

**Duties and Obligations of NASDAQ Directors:
Prepared for the Board of Directors of
The NASDAQ Stock Market LLC**

I. INTRODUCTION AND EXECUTIVE SUMMARY

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

The NASDAQ Exchange is a wholly owned subsidiary of The NASDAQ OMX Group, Inc. ("NASDAQ OMX"), which is a for-profit public corporation. The NASDAQ Exchange is a national securities exchange and a self-regulatory organization ("SRO"). While the Directors of the NASDAQ Exchange owe fiduciary duties to the NASDAQ Exchange and to NASDAQ OMX as the NASDAQ Exchange's parent company, their primary focus is on the regulatory obligations of the NASDAQ Exchange, rather than the obligations to stockholders that typically occupy the attention of a public company board of directors. Exchange Directors do not have direct responsibility for matters within the purview of the NASDAQ OMX Board, such as corporate finance, corporate strategy, merger and acquisition activity, and public company financial reporting.

The main duties of the Exchange Board include authorizing proposals to modify the rules of the NASDAQ Exchange, overseeing the Exchange's regulatory program, reviewing and approving the budget for the Exchange, assessing the adequacy of regulatory controls in the exchange, and, in limited circumstances, reviewing appeals from regulatory decisions of Exchange staff. As an SRO, the Exchange is required to comply with its rules and enforce rule compliance by its members. The Securities and Exchange Commission ("SEC" or "Commission") has authority to discipline an SRO and its directors and officers for failure to do so.

The management of the NASDAQ Exchange is under the direction of the Board, but the Board is not involved in the Exchange's day-to-day operations. The Board selects the officers of the Exchange, who are responsible for management and administration on a day-to-day basis. The Board is entitled to rely on the management they have selected, as long as the Board reasonably believes that the actions and recommendations of management warrant confidence. However, the Board must remain informed and must investigate and act if there is reason to suspect that management is not vigilant, or is not acting in the corporation's best interest.

As directors of a Delaware limited liability company, Exchange Directors are subject to fiduciary duties similar to those of the directors of a stock corporation. Their actions are also entitled to the protection of the business judgment rule. The Directors' fiduciary duties are fully consistent with their regulatory obligations, since

Delaware law imposes a duty on directors to take steps to ensure corporate compliance with applicable law.

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

II. DIRECTORS' REGULATORY OBLIGATIONS UNDER THE EXCHANGE ACT

The NASDAQ Exchange is an SRO, has authority to develop and adopt rules, and has authority to operate markets and discipline its members. Under Sections 19(g) and 19(h) of the Exchange Act, an SRO is required to: 1) comply with the provisions of the Exchange Act, the rules and regulations promulgated thereunder, and its own rules (collectively, the "Governing Rules"); and 2) enforce compliance with the Governing Rules by its members and persons associated with its members. If the SEC finds that the SRO has violated or is unable to comply with any of the Governing Rules, or without reasonable justification or excuse has failed to enforce compliance with any of the Governing Rules, the SEC may suspend or impose limitations on the activities, functions, and operations of the SRO. Further, the SEC may remove from office or censure any SRO officer or director the SEC finds has: willfully violated any provision of the securities laws or SRO rules;¹ willfully abused his or her authority; or failed, without reasonable justification or excuse, to enforce compliance with the securities laws or SRO rules. The Exchange must act in a manner consistent with these provisions of the Exchange Act.

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

The primary function of the Board is to oversee the discharge of the Exchange's obligations as an SRO. Accordingly, the Board's main duties are as follows:

- The Board must authorize proposals to modify the rules of the NASDAQ Exchange. This is the primary focus of most meetings of the Exchange Board. Management presents rule proposals, which include an analysis of

¹In this context, "willfully" means intentionally committing the violative act. The person committing the violative act need not be aware that the action is unlawful.

legal basis for concluding that the proposal is consistent with Exchange Act.

- An SRO's rules include the fees that it charges to members, listed issuers, and users of Exchange data. Thus, the Board must authorize changes to these fees.
- The Board may delegate rule-making authority to senior management, provided that management reports back to the Board concerning the use of the authority. Delegations have been used primarily with regard to transaction execution fees, which frequently must be changed quickly to respond to changes by competitors.
- The Board must oversee the Exchange's regulatory program. This obligation is primarily discharged through the Exchange's Regulatory Oversight Committee (the "ROC"), whose duties are prescribed in the NASDAQ Exchange's by-laws:
 - "The Committee shall oversee the adequacy and effectiveness of Nasdaq's regulatory and self-regulatory organization responsibilities; assess Nasdaq's regulatory performance; and assist the Board and other committees of the Board in reviewing the regulatory plan and the overall effectiveness of Nasdaq's regulatory functions. In furtherance of its functions, the Regulatory Oversight Committee shall (A) review Nasdaq's regulatory budget and specifically inquire into the adequacy of resources available in the budget for regulatory activities; (B) meet regularly with the Chief Regulatory Officer in executive session; and (C) be informed about the compensation and promotion or termination of the Chief Regulatory Officer and the reasons therefor."
 - The Exchange's regulatory functions are discharged through three major channels. First, the MarketWatch Department conducts real-time surveillance of trading activity on the Exchange. Second, the Listing Qualifications Department enforces listing standards for issuers listed on the Exchange. Third, through contracts with the Financial Industry Regulatory Authority ("FINRA"), the Exchange provides for T+1 surveillance of trading activity, membership application processing, member examinations, and enforcement of member conduct rules. The ROC receives reports on these functions at each of its meetings.
- The Board must review and approve the budget for the Exchange. This budget is also subject to review and approval by NASDAQ OMX.

