



INVESTMENT INDUSTRY ASSOCIATION OF CANADA
ASSOCIATION CANADIENNE DU COMMERCE DES VALEURS MOBILIÈRES

www.iiac.ca

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New York Stock Exchange
11 Wall Street
New York, NY
USA, 10005

Re: DEFINITIONS OF PROFESSIONAL AND NON-PROFESSIONAL USAGE FOR MARKET DATA FEE FILINGS – HARMONIZATION BETWEEN JURISDICTIONS

The Investment Industry Association of Canada (the "IIAC") and its members regulated by the Investment Industry Regulatory Organization of Canada ("IIROC") would like to take this opportunity to express their views on possible changes to the definitions of Professional and Non-Professional usage for market data fee filings.

The IIAC is the Canadian association representing the position of 115 IIROC-regulated dealer member firms on securities regulation, public policy and industry issues. We work to foster a vibrant, prosperous investment industry in Canada driven by strong and efficient capital markets.

In July 2019, the IIAC submitted a similar comment letter to Nasdaq where we agreed that the intent of Nasdaq should be that it "*...prices market data fees through the application of specific criteria designed to provide for the equitable allocation of reasonable dues, fees and other charges to customers and to meet Nasdaq's other statutory obligations as a self-regulatory organization*".

The IIAC and its members believe that it is equitable to assign market data fees as per the “*purpose and usage of the data*” by the different types of users (Professional and Non-Professional). We believe that the New York Stock Exchange definitions of Professional and Non-Professional users should be reviewed at this time.

Industry Issues with the Definitions of Professional and Non-Professional Usage

Industry members have informed us of serious concerns regarding market data fees and definitions used by the New York Stock Exchange and other exchanges for Professional and Non-Professional usage. The IIAC believes that the definitions and applications should indeed be reviewed.

Our members have been facing global issues such as:

1. Significant market data usage fee increases;
2. Treatment of non-personal usage as “Professional”;
3. Confusion with respect to corporate account policies surrounding market data;
4. Audits that are time consuming; and
5. Cumbersome regulations that are difficult to interpret.

We have provided further details below surrounding these issues.

1. Significant market data usage fee increases

Investors and dealers have coped with increased fixed and operating costs from new technology and systems and with the significant rise in market data fees charged by exchanges in the marketplace.

To promote best execution practices, accurate prices of financial products are required by market participants. This data is also used to measure trading performance against index benchmarks.

This information being critical for firms has resulted in increased and concentrated power in the hands of exchanges and other trading platforms. The exponential increases in market data fees have a significant bearing on our members’ operational costs.

While it is difficult to obtain precise figures on market data fee trends due to bundling and re-bundling of data packages, the IIAC has used data provided by the TMX Group in Canada to determine that fees for market data have increased by approximately eleven percent (11%) on average annually over the past thirteen years - based on exchange revenue earned from data fees by the TMX Group. This increase in data fees is surprising, especially compared to the annual inflation rate of one to two percent (1% to 2%) in Canada.

It should be noted that the IIAC has not performed a specific fee increase analysis regarding the New York Stock Exchange's market data. Industry members have expressed that the New York Stock Exchange increases have been significant and that the Professional/Non-Professional definitions used for market data usage should be reviewed.

2. Treatment of non-personal usage as "Professional"

Trading and investment activities of investors are sometimes considered to be non-professional when the activity's purpose is not related to a professional designation (for which they are compensated such as those of consultants and investment advisors). Many American exchanges, including the New York Stock Exchange, have much more detailed definitions of "Professional" in regard to real-time market data.

The Professional and Non-Professional definitions are tied to the person using the data more than to the nature of the use itself. Individuals who are employed in the financial industry are classified as Professionals simply because of their employment by banks or investment dealers - even if they are using market data in a purely personal capacity.

Similarly, if individuals are registered with a financial industry regulatory body such as FINRA or IIROC in Canada, they are classified as "Professional" even if their registration is not for activities related to exchange or market functions. It is important to note that fees charged by data vendors and exchanges for "professional use" are substantially more expensive than fees for "non-professional use".

Specifically, the Nonprofessional Subscriber Policy found on the New York Stock Exchange's website defines Non-Professionals as *"any natural person who receives market data solely for his/her personal, non-business use and who is not a "Securities Professional," meaning that the person is:*

- *not registered or qualified with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange/association, or any commodities/futures contract market/association;*
- *not engaged as an "investment advisor," as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); and*
- *not employed by a bank or other organization exempt from registration under Federal and/or state securities laws to perform functions that would require him/her to be so registered or qualified if he/she were to perform such functions for an organization not so exempt."*

The policy further states:

“A person who works outside of the United States will be considered a “Securities Professional” if he or she performs the same functions as someone who would be considered a “Securities Professional” in the United States.”

Further analyzing the New York Stock Exchange’s policy, the IIAC has found many similarities with that of Nasdaq. As per current New York Stock Exchange rules, a natural person receiving market data solely for his/her personal, non-business use through an account in an organization’s name cannot be classified as a Nonprofessional Subscriber because the account through which the market data is received is not registered to a natural person.¹ Rigid application of this rule miscategorizes most sole proprietorships, small business accounts, trusts, and other entities which are not engaged in providing investment advice or operating in a registered capacity. Taking trusts as an example, the New York Stock Exchange’s Nonprofessional Subscriber Policy’s Trust Policy Clarification section states that a Trust is an organization, and by definition, only natural persons can qualify as Nonprofessionals.

