



Securities Industry Association

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April 17, 2002

Ed Knight
Executive Vice President,
Chief Legal Officer
Nasdaq Stock Market
1735 K Street, NW
Washington, D.C. 20006

Re: Nasdaq Online Quote Agreement

Dear Mr. Knight:

The members of the Online Brokerage Legal Committee and Market Data Subcommittee of the Technology & Regulation Committee of the Securities Industry Association¹ are writing to express our concerns about and recommend changes to the Nasdaq Online Quotation Subscriber Agreement ("Agreement"). Millions of brokerage clients are required to click-through the Agreement as a condition to accessing real-time online market data about Nasdaq securities. Our firms had been hopeful that Nasdaq would update the agreement to be less burdensome, in light of the Electronic Signatures in Global and National Commerce Act ("ESIGN") and the longstanding industry interest in having Nasdaq, CTA, and OPRA create a single, uniform, click-through agreement appropriate for our clients.² Regrettably, despite some recent improvements to the

¹ The Securities Industry Association brings together the shared interests of nearly 700 securities firms to accomplish common goals. SIA member firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. The U.S. securities industry manages the accounts of nearly 80 million investors directly and indirectly through corporate, thrift, and pension plans, and generates \$358 billion of revenue. Securities firms employ approximately 760,000 individuals in the United States. (More information about SIA is available on its home page: <http://www.sia.com>.)

² The substantial administrative burdens imposed by the disparate requirements of Nasdaq, CTA, and OPRA are well known and documented. See, e.g., SEC Concept Release on Regulation of Market Information Fees and Revenues, Release No. 34-42208 (Dec. 9, 1999); SIA Report on Market Data pricing, prepared by Arthur Andersen) June 1999.

Agreement,³ it continues a “one size fits all” approach that is confusing to clients because it addresses and treats member firms as “vendors” and clients as “subscribers.”

In addition to the confusing terminology, the new version of the Agreement increases the burdens and costs for members who make Nasdaq quotes (including their own quotes if they are affiliated with a market maker) directly available to their clients. We detail these concerns below.

1. Burdensome Data Entry and Capture for Electronic Signature.

The Agreement now requires that our clients enter the following text or keystrokes:

- name (which we presumably could pre-populate)
- “name or other symbol of your signature,”
- date, and
- whether a client is acting as an agent on the account, her name yet again as well as indication of her title.

The development costs associated with capturing and comparing this data with information already on the member’s records – especially free-text entry such as a client typing in her name, “symbol of signature,” and title – is considerable. Moreover, these are unnecessary burdens as applied to members.

It is likely that Nasdaq requires capture of these multiple data entry fields as a way to create an authenticated, enforceable electronic signature. Although these fields might make sense in a true “vendor–subscriber” relationship, members and their clients have a well-documented relationship beyond the Agreement. Rather than a one-size-must-fit-all approach, Nasdaq should waive the data entry requirements for members that are able to pre-authenticate their clients before the clients are presented with the agreement. For example, Firm A’s client logs in with a unique user ID and password. Firm A’s system recognizes and authenticates the client and allows that client to access account-related information. At that point, the client, already recognized and authenticated (including any authorized agent on an account), can be presented with the Agreement for review and a simple “I agree” click. This is the same process that member firms rely on for authentication and enforceability of their own online agreements with clients.

In terms of the electronic signature, for a pre-authenticated client, a simple “I agree” click satisfies the requirements of the ESIGN law. That, alone, is sufficient “symbol” of the signature, and nothing more should be required.⁴

³ Removal of the six interstitial “I agree” radial buttons, and the decision to include a “Cancel” button instead of an “I disagree” button as the alternative to an affirmative response on the agreement were positive developments.

⁴ ESIGN Section 101(a)(1) provides that a signature “may not be denied legal effect, validity, or enforceability solely because it is in electronic form.” Section 106(5) defines “electronic signature” as any “electronic sound, symbol, or process, attached to or logically associated with a contract or other record and

2. Unnecessary and Confusing Terms for Retail Investors

Member firms receive numerous complaints and inquiries from online clients regarding the meaning and purpose of the confusing prose and definitions of the Online Quote Agreement. Although the agreement may be appropriate from the perspective of a vendor-subscriber relationship where the vendor is offering an information service for a fee, it makes little sense to our clients. They are not “subscribers” at all. They are investors simply seeking quotations from their brokerage firm through electronic means prior to placing an order in a Nasdaq security or checking the current value of their holdings.⁵

We believe that the following terms, in particular, are not necessary and are confusing to our clients:

- Including the personal accounts of registered employees of broker-dealers (or the bank equivalent) within the definition of “professional subscriber,” thereby charging higher fees for the market data they use (e.g., for Level II data), as if they are using the market data in their business;⁶
- For members who do not pass-through Nasdaq’s market data fees, including provisions that indicate or imply that the “subscriber” is responsible for payments to Nasdaq;⁷
- Provisions that attempt to establish a direct formal contractual licensing relationship between Nasdaq and members’ clients, such as the termination, indemnity, enforcement, amendment, and notice clauses;⁸ and
- The audit clause requiring clients deemed to be “Professional Subscribers” to make their premises and records available for Nasdaq inspection, and “Non-Professional Subscribers” to provide information to Nasdaq regarding “receipt, processing, display and redistribution” of the data.⁹

executed or adopted by a person with the intent to sign the record.” The Uniform Electronic Transactions Act (“UETA”) contains similar provisions.

⁵ Most account or online agreements between members and their clients already protect the member as well as “third party information providers” such as Nasdaq. Making clients click-through the additional Online Quote Agreement and enter into a separate contractual relationship with Nasdaq is confusing and unnecessary. In fact, we know of no action taken by Nasdaq or any exchange relating to enforcement of any online quote agreements.

⁶ See *id.* at paragraphs 1 and 3.

⁷ See *id.* at paragraphs 2, 3, 8, and 10.

⁸ See *id.* at paragraphs 13 – 23.

⁹ See *id.* at paragraph 7.

CONCLUSION

Market data is the information that our clients rely upon to make investment decisions and monitor their investments. The procedure required by the current Online Quotation Agreement is still too complicated and burdensome and acts as an unnecessary impediment to customer access to market information. We believe the recommendations included above will result in improved customer access to Nasdaq market information. We are also seeking feedback from Nasdaq on the expected burden on access and administration of customer agreements that will result from the release of new SuperMontage data products and the unbundling of Nasdaq data into three separate categories.

We would welcome the chance to meet with you to discuss these concerns as well as our continued interest in efforts to integrate and simplify the various click-through agreements that CTA, Nasdaq, OPRA, and any future exchange or securities information processor require. Please feel free to contact one of us, or Scott Kursman, SIA Vice President and Associate General Counsel, at 212-618-0508 (skursman@sia.com).

Very truly yours,

Mike Hogan
Chairman, Online
Brokerage Legal
Committee

Christopher Gilkerson
Co-Chair, Market Data
Subcommittee

Cc: Rick Ketchum, President & Deputy Chairman
Adena Friedman, Executive Vice President, Nasdaq Data Products