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September 12, 2008

Via email to director@fasb.org



Mr. Robert H. Herz
Chairman, Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

LETTER OF COMMENT NO. 238

Re: File Reference No. 1600-100 Exposure Draft -- Proposed Statement of Financial Accounting Standards (Disclosures of Certain Loss Contingencies)

Dear Mr. Herz:

The NASDAQ OMX Group appreciates the opportunity to comment upon the proposed amendments to the Statements of Financial Accounting Standard No. 5 and 141(R) regarding disclosure of certain loss contingencies. NASDAQ OMX operates 10 exchanges worldwide, including The Nasdaq Stock Market, a self-regulatory organization that is home to approximately 3100 listed companies. NASDAQ OMX also provides capital raising solutions and other trading, public company, and corporate governance services to issuers worldwide, enabling growth and corporate entrepreneurship, while protecting investors and maintaining market integrity.

NASDAQ OMX shares the Financial Accounting Standard Board's interest in effective financial disclosure to investors and the capital markets. However, NASDAQ OMX believes, as do the overwhelming majority of commentators on the proposed amendments, that their adoption would undermine, rather than serve that interest. Many commentators have made the case that the required disclosures will increase litigation risk and uncertainty by disrupting the careful balance between adversaries imposed by discovery and privilege rules. Issuers, law firms, and accounting firms alike have argued persuasively that the increased risk and cost to issuers and shareholders is not off-set by any benefit to investors, who already receive substantial disclosure regarding litigation loss contingencies. NASDAQ OMX writes in support of the positions put forth by these commentators.

We write separately, however, to emphasize the collateral damage these proposed amendments will have on U.S. capital markets and capital formation. The United States' historical status as the world's largest, most liquid and most competitive public equity capital market has faced serious challenge in recent years. In an

increasingly competitive global marketplace, companies have multiple new alternative venues for listing, launching IPOs, investing, and doing business outside of the United States. These companies routinely voice concerns to NASDAQ OMX about the litigation climate in the United States. They are acutely aware of the multibillion dollar plaintiffs' bar industry, and know first-hand of overzealous lawyers seeking deep pockets to force settlements on meritless claims. While their concerns have in the past been outweighed by the liquidity and effective regulation offered in U.S. markets, those benefits can now be found elsewhere.

Evidence that the threat of litigation is directing capital away from the U.S. is not just anecdotal. Four reports issued on the competitiveness of the U.S. capital markets in the last several years have cited litigation or securities class action lawsuits as factors contributing to the loss of the U.S. competitive edge.¹ Noting that the loss of U.S. public market competitiveness results from a number of factors, including improved technology and increased liquidity outside the U.S., the Interim Report of the Committee on U.S. Capital Market Regulation found that "certainly one important factor contributing to this trend is the growth of U.S. regulatory compliance costs and liability risks." This and other studies suggest that while the litigation cost of doing business provides ample disincentive to issuers contemplating business in the U.S., an even bigger fear is investor and market reaction to real and perceived uncertainties and complexities related to that litigation.²

The proposed amendments, in spite of intending the opposite, compound litigation uncertainties and introduce new complexities regarding cost and risks. Clearly, there is no quick fix to the U.S. litigation problem, and no denying the high volume of cases, excessive damages, unpredictable awards, and opportunities for gamesmanship that too often force settlement of meritless cases. But in this environment, a requirement to disclose information that is by its nature unknowable, speculative, prejudicial, misleading, and confusing, succeeds only in raising the litigation cost, risk and exposure for public companies to the ultimate detriment of investors. The proposed amendments, moreover, replace disclosure rules that have served issuers and investors effectively to date.

Potential issuers contemplating a venue for an IPO, a listing, or doing business – even those that accept the inevitability of heightened litigation exposure in the U.S. and believe other advantages outweigh that downside – will quite rationally view the new

¹ See Committee on Capital Markets Regulation, Interim Report (Nov. 2006), available at <http://www.capmarketsreg.org/research.html>; Commission on the Regulation of the U.S. Capital Markets on the 21st Century, Independent Bipartisan Commission Established by the U.S. Chamber of Commerce, Report and Recommendations (March 2007), available at <http://www.uschamber.com/publications/reports/0703capmarketscomm.htm>; McKinsey & Company, Report Commissioned by Mayor Michael R. Bloomberg and Senator Charles E. Schumer, Sustaining New York's and the U.S.' Global Financial Services Leadership, (2007), available at <http://www.senate.gov/schumer/SchumerWebsite/pressroom/specialreports/2007/NYREPORT%20FIN.M.pdf>; Richard M Kovacevich et al., The Financial Services Roundtable, The Blueprint for U.S. Financial Competitiveness (Nov. 2007), available at <http://found.org/cei/pdfs/FIN.M.CompetitivenessReport.pdf>.

² See Through Their Eyes: How Foreign Investors View and React to the U.S. Legal System, by Robert E. Litan, released by the U.S. Chamber Institute for Legal Reform.

Mr. Robert H. Herz
September 12, 2008
Page 3

amendments as a disincentive. NASDAQ OMX submits that their adoption, beyond proving costly to individual companies and misleading to their investors, will add an unnecessary hindrance to the health and growth of U.S. capital markets, at a time when those markets are in need of competitive advantage. We respectfully recommend that the Board reject the proposed changes to FAS 5.

We appreciate your consideration.

Sincerely,

Edward S. Knight