TMX VOIR LE FUTUR. RÉALISER L'AVENIR.

Le 21 novembre 2017

PAR COURRIER ÉLECTRONIQUE

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Objet : Nasdaq CXC Limited et Ensoleillement Inc. – Demande sous examen coordonné de dispense dans plusieurs territoires conformément à l'Instruction générale 11-203

Madame Beaudoin,

Groupe TMX Limitée (le « **Groupe TMX** » ou « **nous** ») a le plaisir de commenter la demande de Nasdaq CXC Limited (« **Nasdaq Canada** ») présentée à l'Autorité des marchés financiers (l'« **Autorité** ») et à l'autorité en valeurs mobilières ou à l'agent responsable de chacune des autres provinces et de chacun des territoires, exception faite de l'Ontario (ensemble, les « **autorités de dispense** »), concernant une dispense de reconnaissance à titre de bourse.

Les filiales principales du Groupe TMX exploitent des marchés au comptant et des marchés dérivés couvrant de multiples catégories d'actifs, dont les actions, les titres à revenu fixe et les produits énergétiques. La Bourse de Toronto (la « **TSX** »), la Bourse de croissance TSX (la « **TSXV** »), la Bourse Alpha TSX (« **Alpha** »), La Caisse canadienne de dépôt de valeurs, la Bourse de Montréal (la « **MX** »), la Corporation canadienne de compensation de produits dérivés (la « **CDCC** »), Shorcan Brokers Limited et d'autres sociétés du Groupe TMX offrent des marchés d'inscription, des marchés de négociation, des mécanismes de compensation, des produits d'information et d'autres services à la communauté financière mondiale et jouent un rôle central dans les marchés canadiens des capitaux.

Le Groupe TMX est d'avis qu'il est dans l'intérêt de toutes les parties prenantes des marchés canadiens des capitaux que les bourses soient assujetties à une réglementation qui sert l'intérêt public tout en permettant aux bourses d'innover. Les participants aux marchés canadiens des capitaux sont mieux à même de soutenir la concurrence et d'innover lorsqu'une réglementation adéquate est en place, notamment à l'égard des bourses. Par conséquent, nous sommes d'avis que la décision de dispense rendue par les autorités de dispense à l'égard de Nasdaq Canada et d'Ensoleillement Inc. (« **CXCH** ») devrait établir un juste équilibre entre, d'une part, la protection des investisseurs et l'application de conditions propices à l'équité et à l'efficacité des marchés, et d'autre part, la souplesse permettant aux marchés d'innover et de s'adapter rapidement aux besoins changeants de leurs clients. En outre, il est fondamental que le cadre réglementaire canadien régissant Nasdaq, Inc. et ses filiales (ensemble, « **Nasdaq** ») ne confère pas à Nasdaq un avantage réglementaire par rapport aux acteurs canadiens. La concurrence entre les bourses actives au Canada doit reposer sur des conditions réglementaires équitables qui favorisent la vitalité et la croissance des marchés canadiens des capitaux. Nous constatons que les autorités de dispense n'ont pas publié de projet de décision de dispense aux fins de sollicitation de commentaires parallèlement à la demande de dispense de Nasdaq Canada et de CXCH. Par conséquent, nous soulignons dans la présente les éléments pour lesquels nous sommes d'avis que les autorités de dispense ne devraient pas assujettir Nasdaq à un fardeau réglementaire moindre que celui du Groupe TMX, étant donné que cela créerait des conditions réglementaires inéquitables entre les bourses au Canada. Nous soutenons l'intention des autorités de dispense d'imposer de façon uniforme les exigences réglementaires à toutes les bourses dispensées.

Le Groupe TMX a répondu au document d'avis et de sollicitation de commentaires publié par la Commission des valeurs mobilières de l'Ontario (la « **CVMO** ») au sujet de la reconnaissance de Nasdaq Canada et de CXCH à titre de bourses en Ontario. Aux fins de référence, nous avons joint à la présente un exemplaire de notre lettre de commentaires adressée à la CVMO (la « **lettre de commentaires à la CVMO** »); il s'agit de l'**annexe A**.

I. Principes de reconnaissance et de dispense d'une bourse au Canada

Dans notre lettre de commentaires à la CVMO, nous avons traité des quatre principes décrits ci-après qui s'appliquent à la reconnaissance des bourses au Canada. Ces principes s'appliquent de la même façon à la dispense de reconnaissance des bourses au Canada.

- *Intérêt public :* Chaque autorité de dispense accorde une dispense de l'exigence de reconnaissance à titre de bourse si cela ne cause aucun préjudice à l'intérêt public. L'intérêt public est mis en lumière par la mission des Autorités canadiennes en valeurs mobilières (les « **ACVM** »), qui consiste à doter le Canada d'un cadre de réglementation en valeurs mobilières harmonisé qui i) protège les investisseurs contre les pratiques déloyales, abusives ou frauduleuses, ii) favorise l'équité et l'efficience des marchés financiers et iii) réduit les risques pour l'intégrité des marchés et la confiance des investisseurs dans ceux-ci, tout en conservant la latitude et l'innovation propres au système de réglementation provinciale et territoriale du Canada[1].

- *Conditions équitables :* Les ACVM ont développé une vision d'un environnement de marché canadien qui favorise l'équité, la transparence, l'intégrité du marché, l'établissement des cours et la liquidité. En 2001, les ACVM ont mis en œuvre les règles et les politiques définissant ce cadre, soit le *Règlement 21-101 sur le fonctionnement du marché* (le « **Règlement 21-101** ») et le *Règlement 23-101 sur les règles de négociation*. Les principes qui sous-tendent le Règlement 21-101 montrent que les ACVM jugent important de compter sur des marchés canadiens forts et concurrentiels. Il est fondamental que la concurrence entre les marchés actifs au Canada repose sur des conditions équitables. Tous les concurrents, qu'ils soient canadiens ou étrangers, doivent suivre les mêmes règles pour que l'environnement soit réellement équitable, ouvert et concurrentiel.