- Currently, the Exchange's audit committee has responsibility for assessing the adequacy of internal regulatory controls in the Exchange, a responsibility that it shares with the NASDAQ OMX audit committee. In accordance with a more streamlined structure already in place at NYSE Euronext and the New York Stock Exchange, Nasdaq staff plans to develop, propose to the Board, and file with the SEC a proposal to adopt a more limited role for the Exchange audit committee with greater reliance on the NASDAQ OMX audit committee.
- In very limited circumstances, the Exchange Board may be required to review appeals from regulatory decisions of the Exchange. During 2007 and early 2008, the ROC became very active in reviewing delisting decisions relating to issuers that failed to file timely periodic reports, but this was an unusual situation created by an anomalous uptick in the number of delinquent filers and a delay on the part of the SEC in articulating a consistent procedure for SROs to follow. To date, the Exchange Board has not been called upon to review any disciplinary decisions against members, because responsibility for enforcing most rules against Nasdaq members that are also members of FINRA has been formally allocated to FINRA.
- Three subsidiaries of the NASDAQ Exchange conduct operations that are considered part of the Exchange function, and therefore the NASDAQ Exchange Board has indirect responsibility for their regulatory integrity. These entities are The NASDAQ Options Market LLC, which operates the Exchange's option trading platform, and Nasdaq Execution Services LLC and Nasdaq Options Services LLC, which are registered broker-dealers that route orders from the NASDAQ Exchange to other markets posting superior prices to ensure compliance with SEC Regulation NMS. Other subsidiaries of the Exchange are dormant and therefore will not require any attention.

SEC Actions Against SROs

The SEC has found SROs to have engaged in violations of Section 19(g) on several occasions, and has also found SRO officers to have violated Section 19(h). In general, the cases were brought in response to ongoing patterns of conduct or because the SRO's procedures were inadequate to permit prompt detection of misconduct. In some cases, SRO disciplinary bodies failed to take disciplinary action when warranted, or members of the SRO's disciplinary decisional body were tainted or otherwise subject to improper influences. We believe that the separation between the Exchange's business functions and FINRA as its primary regulatory service provider establish a framework for avoiding the conflicts of interest that have resulted in most SEC actions in the past. In addition, it is notable that most actions taken in the past have focused on an SROs failure adequately to supervise activity on a trading floor. Electronic trading provides enhanced ability to enforce

rule compliance and detect rule violations through automation, thereby reducing regulatory risk. The Exchange's internal control regime recently instituted a program for testing of trading systems to ensure that they are operating in accordance with Exchange rules.

- In 1980, the SEC brought a proceeding against the Philadelphia Stock Exchange ("PHLX") for failing to enforce compliance with SEC and exchange quotation rules, as well as various exchange rules governing options position limits, option spread parameters, and options traders. The violations had occurred on an ongoing basis for several months, with the knowledge of exchange staff. Although staff undertook some efforts to bring about compliance, these efforts were not pursued vigorously, and the exchange delayed bringing disciplinary action despite evidence of ongoing violations.
- In 1980, the SEC brought a proceeding against the Boston Stock Exchange ("BSE") and its clearing corporation for failing to employ adequate surveillance procedures and to timely identify practices that resulted in violations of margin, net capital, and record-keeping requirements. The conduct occurred on an ongoing basis for approximately 13 months. When exchange officials became aware of the violations, the exchange conducted an investigation, took disciplinary action, and undertook enhanced surveillance procedures. Although the exchange ultimately sanctioned three members of the BSE Board of Governors, each of the sanctioned Governors was thereafter reelected to the BSE Board, and served on BSE committees.
- In 1989, the SEC brought a proceeding against the Chicago Board Options Exchange ("CBOE") for failing to enforce compliance with CBOE rules. The SEC's action stemmed from the failure of the CBOE's Business Conduct Committee ("BCC") to initiate disciplinary action in response to evidence that certain options trading had been conducted to create the appearance of activity. Evidence that CBOE staff presented to the BCC indicated a pattern of trading abuses by 12 market makers, including the CBOE's Vice Chairman. The conduct had occurred over a protracted period, and apparently had been undertaken for competitive reasons (*i.e.*, to induce the purchase and sale of dually traded options on the CBOE rather than at a competing marketplace).
- In 1996, the SEC initiated a proceeding against the NASD for failing to take adequate action in response to various abusive practices by certain Nasdaq market makers, and failing to apply membership criteria in an even-handed manner. The allegations that formed the basis for the SEC's action against the NASD were detailed in a lengthy report that was issued pursuant to Section 21(a) of the Exchange Act. The NASD settled the action by agreeing to comply with 14 undertakings that set forth detailed requirements governing the NASD's corporate structure and operations. The NASD also agreed to spend \$100 million dollars over five years to enhance its systems

