

the interim period, the Exchange, in a separate filing, extended the implementation date for the gatekeeper provisions for small firms until July 30, 2003, or until such date as a permanent exemption is approved by the SEC and becomes effective.¹⁴

According to NYSE, as a result of numerous interpretive requests, on June 26, 2002, the Exchange and the NASD issued interpretive guidance to certain rule provisions.¹⁵ According to NYSE, upon adoption of the new amendments to the SRO rules, the SROs intend to provide written clarification as to how these rules will impact existing guidance in this area as well as additional issues that may arise once the amendments are adopted.

According to the NYSE, the Exchange, together with other regulatory organizations, also conducted examinations of members' and member organizations' research practices to determine compliance with the new SRO Rules. The Exchange believes that some of the interpretive issues raised by the industry and the preliminary findings from the examinations necessitated certain additional changes, discussed below, to existing NYSE Rules.

October 2002 Filing

In October 2002, the Exchange filed with the SEC proposed amendments to Exchange Rules 472, 351, 344 and 345A.¹⁶ Comparable amendments were also filed by the NASD. The amendments pending with the SEC generally provide for further restrictions on research analysts' compensation, trading activities, issuance of research reports, and notification of research coverage termination, and impose additional disclosure requirements for research reports and research analysts. In addition, pending amendments place certain restrictions on research analysts participating in solicitation or "pitch" meetings with prospective investment banking clients.

Amendments pending with the SEC expand the definition of "research analyst" (associated person) to include research directors, supervisory analysts and others, (e.g., committee members who have direct influence, or control over the preparation of research reports and establishment or change in ratings

or price targets) and thereby subject them to the same trading and ownership prohibitions that the Rule imposes on research analysts.

Following approval, the current 10 and 40-day quiet periods for the issuance of research reports by managers and co-managers of initial and secondary offerings will be extended to include public appearances.

Upon approval by the SEC, the definition of "public appearance" will be amended to include research analysts' making a recommendation in a newspaper article or similar public medium. Extending the definition of "public appearance" to recommendations in a newspaper article will require research analysts to make the same disclosures that they are required to make in other public appearances. As discussed in more detail below, the Exchange received comments on this proposed amendment.

Proposed amendments to NYSE Rule 344 ("Supervisory Analysts") pending with the SEC would establish a new registration category and require a qualification examination for research analysts (NYSE Rule 344). In addition, NYSE Rule 345A ("Continuing Education for Registered Persons") would be amended to include research analysts and supervisory analysts as covered persons subject to the Firm Element of the Continuing Education Program to address applicable rules and regulations, ethics, and professional responsibility.

According to NYSE, pending proposed amendments to the definition of "research report" began the process of conforming NYSE Rules to the mandates of the SOA. As proposed, the term "research report" as it is currently defined in the NYSE Rule 472.10(2) is being amended to conform to the SOA's definition by deleting the criterion of providing a recommendation from the criteria that determines what constitutes a research report.

According to NYSE, the Exchange filed NYSE Amendment No. 1 for the purpose of conforming proposed NYSE rules to those of the NASD and to establish effective dates, noted below, for the various rule provisions.

Sarbanes-Oxley Act Compliance

According to NYSE, as a result of discussions with the NASD and SEC, the Exchange is filing Amendment No. 2 to propose the following additional changes to NYSE Rule 472 to conform it to the requirements of the SOA.

Section 15D(a)(1)(A) of the Exchange Act requires that rules be designed to restrict "the prepublication review or

approval of research reports by persons employed by the broker-dealer who are engaged in investment banking activities, or persons not directly responsible for investment research, other than legal or compliance staff."¹⁷ In the May 10th Order, the Commission approved NYSE Rule 472(b)(1), which prohibits investment banking department review and approval of research reports prior to distribution. According to NYSE, the purpose of that amendment was to help promote fair, objective and unbiased research through the elimination of potential conflicts of interest that are present when an investment banker is able to review, and possibly influence, a research report prior to its publication.

In accordance with the requirements of section 15D(a)(1)(A) of the Exchange Act,¹⁸ the Exchange is proposing amendments that would extend the existing prepublication review and approval prohibition beyond investment banking personnel to anyone associated with the broker or dealer, other than research department personnel (See proposed NYSE Rule 472(b)(2) and (3)). In doing so, the Exchange is augmenting its existing rule prohibitions, which it believes is thus helping to foster a better climate for research analysts to produce unbiased research free of the conflicts that had beset the industry prior to the adoption of the SRO Rules last year.

Section 15D(a)(1)(C) of the Exchange Act requires "that a broker or dealer and persons employed by such broker or dealer who are involved in investment banking activities may not, directly or indirectly retaliate against or threaten to retaliate against any securities analyst employed by that broker or dealer or its affiliates as a result of an adverse, negative or otherwise unfavorable research report that may adversely affect the present or prospective investment banking relationship of the broker or dealer with the issuer that is the subject of the research report."¹⁹

NYSE believes that, although recently enacted NYSE Rule 472 amendments have, to some extent, already addressed this issue, proposed amendments will incorporate the substance of this requirement and extend it to "public appearances" as well (See proposed NYSE Rule 472(g)(2)). In this regard, the Exchange believes that NYSE Rule 472(b)(1) already prohibits research analysts from being under the supervision and control of an investment banking department, and thus limits, to some degree, the ability

¹⁴ See Securities Exchange Act Release No. 47876 (May 15, 2003).

¹⁵ See NYSE Information Memo No. 02-26, dated June 26, 2002, and NASD Notice to Members 02-39, dated July 2002.

¹⁶ See Securities Exchange Act Release No. 47110 (December 31, 2002), 68 FR 826 (January 7, 2003) (SR-NYSE-2002-49; SR-NASD-2002-154) ("October 2002 Filing").

¹⁷ 15 U.S.C. 78o-6(a)(1)(A).

¹⁸ *Id.*

¹⁹ 15 U.S.C. 78o-6(a)(1)(C).