



SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

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

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

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

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

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

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

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

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

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Exhibit Sent As Paper Document

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

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

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Exhibit Sent As Paper Document

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

**Exhibit 4 - Marked Copies**

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

**Exhibit 5 - Proposed Rule Text**

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

**Partial Amendment**

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

**Item 1. Text of the Proposed Rule Change**

(a) Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act” or “Exchange Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) is filing with the Securities and Exchange Commission (the “Commission”) a proposed rule change with respect to amendments to the Sixth Amended and Restated Bylaws (the “CGM Bylaws”) of its parent corporation, Cboe Global Markets, Inc. (“Cboe” or “Corporation”). The text of the proposed rule change is provided in Exhibit 5.

(b) Not applicable.

(c) Not applicable.

**Item 2. Procedures of the Self-Regulatory Organization**

(a) The Cboe Global Markets, Inc. Board of Directors (the “CGM Board”) and the Cboe Exchange, Inc. Board of Directors (the “Exchange Board”) approved the proposed rule change on March 3, 2021 and March 5, 2021, respectively. The proposed amendments to the CGM Bylaws do not require stockholder approval.<sup>3</sup>

As provided in the CGM Bylaws, before any amendment to the CGM Bylaws may be effective, the amendment must be reviewed by the Board of Directors of each self-regulatory subsidiary of Cboe (including the Exchange Board), and, if the amendment must, pursuant to Section 19 of the Act and the rules and regulations promulgated thereunder, be filed with, or filed with and approved by, the Commission, then the amendment will not be

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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 Section 10.1 of the CGM Bylaws, which states the CGM Bylaws may be amended by the Cboe Board at any time.

effective until filed with, or filed with and approved by, the Commission, as the case may be.<sup>4</sup> The Exchange Board as well as the Boards of Directors of Cboe C2 Exchange, Inc. (“C2 Options”), Cboe BZX Exchange, Inc. (“BZX”), Cboe BYX Exchange, Inc. (“BYX”), Cboe EDGA Exchange, Inc. (“EDGA”), and Cboe Options Exchange, Inc. (“Cboe Options”) have reviewed the proposed amendment to the CGM Bylaws. The Exchange's affiliates will each concurrently submit proposed rule changes to propose the changes described in this filing.

No other action is necessary for this rule filing.

(b) Please refer questions and comments on the proposed rule change to Pat Sexton, Executive Vice President, General Counsel, and Corporate Secretary, (312) 786-7467, or Corinne Klott (312) 786-7793, Cboe Exchange, Inc., 400 South LaSalle, Chicago, Illinois 60605.

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

(a) Purpose

Cboe has received a stockholder proposal submitted pursuant to Rule 14a-8 under the Act<sup>5</sup> which requested that the CGM Board take steps to implement a “proxy access” bylaw provision. In general, proxy access bylaws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company’s proxy materials. Such

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<sup>4</sup> See Section 10.2 of the CGM Bylaws.

<sup>5</sup> See 17 CFR 240.14a-8, which requires companies that are subject to the federal proxy rules to include shareholder proposals in companies’ proxy statements to shareholders, subject to certain procedural and substantive requirements.

provisions have become common among S&P 500 companies.<sup>6</sup> Cboe has determined to take the stockholder's requested steps to implement proxy access. Accordingly, the Exchange now proposes to make these changes by adopting new Section 2.16 of the CGM Bylaws and making certain conforming changes to current Sections 2.10 and 2.11 of the CGM Bylaws, all of which are described further below.

In developing its proposal, Cboe generally tried to balance the relative weight of arguments for and against proxy access provisions. On the one hand, Cboe recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are presented in a company's proxy statement. On the other hand, Cboe's proposed proxy access provision includes certain procedural requirements that are designed to help ensure, among other things, that Cboe and its stockholders will have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees will comply with applicable laws, regulations and other requirements. Additionally, the Exchange notes the proposed terms are common among companies that have adopted proxy access. The Exchange also notes that the parent companies of other exchanges have adopted substantively similar proxy access provisions and the Exchange does not believe such provisions are materially different than the Exchange's proposal.<sup>7</sup>

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<sup>6</sup> More than 75% of S&P 500 companies have adopted proxy access bylaw provisions.

<sup>7</sup> See Securities Exchange Release No. 79357 (November 18, 2016) 81 FR 85283 (November 25, 2016) (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). See also Securities Exchange Release

The proposed rule change would add new Section 2.16 to the CGM Bylaws.

Section 2.16 would permit a stockholder, or group of up to 20 stockholders, to nominate director nominees for the Cboe Board, so long as the stockholder(s) have owned at least three percent of Cboe's outstanding shares of capital stock continuously for at least three years. The director nominees would be included in Cboe's annual meeting proxy materials. The proposed provision would limit the number of proposed director nominees to the greater of (i) two or (ii) 20% of the number of Cboe directors in office (rounded down to the nearest whole number, but no less than two) provided that the stockholder(s) and nominee(s) satisfy the other conditions specified in the CGM Bylaws as described further below.

Proposed Section 2.16(a)

The Exchange first proposes to amend the CGM Bylaws to, as set forth in the first sentence of proposed Section 2.16(a), require the Corporation 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")<sup>9</sup> that satisfies the requirements set forth in the proxy access

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No. 77782 (May 6, 2016) 81 FR 29600 (May 12, 2016) (SR-NYSE-2016-14; SR-NYSEArca-2016-25; SR-NYSEMKT-2016-20).

<sup>8</sup> The Required Information is the information provided to Cboe's Corporate Secretary about the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Corporation's proxy statement by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written statement, not to exceed 500 words, in support of the Stockholder Nominee(s)' candidacy (the "Supporting Statement", as defined further below).

<sup>9</sup> As used throughout the CGM Bylaws, the term "Eligible Stockholder" includes each member of a stockholder group that submits a proxy access nomination to the extent the context requires.

provision of CGM Bylaws.<sup>10</sup> Proposed Section 2.16(a) will also make clear that Cboe is able to solicit against any Stockholder Nominee or include in its proxy materials the Corporation's own statements or other information relating to any Eligible Stockholder or Stockholder Nominee, including any information provided to the Corporation pursuant to Section 2.16. This provision clarifies that just because Cboe must include a Stockholder Nominee in its proxy materials if the proxy access provisions are satisfied, Cboe does not necessarily have to support that nominee.

Proposed Section 2.16(b)

Proposed Section 2.16(b) will provide that in order to utilize this provision, the Eligible Stockholder must expressly request at the time of providing a required notice to the Corporation of the proxy access nomination (the "Notice of Proxy Access Nomination") to have its nominee included in the Corporation's proxy materials. Proposed Section 2.16(b) also establishes the deadline for a timely Notice of Proxy Access Nomination. Specifically, such a notice must be delivered to the Cboe's Secretary at the principal executive offices of the Corporation not earlier than the open of business on the one hundred fiftieth (150th) day and not later than the close of business on the one hundred twentieth (120th) day prior to the first anniversary of the date that Cboe first distributed its proxy statement to stockholders for the previous year's annual meeting of stockholders provided, however, that in the event the annual meeting is more than thirty (30) days before or after the anniversary date of the prior year's annual meeting, or if no annual meeting was held in the preceding year, to be timely, the Notice

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<sup>10</sup> When the Corporation includes proxy access nominees in the proxy materials, such individuals will be included in addition to any persons nominated for election by at or the direction of the Board to the Board or any committee thereof.

of Proxy Access Nomination must be received at the principal executive offices of the Corporation no earlier than one hundred fifty (150) days before such annual meeting and no later than the later of one hundred twenty (120) days before such annual meeting or the tenth (10th) day following the day on which public announcement (as defined in Section 2.11) of the date of such meeting is first made by the Corporation. Further Section 2.16 will provide that in no event shall any adjournment or postponement of an annual meeting or the announcement thereof commence a new time period (or extend any time period) for the giving of a Notice of Proxy Access Nomination as described above. Cboe believes this notice period will provide stockholders an adequate window to submit nominees via proxy access, while also providing the Corporation adequate time to diligence a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.

Proposed Section 2.16(c)

Proposed Section 2.16(c) specifies that the maximum number (“the Permitted Number”) of Stockholder Nominees nominated by all Eligible Stockholders that will be included in Cboe’s proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two or 20% 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”). 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 Permitted Number of

Stockholder Nominees included in Cboe's proxy materials shall be calculated based on the number of directors in office as so reduced. In addition, the Permitted Number shall be reduced by (i) the number of individuals who will be included in the Corporation's proxy materials as director nominees recommended by the Board pursuant to an agreement, arrangement or other understanding with a stockholder or group of stockholders (other than any such agreement, arrangement or understanding entered into in connection with an acquisition of stock from the Corporation by such stockholder or group of stockholders) and/or (ii) the number of directors in office as of the Final Proxy Access Nomination Date who were included in the Corporation's proxy materials as Stockholder Nominees for any of the two preceding annual meetings of stockholders (including any persons counted as Stockholder Nominees pursuant to the immediately succeeding sentence) and whose reelection at the upcoming annual meeting is being recommended by the Board. Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision of the CGM Bylaws whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the Permitted Number of Stockholder Nominees has been reached. Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by

Eligible Stockholders pursuant to the proxy access provision exceeds the Permitted Number of nominees allowed. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders pursuant to Section 2.16 exceeds the Permitted Number of nominees allowed, 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 Permitted Number is reached, going in order of the amount (largest to smallest) of shares of Cboe's outstanding capital stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Cboe. If the Permitted 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, then the next highest ranking Stockholder Nominee who meets the requirements of Section 2.16 from each Eligible Stockholder will be selected for inclusion in the Corporation's proxy materials, and this process will continue as many times as necessary, following the same order each time, until the Permitted Number is reached. Additionally, notwithstanding anything to the contrary contained in proposed Section 2.16, Cboe will not be required to include any Stockholder Nominees in its proxy materials pursuant to Section 2.16 for any meeting of stockholders for which the Secretary receives a notice (whether or not subsequently withdrawn) that the Eligible Stockholder or any other stockholder intends to nominate one or more persons for election to the Board pursuant to Section 2.11 of the CGM Bylaws. Cboe believes it is reasonable to limit the Board seats available to proxy access nominees and to establish procedures for selecting candidates if the nominee limit is exceeded. The limitation on Board seats available to proxy access

nominees ensures that proxy access cannot be used to take over the entire Board, which is not the stated purpose of proxy access campaigns. The procedures for selecting candidates if the nominee limit is exceeded establish clear and rational guidelines for an orderly nomination process to avoid the Corporation having to make arbitrary judgments among candidates.

