

March 14, 2008

Nancy M. Morris
Secretary
US Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

**Re: Mutual Recognition on the Basis of Substituted Compliance,
File No. 4-539**

Dear Ms. Morris:

The NASDAQ OMX Group, Inc. ("NASDAQ OMX Group") welcomes the opportunity to comment on the Securities and Exchange Commission's examination of "Mutual Recognition," a concept allowing U.S. investors directly to access foreign markets, provided those markets are supervised in a foreign jurisdiction under a securities regulatory regime that provides investors with protections comparable to what they enjoy in the United States.

The Mutual Recognition concept arises at a unique moment for the NASDAQ OMX Group. On February 27, 2008, we completed the combination of The Nasdaq Stock Market, Inc. with OMX AB, creating the world's largest exchange company. NASDAQ OMX Group delivers trading, exchange technology and public company services across six continents; with over 3,900 companies, NASDAQ OMX Group exchanges have the most worldwide listings among major markets. NASDAQ OMX Group offers multiple capital raising solutions to companies around the globe, including its U.S. listings market; the OMX Nordic Exchange, including First North; and the 144A PORTAL Market. The company offers trading across multiple asset classes including equities, derivatives, debt, commodities, structured products and ETFs. NASDAQ OMX technology supports the operations of over 60 exchanges, clearing organizations and central securities depositories in more than 50 countries. NASDAQ OMX Group operates exchanges in the United States, Finland, Denmark, Sweden, Iceland, Estonia, Latvia, Lithuania, and Armenia.

Mutual Recognition, as Chairman Cox said recently, is intended to benefit U.S. investors by improving direct access to an expanded range of asset classes, reducing

overall trading costs and friction, and promoting competition.¹ It is clear from recent trends that U.S. investors currently enjoy greater access to a wider range of global investments than they did just five years ago.² It is equally clear, however, that incremental benefits to U.S. investors, broker-dealers, and issuers are available if inefficiencies in global trading, clearance and settlement, and regulation can be meaningfully reduced.

The Commission's challenge will be to ensure that Mutual Recognition occurs in a manner that not only benefits individual U.S. investors and institutions in the short term but that also strengthens U.S. capital markets and the U.S. economy, providing U.S. investors with sustainable and lasting benefits. If the initiative proceeds before the market and regulatory environment are ready, the longer-term harm to investors, issuers, and the U.S. economy could be severe. Domestic capital markets already face burdens imposed by Sarbanes-Oxley, other U.S. regulations, and a private litigation environment that is occasionally unpredictable and always costly. The toll these burdens have imposed on capital-raising in the United States has been well-documented in reports by the Committee on Capital Markets Regulation, Chamber of Commerce, and in other studies.³ As a result, the premier status of the U.S. public capital markets has been threatened, reflected in significant reductions in the relative number and dollars raised through initial public offerings, a dramatic rise of private capital raising transactions, increased prominence of foreign sovereign wealth funds, and the rise of London and Hong Kong as global financial centers. Mutual Recognition, if implemented without the necessary care and caution, could further weaken U.S. capital markets, making them less competitive, giving issuers another reason to avoid raising capital in the United States, and ultimately harming the very U.S. investors it is intended to benefit.

While Mutual Recognition may ultimately prove to be beneficial, a threshold question exists about whether the SEC can or should tackle the complex issue of Mutual Recognition before addressing the cumbersome notice-and-comment process that stifles competition and innovation by domestic exchanges that the SEC regulates. As Chairman Cox recognized recently, U.S. equity and options exchanges are placed at a competitive disadvantage by the detailed notice-and-comment process required by the Exchange Act of 1934, which often means that it "could take years before exchange rule filings were finally approved."⁴ Currently, almost a dozen rule proposals and initiatives by The NASDAQ Stock Market alone have been pending at the SEC for over one year. These

¹ February 8, 2008 Speech by Chairman Christopher Cox at *The SEC Speaks in 2008 Program of the Practicing Law Institute*, Washington, DC.

² Ethiopis Tafara and Robert J. Peterson, *A Blueprint for Cross-Border Access to US Investors: A New International Framework*, 48 *Harvard International Law Journal* 31 (2007).

³ See, e.g., *The Competitive Position of the U.S. Public Equity Market*, Committee on Capital Markets Regulation, December 4, 2007; *Report and Recommendations of the Commission on the Regulation of U.S. Capital Markets in the 21st Century*, U.S. Chamber of Commerce, March 2007.

