



Securities Industry Association

120 Broadway • New York, NY 10271-0080 • (212) 608-1500 • Fax (212) 968-0703
1425 K Street, NW • Washington, DC 20005-3500 • (202) 216-2000 • Fax (202) 216-2119
info@sia.com; <http://www.sia.com>

December 19, 2005

Mr. Christopher Concannon
Executive Vice President, Transaction Services
The NASDAQ Stock Market
One Liberty Plaza
165 Broadway
New York, NY 10006

Ms. Mary Revell
Associate Vice President
The NASDAQ Stock Market
9600 Blackwell Road
Rockville, MD 20850

Re: NASDAQ Services Agreement and Membership Application Materials

Dear Mr. Concannon and Ms. Revell:

The Securities Industry Association Technology & Regulation Committee and its Market Data Subcommittee (together, the "Committee") appreciate the opportunity to comment on the new NASDAQ Services Agreement ("NSA") and other exchange membership application materials sent by NASDAQ to our members. As outlined below, the Committee believes that the NSA should be redrafted in significant part to reflect a more mutual relationship between NASDAQ and broker-dealers using (or becoming members of) NASDAQ.

As an initial matter, we are unclear whether there was an opportunity for prospective NASDAQ exchange members to comment on the NSA. The NSA should have been submitted to the Securities and Exchange Commission ("SEC") as part of NASDAQ's rules package and published for comment. At this point we request that NASDAQ immediately publish a notice that the agreement will be changed after opportunity for comment and industry discussion prior to its effective date and advising firms that have not yet signed the NSA to wait until the changes are made and a new NSA is re-circulated.

We are providing our comments on the NSA that was distributed to prospective members. Our main issues and concerns fall into the following four categories: (1) license to use data and information; (2) process for amending terms of the NSA; (3) representations, liability, warranties, and indemnities; and (4) other provisions for review. We have also included comments related to the Trade Reporting Facility Service Bureau/Executing Broker Supplement

(“Attachment 2”) and the NASDAQ Market Center Execution Service Give-Up Addendum to the NASDAQ Services Agreement (“Give-Up Addendum”). Per preliminary discussions with you, the Committee looks forward to the opportunity to discuss these issues in more detail. Our members also are continuing to review the NSA and may have further comments.

1. License to Use Data and Information

Sections 2.A and 2.E of the NSA should be revised to reflect a reciprocal licensing arrangement between NASDAQ and the Subscriber and the unique context of NASDAQ’s status as an exchange that operates pursuant to both its own rules and SEC rules. There are significant competitive issues relating to the use of and access to market data, and we note that Regulation NMS preserves the rights of members to use and distribute their own market data. We also request that certain key terms in the NSA such as “Information and Data,” “Subscriber’s Data,” and “Service” be defined or defined more precisely. We offer in Attachment A certain revisions that reflect these suggestions. In addition, the warranties and disclaimers relating to information and data under Section 2.E for Subscriber’s Data and Section 2.A for Service Data should be of the same type.

2. Process for Amending Terms of the NSA

We request that the following changes be made to the amendment and notice provisions of the NSA:

- a. Sections 1.A, 4, and 17 should be amended to provide reasonable notice and opportunity to comment to Subscribers when NASDAQ proposes to change the scope of the Service and the “NASDAQ Requirements,” which are defined to include “NASDAQ’s decisions, interpretations, operating procedures, specifications, requirements, and other documentation.” The vagueness of the existing language does not provide for clear notice of current requirements, as well as any future changes or additions to those requirements.
- b. Section 1.B should be amended to make any pricing change subject to the same prior notice and opportunity to review as a “NASDAQ Rule” (which is not defined but should be).
- c. Section 20 allows NASDAQ to post “notices, invoices, and other communications required to be given under this Agreement” on NASDAQ’s website. This form of constructive notice is insufficient for substantive changes to the NSA. In addition to posting such notices on NASDAQ’s website, we request that NASDAQ send regular general communications that include such notices to Subscribers by email.
- d. Section 23.A should be amended to resolve the inconsistency between the first and third sentences of this section. We recommend that NASDAQ give Subscribers 60 days notice of its intentions to alter “any term or condition,” and also request and receive written acceptance from the Subscribers of any such change to a term or

condition. We do not believe that such changes should simply be deemed to be accepted by the Subscriber upon any use of the Service after 60 days.

3. Representations, Liability, Warranties, and Indemnities

In Sections 10, 11, and 12, NASDAQ has limited the scope of its liability for at-fault outages of its systems to cases where the outage is more than four hours, and only up to the pro-rated fee it charges for the hours it is unavailable. There is no service level commitment in the agreement. In contrast, Subscribers are required to indemnify NASDAQ from any claims their clients might have arising from NASDAQ's own negligence, which appears to unfairly shift responsibility for NASDAQ's potential negligence to the Subscribers. At the very least, the NSA should contain exceptions to NASDAQ's limits of liability for its gross negligence, breaches of its confidentiality obligations, and breaches of the license under Section 2.E (see our suggested revisions in Attachment A). NASDAQ should also develop and implement service levels with credits for failures that are appropriate for similar commercial market data provider agreements.

