



October 14, 2014

**Via Electronic Mail**

Thomas P. Knorring  
Chairman, Nasdaq/UTP Plan Operating Committee  
c/o The Chicago Board Options Exchange  
400 South LaSalle Street  
Chicago, IL 60605  
[Knorring@cboe.com](mailto:Knorring@cboe.com)

Re: Nasdaq/UTP Plan: Selection of Processor for the Nasdaq SIP

Dear Mr. Knorring:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> and its members have read with interest and concern the press reports on the selection process being carried out by the operating committee of the 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 (“Nasdaq/UTP Plan”). The Nasdaq/UTP Plan governs the Securities Information Processor for Nasdaq-listed securities (the “Nasdaq SIP”) and we understand that Nasdaq informed the operating committee at the beginning of this year that it would not renew its contract to operate the Nasdaq SIP. As such, we understand that the Operating Committee is engaged in a selection process to choose a replacement for Nasdaq as the SIP operator.

The SIPs are critical industry utilities, and the failure of the Nasdaq SIP on August 22, 2013 led to a multiple hour, market-wide halt in trading of Nasdaq-listed securities. SIFMA has repeatedly called for a change in the governance of all of the National Market System Plans (“NMS Plans”) for the various SIPs. The published reports of the selection process being carried out by the Nasdaq/UTP Plan clearly show that the current governance structure of the SIPs is ineffective and must be reformed. In this regard, the Nasdaq/UTP Plan’s selection process raises several serious questions.

You will recall that we wrote to you in March of this year with specific questions that highlighted our concerns about the transparency, participation, and outcome of the process for

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<sup>1</sup> The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

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selecting a new processor for the Nasdaq SIP. On April 23, 2014, you responded to our questions, and you made a number of commitments about the selection process for the Nasdaq SIP. (Copies of that correspondence are attached to this letter). Set forth below are excerpts from your April 23<sup>rd</sup> letter with our follow up questions.

***“The Participants have retained Jordan & Jordan (J&J) to manage the bidding process and to analyze the bids for consideration by the Nasdaq/UTP Plan Operating Committee.”***

- Has the Nasdaq/UTP Plan Operating Committee provided J&J’s analysis to the Advisory Committee of the Nasdaq/UTP Plan? If not, why not?
- Will the Nasdaq/UTP Plan Operating Committee make J&J’s analysis publicly available? If not, why not?

***“At a meeting on February 13, 2014, the UTP Operating Committee provided a status update on the selection process to the Advisory Committee and the SEC, including the status of the newly formed subcommittee to focus on the processor and administrative functions, the subcommittee’s recommendation that the Participants send out RFPs, the retention of J&J and the development of the RFPs”***

- Who are the members of that subcommittee?
- Did that subcommittee prepare any reports? If so, were those reports made available to the Advisory Committee? If they were not so made available, why not?
- Will the reports of that subcommittee be made publically available? If not, why not?

***“We are close to finalizing the selection process and remain committed to implementing a process that maintains and ensures the confidentiality of the bidder submissions, uses objective selection criteria to the fullest extent possible, manages conflicts and permits any qualified party to bid...”***

- What are the objective selection criteria that the Nasdaq/UTP Plan Operating Committee has been using?
- How has the Nasdaq/UTP Plan Operating Committee managed conflicts of interest in the selection process? Has Nasdaq been allowed to vote in the selection process even though it is a bidder? If so, how did the Nasdaq/UTP Plan Operating Committee manage that conflict of interest?

***“Bidders have requested confidentiality and information they provide will not be shared with the public or competing bidders. SEC staff [and the Advisory Committee?] [sic] has participated in meetings and will continue to do so.”***

- Has SEC staff participated in meetings on the selection process? If so, what has been their feedback? Has the SEC or its staff approved the selection process?
- Has the Advisory Committee participated in meetings on the selection process? If so, what has been the nature of that participation? If not, why not? (It is not clear from your bracketed statement whether the Nasdaq/UTP Plan Operating Committee ever intended to include the Advisory Committee in the selection process.)

