

# BY-LAWS OF OPEN MOLECULAR SOFTWARE FOUNDATION

## ARTICLE I

### NAME, PURPOSE AND OFFICES

#### Section 1.1 Name

The name of the corporation is "Open Molecular Software 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 initially be located at 200 B Street, Suite F, Davis, CA 95616. The Board of Directors of the Foundation (the "Board of Directors") is hereby granted full power and authority to change its 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 of Directors at any place or places.

#### Section 1.4 Purpose

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 Delaware General Corporation Law ("DGCL"). The primary purpose of the Foundation is to benefit human health by supporting sustainable, volunteer molecular scientific communities in the development of high quality open source software for the public good. Specifically, the Foundation will: (a) host collaborative projects ("Hosted Projects") creating deliverables consistent with such purpose ("Deliverables"), (b) promote such Deliverables, and (c) undertake such other activities as may from time to time be appropriate to further the purposes and achieve the goals set forth above.

#### Section 1.5 Nonprofit Status

- a. The Foundation is organized and shall be operated as a non-stock, not for profit Foundation organized under the DGCL. The Foundation is organized exclusively for charitable, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations described under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (hereinafter, the "Code"), or corresponding section of any future federal tax code.

- b. The Board of Directors may, in its sole discretion, elect to seek exemption from Federal taxation for the Foundation pursuant to Section 501(a) of the Code. In the event that such exemption is sought and 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)(3) of the Code. All references to the Code contained herein are deemed to include corresponding provisions of any future United States Internal Revenue Law.
  
- c. In the event that such exemption is obtained and until such time, if ever, as such exemption is denied or lost: (i) no part of the net earnings of the Foundation shall inure to the benefit of, or be distributable to, any member of its Board of Directors, its officers, or other private persons, except that the Foundation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth herein; (ii) no substantial part of the activities of the Foundation shall be the carrying on of propaganda or otherwise attempting to influence legislation, and the Foundation shall not participate or intervene in (including the publication or distribution of statements) any political campaign on behalf of (or in opposition to) any candidate for public office; (iii) the Foundation shall be operated and organized exclusively for charitable, religious, educational, literary, and scientific purposes, within the meaning of Section 501(c)(3) of the Code; and (iv) notwithstanding any other provisions of these By-laws, the Foundation shall not carry on any other activities not permitted to be carried on (A) by an organization exempt from federal income tax under Section 501(c)(3) of the Code, or (B) by an organization contributions to which are deductible under Section 170(c)(2) of the Code.

### **Section 1.6 Hosted Projects**

Except as otherwise approved by the Board of Directors in any specific case, a Hosted Project is a collaborative endeavor that (i) is engaged in developing Deliverables consistent with the purpose of the Foundation, (ii) is governed by a board, steering committee or other-titled representative group of individuals, (iii) has an executive director or other individual manager able to act as a principle point of contact ("Hosted Project Director"), (iv) completes and submits such form of application as the Board of Directors may from time to time approve, (v) otherwise meets such criteria as the Board of Directors may from time to time require, and (vi) is accepted by vote of the Board of Directors.

## **ARTICLE II**

### **MEMBERS**

#### **Section 2.1 Membership**

The Foundation shall initially have one class of membership. Additional classes of voting and non-Members may be created in the future, and the rights of existing classes of members may be amended, by vote of the Board of Directors.

## **Section 2.2 Purpose, Eligibility and Designation of Members**

- a. The primary right and obligation of the Members is to elect an effective Board of Directors that is both fairly representative of Hosted Projects and funding sources and benefits from the expertise of unaffiliated experts.
- b. The following shall be eligible to become Members:
  - i. Each Hosted Project shall be entitled to become a Member upon acceptance as a Hosted Project (a "Hosted Project Member"), and shall be entitled to remain a Member while remaining a Hosted Project in good standing;
  - ii. Each entity that provides at least \$X in funding to the Foundation, where X is a number designated from time to time by the Board of Directors, shall have the right to be accepted as a Member (a "Sponsor Member"), with a term of Membership ending on December 31 of the year in which the funding is received by the Foundation; and
  - iii. In the event that the Board of Directors establishes an Foundation Advisory Board, as defined in Section 5.5(b), the members of such Foundation Advisory Board shall collectively be considered to be a single Member.
- c. Each Member shall remain in good standing while it remains in compliance with the terms and conditions of the Foundation's Certificate of Incorporation ("Certificate of Incorporation"), By-laws, and such rules and policies as the Board of Directors and/or any committees thereof (each a "Board Committee") may from time to time adopt.

## **Section 2.3 Privileges of membership**

Subject to Article IV, each Member, while in good standing, shall be entitled to nominate and elect individuals to serve on the Board of Directors (each a "Director"). Except as otherwise required by the DGCL, the Certificate of Incorporation or these By-laws, Members shall have no other voting rights.

## **Section 2.4 Rights in Intellectual Property**

All intellectual property submitted to or owned, adopted or created by the Foundation, including without limitation, any of the same which may be represented by any Deliverables, other standards, guidelines, policies, procedures or tests (collectively, "Intellectual Property"), shall be subject to such policies and procedures, including the Foundation's Intellectual Property Rights Policy (the "IPR Policy"), as may from time to time be adopted by the Board of Directors.

