



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

www.iiac.ca

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Delivered Via Email: TotalMarketsFeedback@nasdaq.com

Nasdaq Office of General Counsel
Attn: Daniel A. Cantu
805 King Farm Blvd.
Rockville, MD 20850

Re: SOLICITATION OF COMMENTS FOR THE NASDAQ STOCK MARKET LLC – POTENTIAL CHANGES TO THE DEFINITIONS OF PROFESSIONAL AND NON-PROFESSIONAL USAGE FOR MARKET DATA FEE FILINGS

The Investment Industry Association of Canada (the "IIAC") and its members would like to take this opportunity to express their views on the potential changes to the definitions of Professional and Non-Professional usage for market data fee filings. We welcome the solicitation of comments issued by Nasdaq.

The IIAC is the Canadian association representing the position of 119 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.

We agree 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).

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

The IIAC welcomes the solicitation of comments by Nasdaq. Our Industry members have informed us of serious concerns regarding market data fees and definitions used by Nasdaq for Professional and Non-Professional usage. The IIAC believes that the definitions and applications should indeed be reviewed. Our members have been facing issues such as:

1. Significant market data usage 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;
5. Cumbersome regulations that are difficult to interpret.

We have provided further details below surrounding these issues, followed by our industry comments to the questions provided by Nasdaq in its solicitation of comments.

1. Significant market data usage increases

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

To promote best execution practices, accurate prices of equity and exchange traded funds are required by market participants. This data is also used to measure trading performance against index benchmarks. This information is critical for firms which has resulted in increased and concentrated power in the hands of exchanges and other trading platforms to raise market data fees. The exponential increases in market data fees have a significant bearing on the costs of investing and the net returns on those investments.

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 per year over the past thirteen years, based on exchange revenue earned from data fees. This increase in data fees is surprising, especially compared to the annual inflation rate of one to two percent (1% to 2%) in Canada.

We also believe that advancements in technology applications should lower, not increase, the cost of data packaging. The result for exchanges is that higher revenue from market data fees has compensated for lower trade execution revenue, contributing to continued earnings and share price growth.

2. Treatment of non-personal usage as “Professional”

As per current Nasdaq rules, broker-dealers must report all non-personal accounts (users) as Professional, regardless of the nature of business. Rigid application of this rule mis-categorizes most sole proprietorships, small business accounts, trusts, and other entities which are not engaged in providing investment advice or operating in a registered capacity. This also does not align to the way that Canadian marketplaces define Professional usage. The TMX in Canada does not include sole proprietorships or trusts in its definition.

We believe that the current definition is too broad and would request further clarification on the objective of classifying non-financial firms as Professionals. As an example, if we analyze a professional dentistry corporation, the dentists do not necessarily know more about the intricacies of investing when compared to general retail investors, yet they are required to pay substantially higher fees. Therefore, the IIAC and its members believe it is imperative to 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 higher market data fees.

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 Nasdaq engages in audits to ensure fees are appropriately charged depending on account type. We believe these audits are intrusive and time consuming. This is primarily due to the method used by Nasdaq to determine the fee to be charged.

5. Cumbersome regulations that are difficult to interpret

We find that certain definitions, such as the terminology 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 interprets them. We recommend harmonizing with other exchanges and regulators.

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, and non-personal accounts will be identified as Professional. This means that the same account may be identified as a Professional account in the United States and Non-Professional account in Canada for market data fee filings. This could happen for the account of a business in a non-financial sector.

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.

QUESTIONS FROM THE NASDAQ SOLICITATION OF COMMENTS

1. DEFINING PERSONAL USE BY PROFESSIONALS

As per the Nasdaq solicitation of comments: “Professionals currently using market data for their own personal brokerage accounts would be charged at a Professional rate. The Exchange is now considering changing those rules to charge the Non-Professional rate for any use of data in the context of an individual’s brokerage account, whether or not that person is a professional. As such, the Exchange requests commentary on the following questions:”

- **Nasdaq question: Do commenters support the proposed approach of classifying Professionals using market data for their own personal brokerage accounts as Non-Professionals? Why or why not?**

IIAC comments: The IIAC and its members support the proposal since a professional would be using the data for personal reasons. However, we would like to request a clear criterion to determine the personal use of data. 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 are managing an account on behalf of a third party and there is remuneration for services.

- **Nasdaq question: What are the administrative costs or burdens, if any, of this proposed approach?**

IIAC comments: There is a significant cost to implement changes to the classification, monitoring and reporting of Professional and Non-Professional users. However, we support the need for change. We request that the reporting classification process be simplified and homogenous across all exchanges in order to streamline reporting. We believe the existence of varying standards across different exchanges is cumbersome and inefficient.

While we understand there will be an initial development cost to apply the updated definitions – that should be clear and easy to understand – we anticipate greater client satisfaction and a more straightforward process in the future which should alleviate the associated costs. In terms of administrative burden, it increases if the current vendor of record is required to hold a Professional/Non-Professional classification for Nasdaq that is different from all other exchanges.

