



*Via Regular Mail & E-Mail*

March 28, 2013

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**Re: Nasdaq UTP Plan Amendment for Level 1 Professional Fee Increase**

Dear Messrs. Ramsay and Knorrning, and Ms. Merritt:

The Securities Industry and Financial Markets Association (“SIFMA”) writes this letter to urge you to take immediate action to address the recent improper action by the Nasdaq UTP Plan (the “Plan”).

It is our understanding that on or around February 14, 2013, the Plan adopted a price increase for core data in executive session without notice to or participation by the Plan’s Advisory Committee members. On February 28, 2013, Nasdaq issued “UTP Vendor Alert #2013-4” purporting to notify the public that “the UTP Level 1 Professional Fee will increase from \$20 to \$25 per month” effective April 1, 2013, pending filing with the Commission. The 25% fee increase is not trivial – for every one of the tens of thousands

of professionals who have access to Level 1 core data, it means an additional \$60 per year in fees. This may reduce professional access to market data which in turn could have a negative impact on investors who rely on those professionals. Moreover, many “professionals” under Nasdaq’s definition are individual investors who, for example, own small businesses.

Although the Nasdaq UTP Plan amendment filing has not yet been published on the SEC’s website, we urge you to take action now to avoid confusion in the market place and to uphold the integrity of the National Market System.

For the reasons set forth below, the Nasdaq UTP Plan’s action was a clear violation of the Commission’s “Governance Amendment” to the UTP Plan in 2005, which was a fundamental component of the Commission’s adoption of Regulation NMS. Moreover, the purported fee increase is (i) unreasonable and unfair, not justified by any data relating to costs as required by the Commission and the United States Circuit Court of Appeals for the District of Columbia in its *NetCoalition* decision, (ii) anti-competitive and in Nasdaq’s (and other exchanges’) individual self-interest and not the public interest, and (iii) issued without sufficient notice and opportunity to comment and prepare for the necessary changes and disruption to business as a result of the fee increase and change in method for counting users.

**I. The 25% Fee Hike on Core Data Is Null and Void Because it Was Adopted in Secret without Required Input from the Advisory Committee, Thereby Violating the Nasdaq UTP Plan and Regulation NMS.**

On or around February 14, 2013, the Plan adopted the UTP Level 1 price increase in executive session without notice to or participation by the Plan’s Advisory Committee members. This was a clear violation of the Commission’s “Governance Amendment” to the UTP Plan in 2005, which was a fundamental component of the adoption of Regulation NMS. The Governance Amendment provides:

Members of the Advisory Committee shall have the right to submit their views to the Operating Committee on Plan matters, prior to a decision by the Operating Committee on such matters. Such matters shall include, but not be limited to, any new or modified product, fee, contract, or pilot program that is offered or used pursuant to the Plan.<sup>1</sup>

Raising the UTP Level 1 Professional Fee from \$20 per month to \$25 per month was clearly a “modified fee” requiring submission to the Advisory Committee for its views before the Operating Committee could make its decision. This did not happen. Because

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<sup>1</sup> Regulation NMS: Final Rules and Amendments to Joint Industry Plans, 34-51808 (June 9, 2005), 70 Fed. Reg. 37496, 37610 (June 29, 2005) (“Regulation NMS”). *See also* Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis at Section IV.E(c) (“Nasdaq UTP Plan”).

the language of the Governance Amendment is mandatory, the subsequent action by the Operating Committee adopting the fee increase while depriving Advisory Committee members of their right to submit their views “prior to a decision” was contrary to the terms of the Plan itself and, therefore, has no legal force or binding effect.

The Commission made clear that, although the views of the Advisory Committee are not necessarily binding on the Operating Committee, the process of including the Advisory Committee in important decisions - including fee increases - and considering its members’ views is fundamental to the functioning of the National Market System Plan. Underlining this importance, the Governance Amendment states: “Notwithstanding any other provision of this Plan, an Advisory Committee shall be formed and shall function in accordance with the provisions set forth in this section.”<sup>2</sup> By withdrawing in secret into an executive session for the deliberate purpose of excluding Advisory Committee members, the Operating Committee violated the Commission’s explicit mandate and undermined one of the key tenets of Regulation NMS.

The Commission was quite explicit in 2005 about its intent to establish a more robust Advisory Committee, finding that “advisory committee members should have more direct involvement in the deliberations of Plan operating committees. Specifically, the Governance Amendment gives advisory committee members the right to attend meetings of the operating committee and to receive information disseminated to the operating committee.” The Commission carefully established five Advisory Committee member seats, each one representing a key market data constituency outside of the exchanges: (i) a broker-dealer with a substantial retail customer base, (ii) a broker-dealer with a substantial institutional investor customer base, (iii) an alternative trading system, (iv) a data vendor, and (v) an investor.