## **Section 2.5 Termination or Suspension of Membership**

Any Member may be suspended from membership or have its membership terminated by the Board of Directors for engaging in any conduct, either within or without the Foundation, that is contrary to the interests of the Foundation or to the advancement of the Foundation's business or goals. No termination or suspension of membership shall be effective unless:

The Member is given notice of the proposed termination or suspension of membership and of the reasons therefor;

Such notice is delivered personally, by acknowledged receipt email, or by certified mail, return receipt requested, or by a national or international overnight courier service, or by other notice in accordance with these By-laws, sent to the last address of the Member shown on the Foundation's records;

Such notice is given at least thirty days prior to the effective date of the proposed termination or suspension of membership; and

Such notice sets forth a procedure determined by the Board of Directors (or other body authorized by the Board of Directors) 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 days before the effective date of the proposed termination or suspension.

Notwithstanding the foregoing, in the event the Board of Directors believes in good faith that a Member is engaging in willful misconduct to the material detriment of the best interests of the Foundation and its Members, the Board of Directors 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 2.5.

In the event of a termination or resignation of a Hosted Project Member for any reason, the Foundation shall cooperate in the transition of such Hosted Project to any successor host it may designate, including by transferring all assets of such Hosted Project, net (in the case of cash) of the Foundation's transition costs and non-cancellable obligations on behalf of the Hosted Project.

## **Section 2.6 Resignation by Member**

A Member may resign as a Member at any time. Fees, if any, already paid by such Member shall not be refundable in such event, and any fees of such Member which may be accrued and unpaid as of such date shall remain due and payable.

## **Section 2.7 Membership Book**

The name and address of each Member shall be contained in a record to be maintained at the principal office of the Foundation (the "Membership Book"). Termination of any membership shall be recorded in such record together with the date of such termination. Each Member shall be responsible for apprising the Foundation in writing of all changes to its name and address, and of the names and addresses of all representatives of such Member appointed to be members of Committees designated by such Member in its application for membership or to receive notices or to vote on behalf of such Member.

## **Section 2.8 Levy of Dues, Assessments or Fees**

Initially, there shall be no fees or other charges for membership by Hosted Projects; provided, however, that the Foundation shall be entitled to deduct management fees from funds received and held on behalf of Hosted Projects. The Board of Directors shall have the right to assess dues, assessments or other fees upon classes of Membership in such amounts as may be approved from time to time by it in its discretion, but 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

### **Section 2.9 Use of Names**

Neither the Foundation nor any Member shall use the name of the other in any form of publicity without the written permission of the other, provided that the Foundation and any Member may each disclose and publicize such Member's membership in the Foundation.

## **ARTICLE III**

### **MEETINGS OF MEMBERS**

#### **Section 3.1 Place of Meetings**

All face to face meetings of the Members shall physically be held at such place within or without the State of Delaware, or as may otherwise be permitted by law, and at such time as may be fixed from time to time by the Board of Directors or President, or if not so designated, at the registered office of the Foundation.

#### **Section 3.2 Annual Meeting**

Annual meetings of Members ordinarily shall be held by written consent pursuant to Section 3.10. Notwithstanding the foregoing, however, the Board of Directors may call any annual meeting to be held in person at such date and time as shall be designated from time to time by the Board of Directors or the Chairperson of the Board of Directors (the "Chair"). Pursuant to such written consent, or at such meeting, as applicable, the Members shall elect a Board of Directors in accordance with Section 4.3 and shall transact such other business as may properly be addressed by written consent, or at such meeting, as applicable.

#### **Section 3.3 Special Meetings**

Special meetings of the Members, for any purpose or purposes, may, unless otherwise prescribed by statute or by the Certificate of Incorporation, be called by the Board of Directors, the President or the Secretary at the request in writing of a majority of the Directors then in office, or at the request in writing of Members entitled to vote at least ten percent of the aggregate votes of all Members. Such request shall state the purpose or purposes of the proposed meeting. Business transacted at any special meeting shall be limited to matters relating to the purpose or purposes stated in the notice of meeting.

Upon request by any person or persons entitled to call a special meeting of the Members, the President, the Chair (if any), or the Secretary shall, within thirty days after receipt of the request, cause notice to be given to the Members entitled to vote at such meeting that a special meeting will

be held at a time chosen by the Board of Directors, but not less than thirty-five nor more than ninety days after receipt of such request.

### **Section 3.4 Notice of Meetings**

Except as otherwise provided by law or these By-laws, notice of each meeting of the Members, annual or special, stating the place, if any, date and hour of the meeting, the means of remote communication, if any, by which Members may be deemed to be present in person and vote at such meeting, and, in the case of a special meeting, the purpose or purposes for which the meeting is called, shall be given not less than ten or more than sixty days before the date of the meeting, to each Member entitled to attend such meeting.

### **Section 3.5 Voting List**

The officer who has charge of the Membership Book of the Foundation shall prepare at least ten days before every meeting of Members, a complete list of the Members entitled to vote at the meeting, arranged in alphabetical order, and showing the address of each such Member. Nothing contained in this Section shall require the Foundation to include electronic mail addresses or other electronic contact information on such list. Such list shall be open to the examination of any Member, for any purpose germane to the meeting, for a period of at least 10 days prior to the meeting: (i) on a reasonably accessible electronic network, provided that the information required to gain access to such list is provided with the notice of the meeting, or (ii) during ordinary business hours, at the principal place of business of the Foundation. In the event that the Foundation determines to make the list available on an electronic network, the Foundation may take reasonable steps to ensure that such information is available only to Members of the Foundation. If the meeting is to be held at a place, then the list shall be produced and kept at the time and place of the meeting during the whole time thereof, and may be inspected by any Member who is present. If the meeting is to be held solely by means of remote communication, then the list shall also be open to the examination of any Member during the whole time of the meeting on a reasonably accessible electronic network, and the information required to access such list shall be provided with the notice of the meeting.