[1] Voir le Plan d'affaires des ACVM 2016-2019 [en ligne] : Autorités canadiennes en valeurs mobilières [https://www.autorites-valeurs-mobilieres.ca/uploadedFiles/General/pdfs_fr/Plan_d'affaires_des_ACVM_2016-2019.pdf] (consulté le 13 novembre 2017).

- *Réduction du fardeau réglementaire indu :* La cadre réglementaire qui régit les bourses doit établir un équilibre entre, d'une part, les questions d'intérêt public relatives à la protection des investisseurs et à l'application de conditions propices à l'équité et à l'efficacité des marchés, et d'autre part, les coûts que doivent assumer les bourses pour satisfaire aux exigences réglementaires. Les ACVM ont accordé la priorité à l'exploration des possibilités de réduire le fardeau réglementaire tout en maintenant des mesures adéquates de protection des investisseurs[2]. Les obligations réglementaires et les coûts de conformité qui y sont liés devraient être proportionnels aux objectifs réglementaires visés[3]. Les autorités de dispense doivent considérer la parité du fardeau réglementaire entre toutes les bourses dispensées. L'environnement de marché canadien ne peut être réellement concurrentiel si les différents marchés assument un fardeau réglementaire et des coûts de conformité inéquitables.

- *Engagement continu à l'égard des marchés canadiens des capitaux :* Le Groupe TMX démontre depuis longtemps un engagement profond à l'égard des marchés canadiens des capitaux. Ce lien avec ceux-ci était une question fondamentale sous-tendant l'acquisition de Groupe TMX Inc. par le Groupe TMX. Pour le moment, Nasdaq Canada propose le maintien de ses activités de négociation actuelles et ne propose aucune expansion de sa gamme de produits et services offerts au Canada. Toutefois, les autorités de dispense doivent s'assurer que Nasdaq démontre un engagement continu à l'égard des éléments propres aux marchés canadiens des capitaux, particulièrement dans l'éventualité d'une expansion de ses activités au-delà de la négociation au Canada.

II. Exigences relatives à la décision de dispense de Nasdaq Canada

La reconnaissance et la dispense des bourses nécessitent que les organismes de réglementation canadiens appliquent un cadre réglementaire qui établit un équilibre entre la protection des investisseurs, par une surveillance des activités des bourses qui favorise l'équité et l'efficacité des marchés, et la souplesse dont ont besoin les groupes boursiers novateurs et agiles capables de favoriser la formation de capital au Canada. Nous sommes d'avis que l'application uniforme des exigences réglementaires aux groupes boursiers concurrentiels garantit le fonctionnement à efficacité maximale de l'environnement de marché canadien et des marchés des capitaux. Dans la présente section, nous soulignons des éléments précis pour lesquels nous sommes d'avis que les autorités de dispense ne devraient pas assujettir Nasdaq à un fardeau réglementaire moindre que celui du Groupe TMX.

a. Exigences relatives à la langue française

Nous prions instamment les autorités de dispense d'exiger de Nasdaq Canada qu'elle offre l'information et les services destinés aux participants au marché dans les deux langues officielles du Canada. Nous soulignons que les bourses du Groupe TMX ont pris auprès de l'Autorité l'engagement de fournir de l'information et des services tant en français qu'en anglais.

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[2] *Ibid.*

[3] Autorités canadiennes en valeurs mobilières, communiqué de presse, « Les autorités en valeurs mobilières du Canada lancent une consultation sur la réduction du fardeau réglementaire des émetteurs assujettis qui ne sont pas des fonds d'investissement » (6 avril 2017) [en ligne] : Autorités canadiennes en valeurs mobilières [https://www.autorites-valeurs-mobilieres.ca/presentation_des_ACVM.aspx?ID=1570&LangType=1036] (consulté le 16 novembre 2017).

Premièrement, lorsque la TSX, la TSXV et Alpha publient un projet de modification de leurs règles de négociation et d'inscription (dans le cas de la TSX et de la TSXV) aux fins de sollicitation de commentaires auprès du public, la bourse concernée le fait à la fois en français et en anglais. De même, lorsque ces bourses publient la version définitive de leurs règles, elles le font simultanément en français et en anglais[4]. Nous remarquons que Nasdaq Canada ne semble pas avoir publié son projet de règles de négociation en français jusqu'à maintenant. Ensuite, la TSX, la TSXV et Alpha publient toute l'information destinée aux émetteurs, aux organisations participantes ou au public (c'est-à-dire l'information et les avis ne concernant pas la modification des règles) simultanément en français et en anglais[5]. Enfin, la TSX, la TSXV et Alpha sont toutes tenues d'offrir une vaste gamme de services en français et en anglais aux émetteurs (dans le cas de la TSX, de la TSXV et d'Alpha) et aux organisations participantes (dans le cas d'Alpha)[6]. Nous sommes d'avis que l'engagement à fournir de l'information et des services dans les deux langues officielles du Canada constitue un élément essentiel de l'exploitation d'une bourse au Canada.

b. Emplacement des bureaux et du personnel

Bien que Nasdaq Canada propose pour le moment de maintenir ses activités de négociation actuelles et ne propose aucune expansion de la gamme de produits et services qu'elle offre au Canada, si Nasdaq élargit son offre au Canada, nous sommes d'avis que les ACVM doit exiger qu'elle démontre un engagement continu à l'égard des différents besoins régionaux des marchés canadiens des capitaux. Le Groupe TMX tient l'engagement continu de maintenir les caractéristiques uniques des marchés du capital de risque, des ressources et des dérivés par la présence de bureaux et de personnel en Colombie-Britannique, en Alberta et au Québec.

Si Nasdaq proposait d'inscrire des valeurs mobilières, y compris des titres d'émetteurs du marché de capital de risque public, il serait essentiel qu'elle prenne l'engagement d'avoir une présence à Montréal, à Vancouver et en Alberta. La TSX et la TSXV tiennent l'engagement d'offrir à Montréal une vaste gamme de services aux émetteurs qui sont de qualité équivalente aux services qu'elles offrent à leurs autres bureaux[7]. Les membres du personnel de la TSX et de la TSXV qui exercent leurs fonctions à Montréal participent activement au processus décisionnel à l'égard des émetteurs que servent la TSX et la TSXV[8]. La TSXV tient aussi l'engagement d'avoir une présence concrète à Vancouver et en Alberta afin de poursuivre sa mission de faire croître un marché canadien du capital de risque public concurrentiel. Elle dispose de bureaux à Vancouver et en Alberta qui jouent un rôle important dans le développement de l'expertise et de l'innovation

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[4] Voir la section VI de la partie III de la décision de dispense de reconnaissance de la TSX rendue par l'Autorité, la section VI de la partie III de la décision de dispense de reconnaissance de la TSXV rendue par l'Autorité et la section 5 de la décision de dispense de reconnaissance d'Alpha rendue par l'Autorité.