This does not align with the way Canadian marketplaces define Professional usage. The TMX in Canada does not include sole proprietorships or trusts in its definition, which we believe is a better classification based on market data usage.

We believe that the New York Stock Exchange’s current definition of “Professional” is too broad and would request further clarification on the rationale behind classifying non-financial firms as Professionals. As an example, if we analyze a dentist at a professional dentistry corporation accessing his or her account under their business’s name, the dentist does not necessarily know more about the intricacies of investing when compared to general retail investors, yet he or she is required to pay substantially higher fees.

Therefore, the IIAC and its members believe the New York Stock Exchange should take a closer look at the definitions to clearly define Professional and Non-Professional usage, to avoid having an excess number of “Professional users” who are unjustifiably charged substantially higher market data fees compared to “Non-Professionals”.

¹ https://www.nyse.com/publicdocs/nyse/data/Policy-Non-ProfessionalSubscribers_PDP.pdf

3. Confusion around corporate account policies surrounding market data

Similar to the section above, the IIAC and its members noticed general confusion and uncertainty regarding corporate account policies on market data within the public investment community. The average corporate account holders do not understand why they are being charged excessive market data fees simply because the ownership of the account varies.

It is important to note that most corporate accounts held by IIAC member firms are not in the financial services sector. We would like to request clarity around these policies as the misclassification of these accounts as Professional seems to be penalizing individuals who are corporate account holders.

4. Audits are time consuming

The IIAC and its members understand that the New York Stock Exchange engages in audits to ensure fees are appropriately charged depending on account type. We believe these audits can be intrusive and unnecessarily time consuming. The Audit section of the New York Stock Exchange's Indirect Bill Policy in the updated NYSE Market Data Policy Package states, *"The NYSE requires that an audit be conducted within six months of Vendor's eligibility for indirect bill model by a firm approved by the NYSE or by their internal audit department so long as the audit and its findings are signed by the Chief Compliance Officer of the firm, a member of the firm's Audit Committee or an individual deemed acceptable by NYSE."*² This is accompanied by an exhaustive checklist of items required to be completed for an audit to be deemed acceptable by the New York Stock Exchange. We believe the process is unnecessarily cumbersome.

Following a similar recommendation, TMX Datalinx has implemented the TMX Datalinx Xpress Program in Canada:

"Designed to ensure that the Clients and TMX have a common ongoing understanding around datafeed usage, pricing and policies, and to ensure that the administration of the prior approval, contracts, entitlements, reporting, and billing are all completed as effortlessly as possible. The TMX looks forward to providing future technical integration between TMX and the consumers, which will further ease the market data administration effort."

We believe such a program could benefit the New York Stock Exchange as well. We remain available to further discuss.

² https://www.nyse.com/publicdocs/data/Policy-ComprehensivPackage_PDP.pdf

5. Cumbersome regulations that are difficult to interpret

We find that certain definitions, such as the definitions of Professional and Non-Professional accounts, are unclear. As an example, the Investment Industry Regulatory Organization of Canada (“IIROC”) uses the same terms, but the definitions are different from the way Nasdaq and the New York Stock Exchange interpret them. We recommend harmonizing these definitions with other exchanges and regulators to provide individuals with universal definitions of these terms.

The IIAC solution

We would like to recommend a move towards harmonization, so the terms and definitions used by different marketplaces and exchanges are the same, in order to avoid confusion for market participants.

For example, the nature of the business will determine whether a non-personal account (mostly corporation accounts) is a Professional or Non-Professional account in Canada. In the United States, the nature of the business is not used to determine whether a non-personal account is a Professional or Non-Professional account, and some non-personal accounts (like the professional dentist) will therefore be “misidentified” as Professional according to the New York Stock Exchange and Nasdaq, as highlighted earlier. This means that the same account may be identified as a Professional account in the United States and as a Non-Professional account in Canada for market data fee filings.

The IIAC and its members believe that:

- Non-personal accounts (corporations) should be considered Non-Professional if they do not provide investment advice and/or are not licensed with a securities/investment association as an investment dealer;
- If a corporation is in the business of providing investment advice and/or facilitating investment/trading of securities, then it should be classified as Professional;
- Individuals should be classified as Non-Professional if they are managing personal accounts or accounts of their spouse or children, regardless of their profession/registration status;
- Individuals should be classified as Professional if they manage an account on behalf of a third party and there is remuneration for services;
- Volumes of orders or transactions should not define Professional and Non-Professional usage.

Conclusion

The IIAC and its members believe there is a need to modernize the U.S. capital markets and engage with the public to foster a dialogue about the New York Stock Exchange's rules and how the terms "Professional" and "Non-Professional" are defined and applied. We support the harmonization process, not just between U.S. exchanges, but also between Canadian and U.S. exchanges and regulators, in terms of definitions and how they are applied.

Harmonization could reduce the burden on firms which would otherwise have to update their systems to capture multiple definitions of Professional/Non-Professional for at least four exchanges, including Nasdaq, NYSE, CME and TMX.

We hope that our comments have highlighted the issues faced by the industry and provided some insight into possible solutions.

We thank the New York Stock Exchange for considering our comments. Please note that the IIAC and its members, as always, remain available for further consultations.

Yours sincerely,



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