### **Section 3.6 Quorum**

Except as otherwise provided by statute, the Certificate of Incorporation or these By-laws, Members entitled to vote more than thirty percent of the aggregate votes of all Members (or such higher percentage of Members as may be required by law, these By-laws or the Certificate of Incorporation to approve any action to be taken at such meeting), present in person or represented by proxy, shall constitute a quorum at all meetings of the Members for the transaction of business. Committees shall have the same rules relating to quorum requirements and voting majorities as provided for in these By-laws, unless otherwise approved by the affirmative vote of the Board of Directors, except as otherwise proved by statute, the Certificate of Incorporation or these By-laws.

### **Section 3.7 Adjournments**

Any meeting of Members may be adjourned from time to time without notice to any other time and to any other place, if any, at which a meeting of Members may be held under these By-laws, which time and place, if any, thereof, and the means of remote communications, if any, by which Members may be deemed to be present in person and vote at such adjourned meeting shall be announced at the meeting by a majority of the Members present in person or represented by proxy and entitled to vote at such meeting (regardless of whether a quorum is present), or, if no Member is present or represented by proxy, by any officer entitled to preside at or to act as secretary of such meeting, without notice other than announcement at the meeting, until a quorum shall be present or represented. At such adjourned meeting at which a quorum shall be present or represented, any business may be transacted which might have been transacted at the original meeting. If the adjournment is for more than thirty days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to all Members entitled to vote at the meeting.

### **Section 3.8 Action at Meetings**

When a quorum is present at any meeting of Members, the vote of more than fifty percent of the aggregate votes of all Members, present in person or represented by proxy and entitled to vote on the question, shall decide any question brought before such meeting, unless the question is one upon which, by express provision of law, the Certificate of Incorporation or these By-laws, a different vote is required, in which case such express provision shall govern and control the decision of such question.

Notwithstanding Section 3.8(a), in the event that any vote is to be taken of a single class of Members, then a quorum for such vote shall be not less than fifty percent of the Members of that class, and when such quorum is present, the vote of more than fifty percent of the aggregate votes of the Members of that class present in person or represented by proxy and entitled to vote on the question, shall decide such question.

### **Section 3.9 Proxies**

Each Member entitled to vote at a meeting of Members, or to express consent or dissent to corporate action in writing without a meeting, may authorize another person or persons to act for the Member by proxy, but no such proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period. Without limiting the manner in which a Member may authorize another person or persons to act for such Member as proxy pursuant to this Section, the following shall constitute valid means by which a Member may grant such authority:

A Member may execute a writing authorizing another person or persons to act for such Member as proxy. Execution may be accomplished by the Member or such Member's authorized officer, director, employee or agent signing such writing or causing such person's signature to be affixed to such writing by any reasonable means including, but not limited to, by facsimile signature.

A Member may authorize another person or persons to act for such Member as proxy by transmitting or authorizing an electronic transmission to the person who will be the holder of the proxy or to a proxy solicitation firm, proxy support service organization or like agent duly authorized by the person who will be the holder of the proxy to receive such transmission, provided

that any such electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the Member. If it is determined that such electronic transmissions are valid, the inspectors or, if there are no inspectors, such other persons making that determination shall specify the information upon which they relied.

### **Section 3.10 Action Without Meeting**

Any action required to be taken at any annual or special meeting of Members, or any action which may be taken at any annual or special meeting of a Committee, Sub-Group thereof or other group of Members or subset of Members, may be taken without prior notice and without a 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. Prompt notice of the taking of the 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 proxyholder, or by a person or persons authorized to act for a Member or proxyholder, shall be deemed to be written and signed 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 proxyholder or by a person or persons authorized to act for the Member or proxyholder and (B) the date on which such Member or proxyholder or authorized person or persons transmitted such electronic transmission.

A consent given by electronic transmission is delivered to the Foundation upon the earliest of: (i) when the consent enters and information processing system, if any, designated by the Foundation for receiving consents, so long as the electronic transmission is in a form capable of being processed by that system and the Foundation is able to retrieve that electronic transmission; (ii) when a paper reproduction of the consent is delivered to the Foundation's principal place of business or an officer or agent of the Foundation having custody of the book in which proceedings of meetings of Members are recorded; (iii) when a paper reproduction of the consent is delivered to the Foundation's registered office in the State of Delaware by hand or by certified or registered mail, return receipt requested; or (iv) when delivered in such other manner, if any, provided by resolution of the Board of Directors of the Foundation. A consent given by electronic transmission is delivered under this provision even if no person is aware of its receipt. Receipt of an electronic acknowledgment from an information processing system establishes that a consent given by electronic transmission was received but, by itself, does not establish that the content sent corresponds to the content received.

