NASDAQ OMX

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Thank you Chairman Johnson and Ranking Member Shelby. On behalf of the NASDAQ OMX Group, I am pleased to testify on "Spurring Job Growth Through Capital Formation While Protecting Investors."

Capital formation and job creation are in NASDAQ OMX's DNA. Forty years ago NASDAQ introduced the world to electronic markets, which are now the standard for markets worldwide. The creation of NASDAQ introduced sound regulation to the over-the-counter trading. Around NASDAQ grew an ecosystem of analysts, brokers, investors and entrepreneurs allowing growth companies to raise capital that was not previously available to them. Companies like Apple, Microsoft, Oracle, Google, and Intel, all of which are listed on the NASDAQ Stock Market, use the capital they raised to make the cutting edge products that are now integral to our daily lives. As they grew, these companies have created millions of jobs along the way. It is this heritage that is the foundation of my testimony today.

Today, the NASDAQ OMX Group owns and operates the global infrastructure of public markets, markets for securities that are publicly traded and available to all investors. We own 24 markets, 3 clearing houses, and 5 central securities depositories, spanning six continents. Eighteen of our 24 markets trade equities. The other six trade options, derivatives, fixed income products, and commodities. Seventy exchanges in 50 countries trust our trading technology to run their markets, and markets in 26 countries rely on our surveillance technology to protect investors, together driving growth in emerging and developed economies. We are the largest single liquidity pool for U.S. publicly traded equities and provide the technology behind 1 in 10 of the world's securities transactions.

To summarize, we believe that regulation is absolutely necessary to support capital formation and protect investors in both the public and private markets. It is, however, particularly critical to the public markets. Significantly, the public markets are best at allocating capital and creating jobs. Therefore, it is absolutely imperative that we strike the right balance in regulating the public markets and avoid losing their benefits.

Recently, Congress has moved forward in its consideration of several proposals that focus on the private company model. Each is briefly described below:

> H.R. 2940: eliminates the ban on solicitation of investors when a company is offering securities under Regulation D.

H.R. 2167: increases the number of shareholders from 500 to 1,000 before a company is required to register with the SEC.

H.R. 1070: increases the offering threshold from $5 million to $50 million before a company must register with the SEC.

H.R. 2930: exempts certain crowd-funding investments from SEC registration.

The first three bills have been well considered and debated, and we have no objection to them. The last bill represents a new and exciting concept, which we look forward to learning more about and sharing views with other market regulators and participants before we reach a final opinion.

While these bills will help the private capital formation markets, my comments today focus on the public markets. Private and public markets play complementary roles. It is ironic that in the debate about these bills about private company markets, supporters have cited challenges facing the public markets -- the declining number of U.S. IPOs and the high cost of being a public company -- to bolster the case for legislation relaxing the rules for raising private capital.

While we support modernizing rules to embrace new circumstances and technologies, our struggling economy demands more substantive action that goes to the heart of the problem. In other words, as we make it easier for companies to avoid the U.S. public capital markets either by staying private or going overseas to list, we should also deal with structural issues that make our public markets less attractive today. In fact, I submit that Congress would signal a retreat from the public markets if it limits the scope of its action to the private markets.

I'm here today to urge you to take steps to enable NASDAQ to continue our long term commitment to facilitating capital formation while protecting investors and contributing to economic and job growth. We ask for your help in reshaping the rules driving the public markets so that investors and entrepreneurs will continue to view the U.S. capital markets as the most efficient and best regulated markets in the world.

Why Do We Need Public Companies and Markets?

In light of the movement to relieve more companies from the obligations of registration and going public, we think it is time for Congress and regulators to review why we need strong, vibrant public company markets. Some might ask, if companies can access the capital they require in the private markets, why should we be concerned? There are three critical reasons in our view to recommit to the public markets:

1. Efficient pricing and funding of entrepreneurial activity: The value of an enterprise, how much capital it should receive, and at what costs are best determined by a deep competitive market like the public markets. A company that has a clear price set in the open market will attract more investors and lenders to help them fund growth. It is well recognized that companies that do not trade on exchanges are valued at a discount. Companies that do not trade in the public markets must establish their value through ad-hoc valuation and opaque negotiation. A limited number of potential investors bid for private companies. Financial experts, the IRS, the SEC, and courts recognize that discounts for lack of marketability can range from 30% and even higher. Clearly, a company valued 30% or more below its true value will not be able to invest, grow and create jobs as quickly.