[5] Voir le paragraphe c) de la section II de la partie III de la décision de dispense de reconnaissance de la TSX rendue par l'Autorité, le paragraphe c) de la section II de la partie III de la décision de dispense de reconnaissance de la TSXV rendue par l'Autorité et le paragraphe b) de la section 8 de la décision de dispense de reconnaissance d'Alpha rendue par l'Autorité.

[6] Voir le paragraphe a) de la section II de la partie III de la décision de dispense de reconnaissance de la TSX rendue par l'Autorité, le paragraphe a) de la section II de la partie III de la décision de dispense de reconnaissance de la TSXV rendue par l'Autorité et le paragraphe a) de la section 8 de la décision de dispense de reconnaissance d'Alpha rendue par l'Autorité.

[7] Voir le paragraphe a) de la section II de la partie III de la décision de dispense de reconnaissance de la TSX rendue par l'Autorité et le paragraphe a) de la section II de la partie III de la décision de dispense de reconnaissance de la TSXV rendue par l'Autorité.

[8] Voir le paragraphe b) de la section II de la partie III de la décision de dispense de reconnaissance de la TSX rendue par l'Autorité et le paragraphe b) de la section II de la partie III de la décision de dispense de reconnaissance de la TSXV rendue par l'Autorité.

dans le marché du capital de risque public. La TSXV fournit par ailleurs des services de finance d'entreprise et des fonctions de réglementation aux émetteurs inscrits qu'elle sert depuis ses bureaux de Vancouver et de l'Alberta. Enfin, la TSXV dispose dans ses bureaux de Vancouver et de l'Alberta du personnel de direction, de gestion et d'exploitation nécessaire au respect de ses engagements à l'égard du marché canadien du capital de risque public[9].

Si Nasdaq Canada propose d'entreprendre des activités relatives aux dérivés au Canada, il est essentiel qu'elle démontre son engagement de respecter la position unique de Montréal à titre de centre d'excellence en dérivés par la présence d'un bureau et du personnel adéquat à Montréal. Le Groupe TMX tient l'engagement de continuer de mettre Montréal en valeur comme centre d'excellence en dérivés et comme pôle d'attraction de ses activités relatives aux produits dérivés et produits connexes, incluant les produits dérivés du marché hors cote[10]. La MX, la bourse de dérivés du Groupe TMX, et la CDCC, la chambre de compensation des dérivés du Groupe TMX, tiennent chacune l'engagement de poursuivre leurs activités à partir de Montréal et de maintenir la direction et l'administration, ainsi que d'autres ressources importantes, à Montréal[11].

Nasdaq constitue un imposant concurrent potentiel pour toutes les bourses canadiennes en place, y compris en ce qui concerne les activités relatives au marché des dérivés, au marché du capital de risque et au marché des titres de sociétés à grande capitalisation. Par conséquent, les autorités en valeurs mobilières du Canada doivent s'assurer que Nasdaq démontre un engagement continu à l'égard des éléments propres aux marchés canadiens des capitaux si elle étend ses activités au-delà de la négociation d'actions au Canada.

c. Révision des frais

Si l'Autorité n'exige pas de Nasdaq qu'elle produise une révision périodique de ses frais de négociation et de transmission de données, elle devrait également ne pas exiger une telle révision de la part des autres bourses dispensées. Dans ses décisions de dispense de reconnaissance de la TSX et de la TSXV, l'Autorité exige que la TSX et la TSXV procèdent chacune à une révision de leurs frais de négociation et de transmission de données tous les trois ans, puis déposent auprès de l'Autorité le rapport de cette révision dans les 30 jours suivant son dépôt à leur conseil d'administration respectif[12]. Nous soulignons que les organismes de réglementation régissant conjointement la TSXV, soit l'Alberta Securities Commission et la British Columbia Securities Commission, n'exigent pas de la TSXV qu'elle procède à une telle révision des frais. La décision de dispense de reconnaissance d'Alpha rendue par l'Autorité n'exige pas d'Alpha qu'elle procède à une révision des frais. Par conséquent, nous encourageons les autorités de dispense à appliquer uniformément l'exigence de révision périodique des frais, ce qui contribuera à faire en sorte que toutes les bourses dispensées soient assujetties à des conditions réglementaires équitables.

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[9] Voir les sections 5, 7, 8 et 9 de l'annexe des ordonnances de reconnaissance de la TSXV rendues par l'Alberta Securities Commission et par la British Columbia Securities Commission.

[10] Voir le paragraphe f) de la section V de la partie I de la décision de reconnaissance de la MX rendue par l'Autorité.

[11] Voir la section IV de la partie III de la décision de reconnaissance de la MX rendue par l'Autorité et la section III de la partie IV de la décision de reconnaissance de la CDCC rendue par l'Autorité.

[12] Voir le paragraphe b) de la section V de la partie I de la décision de dispense de reconnaissance de la TSX rendue par l'Autorité et le paragraphe b) de la section V de la partie I de la décision de dispense de reconnaissance de la TSXV rendue par l'Autorité.