The composition of the Advisory Committee and its mandatory right to be heard was fundamentally important to the Commission, given market data users’ long-held concerns that the exchanges were colluding behind the veil of NMS Plans to adopt unreasonable fees and other burdensome measures in their own self-interest at the expense of investors and other market participants. As the Commission concluded,

Expanding participation of interested parties other than SROs in Plan governance should increase the transparency of Plan business, as well as provide an established mechanism for alternative views to be heard by the Plans and the Commission. Earlier and more broadly based participation could contribute to the ability of the Plans to achieve consensus on disputed issues.

The Plan’s actions in excluding the Advisory Committee and adopting the fee increase behind closed doors<sup>3</sup> with no public input was a direct violation of the Commission’s

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<sup>2</sup> Regulation NMS, 70 Fed. Reg. at 37610; *see also* Nasdaq UTP Plan at Section IV.E.(a).

<sup>3</sup> Our information is that counsel to Nasdaq informed the Plan participants that executive session was appropriate because the fee increase was non-public and allowing the advisory committee members to hear about it in advance would be problematic. This is nonsensical at best, given the explicit purpose of the

express requirements and the Plan’s own governing rules. The fee increase, therefore, must be considered null and void.

**II. The Plan Operating Committee Must Meet with the Advisory Committee to Hear Members’ Views and Should Explain Its Consideration of Those Views in Its Fee Amendment Submission to the Commission.**

We respectfully request that you require the Operating Committee to reconvene in open session with members of the Advisory Committee present to enable them to provide their views as industry representatives. We expect that their views will include the following points.

**A. The 25% Hike on Fees for Core Data is Unreasonable and Not Justified by Any Data Relating to Costs.**

Under the Exchange Act, fees imposed by an exclusive processor of data must be “fair and reasonable.”<sup>4</sup> The fees here concern “core” data—last sale and best bid and offer data. The Commission has previously recognized that the determination of whether core data fees are “fair and reasonable” should take into account the cost of collecting and producing the data. For example, in the 1999 SEC “Market Information Concept Release” (the “Concept Release”) the Commission noted that:

[T]he fees charged by a monopolistic provider of a service (such as the exclusive processors of market information) need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high or underfunding or subsidization fees are too low.<sup>5</sup>

The Concept Release, therefore, found that “the total amount of market information revenues should remain reasonably related to the cost of market information.”<sup>6</sup>

This view was confirmed in *NetCoalition*, where the D.C. Circuit distinguished between “core” data and “non-core” data, such as depth-of-market data.<sup>7</sup> Referring to the legislative history of the Securities Acts Amendments of 1975, the Court found that the Commission has special oversight duties with respect to core data that require it to

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Advisory Committee to provide its views on fee increases. Although Plan Section IV.E.(d) allows executive session to discuss an item that “requires confidential treatment,” that provision cannot be read to eviscerate the explicit function of the Advisory Committee to “submit their views . . . prior to a decision . . . [on] any new or modified product, fee, contract, or pilot program.” Apparently the Commission staff person who regularly attends Plan meetings was also in attendance but did not intervene.

<sup>4</sup> 15 U.S.C. § 78k-1(c)(1)(C).

<sup>5</sup> Regulation of Market Information Fees and Revenues, Release No. 34-42208, 64 Fed. Reg. 70,613, 70,627 (Dec. 17, 1999).

<sup>6</sup> *Id.*

<sup>7</sup> 615 F.3d at 534-35.

conduct a cost analysis typical of public utility ratemaking in determining whether data fees are “fair and reasonable” within the meaning of the Act:

The petitioners rely on portions of the legislative history suggesting the Commission was supposed to “assume a special oversight and regulatory role” over exclusive processors by treating them as public utilities, a role inconsistent with allowing market forces to determine market data prices. S.Rep. No. 94-75, at 12 (1975), as reprinted in 1975 U.S.C.C.A.N. 179, 190 (Senate Report); *see id.* at 11, 1975 U.S.C.C.A.N. at 189 (“Any exclusive processor is, in effect, a public utility, and thus it must function in a manner which is absolutely neutral....”); Conference Report at 93, 1975 U.S.C.C.A.N. at 324 535\*535 (“[W]here a self-regulatory organization or organizations utilize an exclusive processor, that processor takes on certain of the characteristics of a public utility and should be regulated accordingly.”). These statements, however, refer to an “exclusive central processor for the composite [i.e., consolidated core data] tape or any other element of the national market system,” not to an exchange acting as the processor of its proprietary non-core data. Senate Report at 11, 1975 U.S.C.C.A.N. at 189 (emphases added); *see also* Conference Report at 93, 1975 U.S.C.C.A.N. at 324. In fact, the legislative history indicates that the Congress intended . . . that the SEC wield its regulatory power “in those situations where competition may not be sufficient,” such as in the creation of a “consolidated transactional reporting system.” Conference Report at 92, 1975 U.S.C.C.A.N. at 323; *see* Senate Report at 12, 1975 U.S.C.C.A.N. at 190 (“[I]n situations in which natural competitive forces cannot, for whatever reason, be relied upon, the SEC must assume a special oversight and regulatory role.”).<sup>8</sup>

The Plan’s responsibility with respect to the fee increase is clear. It must provide detailed cost data to justify the fee,<sup>9</sup> so that the Commission can carry out its “special oversight and regulatory role.”

