

# **FIRST AMENDED AND RESTATED BY-LAWS OF OPENJS FOUNDATION**

## **ARTICLE I - NAME, PURPOSE, AND OFFICES**

### **Section 1.1 Name**

The name of the corporation is "OpenJS Foundation", and the corporation is referred to in these By-laws as the "Foundation".

### **Section 1.2 Principal Office**

The principal office of the Foundation shall be located at 1 Letterman Drive, Building D, Suite D4700, San Francisco, CA 94129. The Board of Directors of the Foundation (each, a "Director," and collectively, the "Board") is hereby granted full power and authority to change the Foundation principal office from one location to another both within and without said state.

### **Section 1.3 Other Offices**

Branch or subordinate offices may at any time be established by the Board at any place or places.

### **Section 1.4 Purpose**

a) The nature of the business or purposes to be conducted or promoted by the Foundation is to engage in any lawful act or activity for which corporations which are organized as not-for profit may be organized under the General Corporation Law of Delaware. The primary purpose and mission of the Foundation (the "Purpose") is to: (i) promote the widespread adoption and continued development of key JavaScript solutions and related technologies worldwide; (ii) facilitate collaboration within the JavaScript and web development community; (iii) create a center of gravity for open source projects throughout the end-to-end JavaScript ecosystem guiding them toward open governance and diverse collaborator bases; (iv) host the infrastructure to support hosted JavaScript open source projects (the "Projects"); (v) enable, through advancement of Projects and strategic partnerships, an open and accessible web; and (vi) undertake such other activities as may from time to time be appropriate to further the purposes and achieve the goals set forth above.

(b) The Foundation will promote the Projects. In furtherance of these efforts, the Foundation shall seek to solicit the participation of interested parties on a fair, equitable, and open basis in the Projects.

c) In support of such Purpose, the Foundation may engage in some or all of the following activities: (i) drive the development of, disseminate, support, and maintain the Projects, (ii) create and own distinctive trademarks, service marks, and/or certification marks; (iii) administer or subcontract a branding program; (iv) create various printed and/or electronic materials for distribution to members and non-members, (v) maintain its own website, (vi) coordinate the promotion of the Projects among members and non-

members, as well as create basic marketing promotional collateral (e.g., both web pages as well as tangible materials), and (vii) undertake those other activities as the Board may from time to time approve consistent with and in furtherance of the Purpose.

## **Section 1.5 Nonprofit Status**

a) The Foundation is organized and shall be operated as a non-stock, not for profit membership corporation organized under the General Corporation Law of Delaware.

b) The Foundation shall operate as an entity exempt from Federal taxation pursuant to Section 501(a) of the Internal Revenue Code of 1986, as amended hereinafter, the "Code"). Until such time, if ever, as such exemption is denied or lost, the Foundation shall not knowingly engage directly or indirectly in any activity that it believes would be likely to invalidate its status as an organization exempt from federal income taxation under Section 501(a) of the Code as an organization described in Section 501(c)(6) of the Code. All references to the Code contained herein are deemed to include corresponding provisions of any future United States Internal Revenue Law.

## **Section 1.6 Joint Research and Development Venture**

In working toward the achievement of its stated purpose, the Corporation and its Members intend to comply with the National Cooperative Research and Production Act, 15 U.S.C.A. §4301 et seq., and to engage in a "joint research and development venture" as defined therein.

# **ARTICLE II - MEMBERS**

## **Section 2.1 Classes of Membership**

The Foundation shall initially have four classes of membership: Platinum Members, Gold Members, Silver Members, and Associated Entity Members. Additional classes of voting and non-voting members may be created in the future, and the rights of existing classes of members may be amended, in each case pursuant to Section 2.9 of these By-laws. Platinum Members, Gold Members, Silver Members, and any future classes of members that are entitled to general voting rights shall be collectively referred to as "Voting Members." Associated Entity Members shall be non-voting Members. All voting and non-voting memberships in the Foundation are collectively referred to in these By-laws as "Memberships", and a person or entity holding Membership is referred to in these By-laws as a "Member".

## **Section 2.2 Conditions of Membership**

a) Any association, governmental agency, academic entity, or non-profit entity applying for membership shall be admitted to Associated Entity Membership upon at least a majority approval of the Board. Any association, partnership, organization, governmental agency, company, corporation, limited liability company, partnership, academic entity, non-profit, or other entity shall be admitted to Platinum Membership, Gold Membership, or Silver Membership upon: (a) acceptance of its written application on such form as may be from time to time required by the Foundation (which acceptance shall be administered in a non-discriminatory fashion), (b) satisfaction of such other conditions, including without

limitation requirements for in-kind contributions (e.g., assignment of dedicated developers and maintainers to Projects), as may from time to time be established by the Board for such class of Membership, if any, and (c) unless otherwise provided by the Board or these By-laws, payment of such application fees, assessments, initiation fees, annual dues, or other fees for such class of Membership as may from time to time be established by the Board, if any (collectively, "Fees"). A Member shall remain in good standing as a Member provided such Member is in compliance with the terms and conditions of the Foundation's Certificate of Incorporation, By-laws, Membership Application, and such rules and policies (and the terms of any agreements required thereby) as the Board and/or any committees thereof (each a "Board Committee") may from time to time adopt, and is current in its fulfillment of all in-kind commitments and payment of all Fees and penalties for late payment as may be required or determined by the Board (such Fees and penalties are collectively referred to in the By-laws as "Financial Obligations", and all of the foregoing good standing requirements are collectively referred to in these By-laws as "Membership Obligations"). No person or entity may be accepted for Membership if that person or entity has pre-existing, unpaid Financial Obligations to the Foundation.

b) The initial term of Membership for all Members shall be one year after the start of such Member's Membership plus the period through the end of the calendar year (December 31) of the first year of Membership. Thereafter, a Member's Membership and its Membership Obligations shall automatically renew on January 1 for one year periods, regardless of the class of Membership, unless such Member gives written notice of non-renewal to the Foundation not less than sixty (60) days prior to the end of its current Membership year, provided that the Foundation has given all Members notice of upcoming renewal not less than one hundred and twenty (120) and again ninety (90) days prior to December 31 in such year.

### **Section 2.3 Privileges of Platinum Membership**

Each Platinum Member, while in good standing, shall, in addition to all other rights of a Member as provided by these By-laws, the Board, or the law from time to time, be entitled to:

- a) subject to Section 2.8(b), appoint one representative to serve as a Director in accordance with Section 4.3(a) of these By-laws and subject to Section 2.8 below;
- b) eligibility for the Director representative it appoints to the Board to run for election as the chairperson of the Board (the "Chairperson") or Vice Chairperson of the Board the "Vice Chairperson");
- c) all rights provided in Section 2.5(c) below; and
- d) such other rights as the Board of Directors may from time to time approve.

### **Section 2.4 Privileges of Gold Membership**

Each Gold Member, while in good standing, shall, in addition to all other rights of a Member as provided by these By-laws, the Board, or the law from time to time, be entitled to:

- a) subject to Section 2.8(b), nominate a representative to run for election and be elected and serve as a Director in accordance with Section 4.3(b) of these By-laws and subject to Section 2.8 below;

b) vote, together with all other Gold Members as a class, for Directors as described in Section 4.3(b) of these By-laws and subject to Section 2.8 below;

c) all rights provided in Section 2.5(c) below; and

d) such other rights as the Board of Directors may from time to time approve.