III. Conclusion

Le cadre réglementaire qu’appliquent les autorités de dispense pour la dispense de reconnaissance des bourses doit tenir compte de l’environnement concurrentiel général où évoluent les marchés canadiens. Les marchés canadiens, y compris ceux exploités par le Groupe TMX, sont régulièrement en concurrence avec de grandes bourses étrangères pour ce qui est de la fourniture de produits et de la prestation de services, tant au Canada qu’à l’étranger. Il est dans l’intérêt de toutes les parties prenantes des marchés canadiens des capitaux que les bourses canadiennes soient assujetties à une réglementation qui sert l’intérêt public tout en permettant aux bourses d’innover et de soutenir la concurrence des bourses canadiennes et étrangères. Un cadre réglementaire canadien qui procure à un important concurrent étranger comme Nasdaq un avantage réglementaire par rapport aux sociétés canadiennes en place ne profite à aucun participant aux marchés canadiens des capitaux. Par conséquent, nous prions instamment les autorités de dispense de bien prendre en compte le cadre réglementaire de dispense qui s’applique actuellement aux marchés canadiens, y compris en ce qui concerne les questions abordées dans la présente lettre, et de s’assurer que le cadre réglementaire qu’ils imposent à toutes les bourses dispensées sert l’intérêt public, garantit des conditions réellement équitables qui favorisent la concurrence entre les marchés canadiens, prévient un fardeau réglementaire indu et exige un engagement continu à l’égard des marchés canadiens des capitaux.

Enfin, nous remarquons que le personnel de l’Autorité a publié la demande de dispense de Nasdaq Canada en français et qu’aucune des autres autorités de dispense n’a publié la demande de dispense de Nasdaq Canada en anglais[13]. Nous croyons que le secteur s’attend à ce que, si l’anglais est la principale langue parlée par les participants au marché dans un territoire donné, l’autorité de dispense compétente sur ce territoire publie les documents de consultation publique en anglais. Nous soulignons que la traduction de documents est particulièrement coûteuse en temps et en argent pour les participants au marché. Ainsi, nous encourageons les autorités de dispense à adopter une pratique de publication en anglais et en français pour les documents de consultation publique portant sur des changements importants d’un marché. En particulier, si Nasdaq Canada propose d’inscrire des valeurs mobilières à sa cote ou d’entreprendre des activités relatives aux dérivés, nous encourageons les autorités de dispense à publier en anglais et en français les modifications de la décision de dispense de Nasdaq Canada ou le projet de décision de reconnaissance de Nasdaq Canada.

Nous vous remercions de nous avoir donné l’occasion de soumettre nos commentaires. Nous serions heureux de discuter avec vous, à votre convenance, de tout aspect des questions susmentionnées.

Cordialement,

Lou Eccleston
Chef de la direction

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[13] Nous soulignons que nous avons demandé directement à Nasdaq Canada la version anglaise de sa demande de dispense; nous remercions Nasdaq Canada de nous l’avoir fournie.

Annexe A : Lettre de commentaires à la CVMO

[Annexée]

November 13, 2017

VIA EMAIL

Market Regulation Branch
Ontario Securities Commission
20 Queen Street West, 20th Floor
Toronto, ON M5H 3S8
Email: marketregulation@osc.gov.on.ca

Dear Sirs/Mesdames,

Re: Nasdaq CXC Limited and Ensoleillement Inc. Application for Recognition as Exchanges – Notice and Request for Comment

TMX Group Limited ("**TMX Group**" or "**we**") welcomes the opportunity to comment on the Notice and Request for Comment published by the Ontario Securities Commission ("**OSC**") regarding the recognition of Nasdaq CXC Limited ("**Nasdaq Canada**") and Ensoleillement Inc. ("**CXCH**") as exchanges.

TMX Group's key subsidiaries operate cash and derivative markets for multiple asset classes, including equities, fixed income and energy. Toronto Stock Exchange ("**TSX**"), TSX Venture Exchange ("**TSXV**"), TSX Alpha Exchange ("**Alpha**"), The Canadian Depository for Securities, Montreal Exchange ("**MX**"), Canadian Derivatives Clearing Corporation ("**CDCC**"), Shorcan Brokers Limited and other TMX Group companies provide listing markets, trading markets, clearing facilities, data products and other services to the global financial community and play a central role in Canadian capital and financial markets.

TMX Group supports the measured approach that the OSC proposes to apply to the regulation of Nasdaq Canada, CXCH and Nasdaq, Inc., the publicly-listed parent holding company of Nasdaq Canada and CXCH. We believe that it is in the interest of all stakeholders of the Canadian capital markets to have exchanges that are regulated in a manner that is consistent with the public interest, while at the same time accommodates the ability of exchanges to be innovative. Canadian capital markets participants are better able to compete and innovate with appropriate regulation, including the appropriate regulation of exchanges. Therefore, we believe that the OSC's proposed recognition order for Nasdaq Canada and CXCH (the "**Nasdaq Recognition Order**") should strike the appropriate balance between investor protection and fostering fair and efficient markets, on the one hand, and allowing marketplaces to be innovative and responsive to the rapidly changing needs of their customers, on the other hand. Furthermore, is fundamentally important that the Canadian regulatory regime applicable to Nasdaq, Inc. and its subsidiaries (collectively, "**Nasdaq**") does not provide Nasdaq with a regulatory advantage over Canadian incumbents. Competition among exchanges operating in Canada must be rooted in a level regulatory playing field to ensure the health and growth of the Canadian capital markets.

Therefore, we support the OSC where it proposes to be consistent in its application of regulatory requirements to all recognized exchanges, and we urge the OSC to make certain important adjustments to its existing regulatory regime where its application of regulatory requirements is inconsistent.

This letter is divided into the following sections:

I. Principles of Exchange Recognition in Canada

a. Public Interest

As a threshold matter, it is important to understand the rationale for, and regulatory framework applicable to, the recognition of exchanges in Ontario. The OSC's oversight of exchanges is grounded in its governing legislation and statutory mandate. Section 21(2) of the *Securities Act* (Ontario) (the "**Act**") provides that "the Commission may, on the application of a person or company proposing to carry on business as an exchange in Ontario, recognize the person or company if the Commission is satisfied that to do so would be in the public interest." The OSC's public interest jurisdiction with respect to exchanges is informed by the purposes articulated in Section 1.1 of the Act:

(a) to provide protection to investors from unfair, improper or fraudulent practices; and
(b) to foster fair and efficient capital markets and confidence in capital markets.

