

By Courier

Honorable Christopher Cox  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549-1090

Executive Board

Deutsche Börse AG

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6 November 2007

Re: Securities and Exchange Commission file number 4-539; “mutual recognition”

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Dear Chairman Cox,

Deutsche Börse AG (“Deutsche Börse”) is pleased to offer comments on the concept of “mutual recognition” that has been discussed by the Securities and Exchange Commission (“the Commission”), the Commissioners and Commission staff in various statements and speeches over the last several months. We understand that the Commission is contemplating proposing a mutual recognition framework permitting, among other things, certain non-U.S. (“foreign”) exchanges and financial intermediaries to provide certain services to U.S. investors without fully registering in the U.S., as long as those entities are supervised in a foreign jurisdiction under a securities regulatory regime. We understand that such foreign regulation should be substantially comparable to that in the United States and the foreign regulator would recognize U.S. exchanges and intermediaries for similar purposes. The Commission’s June 12, 2007 Roundtable Discussion on Mutual Recognition was, we believe, persuasive of how important and timely this topic is for U.S. investors.

As was noted during the Roundtable, investors around the world show a growing appetite for all types of securities from issuers outside their home jurisdictions. In fact, according to recently published preliminary figures, U.S. holdings of foreign equities increased by 25% from December 31, 2005 to December 31, 2006.<sup>1</sup> During the same period, foreign investment in U.S. equities increased by about 20%.<sup>2</sup> This growth in cross-border investment has occurred in a complex regulatory setting leading to inefficient and therefore costly requirements for firms engaged in cross-border financial services.

Chairman of the  
Supervisory Board  
Kurt F. Viermetz

Executive Board  
Reto Francioni  
(Chief Executive Officer)  
Thomas Eichelmann  
Frank Gerstenschläger  
Michael Kuhn  
Andreas Preuß  
Jeffrey Tessler

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<sup>1</sup> Bureau of Economic Analysis, U.S. Department of Commerce. News Release: U.S. International Investment Position, 2006 (June 28, 2007), accompanying data tables.

<sup>2</sup> *Ibid.*

Aktiengesellschaft  
mit Sitz in  
Frankfurt/Main  
HRB Nr. 32232  
Amtsgericht  
Frankfurt/Main

Through adoption of a mutual recognition framework, the Commission would take the lead to streamline and clarify the regulatory setting for cross-border investment. The contemplated framework will additionally lead to other benefits for U.S. investors by enabling them to have a more direct and efficient access to the markets that they target for their investments. Investors will enjoy lower costs, more transparency, heightened competition for their order flow and more timely corporate information. In addition, with better access to foreign derivatives exchanges, U.S. investors will be able to more easily hedge their foreign equity transactions and manage the risks of holding portfolios of foreign securities.

#### I. About Deutsche Börse's operations and current activities in the U.S.

Deutsche Börse is a publicly listed financial services provider headquartered in Frankfurt, Germany, with a market capitalization of more than \$28 billion.<sup>3</sup> Deutsche Börse operates the Frankfurt Stock Exchange ("FSE"), whose electronic trading platform Xetra is directly accessed by 260 Xetra members located in 19 different countries. FSE is the third largest stock exchange in Europe and complies with the European Union's Markets in Financial Instruments Directive<sup>4</sup>, commonly referred to as "MiFID." Deutsche Börse and its subsidiaries also provide technology services, securities settlement services and market data products to customers worldwide. For example, Clearstream Banking S.A., a 100%-owned subsidiary of Clearstream International S.A., is the international central securities depository linked to markets in 45 countries. Clearstream International S.A. is a 100%-owned subsidiary of Deutsche Börse.

Deutsche Börse indirectly owns 50% of Eurex Frankfurt AG which operates Eurex Deutschland (together "Eurex"), which is the largest derivatives exchange in the world for euro denominated products.<sup>5</sup> Eurex has almost 400 member firms located in 21 countries on four continents (Australia, Asia, Europe and North America). Eurex is the center of trading for all types of derivative products on European interest rates, equities and equity indexes.

Deutsche Börse is active in the U.S. mostly through Eurex, which has been a prominent fixture on the U.S. financial markets landscape for more than ten years. In 1996, Eurex's

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<sup>3</sup> Deutsche Börse's market capitalization on October 23, 2007 was measured as €20.32 billion.