Proposed Section 2.16(d)

Proposed Section 2.16(d) defines who may qualify as an “Eligible Stockholder”. Particularly, an Eligible Stockholder is a stockholder or group of no more than 20 stockholders<sup>11</sup> that (i) has owned continuously for at least three years (the “Minimum Holding Period”) a number of shares of capital stock of the Corporation that represents at least three percent of the outstanding shares of capital stock of the Corporation as of the date the Notice of Proxy Access Nomination is received (the “Required Shares”), (ii) continues to own the Required Shares through the date of the annual meeting and (iii) meets all other requirements of proposed Section 2.16. Cboe believes it is reasonable to require each member of a nominating group to provide such information so that both the Corporation and its stockholders are fully informed about the entire group making the proxy access nomination. As such, Section 2.16(d) further makes clear that whenever the Eligible Stockholder consists of a group of stockholders (including a group of funds that are part of the same Qualifying Fund Group), (i) each provision in Section 2.16 that requires the Eligible Stockholder to provide any written statements, representations,

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<sup>11</sup> For this purpose, any two or more funds that are part of the same Qualifying Fund Group may be counted as one stockholder. A “Qualifying Fund Group” means two or more funds that are (i) under common management and investment control, (ii) under common management and funded primarily by the same employer or (iii) a “group of investment companies” as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Corporation Act of 1940, as amended.

undertakings, agreements or other instruments or to meet any other conditions shall be deemed to require each stockholder (including each individual fund) that is a member of such group to provide such statements, representations, undertakings, agreements or other instruments and to meet such other conditions (except that the members of such group may aggregate the shares that each member has owned continuously for the Minimum Holding Period in order to meet the three percent ownership requirement of the “Required Shares” definition) and (ii) a breach of any obligation, agreement or representation under Section 2.16 by any member of such group shall be deemed a breach by the Eligible Stockholder. No stockholder may be a member of more than one group of stockholders constituting an Eligible Stockholder with respect to any annual meeting.

Proposed Section 2.16(e)

Proposed Section 2.16(e) clarifies, for the avoidance of doubt, how “ownership” will be defined for purposes of meeting the ownership requirements of the Required Shares. Specifically, an Eligible Stockholder shall be deemed to “own” only those outstanding shares of Cboe’s capital 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: that are (1) sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed; (2) 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 (3) subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar instrument or 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 Cboe's outstanding capital stock, in any such case which instrument or agreement has, or is intended to have, the purpose or effect of: (A) 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 (B) hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or its affiliates.

Further, a stockholder shall "own" shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder's ownership of shares shall be deemed to continue during any period in which (i) the stockholder has loaned such shares provided that the stockholder has the power to recall such loaned shares on five (5) business days' notice and includes in the Notice of Proxy Access Nomination an agreement that it will (1) recall such loaned shares upon being notified that any of its Stockholder Nominees will be included in the Corporation's proxy materials and (2) will hold such shares through the date of the annual meeting or (ii) 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. Section 2.16(e) also clarifies that the terms "owned," "owning" and other variations of the word "own" shall have correlative meanings. Whether outstanding shares of Cboe's capital stock are "owned" for these purposes shall be determined by the Board. For purposes of Section 2.16, the term "affiliate" or "affiliates"

shall have the meaning ascribed thereto under the rules and regulations of the Act.<sup>12</sup> An Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of proposed Section 2.16. In proposing the Required Shares and the Minimum Holding Period, Cboe seeks to ensure that the Eligible Stockholder has had a sufficient stake in the Corporation for a sufficient amount of time and is not pursuing a short-term agenda.

Proposed Section 2.16(f)

Proposed Section 2.16(f) sets forth the information that an Eligible Stockholder must provide to Cboe's Corporate Secretary in writing within the deadline discussed above in order to make a proxy access nomination. This information includes:

- a statement by the Eligible Stockholder (1) setting forth and certifying as to the number of shares it owns and has owned continuously for the Minimum Holding Period and (2) agreeing to continue to own the Required Shares through the date of the annual meeting;
- one or more written statements from the record holder of the Required Shares (and from each intermediary through which the Required 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 Cboe's Secretary at the principal

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

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

- a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a-18 under the Act<sup>13</sup>;
- the information, representations and agreements and other documents that are required to be set forth in or included with a stockholder's notice of nomination given pursuant to Section 2.11 of the CGM Bylaws;
- the written consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected;
- a representation that the Eligible Stockholder:
  - acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of Cboe, and does not presently have such intent;

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<sup>13</sup> See 17 CFR 240.14n-101 and 17 CFR 240.14a-18, which generally require a Nominating Stockholder to provide notice to the Corporation of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to the Corporation.

- has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s);
- 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;
- has not distributed and will not distribute to any stockholder of the Corporation any form of proxy for the annual meeting other than the form distributed by the Corporation;
- has complied and will comply with all laws, rules and regulations applicable to solicitations and the use, if any, of soliciting material in connection with the annual meeting, and
- has provided and will provide facts, statements and other information in all communications with Cboe and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;
- 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 the stockholders of the Corporation or out of the information that the Eligible Stockholder provided to the Corporation;
- indemnify and hold harmless the Corporation and each of its Directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against the Corporation or any of its Directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to this Section 2.16 or any solicitation or other activity in connection therewith; and
  - file with the Securities and Exchange Commission any solicitation or other communication with the stockholders of the Corporation relating to the meeting at which its Stockholder Nominee(s) 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 for such solicitation or other communication under Regulation 14A of the Act;
- 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 receive communications, notices and inquiries from the Corporation and to act on behalf of all members of the group with respect to all matters relating to the nomination under this Section 2.16 (including withdrawal of the nomination);

- in the case of a nomination by an Eligible Stockholder consisting of a group of stockholders in which two or more funds are intended to be treated as one stockholder for purposes of qualifying as an Eligible Stockholder, documentation reasonably satisfactory to the Corporation that demonstrates that the funds are part of the same Qualifying Fund Group; and
- a written representation and agreement by the Stockholder Nominee that such person:
  - will act as a representative of all of the stockholders of the Corporation while serving as a director;
  - will provide facts, statements and other information in all communications with the Corporation and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading);
  - is not and will not become a party to (i) any compensatory, payment or other financial agreement, arrangement or understanding with any person or entity other than the Corporation in connection with service or action as a director of the Corporation that has not been disclosed to the Corporation, (ii) any Voting Commitment that has not been disclosed to the Corporation

- or (iii) any Voting Commitment<sup>14</sup> that could reasonably be expected to limit or interfere with the Stockholder Nominee's ability to comply, if elected as a director of the Corporation, with its fiduciary duties under applicable law; and
- will abide by and comply with the CGM Bylaws, the Certificate of Incorporation and applicable policies of the Corporation including all applicable publicly disclosed corporate governance, conflict of interest, confidentiality and stock ownership and trading policies and guidelines of the Corporation, as well as the applicable provisions of the rules and regulations of the Securities and Exchange Commission and any stock exchange applicable to the Corporation.

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

Proposed Section 2.16(g)

Proposed Section 2.16(g) establishes additional information the Stockholder Nominee must provide. Particularly:

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<sup>14</sup> A "Voting Commitment" is defined as any agreement, arrangement or understanding with any person or entity as to how the Stockholder Nominee would vote or act on any issue or question as a director.

- the Stockholder Nominee(s) must submit all completed and signed questionnaires required of directors and officers of the Corporation;
- the Corporation may require any proposed Stockholder Nominee to furnish any information:
  - that may reasonably be requested by the Corporation to determine whether the Stockholder Nominee would be independent under Section 3.3 and otherwise qualifies as independent under the rules of the principal national securities exchange on which the outstanding capital stock of the Corporation is traded;
  - that could be material to a reasonable stockholder's understanding of the independence, or lack thereof, of such Stockholder Nominee;
  - that would be required to satisfy the requirements for qualification of directors under applicable foreign regulations; or
  - (that may reasonably be requested by the Corporation to determine the eligibility of such Stockholder Nominee to be included in the Corporation's proxy materials pursuant to this Section 2.16 or to serve as a director of the Corporation; and
- the Corporation may require the Eligible Stockholder to furnish any other information that may reasonably be requested by the Corporation to verify the Eligible Stockholder's continuous Ownership of the Required Shares for the Minimum Holding Period and through the date of the annual meeting.

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

Proposed Section 2.16(h)

Proposed Section 2.16(h) provides that an Eligible Stockholder may provide, at its option, to the Secretary, at the time the Notice of Proxy Access Nomination is provided, a written statement, not to exceed 500 words, in support of its Stockholder Nominee(s)' candidacy (a "Supporting Statement"). Only one Supporting Statement may be submitted by an Eligible Stockholder (including any group of stockholders together constituting an Eligible Stockholder) in support of its Stockholder Nominee(s). Notwithstanding anything to the contrary contained in Section 2.16, the Corporation may omit from its proxy materials any information or Supporting Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law, rule or regulation. The Exchange notes proposed Section 2.16(h) allows Cboe 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, rule or regulation.

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<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

Proposed Section 2.16(i)

Pursuant to proposed Section 2.16(i), each Eligible Stockholder or Stockholder Nominee must promptly notify Cboe's Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee, as the case may be, to Cboe or its stockholders that when provided was not, or thereafter 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. An Eligible Stockholder shall also provide immediate notice to the Corporation if the Eligible Stockholder ceases to own any of the Required Shares prior to the date of the annual meeting. In addition, any person providing any information to the Corporation pursuant to Section 2.16(i) shall be required to update or supplement such information, if necessary, so that all such information shall be true and correct as of the (i) as of the record date for determining the stockholders entitled to receive notice of the meeting and (ii) as of the date that is ten (10) business days prior to the meeting (or any postponement, adjournment or recess thereof), and such update shall be received by the Secretary at the principal executive offices of the Corporation (A) not later than five (5) business days after the record date for determining the stockholders entitled to receive notice of such meeting (in the case of an update required to be made under clause (i)) and (B) not later than seven (7) business days prior to the date for the meeting, if practicable, or, if not practicable, on the first practicable date prior to the meeting or any adjournment, recess

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to state any material fact necessary in order to make the statements therein not false or misleading.

or postponement thereof (in the case of an update required to be made pursuant to clause (ii)).