2. DEFINING PROFESSIONAL USE BY NON-PROFESSIONALS

As per the Nasdaq solicitation of comments: “Under current rules, any person who does not meet the employment or registration criteria of a Professional is a Non-Professional, even if that person is trading hundreds of thousands of dollars daily at a home office. Given that one of the key goals of the Professional/Non-Professional distinction is to set fees based on the purpose and usage of the data, Nasdaq is considering changing that definition so that any individual conducting a high level of trading activity would be considered a Professional for any month in which the trading threshold is crossed.

According to an analysis of the Survey of Consumer Finances (SCF) commissioned by the Department of Labor using data from 2001 to 2013, brokerage account-owning households at the 99th percentile of trading activity (i.e., households that trade more than 99 percent of all other brokerage account-owning households) were engaged in between 156 and 260 trades per year between 2001 and 2013. Taking a very conservative view of the data, Nasdaq is considering setting a level of 400 trades per month (equivalent to 4,800 trades per year), as the point of demarcation between Non-Professional and Professional use. This proposed line of demarcation for trading activity is, on an annual basis, nearly 20 times more than the highest level of annual trading activity at the 99th percentile of households between 2001 and 2013.”

- **Nasdaq question: Do commenters support the proposed approach of classifying individuals who execute an average of 400 trades per month as Professionals? Why or why not?**

IAC comments: The proposed structure is not aligned with the current business models of the retail brokerage community. It also does not align with the TMX or NYSE.

Nasdaq should encourage active trading, not discourage trading due to potentially greatly increased fees. Setting a trade threshold will penalize trading strategies that encourage a high level of activity. Furthermore, the data used by Nasdaq to determine the 400-trade threshold is from 2013. We do not believe that volumes of orders or trades should be used to determine the Professional and Non-Professional classification.

If the current proposal is to be implemented, we would raise the following questions:

- How often will Nasdaq assess trading volume and change the Professional trade threshold?
 - Will Nasdaq reduce the threshold in the future, creating more Professional accounts?
 - How does Nasdaq define a trade?
 - Should firms be expected to count trades solely on the Nasdaq exchange listed products?
 - How are firms to monitor classification when trading varies below and above the 400-trade threshold from one month to another?
- **Nasdaq question: What are the administrative costs or burdens, if any, of this proposed approach?**

IIAC comments: We feel that the 400-trade threshold per month is somewhat ambiguous and raises questions as per the section above.

If a client executes 400 trades in a month but does not reach the 400-trade threshold in the following month, how is the user defined as Professional or Non-Professional in the second month since the firm does not have visibility into what the trading volumes will be until the trading takes place? Another concern is around the mechanism through which clients would be notified in the event their status changes midway through the month. This requires significant technology development efforts in order to define and change a status over a period of time.

The addition of a new threshold also requires adding a new monitoring or systematic control for this threshold. If the threshold is to be implemented, we would like to request clear guidance on possible actions firms can take when a client is over the threshold in the middle of any given month, as there is a large potential for complaints if the firms are expected to increase the cost when a client exceeds 400 trades in a month. Invoicing subscribers will become challenging because the change in Professional status will need to flow downstream to the accounting systems in order to invoice clients the Professional rate when they make their 400th trade in a calendar month. We would also request further guidance on actions firms would need to take if the trading volume for a client eventually drops below 400 trades a month.

Complicating the issue further, there are some retail brokers who subsidize Non-Professional customers' real-time market data fees but require Professionals to pay for their own market data fees. As a result, customers who become Professionals may be incentivized to open accounts elsewhere or open accounts with multiple firms to reset back to Non-Professional status. We are also concerned that going forward, firms will be forced to require subscribers to sign both Professional and Non-Professional agreements as the classification may frequently change for a client if the proposal is implemented.

3. IDENTIFYING NON-PROFESSIONAL USE BY FIRMS

As per the Nasdaq solicitation of comments: "All firms and other entities are currently classified as Professionals, no matter the size of the firm or the type of business. Nasdaq is considering changing the definition of Non-Professional so that small businesses not involved in the financial services industry are classified as such. To do so, Nasdaq is considering using a table published by the U.S. Small Business Administration ("SBA") to identify small businesses. The "Table of Small Business Size Standards Matched to North American Industry Classification Codes" sets a threshold for small businesses based on either the average annual receipts or the average employment of a firm, and that threshold varies according to industry as defined by North American Industry Classification System ("NAICS") Codes. Nasdaq's goal in using these guidelines is to employ an existing benchmark to identify small businesses and non-financial firms in order to minimize administrative costs for our customers. With the aid of the SBA chart, the Exchange proposes classifying all non-financial entities (that is, all firms not classified under the category "Finance and Insurance" under Section 52 of the NAICS) that also meet the SBA's small business criteria under their category as Non-Professionals."