Any copy, facsimile or other reliable reproduction of a document (including any electronic transmission) may be substituted or used in lieu of the original document for any and all purposes for which the original document could be used, provided that such copy, facsimile or other reproduction shall be a complete reproduction of the entire original document.

### **Section 3.11 Action Held by Remote Communication**



If authorized by the Board of Directors in its sole discretion, and subject to such guidelines and procedures as the Board of Directors may adopt, Members and proxyholders not physically present at a meeting of Members may, by means of remote communication: (A) participate in a meeting of Members; and (B) be deemed present in person and vote at a meeting of Members whether such meeting is to be held at a designated place or solely by means of remote communication, provided that (i) the Foundation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a Member or proxyholder, (ii) the Foundation shall implement reasonable measures to provide such Members and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the Members, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings, and (iii) if any Member or proxyholder votes or takes other action at the meeting by means of remote communication, a record of such vote or other action shall be maintained by the Foundation.

### **Section 3.12 Nomination and Election Procedures**

Subject to the provisions of Section 4.3, the Board of Directors shall establish reasonable nomination and election procedures given the nature, size, and operations of the Foundation, including a reasonable means for Members of appropriate types of Members 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.

### **Section 3.13 Order of Business**

The order of business at all meetings of Members shall be as determined by the presiding Officer, but the order of business to be followed at any meeting at which a quorum is present may be changed by a vote of the Members.

## **ARTICLE IV**

### **DIRECTORS**

#### **Section 4.1 Powers**

The business and affairs of the Foundation shall be managed by its Board of Directors, which shall be, and shall possess all of the powers of, the "Governing Body" of the Foundation as a non-stock membership Foundation under the DGLC. The Board of Directors 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.

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

Subject to Section 4.4, the total number of Directors shall be at least one and not more than seven. Up to four Directors shall be individuals who are actively participating in a Hosted Project (“Hosted Project Directors”), and three Directors shall be individuals who are neither participants in a Hosted Project, nor affiliated with any Sponsor Member or member of the Foundation Advisory Board (“Outside Directors”). The Board of Directors will put in place a Hosted Project Director nomination and election process providing that when there are (i) three or fewer Hosted Projects, there shall be a number of Hosted Project Directors equal to the number of Hosted Projects, and (ii) when there are four or more Hosted Projects, there shall be four Hosted Project Directors, with no Hosted Project being represented by more than one Director; provided, however, that no changes to the Board of Directors need be made between annual elections of Directors, notwithstanding any interim changes in the number of Hosted Projects.

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

- a. The initial, interim Board of Directors shall comprise those individuals named in the Action of Sole Incorporator. At such time as the initial Board of Directors deems it appropriate following the orderly formation of the Foundation (and not later than April 1, 2022 or ninety days after acceptance of a second Hosted Project, whichever comes first), a first Member election of the Board shall be held. The terms of the initial, interim Board of Directors shall end at the election and qualification of the first Member elected Board of Directors.
- b. At the time of each election of Directors, Directors shall be nominated as follows:
  - i. Each Hosted Project shall be entitled to nominate (x) a number of individuals actively participating in such Hosted Project equal to the number of open Hosted Project Director seats, and (y) a number of non-affiliated individuals equal to the number of open Outside Director Seats;
  - ii. Each Sponsor Member shall be entitled to nominate a number of individuals equal to the number of open Outside Director Seats;
  - iii. The Foundation Advisory Board, when there is an Foundation Advisory Board, shall be entitled to nominate (x) a number of individuals actively participating in Hosted Projects equal to the number of open Hosted Project Director seats, and (y) a number of non-affiliated individuals equal to the number of open Outside Director Seats; and
  - iv. The Board of Directors shall be entitled to nominate a number of individuals to serve as Outside Directors equal to the then number of open Outside Directors seats.
- c. At the time of the election of Directors, voting rights shall be allocated and exercised as follows:
  - i. Each Hosted Project shall be entitled to cast a number of votes equal to (A) (x) the lesser of three, or the actual number of individuals spending their full time on the work of such Hosted Project, plus (y) up to an additional three where the number is determined by the total external funding received by such Hosted Project in the preceding year divided by \$Y, where Y is a number from time to time designated by the Board of Directors in order to ensure that projects which differ substantially in funding have varying numbers of votes, times (B) the number of open Board of Director seats, for each open Board seat;
  - ii. Each Sponsor Member shall be entitled to one vote for each open Director seat;
  - iii. The Foundation Advisory Board, when there is an Foundation Advisory Board, shall be entitled to cast a number of votes equal to the then current total number of Hosted Projects times the number of open Board seats; and

- iv. Each Hosted Project and the Foundation Advisory Board, when there is a Foundation Advisory Board, will exercise its votes by appointing a number of electors equal to the number of votes it is entitled to cast per open Director position.
- d. (Subject to Section 4.3(e) below, each Director shall serve for a term of two years, provided that in the case of the first Member elected Board of Directors, an officer shall draw straws to determine two Hosted Project Directors to serve for two years and two Hosted Directors to serve for one year, and two Outside Directors to serve for two years and one to serve for one year.
- e. Each Director shall hold office until the earliest to occur of (i) the expiration of the term for which such Director was elected and such Director's successor is elected and qualified; (ii) in the case of a Hosted Project Director, the termination of the relationship for any reason between the Foundation and such Hosted Project; and (iii) the death, resignation or removal of such Director, or the cessation of the participation of such Director in the related Hosted Project.
- f. The Board of Directors 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 of Directors are held by active, contributing individuals, but no such rule may be imposed retroactively.