This provision further makes clear that providing any such notification, update or supplement, shall not be deemed to cure any defect in any previously provided information or communications or limit the remedies available to the Corporation relating to such defect (including the right to omit a Stockholder Nominee from its proxy materials). This provision is intended to protect Cboe's stockholders by requiring an Eligible Stockholder or Stockholder Nominee to give Cboe notice of information previously provided that is materially untrue. Cboe may then decide what action to take with respect to such defect, which may include, as noted above, omitting the relevant Stockholder Nominee from its proxy materials.

Proposed Section 2.16(j)

Proposed Section 2.16(j) provides that Cboe shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the proxy access nomination shall be disregarded and no vote on such Stockholder Nominee will occur, even if Cboe has received proxies in respect of the vote. These circumstances occur when the Stockholder Nominee:

- would not be an independent director under Section 3.3, under the rules of the principal national securities exchange on which the outstanding capital stock of the Corporation is traded, any applicable rules of the Securities and Exchange Commission and any publicly disclosed standards used by the Board in determining and disclosing independence of the

Corporation's directors, in each case as determined by the Board in its sole discretion;

- would not meet the audit committee independence requirements under the rules of the principal national securities exchange on which the outstanding capital stock of the Corporation is traded;
- if elected, intended to resign as a director of the Corporation prior to the end of the full term for which he or she is standing for election;
- is or has been subject to any statutory disqualification under Section 3(a)(39) of the Act;
- is or has been subject to disqualification under 17 CFR § 1.63;
- if elected, would cause the Corporation to be in violation of these Bylaws, the Certificate of Incorporation, the rules of the principal national securities exchange on which the outstanding capital stock of the Corporation is traded, or any applicable law, rule or regulation;
- is or has been, within the past three years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914;
- 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 10 years;
- 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;

- has provided any information to the Corporation or its stockholders that was untrue in any material respect or that omitted to state a material fact necessary to make the statements made, in light of the circumstances in which they were made, not misleading; or
- breaches or fails, or the Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the CGM Bylaws, including, but not limited to, Section 2.16 and any agreement, representation or undertaking required by Section 2.16.

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

Proposed Section 2.16(k)

Proposed Section 2.16(k) provides that notwithstanding anything to the contrary contained in the CGM Bylaws, if (i) a Stockholder Nominee and/or the applicable Eligible Stockholder breaches any of its agreements or representations or fails to comply with any of its obligations under this Section 2.16 or (ii) a Stockholder Nominee otherwise becomes ineligible for inclusion in the Corporation's proxy materials pursuant to this Section 2.16, or dies, becomes disabled or otherwise becomes ineligible or unavailable for election at the annual meeting, in each case as determined by the Board or the chairman of the meeting, (1) the Corporation may omit or, to the extent feasible, remove the information concerning such Stockholder Nominee and the related Supporting Statement from its proxy materials and/or otherwise communicate to its stockholders that such Stockholder Nominee will not be eligible for election at the annual

meeting, (2) the Corporation shall not be required to include in its proxy materials any successor or replacement nominee proposed by the applicable Eligible Stockholder or any other Eligible Stockholder and (3) the chairman of the meeting shall declare such nomination to be invalid and such nomination shall be disregarded, notwithstanding that proxies in respect of such vote may have been received by the Corporation. Cboe believes this provision protects the Corporation 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.

Proposed Section 2.16(l)

Proposed Section 2.16(l) states that the following Stockholder Nominees who are included in the Corporation's proxy materials for a particular annual meeting of stockholders will be ineligible to be a Stockholder Nominee for the next two annual meetings: (i) Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or (ii) Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election. For the avoidance of doubt, Section 2.16(l) also clarifies that this provision shall not prevent any stockholder from nominating any person to the Board pursuant to Section 2.11 of the CGM Bylaws. Section 2.16(l) will save the Corporation and its stockholders the time and expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but ultimately did not stand for election or receive a substantial amount of votes.

After the next two annual meetings, these Stockholder Nominees would again be eligible for nomination through the proxy access provisions of the Bylaws.

Proposed Section 2.16(m)

Proposed Section 2.16(m) provides that notwithstanding the provisions of proposed Section 2.16, if the Eligible Stockholder providing notice (or a qualified representative of the Eligible Stockholder) does not appear in person (including virtually, in the case of a meeting held solely by means of remote communication) at the stockholder meeting to present the nomination of such Stockholder Nominee, such proposed nomination shall not be presented by the Corporation and shall not be transacted, notwithstanding that proxies in respect of such vote may have been received by the Corporation. For purposes of this Section 2.16, to be considered a qualified representative of the Eligible Stockholder providing notice, a person must be a duly authorized officer, manager or partner of such stockholder or must be authorized by a writing executed by such stockholder or an electronic transmission delivered by such stockholder to act for such stockholder as proxy at the meeting and such writing or electronic transmission, or a reliable reproduction of the writing or electronic transmission, must be provided to the Corporation at least twenty-four (24) hours prior to the meeting.

Proposed Section 2.16(n)

In case there are matters involving a proxy access nomination that are open to interpretation, proposed Section 2.16(n) 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 make all determinations deemed necessary or

advisable in connection with proposed Section 2.16 as to any person, facts or circumstances. In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be final, conclusive and binding on the Corporation, the stockholders and all other parties. While Cboe has attempted to implement a clear, detailed and thorough proxy access provision, there may be matters about future proxy access nominations that are open to interpretation. In these cases, Cboe believes it is reasonable and necessary to designate an arbiter to make final decisions on these points and that the Board is best-suited to act as that arbiter.

#### Proposed Section 2.16(o)

For the avoidance of doubt, proposed Section 2.16(o) states that the proxy access provisions outlined in proposed Section 2.16 shall be the exclusive means for stockholders to include nominees in the Corporation's proxy materials. Stockholders may, of course, continue to propose nominees through other means, but the Board will have final authority to determine whether to include those nominees in the Corporation's proxy materials.

#### Revisions to Other Sections of the Bylaws

Cboe also proposes to make conforming changes to Sections 2.10 and 2.11 to provide clarifications and prevent confusion. First, the Exchange proposes to add a reference to Section 2.11 and proposed Section 2.16 to clarify the exact bylaw provisions relating to stockholder nominees. Next, the Exchange proposes to amend Section 2.11. Section 2.11 currently describes the business that may be properly brought before an annual meeting of stockholders and the methods by which nominations of persons for

election to the Board may be made at an annual meeting of stockholders. Cboe proposes to add proxy access nominations (i.e., reference to Section 2.16) to the list of methods. Current Section 2.11(a)(i) also states, among other things, that compliance with Section 2.11 shall be the exclusive means for a stockholder to propose business or director nominations before an annual meeting stockholders. The Exchange proposes to clarify that Sections 2.11 and 2.16 are the exclusive means for a stockholder to make a director nomination.

(b) Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>16</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>17</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In light of a shareholder proposal received from a stockholder, Cboe is proposing changes to its Bylaws to implement proxy access. The Exchange believes that this filing furthers the objectives of Section 6(b)(5) of the Act because the proposed rule change would be consistent with and facilitate a governance and regulatory structure that is

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<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. Particularly, the Exchange believes that, by permitting an Eligible Stockholder of Cboe that meets the stated requirements to nominate directors and have its nominees included in Cboe's annual meeting proxy statement, the proposed rule change strengthens the corporate governance of the Exchange's ultimate parent company, which is beneficial to both investors and the public interest.

Additionally, the procedural requirements are designed to help protect investors by stating clearly and explicitly the procedures stockholders must follow in order to submit a proper proxy access nomination. The informational requirements are designed to enhance investor protection by helping to ensure among other things, that the Corporation and its stockholders have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees comply with applicable laws, regulations and other requirements. Moreover, as noted above, proxy access has become commonplace among companies and the Exchange believes its core provisions are common among companies that have adopted proxy access, including the parent companies of other exchanges that have adopted similar proxy access provisions.<sup>18</sup>

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<sup>18</sup> See Securities Exchange Release No. 79357 (November 18, 2016) 81 FR 85283 (November 25, 2016) (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). See also Securities Exchange Release

Finally, the remaining changes to existing provisions of the CGM Bylaws are clarifying in nature, and they enhance investor protection and the public interest by preventing confusion with respect to the operation of the Bylaw provisions.

**Item 4. Self-Regulatory Organization’s Statement on Burden on Competition**

Because the proposed rule change relates to the governance of the Corporation and not to the operations of the Exchange, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issue or have any impact on competition; rather, adoption of a proxy access bylaw by the Corporation is intended to enhance corporate governance and accountability to stockholders.

**Item 5. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others**

The Exchange neither solicited nor received comments on the proposed rule change.

**Item 6. Extension of Time Period for Commission Action**

The Exchange does not consent to an extension of the time period for the Commission action on the proposed rule change specified in Section 19(b)(2) of the Act.<sup>19</sup>

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

Not applicable.

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No. 77782 (May 6, 2016) 81 FR 29600 (May 12, 2016) (SR–NYSE–2016–14; SR–NYSEArca–2016–25; SR–NYSEMKT–2016–20).

<sup>19</sup> 15 U.S.C. 78s(b)(2).

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

The proposed rule change is not based on a rule either of another self-regulatory organization or of the Commission. While CGM's proposed proxy access provision is not based on the rules of another self-regulatory organization or of the Commission, the Exchange notes that Nasdaq Inc. and Intercontinental Exchange, Inc., which are both holding companies for multiple national securities exchanges, previously amended their Bylaws to adopt a proxy access provisions.<sup>20</sup> While Cboe drafted its own proxy access provision reflecting its own approach, it notes that many of the procedural and informational requirements in its proposed provision are the same as or similar to those in Nasdaq Inc.'s and/or Intercontinental Exchange, Inc.'s proxy access provisions. Particularly, the Exchange believes the proxy access provisions in Nasdaq Inc.'s and/or Intercontinental Exchange, Inc.'s Bylaws are substantively similar to, and not materially different than, the Exchange's proposed proxy access provision.

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

Not applicable.

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

Not applicable.

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<sup>20</sup> See Securities Exchange Release No. 79357 (November 18, 2016) 81 FR 85283 (November 25, 2016) (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). See also Securities Exchange Release No. 77782 (May 6, 2016) 81 FR 29600 (May 12, 2016) (SR-NYSE-2016-14; SR-NYSEArca-2016-25; SR-NYSEMKT-2016-20).

