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BY E-MAIL: comments@osc.gov.on.ca

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Secretary of the Commission
Ontario Securities Commission
20 Queen Street West
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RE: Notice and Request for Comment Regarding Application for Exemption from Recognition and Registration as an Exchange by Chicago Mercantile Exchange Inc., Board of Trade of the City of Chicago, Inc., Commodity Exchange, Inc. and New York Mercantile Exchange, Inc.

Dear Sir:

TMX Group Limited ("TMX Group") welcomes the opportunity to comment on the application (the "Application") of Chicago Mercantile Exchange Inc. ("CME"), Board of Trade of the City of Chicago, Inc. ("CBOT"), Commodity Exchange, Inc. ("COMEX") and New York Mercantile Exchange, Inc. ("NYMEX") (together, the "CMEG Exchanges") for: (a) an exemption ("OSA Exemption") from recognition as an exchange under subsection 21(1) of the *Securities Act* (Ontario) ("OSA"); (b) an exemption from recognition as a commodity futures exchange under subsection 15(1) of the *Commodity Futures Act* (Ontario) ("CFA"); and (c) an exemption from the registration requirement under section 22 of the CFA for trades in contracts on the CMEG Exchanges.

For the reasons detailed below, TMX Group believes that the OSA Exemption should not be permitted.

TMX Group

TMX Group's key subsidiaries operate cash and derivative markets for multiple asset classes including equities, fixed income and energy. Toronto Stock Exchange, TSX Venture Exchange, TMX Select, Alpha Exchange, The Canadian Depository for Securities, Montréal Exchange, Canadian Derivatives Clearing Corporation, Natural Gas Exchange, Boston Options Exchange, Shorcan, Shorcan Energy Brokers,



Equicom and other TMX Group companies provide listing markets, trading markets, clearing facilities, data products and other services to the global financial community. TMX Group is headquartered in Toronto and operates offices across Canada (Montreal, Calgary and Vancouver), in key U.S. markets (New York, Houston, Boston and Chicago) as well as in London, Beijing and Sydney.

OSA Exemption Reasons

The CMEG Exchanges are seeking the OSA Exemption in order to provide exchange services for their exchange-traded products which would be considered securities under section 1(1) of the OSA and which would therefore subject the CMEG Exchanges to the requirements of the OSA. In the United States, securities products of this sort are regulated by the Securities Exchange Commission (the "SEC"). CME's deemed recognition as a securities clearing agency by the SEC is noted in the Application as a supporting fact.

The Need for a Consistent Regulatory Approach in Ontario

The OSC should reconsider granting the OSA Exemption due to: (1) the lack of reciprocity by the SEC with respect to exchanges for securities and the resulting unfairness to domestic exchanges; and (2) the need for additional investor protection in securities markets.

As TMX Group previously noted in its letter to the OSC dated June 14, 2013 regarding CME's application to be exempted from recognition as a clearing agency,¹ it supports a policy of mutual recognition or substituted compliance based on the equivalence of regulatory regimes for the purposes of regulatory recognition or exemption only where it is applied on a reciprocal basis under that foreign regulatory regime. Otherwise, it creates an unfair competitive disadvantage for domestic exchanges relative to their foreign competitors.

There is no equivalent to the OSA Exemption that is applied on a reciprocal basis in the United States by the Securities Exchange Commission ("SEC") which regulates securities exchanges. The description of the U.S. approach below demonstrates the lack of reciprocity and the investor protection considerations behind this.

U.S. Approach

The SEC does not recognize foreign exchanges on the basis of their regulation in their home jurisdiction nor does it have a separate registration category for foreign exchanges under the *Securities Exchange Act of 1934* (the "Exchange Act") which takes into account robust domestic requirements and recognizes principles of duplicate/inefficient regulation and regulatory cooperation. In certain discreet cases the SEC has issued "no action" letters to foreign securities exchanges for limited kinds of educational activity. Generally, however, foreign securities exchanges must either: (a) register as an exchange; (b) operate as an alternative trading system;

¹ The OSC granted CME the exemption from clearing agency recognition on June 27, 2013.



or (c) operate under an exemption granted solely as a result of *de minimus* trading volumes.

The SEC approach to the foreign securities exchange issue was recently illustrated in an Investigative Report regarding Eurex Deutschland ("Eurex").²

Eurex, a foreign derivatives exchange headquartered in Frankfurt, Germany, self-reported to the SEC and Commodity Futures Trading Commission ("CFTC") staff that it had been offering and selling contracts to persons in the U.S. on a narrow-based security index for approximately 18 months without complying with securities law registration requirements. The index was initially broad-based and at that time would have been subject to the exclusive jurisdiction of the CFTC. As a narrow-based index, however, the product was deemed a security pursuant to US laws and therefore subject to SEC regulation.