***“The Operating Committee is committed to working with you and the Advisory Committee in a transparent manner as the Committee endeavors to select a service provider who will appropriately maintain and operate the SIP system for Nasdaq-listed stocks.”***

- How has the Nasdaq/UTP Plan Operating Committee worked with SIFMA in a transparent manner?
- How has the Nasdaq/UTP Plan Operating Committee worked with the Advisory Committee in a transparent manner?

In addition, the recent reports of the selection process have raised other important questions:

- Will the self-regulatory organizations (“SROs”) that govern the SIP NMS Plans now provide direct industry representation on the operating committees of those plans? If not, why not?
- Why does the Operating Committee allow participation in the selection process by SROs that do not have any active equities business?

SIFMA requests responses to these questions at your earliest convenience. In the meantime, our specific concerns are set forth in more detail below.

SIFMA continues to believe that the current SIP governance structure suffers from a lack of transparency and insulated governance. We have raised this issue multiple times, including last year after the August 22<sup>nd</sup> Nasdaq SIP outage that led to a multiple hour halt in trading of Nasdaq securities,<sup>2</sup> and then again this year in SIFMA’s recommendations on Equity Market Structure.<sup>3</sup> Simply put, the existing governance structure for the SIPs is ineffective and must be

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<sup>2</sup> See Letter from Theodore R. Lazo, Managing Direct and Associate General Counsel, SIFMA to Mary Jo White, Chair, Commission dated December 5, 2013.

<sup>3</sup> See SIFMA Recommendations for Enhancing Fairness, Stability, and Transparency in US Equity Markets dated July 14, 2014, available at <http://sifma.org/workarea/downloadasset.aspx?id=8589949840>.

reformed. Contrary to their public statements,<sup>4</sup> the SROs so far have not made any changes to the governance structure for the SIP NMS Plans, leading now to a highly flawed selection process for the Nasdaq SIP. The SROs should address these governance shortcomings now.

As we have stated previously, the NMS Plans should include direct representatives from the industry (both broker-dealers and asset managers) and the public, and those independent representatives should have voting power on the operating committees of the SIP NMS Plans. These changes would make the governance of the SIPs consistent with the statutory “fair representation” requirements governing the SROs themselves. In addition, these steps would help assure that the SIPs operate for the benefit of the public good, not just for the benefit of the participating SROs. There is *nothing* in the Exchange Act, or the applicable rules thereunder, that would prohibit industry members from fully participating in the governance of the SIPs, or of any other NMS Plan, with rights equivalent to the SROs in the administration of the affairs of the SIPs.

The SROs frequently remind SIFMA that indirect industry participation in NMS Plan governance is available through advisory committee membership. However, the advisory committee structure has been wholly unsuccessful. Advisory committee members are given no substantive voice in the operation of the SIPs, their role is without authority, and there is no mechanism for them to elicit or report feedback from the broad constituencies that depend on the SIP data. In addition, the SROs conduct all of the meaningful business of the SIPs in executive session, from which advisory committee members are excluded. This was the case when the operating committee of the Nasdaq/UTP Plan conducted a post-mortem of the August 22nd events in executive session without the advisory committee members, who were simply briefed *after* the executive session. And the same appears to have been the case with the current selection process, despite the statements in your April 23<sup>rd</sup> letter. To our knowledge, the Advisory Committee to the Nasdaq/UTP Plan has had no substantive role in the process.

The current governance process has led to a flawed selection process for the Nasdaq SIP. To our knowledge, there has been no management of very obvious conflicts of interest. In addition, several Nasdaq/UTP Plan participants that have no current equities activity appear to be participating in the selection process.

According to published reports, Nasdaq has full voting rights in the selection process despite its obvious conflict of interest in seeking to succeed itself as the processor for the Nasdaq/UTP Plan. There is no explanation for why this could be the case if, as you stated in your April 23<sup>rd</sup> letter, the SROs had in fact developed a process to manage conflicts in the selection process. We note that the SROs did address this issue in their selection process for the processor for the Consolidated Audit Trail (“CAT”). SIFMA supported that process, which excludes SROs that also are bidding to become the processor from participating in the final selection vote if their bids are still under consideration. Yet at the same time, and in connection

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<sup>4</sup> See e.g. SROs’ November 12<sup>th</sup>, 2013 press release stating that SROs and SIP Committees had compiled a series of proposals designed among other things to “**enhance governance, accountability and transparency**”, available at <http://www1.nyse.com/press/1384259426409.html>.