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

The number of Directors, the persons eligible to become Directors and the classes of Members eligible to elect and/or nominate Directors may be amended at any time by a vote of the Board of Directors or by a vote of the Members.

#### **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 President 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. Unless otherwise specified by law or the Certificate of Incorporation, any Director may be removed by a majority of the other Directors then in office (i) for engaging in any conduct, either within or without the Foundation, that is contrary to the interests of the Foundation or to the advancement of the Foundation's business or industry goals, (ii) for persistent failure to contribute materially to advancing the business of the Board of Directors, or (iii) failing to attend a sufficient number of Board meetings as required by any attendance policy from time to time adopted by the Board of Directors.

#### **Section 4.6 Vacancies**

A vacancy on the Board of Directors occurring as a result of the death, resignation or removal of a Director shall be filled by a vote of the Members, provided that in the event of a vacancy occurring less than three months prior to the next election of Directors, the Board may opt not to hold such an election. The term of a Director elected in an interim election shall be the unexpired portion of the term of the Director whom the Director is replacing.

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

#### **Section 4.7 Place of Meetings**

The Board of Directors may hold meetings, both regular and special, either within or without the State of Delaware.

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

Regular meetings of the Board of Directors may be held without notice at such time and at such place as shall from time to time be determined by the Board of Directors; provided that any Director who is absent when such a determination is made shall be given prompt notice of such determination. A regular meeting of the Board of Directors may be held without notice immediately after and at the same place as the annual meeting of Members.

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

Special meetings of the Board of Directors may be called by the President, 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. Notice shall be given to each Director in person, by telephone, or by facsimile, electronic mail or other form of electronic communications, sent to such Director's address as it appears on the records of the Foundation, at least twenty-four (24) hours in advance of the meeting, or by written notice mailed to each Directors address at least forty-eight (48) hours in advance of the meeting. A notice need not specify the purposes of the meeting.

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

Except where a Super Majority Vote is required under these By-laws, at all meetings of the Board of Directors a majority of Directors then in office, 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 of Directors, except as may be otherwise specifically provided by law, the Certificate of Incorporation or these By-laws.]

In order to pass a "Super Majority Vote", a resolution must be taken at a meeting of the Board of Directors at which at least two-thirds of the Directors then in office are present and participating and in support of which at least two-thirds of the Directors then in office 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 of Directors shall be required with respect to the following matters:

Amending or repealing any provision of these By-laws;

Amending the Certificate of Incorporation;

Adopting or recommending to the Members an agreement of merger or consolidation;

Approving or recommending to the Members the sale, lease or exchange of all or substantially all of the Foundation's property and assets;

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;

Enlarging or reducing the size of the Board of Directors;

Amending or modifying the eligibility requirements for membership on the Board of Directors or the classes of Members eligible to nominate and elect Directors;

Adopting, amending or repealing any IPR Policy;

Constituting or dissolving the Foundation Advisory Board; and

Any other matter specifically requiring a Super Majority Vote of the Board of Directors pursuant to these By-laws.

No Director whose attendance and voting rights have been suspended shall be counted for purposes of determining quorum, the number of Directors then in office or the number of Directors required for voting purposes, unless otherwise required by law, these By-laws or the Certificate of Incorporation. If a quorum shall not be present at any meeting of the Board of Directors, 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**

Unless otherwise restricted by the Certificate of Incorporation or these By-laws, any action required or permitted to be taken by the Board of Directors may be taken without a meeting and without prior notice if a majority of Directors then in office (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, so long as:

such written consent shall have been sent simultaneously to all Directors then in office for their consideration;

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

two or more such Directors have not objected to the taking of any such action by written notice delivered to the Foundation within ten business days following the date that written notice of the Directors action is mailed or otherwise delivered to such Directors.

After an action is taken, the consent or consents relating thereto shall be filed with the minutes of the proceedings of the Board of Directors, in the same paper or electronic form as the minutes are maintained.

Notwithstanding the foregoing, the ability of two 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 of Directors.

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 Telephonic Meetings**

Unless otherwise restricted by the Certificate of Incorporation or these By-laws, members of the Board of Directors or of any Board Committee may participate in a meeting of the Board of Directors 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 hear each other, and such participation in a meeting shall constitute presence in person at the meeting.

#### **Section 4.13 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 4.14 Fees and Compensation**

Directors shall not receive any stated salary or reimbursements for their services as Directors; provided that, by resolution of a majority of the Board of Directors, 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 of Directors, in such amounts as the Board of Directors 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 Board of Directors may also approve reimbursement of expenses for members of Board Committees in connection with their service on such Board Committees.