⁴ See, *infra*, at footnote 1.

delayed proposals range from introducing innovative new market data products⁵ to creating a new and competitive options market⁶ to rationalizing exchange listing standards⁷ to improving exchanges' investor protection tools.⁸

The delay in obtaining rule approvals under the Exchange Act affects many U.S. equities and options exchanges. For example, three U.S. exchanges have filed proposals to offer new data products that would for the first time offer free real-time last sale prices to millions of investors that use the Internet to follow their investment portfolios. These "Last Sale" data products have been pending over *15 months* although internet portals such as Google and Yahoo are waiting to provide this data free of charge to investors. This delay in obtaining SEC approvals deprives investors of useful data, stifles competition and innovation by domestic exchanges, and harms U.S. capital markets' ability to compete with foreign markets that can rapidly create and launch new products. NASDAQ OMX Group believes it would be prudent for the SEC to effectively address this issue before approaching the broader and more complex concept of Mutual Recognition.

Contrast the SEC stock exchange rule-making process under the Exchange Act with the rulemaking process in Great Britain under the Financial Services Authority ("FSA"). Generally, the London Stock Exchange ("LSE") and other British exchanges can make rule changes without approval of the FSA and can determine the rule's effective date. In the UK, exchanges must have procedures for adopting and amending rules. These procedures must include consultation with users of the Exchange's facilities in appropriate cases. An Exchange must also notify the FSA if it alters or revokes any of its rules or guidance, or if it makes new rules or issues new guidance. The FSA has the authority to block a rule if it appears that the rule will impose a requirement on persons affected (directly or indirectly) by it, and that that requirement is excessive. Under the FSA's regulatory regime, the LSE could learn of an innovative market data product that the NASDAQ OMX Group filed with the SEC, copy that product, and sell it to investors overseas long before the product would be approved for sale in the United States.

The SEC rule filing process governed by the Exchange Act of 1934 also contrasts with another U.S. financial exchange regulator, the Commodity Futures Trading Commission ("CFTC"). This agency regulates exchanges, such as the Chicago Mercantile Exchange, which have been allowed to evolve rapidly and attain clear global

⁵ SR-NASDAQ-2006-060 (filing proposing Nasdaq Last Sale data product submitted on December 19, 2006, and still pending).

⁶ SR-NASDAQ-2007-004 (filing proposing NASDAQ Options Market, a seventh competing options exchange, filed January 31, 2007, and approved March 12, 2008).

⁷ Initiative to conform exchange listing standards governing timely filing of periodic financial disclosures to rules already in place at other SROs, first broached with SEC staff in November of 2006 and still pending.

⁸ SR-NASDAQ-2007-001 (filing clarifying the applicability of Nasdaq Rule 11890 to transactions resulting from unauthorized or manipulative trading activity, filed January 22, 2007, and still pending).

leadership in a short period of time while the cash equities markets such as the NASDAQ OMX Group and NYSE Euronext have been allowed to advance incrementally and only after lengthy consideration by the SEC. The CFTC applies a rule process in which exchanges can implement rule changes immediately upon providing notice to the CFTC. The CFTC can block changes that they determine to be contrary to law, but is not required to provide pre-approval. During the seven years that this regulatory regime has been in effect for futures exchanges, no problems in the futures markets have emerged that would call into question the viability of the regulatory approach.

The Exchange Act's antiquated rule process for stock exchanges is a remnant of an era when domestic competition was limited and global competition virtually non-existent. In today's global and intensely competitive environment, any public benefits that this process might still conceivably yield are outweighed by the burdens being imposed on the global competitiveness of the U.S. capital markets by persistent, lengthy delays under the Exchange Act rule-filing process. NASDAQ OMX Group suggests that the SEC consider focusing on improving its regulation of domestic markets before expanding access to and competition from foreign markets that are subject to less cumbersome regulatory regimes. While working to improve the domestic rule-filing process, the SEC could continue its current incremental response to discrete regulatory topics by, for example, negotiating and executing additional and expanded Memoranda of Understanding with individual markets or multiple markets.

Comparability of Regulatory Regimes

If the SEC chooses to pursue Mutual Recognition without first resolving the lengthy rule-filing delays experienced by U.S. markets that it regulates, it must explain in greater detail what is meant by "comparability" of regulatory regimes. The Mutual Recognition materials published to date are too general and vague for commenters to assess systematically whether our regulatory regime, including the arcane system of notice-and-comment rule-making, can truly be comparable to the principles-based, market-driven regulatory regimes prevalent in Europe and elsewhere.