**B. The Fee Increase is Anti-competitive and Is in Nasdaq’s Self-Interest, Not the Public’s Interest**

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<sup>8</sup> *Id.*

<sup>9</sup> We doubt that the Plan can do so. At the same time the Plan is raising professional fees 25%, Nasdaq is taking the same data and offering it at a discount in its own “proprietary” data product.

Nasdaq, as administrator of the Plan, has a major conflict of interest in that it markets and sells a competing market data product called NASDAQ Basic. The slower, more expensive, and more cumbersome Nasdaq can make core data, the better its competing market data product looks to prospective buyers in comparison. Given this dynamic, the Plan must consider the potential impacts of its professional fee increase on other data vendors, subscribers, and ultimately investors.

Nasdaq's market data website directly sells against the core data that it has a duty to administer for the good of investors and the National Market System under Exchange Act Section 11A. Rather than promoting core data, Nasdaq's website instead states:

NASDAQ Basic is a proprietary data product that provides a faster, easier-to-administer alternative to the UTP Level 1 and CTA Products. NASDAQ Basic offers Best Bid and Offer and Last Sale information for all U.S. exchange-listed securities based on liquidity within the Nasdaq market center, as well as trades reported to the FINRA/NASDAQ Trade Reporting Facility. Nasdaq has more U.S. equity liquidity than any other U.S. exchange, making this product a reliable and accurate source for real-time, intraday trade and quote data.

#### Key Benefits

- Cost Savings – Save an average of 75% off Level 1 fees with flexible pricing options focused on lower per-user rates.
- Administrative Savings – Consolidate all of your U.S. exchange data into one easy-to-administer feed.
- Faster Access – Get data directly from NASDAQ and avoid the latency of data from the Securities Information Processor (SIP) and Consolidated Tape Association (CTA).<sup>10</sup>

Despite the obvious conflict of interest of selling against the Plan's own core data and service, Nasdaq is the Plan participant who lobbied for the fee increase on the Plan's agenda and took actions to exclude the Advisory Committee from participating in the discussion. In the very least Nasdaq must recuse itself from voting on the fee increase, as any board member of a public company would be required to do in any similar situation under basic conflict of interest principles.<sup>11</sup>

### **C. The Plan Has Not Provided Sufficient Notice and Opportunity to Comment and Prepare for the Required Changes**

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<sup>10</sup> <http://www.nasdaqtrader.com/Trader.aspx?id=nasdaqbasic>

<sup>11</sup> Nasdaq, of course, wins either way. Because Regulation NMS Rule 603(c) requires broker-dealers and others to purchase the consolidated data from the Plan "in a context in which a trading or order-routing decision can be implemented," firms must buy Nasdaq UTP Plan data in some contexts, but will look to buy the cheaper and faster NASDAQ Basic data in others. There is nothing inherently cheaper and faster about NASDAQ Basic data. Those advantages are entirely creatures of the odd system that Regulation NMS has created and that Nasdaq (and other exchanges) have exploited.

In conjunction with the fee increase, the Plan has adopted other policy changes and rules that are required to be filed with the Commission. Because they are not fee changes and do not deal with administrative or ministerial matters, those other rule changes or amendments to the Plan may not take effect on filing. These changes include a new “net reporting program” subject to a slew of requirements under “Nasdaq OMX Global Data Policies.” These are changes that must be filed with the Commission for prior notice and opportunity for public comment.

As a package, the fee and related changes require professionals and their firms, as well as market data vendors, to alter their systems and business plans. Nasdaq’s vendor alert dated February 28, 2013 provided a bare month’s notice of the amendments, even assuming they legally may take effect. Substantial fee and reporting changes should require a six month notice period to enable market participants to make the necessary adjustments.

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For the reasons set forth above, we request that you consider the Nasdaq UTP Plan’s adoption of the professional fee increase as null and void and require that the Plan’s Operating Committee reconvene to reconsider Nasdaq’s proposal in light of the above comments and those of its individual Advisory Committee members. We would welcome the opportunity to meet to discuss this matter. Please contact Melissa MacGregor at SIFMA at 202-962-7385 if you have any questions.

Respectfully submitted,



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SIFMA