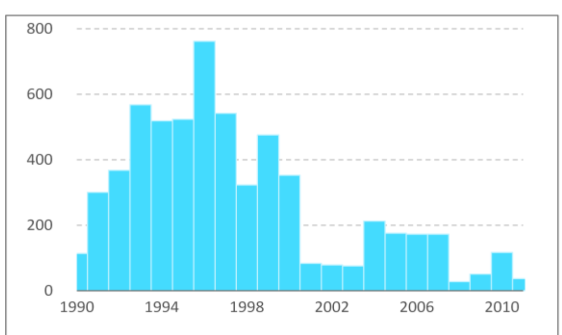
2. Jobs: A healthy public equity market enables companies to raise capital more efficiently, funding more rapid growth and more jobs. Companies create 90% of their new jobs after they go public. An IPO is the best public policy outcome in terms of jobs for the broader economy. A company that has exchange-traded shares can better use its stock as a currency to grow its business and incentivize employees. A successful IPO is a very public signal to other entrepreneurs about the availability of capital financing.

3. Wide availability of investment opportunity: A public listing allows the most diverse universe of investor's access to ownership. This democratization allows employees, individual investors, pensions, mutual funds, corporations and others to put their capital to work and enjoy the rewards, and risks, of equity ownership.

<u>Condition of the U.S. Public Markets</u>

The United States used to be the market of choice for global IPOs. From 1995 to 2010, listings on U.S. exchanges shrank from 8,000 to 5,000, while listings on non-U.S. exchanges grew from 23,000 to 40,000.

•U.S. IPOs declining over time



Source: Thomson Reuters.

Calls to increase exemptions from SEC registration indicate that excessive regulation is stifling innovation, capital formation, and growth. Prior to the internet bubble, the U.S. averaged 398 IPOS per year in the early 1990s and there were never fewer than 114 IPOs per year, even during a recession. Following the regulatory changes of the last decade, there has been an average of only 117 U.S. IPOs per year. In 5 of the last 10 years, including 2011, there have been fewer IPOs than in the worst year of the 1990s. In addition to the overall decline in the number of public companies, the average IPO has increased in size as the cost of complying with increased regulation has deterred many smaller and younger companies from going public.

I am not suggesting that the health of the U.S. economy is dependent on the number of companies listing on U.S. exchanges. It is, of course, much more complex than that. But, I would point to two recent academic studies which suggest that the reduction in the availability of IPO capital may have profound consequences for the U.S. economy as a whole. When IPO capital formation is restricted, entrepreneurs are incented to create products which complement existing products of large companies, rather than creating transformational products which change the way we live, work and think. Entrepreneurs are forced to sell their ideas too cheaply in the private markets. Essentially, the NASDAQ ecosystem of the past has been replaced in a "second best" form by the private markets. In the broadest terms, resources are inefficiently allocated, growth is negatively impacted, and the economy falls short of its potential.

As I indicated above, we operate in 50 countries around the world and provide regulatory services in 26. Markets in Australia, Canada, Brazil and Hong Kong offer levels of efficiency and regulatory integrity that are perceived as world class by investors and issuers. Longstanding rivals to the U.S. markets such as the United Kingdom have also taken significant steps to improve the efficiency and competitiveness of their markets. And that is good for the global economy. However, the U.S. is no longer the top jurisdiction for capital raised via IPOs, ranking second in 2011, and only three of the top 10 IPOs so far this year have been by U.S. firms. In 2010, IPO issuances from the Asia-Pacific region accounted for almost two-thirds of global capital raised. The story is the same for smaller companies too. Venture oriented markets in Australia, Canada and the U.K. have listed 155 companies each raising $50 million dollars or less, while only 44 such companies have listed in the U.S. during 2011.