**Item 11.      Exhibits**

Exhibit 1.      Completed Notice of Proposed Rule Change for publication in the  
Federal Register.

Exhibit 5.      Proposed rule text.

EXHIBIT 1**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34- ; File No. SR-CboeEDGX-2021-021]

[Insert date]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing of a Proposed Rule Change to Amend the Sixth Amended and Restated Bylaws of its Parent Corporation, Cboe Global Markets, Inc.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on [insert date], Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX” ) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) is filing with the Securities and Exchange Commission (the “Commission”) a proposed rule change with respect to amendments to the Sixth Amended and Restated Bylaws (the “CGM Bylaws”) of its parent corporation, Cboe Global Markets, Inc. (“Cboe” or “Corporation”). The text of the proposed rule change is provided in Exhibit 5.

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

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

The text of the proposed rule change is also available on the Exchange's website ([http://markets.cboe.com/us/options/regulation/rule\\_filings/edgx/](http://markets.cboe.com/us/options/regulation/rule_filings/edgx/)), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

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

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

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

#### **1. Purpose**

Cboe has received a stockholder proposal submitted pursuant to Rule 14a-8 under the Act<sup>3</sup> which requested that the CGM Board take steps to implement a "proxy access" bylaw provision. In general, proxy access bylaws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company's proxy materials. Such provisions have become common among S&P 500 companies.<sup>4</sup> Cboe has determined to take the stockholder's requested steps to implement proxy access. Accordingly, the Exchange now proposes to make these changes by adopting new Section 2.16 of the

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<sup>3</sup> See 17 CFR 240.14a-8, which requires companies that are subject to the federal proxy rules to include shareholder proposals in companies' proxy statements to shareholders, subject to certain procedural and substantive requirements.

<sup>4</sup> More than 75% of S&P 500 companies have adopted proxy access bylaw provisions.

CGM Bylaws and making certain conforming changes to current Sections 2.10 and 2.11 of the CGM Bylaws, all of which are described further below.

In developing its proposal, Cboe generally tried to balance the relative weight of arguments for and against proxy access provisions. On the one hand, Cboe recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are presented in a company's proxy statement. On the other hand, Cboe's proposed proxy access provision includes certain procedural requirements that are designed to help ensure, among other things, that Cboe and its stockholders will have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees will comply with applicable laws, regulations and other requirements. Additionally, the Exchange notes the proposed terms are common among companies that have adopted proxy access. The Exchange also notes that the parent companies of other exchanges have adopted substantively similar proxy access provisions and the Exchange does not believe such provisions are materially different than the Exchange's proposal.<sup>5</sup>

The proposed rule change would add new Section 2.16 to the CGM Bylaws. Section 2.16 would permit a stockholder, or group of up to 20 stockholders, to nominate director nominees for the Cboe Board, so long as the stockholder(s) have owned at least three percent of Cboe's outstanding shares of capital stock continuously for at least three

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<sup>5</sup> See Securities Exchange Release No. 79357 (November 18, 2016) 81 FR 85283 (November 25, 2016) (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). See also Securities Exchange Release No. 77782 (May 6, 2016) 81 FR 29600 (May 12, 2016) (SR-NYSE-2016-14; SR-NYSEArca-2016-25; SR-NYSEMKT-2016-20).

years. The director nominees would be included in Cboe's annual meeting proxy materials. The proposed provision would limit the number of proposed director nominees to the greater of (i) two or (ii) 20% of the number of Cboe directors in office (rounded down to the nearest whole number, but no less than two) provided that the stockholder(s) and nominee(s) satisfy the other conditions specified in the CGM Bylaws as described further below.

Proposed Section 2.16(a)

The Exchange first proposes to amend the CGM Bylaws to, as set forth in the first sentence of proposed Section 2.16(a), require the Corporation to include in its proxy statement, its form proxy and any ballot distributed at the stockholder meeting, the name of, and certain Required Information<sup>6</sup> about, any person nominated for election (the "Stockholder Nominee") to the Board by a stockholder or group of stockholders (the "Eligible Stockholder")<sup>7</sup> that satisfies the requirements set forth in the proxy access provision of CGM Bylaws.<sup>8</sup> Proposed Section 2.16(a) will also make clear that Cboe is able to solicit against any Stockholder Nominee or include in its proxy materials the Corporation's own statements or other information relating to any Eligible Stockholder or

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

<sup>7</sup> As used throughout the CGM Bylaws, the term "Eligible Stockholder" includes each member of a stockholder group that submits a proxy access nomination to the extent the context requires.

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

Stockholder Nominee, including any information provided to the Corporation pursuant to Section 2.16. This provision clarifies that just because Cboe must include a Stockholder Nominee in its proxy materials if the proxy access provisions are satisfied, Cboe does not necessarily have to support that nominee.

Proposed Section 2.16(b)

Proposed Section 2.16(b) will provide that in order to utilize this provision, the Eligible Stockholder must expressly request at the time of providing a required notice to the Corporation of the proxy access nomination (the “Notice of Proxy Access Nomination”) to have its nominee included in the Corporation’s proxy materials. Proposed Section 2.16(b) also establishes the deadline for a timely Notice of Proxy Access Nomination. Specifically, such a notice must be delivered to the Cboe’s Secretary at the principal executive offices of the Corporation not earlier than the open of business on the one hundred fiftieth (150th) day and not later than the close of business on the one hundred twentieth (120th) day prior to the first anniversary of the date that Cboe first distributed its proxy statement to stockholders for the previous year’s annual meeting of stockholders provided, however, that in the event the annual meeting is more than thirty (30) days before or after the anniversary date of the prior year’s annual meeting, or if no annual meeting was held in the preceding year, to be timely, the Notice of Proxy Access Nomination must be received at the principal executive offices of the Corporation no earlier than one hundred fifty (150) days before such annual meeting and no later than the later of one hundred twenty (120) days before such annual meeting or the tenth (10th) day following the day on which public announcement (as defined in Section 2.11) of the date of such meeting is first made by the Corporation. Further

Section 2.16 will provide that in no event shall any adjournment or postponement of an annual meeting or the announcement thereof commence a new time period (or extend any time period) for the giving of a Notice of Proxy Access Nomination as described above. Cboe believes this notice period will provide stockholders an adequate window to submit nominees via proxy access, while also providing the Corporation adequate time to diligence a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.

Proposed Section 2.16(c)

Proposed Section 2.16(c) specifies that the maximum number (“the Permitted Number”) of Stockholder Nominees nominated by all Eligible Stockholders that will be included in Cboe’s proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two or 20% 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”). 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 Permitted Number of Stockholder Nominees included in Cboe’s proxy materials shall be calculated based on the number of directors in office as so reduced. In addition, the Permitted Number shall be reduced by (i) the number of individuals who will be included in the Corporation’s proxy materials as director nominees recommended by the Board pursuant to an agreement, arrangement or other understanding with a stockholder or group of

stockholders (other than any such agreement, arrangement or understanding entered into in connection with an acquisition of stock from the Corporation by such stockholder or group of stockholders) and/or (ii) the number of directors in office as of the Final Proxy Access Nomination Date who were included in the Corporation's proxy materials as Stockholder Nominees for any of the two preceding annual meetings of stockholders (including any persons counted as Stockholder Nominees pursuant to the immediately succeeding sentence) and whose reelection at the upcoming annual meeting is being recommended by the Board. Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision of the CGM Bylaws whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the Permitted Number of Stockholder Nominees has been reached. Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to the proxy access provision exceeds the Permitted Number of nominees allowed. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders pursuant to Section 2.16 exceeds the Permitted Number of nominees allowed, 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 Permitted Number is reached, going in order of the amount (largest to smallest) of shares of Cboe's outstanding capital stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Cboe. If the Permitted 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, then the next highest ranking Stockholder Nominee who meets the requirements of Section 2.16 from each Eligible Stockholder will be selected for inclusion in the Corporation's proxy materials, and this process will continue as many times as necessary, following the same order each time, until the Permitted Number is reached. Additionally, notwithstanding anything to the contrary contained in proposed Section 2.16, Cboe will not be required to include any Stockholder Nominees in its proxy materials pursuant to Section 2.16 for any meeting of stockholders for which the Secretary receives a notice (whether or not subsequently withdrawn) that the Eligible Stockholder or any other stockholder intends to nominate one or more persons for election to the Board pursuant to Section 2.11 of the CGM Bylaws. Cboe believes it is reasonable to limit the Board seats available to proxy access nominees and to establish procedures for selecting candidates if the nominee limit is exceeded. The limitation on Board seats available to proxy access nominees ensures that proxy access cannot be used to take over the entire Board, which is not the stated purpose of proxy access campaigns. The procedures for selecting candidates if the nominee limit is exceeded establish clear and rational guidelines for an orderly nomination process to avoid the Corporation having to make arbitrary judgments among candidates.

Proposed Section 2.16(d)

Proposed Section 2.16(d) defines who may qualify as an “Eligible Stockholder”.

Particularly, an Eligible Stockholder is a stockholder or group of no more than 20 stockholders<sup>9</sup> that (i) has owned continuously for at least three years (the “Minimum Holding Period”) a number of shares of capital stock of the Corporation that represents at least three percent of the outstanding shares of capital stock of the Corporation as of the date the Notice of Proxy Access Nomination is received (the “Required Shares”), (ii) continues to own the Required Shares through the date of the annual meeting and (iii) meets all other requirements of proposed Section 2.16. Cboe believes it is reasonable to require each member of a nominating group to provide such information so that both the Corporation and its stockholders are fully informed about the entire group making the proxy access nomination. As such, Section 2.16(d) further makes clear that whenever the Eligible Stockholder consists of a group of stockholders (including a group of funds that are part of the same Qualifying Fund Group), (i) each provision in Section 2.16 that requires the Eligible Stockholder to provide any written statements, representations, undertakings, agreements or other instruments or to meet any other conditions shall be deemed to require each stockholder (including each individual fund) that is a member of such group to provide such statements, representations, undertakings, agreements or other instruments and to meet such other conditions (except that the members of such group may aggregate the shares that each member has owned continuously for the Minimum

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<sup>9</sup> For this purpose, any two or more funds that are part of the same Qualifying Fund Group may be counted as one stockholder. A “Qualifying Fund Group” means two or more funds that are (i) under common management and investment control, (ii) under common management and funded primarily by the same employer or (iii) a “group of investment companies” as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Corporation Act of 1940, as amended.