4. Other Provisions for Review

The Committee also wishes to raise the following additional areas of concern for SIA members:

1. *Termination.* Sections 2.C and 2.F should be revised to permit termination for material breach only, and be made subject to the arbitration provisions in Section 18. It seems unnecessarily broad to give NASDAQ "sole discretion" to terminate the NSA immediately without notice or opportunity to cure, and particularly if it believes the Subscriber "is about to violate any applicable law." NASDAQ also should expressly state in the NSA that it will continue to treat all of its members in a non-discriminatory, consistent manner, as it is clearly required to do by regulation once it becomes a registered exchange.
2. *Audit Rights.* We request that NASDAQ limit its right to audit Subscribers pursuant to Sections 1.B and 2.D to no more than once per year, instead of once per quarter. Discretionary audits should only be permitted "for cause." For competitive reasons, access to Subscribers' systems should be limited to specifically enumerated audit purposes (see Section 3.B).
3. *Authorized Devices.* The requirements under Sections 3.D and 3.E would impose new obligations on Subscribers that are unnecessarily burdensome. For example, a new requirement to give NASDAQ notice within one business day of a change in employees who have access to the Service is particularly problematic.
4. Finally, members are also concerned with certain elements of the following provisions: effective date, "no government rights," arbitration, and force majeure,

and also with aspects of the confidentiality provisions. We welcome the opportunity to provide you with further detail on these concerns.

5. New Attachment 2 and Give-Up Addendum

The Committee would like to take this opportunity to also comment on Attachment 2 and the Give-Up Addendum. It seems unnecessary for members to be required to provide notice to any broker-dealers with which they have current Attachment 2 and Give-Up Addendum agreements by sending such parties copies of a paragraph in the NASDAQ's cover letter (accompanying the membership application materials) explaining the change to the documents, along with samples of the new agreements. Almost all broker-dealers that have entered into Attachment 2 and Give-Up Addendum agreements are NASD members and will therefore be going through this same membership application process with NASDAQ. Consequently, these broker-dealers will already have ample notice of these changes. The only broker-dealers that our members should be required to provide such notice to would be any non-NASD members with which they have such agreements that would not be going through this same process of becoming a NASDAQ member (e.g., non-U.S. banks and broker-dealers).

We also request that paragraph 3 of the Give-Up Addendum be amended to limit NASDAQ's broad powers to force market participants to settle transactions and to provide instead Subscribers with the opportunity to object to errors or other problems that are not fairly attributable to that participant before settlement.

SIA appreciates this opportunity to comment on the NSA. If you have any questions or would like to discuss these issues further, please call me at (202) 216-2034 or Christopher Gilkerson, Chair of the Technology & Regulation Committee and the Market Data Subcommittee, at (415) 636-3667.

Very truly yours,

Melissa MacGregor
Assistant Vice President
and Assistant General Counsel

Enclosure

cc: Robert L.D. Colby, Acting Director, SEC Division of Market Regulation
Elizabeth King, Associate Director, SEC Division of Market Regulation
Christopher Gilkerson, Charles Schwab & Co., Inc.
Ira Hammerman
Ann Vlcek

ATTACHMENT A
Proposed Revisions to NASDAQ Services Agreement

- A. NASDAQ grants to Subscriber a non-exclusive, non-assignable, non-transferable license to receive and use the Service during the term of this Agreement. Further, NASDAQ grants to Subscriber a non-exclusive, non-assignable, non-transferable worldwide license to use the Information and Data received during the term of this Agreement through the Service (“Service Data”) even after termination or cancellation of this Agreement (unless this Agreement is terminated by NASDAQ pursuant to Section 6 due to Subscriber’s breach of this Agreement. Subject to Section 2.E below, as between NASDAQ and Subscriber, NASDAQ retains all ownership and other rights associated with Service Data. Subscriber will attribute the appropriate source of the Information and Data received through the Service as set forth in applicable NASDAQ Rules. Subscriber acknowledges, based on NASDAQ’s representation, that NASDAQ’s third party information providers have proprietary rights in their respective information and data.
- E. As consideration for receiving authorization to use the Service and the benefits associated therewith, Subscriber does hereby grant to NASDAQ a non-exclusive, non-assignable, non-transferable, worldwide, irrevocable license to receive and use Information and Data that Subscriber or Subscriber’s agent enters into the Service and System (“Subscriber’s Data”) for the following purposes: within Service Data; for internal commercial purposes (i.e., purposes that do not include disclosing, publishing, or distributing outside of NASDAQ); and for use within NASDAQ market data products (i.e., products that include disclosure, publication, or distribution to third parties) subject to “Product Notice” and “General Availability” requirements. The Product Notice requirement means: (i) if offered for a fee, product information is set forth in SEC Rules or NASDAQ Rules or, if offered without a fee, product information is set forth in NASDAQ Requirements or in another publicly available manner. The General Availability requirement means that Subscriber’s Data is generally made available with the same type of information of other Subscribers or in an aggregate manner that does not directly or indirectly identify Subscriber as the source of the information. For the avoidance of doubt, Subscriber’s license to NASDAQ also includes use of Subscriber’s Data by NASDAQ’s Market Intelligence Desk for the purpose of providing confidential information to issuers relating to the market in an issuer’s own securities. As a condition of the license, NASDAQ represents and warrants that Market Data Products that include Subscriber’s Data will be made available to Subscriber, NASDAQ Members and others on terms that are fair and reasonable and that allow redistribution to Subscriber’s clients on terms that are not unreasonably discriminatory. Subject to the foregoing license, as between NASDAQ and Subscriber, Subscriber retains all ownership and other rights associated with Subscriber’s Data. No provision in this agreement shall impair any right, interest, or use of Subscriber’s Data granted by operation of SEC Rules or any other rule or law.

“NASDAQ Rules” shall mean “the rules and regulations of NASDAQ subject to SEC review and approval after public notice and opportunity to comment in accordance with SEC Rules.”

Definition needed for: “Information and Data.”