STATEMENT AND SOLICITATION OF COMMENTS BY THE NASDAQ LISTING AND HEARING REVIEW COUNCIL ABOUT CORPORATE GOVERNANCE "BEST PRACTICES"

We have recently experienced unprecedented turmoil and crisis in the financial markets and in the global economy. This has created many serious problems, the full consequences of which cannot yet be realized. These issues are the subject of close scrutiny by the Administration, Congress and the press. Many changes are taking place and the regulatory climate in this country will be fundamentally reshaped.

The nation's exchanges have a defined but important role to play in this process. The regulatory reach of any one market is, of course, limited to the universe of public companies it lists and trades. The Nasdaq Listing and Hearing Review Council ("Listing Council") is appointed by the Board of Directors of the Nasdaq Stock Market LLC to provide advice on public policy issues related to listed companies. The Listing Council has long embraced a robust, dynamic and transparent approach to regulation. These rules are constantly reexamined and major revisions have occurred from time to time.

Most recently, Nasdaq adopted wide-reaching reforms in 2003 in response to the governance debate precipitated by the collapse of Enron and other public companies. These reforms elevated the role of independent directors by adopting stricter, more objective criteria for director independence, and by requiring, among other things, that listed companies have a majority independent board and an independent board nominations and executive compensation process. Importantly, independent directors were, for the first time, required to meet regularly in executive session, apart from management and non-independent directors. Shareholders in turn were empowered to approve stock-based compensation. These changes strengthened the governance process at public companies.

The financial crisis has many causes, but unlike the events leading to the 2003 reforms, few have suggested that their root cause is attributable to breakdowns in the internal governance structure at public companies. Yet, shareholders and others are, we believe, appropriately examining how well boards of directors prepared for, and today are dealing with the consequences of, this crisis. Some have asked whether boards have paid sufficient attention to issues such as risk management and whether shareholders should be further empowered by advisory votes on executive pay. Others have questioned, for example, whether directors should be elected by a majority vote and whether all directors should be elected annually. Legislation has been introduced to address certain of these issues, the Securities and Exchange Commission is considering various rulemaking proceedings and a number of state legislatures are debating similar issues.

Yet, it is difficult to argue with the proposition that corporate boards of directors, and their many independent directors, are today busier than they have ever been before. The various requirements imposed by the Sarbanes-Oxley Act of 2002 and the new exchange listing standards, when combined with our litigious legal environment, have imposed a heavy workload on corporate boards. In this context, we are concerned that the adoption

of new mandatory listing requirements could distract boards and consume valuable resources, and, thus, prove counterproductive.

On the other hand, there are a number of governance practices which a prudent board should regularly consider and to which the shareholders of a public company are entitled to expect transparency. In considering the proper approach to address these areas we believe that much can be gleaned from the example of non-U.S. markets, such as the NASDAQ OMX Nordic markets. The corporate governance model widely followed around the world is often referred to as "comply or disclose" or "comply or explain." Unlike the traditional, mandatory U.S. rule, for which delisting may be the only alternative, in a "comply or disclose" model a corporation publicly represents that it either satisfies the practice at issue, or, if it doesn't, explains why not. This governance approach is sometimes referred to as adopting "best practices." There are, of course, U.S. examples of "comply or disclose" regarding such matters as the SEC's requirement to disclose whether a company has a financial expert on its audit committee. Similarly, a non-U.S. company listing on Nasdaq may choose to "comply or disclose" regarding a variety of corporate governance practices. This model offers flexibility to companies and transparency to investors and allows practices to evolve in a logical manner. In the competition for scarce investor resources, corporations with the best practices will, over time, likely emerge as the winners.

Given the foregoing, the Listing Council solicits comments from companies, investors and other interested parties, as to whether Nasdaq should adopt corporate governance "best practice" policies and, if so, what issues those ought to address. We would expect that any required disclosures would appear either in a company's proxy, in the case of most U.S. companies, or in its annual report filed with the SEC for all other companies.

The following is a broad list of potential "best practice" recommendations. In posing this list we do not mean to suggest that Nasdaq necessarily intends to adopt recommendations in each of these categories. Accordingly, it would be helpful for commenters to identify and prioritize those issues they feel most strongly about. For those who would suggest that the exchanges adopt, instead, mandatory requirements, please explain why you believe that would be preferable to a "comply or disclose" model and which specific rules you believe should be, without exception, required of all listed companies.

<u>Best Practice Proposals</u>

1) We believe that one of the more important governance requirements adopted in 2003 was that independent directors meet regularly in executive session, apart from management and other directors. Should this practice be expanded such that companies would hold an executive session of independent directors at each regularly scheduled board meeting? Should companies disclose the frequency with which they hold such meetings?
2) The agenda for executive sessions will likely vary from meeting to meeting and company to company. Should companies adopt an annual agenda for their

executive sessions? If so, which of the following topics are appropriate for inclusion on that agenda:

a) Has the "tone at the top" of the company established a culture of integrity?

b) Does the company use self-evaluations to assess whether its board, board committees and individual directors are operating competently and effectively?

c) Do the independent directors have adequate access to information about corporate strategy and other issues and adequate input into setting the board's agenda?

d) Does the company have an effective business risk management strategy and are sufficient resources allocated to it? Should this responsibility be allocated to a committee other than the audit committee, given the existing responsibilities of that committee?

e) Does the company have an effective orientation program for new directors?

Should other topics also be considered?

3) Given the demands on director's time, should the company adopt a limit on the number of outside boards on which a director can serve, and, if so, what number is appropriate?

4) Should the company require its directors to participate, either annually or on some periodic basis, in continuing education programs, as are, for example, sponsored by various universities and certified by certain governance organizations?

5) Should shareholders vote annually on appointing the outside auditor?

6) Should the company adopt some form of advanced resignation requirement to address the circumstance where a director fails to receive a favorable vote by a majority of the shareholders?

7) Should the company develop a process to facilitate shareholder communications with directors and, if so, what role should the independent directors play in that process?

8) To facilitate independent board leadership, should the company either have an independent Chairman or an independent Lead Director?

9) Should all directors be elected annually?

Given the significance of these issues and the evolving and on-going debate regarding the economic crisis, Nasdaq has determined to hold the comment period open through Friday, October 30, 2009. Please email your comments to commentsolicitation@nasdaq.com. If you prefer, you can mail your comments to: Michael S. Emen, Senior Vice President, Listing Qualifications, The NASDAQ Stock Market, 9600 Blackwell Road, Rockville Maryland, 20850.