## **Section 2.5 Privileges of Silver Membership**

Each Silver Member, while in good standing, shall, in addition to all other rights of a Member as provided by these By-laws, the Board, or the law from time to time, be entitled to:

a) subject to Section 2.8(b), nominate a representative to run for election and be elected and serve as a Director in accordance with Section 4.3(c) of these By-laws and subject to Section 2.8 below;

b) vote, together with all other Silver Members as a class, for Directors as described in Section 4.3(c) of these By-laws and subject to Section 2.8 below;

c) appoint one voting representative, on a one vote per Member basis, to each Member Committee (defined in Section 5.4(a)), for example, a Marketing Committee, Finance Committee, or other Member Committee; and

d) such other rights as the Board of Directors may from time to time approve.

## **Section 2.6 Privileges of Associated Entity Membership**

Each Associated Entity Member, while in good standing, shall be entitled to:

a) participate, in a non-voting capacity, in such Member Committees as may from time to time be determined by the Board; and

b) such other rights as the Board of Directors may from time to time approve.

## **Section 2.7 Participation**

Participation in the Cross Project Council ("CPC") (described further in Section 5.4(b) below) and Projects shall not be limited to Members, but may be subject to such operating procedures and terms of participation and other rules as may from time to time be approved by the Board or the applicable Project.

## **Section 2.8 Subsidiaries, Etc.**

a) Only the legal entity that has been accepted as a Member of the Foundation and its Subsidiaries (as defined below) shall be entitled to enjoy the rights and privileges of such Member's Membership; provided, however, that such Member and its Subsidiaries shall be treated together as a single Member except as otherwise provided in Section 2.8(b) below. For purposes of this Section, the term "Subsidiaries" shall mean the subset of all Related Companies (as defined in Section 2.8(c) below) that a Member controls.

b) Any number of Related Companies (as defined below) may become Members, but the rights of each such Member enumerated in Sections 2.3 to 2.5 with respect to representation on the Board of Directors are subject to the restriction that only one such Member which is part of a group of Related Companies shall be entitled at one time to have a representative on the Board or vote on matters voted on by the Members, except as follows:

(i) If a Member that is a Related Company to a Member already represented on the Board is deemed by the Board of Directors to be able to make an important contribution to the Board, then such Member shall be permitted to (x) appoint a Director (if it is a Platinum Member); or (y) nominate a representative to run for election as the End User Director, as defined in section 4.3(g) (if it is a Member of any class of Membership); or (c) nominate a representative to run for election by its class of Membership (if it is a Gold or Silver Member), provided that, in each of the above cases, such right shall be limited to one year unless such permission is renewed by the Board upon reapplication by the Member.

(ii) The determination by the Board of whether a group of Related Companies shall be entitled to be represented by more than one appointed or elected Director shall be made pursuant to such reasonable criteria as the Board of Directors may from time to time establish and apply in a consistent and non-discriminatory fashion.

(iii) When two Platinum Members are (x) each represented by an appointed Director pursuant to Subsection 2.8(b)(i) above, those Directors shall together have only one vote, and shall inform the Secretary which of the two shall be entitled to cast such vote, and (y) each represented by a Director, one of which is the End User Directors, the End User Director shall be entitled to vote and the other Director not.

(iv) A Member that is part of a group of Related Companies that is already represented by one or more appointed or elected Directors may also be the employer of a single Community Director.

c) For purposes of these By-laws, the term "Related Company" shall mean any entity which controls or is controlled by a Member, or which, together with a Member, is under the common control of a third party, in each case where such control results from ownership, either directly or indirectly, of more than fifty percent (50%) of the voting securities or membership interests of the entity in question; and "Related Companies" are entities that are each a Related Company of a Member.

d) Except with respect to Related Companies, if a Member is a corporation, limited liability company, foundation, consortium, membership organization, user group, or other entity that has stockholders, members, or sponsors, then the rights and privileges granted to such Member shall extend only to the employee-representatives of such Member, and not to its stockholders, members, sponsors, etc., unless otherwise approved by the Board in a specific case from time to time.

e) Memberships shall be non-transferable, non-salable, and non-assignable, except that any Member may transfer its current Membership benefits and obligations to: (i) any Related Company if the transferee qualifies for Membership in the transferring Member's class and the Board in its discretion permits such transfer, provided, however, that the transferor and transferee shall be and remain jointly and severally liable for any unpaid membership dues, fees, or assessments of the transferring member; and (ii) a successor of all or substantially all of such Member's securities, business, and/or assets, whether by

merger, sale, operation of law, or otherwise (such transferee (i) and/or (ii) shall be referred to as "Successor"). The Successor shall be bound by these By-laws, the Certificate of Incorporation, any membership agreement, and such policies and procedures as the Board may from time to time adopt, and the Successor shall assume the rights, liabilities, and obligations of the Membership, including without limitation, all Membership Obligations, participation obligations, commitments, contributions, and activities of the acquired Member, which shall continue and be binding upon such successor and shall inure to the benefit of the Foundation. In the event of a transfer within Related Companies where the Successor would be required to pay a higher dues amount than the transferor has already paid for the transferred Membership, the Successor shall pay the difference on a pro-rated basis for the balance of the then current Membership year; however, under no circumstance shall a refund of any amounts already paid by the transferor to the Successor be due as a result of a transfer, and any amounts still owing by the transferor at the time of a transfer shall remain due and payable by the Successor. In the event of a transfer under (ii) above, if the Successor is also a Member, then at the election of the Successor, either the Membership of the acquired Member or the Membership of the Successor shall terminate effective upon closing of the acquisition; provided, however, the Membership Obligations and participation obligations, commitments, contributions, and activities of the acquired Member shall continue and be binding upon such Successor and shall inure to the benefit of the Foundation.

## **Section 2.9 Additional Classes of Members**

The conditions, privileges, powers, and voting rights (if any) of any class of Members may be changed, and one or more additional classes of Membership may be created, and the conditions, voting rights (if any), powers, and privileges of each such class may be prescribed, by amendment to these By-laws in accordance with Article XIV.

## **Section 2.10 Termination or Suspension of Membership**

Any Member may be suspended from Membership or have its Membership terminated by the Board for material failure to satisfy its Membership Obligations or for engaging within the Foundation, in any (1) willful misconduct or otherwise acting to the material detriment of the best interests of the Foundation and its Members, or (2) conduct that is contrary to the Purpose of the Foundation or to the advancement of the Foundation's business or industry goals (in either case, other than conduct or actions taken in good faith reliance on Section 13 of these By-laws), as reasonably determined by the Board in good faith. Financial Obligations already paid shall not be refundable upon any such termination or suspension, and all Financial Obligations of such Member which may be accrued and unpaid as of the date of such termination shall remain due and payable. Terminations or suspensions of Membership for failure to satisfy Financial Obligations within sixty (60) days of the date of the applicable invoice may be imposed with notice and without right of formal appeal under such procedures as the Board may from time to time approve. Except as provided in the last paragraph of this Section 2.10, no termination or suspension of Membership for any other purpose shall be effective unless:

a) The Member is given notice of the proposed termination or suspension of Membership and of the reasons therefor;

b) Such notice is delivered personally or by certified mail, return receipt requested, or by a national or international overnight courier service, sent to the last address of the Member shown on the Foundation's records;

c) Such notice is given at least thirty (30) days prior to the effective date stated in the notice of the proposed termination or suspension of Membership;

d) Such notice sets forth a procedure determined by the Board (or other body authorized by the Board) to decide whether or not the proposed termination or suspension shall take place, whereby the Member is given the opportunity to be heard by such body, either orally (and represented by counsel if the Member so desires, at its sole cost and expense) or in writing, not less than five (5) days before the effective date of the proposed termination or suspension; and

e) Such termination or suspension of Membership is approved by Super Majority Vote (as defined in Section 4.10(b) below) of the Board. Notwithstanding the foregoing, in the event that the Board believes in good faith that a Member is engaging within the Foundation, in any (1) willful misconduct or otherwise acting to the material detriment of the best interests of the Foundation and its Members, or (2) conduct that is contrary to the Purpose of the Foundation or to the advancement of the Foundation's business or industry goals (in either case, other than conduct or actions taken in good faith reliance on Section 13 of these By-laws), the Board, acting by Super Majority Vote, may suspend such Member's Membership immediately, provided that such Member is otherwise afforded the protections provided for in subsections (a), (b), and (d) of this Section 2.10.