Holding Period in order to meet the three percent ownership requirement of the “Required Shares” definition) and (ii) a breach of any obligation, agreement or representation under Section 2.16 by any member of such group shall be deemed a breach by the Eligible Stockholder. No stockholder may be a member of more than one group of stockholders constituting an Eligible Stockholder with respect to any annual meeting.

Proposed Section 2.16(e)

Proposed Section 2.16(e) clarifies, for the avoidance of doubt, how “ownership” will be defined for purposes of meeting the ownership requirements of the Required Shares. Specifically, an Eligible Stockholder shall be deemed to “own” only those outstanding shares of Cboe’s capital 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: that are (1) sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed; (2) 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 (3) subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar instrument or 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 Cboe’s outstanding capital stock, in any such case which instrument or agreement has, or is intended to have, the purpose or effect of: (A) 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 (B) hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or its affiliates.

Further, a stockholder shall “own” shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder’s ownership of shares shall be deemed to continue during any period in which (i) the stockholder has loaned such shares provided that the stockholder has the power to recall such loaned shares on five (5) business days’ notice and includes in the Notice of Proxy Access Nomination an agreement that it will (1) recall such loaned shares upon being notified that any of its Stockholder Nominees will be included in the Corporation’s proxy materials and (2) will hold such shares through the date of the annual meeting or (ii) 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. Section 2.16(e) also clarifies that the terms “owned,” “owning” and other variations of the word “own” shall have correlative meanings. Whether outstanding shares of Cboe’s capital stock are “owned” for these purposes shall be determined by the Board. For purposes of Section 2.16, the term “affiliate” or “affiliates” shall have the meaning ascribed thereto under the rules and regulations of the Act.<sup>10</sup> An

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<sup>10</sup> Pursuant to Rule 12b-2 under the Act, “[a]n ‘affiliate’ of, or a person ‘affiliated’ with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.” 17 CFR 240.12b-2. Further, “[t]he term ‘control’ (including the terms ‘controlling,’ ‘controlled by’ and ‘under common control with’) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the

Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of proposed Section 2.16. In proposing the Required Shares and the Minimum Holding Period, Cboe seeks to ensure that the Eligible Stockholder has had a sufficient stake in the Corporation for a sufficient amount of time and is not pursuing a short-term agenda.

Proposed Section 2.16(f)

Proposed Section 2.16(f) sets forth the information that an Eligible Stockholder must provide to Cboe's Corporate Secretary in writing within the deadline discussed above in order to make a proxy access nomination. This information includes:

- a statement by the Eligible Stockholder (1) setting forth and certifying as to the number of shares it owns and has owned continuously for the Minimum Holding Period and (2) agreeing to continue to own the Required Shares through the date of the annual meeting;
- one or more written statements from the record holder of the Required Shares (and from each intermediary through which the Required 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 Cboe's Secretary at the principal executive offices of the Corporation, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five (5) business days after the record date for the annual meeting, written

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ownership of voting securities, by contract, or otherwise.” 17 CFR 240.12b-2.

statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date;

- a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a-18 under the Act<sup>11</sup>;
- the information, representations and agreements and other documents that are required to be set forth in or included with a stockholder's notice of nomination given pursuant to Section 2.11 of the CGM Bylaws;
- the written consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected;
- a representation that the Eligible Stockholder:
  - acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of Cboe, and does not presently have such intent;
  - has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s);
  - 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

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<sup>11</sup> See 17 CFR 240.14n-101 and 17 CFR 240.14a-18, which generally require a Nominating Stockholder to provide notice to the Corporation of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to the Corporation.

individual as a director at the annual meeting, other than its  
Stockholder Nominee(s) or a nominee of the Board;

- has not distributed and will not distribute to any stockholder of the Corporation any form of proxy for the annual meeting other than the form distributed by the Corporation;
- has complied and will comply with all laws, rules and regulations applicable to solicitations and the use, if any, of soliciting material in connection with the annual meeting, and
- has provided and will provide facts, statements and other information in all communications with Cboe and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;
- 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 the stockholders of the Corporation or out of the information that the Eligible Stockholder provided to the Corporation;
  - indemnify and hold harmless the Corporation and each of its Directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or

- investigative, against the Corporation or any of its Directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to this Section 2.16 or any solicitation or other activity in connection therewith; and
- file with the Securities and Exchange Commission any solicitation or other communication with the stockholders of the Corporation relating to the meeting at which its Stockholder Nominee(s) 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 for such solicitation or other communication under Regulation 14A of the Act;
  - 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 receive communications, notices and inquiries from the Corporation and to act on behalf of all members of the group with respect to all matters relating to the nomination under this Section 2.16 (including withdrawal of the nomination);
  - in the case of a nomination by an Eligible Stockholder consisting of a group of stockholders in which two or more funds are intended to be treated as one stockholder for purposes of qualifying as an Eligible Stockholder, documentation reasonably satisfactory to the Corporation that demonstrates that the funds are part of the same Qualifying Fund Group; and

- a written representation and agreement by the Stockholder Nominee that such person:
  - will act as a representative of all of the stockholders of the Corporation while serving as a director;
  - will provide facts, statements and other information in all communications with the Corporation and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading);
  - is not and will not become a party to (i) any compensatory, payment or other financial agreement, arrangement or understanding with any person or entity other than the Corporation in connection with service or action as a director of the Corporation that has not been disclosed to the Corporation, (ii) any Voting Commitment that has not been disclosed to the Corporation or (iii) any Voting Commitment<sup>12</sup> that could reasonably be expected to limit or interfere with the Stockholder Nominee's ability to comply, if elected as a director of the Corporation, with its fiduciary duties under applicable law; and

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<sup>12</sup> A "Voting Commitment" is defined as any agreement, arrangement or understanding with any person or entity as to how the Stockholder Nominee would vote or act on any issue or question as a director.

- will abide by and comply with the CGM Bylaws, the Certificate of Incorporation and applicable policies of the Corporation including all applicable publicly disclosed corporate governance, conflict of interest, confidentiality and stock ownership and trading policies and guidelines of the Corporation, as well as the applicable provisions of the rules and regulations of the Securities and Exchange Commission and any stock exchange applicable to the Corporation.

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

Proposed Section 2.16(g)

Proposed Section 2.16(g) establishes additional information the Stockholder Nominee must provide. Particularly:

- the Stockholder Nominee(s) must submit all completed and signed questionnaires required of directors and officers of the Corporation;
- the Corporation may require any proposed Stockholder Nominee to furnish any information:
  - that may reasonably be requested by the Corporation to determine whether the Stockholder Nominee would be independent under

Section 3.3 and otherwise qualifies as independent under the rules of the principal national securities exchange on which the outstanding capital stock of the Corporation is traded;

- that could be material to a reasonable stockholder's understanding of the independence, or lack thereof, of such Stockholder Nominee;
  - that would be required to satisfy the requirements for qualification of directors under applicable foreign regulations; or
  - (that may reasonably be requested by the Corporation to determine the eligibility of such Stockholder Nominee to be included in the Corporation's proxy materials pursuant to this Section 2.16 or to serve as a director of the Corporation; and
- the Corporation may require the Eligible Stockholder to furnish any other information that may reasonably be requested by the Corporation to verify the Eligible Stockholder's continuous Ownership of the Required Shares for the Minimum Holding Period and through the date of the annual meeting.

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

Proposed Section 2.16(h)

Proposed Section 2.16(h) provides that an Eligible Stockholder may provide, at its option, to the Secretary, at the time the Notice of Proxy Access Nomination is provided, a written statement, not to exceed 500 words, in support of its Stockholder Nominee(s)' candidacy (a "Supporting Statement"). Only one Supporting Statement may be submitted by an Eligible Stockholder (including any group of stockholders together constituting an Eligible Stockholder) in support of its Stockholder Nominee(s). Notwithstanding anything to the contrary contained in Section 2.16, the Corporation may omit from its proxy materials any information or Supporting Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law, rule or regulation. The Exchange notes proposed Section 2.16(h) allows Cboe to comply with Rule 14a-9 under the Act<sup>13</sup> and to protect its stockholders from information that is materially untrue or that violates any law, rule or regulation.

Proposed Section 2.16(i)

Pursuant to proposed Section 2.16(i), each Eligible Stockholder or Stockholder Nominee must promptly notify Cboe's Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee, as the case may be, to Cboe or its stockholders that when provided was not, or thereafter ceases

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<sup>13</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.

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. An Eligible Stockholder shall also provide immediate notice to the Corporation if the Eligible Stockholder ceases to own any of the Required Shares prior to the date of the annual meeting. In addition, any person providing any information to the Corporation pursuant to Section 2.16(i) shall be required to update or supplement such information, if necessary, so that all such information shall be true and correct as of the (i) as of the record date for determining the stockholders entitled to receive notice of the meeting and (ii) as of the date that is ten (10) business days prior to the meeting (or any postponement, adjournment or recess thereof), and such update shall be received by the Secretary at the principal executive offices of the Corporation (A) not later than five (5) business days after the record date for determining the stockholders entitled to receive notice of such meeting (in the case of an update required to be made under clause (i)) and (B) not later than seven (7) business days prior to the date for the meeting, if practicable, or, if not practicable, on the first practicable date prior to the meeting or any adjournment, recess or postponement thereof (in the case of an update required to be made pursuant to clause (ii)).

This provision further makes clear that providing any such notification, update or supplement, shall not be deemed to cure any defect in any previously provided information or communications or limit the remedies available to the Corporation relating to such defect (including the right to omit a Stockholder Nominee from its proxy materials). This provision is intended to protect Cboe's stockholders by requiring an

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

Proposed Section 2.16(j)

Proposed Section 2.16(j) provides that Cboe shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the proxy access nomination shall be disregarded and no vote on such Stockholder Nominee will occur, even if Cboe has received proxies in respect of the vote. These circumstances occur when the Stockholder Nominee:

- would not be an independent director under Section 3.3, under the rules of the principal national securities exchange on which the outstanding capital stock of the Corporation is traded, any applicable rules of the Securities and Exchange Commission and any publicly disclosed standards used by the Board in determining and disclosing independence of the Corporation's directors, in each case as determined by the Board in its sole discretion;
- would not meet the audit committee independence requirements under the rules of the principal national securities exchange on which the outstanding capital stock of the Corporation is traded;
- if elected, intended to resign as a director of the Corporation prior to the end of the full term for which he or she is standing for election;

- is or has been subject to any statutory disqualification under Section 3(a)(39) of the Act;
- is or has been subject to disqualification under 17 CFR § 1.63;
- if elected, would cause the Corporation to be in violation of these Bylaws, the Certificate of Incorporation, the rules of the principal national securities exchange on which the outstanding capital stock of the Corporation is traded, or any applicable law, rule or regulation;
- is or has been, within the past three years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914;
- 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 10 years;
- 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;
- has provided any information to the Corporation or its stockholders that was untrue in any material respect or that omitted to state a material fact necessary to make the statements made, in light of the circumstances in which they were made, not misleading; or
- breaches or fails, or the Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the CGM Bylaws, including, but not limited to, Section 2.16 and any agreement, representation or undertaking required by Section 2.16.