The OSC has included these principles in the recitals of recognition orders of several of the exchanges it has recognized. Such recitals state that "the Commission considers the proper operation of an exchange as essential to investor protection and maintaining a fair and efficient capital market…"[1]

The OSC does not operate the capital markets itself, but its statutory mandate is to create an environment where fair and efficient capital markets may develop, while ensuring investor protection. In Canada, most new market structure developments and practices come from marketplaces, dealers and market participants, and regulators ensure that developments and practices are consistent with the principles underlying the Canadian regulatory framework. The Canadian Securities Administrators' ("**CSA**") role is not simply to respond to market issues, but to understand the changes and business decisions in the market and to have the courage to foster a responsive regulatory climate that allows innovation to occur while ensuring that core principles,

[1] See the recitals of the OSC's recognition orders for TMX Group, TSX and Alpha (among other entities) and the Canadian Securities Exchange, and the recitals of the Nasdaq Recognition Order.

such as investor protection, are preserved.[2] Fostering a responsive regulatory climate that provides for investor protection and fair and efficient markets, while also accommodating exchange innovation, are critical to the recognition of any exchange that operates in Ontario.

b. Level Playing Field

The CSA has developed a vision for a competitive Canadian marketplace environment that promotes fairness, transparency, market integrity, price discovery and liquidity. In 2001, the CSA implemented the rules and policies creating this framework, National Instrument 21-101 *Marketplace Operation* ("**NI 21-101**") and National Instrument 23-101 *Trading Rules* ("**NI 23-101**"). This framework sets out core principles required for all marketplaces (exchanges and ATSs), including:[3]

- *A common set of rules*: All entities carrying on business as a "marketplace" trading securities would be subject to NI 21-101 and NI 23-101, with similar requirements applying, but with differentiation between exchanges and ATSs where appropriate.

- *Oversight*: All marketplaces are subject to full commission oversight. Applications for recognition (exchange) or registration (ATS) include a comprehensive form describing the marketplace's business operations. Significant changes to operations, rules and fees require approval and are generally subject to public notice and comment prior to implementation. The comment and approval process ensures that marketplaces operate within the established framework and the impact of a marketplace's operations on the broader capital markets is considered vis-à-vis the purposes of the Act and the vision of competitive markets.

These rules set the framework for fair and open competition among marketplaces in Canada. The rules have been successful in promoting competition among marketplaces. Since these rules were enacted, three new exchanges and 13 ATSs have commenced operations in Ontario.

It is fundamentally important that competition among marketplaces operating in Canada is rooted in a level playing field. All competitors, whether domestic or foreign, must play by the same rules in order to ensure a truly fair, open and competitive environment. While NI 21-101 and NI 23-101 establish a common set of rules for all entities carrying on business as a marketplace in Canada, these rules are substantially augmented by requirements implemented through exchange recognition orders and exemption orders issued by members of the CSA. Therefore, to truly ensure that competition among marketplaces is rooted in a level playing field, the OSC must consider the combined effect of the requirements of NI 21-101, NI 23-101, the recognition orders and the exemption orders applicable to a recognized exchange.

The principles underlying NI 21-101 indicate that having strong and competitive Canadian marketplaces is important to the CSA. Further, Canadian stakeholders in the capital markets expect that the Canadian regulatory regime will foster the growth and competitiveness of Canadian marketplaces. Therefore, the Canadian regulatory regime applicable to Nasdaq must not provide Nasdaq with a regulatory advantage over Canadian incumbents, particularly since Nasdaq is one of the largest exchange groups in the world. Nasdaq Canada is already a

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[2] See Timothy Baikie, Tracey Stern and Maureen Jenson, "A Framework for Responsive Market Regulation" (April 2017) at 3-4, online: Ontario Securities Commission <www.osc.gov.on.ca/documents/en/responsive-market-regulation.pdf> (13 November 2017).
[3] *Ibid.* at 6-7.

formidable competitor in the Canadian marketplace[4] and will be able to draw on the considerable resources of Nasdaq to increase its competitive presence in Canada. The Canadian regulatory regime should not create an imbalance that favours large, foreign competitors such as Nasdaq over domestic competitors.

c. Reducing Undue Regulatory Burden

The regulatory framework applicable to exchanges must balance public interest concerns regarding investor protection and fostering fair and efficient capital markets with the cost to exchanges of complying with regulatory requirements. The OSC and the CSA have each prioritized the identification of opportunities to reduce regulatory burden while maintaining appropriate investor protections.[5] The OSC has stated:[6]

> We believe that our markets are better able to compete, innovate and flourish with appropriate regulation. Regulatory costs should be proportionate to the regulatory objectives sought. The OSC is committed to re-examining our rules and processes to ensure they are appropriate, necessary and relevant. Our objective is to reduce regulatory burden wherever possible, as long as appropriate safeguards for investors are in place.

Therefore, when developing the requirements in an exchange's recognition order, the OSC should consider the resources required by the exchange to comply with such requirements, and whether the cost of compliance is proportionate to the regulatory objective of the requirements. Further, the OSC should consider whether the cost of compliance creates a regulatory burden that inhibits innovation and competition among Canadian marketplaces. Finally, the OSC must consider the parity of regulatory burden across all recognized exchanges. The Canadian marketplace environment will not be truly competitive if different marketplaces face unequal levels of regulatory burden and compliance costs.

d. Ongoing Commitment to the Canadian Capital Markets

TMX Group has a long and deep commitment to the Canadian capital markets. This connection to Canada's capital markets was a fundamental concern underlying the acquisition of TMX Group Inc. by TMX Group (the "**Maple acquisition**"). When TMX Group applied to the OSC for approval of the Maple acquisition, it emphasized the importance of TMX Group's ongoing connection to Canada. TMX Group stated:[7]

> TMX Group will continue to be responsive to the distinctive needs of capital market participants in Canada, with a particular ongoing commitment to maintain the unique characteristics of Canada's venture, resources and derivatives markets, as well as to

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[4] We note that, according to the Report of Market Share by Marketplace (Current), the combined market share of trading volume of TSX and TSXV-listed securities for Nasdaq Canada's three trading venues (excluding intentional crosses) was approximately 15% over the third quarter of 2017, online: Investment Industry Regulatory Organization of Canada <www.iiroc.ca/industry/marketmonitoringanalysis/Pages/StatisticsInformation.aspx> (13 November 2017).