## **Section 2.11 Resignation by Member**

A Member may resign as a Member at any time. Any Financial Obligations already paid by such Member shall not be refundable upon any resignation, including any resignation pursuant to Section 2.12 or 2.14 below, and all such Financial Obligations of such Member which may be accrued and unpaid as of such date shall remain due and payable.

## **Section 2.12 Levy of Dues, Assessments, or Fees**

The Foundation may levy dues, assessments, or fees upon its Members in such amounts as may be approved from time to time by the Board, but shall provide at least thirty (30) days' notice of such levy. For the avoidance of doubt, no such levy shall be effective until at least thirty (30) days have passed since the provision of notice. A Member upon learning of any increase in dues, or of any levy of any assessments or fees, may avoid liability therefor by resigning from Membership prior to the date such dues, assessments, or fees are due and payable, except where the Member is, by contract with the Foundation or otherwise, independently and explicitly liable for such dues, assessments, or fees. No provision of the Certificate of Incorporation or By-Laws of the Foundation authorizing such dues, assessments, or fees shall, of itself, create such liability. In no event shall the failure of a Member to pay any dues or assessments give rise to any claim in favor of the Foundation for indirect or consequential damages.

## **Section 2.13 Use of Names**

Unless otherwise provided herein, neither the Foundation nor any Member shall use the name, logo, trademark, service mark, or other distinctive mark of another Member in any form of publicity without the written permission of the other member, provided that the Foundation and any Member may each disclose and publicize such Member's Membership in the Foundation.

## **Section 2.14 Rights in Intellectual Property**

The Members and Board shall neither adopt, nor make any material change to: (1) any intellectual property rights policy of the Foundation or any other material policy or procedure of the Foundation governing intellectual property (individually and collectively, as the context requires, an "IP Policy"), or (2) any proposed or requested change to any requirement or obligation in the By-laws to seek or obtain the consent by a Super Majority Vote of the Directors, unless approved by a Super Majority Vote of the Directors and the Foundation gives not less than ninety (90) days' prior written notice to all Members of the effective date of such adoption or change, such that any Member may resign its Membership prior to the effective date thereof in accordance with Section 2.11 above. A material change shall be deemed to include, without limitation, the imposition of any patent license obligation or encumbrance on Members, a change in a contribution agreement or license applicable to Members' contributions, the combination or formal affiliation of the Foundation with another organization, any alteration in the definition of "Related Company," or a change in the IPR Policy relating the choice and/or approval of exceptions of outbound licenses for software developed by a Project (the "Open Source Software").

# **ARTICLE III - ACTIONS OF MEMBERS**

## **Section 3.1 Action Without Meeting**

Any action required or permitted to be taken by the Members, or any class of Members under the General Corporation Law of Delaware, or at any meeting of a Member Committee or other group of Members or subset of Members, may be taken without prior notice and without an in-person vote, if a consent in writing, setting forth the action to be taken, shall be signed by Members (or members of a class of Members, as the case may be), making up not less than that percentage of all Members as would be necessary to authorize or take such action at a meeting at which all Members (or class of Members, as the case may be) entitled to vote thereon were present and voted, in accordance with the General Corporation Law of Delaware. Pursuant to such written consent, the Voting Members shall appoint or elect, as appropriate to its class of Membership, a Board in accordance with Section 4.3 on an annual basis. Prompt electronic notice of the taking of any corporate action without a meeting by less than unanimous written consent shall be given to those otherwise entitled to vote thereon who have not consented in writing. An electronic transmission consenting to an action to be taken and transmitted by a Member or by a person or persons authorized to act for a Member or proxyholder, shall be deemed to be written, signed, and dated for the purposes of this Section, provided that any such electronic transmission sets forth or is delivered with information from which the Foundation can determine (a) that the electronic transmission was transmitted by the Member or by a person or persons authorized to act for the Member and (b) the date on which such Member or authorized person or persons transmitted such electronic transmission. The date on which such electronic transmission is transmitted shall be deemed to be the date



on which such consent was signed. Consents given by electronic transmission (i) may be delivered by electronic transmission to the principal place of business of the Foundation or to an Officer or agent of the Foundation having custody of the book in which actions of Members without a meeting are recorded, need not be reproduced in paper form, and may be maintained in electronic form as long as they are capable of being readily reproduced in paper form, and (ii) may be otherwise delivered to the principal place of business of the Foundation or to an Officer or agent of the Foundation having custody of the book in which actions of Members without a meeting are recorded if, to the extent and in the manner provided by resolution of the Board. Any copy, facsimile, or other reliable reproduction of a consent in writing may be substituted or used in lieu of the original writing for any and all purposes for which the original writing could be used, provided that such copy, facsimile, or other reproduction shall be a complete reproduction of the entire original writing.

### **Section 3.2 Nomination and Election Procedures**

Subject to the provisions of Section 4.3, the Board shall establish reasonable nomination and election procedures given the nature, size, and operations of the Foundation, including a reasonable means for Members of appropriate classes to nominate a person for election as a Director, a reasonable opportunity for a nominee to communicate to the Members the nominee's qualifications and the reasons for the nominee's candidacy (if requested by such nominee), a reasonable opportunity for all nominees to solicit votes (if requested by any such nominee), and a reasonable opportunity for all Members entitled to vote thereon to choose among the nominees.

## **ARTICLE IV - DIRECTORS**

### **Section 4.1 Powers; Voting**

The business and affairs of the Foundation shall be managed by its Board, which shall be, and shall possess all of the powers of, the "Governing Body" of the Foundation as a not-for-profit membership corporation under General Corporation Law of Delaware. The Board may exercise all powers of the Foundation and do all such lawful acts and things as are not by statute or by the Certificate of Incorporation or by these By-laws directed or required to be exercised or done by the Members. No Director may act for, or speak on behalf of, the Board of Directors or the Foundation except as directed or authorized by the Board of Directors.

### **Section 4.2 Number of Directors**

Subject to Sections 4.3 and 4.4, the total number of Directors shall be at least one and not more than the number determined in the manner set forth in Sections 4.3 and 4.4 below.

### **Section 4.3 Nomination, Election, and Term of Office of Directors**

a) Each Platinum Member (while remaining in good standing) shall be entitled individually to appoint one Director (each a "Platinum Director"). Each Platinum Director shall serve in accordance with Section 4.3(k) below and until his or her successor shall be duly appointed or until his or her earlier resignation or removal.

b) At the time of any election of Directors where there is at least one (1) Gold Member in good standing, each Gold Member in good standing shall have the right to vote, together with any other Gold Members as a class, to elect that number of Directors equal to the lesser of (i) the number of Gold Members then in good standing divided by three (3), rounded down to the nearest whole number, and (ii) that number of Directors equal to the number of Platinum Directors then being appointed or in office, less three (3); provided that regardless of the foregoing, as long as there is at least one (1) Gold Member in good standing, the Gold Member(s) shall always be entitled a minimum of one Director, and a maximum of three (3) directors (each such Director being referred to as a "Gold Director"). In the event that there are two Gold Members, each desiring to vote for its own nominee, the winner shall be determined by a coin toss. Each Gold Director shall serve in accordance with Section 4.3(k) below and until his or her successor is elected and qualified or until his or her earlier resignation or removal. The selection of nominees for such position(s) shall be performed under such nominating procedures as may be set by the Board from time to time.