<sup>4</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

<sup>5</sup> Deutsche Börse and SWX Swiss Exchange equally and jointly own Eurex Zurich AG which fully owns Eurex Frankfurt AG. Eurex Frankfurt AG owns 100% of U.S. Exchange Holdings, Inc., Eurex Clearing AG, and Eurex Repo as well as 79% of Eurex Bonds.

predecessor entity, Deutsche Terminbörse GmbH, received a no-action letter from the Commodity Futures Trading Commission (“CFTC”) which allowed it to install trading screens in the U.S. without an additional registration as a board of trade in the U.S. This was the first of many such no-action letters that foreign exchanges have received from the CFTC in the following years. Since that first letter was received, Eurex has worked closely with the CFTC. Eurex has grown to almost 70 U.S. members today.

Deutsche Börse’s indirect subsidiary, U.S. Exchange Holdings, Inc. (“USEH”), holds significant non-controlling shares in the Clearing Corporation and U.S. Futures Exchange, L.L.C.<sup>6</sup> As the Commission is aware, Eurex and the International Securities Exchange Holdings, Inc. (“ISE”) have agreed for Eurex to acquire all shares of the ISE, which is the largest equity options exchange in the world.<sup>7</sup>

As noted above, Eurex has extensive business dealings in the U.S. It publicly solicits to attract members in the U.S. and actively markets Eurex’s trading opportunities afforded to the public. All of the products for which Eurex provides access to U.S. residents are “foreign” in that they are based on government or corporate securities that are not registered in the U.S., indexes based on these, or money market interest rates outside of the U.S.

In July 2005, Eurex was provided by the Commission no-action relief to conduct market familiarization activities with eligible Qualified Institutional Buyers (“QIBs”) and eligible broker dealers for many of its equity and equity index options.<sup>8</sup> In accordance with that relief, Eurex has informed all of its members of the existence of the no-action relief and their obligations under the Commission’s guidance.<sup>9</sup> Otherwise, Eurex does not connect its U.S. members directly to its equity and equity options markets, promote its equity and equity index options in the U.S. nor offer in the U.S. a number of futures contracts on indexes considered to be “narrow-based” in accordance with the Commodity Exchange Act and associated regulations.<sup>10</sup>

Due to the current regulations FSE, Deutsche Börse’s stock market, does not market equities trading in the U.S., provide investors with information about regulatory and business conditions on the FSE, connect market participants to FSE’s electronic trading

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<sup>6</sup>The Clearing Corporation is a Derivatives Clearing Organization, and U.S. Futures Exchange is a Designated Contract Market. Both are registered with the CFTC.

<sup>7</sup> The shares will be held by USEH.

<sup>8</sup> Rule 144a of the Securities Act of 1933.

<sup>9</sup> Eurex Circular 101/06, May 22, 2006 at <http://www.eurexchange.com/download/documents/-circulars/cf1012006e.pdf>.

<sup>10</sup> 7 USC §§1a(25) and 2(a)(1)(C)(ii)(III) and 17 CFR Part 41.

platform, Xetra, from locations in the U.S., nor admit U.S. resident entities as members for trading on the FSE. Since the U.S. government reports extensive holdings of German equities (\$220 billion)<sup>11</sup>, however, it seems apparent that U.S. equity investors' buy and sell orders find their way to FSE.<sup>12</sup> In meetings in Europe, FSE representatives are often told by U.S. entities that the Xetra trading system is a very attractive trading venue and they would like to have direct access to it. In many cases, though, these potential trading participants tell us that they are dissuaded from connecting to Xetra because of the expense and complication of establishing a trading operation offshore. Instead they incur the risks and costs of using intermediaries to conduct their trading business.

We would like to point out a current anomaly in the Dow Jones EURO STOXX® 50 Index futures and options contracts traded at Eurex which could be resolved by mutual recognition. Eurex members registered in and operating from locations in the U.S. contribute about 17% of the volume in the *futures* contract which has had an average daily trading volume of somewhat more than 1.2 million contracts per day in 2007.<sup>13</sup> But the Dow Jones EURO STOXX 50 Index *options* contracts are neither tradable by Eurex members from Eurex terminals in the U.S., nor is Eurex permitted even to provide information about them to the U.S. public except for eligible QIBs and broker dealers. In view of the facts that the Dow Jones EURO STOXX 50 Index is already freely tradable by U.S. residents as a futures contract and that the index underlies the second most actively traded index option contracts in the world<sup>14</sup>, it appears that the present framework which does not recognize foreign options exchanges might not always appropriately serve regulatory purposes.