## **ARTICLE V**

### **EXECUTIVE COMMITTEE AND OTHER COMMITTEES**

#### **Section 5.1 Executive Committee**

The Board of Directors may (but shall not be required), by resolution adopted by a majority of the Directors then in office (provided a quorum is present), create an Executive Committee, consisting of one or more Directors. The Board of Directors may designate one or more Directors as alternate

members of such Executive Committee, who may replace any absent member at any meeting of such Executive Committee. The Executive Committee, subject to any limitations imposed by the Certificate of Incorporation, these By-laws, statute and/or resolution adopted by the Board of Directors, shall have and may exercise all of the powers of the Board of Directors which are delegated to the Executive Committee from time to time by the Board of Directors; provided, however, that the Executive Committee shall have no authority with respect to:

Approving any action which requires approval of the Members;

Filling vacancies on the Board of Directors;

Fixing compensation of the Directors for serving on the Board of Directors or on any Board Committee;

Amending or repealing any resolution of the Board of Directors which by its express terms is not so amendable or repealable;

Taking any other action at any time reserved solely to the full Board of Directors under the DGCL; and

Adopting any resolution or approving any action that requires a Super Majority Vote under these By-Laws.

## **Section 5.2 Other Committees of the Board of Directors**

The Board of Directors may create such nominating, audit, compensation and other Board Committees, each consisting of one or more Directors appointed by the Board of Directors, as the Board of Directors 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 of Directors, subject to the limitations imposed by the Certificate of Incorporation or by these By-laws. No such Committee shall have the power or authority to take any action prohibited by Section 5.1 above to be taken by the Executive Committee. The Board of Directors 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. 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 of Directors. Each Board Committee shall keep regular minutes of its meetings and make such reports to the Board of Directors as the Board of Directors may request.

## **Section 5.3 Meetings of Committees of the Board of Directors**

Except as otherwise provided in these By-laws or by resolution of the Board of Directors, 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 of Directors 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 of Directors.

#### **Section 5.4 Term of Office of Members of Committees of the Board of Directors**

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

#### **Section 5.5 Committees and Boards of the Members**

- a. From time to time, the Board of Directors may establish committees of constituencies of the Foundation (e.g., Members, participants in Hosted Projects, etc.), with the eligibility, rights, and obligations of such committees to be as established in a charter approved by the Board of Directors ("Committees"). Unless otherwise specified in these By-laws or by the Board of Directors, each Member Committee may have such sub-groups, working groups, and other groups as from time to time may be approved by such Member Committee, within the strategic direction established by the Board of Directors (each a "Sub-Group").
- b. The Board of Directors may in its discretion establish an Foundation Advisory Board of entities providing significant contributions to Hosted Projects, with the eligibility, rights, and obligations of such Foundation Advisory Board and its members to be as established in a charter approved by the Board of Directors ("Foundation Advisory Board").

## **ARTICLE VI**

### **OFFICERS**

#### **Section 6.1 Officers**

The Officers of the Foundation shall be a President, who shall also be a Director, a Secretary and a Treasurer, neither of whom need be a Director. The Foundation may also have, at the discretion of the Board of Directors, a Chair, an Executive Director, and such other Officers with such titles, terms of office and duties as may be determined in accordance with the provisions of Section 6.3. When the Foundation has a Chair (and otherwise, the President), that individual shall preside over meetings of the Board of Directors. One person may hold two or more offices unless the Certificate of Incorporation or these By-laws otherwise provide.

#### **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.

#### **Section 6.3 Election**

The Board of Directors at its first meeting after each annual meeting of Members shall choose a President, a Chair (if desired), a Secretary and a Treasurer. Other Officers may be elected by the



Board of Directors at such meeting, and any or all Officers may be replaced, at any other meeting of, or by written consent of, the Board of Directors.

#### **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 (i) death, resignation or removal, or (ii) ceasing to be an employee of a Member represented, or (iii) the termination of the membership of the Member that is his or her employer. Any officer elected by the Board of Directors may be removed at any time by the Board of Directors 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 President**

The President shall have all of the powers normally associated with the role of chief executive officer and preside at all meetings of the Board of Directors and the Members. The President shall oversee the management of the business of the Foundation and see that all orders and resolutions of the Board of Directors are carried into effect. Without limiting the foregoing, the President shall:

Execute bonds, mortgages, and other contracts, 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 of Directors to some other officer or agent of the Foundation; and

Oversee the Executive Director (if any).

#### **Section 6.6 Executive Director**

The Executive Director (if any) shall preside over the day-to-day affairs of the Foundation under the direction of the Board of Directors and the President and perform such other duties and have such other powers as the Board of Directors or the President 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, and shall:

Prepare and maintain lists of Members and their addresses as required;

Attend all meetings of the Board of Directors and all meetings of the Members and record all the proceedings of the meetings of the Foundation and of the Board of Directors in a book to be kept for that purpose and perform like duties for the standing Board Committees when required; and

Give, or cause to be given, notice of all meetings of the Members and special meetings of the Board of Directors, and perform such other duties as may be from time to time prescribed by the Board of Directors, and be under their supervision.

### **Section 6.8 Treasurer**

The Treasurer (if any) shall perform such duties and shall have such powers as may be assigned to him or her by the Board of Directors or the President. In addition, the Treasurer shall perform such duties and have such powers as are incident to the office of Treasurer. The Treasurer shall have the custody of the corporate funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Foundation and shall deposit all moneys and other valuable effects in the name and to the credit of the Foundation in such depositories as may be designated by the Board of Directors, taking proper vouchers for such disbursements, and shall render to the President and the Board of Directors, when the President or Board of Directors so requires, an account of all his or her transactions as Treasurer and of the financial condition of the Foundation. Notwithstanding the foregoing, upon prior notice to the Board, the Treasurer may delegate and supervise any or all of the foregoing duties and actions to a person or service provider retained by the Foundation.