c) At the time of any election of Directors where there are at least ten (10) Silver Members in good standing, each Silver Member in good standing shall have the right to vote, together with the other Silver Members as a class, to elect that number of Directors equal to the number of Silver Members then in good standing divided by ten (10) (rounded down to the nearest whole number) (each such Director being referred to as a "Silver Director"). Each Silver Director shall serve in accordance with Sections 4.3(k) below and until his or her successor is elected and qualified or until his or her earlier resignation or removal. The selection of nominees for such position(s) shall be performed under such nominating procedures as may be set by the Board from time to time.

d) At the time of any election of Directors, the CPC shall have the right to designate one representative to the Board of Directors in accordance with Section 5.4(b) below, which representative shall automatically be a member of the Board (the "CPC Director").

e) At the time of any election of Directors where the number of Platinum Directors is two or greater, in addition to the CPC Director, the CPC shall have the right to designate a second additional representative to the Board of Directors in accordance with Section 5.4(b) below (the "At Large Community Director").

f) At the time of any election of Directors where both (i) the number of Platinum Directors is three or greater and (ii) the number of IM Program Participants (defined in Section 5.4(c) below) is two thousand (2,000) or greater, in addition to the CPC Director and At Large Community Director, the CPC shall have the right to designate a third additional representative to the Board of Directors in accordance with Section 5.4(b) below (the "Additional Community Director;" and the CPC Director, At Large Community Director, and Additional Community Director, each a "Community Director").

g) At the time of any election of Directors, the Platinum, Gold and Silver Members, voting together as a class, shall elect a single Director, who shall be an employee of a Member of any such class of Membership that is an end user of software supported by the Foundation (the "End User Director"). A Member desiring to nominate an employee to serve as the End User Director shall state the basis for its belief that its business experience will allow its nominee it to appropriately represent the interests of entities that are end users of software supported by the Foundation.

h) Each Community Director shall serve in accordance with Section 4.3(k) below and until his or her successor is elected and qualified or until his or her earlier resignation or removal; provided, that in the event that after any election of Directors, the number of Platinum Members or participants in the Individual Membership Program (further described in Section 5.4(c) below) decreases such that the number of Community Directors then in office exceeds the number of Community Directors permitted by subclause “d,” “e,” or “f” (as applicable) of this Section 4.3, then the Community Directors then in office may continue to serve until the next annual election of Directors, at which time the required decrease in the number of Community Directors (if applicable) shall take effect. If, at the time of such next annual election, the terms of a sufficient number of Community Directors are not expiring, the selection of the Community Director to resign shall be determined by such procedures as may be set by the Board of Directors from time to time.

i) Notwithstanding anything to the contrary contained herein, in the event that after any election of Directors, the number of Platinum Members decreases or the number of Gold Members increases, and such decrease or increase, as the case may be, causes a situation where the number of Gold Directors previously elected exceeds the number of Platinum Directors then being appointed or in office less three (3), then in such event the Gold Directors previously elected may serve until the next annual election of Directors, at which time the required decrease in the number of Gold Directors (if applicable) shall take effect. If the terms of a sufficient number of Gold Directors are not expiring as of the date of such election, the selection of the Gold Director(s) to resign shall be determined by such procedures as may be set by the Board of Directors from time to time.

j) Any Director nominated, appointed, or elected by any class of Members, or by any Member, may, but shall not automatically, be re-nominated, re-appointed and/or re-elected for additional terms.

k) Each Director (other than Community Directors) shall be an employee of the Member (or a Related Company) which nominated or appointed him or her at the time of such appointment or nomination. Each Director shall hold office until the earliest to occur of the expiration of the term for which such Director was appointed or elected and such Director's successor is appointed or elected and qualified, or until his or her earlier death, resignation, removal, and in the case of a Platinum, Gold or Silver Director, until the earlier of (i) expiration or termination of Membership of the Member that nominated or appointed such Director, (ii) the combination, by merger, acquisition or otherwise, of two Members that each have representatives on the Board (disregarding for such purpose the Community Directors and the End User Director, unless, in the latter case, the transaction is between a Member and a Related Company), upon which event one of the two representatives, as designated by the surviving Member, shall be deemed to have resigned, or (iii) if requested by the Board or the employer of such Director, upon the termination of the employment of such Director by the Member that nominated or appointed such Director. In addition, during such times as the Membership of any Member that has a representative serving as a Director is suspended pursuant to Section 2.10 above, the attendance and voting rights of such Director representative shall also be suspended until such time, if ever, as the suspension of such Member is lifted.

l) Each Platinum, Gold, Silver and End User Director (or the Member that appointed or is the employer of such Director), and each Community Director, may designate in writing (which designation may be withdrawn in writing at any time by such Director, Member, End User Director, or Community Director, as the case may be) an individual to act as a Director in his or her stead, whether for a single meeting or as

a standing alternate. Any such alternate Director shall also be an employee of the Member that appointed or nominated the original Director (except for the alternates of the Community Directors, the alternative for whom shall be approved by the CPC). Any such alternate Director shall be entitled to (i) attend and vote at all meetings which the designating Director does not attend, (ii) sign all written consents in lieu of the designating Director, and (iii) otherwise exercise the duties and enjoy the privileges of the designating Director in the absence or unavailability of the designating Director; provided, however, that no such alternate Director may propose a vote or vote upon any Board Committee.

m) The Board may approve from time to time such reasonable attendance and other requirements as it shall deem to be advisable to ensure that seats on the Board are held by active, contributing individuals. Such rules may provide that in the event that such requirements have not been met, a Director who fails to meet such requirements shall automatically be deemed to have resigned from the Board, but no such rule may be imposed retroactively.

#### **Section 4.4 Enlargement or Reduction**

Subject to Section 2.8 above and Section 4.10 below, the number of Directors, the persons eligible to become Directors and the classes of Members eligible to appoint, elect, and/or nominate Directors may be amended at any time by a Super Majority Vote (as defined in Section 4.10(b)) of the Board that includes a majority of the Platinum Directors then in Good Standing.

#### **Section 4.5 Resignation and Removal**

Any Director may resign at any time upon notice to the Foundation in writing or by electronic transmission at the principal place of business of the Foundation or to the Chairperson or Secretary. Such resignation shall be effective upon receipt unless it is specified to be effective at some other time or upon the happening of some other event. Any Director who was appointed by a Member under Section 4.3(a) may be removed by that Member at any time, and for any reason, or for no reason. Any or all of the Directors who were elected by a class of Members voting as a class or by the Board may be removed by a majority vote of such class of Members or the Board, respectively. Unless otherwise specified by law or the Certificate of Incorporation, any Director may be removed by a Super Majority Vote of the other Directors (not counting the Director subject to such removal vote in determining the requisite vote) for engaging within the Foundation, in his or her capacity as Director, in any (1) willful misconduct or otherwise acting to the material detriment of the best interests of the Foundation and its Members, or (2) conduct that is contrary to the Purpose of the Foundation or to the advancement of the Foundation's business or industry goals, as reasonably determined in good faith by such other Directors; provided, however, that the Member or class of Members that appointed and elected or nominated and elected (as the case may be) such removed Director shall be entitled to appoint and elect or nominate and elect (as the case may be) a replacement for such removed Director to serve for the balance of such removed Director's term.

#### **Section 4.6 Vacancies**

a) Vacancies on the Board occurring as a result of the death, resignation, removal, or termination of employment of a Director who was appointed or elected by a Member, or who was nominated and elected by a class of Members or the CPC, may be filled by such Member or class of Members or the CPC, as

applicable. All other vacancies shall be filled by the vote of a majority of Directors then in Good Standing, whether or not less than a quorum, or by a sole remaining Director. The term of a Director so appointed or elected shall be the unexpired portion of the term of the Director, if any, whom the Director so appointed or elected is replacing.

b) In the event of a vacancy on the Board, the remaining Directors, except as otherwise provided by law or these By-laws, may exercise the powers of the full Board until the vacancy is filled.

