



Securities Industry Association

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April 8, 2005

VIA ELECTRONIC MAIL

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: Proposed Rule Change Relating to TRACE Market Data Fees
Release No. 34-51336; File No. SR-NASD-2005-026

Dear Mr. Katz:

The Securities Industry Association¹ ("SIA") appreciates the opportunity to comment on the proposed rule change relating to TRACE Market Data Fees submitted by the National Association of Securities Dealers ("NASD") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")². SIA commends the NASD for its efforts to codify its interpretation of the term "Non-Professional" consistent with the intended use of the data rather than an end-user's job title or affiliation with an entity that itself would be considered "professional". The rationale the NASD has followed here, that the financial services industry employees should be considered non-professionals when they access data for personal, non-commercial uses, should be applied uniformly to all other individual subscribers of bond or equity market data no matter which SRO, directly or indirectly, control the market data. Therefore SIA is filing this comment letter also as a petition for rulemaking to review the definitions of "Professional" and "Non-Professional" as interpreted for market data fee and administrative purposes by the Consolidated Tape Association, the NASDAQ UTP Plan, the New York Stock Exchange, NASDAQ, the Options Price Reporting Authority and the NASD ("SROs and Plans"). In addition, for the reasons stated below in Part II, the SIA supports the

¹ The Securities Industry Association brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. At its core: Commitment to Clarity, a commitment to openness and understanding as the guiding principles for all interactions between investors and the firms that serve them. SIA members (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. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated an estimated \$227.5 billion in domestic revenue and \$305 billion in global revenues. (More information about SIA is available at: www.sia.com.)

² Exchange Act Release No. 51336 (March 9, 2005), 70 Fed. Reg. 12921 ("Proposal")

adoption of the proposed rule change to clarify the definition of “Non-Professional” and the proposal to offer a single fee for real time TRACE transaction data.³

I. PETITION FOR RULEMAKING TO REVIEW PLANS’ AND SROS’ INCONSISTENT AND EXPANSIVE INTERPRETATIONS OF THE “PROFESSIONAL” MARKET DATA DEFINITION AND USER CATEGORY

The SIA respectfully requests that the SEC initiate a rulemaking to review the Non-Professional and Professional definitions used by the SROs and Plans. The SROs and Plans have divergent interpretations of the same SEC-approved definition of “Non-Professional”⁴ and, concordantly, of “Professional”. This has resulted in the SROs and Plans enforcing an expansive application of the definition of “Professional” to reach market data users who have nothing to do with the securities industry and who fall within the plain meaning of the term “Non-Professional”. This has a negative impact on users who are deemed “Professionals” and are therefore charged substantially higher fees to access market data, including stock quotes.

The SIA requests that the SEC review the SROs’ and Plans’ practice with respect to these definitions and market data user categories for consistency with the SEC’s original intent when it approved the various definitions of “non-professional”, long before Internet access to market data became the norm. The various interpretations as applied by the SROs and Plans also have resulted in excessive and unjustified administrative burdens on SIA members. This request is consistent with the SIA’s urging in its comment letter on Reproposed Regulation NMS that the SEC should consider market data issues holistically rather than piecemeal.

³ We also applaud the NASD’s approach in filing, as a rule change, an interpretation or policy change relating to its market data user classifications which may have an impact on market data fees. This is the approach the SIA has urged all SROs and Plans to take, consistent with the requirements of Sections 19 and 11A of the Securities Exchange Act of 1934.

⁴ For example, the term “Non-Professional” is defined twice in NASD Rule 7010, and the definitions are subtly different in ways that are potentially significant. For example, the definition of “non-professional” in NASD Rule 7010(k)(3)(c)(ii) (which relates to TRACE data), includes references to employees that are not included in the definition of the term in NASD Rule 7010(e)(2) (which relates to NASDAQ data), and it is the use of data by these employees which underlies the need for this NASD proposal. The principal differences between the two definitions are underscored below for ease of reference.

As used in Rule 7010(k)(3) a “non-professional” is a natural person who is neither:

- a. registered nor qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association, or an employee of the above who uses such information primarily for business-related activities;
- b. engaged as an “investment adviser” 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), or an employee of the above who uses such information primarily for business-related activities;
- c. employed by a bank, insurance company or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or
- d. engaged in, or has the intention to engage in, any redistribution of all or any portion of the information disseminated through TRACE.

II. THE SIA SUPPORTS THE ADOPTION OF THE PROPOSED RULE CHANGE TO CLARIFY THE DEFINITION OF “NON-PROFESSIONAL”

The NASD is proposing to amend NASD Rule 7010(k)(3)(C)(ii) to clarify the definition of “Non-Professional” to include registered persons who are using the data for personal, non-commercial purposes. The SIA agrees with the NASD that the current definition requires clarification and it supports the proposed revision, which will properly align the true use of the data with the appropriate fee. As indicated by the SIA’s related petition for rulemaking, although the NASD has taken a significant step, more needs to be done to avoid the significant administrative burdens and unfairness that results from SROs’ and Plans’ inconsistent and expansive interpretation of “Professional”.

For example, the NASD’s proposal also does not expressly address another significant issue of importance to SIA members: we believe that the definition of “Non-Professional” should also include market data subscribers who are natural persons using a brokerage account established in the name of an entity name they or their family control. The category of individuals we believe should be included as Non-Professionals in this context are not registered persons. Instead these individuals are typically small business owners who have not chosen to do business through a trust, partnership or corporate brokerage account for reasons having nothing to do with their access to and consumption of market data. The SIA’s view, consistent with the plain language of the “Non-Professional” definition, is that such subscribers legitimately should be deemed non-professionals. Other SROs’ and Plans do not follow the plain language of their own rules. The SIA believes that it would be helpful for the NASD to clarify its position on this issue when it publishes its final rule change.

III. THE PROPOSAL TO OFFER A SINGLE FEE FOR REAL-TIME TRACE TRANSACTION DATA

As recently stated in our comment letters on Rule NMS and the SRO Governance and Transparency Proposal, “SIA supports a simple and straight forward approach to market data fees. Under this approach, the fees charged for market data would be based on SRO and Plan costs related to aggregating and disseminating securities pricing information.” Accordingly, SIA supports the NASD’s proposal to introduce a single fee for real-time TRACE transaction data feed particularly because it would, as the NASD states in the proposal “better reflect NASD’s administrative costs, allocate such costs appropriately among real-time TRACE transaction data recipients based upon use and misappropriation risk, and simplify the fee structure.”⁵

⁵ Exchange Act Release No. 51336 at page 12922.

IV. THE PROPOSAL TO OFFER A REDUCED FEE FOR TAX EXEMPT ORGANIZATIONS THAT PROVIDE TRACE INFORMATION TO NON-PROFESSIONALS AT NO CHARGE

Finally, the SIA is not opposed to the NASD's proposal to offer a reduced fee of \$400 per month for qualifying Tax-Exempt Organizations that provide trace information to non-professionals at no charge. However, the SIA suggests that further review of such arrangements may be warranted to determine the justifiable basis for a reduced fee, including a better description of the tax exempt organizations that would benefit from a reduced price structure, a better explanation as to why the reduced fee is necessary, and an analysis of the potential impact such a proposal may have on competition.

Questions regarding this letter may be directed to me at 212-908-7468 or to Michael Udoff of SIA staff at 212-618-0509.

Very truly yours,

Andrew C. Wels
Chairman
SIA Technology & Regulation
Market Data Subcommittee

cc: Sharon Zackula, Associate General Counsel, NASD
Patrice Gliniecki, Senior Vice President and Deputy General Counsel, NASD