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

Proposed Section 2.16(k)

Proposed Section 2.16(k) provides that notwithstanding anything to the contrary contained in the CGM Bylaws, if (i) a Stockholder Nominee and/or the applicable Eligible Stockholder breaches any of its agreements or representations or fails to comply with any of its obligations under this Section 2.16 or (ii) a Stockholder Nominee otherwise becomes ineligible for inclusion in the Corporation's proxy materials pursuant to this Section 2.16, or dies, becomes disabled or otherwise becomes ineligible or unavailable for election at the annual meeting, in each case as determined by the Board or the chairman of the meeting, (1) the Corporation may omit or, to the extent feasible, remove the information concerning such Stockholder Nominee and the related Supporting Statement from its proxy materials and/or otherwise communicate to its stockholders that such Stockholder Nominee will not be eligible for election at the annual meeting, (2) the Corporation shall not be required to include in its proxy materials any successor or replacement nominee proposed by the applicable Eligible Stockholder or any other Eligible Stockholder and (3) the chairman of the meeting shall declare such nomination to be invalid and such nomination shall be disregarded, notwithstanding that proxies in respect of such vote may have been received by the Corporation. Cboe believes this provision protects the Corporation 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.

Proposed Section 2.16(l)

Proposed Section 2.16(l) states that the following Stockholder Nominees who are included in the Corporation's proxy materials for a particular annual meeting of stockholders will be ineligible to be a Stockholder Nominee for the next two annual meetings: (i) Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or (ii) Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election. For the avoidance of doubt, Section 2.16(l) also clarifies that this provision shall not prevent any stockholder from nominating any person to the Board pursuant to Section 2.11 of the CGM Bylaws. Section 2.16(l) will save the Corporation and its stockholders the time and expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but ultimately did not stand for election or receive a substantial amount of votes. After the next two annual meetings, these Stockholder Nominees would again be eligible for nomination through the proxy access provisions of the Bylaws.

Proposed Section 2.16(m)

Proposed Section 2.16(m) provides that notwithstanding the provisions of proposed Section 2.16, if the Eligible Stockholder providing notice (or a qualified representative of the Eligible Stockholder) does not appear in person (including virtually, in the case of a meeting held solely by means of remote communication) at the stockholder meeting to present the nomination of such Stockholder Nominee, such

proposed nomination shall not be presented by the Corporation and shall not be transacted, notwithstanding that proxies in respect of such vote may have been received by the Corporation. For purposes of this Section 2.16, to be considered a qualified representative of the Eligible Stockholder providing notice, a person must be a duly authorized officer, manager or partner of such stockholder or must be authorized by a writing executed by such stockholder or an electronic transmission delivered by such stockholder to act for such stockholder as proxy at the meeting and such writing or electronic transmission, or a reliable reproduction of the writing or electronic transmission, must be provided to the Corporation at least twenty-four (24) hours prior to the meeting.

Proposed Section 2.16(n)

In case there are matters involving a proxy access nomination that are open to interpretation, proposed Section 2.16(n) 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 make all determinations deemed necessary or advisable in connection with proposed Section 2.16 as to any person, facts or circumstances. In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be final, conclusive and binding on the Corporation, the stockholders and all other parties. While Cboe has attempted to implement a clear, detailed and thorough proxy access provision, there may be matters about future proxy access nominations that are open to interpretation. In these cases, Cboe believes it is reasonable and necessary to

designate an arbiter to make final decisions on these points and that the Board is best-suited to act as that arbiter.

#### Proposed Section 2.16(o)

For the avoidance of doubt, proposed Section 2.16(o) states that the proxy access provisions outlined in proposed Section 2.16 shall be the exclusive means for stockholders to include nominees in the Corporation's proxy materials. Stockholders may, of course, continue to propose nominees through other means, but the Board will have final authority to determine whether to include those nominees in the Corporation's proxy materials.

#### Revisions to Other Sections of the Bylaws

Cboe also proposes to make conforming changes to Sections 2.10 and 2.11 to provide clarifications and prevent confusion. First, the Exchange proposes to add a reference to Section 2.11 and proposed Section 2.16 to clarify the exact bylaw provisions relating to stockholder nominees. Next, the Exchange proposes to amend Section 2.11. Section 2.11 currently describes the business that may be properly brought before an annual meeting of stockholders and the methods by which nominations of persons for election to the Board may be made at an annual meeting of stockholders. Cboe proposes to add proxy access nominations (i.e., reference to Section 2.16) to the list of methods. Current Section 2.11(a)(i) also states, among other things, that compliance with Section 2.11 shall be the exclusive means for a stockholder to propose business or director nominations before an annual meeting stockholders. The Exchange proposes to clarify that Sections 2.11 and 2.16 are the exclusive means for a stockholder to make a director nomination.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>14</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>15</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In light of a shareholder proposal received from a stockholder, Cboe is proposing changes to its Bylaws to implement proxy access. The Exchange believes that this filing furthers the objectives of Section 6(b)(5) of the Act because the proposed rule change would be consistent with and facilitate a governance and regulatory structure that is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. Particularly, the Exchange believes that, by permitting an Eligible Stockholder of Cboe that meets the stated requirements to nominate directors and have its

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<sup>14</sup> 15 U.S.C. 78f(b).

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

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

Additionally, the procedural requirements are designed to help protect investors by stating clearly and explicitly the procedures stockholders must follow in order to submit a proper proxy access nomination. The informational requirements are designed to enhance investor protection by helping to ensure among other things, that the Corporation and its stockholders have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees comply with applicable laws, regulations and other requirements. Moreover, as noted above, proxy access has become commonplace among companies and the Exchange believes its core provisions are common among companies that have adopted proxy access, including the parent companies of other exchanges that have adopted similar proxy access provisions.<sup>16</sup>

Finally, the remaining changes to existing provisions of the CGM Bylaws are clarifying in nature, and they enhance investor protection and the public interest by preventing confusion with respect to the operation of the Bylaw provisions.

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

Because the proposed rule change relates to the governance of the Corporation and not to the operations of the Exchange, the Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or

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<sup>16</sup> See Securities Exchange Release No. 79357 (November 18, 2016) 81 FR 85283 (November 25, 2016) (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). See also Securities Exchange Release No. 77782 (May 6, 2016) 81 FR 29600 (May 12, 2016) (SR-NYSE-2016-14; SR-NYSEArca-2016-25; SR-NYSEMKT-2016-20).

appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issue or have any impact on competition; rather, adoption of a proxy access bylaw by the Corporation is intended to enhance corporate governance and accountability to stockholders.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- A. by order approve or disapprove such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeEDGX-2021-021 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-CboeEDGX-2021-021. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, D.C. 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeEDGX-2021-021 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to  
delegated authority.<sup>17</sup>

Secretary

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

Exhibit 5

(additions are underlined; deletions are [bracketed])

\* \* \* \* \*

**[SIXTH] SEVENTH AMENDED AND RESTATED  
BYLAWS  
OF  
CBOE GLOBAL MARKETS, INC.**

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2.10 *Action at Meeting.* When a quorum is present at any meeting, (a) a majority of the votes properly cast upon any question other than an election of directors shall decide the question, except when a different vote is required by the Certificate of Incorporation, these Bylaws, the rules or regulations of any stock exchange applicable to the Corporation, or any law or regulation applicable to the Corporation or its securities, and (b) each nominee for director shall be elected to the Board of Directors if a majority of the votes properly cast are in favor of such nominee's election (i.e., if the number of votes properly cast "for" a nominee's election exceeds the number of votes properly cast "against" that nominee's election (with "abstentions" and "broker nonvotes" not counted as a vote cast either "for" or "against" that director's election)); provided, however, that, if (x) the Secretary receives a notice that a stockholder has nominated one or more persons for election to the Board of Directors in compliance with the requirements set forth in Section 2.11 or Section 2.16 of these Bylaws and (y) such nomination has not been withdrawn by such stockholder on or prior to the tenth (10th) day preceding the date that the Corporation first mails its notice of meeting for such election (a "Contested Election"), a plurality of the votes properly cast for the election of directors shall be sufficient to elect directors. No ballot shall be required for any election unless requested by a stockholder present or represented at the meeting and entitled to vote in the election.

2.11 *Notice of Business and Nomination of Directors at Meetings of Stockholders.*

(a) Annual Meeting of Stockholders.

(i) At an annual meeting of stockholders, only such business shall be conducted as shall have been properly brought before the meeting, and only such persons who are nominated in accordance with the following procedures or in accordance with Section 2.16 shall be eligible for election as directors. Business and nominations of persons for election to the Board of Directors at an annual meeting of stockholders may be made only (A) pursuant to the Corporation's notice of meeting (or any supplement thereto) given by or at the direction of the Board of Directors (or any duly authorized committee thereof), (B) otherwise properly brought before the meeting by or at the direction of the Board of Directors (or any duly authorized committee thereof) or (C) by any stockholder of the Corporation (I) who is a stockholder of record on the date of the notice given pursuant to this *Section 2.11* and through the date of such annual meeting, (II) who is entitled to vote at the annual meeting and (III) who complies with the notice procedures set forth in this *Section 2.11* or (D) in the case of a nomination, by any Eligible Stockholder who complies with all of the requirements set forth in Section 2.16. Clause (C) of the preceding sentence and Section 2.16 shall be the exclusive means for a stockholder to [propose business or] make director nominations before an annual meeting of stockholders, and clause (C) of the preceding sentence

shall be the exclusive means for a stockholder to propose business before an annual meeting of stockholders, other than business properly brought under Rule 14a-8 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”) (or any successor provision of law) and included in the Corporation’s notice of meeting in accordance therewith.