Any Mutual Recognition proposal must address whether comparability of regulatory regimes will be based on the elements of a regulatory system or on the outcome of a regulatory system. There may be elements of a regulatory system that are so central to effective regulation that systems lacking those elements could not be deemed comparable. For example, some would question whether a system that lacks Sarbanes-Oxley protections could be comparable to the U.S. If comparability will be based on the elements of the regulatory systems, what elements will be used to determine comparability? If regulatory outcomes will be the basis for comparison, the proposal must explain how the SEC will measure the outcome of regulation. Commenters need significantly more detail than has been provided to date in order to submit meaningful comments on whether Mutual Recognition will benefit the U.S. investor, capital markets, and economy.

It is useful, when evaluating comparability based on the elements versus the outcomes of a regulatory regime, to consider whether the principles-based regulatory regime established under the European Commission's Markets in Financial Instruments Directive ("MiFID") is comparable to the command-and-control model established under the SEC's Regulation NMS such that European markets would be granted Mutual Recognition as some have suggested. The U.S. and European regulatory regimes have a substantial commonality of elements, including best execution, market data distribution, order handling and firm quote requirements, and trade reporting of off-exchange trades. One can imagine a scenario in which the SEC creates a checklist of ostensibly critical regulatory elements such as those listed above, identifies those elements under both the MiFID and Regulation NMS regulatory regimes, and on that basis grants Mutual Recognition by substituted compliance.

While this method of comparing regulatory elements appears useful, it overlooks profound differences between the principles-based approach taken by the European Commission and the micro-structure approach taken by the SEC. Rather than legislating details, either small or large, of market structure, the European Commission permits markets to determine which structure is best, requiring only that markets are sufficiently transparent and fair to protect investors. The SEC, on the other hand, identified a detailed market micro-structure it hoped to achieve and then crafted a set of prescriptive rules governing the minutest operations of the markets including for how long quotes are posted, how quotes are accessed, at what price quotes can be accessed, at what pricing increment they can be posted and accessed, at what cost access is provided, and the speed at which quotes are accessed (among many others). As discussed above, the SEC also continues to exercise plenary powers over the minutest proposed changes to U.S. exchanges' operations through the burdensome exchange rule-filing process. The European Commission leaves many of these market structure elements for firms and markets to control.

This divergence in approach is readily apparent in how MiFID and Regulation NMS view the duty of Best Execution, a fundamental investor protection requirement of any regulatory regime. Under Regulation NMS, Best Execution is based strictly upon price. While certain order types and functions are exempt, the Order Protection Rule generally requires that all executions occur at the best available price, meaning that other considerations such as speed, certainty, and size of execution may not be taken into account if doing so results in an inferior execution price. MiFID, on the other hand, requires best-priced executions for retail investors (where price includes quoted price and related fees) but leaves institutions free to set their own best execution policies, provided they publish and demonstrate adherence to them. Thus, institutions are free to consider price, speed, fill rate, market impact, and any other reasonable factor.

There is also significant divergence in how MiFID and Regulation NMS regulate the collection, distribution, and allocation of revenue from the sale of market data. Under Regulation NMS, the SEC re-affirmed its commitment to the current national market system apparatus characterized by a central processor collecting the best bid, best offer and last sale information from each exchange and association, which in turn collect the

best bid, best offer and last sale information from each broker-dealer member. U.S. broker-dealers are now free to sell market data emanating from their quotation and execution systems, but their practical ability to do so is tempered by the requirement that they send their best bid, best offer, and last sale information to an exchange. Exchanges are also free to sell their market data but they also are limited by their obligations to feed the central processor, by the complex revenue allocation formula of Regulation NMS, and by the cumbersome Exchange Act rule-filing process.

European markets and broker-dealers, on the other hand, are free to compete without such encumbrances. The European Commission permits exchanges and non-exchanges alike to sell any and all market data pursuant to market forces. There is no central processor, no forced provision or consolidation of best bid, best offer, and last sale information, no vendor display rule, no revenue allocation formula, and no protracted rule-approval process. The EC's fundamental premise – that market forces governing investors, broker-dealers, exchanges, and other market participants will determine how much data is provided and at what price – is almost diametrically opposite to the premise of Regulation NMS. To the extent Regulation NMS opened the door somewhat for exchanges to sell proprietary market data products outside the central processor, that door has been slammed shut for the past 15 months as the SEC considers the proper standards for reviewing the fees charged for those products. European exchanges face no similar limitation on their ability to sell market data products.

