September 14, 2009

David Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Center
1155 21st Street, N.W.
Washington, DC 20581

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Dear Ms. Murphy and Mr. Stawick:

The NASDAQ OMX Group, Inc. ("NASDAQ OMX") appreciates the opportunity to submit written comments in response to the joint request by the Securities and Exchange Commission (the "SEC") and the Commodity Futures Trading Commission (the "CFTC") for input on means to harmonize regulation by the two agencies. NASDAQ OMX is the world's largest exchange company. It delivers trading, exchange technology and public company services across six continents, with over 3,700 listed companies. NASDAQ OMX offers multiple capital raising solutions to companies around the globe, including its U.S. listings market, NASDAQ OMX Nordic, NASDAQ OMX Baltic, NASDAQ OMX First North, and the U.S. 144A sector. NASDAQ OMX offers trading across multiple asset classes, including equities, derivatives, debt, commodities, structured products and exchange-traded funds. NASDAQ OMX technology supports the operations of over 70 exchanges, clearing organizations and central securities depositories in more than 50 countries. In the U.S., our operations encompass entities regulated by both the SEC and the CFTC. In light of this background, NASDAQ OMX believes that it can offer unique perspectives on the issues confronting the two agencies.

The bifurcated regulatory approach of the United States, in which exchanges are subject to regulation by different agencies applying different statutory requirements, is unique in the global financial system and does not, in general, reflect conscious regulatory design. Accordingly, we believe that everything should be "on the table" as the agencies examine ways to harmonize and streamline. In each instance where the agencies identify differences, they should then assess whether those differences are based on objective distinctions in the needs of the market and its participants, or whether they exist for purely historical reasons. If the latter, then the agencies should adopt the model that is best able to support open, fair, and transparent markets, promote competition, and reduce systemic risk. More restrictive approaches that do not actually serve these goals should be abandoned; conversely, less restrictive approaches that open the door to regulatory risks should also be avoided.

Review and Approval of Rule Changes

Perhaps the most salient difference in the regulatory approaches of the two agencies is reflected in the statutory frameworks for exchange regulation that they administer. The SEC follows a rules-based approach, under which every aspect of an exchange's operations must be filed with, and in most cases, approved by the SEC. By contrast, the Commodity Exchange Act permits the CFTC to apply a flexible principles-based approach that allows the exchanges that it regulates to certify that their rules comply with applicable principles. This approach thereby frees the agency to set broad regulatory policy standards and focus resources on the areas of most risk.

If the rules-based approach was needed to keep exchanges from implementing harmful rule changes, then one would expect the SEC to make frequent use of its authority under Section 19 of the Securities Exchange Act of 1934 to abrogate, disapprove, or amend exchange rules. However, abrogation of immediately effective filings is a rare event, and to our knowledge, the SEC has not instituted disapproval proceedings since the 1990s and has rarely if ever invoked its authority to amend existing exchange rules. Conversely, if a principles-based approach was inadequate to protect investors, one would expect that the CFTC would frequently be forced to use its cease-and-desist and civil penalty authority to remedy deficiencies at exchanges. To the contrary, the evidence suggests that the principles-based approach is adequate to provide for the integrity not only of the exchanges that the CFTC regulates, but also securities and futures exchanges in numerous other countries that apply principles-based regulation.

NASDAQ OMX recognizes, however, that the SEC is not at liberty to adopt a principles-based approach without Congressional action. There are, however, numerous concrete steps that the SEC can take through administrative action to make its rule-based approach more efficient for both the agency and the exchanges that it regulates without limiting the SEC's broad authority. For example, the SEC could streamline the time needed to process rule filings by recognizing that the exchange's own website posting of its filings, together with electronic submission to the SEC, constitutes publication of the filing and allows interested parties to begin the comment process. The SEC could still reject a filing that did not adhere to SEC Rule 19b-4, but it could avoid the ministerial task of processing the filing for Federal Register publication altogether. Similarly, the SEC could expand the categories of filings eligible for immediate effectiveness, potentially to include initial submission of all filings, and potentially with delayed operative dates to allow SEC review prior to a new rule taking effective. The SEC could then use its unfettered abrogation authority to delay the effectiveness of filings that are deemed to require an advance notice-and-comment process or where the agency believes that disapproval of the filing is a possibility.