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2.16 Proxy Access. (a) Whenever the Board of Directors solicits proxies with respect to the election of directors at an annual meeting of stockholders, subject to the provisions of this Section 2.16, the Corporation shall include in its proxy statement for such annual meeting, in addition to any persons nominated for election by or at the direction of the Board of Directors, the name, together with the Required Information (as defined below), of any person nominated for election to the Board of Directors as a director by an Eligible Stockholder (as defined below) pursuant to and in accordance with this Section 2.16 (a “Stockholder Nominee”). For purposes of this Section 2.16, the “Required Information” that the Corporation will include in its proxy statement is (i) the information provided to the Secretary concerning the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Corporation’s proxy statement pursuant to Section 14 of the Exchange Act and the rules and regulations promulgated thereunder and (ii) if the Eligible Stockholder so elects, a Supporting Statement (as defined below). For the avoidance of doubt, nothing in this Section 2.16 shall limit the Corporation’s ability to solicit against any Stockholder Nominee or include in its proxy materials the Corporation’s own statements or other information relating to any Eligible Stockholder or Stockholder Nominee, including any information provided to the Corporation pursuant to this Section 2.16. Subject to the provisions of this Section 2.16, the name of any Stockholder Nominee included in the Corporation’s proxy statement for an annual meeting of stockholders shall also be set forth on the form of proxy and any ballot distributed by the Corporation in connection with such annual meeting.

(b) In addition to any other applicable requirements, for a nomination to be made by an Eligible Stockholder pursuant to this Section 2.16, the Eligible Stockholder must have given timely notice thereof (a “Notice of Proxy Access Nomination”) in proper written form to the Secretary and must expressly request in the Notice of Proxy Access Nomination to have such nominee included in the Corporation’s proxy materials pursuant to this Section 2.16. To be timely, a Notice of Proxy Access Nomination shall be delivered to the Secretary at the principal executive offices of the Corporation not earlier than the open of business on the one hundred fiftieth (150th) day and not later than the close of business on the one hundred twentieth (120th) day prior to the first anniversary of the date that the Corporation first distributed its proxy statement to stockholders for the preceding year’s annual meeting of stockholders provided, however, that in the event the annual meeting is more than thirty (30) days before or after the anniversary date of the prior year’s annual meeting, or if no annual meeting was held in the preceding year, to be timely, the Notice of Proxy Access Nomination must be received at the principal executive offices of the Corporation no earlier than one hundred fifty (150) days before such annual meeting and no later than the later of one hundred twenty (120) days before such annual meeting or the tenth (10th) day following the day on which public announcement (as defined in Section 2.11) of the date of such meeting is first made by the Corporation. In no event shall any adjournment or postponement of an annual meeting or the announcement thereof commence a new time period (or extend any time period) for the giving of a Notice of Proxy Access Nomination as described above.

(c) The maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in the Corporation’s proxy materials with respect to an annual meeting of

stockholders shall not exceed the greater of (i) two or (ii) 20% of the number of directors in office as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with this Section 2.16 (the “Final Proxy Access Nomination Date”) or, if such amount is not a whole number, the closest whole number below 20% (such greater number, as it may be adjusted pursuant to this Section 2.16(c), the “Permitted Number”). In the event that one or more vacancies on the Board of Directors occurs with respect to any directors for any reason after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board of Directors resolves to reduce the size of the Board of Directors in connection therewith, the Permitted Number shall be calculated based on the number of directors in office as so reduced. In addition, the Permitted Number shall be reduced by (i) the number of individuals who will be included in the Corporation’s proxy materials as director nominees recommended by the Board of Directors pursuant to an agreement, arrangement or other understanding with a stockholder or group of stockholders (other than any such agreement, arrangement or understanding entered into in connection with an acquisition of stock from the Corporation by such stockholder or group of stockholders) and/or (ii) the number of directors in office as of the Final Proxy Access Nomination Date who were included in the Corporation’s proxy materials as Stockholder Nominees for any of the two preceding annual meetings of stockholders (including any persons counted as Stockholder Nominees pursuant to the immediately succeeding sentence) and whose reelection at the upcoming annual meeting is being recommended by the Board of Directors. For purposes of determining when the Permitted Number has been reached, any individual nominated by an Eligible Stockholder for inclusion in the Corporation’s proxy materials pursuant to this Section 2.16 whose nomination is subsequently withdrawn or whom the Board of Directors decides to nominate for election to the Board of Directors as a director shall be counted as one of the Stockholder Nominees. Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the Corporation’s proxy materials pursuant to this Section 2.16 shall rank such Stockholder Nominees based on the order in which the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the Corporation’s proxy materials in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to this Section 2.16 exceeds the Permitted Number. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders pursuant to this Section 2.16 exceeds the Permitted Number, the highest ranking Stockholder Nominee who meets the requirements of this Section 2.16 from each Eligible Stockholder will be selected for inclusion in the Corporation’s proxy materials until the Permitted Number is reached, going in order of the amount (largest to smallest) of shares of outstanding capital stock of the Corporation each Eligible Stockholder disclosed as Owned in its Notice of Proxy Access Nomination. If the Permitted Number is not reached after the highest ranking Stockholder Nominee who meets the requirements of this Section 2.16 from each Eligible Stockholder has been selected, then the next highest ranking Stockholder Nominee who meets the requirements of this Section 2.16 from each Eligible Stockholder will be selected for inclusion in the Corporation’s proxy materials, and this process will continue as many times as necessary, following the same order each time, until the Permitted Number is reached. Notwithstanding anything to the contrary contained in this Section 2.16, the Corporation shall not be required to include any Stockholder Nominees in its proxy materials pursuant to this Section 2.16 for any meeting of stockholders for which the Secretary receives a notice (whether or not subsequently withdrawn) that the Eligible Stockholder or any other stockholder intends to nominate one or more persons for election to the Board of Directors pursuant to Section 2.11 of these Bylaws.

(d) An “Eligible Stockholder” is a stockholder or group of no more than 20 stockholders (counting as one stockholder, for this purpose, any two or more funds that are part of the same Qualifying Fund Group (as defined below)) that (i) has Owned (as defined below) continuously for at least three years (the “Minimum Holding Period”) a number of shares of capital stock of the Corporation that represents at least three percent of the outstanding shares of capital stock of the Corporation as of the date the Notice of Proxy Access Nomination is received at the principal executive offices of the Corporation in accordance with this Section 2.16 (the “Required Shares”), (ii) continues to Own the Required Shares through the date of the annual meeting and (iii) meets all other requirements of this Section 2.16. A “Qualifying Fund Group” means two or more funds that are (i) under common management and investment control, (ii) under common management and funded primarily by the same employer or (iii) a “group of investment companies” as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Corporation Act of 1940, as amended. Whenever the Eligible Stockholder consists of a group of stockholders (including a group of funds that are part of the same Qualifying Fund Group), (i) each provision in this Section 2.16 that requires the Eligible Stockholder to provide any written statements, representations, undertakings, agreements or other instruments or to meet any other conditions shall be deemed to require each stockholder (including each individual fund) that is a member of such group to provide such statements, representations, undertakings, agreements or other instruments and to meet such other conditions (except that the members of such group may aggregate the shares that each member has Owned continuously for the Minimum Holding Period in order to meet the three percent Ownership requirement of the “Required Shares” definition) and (ii) a breach of any obligation, agreement or representation under this Section 2.16 by any member of such group shall be deemed a breach by the Eligible Stockholder. No stockholder may be a member of more than one group of stockholders constituting an Eligible Stockholder with respect to any annual meeting.

(e) For purposes of this Section 2.16, a stockholder shall be deemed to “Own” only those outstanding shares of capital stock of the Corporation as to which the stockholder possesses both:

(i) the full voting and investment rights pertaining to the shares and

(ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided that the number of shares calculated in accordance with clauses (i) and (ii) shall not include any shares:

(1) sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed,

(2) 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

(3) subject to any option, warrant, forward contract, swap, contract of sale, or other derivative or similar instrument or 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 outstanding shares of capital stock of the Corporation, in any such case which instrument or agreement has, or is intended to have, the purpose or effect of:

(A) 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

(B) 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 affiliate.

A stockholder shall “Own” shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder’s Ownership of shares shall be deemed to continue during any period in which (i) the stockholder has loaned such shares, provided that the stockholder has the power to recall such loaned shares on five (5) business days’ notice and includes in the Notice of Proxy Access Nomination an agreement that it (1) will promptly recall such loaned shares upon being notified that any of its Stockholder Nominees will be included in the Corporation’s proxy materials and (2) will continue to hold such recalled shares through the date of the annual meeting or (ii) 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. The terms “Owned,” “Owning” and other variations of the word “Own” shall have correlative meanings. Whether outstanding shares of capital stock of the Corporation are “Owned” for these purposes shall be decided by the Board of Directors. For purposes of this Section 2.16, the term “affiliate” or “affiliates” shall have the meaning ascribed thereto under the rules and regulations of the Exchange Act. An Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to “Own” for the purposes of this Section 2.16.