## II. About regulation of Deutsche Börse's operations

The Commission has acquainted itself with the German regulatory environment in conjunction with its commitment to a series of Memoranda of Understanding ("MoUs") with the competent authority in Germany. As the Commission is aware, Eurex and FSE

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<sup>11</sup> U.S. Treasury Department, Federal Reserve Bank of New York and Board of Governors of the Federal Reserve System "Preliminary Annual Report on US Holding of Foreign Securities" (September 28, 2007).

<sup>12</sup> For example, since about half of all shares in Deutsche Börse are held by U.S. investors and approximately 90% of all exchange trading in German equities is conducted on FSE where Deutsche Börse is listed, one can assume that U.S. investors are participating indirectly in trading at FSE.

<sup>13</sup> Please note, Eurex members registered as Futures Commission Merchants may enter Dow Jones EURO STOXX 50 Index futures orders for their customers directly into Eurex terminals in the U.S.; i.e. customer business does not need to be intermediated by a foreign broker.

<sup>14</sup> Trading volume in Dow Jones EURO STOXX 50 Index options is exceeded only by KOSPI 200 options traded at the Korea Exchange.

are regulated according to the German Exchange Act. The German Exchange Act provides the means and measures necessary to maintain efficient and orderly trading and to protect investors and the public. To meet these objectives, the German Exchange Act establishes rules governing the establishment, organization, and supervision of exchanges, delegates self-regulatory authority to the exchanges, and regulates the admission of trading participants and securities to exchange trading. In addition, the German Exchange Act contains provisions designed to prevent price manipulation, fraud and other deceptive practices. In addition, the Securities Trading Act establishes trade reporting obligations, insider trading rules, public disclosure rules and rules of conduct for enterprises admitted to trading on an exchange that deal with the public.

The Bundesanstalt für Finanzdienstleistungsaufsicht ("German Federal Financial Supervisory Agency," hereinafter "BAFin") supervises investment firms and banks. The Exchange Supervisory Authority in the State of Hesse is responsible for exchange supervision. BAFin is responsible for licensing enterprises active in the securities business and ensures that licensed enterprises maintain compliance with capital and organizational requirements. BAFin also is charged with enforcement of the Securities Trading Act and has the general power to counter any irregularities that may impair the orderly conduct of securities trading.

BAFin has the authority to request information and to compel the production of documents from exchange trading participants within its jurisdiction (*i.e.* located in Germany) and their personnel. BAFin cooperates with competent authorities of other countries in connection with the supervision of securities and derivatives markets and trading activity thereon, including by sharing non-public market surveillance information. Accordingly, BAFin and its predecessor agencies have signed several MoUs with the Commission, most recently in April 2007.<sup>15</sup>

### III. Deutsche Börse's suggestions for a framework for mutual recognition

We are encouraged by recent statements from you, the other Commissioners, and Commission staff indicating that the Commission is moving to implement a broad, robust mutual recognition framework based on substituted compliance in the near future.

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<sup>15</sup> Memorandum of Understanding between the United States Securities and Exchange Commission and the German Bundesaufsichtsamt für den Wertpapierhandel Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, October 17, 1977 and the Memorandum of Understanding Concerning Consultation, Cooperation, and the Exchange of Information Related to Market Oversight and the Supervision of Financial Firms between SEC and BaFin, April 26, 2007.

Deutsche Börse believes that the Commission could best liberalize cross-border investment in consultation with and parallel to a foreign regulator recognizing that the securities and derivatives exchanges in each other's jurisdiction are appropriately regulated for cross-border trading.

A system of mutual recognition will avert regulators from duplicating supervision of exchanges by domestic and foreign supervisory authorities. Not only does this avoid additional costs for exchanges, market participants and investors trying to comply with overlapping rules, it also will help regulators to save on scarce regulatory resources in the various jurisdictions. Mutual recognition will foster the international dialogue on appropriate and efficient market regulation which will benefit all entities and, furthermore, is consistent with the trend toward globalization of capital markets.

In light of the ongoing discussions regarding mutual recognition, Deutsche Börse would be pleased if the Commission positively considered the suggestions outlined in the points below.