[5] See the OSC's 2017-2018 Statement of Priorities, online: Ontario Securities Commission <www.osc.gov.on.ca/documents/en/Securities-Category1/sn_20170629_11-777_rfc-sop-end-2018.pdf> (13 November 2017) and the CSA Business Plan 2016-2019, online: Canadian Securities Administrators <www.securities-administrators.ca/uploadedFiles/General/pdfs/CSA_Business_Plan_2016-2019.pdf> (13 November 2017).

[6] (2017) 40 OSCB 5451.

[7] (2011) 34 OSCB 10469.

> maintain its position as the leading global exchange for resource companies…Additionally, we will remain focused on supporting the unique needs of small- and medium-sized enterprises, which represent the backbone of the Canadian economy, as well as Canada's derivative and energy markets.

To that end, TMX Group has made commitments to various CSA members that underscore its commitment to Canada. Its equities exchanges, TSX, TSXV and Alpha, publish all information intended for issuers, participating organizations or the public simultaneously in French and English. TSX and TSXV ensure that they offer services in Montreal in French and English for issuers, and ensure that personnel who perform their duties in Montreal also actively participate in the decision-making process regarding issuers. Alpha ensures that it offers services in English and French to both issuers and participating organizations of a quality equivalent to those offered in Ontario. We note that the Autorité des marchés financiers ("**AMF**") has not published Nasdaq Canada's proposed exemption order for comment, so it is unclear whether Nasdaq Canada will be similarly committed to providing information and services in both of Canada's official languages, or in Montreal.

At this time, Nasdaq Canada is proposing to continue its current trading operations and is not proposing an expansion of the services and products it offers in Canada. However, Nasdaq is a formidable potential competitor to all Canadian incumbent marketplaces, including TMX Group's existing derivatives, public venture market and senior equities operations. Therefore, Canadian securities regulators must ensure that Nasdaq demonstrates an ongoing commitment to the distinctive constituents of the Canadian capital markets should it expand its operations in Canada beyond trading.

II. Comparison of the Proposed Regulatory Regime for Nasdaq, Inc., Nasdaq Canada and CXCH to TMX Group's Regulatory Regime

The recognition of exchanges calls for Canadian regulators to apply a regulatory framework that balances investor protection, through the oversight of exchange operations that foster fair and efficient capital markets, with accommodating innovative and agile exchange groups that can foster capital formation in Canada. We believe that the consistent application of regulatory requirements to competitive exchange groups ensures that both the Canadian marketplace environment and the capital markets that drive the marketplaces are able to operate at peak efficiency. In this section, we outline the specific areas of the proposed Nasdaq regulatory regime that we believe impose a lesser regulatory burden on Nasdaq than TMX Group, and thus create an unequal playing field among recognized exchanges in Ontario.

We note that TMX Group, the parent holding company of TSX, TSXV, MX and Alpha (among other entities), is recognized as an exchange by both the OSC under the Act and by the AMF under the *Derivatives Act* (Quebec). In contrast, the OSC is not proposing to recognize Nasdaq, Inc., the parent holding company of Nasdaq Canada and CXCH, as an exchange, nor is the AMF proposing to either recognize Nasdaq, Inc. as an exchange or exempt it from recognition. Many of the differences between the Nasdaq Recognition Order and the recognition order for TMX Group, TSX and Alpha (among other entities) (the "**TMX Recognition Order**") discussed in this section are rooted in this fundamental difference between the treatment of Nasdaq, Inc. and TMX Group. This distinction puts these two exchange groups on an inherently unequal playing field in Canada and results in a lesser regulatory burden on Nasdaq.

While Nasdaq Canada and CXCH have applied for recognition as exchanges only in Ontario, we urge the OSC to consider the complete Canadian regulatory framework applicable to TMX Group and its subsidiaries, whether imposed by the OSC or other members of the CSA, when considering whether Nasdaq and TMX Group compete on a truly level playing field in Canada. We note that unique among its global exchange and clearing group peers, TMX Group is subject to overlapping securities regulatory requirements imposed by four *domestic* securities regulators.

a. Prior Regulatory Approval of Certain Aspects of Operations

The Nasdaq Recognition Order does not require regulatory approval for various changes to Nasdaq's operations, whereas the TMX Group Recognition Order requires prior regulatory approval for many types of changes to TMX Group's operations. A requirement for prior regulatory approval creates uncertainty for the exchange and potential time delays regarding the implementation of the changes. This difference means Nasdaq can be more nimble than its competitors when it is implementing changes to its exchanges' operations. We believe that prior regulatory approval should be reserved only for significant items impacting the operation of recognized exchanges. In this section, we discuss specific requirements for prior regulatory approval that enable Nasdaq to be more agile than its competitors in effecting operational changes.

Internal Cost Allocation Model

The Nasdaq Recognition Order does not require Nasdaq, Inc., CXCH or Nasdaq Canada to establish an internal cost allocation model. In contrast, the TMX Recognition Order requires TMX Group, TSX and Alpha to establish and maintain an internal cost allocation model with respect to the allocation of costs or transfer of prices between the exchanges and their affiliates.[8] TMX Group, TSX and Alpha must obtain prior OSC approval for any changes to this internal cost allocation model.[9]

In its October 7, 2011 Notice and Request for Comment regarding the Maple acquisition, OSC staff outlined the following concerns that ultimately gave rise to the requirement for an internal cost allocation model:[10]

> There is a concern that the Maple Proposal could lead to a decrease in competition among marketplaces and an increase in exchange fees (trading, listings and/or data fees).
>
> […]
>
> More generally, there is also a concern not just with the setting of fees but the allocation of costs. In a vertically integrated organisation with more diverse businesses under common ownership there will likely be greater sharing of resources such as staffing and information technology systems. The fair allocation of costs becomes increasingly more difficult since allocations are no longer just within the marketplace services or the clearing agency services but also between trading and clearing services. Improper allocation of costs could result in unfair pricing, especially where there is competition. For example, if the exchange is not bearing a fair allocation of costs it may be able to offer trading services at a level that competing marketplaces cannot.

[8] See Section 11 of the TMX Recognition Order.
[9] The AMF recognition order for TMX Group and MX contains similar requirements. Therefore, changes to TMX Group's internal cost allocation model require prior approval from both the AMF and the OSC.
[10] (2011) 34 OSCB 10455-56.