<u>What is Hurting the U.S. Public Markets?</u>

Well-intentioned incremental public policy decisions have accumulated over time, that in their totality, serve as major barricades to getting more IPOs in the U.S. Although issues like our litigious legal environment and our outdated tax system impact the decision-making in this area, today I will focus on two categories more directly in this Committee's jurisdiction – regulation of public companies and regulation of the exchanges and their competitors. And I would note that many of these conclusions are well supported by two recent Blue Ribbon studies: The President's Council on Jobs and Competitiveness and the IPO Task Force, which arose from the Treasury Department's Access to Capital Conference.

Regulation of Public Companies: Too many times, regulation has been approached with a "one size fits all" solution. Yes, Sarbanes-Oxley comes to mind. As we look back on the enactment of Sarbanes-Oxley in the wake of Enron's collapse, while it can be said that Congress acted quickly and aggressively to restore investor confidence, the bill which was produced did not distinguish between the large companies listed on our Global Select Market, and the small companies listed on our Capital Market. The SEC and PCAOB have continued that approach with rules and legal obligations that usually assume that all public companies are large enterprises that can digest and respond to rules and regulations with the same ease. This is not the case, and it is chasing companies away from our markets and hurting job creation.

We believe it is time for a new approach. We commend to the Committee the October 20, 2011, report of the IPO Task Force entitled "Rebuilding the IPO On-Ramp." This Task Force, whose members are some of the best experts on capital formation and represent diverse interests, set forth a detailed proposal to create a regulatory on-ramp for early-stage growth companies, during which disclosure rules and compliance burdens would be phased-in, while maintaining investor protections. The Task Force also made detailed recommendations about how to improve research coverage for smaller companies. These recommendations merit careful consideration.

Market Structure Does Not Help Attract Companies to the Public Markets

We believe that the daily operation of the markets and their increasing complexity hurt efforts to get companies to go public here in the U.S. Today's U.S. markets are increasingly fragmented and volatile. Liquidity in U.S. stocks is dispersed across 13 exchanges, over 40 other registered execution venues, and uncounted other trading facilities. The declining cost of launching and operating electronic order crossing systems has led to a proliferation of decentralized pools of liquidity that compete by offering their owners and customers reductions in fees, obligations, transparency and order interaction.

Consider that today nearly one-third of public company stocks trade 40% to 50% of their volume away from the exchanges. In the past 3 years the percentage of U.S. market share traded in systems that do not publicly post their bids and offers rose from 20% to over 30%. Many retail and core investor orders are executed away from the primary exchanges.

We recognize that there are situational benefits and value to some orders trading away from the public. We also recognize that competition between markets has dramatically reduced investors' costs and improved market quality in listed securities through technological and structural innovation. However, the unintended consequences of the market fragmentation has been a lack of liquidity and price discovery in listed securities outside the top few hundred names and a disturbing absence of market attention paid to small growth companies by all market participants, including exchanges.

Such fragmentation of trading creates a thin crust of liquidity that is easily ruptured, as occurred on May 6, 2010. In fact, the SEC and CFTC in their joint "Flash Crash" report pointed out: "The Commission has noted that absent extraordinary conditions such as those occurring on May 6, 2010, retail orders are generally executed by internalizers away from exchanges and without pre-trade transparency, exposure or order interaction." Fragmentation and current market structure may be raising investors' costs. In 2010, the U.S., which has perennially ranked first globally for institutional investor costs, fell to fourth in the world, behind Sweden, Japan, and France. Price discovery and available transparent liquidity are essential parts of vibrant market systems.

We believe that, whenever possible, public price discovery should be encouraged to ensure a robust and balanced marketplace. Private transactions serve an important role at times and in those situations should be encouraged -- when a customer can get price improvement, or when market impact for larger institutional orders can be minimized. That said, we must also ensure that there is ample liquidity contributing to the critical role of price discovery. Transparency is critical to efficient markets.

Just as our markets continue to evolve and adapt, so must the regulatory structure of our markets. We need to strengthen regulation by modernizing systems and increasing transparency to regulators. We support the development of a consolidated audit trail with real time market surveillance and new regulatory tools to help regulators keep pace with technology advances and other changes in the markets.

Additional steps the SEC should take include adopting modifications to the market data revenue allocation formula to emphasize the value of public quotations.

Finally, we believe that companies should be able to choose the manner in which their shares trade, particularly for smaller companies in the period following an IPO when an efficient and liquid market is still developing.