- We believe that the regulatory cooperation and enforcement MoUs that the Commission has already concluded with foreign regulators provide a sound basis for identifying those jurisdictions that are most willing and capable to cooperate satisfactorily with the Commission. A program built initially on these agreements would provide U.S. investors access to a numerous and diverse set of foreign marketplaces within a short timeframe.
- The Commission might make its determination about the comparability of regulation in a foreign jurisdiction based on objective information such as:
  - The financial market regulator's authority under its local law to enforce its rules
  - That regulator's authority to share certain non-public information and information gathered in the course of an official investigation with the Commission
  - Requirements for issuers of publicly tradable securities
  - Nature of its oversight and authority over brokers and
  - Licensing requirements for exchanges, clearinghouses, brokers and dealers
- The Commission should consider establishing minimum trading volume criteria for foreign exchanges. Trading volume indicates among other things that an exchange is able to attract and sustain investor and trader interest which in turn validates that exchange's effectiveness as a market operator.
- Some classes of investors, *e.g.* QIBs, and eligible broker-dealers are already active

internationally and we recommend that the Commission extend its mutual recognition framework even at first to include investors beyond them in order to have a demonstrable effect on trading patterns. Accredited investors, as defined in Regulation 501(a) under the Securities Act of 1933, should be the immediate targets of improved access to foreign securities.<sup>16</sup> This class, defined by the Commission as natural persons and institutions qualified to invest in hedge funds is assumed by the Commission to be both sophisticated enough to invest in foreign jurisdictions and have adequate access to expert services.

- U.S. broker dealers should be permitted to solicit orders from accredited investors for transacting on foreign exchanges recognized by the Commission within the mutual recognition framework; to become members of foreign exchanges; and to enter their own and their customers' orders for foreign instruments directly into terminals from their offices in the U.S.
  - Accredited investors should be permitted to have direct access to trading screens from locations in the U.S.
  - Recognized foreign exchanges should be able to communicate directly with broker dealers to solicit them to become members of their exchanges. Foreign exchanges that are recognized by the Commission should be permitted to communicate directly with accredited investors.
  - The Commission's interest should be focused on U.S. investors and traders having accurate and complete information on which to base their decisions. The Commission should rely on foreign exchanges and broker dealers providing full and clear disclosures to investors as the key to regulating distribution of products.
  - As the Commission gains experience with overseeing increased levels of cross-border trading, it should consider allowing the various segments of the investing public access to foreign products on the same basis as it does for U.S. instruments.
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- Ideally, the Commission would permit exchanges to market their full ranges of investment securities and risk management products under the mutual recognition framework. In Deutsche Börse's case, this would extend to all securities products that are listed for trading on FSE and Eurex including exchange traded structured products. Deutsche Börse understands, however, that the Commission may think it prudent to adopt an incremental approach.

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<sup>16</sup> At the time of this letter, Rule 501(a) defines accredited investors as natural persons having \$1,000,000 in assets and business entities with assets of \$5,000,000, among other things.

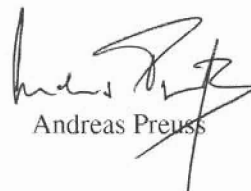
- In a first phase, the Commission might consider allowing access initially to all of the component stocks of the major foreign stock indexes, options on those component stocks, and futures, options and ETFs on the *major* foreign stock indexes that are traded on a foreign exchange recognized by the Commission. The importance of the indexes themselves is indicated by the volumes of trading in derivatives based on them. For these purposes, an index on which derivatives trade in total volume of 25,000 contracts per day or more should be considered *major*.
- Once the Commission, foreign exchanges and U.S. broker dealers have gained experience with these initial instruments, the Commission might consider permitting foreign exchanges to offer all of their tradable instruments to U.S. investors. The Commission should prioritize those instruments which are most liquid and actively traded for step-wise addition in any incremental approach.

On behalf of Deutsche Börse, we would like to thank you and the Commission for considering our comments on a mutual recognition framework. We are looking forward to the next steps in the process and would like to assure you that we will convey our support for your efforts to realize mutual recognition to our regulators in Germany. If you have any questions or if we can assist you in any way please do not hesitate to contact Mr. Michael Peters, Member of Eurex Executive Board (+49-69-2111-5649), Ms. Heike Eckert, Executive Vice President, USEH (1-312-544-1086) or either of us directly.

Very truly yours,



Reto Francioni



Andreas Preuss

cc: Hon. Paul S. Atkins, Commissioner  
Hon. Annette L. Nazareth, Commissioner  
Hon. Kathleen L. Casey, Commissioner  
Ms. Nancy M Morris, Secretary