#### **Section 4.7 Place of Meetings; Telephonic Meetings**

The Board may hold meetings, both regular and special, either within or without the State of Delaware. Unless otherwise restricted by the Certificate of Incorporation or these By-laws, members of the Board or of any Board Committee may participate in a meeting of the Board or of any Board Committee, as the case may be, by means of conference telephone, video conference equipment, or other communications equipment by means of which all persons participating in the meeting can communicate with each other in real time, and such participation in a meeting shall constitute presence in person at the meeting.

#### **Section 4.8 Regular Meetings**

Regular meetings of the Board may be held on a scheduled basis at such time and at such place as shall from time to time be determined by the Board and communicated to the Members; provided that any Director who is absent when such a determination is made shall be given prompt notice of such determination.

#### **Section 4.9 Special Meetings**

Special meetings of the Board may be called by the Chairperson, Secretary, or on the written request of two or more Directors, or by one Director in the event that there is only one Director in office. Two (2) business days' notice to each Director, either personally or by telecopy, commercial delivery service, electronic transmission, or similar means sent to his or her business or home address, or three (3) business days' notice by written notice deposited in the mail, shall be given to each Director by the Secretary or by the Officer or one of the Directors calling the meeting. A notice or waiver of notice or any waiver by electronic transmission of a meeting of the Board need not specify the purposes of the meeting.

#### **Section 4.10 Quorum, Action at Meeting, Adjournments**

a) For purposes of these By-laws, the term "Good Standing" shall mean, with respect to the status of a Director, a Director who is then in office and whose voting rights as a Director are not then in suspension. At all meetings of the Board, a majority of Directors then in Good Standing shall constitute a quorum for the transaction of business and the act of a majority of such Directors present at any meeting at which there is a quorum shall be the act of the Board, except as may be otherwise specifically provided by law, the Certificate of Incorporation, or these By-laws.

b) In order to pass a "Super Majority Vote", a resolution must be taken at a meeting of the Board at which at least two-thirds of the Directors then in Good Standing are present and participating (whether in person, by proxy, or otherwise), and in support of which at least two-thirds of the Directors then in Good

Standing have voted affirmatively, or by an equivalent number of Directors acting by written consent in the manner described in Section 4.11 below. A Super Majority Vote of the Board shall be required whenever so noted in these By-laws, and, in addition, with respect to the following matters:

- i) amending the Certificate of Incorporation;
  - ii) adopting or recommending to the Members an agreement of merger or consolidation;
  - iii) approving or recommending to the Members the sale, lease, or exchange of all or substantially all of the Foundation's property and assets;
  - iv) approving or recommending to the Members the dissolution, liquidation, or winding up of the Foundation or a revocation of any such dissolution, liquidation, or winding up;
  - v) enlarging or reducing the size of the Board;
  - vi) amending or modifying the eligibility requirements for membership on the Board or the classes of Members eligible to appoint and/or elect Directors;
  - vii) terminating or suspending a Member's Membership, pursuant to Section 2.10 above;
  - viii) eliminating the Platinum Member right set forth in Section 2.3(a) above;
  - ix) adopting or amending any IP Policy document, or amending or deleting any provision of these By-laws relating to the IP Policy; and
  - x) adopting amending any charter or other document relating to the operations or scope of the CPC.
- c) No Director whose attendance and voting rights have been suspended shall be counted for purposes of determining quorum, the number of Directors then in Good Standing, or the number of Directors required for voting purposes, unless otherwise required by law, these Bylaws, or the Certificate of Incorporation. If a quorum shall not be present at any meeting of the Board, a majority of the Directors present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present. In the event that one or more of the Directors shall be disqualified from voting at any meeting upon any matter, then the required quorum as it relates to the consideration of such matter shall be reduced by one for each such Director so disqualified.

#### **Section 4.11 Action by Consent**

a) Unless otherwise restricted by the Certificate of Incorporation or these By-Laws, any action required or permitted to be taken by the Board or any committee thereof may be taken without a meeting and without prior notice if a majority of Directors then in Good Standing (or such greater number of Directors as may be required by law or the By-laws of the Foundation for the taking of any such action at a meeting) consent thereto in writing or by electronic transmission, and the writing or writings, or electronic transmission or transmissions, are filed with the minutes of proceedings of the Board, provided that:

i) such written consent or electronic transmission shall have been sent simultaneously to all Directors then in Good Standing for their consideration;

ii) prompt written notice of any action so taken (which notice may be given by electronic transmission) is given to those Directors who have not consented in writing or by electronic transmission; and

iii) two (2) or more such Directors have not objected to the taking of any such action by written notice delivered to the Foundation within ten (10) business days following the date that written notice of the Directors action is mailed or otherwise delivered to such Directors. Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form.

b) Notwithstanding the foregoing, the ability of two (2) or more non-consenting Directors to prevent the taking of an action by written consent under clause 4.11(a)(iii) above shall not prevent any such action from being taken at a later date at an actual meeting of the Board.

c) Unless otherwise restricted by the Certificate of Incorporation or these By-Laws, any action required or permitted to be taken at any meeting of any Board Committee may be taken in the manner set forth in the preceding clauses 4.11(a) and (b).

## **Section 4.12 Inspection Rights**

Every Director shall have the absolute right at any time to inspect, copy, and make extracts of, in person or by agent or attorney, all books, records, and documents of every kind, and to inspect the physical properties of the Foundation.

## **Section 4.13 Fees and Compensation**

Directors shall not receive any stated salary or compensation for their services as Directors; provided that, by resolution of a majority of the Board, the Foundation may reimburse Directors for expenses incurred while acting on behalf of the Foundation and/or expenses incurred in attending meetings of the Board, in such amounts as the Board may determine to be appropriate. Nothing herein contained shall be construed to preclude any Director from serving the Foundation in any other capacity as an Officer, agent, employee, or otherwise, and receiving compensation therefor. The Directors may also approve reimbursement of expenses for members of Board Committees in connection with their service on such Board Committees.

# **ARTICLE V - BOARD AND MEMBER COMMITTEES**

## **Section 5.1 Committees of the Board**

a) The Board may, by resolution create such Executive, nominating, audit, compensation, and other Board Committees, each consisting of one or more Directors appointed by the Board, as the Board may from time to time deem advisable, to perform such general or special duties as may from time to time be delegated to any such Board Committees by the Board, subject to the limitations imposed by law, the

Certificate of Incorporation or these By-laws. No Committee shall have the power or authority to take any of the following actions:

- i) approving any action which requires approval of the Voting Members;
- ii) filling vacancies on the Board;
- iii) fixing compensation of the Directors, Executive Director, and other employees for serving on the Board or on any Board Committee;
- iv) amending or repealing the By-laws or adopting new By-laws;
- v) adopting a policy or amending or repealing any policy adopted by the Board;
- vi) amending or repealing any resolution of the Board which by its express terms is not so amendable or repealable;
- vii) amending the Certificate of Incorporation;
- viii) adopting an agreement of merger or consolidation;
- ix) recommending to the Members the sale, lease, or exchange of all or substantially all of the Foundation's property and assets;
- x) recommending to the Members a dissolution of the Foundation or a revocation of a dissolution; and
- xi) taking any other action for which a vote of more than a simple majority of the Board is required by these By-laws, the Certificate of Incorporation, or applicable law.

b) Unless a Member objects, the Board may designate one or more Directors as alternate members of any Board Committees, who may replace any absent member at any meeting of such Board Committees, unless the Platinum Member objects in writing to a replacement of the Director appointed by such Platinum Member. Any such Board Committee or Board Committees shall have such powers, duties, and name or names as may be determined from time to time by resolution adopted by the Board. Each Board Committee shall keep regular minutes of its meetings and make such reports to the Board as the Board may request.