### **Section 6.10 Compensation**

The compensation, if any, of the Officers shall be fixed from time to time by the Board of Directors, and no Officer shall be prevented from receiving such compensation by reason of the fact that the Officer is also a Director of the Foundation.

## **ARTICLE VII**

### **NOTICES**

#### **Section 7.1 Delivery**

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 the DGCL, the Certificate of Incorporation, or these By-laws may be given in writing directed to the Member's mailing address (or by electronic transmission directed to the Member's electronic mail address, as applicable) as it appears on the records of the Foundation and shall be given (1) if mailed, when the notice is deposited in the U.S. mail, postage prepaid, (2) if delivered by courier service, the earlier of when the notice is received or left at such Member's address or (3) if given by electronic mail, when directed to such Member's electronic mail address unless the Member has notified the Foundation in writing or by electronic transmission of an objection to receiving notice by electronic mail or such notice is prohibited by subsection (e) of this Section. A notice by electronic mail must include a prominent legend that the communication is an important notice regarding the Foundation.

Without limiting the manner by which notice otherwise may be given effectively to Members, but subject to subsection (e) of this Section, any notice to Members given by the Foundation under any

provision of the DGCL, the Certificate of Incorporation, or these By-laws shall be effective if given by a form of electronic transmission consented to by the Members to whom the notice is given. Any such consent shall be revocable by the Member by written notice or electronic transmission to the Foundation.

Notice given pursuant to subsection (b) of this Section shall be deemed given: (1) if by facsimile telecommunication, when directed to a number at which the Member has consented to receive notice; (2) 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; and (3) if by any other form of electronic transmission, when directed to the Member or Director.

For purposes of these By-laws, (1) "electronic transmission" means any form of communication, not directly involving the physical transmission of paper, including the use of, or participation in, or one or more electronic networks or databases (including one or more distributed electronic networks or databases), 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, (2) "electronic mail" means an electronic transmission directed to a unique electronic mail address (which electronic mail shall be deemed to include any files attached thereto and any information hyperlinked to a website if such electronic mail includes the contact information of an officer or agent of the Foundation who is available to assist with accessing such files and information) and (3) "electronic mail address" means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the "local part" of the address) and a reference to an internet domain (commonly referred to as the "domain part" of the address), whether or not displayed, to which electronic mail can be sent or delivered.

Notwithstanding the foregoing, a notice may not be given by an electronic transmission from and after the time that (1) the Foundation is unable to deliver by such electronic transmission two consecutive notices given by the Foundation and (2) such inability becomes known to the secretary or an assistant secretary of the Foundation or to the transfer agent, or other person responsible for the giving of notice, provided, however, the inadvertent failure to discover such inability shall not invalidate any meeting or other action.

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.

An affidavit of the secretary or an assistant secretary or of the transfer agent or other agent of the Foundation that notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein.

## **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 or a waiver by electronic transmission by the person entitled to notice whether before or after the time stated therein, shall be deemed equivalent thereto. Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting at the beginning of the meeting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any meeting needs to be specified in any written waiver or any waiver by electronic transmission.

## **ARTICLE VIII**

### **INDEMNIFICATION**

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

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 Foundation, 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**

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 Foundation, 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 (1) by a majority vote of such Directors who were not parties to such action, suit or proceeding, even though less than a quorum or (2) by the Members of the Foundation.

### **Section 8.5 Advance Payment**

Expenses incurred in defending a civil or criminal action, suit or proceeding may 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 Section 8.1 or 8.2 above 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 Members or 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 of Directors 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 Foundation, 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 DGCL. 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 of Directors 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 of Directors 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 notice of or Members entitled to vote at any meeting of Members or any adjournment thereof, or to express consent to corporate action in writing without a meeting, or 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 of Directors may fix, in advance, a record date, which shall not be more than sixty days nor fewer than ten days before the date of such meeting, nor prior to the adoption of the resolution by the Board of Directors fixing such record date. A determination of Members of record entitled to notice of or Members entitled to vote at a meeting of Members shall apply to any adjournment of the meeting; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting. If no record date is fixed, the record date for determining Members entitled to notice of or Members entitled to vote at a meeting of Members shall be at the close of business on the day before the day on which notice is given or, if notice is waived, at the close of business on the day before the day on which the meeting is held. The record date for determining Members entitled to express consent to corporate action in writing without a meeting, when no prior action by the Board of Directors is necessary, shall be the day on which the first written consent is delivered to the Foundation. The record date for determining Members entitled to express consent to corporate action in writing without a meeting, when prior action by the Board of Directors is necessary, shall be at the close of business on the day on which the Board of Directors adopts the resolution taking such prior 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 Member or a representative of a Member, and to hold liable for any fees payable by 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 DGCL.

## **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 Foundation, 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 of Directors or Board Committee which authorizes the contract or transaction or solely because his, her or their votes are counted for such purpose, if:

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 of Directors or such Board Committee, and the Board of Directors 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

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 Members entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the Members; or

The contract or transaction is fair as to the Foundation as of the time it is authorized, approved or ratified, by the Board of Directors, a Board Committee, or the Members.

Common or interested Directors may be counted in determining the presence of a quorum at a meeting of the Board of Directors 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 purposes of the Foundation, may be authorized by the Board of Directors. The Board of Directors 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 of Directors 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 of Directors to the contrary, the President shall be authorized to execute such contracts and instruments on behalf of the Foundation.