Small Companies Need a Strong Venture Exchange to Grow and Create Jobs

In our markets the number one source of job creation is entrepreneurship. Just as business incubators nurture small companies until they are ready to leave the security of that environment and operate independently, there should be a space for incubating small public companies until they are ready to graduate to a national listing. The U.S. must create a space for these companies just as our foreign competitors have successfully done.

Canada, the United Kingdom, and Sweden have successful venture markets with significant numbers of listed companies and substantial capital-raising success. These markets list hundreds of small companies that create jobs at a fast rate. Venture market companies regularly grow and then graduate to the main markets in those countries. The U.S. has no equivalent exchange-supported, organized venture market.

In just five years, the Swedish First North Market, run by NASDAQ OMX, has grown to 141 listings with a total capitalization of 2.8 billion Euros. Twenty-two First North companies have graduated to the main market since 2006. All of this in a country of 9 million people. The Toronto Stock Exchange's TSX Venture Exchange may be the most successful of these venture markets. The TSX Venture Exchange lists 2,100 companies with a total market capitalization of $37.8 billion and a median size of $4.2 million. And 451 TSX Venture Exchange companies have graduated to the Toronto Stock Exchange since 1999. Graduates account for more than $87 billion in market capitalization. According to the London Stock Exchange, The London AIM Market has been one of the fastest growing markets in the world for the last decade. They have listed over 1,200 companies, including 234 international listings, some of which are American firms, and 141 AIM Market listings have graduated to LSE's main market. These markets have successfully used special listing standards and adopted innovative market structures targeted towards smaller companies.

<u>BX Venture Market can be the U.S. Home for Small Companies.</u> The NASDAQ OMX Group has received approval to create a new listing venue on the former Boston Stock Exchange. The BX Venture Market will have strict qualitative listing requirements, similar to other exchanges, but lower quantitative standards that would attract smaller, growth companies. The availability of the BX Venture Market will facilitate their ability to raise capital to continue and expand their businesses, creating jobs and supporting the U.S. economy. The BX Venture Market will provide a well-regulated listing alternative for companies that otherwise would transfer to, or remain on, the largely unregulated Pink Sheets or OTCBB, where there are no listing requirements, no public interest review, limited liquidity, and limited transparency, or list on junior tiers of non-US markets.

However, under existing structures, these companies will receive little regulatory benefit from opting to subject themselves to these additional requirements. For example, unlike companies listing on other exchanges with higher quantitative listing requirements, they will still be subject to the state's Blue Sky laws. We believe that there should be incentives provided to these smaller companies that list on a public company, such as the on-ramp described in the IPO Task Force Report. We also believe that steps should be taken to limit the fragmentation of trading in these smaller companies.

NASDAQ's Recommendations for Strong *Public* Capital Markets

Our capital markets require multi-faceted actions to help invigorate the atmosphere for entrepreneurs to help their companies' access capital and create jobs. We believe that these reforms would restore the ecosystem that once existed and is necessary to nurture, sustain and grow public companies and reinvigorate the U.S. engine of job growth.

Solution #1: Reform Sarbanes-Oxley

All of the NASDAQ OMX executives who are engaged in selling the U.S. markets to companies around the world tell me, to a person, that Sarbanes-Oxley is the most quoted reason for not listing on NASDAQ. President Obama's own Council on Jobs and Competitiveness has called for sweeping reforms to regulation in this area. The President's Council stated:

> "Amend Sarbanes-Oxley (Sox) to allow shareholders of public companies with market valuations below $1 billion to opt out of at least Section 404 compliance, if not to all of the requirements, of Sarbanes Oxley; or, alternatively, exempt new companies from Sox compliance for five years after they go public."

We believe that a further reduction in compliance costs could be obtained if the Section 404(b) examination were allowed to occur every two years for exchange-listed companies that are found to have no significant weaknesses.

Solution #2: Reject Expensive and Expansive New Regulations on Public Companies and Reexamine Existing Regulations

Policy makers and regulators must also be careful about imposing new regulations that lack necessity, yet will raise a public company' costs. Congress, the SEC and other regulators should evaluate the global competitive landscape before imposing new regulations.