(f) To be in proper written form, a Notice of Proxy Access Nomination must set forth or be accompanied by the following:

(i) a statement by the Eligible Stockholder (1) setting forth and certifying as to the number of shares it Owns and has Owned continuously for the Minimum Holding Period and (2) agreeing to continue to Own the Required Shares through the date of the annual meeting;

(ii) one or more written statements from the record holder of the Required Shares (and from each intermediary through which the Required Shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven (7) calendar days prior to the date the Notice of Proxy Access Nomination is delivered to the Secretary at the principal executive offices of the Corporation, the Eligible Stockholder Owns, and has Owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder’s agreement to provide, within five (5) business days following the record date for the annual meeting, one or more written statements from the record holder and such intermediaries verifying the Eligible Stockholder’s continuous Ownership of the Required Shares through the record date;

(iii) a copy of the Schedule 14N that has been or is concurrently being filed with the Securities and Exchange Commission as required by Rule 14a-18 under the Exchange Act;

(iv) the information, representations, agreements and other documents that are required to be set forth in or included with a stockholder’s notice of a nomination given pursuant to Section 2.11 of these Bylaws;

(v) a written consent of each Stockholder Nominee to being named in the Corporation’s proxy statement as a nominee and to serving as a director if elected;

(vi) a representation that the Eligible Stockholder:

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

(2) has not nominated and will not nominate for election to the Board of Directors as a director at the annual meeting any person other than the Stockholder Nominee(s) it is nominating pursuant to this Section 2.16,

(3) 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 Exchange 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 of Directors,

(4) has not distributed and will not distribute to any stockholder of the Corporation any form of proxy for the annual meeting other than the form distributed by the Corporation,

(5) has complied and will comply with all laws, rules and regulations applicable to solicitations and the use, if any, of soliciting material in connection with the annual meeting, and

(6) has provided and will provide facts, statements and other information in all communications with the Corporation and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;

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

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

(2) indemnify and hold harmless the Corporation and each of its Directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against the Corporation or any of its Directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to this Section 2.16 or any solicitation or other activity in connection therewith, and

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

(viii) in the case of a nomination by an Eligible Stockholder consisting of a group of stockholders, the designation by all group members of one member of the group that is authorized to receive communications, notices and inquiries from the Corporation and to act on behalf of all members of the group with respect to all matters relating to the nomination under this Section 2.16 (including withdrawal of the nomination);

(ix) in the case of a nomination by an Eligible Stockholder consisting of a group of stockholders in which two or more funds are intended to be treated as one stockholder for purposes of qualifying as an Eligible Stockholder, documentation reasonably satisfactory to the Corporation that demonstrates that the funds are part of the same Qualifying Fund Group; and

(x) a written representation and agreement by the Stockholder Nominee that such person:

(1) will act as a representative of all of the stockholders of the Corporation while serving as a director,

(2) will provide facts, statements and other information in all communications with the Corporation and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading),

(3) is not and will not become a party to (i) any compensatory, payment or other financial agreement, arrangement or understanding with any person or entity other than the Corporation in connection with service or action as a director of the Corporation that has not been disclosed to the Corporation, (ii) any Voting Commitment that has not been disclosed to the Corporation or (iii) any Voting Commitment that could reasonably be expected to limit or interfere with the Stockholder Nominee's ability to comply, if elected as a director of the Corporation, with its fiduciary duties under applicable law,

(4) will abide by and comply with these Bylaws, the Certificate of Incorporation and applicable policies of the Corporation including all applicable publicly disclosed corporate governance, conflict of interest, confidentiality and stock ownership and trading policies and guidelines of the Corporation, as well as the applicable provisions of the rules and regulations of the Securities and Exchange Commission and any stock exchange applicable to the Corporation.

(g) In addition to the information required or requested pursuant to Section 2.16(f) or any other provision of these Bylaws,

(i) the Stockholder Nominee(s) must submit all completed and signed questionnaires required of directors and officers of the Corporation;

(ii) the Corporation may require any proposed Stockholder Nominee to furnish any other information:

(1) that may reasonably be requested by the Corporation to determine whether the Stockholder Nominee would be independent under Section 3.3 and otherwise qualifies as independent under the rules of the principal national securities exchange on which the outstanding capital stock of the Corporation is traded,

(2) that could be material to a reasonable stockholder's understanding of the independence, or lack thereof, of such Stockholder Nominee,

(3) that would be required to satisfy the requirements for qualification of directors under applicable foreign regulations, or

(4) that may reasonably be requested by the Corporation to determine the eligibility of such Stockholder Nominee to be included in the Corporation's proxy materials pursuant to this Section 2.16 or to serve as a director of the Corporation; and

(iii) the Corporation may require the Eligible Stockholder to furnish any other information that may reasonably be requested by the Corporation to verify the Eligible Stockholder's continuous Ownership of the Required Shares for the Minimum Holding Period and through the date of the annual meeting.

(h) The Eligible Stockholder may, at its option, provide to the Secretary, at the time the Notice of Proxy Access Nomination is provided, a written statement, not to exceed 500 words, in support of its Stockholder Nominee(s)' candidacy (a "Supporting Statement"). Only one Supporting Statement may be submitted by an Eligible Stockholder (including any group of stockholders together constituting an Eligible Stockholder) in support of its Stockholder Nominee(s). Notwithstanding anything to the contrary contained in this Section 2.16, the Corporation may omit from its proxy materials any information or Supporting Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law, rule or regulation.

(i) In the event that any information or communications provided by an Eligible Stockholder or a Stockholder Nominee to the Corporation or its stockholders is not, when provided, or thereafter ceases to be true and correct in all material respects or omits to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, such Eligible Stockholder or Stockholder Nominee, as the case may be, shall promptly notify the Secretary of any such defect and of the information that is required to correct any such defect. Without limiting the foregoing, an Eligible Stockholder shall provide immediate notice to the Corporation if the Eligible Stockholder ceases to Own any of the Required Shares prior to the date of the annual meeting. In addition, any person providing any information to the Corporation pursuant to this Section 2.16(i) shall further update and supplement such information, if necessary, so that all such information shall be true and correct as of the (i) as of the record date for determining the stockholders entitled to receive notice of the meeting and (ii) as of the date that is ten (10) business days prior to the meeting (or any postponement, adjournment or recess thereof), and such update shall be received by the Secretary at the principal executive offices of the Corporation (A) not later than five (5) business days after the record date for determining the stockholders entitled to receive notice of such meeting (in the case of an update required to be made under clause (i)) and (B) not later than seven (7) business days prior to the date for the meeting, if practicable, or, if not practicable, on the first practicable date prior to the meeting or any adjournment, recess or postponement thereof (in the case of an update required to be made pursuant to clause (ii)). For the avoidance of doubt, no notification, update or supplement provided pursuant to this Section 2.16(i) or otherwise shall be deemed to cure any defect in any previously provided information or communications or limit the remedies available to the Corporation relating to any such defect (including the right to omit a Stockholder Nominee from its proxy materials pursuant to this Section 2.16).

(j) Notwithstanding anything to the contrary contained in this Section 2.16, the Corporation shall not be required to include, pursuant to this Section 2.16, a Stockholder Nominee in its proxy materials for any meeting of stockholders (and any such nomination shall be disregarded and no

vote on such Stockholder Nominee will occur, notwithstanding that proxies in respect of such vote may have been received by the Corporation):

(i) who would not be an independent director under Section 3.3, under the rules of the principal national securities exchange on which the outstanding capital stock of the Corporation is traded, any applicable rules of the Securities and Exchange Commission and any publicly disclosed standards used by the Board of Directors in determining and disclosing independence of the Corporation's directors, in each case as determined by the Board of Directors in its sole discretion;

(ii) who would not meet the audit committee independence requirements under the rules of the principal national securities exchange on which the outstanding capital stock of the Corporation is traded;

(iii) who, if elected, intends to resign as a director of the Corporation prior to the end of the full term for which he or she is standing for election;

(iv) who is or has been subject to any statutory disqualification under Section 3(a)(39) of the Exchange Act;

(v) who is or has been subject to disqualification under 17 CFR § 1.63;

(vi) whose election as a member of the Board of Directors would otherwise cause the Corporation to be in violation of these Bylaws, the Certificate of Incorporation, the rules of the principal national securities exchange on which the outstanding capital stock of the Corporation is traded, or any applicable law, rule or regulation;

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

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

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

(x) who shall have provided any information to the Corporation or its stockholders that was untrue in any material respect or that omitted to state a material fact necessary to make the statements made, in light of the circumstances in which they were made, not misleading;  
or

(xi) if the Eligible Stockholder and/or applicable Stockholder Nominee breaches or fails to comply with its obligations pursuant to these Bylaws, including, but not limited to, this Section 2.16 and any agreement, representation or undertaking required by this Section 2.16.

(k) Notwithstanding anything to the contrary contained in these Bylaws, if (i) a Stockholder Nominee and/or the applicable Eligible Stockholder breaches any of its agreements or representations or fails to comply with any of its obligations under this Section 2.16 or (ii) a Stockholder Nominee otherwise becomes ineligible for inclusion in the Corporation's proxy materials pursuant to this Section 2.16, or dies, becomes disabled or otherwise becomes ineligible or unavailable for election at the annual meeting, in each case as determined by the Board of Directors or the chairman of the meeting, (1) the Corporation may omit or, to the extent feasible,

remove the information concerning such Stockholder Nominee and the related Supporting Statement from its proxy materials and/or otherwise communicate to its stockholders that such Stockholder Nominee will not be eligible for election at the annual meeting, (2) the Corporation shall not be required to include in its proxy materials any successor or replacement nominee proposed by the applicable Eligible Stockholder or any other Eligible Stockholder and (3) the chairman of the meeting shall declare such nomination to be invalid and such nomination shall be disregarded, notwithstanding that proxies in respect of such vote may have been received by the Corporation.

(l) Any Stockholder Nominee who is included in the Corporation's proxy materials for a particular annual meeting of stockholders but either (i) withdraws from or becomes ineligible or unavailable for election at the annual meeting, or (ii) does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election, will be ineligible to be a Stockholder Nominee pursuant to this Section 2.16 for the next two annual meetings of stockholders. For the avoidance of doubt, the immediately preceding sentence shall not prevent any stockholder from nominating any person to the Board of Directors pursuant to Section 2.11 of these Bylaws.

(m) Notwithstanding the provisions of this Section 2.16, if the Eligible Stockholder providing notice (or a qualified representative of the Eligible Stockholder) does not appear in person (including virtually, in the case of a meeting held solely by means of remote communication) at the stockholder meeting to present the nomination of such Stockholder Nominee, such proposed nomination shall not be presented by the Corporation and shall not be transacted, notwithstanding that proxies in respect of such vote may have been received by the Corporation. For purposes of this Section 2.16, to be considered a qualified representative of the Eligible Stockholder providing notice, a person must be a duly authorized officer, manager or partner of such stockholder or must be authorized by a writing executed by such stockholder or an electronic transmission delivered by such stockholder to act for such stockholder as proxy at the meeting and such writing or electronic transmission, or a reliable reproduction of the writing or electronic transmission, must be provided to the Corporation at least twenty-four (24) hours prior to the meeting.

(n) The Board of Directors (or any other person or body authorized by the Board) shall have the exclusive power and authority to interpret the provisions of this Section 2.16 of these Bylaws and make all determinations deemed necessary or advisable in connection with this Section 2.16 as to any person, facts or circumstances. All such actions, interpretations and determinations that are done or made by the Board (or any other person or body authorized by the Board) shall be final, conclusive and binding on the Corporation, the stockholders and all other parties.

(o) This Section 2.16 shall be the exclusive method for stockholders to include nominees for director in the Corporation's proxy materials.

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