## **Section 5.2 Meetings of Committees of the Board**

Except as otherwise provided in these By-laws or by resolution of the Board, each Board Committee may adopt its own rules governing the time and place of holding and the method of calling its meetings and the conduct of its proceedings and shall meet as provided by such rules, but unless otherwise provided by resolution of the Board or in such rules, its business shall be conducted as nearly as possible in the same manner as is provided in these By-laws for the conduct of the business of the Board.



## **Section 5.3 Term of Office of Members of Committees of the Board**

Each member of a Board Committee shall serve for such term as shall be established at the time of his or her election as a Director.

## **Section 5.4 Member Committees; CPC; Individual Membership Program**

a) From time to time, the Board may establish committees of the Members (each a “Member Committee”). Membership attendance and voting rights in all Member Committees shall be as specified in Article II, and any such Member Committee may operate under such further or different rules of process as it may propose and which are approved by the Board.

b) A Cross Project Council (the “CPC”) shall be established and operated pursuant to a charter to be approved by the Board (collectively, the “CPC Charter”). Except as otherwise expressly provided in this Agreement or required by the Board, the CPC shall be the principle forum for discussion of recruiting, managing, coordinating, and hosting of new Projects and shall be responsible for establishing and operating the Individual Membership Program. Subject to approval of the Board, the creation and operation of Projects shall be pursuant to the CPC Charter. Members of the CPC need not be Members of the Foundation, and eligibility for participation in the CPC shall be established pursuant to the CPC Charter. The CPC shall elect a chair of the CPC (the “CPC Chair”) in accordance with the CPC Charter, and the Community Directors (defined in Section 4.3(f)) in accordance with Sections through 4.3(d) through (f) and 5.4(c) hereof. The CPC Chair and Community Directors may be re-elected for additional terms without limit. The CPC shall be under the leadership of the CPC Chair, and the CPC Chair may (but need not) be the CPC Director. The Community Directors shall attend meetings of the Board as members of the Board, and may vote at such meetings.

c) Subject to approval of the Board, the CPC may from time to time establish (or restructure or disband) an “Individual Membership Program” (the “IM Program”), for purposes of promoting and supporting the involvement of interested individuals in the activities of the Foundation. The IM Program shall operate in accordance with a charter proposed by the CPC and approved by the Board, which charter, among other things, shall define the purpose and scope of the IM Program, establish eligibility for individuals participating in the IM Program (“IM Program Participants”), establish nomination and election procedures whereby the IM Program Participants shall elect a chair of the IM Program (“IM Program Chair”), and address such other matters as the CPC and/or Board may require. The IM Program Chair may be re-elected for additional terms without limit, and may (but need not) be designated by the CPC as the Additional Community Director pursuant to Section 4.3(f).

## **ARTICLE VI - OFFICERS**

### **Section 6.1 Officers**

The Officers of the Foundation shall be a Chairperson and a Vice Chairperson (each of which shall be a Platinum Director, unless no Platinum Director is willing to be nominated to such position) and a Secretary (each of whom shall also be a Director, unless no Director is willing to be nominated for such position). The Foundation may also have, at the discretion of the Board, an Executive Director, one or

more Vice Chairpersons, one or more Assistant Secretaries, and such other Officers with such titles, terms of office and duties as may be elected in accordance with the provisions of Section 6.3. The Chairperson shall be elected by a majority of the Platinum Members, and shall preside over meetings of the Board. The Vice Chairperson shall be elected by a majority of the Platinum Members, and shall preside over meetings of the Board and the Members in the absence of the Chairperson.

## **Section 6.2 Vacancies**

A vacancy in any office because of death, resignation, removal, disqualification, or any other cause shall be filled in the manner prescribed in these By-laws for regular elections to such office and may be filled by the Board, at its discretion.

## **Section 6.3 Election**

The Board at its annual meeting each year shall choose a Chairperson, a Vice Chairperson, and a Secretary. Other Officers may be elected by the Board at any such meeting, and any or all Officers may be replaced, at any other meeting of, or by written consent of, the Board.

## **Section 6.4 Tenure**

Each Officer of the Foundation shall hold office until his or her successor is chosen and qualifies, unless a different term is specified in the vote choosing or electing him, or until his or her earlier death, resignation, or removal. Any Officer elected by the Board may be removed at any time by the Board or a Board Committee duly authorized to do so. Any Officer may resign by delivering his or her written resignation to the Foundation at its principal place of business or to the Secretary. Such resignation shall be effective upon receipt unless it is specified to be effective at some other time or upon the happening of some other event.

## **Section 6.5 Chairperson and Executive Director**

a) The Chairperson shall have all of the powers normally associated with the role of chief executive officer and preside at all meetings of the Board and the Members, in addition to any other power granted the Chairperson under these By-laws or by applicable law. The Chairperson shall oversee the management of the business of the Foundation and see that all orders and resolutions of the Board are carried into effect. Without limiting the foregoing, the Chairperson shall:

i) Execute bonds, mortgages, and other contracts requiring a seal, under the seal of the Foundation, except where required or permitted by law to be otherwise signed and executed and except where the signing and execution thereof shall be expressly delegated by the Board to some other Officer or agent of the Foundation; and

ii) Oversee the Executive Director (if any).

b) The Executive Director (if any) shall preside over the day-to-day affairs of the Foundation under the direction of the Board and the Chairperson and perform such other duties and have such other powers as the Board or the Chairperson may from time to time prescribe.

## **Section 6.6 Vice Chairperson**

In the absence of the Chairperson or in the event of his or her inability or refusal to act, the Executive Director or the Vice Chairperson shall perform the duties of the Chairperson concerning the management of the business of the Foundation, and when so acting, shall have all the powers of and be subject to all the restrictions upon the Chairperson; provided, however, that nothing within this Section 6.6 shall operate to grant powers of the Chairperson as chair of the Board of Directors or as a member of the Board of Directors to any Executive Director or Vice Chairperson. The Vice Chairperson shall perform such other duties and have such other powers as the Board or the Chairperson may from time to time prescribe.

## **Section 6.7 Secretary**

The Secretary shall have such powers and perform such duties as are incident to the office of Secretary under the General Corporation Law of Delaware, including without limitation a recording all the proceedings of the meetings of the Foundation and of the Board. The Secretary, and each Assistant Secretary, shall have authority to affix the Corporate seal to any instrument requiring it and when so affixed, it may be attested by signature of the Secretary or by the signature of such Assistant Secretary. The Board may give general authority to any other Officer to affix the seal of the Foundation and to attest the affixing by such Officer's signature.

## **Section 6.8 Assistant Secretaries**

Any Assistant Secretary shall, in the absence of the Secretary or in the event of his or her inability or refusal to act, perform the duties and exercise the powers of the Secretary. In the absence of the Secretary or any Assistant Secretary at any meeting of Directors, the person presiding at the meeting shall designate a temporary or acting Secretary to keep a record of the meeting.

## **Section 6.9 Compensation**

No Officer, other than an Executive Director, shall receive compensation for serving as an Officer.