As an exchange operator, NASDAQ OMX of course believes that a streamlined rule filing approach will enhance the competitiveness of SEC-regulated exchanges with CFTC-regulated exchanges and alternative trading systems that are not subject to comparable requirements. We also believe, however, that the SEC may reasonably conclude that a streamlined approach to rule filings will enhance its own efficiency and allow it to devote greater resources to market surveillance, compliance and inspections oversight, and enforcement. In an economic and regulatory environment that has been challenged by unprecedented complexity, the collapse of major investment banks, unanticipated failures in the credit and over-the-counter derivatives markets, and major failures of broker conduct, we believe that the SEC should consider whether the current rule approval process reflects an optimal allocation of regulatory resources. This is not a plea for lighter regulation, but rather for smarter regulation. We believe that an approach to exchange regulation that devotes staff time to understanding exchange operations and examining, on an ongoing basis, whether those operations are consistent with fair and open markets and investor protection will serve the SEC's goals far better than the current process of examining and approving incremental changes to rules as they are filed by exchanges.

Novel Products

Jurisdictional disputes between the SEC and the CFTC have often stymied the introduction of new financial products that have elements of both securities and futures. A recent example is the delay in availability of futures and options on the SPDR Gold Trust ETF. The agencies have taken a positive step by agreeing to a Memorandum of Understanding on Novel Derivative Products that provides a framework for resolving jurisdictional disputes, but NASDAQ OMX believes that more can be done in this area. Accordingly, we would support establishing a clear timetable for the agencies to reach agreement, and empowering the Secretary of the Treasury to make jurisdictional determinations if the agencies are unable to agree within the stated timeframe. The failure of agencies to agree on jurisdiction can have the effect of driving activity to foreign markets, where neither agency can regulate it. Therefore, an efficient method of arbitrating jurisdictional disputes will advance the agencies' own interests in providing comprehensive oversight, as well as the interests of issuers and exchanges in making new products available.

Margin and Bankruptcy

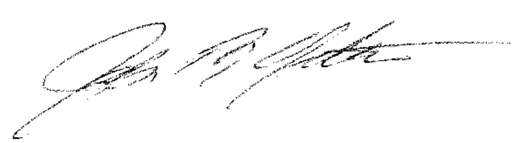
The agencies well understand the differences that exist between them in approaches to margin – both disparities between margin on futures and comparable options and difficulties in establishing rules to allow portfolio margining. The absence of a regime for portfolio margining in turn reflects differences in the treatment of customer accounts under federal law. These differences, however, create the risk of protracted proceedings in the event of the bankruptcy of an entity holding both futures and securities accounts. NASDAQ OMX believes that these differences, like so many between the agencies, do not reflect the needs of the exchanges and their participants, but rather the incremental evolution of structures that were established in parallel for purely historical reasons. Regulatory regimes in foreign jurisdictions do not face comparable difficulties, for the simple reason that a single regulator applies a unified statutory structure to regulate all types of instruments and exchanges.

The costs of the current structure are significant, and include the competitive advantage enjoyed by futures exchanges with lower margin requirements, the costs borne by investors that must pay excessive margin in a regime that does not allow cross margining of futures and securities, and the costs potentially borne by investors and taxpayers in the event of a protracted bankruptcy of a major financial firm. Moreover, there does not appear to be any real dispute as to the desirability of eliminating these disparities to allow for more efficient margining and better protection for investors in bankruptcy. Rather, impediments to action include differences in regulatory philosophy and the possible need for legislative changes. We note, however, that many of the participants in the agencies' joint meetings on harmonization provided practical and actionable advice on the best means to achieve these goals. Accordingly, NASDAQ OMX recommends that the agencies analyze these recommendations carefully and work expeditiously on this issue to develop a concrete and comprehensive plan that would reflect both any changes that can be made by the agencies in the short term and any recommendations for legislative action.

Conclusion

The Administration's call for regulatory harmonization, and the resulting joint agency meetings, provide an unprecedented opportunity for the agencies to work together to develop the best possible regulatory structures to promote market efficiency and investor protection. We hope that both agencies will avoid a narrow focus on "turf" or on historical precedent and instead adopt structures and processes that allow them to maximize their regulatory resources and eliminate, to the greatest extent possible, regulatory differences that do not serve overarching policy goals. If you have any questions, or wish to further discuss any of the issues raised in this letter, please do not hesitate to contact me at +1 301 978 8497.

Sincerely,



John M. Yetter
Vice President and Deputy General Counsel