We note that Nasdaq is a diverse group of businesses under common ownership, with an opportunity to share resources such as staffing and information technology systems.[11] If Nasdaq Canada is not bearing a fair allocation of costs, it may be able to offer trading services at a level that competing marketplaces cannot. Therefore, if OSC staff have determined that it is not necessary for Nasdaq, Inc., CXCH and Nasdaq Canada to establish and maintain an internal cost allocation model, other recognized exchanges should similarly not be required to maintain one for regulatory purposes.

Integration of Business or Corporate Functions

The Nasdaq Recognition Order does not requires Nasdaq, Inc., CXCH or Nasdaq Canada to obtain prior OSC approval before implementing any significant integration, combination or reorganization of any businesses, operations or corporate functions related to trading, clearing and settlement, including marketplace and clearing agency operations, with its affiliates. In contrast, the TMX Recognition Order requires TMX Group to obtain prior OSC approval for such integrations, combinations and reorganizations.[12] This difference provides Nasdaq with much greater flexibility than TMX Group to reorganize its operations and corporate functions. By way of example, pursuant to the Nasdaq Recognition Order, Nasdaq Canada is able to integrate its trading operations with any of its U.S. or European affiliates without obtaining prior approval from any Canadian securities regulator. In contrast, TSX and MX require prior OSC and AMF approval before a significant integration of their trading operations.

Outsourcing

The Nasdaq Recognition Order does not require Nasdaq Canada to obtain prior OSC approval before entering into outsourcing arrangements for any of its key services or systems. The TMX Recognition Order requires TSX and Alpha to obtain prior OSC approval before entering into or amending any outsourcing arrangements related to any of their key services or systems with a service provider, including affiliates.[13] We note that Nasdaq Canada recently migrated its legacy technology platform to Nasdaq, Inc.'s trading platform.[14] As an ATS, Nasdaq Canada did not require prior OSC approval to outsource its trading technology to an affiliate. However, even if Nasdaq Canada had done this after its recognition as an exchange, it would not have required prior OSC approval for this change pursuant to the Nasdaq Recognition Order. In contrast, if TSX proposed to outsource its trading platform to the SOLA platform operated by MX, TSX would require prior OSC approval. This is the case even though TSX would be using the trading technology of both an affiliate and another Canadian recognized exchange. Ironically, if TSX proposed to outsource its trading platform to Nasdaq, Inc., TSX would require prior OSC approval for this change, even though Nasdaq Canada did not require prior OSC approval to use the same technology for its trading platform.

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[11] In fact, Nasdaq Canada has already migrated its legacy technology platform to Nasdaq, Inc.'s technology platform. See Nasdaq CXC Notice (December 20, 2016), online: Nasdaq <http://business.nasdaq.com/media//NasdaqCXCNewsDecember202016_tcm5044-36899.pdf> (13 November 2017).
[12] See Section 10 of the TMX Recognition Order. We note that depending on the TMX Group affiliates that are involved, the transaction may also require the prior approval of the AMF, Alberta Securities Commission and/or the British Columbia Securities Commission.
[13] See Sections 37 and 55 of the TMX Recognition Order. We note that depending on the TMX Group affiliates that are involved with the potential outsourcing, the outsourcing may also require the prior approval of the AMF, the Alberta Securities Commission and/or the British Columbia Securities Commission.
[14] See *supra* note 11.

b. *Periodic Reporting of Activities and Business Developments*

Since the OSC is not proposing to recognize Nasdaq, Inc. as an exchange, Nasdaq, Inc. will not be required to provide extensive reports and information to the OSC regarding its activities and business developments. TMX Group, like Nasdaq, Inc., is a holding company that does not perform any exchange functions. However, the OSC has recognized TMX Group as an exchange and TMX Group is required to provide detailed reports and information to the OSC regarding its activities and business developments. The provision of reports is time consuming and resource intensive. TMX Group performs the reporting functions noted below solely due to regulatory requirements related to exchange oversight (even though TMX Group does not perform any exchange functions). Management and the board of directors of TMX Group do not derive value from having a non-operating entity compile the information required in these reports.

NI 21-101 Reporting Obligations

As recognized exchanges, TMX Group and TMX Group Inc. are each required to file a consolidated Form 21-101F1 *Information Statement* ("**Form 21-101F1**") on an annual basis and to provide updates to the information contained in the Form 21-101F1 on a periodic, and at least monthly, basis. This is the case even though these are holding companies and neither entity carries on any exchange operations. In aggregate, this regulatory requirement involves annual filings consisting of almost 500 pages, which have to be reviewed and compiled by TMX Group employees and certified by TMX Group's chief executive officer. Further, since TMX Group is recognized as an exchange by the AMF, TMX Group must provide its Form 21-101F1 filings in both English and French, which involves considerable translation time and expense. As neither the OSC nor the AMF is proposing to recognize Nasdaq, Inc. as an exchange, TMX Group is subject to considerably more administrative burden (and therefore more burden on TMX Group's resources) in this area than Nasdaq, Inc.

TMX Group believes that the information provided in its Form 21-101F1 is of limited incremental value to the OSC and AMF. As a reporting issuer, TMX Group is required to make information regarding its directors and officers, material subsidiaries, significant shareholders, articles and bylaws, board and committee charters and financial status publicly available pursuant to CSA continuous disclosure requirements. This information is substantially similar to the information TMX Group provides in its Form 21-101F1 filings.