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with a market utility just as critical as the CAT, the operating committee of the Nasdaq/UTP Plan appears to be allowing Nasdaq to vote for itself as the plan processor.

Separately, we note that published reports of the selection process indicate that SROs that do not report transactions to the Nasdaq SIP are participating in the selection process. For example, the National Stock Exchange appears to be participating despite the fact that it has publicly stated that it has ceased operations altogether.<sup>5</sup> In addition, the Chicago Board Options Exchange and the International Securities Exchange appear to be participating even though they no longer conduct equities businesses. It seems self-evident that participation in this vital selection process should not include organizations that do not engage in an equities business or are not even in operation.

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We would appreciate a prompt response to our specific questions. With the next meeting of Nasdaq/UTP Plan Operating Committee scheduled for October 15, 2014, time is of the essence in addressing these very serious questions about the integrity of the selection process and the accuracy of the commitments in your April 23<sup>rd</sup> letter. The selection process should be carried out with public transparency to the fullest extent possible. In addition, the ineffective governance structure of the Nasdaq/UTP Plan now has the potential to create a highly compromised result that would not serve the interests of the market or of investors. Going forward, the governance of the Nasdaq/UTP Plan, and of the other SIPs, should include direct industry representation with rights equivalent to the SROs.

SIFMA urges the Nasdaq/UTP Plan Operating Committee to address these issues before a new processor is chosen for the Nasdaq SIP. We look forward to your reply.

Sincerely,



Theodore R. Lazo  
Managing Director and  
Associate General Counsel



Melissa MacGregor  
Managing Director and  
Associate General Counsel

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<sup>5</sup> See Securities Exchange Act Release No. 72107 (May 6, 2014), 79 FR 27017 (May 12, 2014).

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cc: Mary Jo White, Chair  
Luis A. Aguilar, Commissioner  
Daniel M. Gallagher, Commissioner  
Michael S. Piwowar, Commissioner  
Kara M. Stein, Commissioner  
Stephen Luparello, Director, Division of Trading and Markets  
David S. Shillman, Associate Director, Division of Trading and Markets



*Invested in America*

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Chair, Nasdaq UTP Plan Operating Committee  
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Dear Tom:

As you know, the Market Data Subcommittee of the SIFMA Technology & Regulation Committee has long held that the reliability and fairness of the consolidated market data system is extremely important to our members and investors. You and the UTP Plan Operating Committee play a major role in the governance of that system.

Recently, Nasdaq announced that it would terminate its contract to operate the Nasdaq UTP Plan Securities Information Processor (SIP) in light of concerns it expressed following the August 2013 trading halt in Nasdaq-listed securities. At the same time, NYSE Euronext reportedly offered to take over that function. Consequently, we understand that you are in the process of selecting the next SIP Operator and administrator of the Plan.

Due to the importance of Nasdaq UTP data to our members and their clients, and the importance of the RFP process we understand you have initiated in terms of transparency, participation, and outcome, we request that you answer the following questions before the RFP is issued:

- What are the specific factors which prompted the Plan to issue an RFP?
- How will those factors be addressed in the RFP process?
- When will the RFP be publicly available, and is there an opportunity for members of the industry to comment on it?
- Will the RFP cover both operation and management of the SIP as well as administration of the Plan?
- Could those responsibilities be combined or should they be separated?
- Given that members of the Operating Committee may have certain conflicts of interest, what process will the Operating Committee follow to make its final decisions?
- Has consideration been given as to whether it is appropriate for SIP operators to also be engaged in the business of operating and selling competing market data products?

- What role, if any, will the Advisory Committee, interested industry participants, and the SEC staff play in making the decisions?
- As part of this process, will the Plan file any proposals or plan amendments with the SEC for public comment and Commission approval?
- What is the overall expected timing for this process?