# **ARTICLE VII - NOTICES**

## **Section 7.1 Delivery**

a) Whenever, under the provisions of law, or of the Certificate of Incorporation or these By-laws, written notice is required to be given to any Director or Member, such notice may be given by mail, addressed to such Director or Member, at his, her, or its address as it appears on the records of the Foundation, with postage thereon prepaid. Unless written notice by mail is required by law, the Certificate of Incorporation, or another provision of these By-laws, and subject to the provisions below relating to notice by electronic transmission to Members, written notice may also be given by electronic mail, telecopy, commercial delivery service, or similar means, addressed to such Director or Member at his, her, or its physical, email, or telecopy address or number as it appears on the records of the Foundation. Without limiting the manner by which notice otherwise may be given effectively to Members, any notice to Members given by the Foundation under any provision of law, the Certificate of Incorporation, or the

By-laws, unless written notice by mail is required by law, the Certificate of Incorporation, or another provision of these By-laws, shall be effective if given by a form of electronic transmission consented to by the Member to whom the notice is given.

b) Notice given pursuant to this Section shall be deemed given: (i) if by facsimile telecommunication (A) to a Member, when directed to a number at which the Member has consented to receive notice and (B) to a Director, when directed to the number for such Director as it appears on the records of the Foundation; (ii) if by electronic mail to (A) a Member, when directed to an electronic mail address at which the Member has consented to receive notice and

B) to a Director, when directed to the electronic mail address for such Director as it appears on the records of the Foundation; (iii) if by a posting on an electronic network together with separate notice to the Member or Director of such specific posting, upon the later of (A) such posting and (B) the giving of such separate notice; (iv) if by any other form of electronic transmission, when directed to the Member or Director; (v) if by in-hand delivery or oral notice, at the time it is actually given; (vi) if by mail, at the time when the same shall be deposited in the United States mail; and (vii) if by commercial delivery carrier or similar means, at the time when the same shall be deposited with the carrier, in each case the transmission charge to be paid by the Foundation or the person sending such notice and not by the addressee. An affidavit of the Secretary or an Assistant Secretary or of the transfer agent or other agent of the Foundation that the notice has been given by a form of electronic transmission shall, in the absence of fraud, be prima facie evidence of the facts stated therein.

c) For purposes of these By-laws, "electronic transmission" means any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved, and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process.

d) Without limiting the foregoing, the Foundation adopts electronic mail as its principal source of communication with its Members. Each Member acknowledges and agrees that the Foundation shall not be under any obligation (except as required by law or these By-laws) to send any notice to any Member by any means other than electronic mail, and it is therefore the responsibility of each Member to avail itself of and make such arrangements as may be necessary to receive notice in such fashion.

## **Section 7.2 Waiver of Notice**

Whenever any notice is required to be given under the provisions of law or of the Certificate of Incorporation or of these By-laws, a waiver thereof in writing, signed by the person or persons entitled to said notice, whether before or after the time stated therein, or a waiver by electronic transmission by the person entitled to notice, shall be deemed equivalent thereto.

## **ARTICLE VIII - INDEMNIFICATION**

### **Section 8.1 Actions other than by or in the Right of the Foundation**

Subject to confirmation of the appropriateness of such action by the Board as provided in Section 8.4 below, the Foundation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative (other than an action by or in the right of the Foundation) by reason of the fact that he or she is or was a Director, Officer, employee, or agent of the Foundation, or is or was serving at the request of the Foundation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, against expenses (including attorneys' fees), judgments, fines, and amounts paid in settlement actually and reasonably incurred by him or her in connection with such action, suit, or proceeding if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Foundation, and, with respect to any criminal action or proceedings, had no reasonable cause to believe this conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the Foundation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful.

### **Section 8.2 Actions by or in the Right of the Foundation**

Subject to confirmation of the appropriateness of such action by the Board as provided in Section 8.4 below, the Foundation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action or suit by or in the right of the Foundation to procure a judgment in its favor by reason of the fact that he or she is or was a Director, Officer, employee, or agent of the Foundation, or is or was serving at the request of the Foundation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him or her in connection with the defense or settlement of such action or suit if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Foundation; provided, however, that no indemnification shall be made in respect of any claim, issue, or matter as to which such person shall have been adjudged to be liable unless, and only to the extent that, the Court of Chancery of the State of Delaware or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery of the State of Delaware or such other court shall deem proper.

### **Section 8.3 Success on the Merits**

To the extent that any person described in Section 8.1 or 8.2 of this Article VIII has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in said Sections, or in defense of any claim, issue, or matter therein, he or she shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him or her in connection therewith.

## **Section 8.4 Specific Authorization**

Any indemnification under Section 8.1 or 8.2 of this Article VIII (unless ordered by a court) shall be made by the Foundation only as authorized in the specific case upon a determination that indemnification of any person described in said Sections is proper in the circumstances because he or she has met the applicable standard of conduct set forth in said Sections. Such determination shall be made by a majority vote of a such Directors who were not parties to such action, suit, or proceeding, even though less than a quorum.

## **Section 8.5 Advance Payment**

Expenses incurred in defending a civil or criminal action, suit, or proceeding shall be paid by the Foundation in advance of the final disposition of such action, suit, or proceeding upon receipt of an undertaking by or on behalf of any person described in said Section to repay such amount if it shall ultimately be determined that he or she is not entitled to indemnification by the Foundation as authorized in this Article VIII.

## **Section 8.6 Non-Exclusivity**

The indemnification and advancement of expenses provided by, or granted pursuant to, the other Sections of this Article VIII shall not be deemed exclusive of any other rights to which those provided indemnification or advancement of expenses may be entitled under any By-law, agreement, vote of disinterested Directors, or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such office.

## **Section 8.7 Jurisdiction of Delaware Court of Chancery**

The Delaware Court of Chancery is vested with exclusive jurisdiction to hear and determine all actions for advancement of expenses or indemnification. The Delaware Court of Chancery may summarily determine the Foundation's obligation to advance expenses (including attorney's fees).

## **Section 8.8 Insurance**

The Board may authorize the Foundation to purchase and maintain insurance on behalf of any person who is or was a Director, Officer, employee, or agent of the Foundation, or is or was serving at the request of the Foundation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against any liability asserted against him or her and incurred by him or her in any such capacity, or arising out of his or her status as such, whether or not the Foundation would have the power to indemnify him or her against such liability under the provisions of this Article VIII.

## **Section 8.9 Continuation of Indemnification and Advancement of Expenses**

The indemnification and advancement of expenses provided by, or granted pursuant to, this Article VIII shall continue as to a person who has ceased to be a Director, Officer, employee, or agent of the Foundation and shall inure to the benefit of the heirs, executors, and administrators of such a person.

## **Section 8.10 Severability**

If any word, clause or provision of this Article VIII or any award made hereunder shall for any reason be determined to be invalid, the provisions hereof shall not otherwise be affected thereby but shall remain in full force and effect.

## **Section 8.11 Intent of Article**

The intent of this Article VIII is to provide for indemnification and advancement of expenses to the fullest extent permitted by Section 145 of the General Corporation Law of Delaware. To the extent that such Section or any successor section may be amended or supplemented from time to time, this Article VIII shall be amended automatically and construed so as to permit indemnification and advancement of expenses to the fullest extent from time to time permitted by law.

# **ARTICLE IX - BOOKS AND RECORDS**

## **Section 9.1 Books and Records**

The Foundation shall keep adequate and correct books and records of account, minutes of the proceedings of the Members, the Board and Board Committees, and a record of the Members giving their names and addresses and the class of Membership held by each.

## **Section 9.2 Form of Records**

Minutes shall be kept in written form. Other books and records shall be kept either in written form or in any other form capable of being converted into written form.

## **Section 9.3 Reports to Directors, Members, and Others**

The Board shall cause such reports to be prepared, filed, and/or distributed as may be required.

## **Section 9.4 Record Date**

In order that the Foundation may determine the Members entitled to express consent to corporate action in writing without a meeting, or the Members entitled to receive payment of any distribution, if any, permitted by law and the Foundation's then current federal and state tax status, or allotment of any rights, or entitled to exercise any rights in respect of any change, conversion, or exchange of Membership or for the purpose of any other lawful action, the Board may fix, in advance, a record date, which shall not be (i) more than sixty (60) days prior to the adoption of the resolution by the Board and (in the case of consent to corporate action in writing without a meeting) the date upon which such written consent is delivered to the Members, nor (ii) later than the date upon which the Board adopts the resolution proposing the taking of such action. In the absence of such a determination, the record date shall be at the close of business on the day on which the Board adopts the resolution proposing the taking of such action.