#### **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 of Directors.

#### **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 of Directors 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 of Directors.

## **ARTICLE XII**

### **DISSOLUTION**

The Foundation may be dissolved upon the affirmative vote of not less than two-thirds of the then-serving members of the Board of Directors, provided that (i) such dissolution is otherwise approved and effected in compliance with the then current requirements of the DGCL, and (ii) upon the dissolution of the organization, assets shall be distributed for one or more exempt purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code, or shall be distributed to the federal government, for a public purpose. Any such assets not disposed of shall be disposed of by a court of competent jurisdiction in the county in which the principal office of the organization is then located, exclusively for such purposes or to such organization or organizations, as said Court shall determine, which are organized and operated exclusively for such purposes.

## **ARTICLE XIII**

### **GENERAL PROVISIONS**

#### **Section 13.1 Fiscal Year**

The fiscal year of the Foundation shall be determined, and may be changed, by resolution of the Board of Directors.

#### **Section 13.2 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 13.3 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 of Directors, 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, Sub-Group meetings, Board of Directors 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.
- 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.

#### **Section 13.4 Form of Records**

Any records administered by or on behalf of the Foundation in the regular course of its business, including its membership list, books of account, and minute books, may be kept on, or by means of, or be in the form of, any information storage device, method, or one or more electronic networks or databases (including one or more distributed electronic networks or databases), provided that the records so kept can be converted into clearly legible paper form within a reasonable time. The Foundation shall convert any records so kept into clearly legible paper form upon the request of any person entitled to inspect such records pursuant to any provision of the General Corporation Law of the State of Delaware. When records are kept in such manner, a clearly legible paper form prepared from or by means of the information storage device, method or one or more electronic networks or databases (including one or more distributed electronic networks or databases) shall be valid and admissible in evidence, and accepted for all other purposes, to the same extent as an original paper record of the same information would have been, provided the paper form accurately portrays the record.

#### **Section 13.5 Document Form, Signature and Delivery**

Without limiting the manner in which any act or transaction may be documented, or the manner in which a document may be signed or delivered:

- a. Any act or transaction contemplated or governed by the DGCL or the Certificate of Incorporation or these By-laws may be provided for in a document, and an electronic transmission shall be deemed the equivalent of a written document. "Document" means (i) any tangible medium on which information is inscribed, and includes handwritten, typed, printed or similar instruments, and copies of such instruments and (ii) an electronic transmission.
- b. Whenever the DGCL or the Certificate of Incorporation or these By-laws requires or permits a signature, the signature may be a manual, facsimile, conformed or electronic signature. "Electronic signature" means an electronic symbol or process that is attached to, or

logically associated with, a document and executed or adopted by a person with an intent to authenticate or adopt the document.

- c. Unless otherwise agreed between the sender and recipient, an electronic transmission shall be deemed delivered to a person for purposes of the DGCL and the Certificate of Incorporation and By-laws when it enters an information processing system that the person has designated for the purpose of receiving electronic transmissions of the type delivered, so long as the electronic transmission is in a form capable of being processed by that system and such person is able to retrieve the electronic transmission. An electronic transmission is delivered under this Section even if no person is aware of its receipt. Receipt of an electronic acknowledgement from an information processing system establishes that an electronic transmission was received but, by itself, does not establish that the content sent corresponds to the content received.

This provision shall not prohibit one or more persons from conducting a transaction in accordance with any electronic signature rules so long as the part or parts of the transaction that are governed by the DGCL are documented, signed and delivered in accordance with this Section or otherwise in accordance with the DGCL. This Section shall apply solely for purposes of determining whether an act or transaction has been documented, and the document has been signed and delivered, in accordance with the DGCL, the Certificate of Incorporation and these By-laws.

## **ARTICLE XIV**

### **ANTITRUST COMPLIANCE**

#### **Section 14.1 General**

The Foundation will conduct all of its activities in conformance with all international, U.S. federal and state antitrust laws, including the Sherman Act, the Clayton Act, the Robinson-Patman Act and the Federal Trade Commission Act. The Board of Directors and the President shall consult legal counsel and seek legal review whenever necessary to insure that the activities of the Foundation are conducted in conformance with such laws.

#### **Section 14.2 Availability of Intellectual Property**

It is the good faith objective of the Foundation to make all Deliverables developed by Hosted Projects or by the Foundation publicly available upon completion and adoption, either without charge, or upon fair and reasonable terms and conditions.

#### **Section 14.3 No Obligation to Endorse**

No Member shall, by reason of its membership or participation in the Foundation or otherwise, be obligated to use or endorse any Deliverables, nor shall any such Member be precluded from independently licensing, using or endorsing similar Deliverables or documentation developed by it or by others.

## **ARTICLE XV**

### **AMENDMENTS**

Except where such power is expressly limited by law, the Certificate of Incorporation or these By-laws 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 majority vote of (i) the Board of Directors or (ii) the Members then in good standing, at any annual meeting of the Members or regular meeting of the Board of Directors or at any special meeting of the Members or of the Board of Directors, provided, however, that in the case of a regular or special meeting of Members, notice of such alteration, amendment, repeal or adoption of new By-laws shall be contained in the notice of such meeting.