The SEC investigated and concluded that Eurex failed to comply with federal securities laws by effecting transactions in the U.S. in security futures: (1) that were not listed on a national securities exchange or national securities association in violation of Section 6(h)(1) of the Exchange Act; and (2) without registering as a national securities exchange in violation of Section 5 of the Exchange Act. In addition, Eurex offered and sold security futures in the U.S without registering the transactions and without having a valid exemption from registration for the transactions as required by Section 5 of the *Securities Act of 1933* (the "Securities Act").

The Securities Act contains a statutory exemption from all provisions of the Securities Act, other than the anti-fraud provisions,³ for security futures cleared by a U.S.-registered or exempt clearing agency and traded on a national securities exchange. The exemption was not, however, available in this case because the conditions were not met – *i.e.* the security futures were not traded on a national securities exchange and cleared by a U.S.-registered or exempt clearing agency.

The report provided the following rationale for the SEC's determination: "Because Eurex was not able to rely on the statutory exemption for security futures and did not register the security futures at issue under the Securities Act, certain disclosures under the Securities Act were not available to investors. For example, if Eurex had registered the security futures at issue under the Securities Act, it would have filed a registration statement with the Commission covering the offer and sale of the security futures that would disclose to investors information about the security futures and about the clearing agency that is the issuer of the security futures. Moreover, investors would have been entitled to the protections of [the civil liabilities on account of false registration statement section and civil liabilities arising in connection with prospectuses and communications section] of the *Securities Act* with respect to the disclosures contained in the registration statement and other offering materials."

² Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Eurex Deutschland; Release No. 70148 / August 8, 2013.

³ Securities Act, Section 17(a).



The report makes clear that in order to provide exchange services relating to a security product, a foreign exchange must be registered as an exchange or make use of a registered exchange even if such exchange may be permitted to offer exchange services relating to derivative futures products pursuant to CFTC rules. Under CFTC rules foreign derivatives exchanges are permitted to operate as Foreign Boards of Trades, a category which does not recognize foreign exchange oversight and regulation. The SEC, as described, has no such equivalent registration category. The SEC has consistently raised similar concerns over time with respect to recognizing foreign securities exchanges. In an earlier Concept Release⁴ discussing the issue of how to regulate foreign exchanges in the United States, the SEC noted that any approach should address questions about the lack of comparable information regarding securities of non-reporting foreign companies, whether sufficient information is disclosed to domestic investors regarding the risks of trading on foreign markets and whether the SEC would have the ability to enforce the antifraud provisions of U.S. securities laws.

The analogous regulatory approach in Ontario would be to require registration (and not exemption) as a securities exchange pursuant to the OSA for foreign exchanges if they wish to offer any securities products to Ontario residents. Similar arguments exist in Ontario with respect to exchange registration for the offering of securities products – namely to ensure that investors have access to adequate disclosure and to the OSA civil liability provisions.

OSC Approach

OSC Staff Notice 21-702 *Regulatory Approach for Foreign-Based Stock Exchanges* sets out the OSC approach to evaluating the appropriate level of regulation for foreign-based stock exchanges looking to provide Ontario residents direct access to their markets. The notice addresses the approach to regulation of foreign exchanges in other jurisdictions to demonstrate that the approach proposed in the notice is consistent with international norms. The notice asserts that “[r]eliance on foreign country regulation has been adopted by a number of foreign regulators, including...the Commodity Futures Trading Commission (CFTC) in the United States... the CFTC [has] recognized the home country regulation of foreign-based exchanges and have allowed foreign-based exchanges to operate within their jurisdictions by imposing certain terms and conditions.”

As described above, while some regulators may take this approach, the SEC, the stock exchange regulator in the United States does not. If the approach taken by foreign stock exchange regulators was a factor in developing or supporting the OSC approach to foreign exchange recognition or exemption, the OSC should take into consideration the SEC’s approach with respect to requiring recognition and the issues that the SEC has raised specifically relating to foreign exchanges for securities.

⁴ Release No. 34-38672; International Series Release No. IS-1085; File No. S7-16-97.



Further, given the OSC's concern for ensuring market fairness, it should consider the competitive disadvantage to which it would be subjecting its domestic exchanges as a result of its proposed approach of exempting a foreign securities exchange. While it is quite onerous for a foreign securities exchange to enter the U.S. market because they must become a direct registrant with the SEC, exempting U.S. securities exchanges entering Ontario makes it easy by comparison to enter the Ontario market, putting domestic exchanges in a position where it is very difficult to grow into Canada's closest and most significant market while being subject to all of the foreign competition expanding into Canada. If the OSC wishes to exempt foreign securities exchanges on the basis of their domestic regulation, it should first ensure the institution of reciprocal arrangements with regulators in those foreign jurisdictions.

In light of the above, we ask that the OSC reconsider granting the CMEG Exchanges the OSA Exemption.

Warmest regards,

A handwritten signature in blue ink, appearing to read "Tom A. Kloet". The signature is fluid and cursive.

Thomas A. Kloet
Chief Executive Officer
TMX Group Limited

TK/dlb