blower procedures. The Board is responsible for overseeing the implementation of effective whistle-blower procedures. In particular, the Audit Committee must establish procedures that facilitate the reporting of illegal activity to the proper persons and protect whistle-blowers from retaliation.
- Executive and Director Loans. Sarbanes-Oxley prohibits personal loans or extensions of credit to executive officers and directors. Accordingly, the Board must carefully review certain compensation arrangements and make informed decisions regarding their legality.
- Attorney Communications. Under Sarbanes-Oxley, attorneys may be required to report "up the ladder" to the Audit Committee and Board level credible evidence of a material violation of the securities law or breach of fiduciary duty or similar violation of the company or an agent of the company. The Board must ensure that proper procedures are in place to facilitate these communications and respond accordingly.

These are just some of the comprehensive reforms mandated by Sarbanes-Oxley. The SEC may consider additional rules that could further increase the duties of Board members. Non-compliance with Sarbanes-Oxley could result in serious criminal and civil penalties for Board members and NASDAQ OMX. The Office of General Counsel, the Corporate Secretary, the Audit Committee and others will advise Board members throughout their tenure on compliance with Sarbanes-Oxley.

## V. LISTING STANDARDS

In February 2005, NASDAQ OMX listed on The NASDAQ National Market and formally became subject to the NASDAQ Exchange's listing standards. These standards are set forth in the 5000 series of the NASDAQ Exchange Manual. Set forth below are summaries of certain rules applicable to Directors of a NASDAQ-listed company.

- Independent Directors. NASDAQ Exchange listing rules generally require that a majority of a listed company's Board be comprised of independent directors. In addition, the audit committee must be comprised entirely of independent directors and independent directors must be involved in decisions regarding the compensation of executive officers and the nomination of directors. For a director to be considered independent, the board must determine that the director has no relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The NASDAQ Exchange rules specify certain relationships that would preclude independence, including employment with the company; the receipt of more than \$120,000 in payments other than for board services; and payments between NASDAQ OMX and certain entities with which a director is affiliated, if those payments exceed the greater of \$200,000 or 5% of the recipient's revenues. If a family member of the director has certain of these relationships, the director may also be precluded from being considered independent. NASDAQ OMX relies on the director's questionnaire to identify the relevant relationships, but Board members should also contact the Office of General Counsel or the Corporate Secretary in the event a new relationship develops.
- Conflicts of Interest. NASDAQ Exchange listing rules requires that the audit committee or another independent body of the Board conduct appropriate review and oversight of related party transactions. NASDAQ OMX satisfies this requirement by obtaining audit committee approval of related party transactions. (The NASDAQ OMX audit committee has pre-approved limited classes of transactions and in some cases may approve transactions after the fact, but in general, it has required review and approval of transactions before they are entered into.) Item 404(b) of SEC Regulation S-K requires companies to disclose their policies and

procedures for the review, approval, or ratification of related party transactions.

- Code of Conduct. The listing rules require that NASDAQ OMX have a code of conduct applicable to all directors, as well as officers and employees. Any waivers of the code for directors and executive officers must be approved by the board and publicly disclosed on a Form 8-K.
- Shareholder Approval. NASDAQ Exchange listing rules may require shareholder approval for an issuance of common stock or a security convertible into common stock to a director or an entity affiliated with a director, if that issuance is at a price less than the market value of the stock.