## **Section 9.5 Registered Members**

The Foundation shall be entitled to recognize the exclusive right of a person registered on its books as a Member or a representative of a Member to receive distributions, if any, and to vote, if such records indicate that such person is a Voting Member or a representative of a Voting Member, and to hold liable for Financial Obligations each Member registered on its books, and shall not be bound to recognize any equitable or other claim to or interest in Membership on the part of any other person, whether or not it shall have express or other notice thereof, except as otherwise provided by the General Corporation Law of Delaware.

## **ARTICLE X - CERTAIN TRANSACTIONS**

### **Section 10.1 Transactions with Interested Parties**

No contract or transaction between the Foundation and one or more of its Directors or Officers, or between the Foundation and any other corporation, partnership, association, or other organization in which one or more of its directors or officers are Directors or Officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because such Director or Officer (or other director or officer) is present at or participates in the meeting of the Board or Board Committee which authorizes the contract or transaction or solely because his, her, or their votes are counted for such purpose, if:

- a) The material facts as to his or her relationship or interest and as to the contract or transaction are disclosed or are known to the Board or such Board Committee, and the Board or such Board Committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested Directors, even though the disinterested Directors be less than a quorum; or
- b) The material facts as to his or her relationship or interest and as to the contract or transaction are disclosed or are known to the Voting Members entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the Voting Members; or
- c) The contract or transaction is fair as to the Foundation as of the time it is authorized, approved, or ratified, by the Board, a Board Committee, or the Voting Members. Common or interested Directors may be counted in determining the presence of a quorum at a meeting of the Board or Board Committee that authorizes the contract or transaction.

## **ARTICLE XI - GRANTS, CONTRACTS, LOANS, ETC.**

### **Section 11.1 Grants**

The making of grants and contributions, and otherwise rendering financial assistance for the Purpose of the Foundation, may be authorized by the Board. The Board may authorize any Officer or Officers, agent or agents, in the name of and on behalf of the Foundation to make any such grants, contributions or assistance.



## **Section 11.2 Execution of Contracts**

The Board may authorize any Officer, employee, or agent of the Foundation, in the name and on behalf of the Foundation, to enter into any contract or execute and satisfy any instrument, and any such authority may be general or confined to specific instances, or otherwise limited. In the absence of any action by the Board to the contrary, the Chairperson shall be authorized to execute such contracts and instruments on behalf of the Foundation as he or she may deem to be reasonably necessary, subject to such standing limits as may from time to time have been established by vote of the Board, but must inform the Board of any such actions.

## **Section 11.3 Checks, Drafts, Etc.**

All checks, drafts, and other orders for the payment of money out of the funds of the Foundation, and all notes or other evidences of indebtedness of the Foundation, shall be signed on behalf of the Foundation in such manner as shall from time to time be determined by resolution of the Board.

## **Section 11.4 Deposits**

The funds of the Foundation not otherwise employed shall be deposited from time to time to the order of the Foundation in such banks, trust companies, or other depositories, or shall be otherwise invested, as the Board may select or direct, or as may be selected or directed by an Officer, employee, or agent of the Foundation to whom such power may from time to time be specifically delegated by the Board.

# **ARTICLE XII - GENERAL PROVISIONS**

## **Section 12.1 Fiscal Year**

The fiscal year of the Foundation shall initially end on December 31, subject to change at any time by resolution of the Board.

## **Section 12.2 Reserves**

The Directors may set apart out of any funds of the Foundation a reserve or reserves for any proper purpose and may abolish any such reserve.

## **Section 12.3 Seal**

The Board may, by resolution, adopt a corporate seal. The corporate seal shall have inscribed thereon the name of the Foundation, the year of its organization and the word "Delaware". The seal may be used by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise. The seal may be altered from time to time by the Board.

## **Section 12.4 Proprietary Rights**

a) Except as specifically provided to the contrary in such policies and procedures as may from time to time be approved by the Board, all information disclosed by any participant during any official meeting or

activity of the Foundation, including but not limited to Member meetings, Member Committee Meetings, Foundation meetings, Board meetings, meetings of Board Committees and sub-committees thereof, electronic mail, or the like, shall be deemed to have been disclosed on a non-confidential basis, but without waiver of any rights represented by valid patents, patent applications, and Federal and international statutory copyrights.

b) No express or implied right, whether by implication, estoppel, or otherwise, to any patent, copyright, trademark, trade secret, or other intellectual property right of any Member is or shall be deemed to be granted to the Foundation or to any other Member by reason of its Membership in or participation in the activities of the Foundation, except as may be provided in a separate written agreement or IP Policy.

c) No Member shall at any time be required to exchange proprietary information with any other Member solely by reason of its being a Member of the Foundation.

## **ARTICLE XIII - ANTITRUST COMPLIANCE**

### **Section 13.1 General**

The Foundation will conduct all of its activities in conformance with all international, U.S. federal, and state antitrust laws and competition laws, including but not limited to the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, and the EU Competition Regulations. The Board and the Chairperson shall consult legal counsel and seek legal review whenever necessary to ensure that the activities of the Foundation are conducted in conformance with such laws. Each of the Members of the Foundation is committed to fostering competition in the development of new products and services, and the activities of the Foundation are intended to promote such competition. Each Member acknowledges that it may compete with other Members in various lines of business and that it is therefore imperative that they and their representatives act in a manner that does not violate any applicable state, federal, or international antitrust laws or regulations. Without limiting the generality of the foregoing, Members that are competitors shall not discuss issues relating to product costs, product pricing, methods, or channels of product distribution, division of markets, allocation of customers, or any other topic that would be prohibited by applicable antitrust laws. Each Member shall assume responsibility to provide appropriate legal counsel to its representatives acting under these By-laws regarding the importance of limiting the scope of their discussions to the topics that relate to the Purpose of the Foundation, whether or not such discussions take place during formal meetings, informal gatherings or otherwise.

### **Section 13.2 Availability of Intellectual Property**

It is the good faith objective of the Foundation (a) to make all Open Source Software available promptly as it is developed and owned by the Foundation on the same terms and conditions to all Members and at the same point in time to all Members, and (b) to make all such Open Source Software available to all non-Members under the same Open Source Software license(s).

### **Section 13.3 No Obligation to Endorse**

No Member shall, by reason of its Membership or participation in the Foundation or otherwise, be obligated to license from the Foundation, use or endorse any intellectual property developed or endorsed by the Foundation, or to conform any of its products to any code base, specification, software, documentation, or platform developed or adopted by the Foundation or any Project, nor shall any such Member be precluded from independently licensing, using, or endorsing similar intellectual property, platform, software, specifications, or documentation developed by it or by others. No provision of these By-Laws or the membership agreement shall be interpreted to prevent any Member from using any technology or platform other than technology of the Projects, or from engaging in other activities or business ventures, independently or with others, whether or not competitive with the activities contemplated herein or those of any Member.

## **ARTICLE XIV - AMENDMENTS**

Except as otherwise required under these Bylaws, or where such power is expressly limited by law or the Certificate of Incorporation as to any specific action, these By-laws may be altered, amended, or repealed, and new By-laws may be adopted, in each case by an affirmative Super Majority Vote .

---

## Register of Amendments to the By-laws:

September 27, 2019	1.4(b)	Delete the word “all”
September 27, 2019	2.2(b)	Delete phrase “Platinum Members shall be three years after the start date of such Platinum Member’s Membership plus the period through the end of the calendar year (December 31) of the third year of Membership; and the initial term of Membership for all other”
September 27, 2019	13.2	Replace “Open Source license(s)” with “Open Source Software license(s)”