These vast differences in approach to best execution and to market data are particularly troubling because best execution and market data availability have been lodestars of the U.S. national market system since Congress adopted the 1975 Act Amendments to the Exchange Act of 1934. What can be meant by comparability if two critical features of our regulatory regime can differ so markedly from other regulatory regimes and yet still be deemed comparable?

Definition of Foreign Security

The roles of exchanges and broker-dealers in a Mutual Recognition regime has received significantly more attention than the role of issuers, as noted recently by John White, Director of the Division of Corporation Finance.⁹ The NASDAQ OMX Group sees two ways that Mutual Recognition can, unless prudently implemented, harm the competitiveness of U.S. capital markets with respect to issuers. First, Mutual Recognition could give issuers another reason to avoid registering in the U.S. while preserving their access to U.S. capital and trading. U.S.-registered companies might be tempted to seek foreign security status and still enjoy full access to U.S. capital via foreign markets' trading systems. Whether either of these concerns ultimately emerges will depend largely on details of Mutual Recognition that remain unknown, including whether the definition of a "foreign security" will turn on domicile, business activity, revenue generation, headquarters, employee base, a combination of those factors, or other factors.

⁹ *Corporation Finance in 2008 – International Initiatives*, John D. White, Remarks Before the PLI's Seventh Annual Institute on Securities Regulation in Europe (Jan. 14, 2008).

Second, since Mutual Recognition is designed to bring a wider variety of foreign securities to U.S. investors, it is important to understand the standards that will determine which securities qualify to enter the U.S. for the first time. For example, would a foreign regulatory regime be comparable to the U.S. if it did not provide protections such as detailed periodic financial disclosures, independent directors, audit committees, and independent auditors? Would all issuers that meet the designated criteria be permitted to trade here, regardless of their public float, shareholder base, and track record in trading and financial disclosure and, if not, what limiting factors will apply? There is a range of unanswered questions surrounding the fair and equal treatment of U.S. investors *vis a vis* home country investors of a foreign issuer as well as U.S. investors' ability to quickly and inexpensively access information about foreign issuers.

Issuers play a prominent role in the competitiveness and success of U.S. public capital markets. Given that role, it will be important for the Commission to provide a detailed framework and guidelines (or multiple frameworks and guidelines, if the Commission so proposes) that will govern the selection of issuers that can enter the U.S. through a Mutual Recognition program. Currently there are more questions than answers about the role of issuers in the Mutual Recognition regime the SEC contemplates.

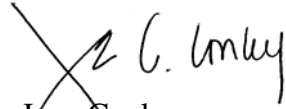
Conclusion

The concept of Mutual Recognition has gained momentum at the SEC faster than it has gained clarity. There is still much to learn about the form of Mutual Recognition that the SEC envisions, the potential benefits to investors and the potential risks to U.S. capital markets associated with it before determining whether Mutual Recognition is necessary or even desirable.

What is certain is that the Exchange Act rule-filing process that the SEC administers is broken. Almost a dozen proposals and initiatives of the NASDAQ Stock Market and numerous proposals of other U.S. exchanges have been pending at the SEC for over a year. These delays are not a temporary aberration, but are fully consistent with the historical record of cumbersome and costly micro-management of U.S. securities exchanges. These delays are hobbling the U.S. exchanges as they attempt to compete

globally on behalf of the U.S. The detrimental impact of these delays will worsen if the Commission permits Mutual Recognition without first fixing this regulatory problem. The NASDAQ OMX Group urges the Commission to address reform of the rule-filing process before becoming engrossed in the complex concept of Mutual Recognition.

Sincerely,

A handwritten signature in black ink, appearing to read "Joan Conley". The signature is written in a cursive style and is positioned above the printed name.

Joan Conley
Senior Vice President and
Corporate Secretary

cc: Chairman Christopher Cox
Commissioner Katherine Casey
Commissioner Paul Atkins
Ethiopia Tafara, Director, Division of International Affairs
Erik Sirri, Director, Division of Trading and Markets
John D. White, Director, Division of Corporation Finance