

of such personnel directly to retaliate against research analysts. According to NYSE, it is generally established that "control" refers to the ability to "hire, fire, reward and punish" and, thus, prohibiting control of research analysts by an investment banking department limits such opportunities for retaliation.

Further, amendments filed pursuant to the October 2002 Filing that are pending with the SEC would provide for the review and approval of research analysts' compensation by a committee of the member or member organization that reports to its Board of Directors, or where the member or member organization has no Board of Directors, to a senior executive officer of the member or member organization. Such committee would be prohibited from having representatives from the member's or member organization's investment banking department serving on such a committee, and would thus foreclose opportunities for the investment banking department to retaliate against a research analyst by adversely impacting his or her compensation. According to NYSE, in conforming to the SOA's anti-retaliation requirement, the Exchange will expand upon the limitations already imposed and pending limitations on such conduct in NYSE Rule 472.

Section 15D(a)(2) of the Exchange Act imposes quiet periods (e.g., prohibition against publishing or otherwise distributing research reports) on brokers or dealers who have participated, or are to participate in a public offering as underwriters or dealers.²⁰ Current SRO rules impose quiet periods on the issuance of research reports of 40-days for initial public offerings ("IPOs") and 10 days for certain secondary offerings.²¹ However, these prohibitions apply only to managers and co-managers of securities offerings. NYSE believes that the current SRO quiet periods exceed those provided for under the Federal securities laws.

According to NYSE, in enacting quiet periods that exceeded those currently prescribed under the Federal securities laws,²² the Exchange was seeking to

minimize incentives that managing underwriters, by virtue of their relationships with issuers, would have to reward such issuers for their underwriting business by publishing favorable research soon after the completion of a securities offering. As such, the Exchange believes that extended quiet periods would allow market forces to determine the price of the security in the after-market, regardless of research reports with favorable and potentially biased recommendations.

The proposed amendments impose a 25-day quiet period on underwriters and dealers who are not managers or co-managers of an issuer's IPO (See proposed NYSE Rule 472(f)(3)). In doing so, the Exchange will place limitations on the issuance of research reports on any and all distribution participants following an issuer's IPO. The Exchange believes that this will eliminate any possible or potential competitive disadvantage that managers and co-managers are subject to under the current NYSE rule provisions.

In proposing a shorter quiet period for such dealers and underwriters than what is provided for under NYSE Rule 472(f)(1), the Exchange recognizes that such distribution participants, do not, by virtue of their relationships and compensation arrangements with issuers, have the same incentives and opportunities to publish favorable research for such issuers as do managers and co-managers of such offerings. Accordingly, the NYSE believes that a 25-day quiet period is appropriate for such distribution participants. According to NYSE, the Exchange, along with the NASD, is proposing a uniform definition of the term "offering date" that will be applied to this new quiet period as well as to the existing ones (NYSE Rule 472(f)(1) and (2)) (See proposed NYSE Rule 472.120).

Further, section 15D(a)(2) of the Exchange Act utilizes the term "publish or otherwise distribute" in its rule text.²³ Accordingly, the Exchange is proposing to make conforming changes where applicable to its current rule provisions (See proposed NYSE Rules 472(b)(2) and (3), NYSE Rules 472(e)(2), (4)(i) and (iv), (f)(1), (2) and (3)). In addition, the Exchange will be renumbering paragraphs 472(f)(3) through (5) as a result of the above changes.

Section 15D(b)(2) of the Exchange Act requires disclosure of "whether any

compensation has been received by a broker or dealer, or any affiliate thereof, including the securities analyst, from the issuer, that is the subject of the appearance or research report, subject to such exemptions as the Commission may determine appropriate and necessary to prevent disclosure of material non-public information regarding specific potential future investment banking transactions of such issuer."²⁴

Currently, Exchange Rule 472(k)(1)(ii)(b) requires that a member or member organization must disclose in research reports if the member or member organization or its affiliate has received compensation for investment banking services from a subject company in the past twelve (12) months. In addition to this required disclosure, proposed amendments would require disclosure in research reports of receipt of *any compensation*, other than for investment banking services, by a member or member organization from a subject company in the prior twelve (12) months (with no forward-looking provision) (See proposed NYSE Rule 472(k)(1)(iii)(c)).

According to NYSE, in requiring this additional disclosure, the Exchange recognizes that the receipt of any compensation, not just that resulting from investment banking services, may lend itself to the types of potential conflicts of interest between members and member organizations and their subject companies, that the initial rule amendments approved in the May 10th Order were promulgated to address, and thus in the interest of investor protection should be disclosed in research reports.

In addition, proposed NYSE Rule 472(k)(1)(ii) would require a research analyst (associated person) to disclose in public appearances (if such person knows or has reason to know) whether the member or member organization or any affiliate thereof, received any compensation from a subject company in the past twelve (12) months. Further, proposed NYSE Rule 472(k)(1)(i)(f) will require disclosure in a research report and public appearances of whether a research analyst (associated person) received any compensation from a subject company in the past twelve (12) months.

Although current NYSE Rules prohibit a research analyst from being compensated for specific investment banking services transactions (See NYSE Rule 472(h)(1)), and require disclosure in research reports of whether a research analyst received compensation, based in

²⁰ 15 U.S.C. 78o-6(a)(2).

²¹ See NYSE Rule 472(f)(1), (2); NASD Rule 2711(f).

²² Currently, Rule 174(d) under the Securities Act of 1933 (the "Securities Act") provides for a twenty-five (25)-day prospectus delivery requirement for an issuer's IPO if the security is to be listed on an exchange or authorized for inclusion in an interdealer quotation system such as Nasdaq. 17 CFR 230.174(d). The twenty-five (25)-day quiet period coincides with the twenty-five (25)-day prospectus delivery requirement under this rule. See Proposed NYSE Rule 472(f)(3). In addition, the restrictions regarding publication of research reports in Rule 101 of Regulation M do not apply

to research reports that comply with Rules 138 or 139 (available to certain S-2 and/or S-3 issuers) under the Securities Act. 17 CFR 242.101(b)(1); 17 CFR 230.138; 17 CFR 230.139.

²³ 15 U.S.C. 78o-6(a)(2).

²⁴ 15 U.S.C. 78o-6(b)(2).