One example is the recent PCAOB proposal to require public companies to rotate auditors. In 2005 after the PCAOB was created, a hearing was held in the House Financial Services Committee and then-Chairman William J. McDonough was asked about the viability of required auditor rotation. Chairman McDonough wisely rejected the idea then, and it should be rejected now.

Existing regulations should also be reexamined. In that regard, as noted earlier, we believe there is significant merit in the IPO Task Force's idea to ease compliance burdens during a small company's transition to being a public company. Recent regulations that have resulted in a dramatic reduction of research coverage for smaller companies should also be reviewed.

Solution #3: Support a Strong and Vibrant Venture Exchange with Innovative Market Structure for Small Companies

While we are certain the BX Venture Market is needed, we also believe that innovative trading rules are required to make the market successful. Small companies do not trade like big ones. As you look at the trading behaviors of small companies, building and maintaining liquidity can be a constant challenge. When we examine what has worked here and abroad in building liquidity for smaller companies, we believe these stocks should receive the same protections as Regulation NMS securities and that market data should be made widely available through existing data feeds.

The most prevalent listed company concern we hear about equity market structure relates to volatility. It is time for the SEC to consider allowing certain IPO companies, especially smaller companies using the public market to fuel growth, for a period of up to a year, to choose the market structure they feel would best introduce their stock to the marketplace. Empower these IPO companies to restrict the fragmentation that occurs in their stock and causes volatility and limit their trading to a well-regulated, transparent market unless off-exchange trading delivers real price improvement.

The SEC should allow companies to pay for market quality by allowing the exchanges to establish programs to reward broker dealers for committing capital to a stock and meeting rigorous market-quality benchmarks established by the exchange. This has worked in our Nordic markets.

Solution #4: The SEC Should Act on the Market Structure Concept Release and Allow Public Companies to Opt Out of a Fragmented Market

The SEC's thoughtful market structure reform proposals have not moved forward while the agency has been focused elsewhere. Regulators must turn attention back to these proposals. Such action is consistent with the SEC's Congressional mandate to ensure that our markets are open, fair and orderly. Congressional input to regulators will restore this initiative.

Solution #5: Create Jobs by allowing Companies to Hire the Employees They Need

One issue that we now mention to every Member of Congress and in testimony to every Committee we appear before is legal immigration reform. The United States achieved its economic prominence by inviting the best and the brightest from around the globe to unleash their creative capabilities on American soil and contribute to the American mosaic, culturally, politically and economically. Immigrants have been some of the greatest contributors to business, science and technology in American Society. 25% of technology and engineering companies from 1995 to 2005 had at least one immigrant key founder.

Our economy and NASDAQ itself have directly benefited from the contributions of foreign-born talent. Looking just at the Fortune 500 companies, we found at least 14 active NASDAQ companies that have foreign-born founders. These companies represent over $522 billion in market capitalization and employ almost 500,000 workers.

Legal immigration is a source of economic growth in the United States and NASDAQ OMX is concerned that continued entanglement in the illegal immigration debate will only exacerbate our already anemic economy. Every year we send approximately 17,000 STEM graduate students back to their home countries after educating them here in the finest universities in the world. It is critical that we reform our immigration system to accommodate these graduates. If U.S. companies cannot hire them here, they will hire them for the same job overseas. Therefore, I recommend the following to the U.S. Congress:

- ***Debate Legal Immigration on its own merits:*** Do not link *legal* reform to reform of *illegal* immigration – Americans are losing jobs and opportunity while one issue drags down the other. American workers, with good jobs, cluster around these highly-skilled workers. Achieving a comprehensive solution will take years – years Americans who need jobs do not have.

- ***Enact a more flexible and stable regime for Legal Immigration***: Reform must convey economic priorities about job growth and global competitiveness. Increasing H-1B numbers is no longer enough. We need to admit and keep entrepreneurs here so that the creative dynamism of our marketplace has the very best skills and minds. The default should be "yes," not "no."

- ***Attack the "job stealing" myth directly:*** Opponents of Legal Immigration reforms argue that when a foreign born immigrant gets a job, American graduates are the losers. Research tells a different story. The National Federation for American Policy says that for every H-1B worker requested, U.S. technology companies *increase* their employment by five workers.

Thank you again for inviting me to testify. I look forward to responding to your questions.