for market surveillance, including the development and implementation of enhanced audit trail, surveillance, enforcement, and internal audit functions.

- In 1997, the SEC initiated proceedings against two SROs that are wholly owned subsidiaries of the PHLX: Stock Clearing Corporation of Philadelphia (“SCCP”) and Philadelphia Depository Trust Corporation (“Philadep”). Also named were two officers of SCCP and Philadep. The proceedings concerned several instances in which SCCP and/or Philadep, without SEC approval, had implemented operational modifications that constituted rule amendments. Because SRO rule amendments must be approved by the SEC, SCCP and Philadep had violated the Exchange Act in failing to seek SEC approval for the rule amendments. In addition, because SCCP and Philadep’s actual practices deviated from their existing rules (which had been approved by the SEC), the SROs had violated the Exchange Act by failing to comply with those existing rules. The SEC charged that officers had known of the SROs’ noncompliance, possessed authority to ensure compliance, and thus had caused the SROs’ violations.
- In 2000, the SEC brought a proceeding against the American Stock Exchange, the CBOE, the Pacific Exchange, and the PHLX (collectively, the “Options Exchanges”) for engaging in conduct that impeded multiple listings of stock options and for failing to enforce members’ compliance with exchange rules relating to, among other things, the handling of customer orders and the reporting of trades. The Options Exchanges settled the action by agreeing to comply with detailed undertakings relating to audit trails, listing requirements, order handling, trade reporting, and other matters.
- In 2005, the SEC initiated proceedings against the New York Stock Exchange (the “NYSE”) for failure to monitor and police specialist trading activity, thereby allowing the NYSE specialists to engage in unlawful interpositioning and trading ahead. As a result, the NYSE has agreed to subject its regulatory activities to an independent regulatory auditor until 2011, at a cost of \$20 million and to adopt numerous enhancements to its surveillance systems, the cost of which are not specified in the SEC’s Order.
- In 2005, the SEC initiated proceedings against the National Stock Exchange (“NSX”) for failure to enforce a rule requiring NSX dealers to offer price improvement to customer orders in certain circumstances. The NSX agreed to a range of remedial measures, including agreeing to subject its regulatory activities to an independent auditor and to eliminate any involvement in regulatory matters on the part of its President and CEO. The SEC also censured the President and CEO.
- In 2005, the SEC issued a 21(a) Report regarding The Nasdaq Stock Market, Inc., the former operator of the Nasdaq market. Although the SEC did not take any enforcement action in connection with the Report, the Report

emphasized the obligations of all persons associated with an SRO to fulfill regulatory obligations by referring potential regulatory violations to the Nasdaq Office of General Counsel for further referral to FINRA or the SEC.

- In 2007, the SEC initiated and settled proceedings against the American Stock Exchange (“Amex”) and one of its compliance officers for failure to enforce a range of rules relating to its specialists. As a result, Amex has undertaken to retain an independent auditor to review and report on its surveillance functions for the next three years. The SEC also initiated a proceeding against the former CEO of Amex.

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

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

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

Categories of Directors

There are unique aspects of the obligations of Board members who are defined as “Industry Directors” or “Member Representative Directors.” Industry

Directors are nominated, to a large degree, to bring the industry expertise that they possess by virtue of their employment to the decision-making process of the NASDAQ Exchange. Several of the Industry Directors on the NASDAQ Exchange Board have also been specially nominated by a committee composed of registered representatives of NASDAQ members to serve as Member Representative Directors. Notwithstanding the designation of these directors, the overriding demands on Board members in carrying out their duties are to comply with the Exchange's regulatory obligations to ensure the protection of investors and the maintenance of fair and orderly markets, and to advance the public interest. By complying with these regulatory obligations and generally acting in the best interests of the NASDAQ Exchange, Industry Directors would generally be acting in a manner consistent with their duties of loyalty and care, as discussed below. The powers of all members of the Board must ultimately be exercised in a manner consistent with regulatory obligations and interests of the NASDAQ Exchange, not the employing organization of the board member. Thus, for example, while an Industry Director or a Member Representative Director is expected to draw on his or her background in the securities industry in determining how to vote on issues presented to the Board, he or she has a duty to vote in the interest of the Exchange rather than as a representative of the securities industry, a specific segment of that industry or of his or her firm.