Recognition Order Reporting Obligations

Since the OSC is not proposing to recognize Nasdaq, Inc. as an exchange, Nasdaq, Inc. will not be required to provide reports to the OSC pursuant to the Nasdaq Recognition Order. In contrast, as a recognized exchange, TMX Group is required to provide extensive reporting to the OSC pursuant to the TMX Recognition Order, including the following:[15]

- immediate notification of a decision to enter into a definitive agreement, other than confidentiality agreements and certain standard form agreements, with any governmental or regulatory body, self-regulatory organization, clearing agency, stock exchange, other marketplace or market;
- notification of any plans by TMX Group or its affiliates (whether recognized exchanges or not) that carry on business in Canada to enter into new businesses or to cease existing

[15] See Appendix A to Schedule 2 of the TMX Recognition Order.

businesses, promptly after the board of directors has made the decision to implement those plans;

- immediate notification of the appointment of any new director or the resignation of a director, officer or TMX Group's auditors, including a statement regarding the reason for the resignation;
- copies of all minutes of the board of directors and any committees of the board, promptly after their approval;
- any strategic plan for TMX Group and its affiliates carrying on business in Canada, including strategic plans related to equities, fixed income and derivatives (including exchange-traded and over-the-counter derivatives) businesses, within 30 days of approval by the board of directors;
- a list of the internal audit reports and risk management reports issued in the previous quarter that relate to the operations and business of TMX Group; and
- at least annually, or more frequently if required by the OSC, TMX Group's assessment of the risks facing TMX Group and its affiliates carrying on business in Canada and its plan for addressing such risks.

Many, if not most, of these reporting requirements explicitly capture activities that are well beyond any exchange-like functions that may be carried out by TMX Group. Similarly, these requirements also go well beyond concerns regarding changes to the delivery of trading, clearing, settlement, and depository services to Canadian capital market participants. Additionally, TMX Group is required to provide a level of reporting to its principal securities regulator regarding non-exchange operations that is much more detailed than the level of reporting provided by its competitors, including Nasdaq, Inc., to their principal domestic securities regulator(s). These reporting requirements create meaningful regulatory burden on TMX Group that Nasdaq, Inc. will not have to bear.

Financial Reporting Obligations

Nasdaq, Inc. is not required to provide financial information to the OSC pursuant to the Nasdaq Recognition Order that is equivalent to the financial information that TMX Group must provide to the OSC pursuant to the TMX Recognition Order. First, TMX Group must provide its annual financial budget, together with underlying assumptions, to the OSC within 30 days of the beginning of each fiscal year.[16] Second, TMX Group must provide the OSC with annual audited consolidated financial statements and unaudited non-consolidated financial statements without notes, and quarterly unaudited consolidated financial statements and unaudited non-consolidated financial statements without notes.[17] TMX Group expends a meaningful amount of internal resources preparing non-consolidated financial statements, which Nasdaq, Inc. will not have to expend.

c. Recognition Order Compliance

The Nasdaq Recognition Order imposes less onerous requirements on Nasdaq, Inc. regarding ensuring compliance with the terms and conditions of the Nasdaq Recognition Order than those imposed on TMX Group pursuant to the TMX Recognition Order. The TMX Group Recognition Order requires the chief executive officer and general counsel of each of TMX Group, TMX Group Inc., TSX and Alpha to annually certify that these entities are complying with their recognition

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[16] See Section 13(d) of the TMX Recognition Order.
[17] See Sections 13(a) and 13(b) of the TMX Recognition Order.

order requirements.[18] TMX Group and its subsidiaries have developed an extensive compliance program to enable these officers to provide the required certifications. We note that the certification requirement for Nasdaq, Inc. in the Nasdaq Recognition Order is more moderate – it permits the inclusion of knowledge qualifiers that TMX Group is not permitted to include in its certification.[19] We anticipate that this more moderate approach will apply to TMX Group as well.

The Nasdaq Recognition Order imposes requirements on Nasdaq, Inc. regarding reporting breaches or potential breaches of the terms and conditions of the recognition order that are less onerous than those imposed on TMX Group pursuant to the TMX Recognition Order.[20] TMX Group understands the importance of a whistleblower program that requires the appropriate reporting of breaches of recognition order requirements. However, as the requirements regarding Nasdaq, Inc.'s whistleblower program in the Nasdaq Recognition Order are more moderate, we anticipate that the OSC will similarly apply this approach to TMX Group.

III. Conclusion

The regulatory framework that the OSC applies to the recognition of exchanges must acknowledge the broader competitive environment in which Canadian marketplaces exist. Canadian marketplaces, including those operated by TMX Group, routinely compete with large foreign exchanges for the provision of products and services, both within and outside Canada. It is in the interest of all stakeholders of the Canadian capital markets to have Canadian exchanges that are regulated in a manner that is consistent with the public interest, while at the same time accommodates the ability of exchanges to be innovative and competitive with both domestic and foreign exchanges. TMX Group supports the measured approach that the OSC proposes to apply to the regulation of Nasdaq Canada, CXCH and Nasdaq, Inc. However, a Canadian regulatory regime that provides a large, foreign competitor such as Nasdaq with a regulatory advantage over Canadian incumbents does not benefit any participant of the Canadian capital markets. Therefore, we urge the OSC to give strong consideration to the differences in the proposed regulatory regime for Nasdaq discussed in this letter to ensure the regulatory framework applicable to all recognized exchanges is consistent with the public interest, ensures a truly level playing field that fosters competition among Canadian marketplaces, avoids undue regulatory burden and requires an ongoing commitment to the Canadian capital markets.

Finally, we note that OSC staff published a Notice and Request for Comment regarding Nasdaq Canada's proposal to introduce a Guaranteed Execution Facility on October 26, 2017,[21] two weeks after the publication of Nasdaq Canada's application for recognition as an exchange. We believe that the OSC should not adopt a practice of separating recognition order public comment processes from public comment processes for related major changes to the marketplace. For example, should Nasdaq Canada propose to list securities, we believe that marketplace participants should have the opportunity to comment on both Nasdaq Canada's proposed listing rules and amendments to the Nasdaq Recognition Order permitting Nasdaq Canada to engage in a listing business simultaneously. In order to ensure that the regulatory framework applicable to exchanges meets the principles discussed in this letter, marketplace participants must have the opportunity to comment on the combined effect of major changes to marketplace operations and related recognition order changes.

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[18] See Section 16 of the TMX Recognition Order.
[19] See Section 47 of the Nasdaq Recognition Order.
[20] See Section 48 of the Nasdaq Recognition Order and Section 16 of the TMX Recognition Order.
[21] (2017) 40 OSCB 8793.

Thank you for the opportunity to comment. We would be pleased to discuss any aspect of these matters at your convenience.

Best regards,

Lou Eccleston
Chief Executive Officer