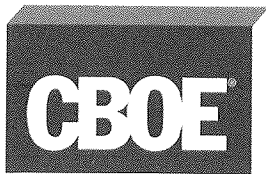
We continue to appreciate our dialogue and thank you in advance for providing answers these important questions. Please let us know if a phone call or meeting would be beneficial in expediting the answers and we will schedule something with you as soon as possible.

Sincerely,

/Melissa MacGregor/

Melissa MacGregor  
Managing Director and Associate General Counsel





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Melissa MacGregor  
Managing Director and Associate General Counsel  
SIFMA

April 23, 2014

Dear Melissa:

We thank SIFMA for its interest in the process of selecting a Securities Information Processor ("SIP") for the Participants in the Nasdaq/UTP Plan. We would like to respond to the questions that your letter raised.

The Participants' issuance of the request for proposals ("RFPs") is in response to Nasdaq's submission of a letter terminating its contract to operate the UTP Plan SIP as of January 2016. Historically, Nasdaq's service as the UTP Plan SIP included the administrative functions attendant to the Participant's distribution of market data under the Nasdaq/UTP Plan. So, Nasdaq's termination of its contract to operate the UTP Plan SIP also terminates its role as the administrator under the Nasdaq/UTP Plan.

As a result, the Participants have determined to send out two RFPs, one for the SIP function and one for the administrative function. The Participants have retained Jordan & Jordan (J&J) to manage the bidding process and to analyze the bids for consideration by the Nasdaq/UTP Plan Operating Committee. J&J is an independent firm that has deep knowledge of the financial industry and market data technology and has successfully managed RFP processes, including SIP RFP processes.

At a meeting on February 13, 2014, the UTP Operating Committee provided a status update on the selection process to the Advisory Committee and the SEC, including the status of the newly formed subcommittee to focus on the processor and administrative functions, the subcommittee's recommendation that the Participants send out RFPs, the retention of J&J and the development of the RFPs.

We are close to finalizing the selection process and remain committed to implementing a process that maintains and ensures the confidentiality of the bidder submissions, uses objective selection criteria to the fullest extent possible, manages conflicts and permits any qualified party to bid, including Plan Participants and non-Plan Participants.



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The SIP RFP is under review and we expect to see a draft of the administrative RFP in the near future. The timeline for the SIP RFP is as follows:

(1) February-April:

J&J and the Participants develop the RFP and document requirements. J&J will publicize the RFP and reach out to qualified prospective bidders, any of whom is welcome to participate in the RFP process.

(2) April-June:

J&J coordinates communications to prospective bidders; Bidders respond to the RFP through J&J.

(3) June-August:

J&J evaluates bids and analyzes results based on defined evaluation criteria, scores vendor responses, develops a capabilities matrix and reviews information with the subcommittee. The subcommittee, with input from J&J, recommends a short list of final candidates. The Operating Committee, with input from the subcommittee and J&J, makes the final selection of the UTP SIP service provider.

Bidders have requested confidentiality and information they provide will not be shared with the public or competing bidders. SEC staff [and the Advisory Committee?] has participated in meetings and will continue to do so. The UTP Operating Committee will comply as necessary with the filing requirements of the Securities Exchange Act of 1934.

J&J will consider key capabilities, including the bidders' ability to:

- a) Perform the service for commercially reasonable terms;
- b) Provide highly available service and resiliency;
- c) Meet UTP's future capacity requirements;
- d) Process information within the Participants' latency requirements;
- e) Disseminate information fairly to all recipients at the same time;
- f) Provide secure processing;
- g) Comply with regulatory and functional requirements;
- h) Provide appropriate staffing to support the production and test environments;
- i) Provide the required services in a cost effective manner;
- j) Respond in a flexible, timely, qualitative and cost effective manner to new business and regulatory needs;



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k) Leverage its' experience in financial markets to provide this service.

The Operating Committee is committed to working with you and the Advisory Committee in a transparent manner as the Committee endeavors to select a service provider who will appropriately maintain and operate the SIP system for Nasdaq-listed stocks. Again, we appreciate your interest.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Thomas Knorr", written in a cursive style.

Thomas Knorring

UTP Chairman