III. SUMMARY OF RELEVANT DELAWARE CORPORATE LAW

Statutory Provisions

The General Corporation Law of the State of Delaware ("General Corporation Law") is applicable to NASDAQ OMX, and the Delaware Limited Liability Company Act ("LLC Act") is applicable to the NASDAQ Exchange. Although the Delaware case law regarding limited liability companies is not as developed as that regarding corporations, Directors of the NASDAQ Exchange should consider their relationship to the NASDAQ Exchange and its owner, NASDAQ OMX, to be governed by precepts similar to those governing the relationship of NASDAQ OMX's Directors to the corporation and its stockholders.

A. The Business Judgment Rule

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

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

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

B. The Duty of Care

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

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

Much of the Delaware law on the duty of care has been developed in change-of-control cases. In the majority of cases in which the issue has been raised,

corporate directors have been found to have satisfied their duty of care. However, Delaware case law does underscore that time for reflection and adequate information are cornerstones of the duty of care. For example, there have been cases in which directors were held liable for approving a merger during a relatively short board meeting, without advice from an investment bank, without adequate understanding of the terms of the agreement or whether the sale price reflected the full value of the corporation. In another case, directors were found to have breached their duty of care in approving a merger when most of the directors had little or no knowledge of the transaction before the board meeting, and the board did not take reasonable steps to be adequately informed before it acted. While the narrow facts of these cases have limited relevance to a subsidiary board, but the overall requirement of careful deliberation remains applicable.

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

C. The Duty of Loyalty

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

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

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

D. The Duty of Good Faith

For directors to fulfill their fiduciary duties they must also act in good faith. While the duty of good faith is viewed by some as a subsidiary requirement of the

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

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

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

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

Regulatory Obligations and Fiduciary Duties

It is important to note that the regulatory obligations of the Directors of the NASDAQ Exchange are complementary to, and not in conflict with, the fiduciary obligations of the Directors. In considering what is in the best interests of the corporation and its stockholders, a Director can consider many issues besides short-term maximization of stockholder value. These issues include many factors such as long term growth, strategic investments, enhanced reputation and legal compliance that might not maximize stockholder value, at least in the short term. Unless the corporation has put itself up for sale, "a board of directors, while always required to act in an informed manner, is not under any per se duty to maximize shareholder

value in the short term...." *Paramount Communications v. Time, Inc.*, 571 A.2d 1140, 1150, 1154 (Del. 1989) ("Directors are not obligated to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.").

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

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

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

Provisions of Nasdaq Corporate Documents

The Limited Liability Company Agreement of the Nasdaq Exchange provides that the purposes of the NASDAQ Exchange include

- (i) supporting the operation, regulation, and surveillance of the national securities exchange operated by the [NASDAQ Exchange],
- (ii) preventing fraudulent and manipulative acts and practices, promoting just and equitable principles of trade, fostering cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, removing

impediments to and perfecting the mechanisms of a free and open market and a national market system, and, in general, protecting investors and the public interest, (iii) supporting the various elements of the national market system pursuant to Section 11A of the Exchange Act and the rules thereunder, (iv) fulfilling the [NASDAQ Exchange]'s self-regulatory responsibilities as set forth in the Exchange Act, and (v) supporting such other initiatives as the Board may deem appropriate.

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

The Limited Liability Company Agreement of the Nasdaq Exchange provides that Directors shall be indemnified against judgments, fines, amounts paid in settlement and expenses (including attorneys fees and other costs), and that costs shall be advanced in each case to the fullest extent permitted by Delaware Law. In addition, NASDAQ OMX has procured insurance policies providing aggregate coverage for directors' and officers' liability of \$100 million, professional liability of \$15 million, employment practices liability of \$20 million, and fiduciary liability of \$10 million. These policies apply to NASDAQ Exchange directors as well as NASDAQ OMX directors.

IV. RESPONSIBILITIES OF THE NASDAQ OMX BOARD

Because NASDAQ OMX is a public company listed on the NASDAQ Exchange, its directors have direct responsibility for compliance with the Sarbanes-Oxley Act of 2002 and NASDAQ Exchange listing standards. In addition, its responsibilities include general oversight over corporate finance, corporate strategy, merger and acquisition activity, and indirect supervision of numerous operating subsidiaries on six continents, including the NASDAQ Exchange. Although the Exchange Board may occasionally be asked to adopt a resolution in support of a particular undertaking of NASDAQ OMX, as a general matter, the Exchange Board will not have responsibilities in these areas.