- **Nasdaq question: Do commenters support the proposed approach of using the SBA's Table of Small Business Size Standards Matched to NAICS Codes to identify businesses that should be classified as Non-Professionals? Why or why not?**

IIAC comments: We agree that small businesses that are not involved in the financial services industry should be classified as Non-Professionals. In essence, using the SBA's Table of Small Business Size Standards may still incorrectly capture large businesses that are not in the financial services industry as being Professionals.

The IIAC would like to revisit the "Finance and Insurance" category after analyzing the full impact of this proposal on its members. There may be specific "Finance and Insurance" subcategories, rather than the whole category, that would be more appropriate in order to classify a corporation as Professional.

Furthermore, classifying businesses based on their size may not be an accurate proxy for how these businesses are using market data. The proposed rule also seems complex to implement when applying annual receipts/employee counts and could change dramatically for businesses on a year-to-year basis.

IIAC additional comments: Going forward, we also believe Nasdaq should stop utilizing the customer's use of a business email address domain as a way of proving Professional classification.

We would recommend that Nasdaq offer an enterprise level license for Non-Professional usage where fees would be capped.

- **Nasdaq question: What are the additional administrative costs or burdens, if any, of the proposed approach?**

IIAC comments: We recommend that only individuals registered with regulatory bodies and trading for the firm's clients should be identified as Professional users. This would result in limited administrative and development costs and a streamlined protocol for implementation. At minimum, this would require 3-6 months of development work and testing to bring in new data feeds for NAICS codes, licensing costs to consume this data, storage and ongoing maintenance costs.

Additionally, if firms use an NAICS code system, the process would require them to upload the NAICS code database to their market data sign-up process and have customers self-select their industry. It would not be feasible, in an online environment, to select a classification for them. We also recommend adding a new table which outlines business classifications during the onboarding process.

Furthermore, we recommend that corporations be considered Non-Professionals if they do not provide investment advice and/or are not licensed with a securities or 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.

4. ADMINISTRATIVE BURDENS ON REPORTING FIRMS

“Nasdaq is aware of complaints from certain customers that, notwithstanding good-faith efforts to report Professional and Non-Professional usage accurately, they have been penalized with audit findings for errors beyond their control. To eliminate this point of contention, Nasdaq is considering a rule change that would exempt customers who implement a pre-approved reporting system that is reasonably designed to identify reporting errors from audit liability. Pre-approval by Nasdaq would be based on a customer submission that would identify systems, processes and procedures to identify and correct reporting errors on a timely basis. Failure by a customer to implement a pre-approved system would result in audit liability for reporting errors.”

- **Nasdaq question: Do commenters support the proposed exemption from audit liability for customers who implement a reasonable, pre-approved system for reporting Professional and Non-Professional users from audit liability? Why or why not?**

IIAC comments: We absolutely support the proposed exemption as there should be no requirement or burden on firms to continually audit and validate Professional and Non-Professional users. Approving the verification process demonstrates to the exchange that the company is making a good faith effort to qualify subscribers. Nasdaq already has a system that would pre-qualify subscribers, and other exchanges (such as the TMX in Canada) are also moving in this direction.

IIAC and Members Additional Question: Would firms be forced to subscribe to a Nasdaq-based approval system in order to avoid an audit fee liability?

- **Nasdaq question: What are the additional administrative costs or burdens, if any, of the proposed approach, and would such costs or burdens be offset by lower audit invoices?**

IIAC comments: We do not see a reduction in costs by moving to this model but see less burden on additional oversight that is required by our teams. The key is to simplify the definition and allow monthly reporting utilizing the same standard across all exchanges as a move towards harmonization. A member disclosed that they have elected to contract experts in this domain which includes systems, processes and procedures that would meet Nasdaq standards. Overall, firms will have to update their systems to capture multiple definitions of Professional/Non-Professional for at least four exchanges, including Nasdaq, NYSE, CME and TMX.

Additionally, we would like to recommend that the exchange stop including the use of business email addresses in determining Professional status. Currently, auditors identify clients as Professionals if they opened their account with a business email address - even though the use of a business email is not prohibited anywhere in the exchange documentation.

IIAC and Members Additional Question: Would the new classification rules apply to both the UTP and Nasdaq proprietary data?

Conclusion

The IIAC and its members appreciate Nasdaq's initiative to modernize the U.S. capital markets and engage with the public to foster a dialogue about Nasdaq rules as set forth in *TotalMarkets: A Blueprint for a Better Tomorrow*. We agree with Nasdaq that it is time to revisit 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.

We believe that using volumes of orders and/or trades to classify a client as Professional or Non-Professional may cause further issues.

We hope that our comments have highlighted the issues faced by the industry and provided some insight into possible solutions. We thank Nasdaq for considering our comments. Please note that the IIAC and its members, as always, remain available for further consultations.

Yours sincerely,



Mustapha Saleem
Policy Analyst
msaleem@iiac.ca



Annie Sinigagliese
Managing Director
asinigagliese@iiac.ca