



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, it 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
 - b. Level Playing Field
 - c. Reducing Undue Regulatory Burden
 - d. Ongoing Commitment to the Canadian Capital Markets
- II. Comparison of the Proposed Regulatory Regime for Nasdaq, Inc., Nasdaq Canada and CXCH to TMX Group's Regulatory Regime
 - a. Prior Regulatory Approval of Certain Aspects of Operations
 - b. Periodic Reporting of Activities and Business Developments
 - c. Recognition Order Compliance
- III. Conclusion

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 ATs), 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 ATs 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 ATs 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

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 marketplace⁴ 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

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.iroc.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 require 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.

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

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.

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,

A handwritten signature in black ink, appearing to be 'L. Eccleston', with a long horizontal flourish extending to the right.

Lou Eccleston
Chief Executive Officer