

sufficient upon which to base an investment decision.

While commenters acknowledge the SOA definition,⁵⁶ some nevertheless urge the SROs to interpret the SOA's definition to be a non-substantive change to the current NASD and NYSE definitions of "research report."⁵⁷ One commenter, for example, believes that the SROs should interpret the SOA definition effectively to continue to require a recommendation or a "subjective view or conclusion."⁵⁸ Commenters argued that, otherwise, the proposed definition would be over-inclusive, encompassing many types of communications that traditionally have not been classified as research reports, including those by individuals who are not typically considered research analysts.⁵⁹ Consequently, these commenters argue that the scope of the modified definition would result in unnecessary regulation and could constrict the free flow of information to the investing public.⁶⁰

The SROs do not believe that the commenters' suggestions are consistent with the requirements of the SOA.⁶¹ The NASD notes that Congress adopted a definition of "research report" that is very similar to the current definitions of "research report" in NASD Rule 2711, except for the deletion of the requirement that there be a recommendation.⁶² The NASD believes that they must therefore recognize the import of that distinction.⁶³ As such, the NASD declines to interpret the definition in a way that they would consider to be rendering a conscious Congressional act to be superfluous.⁶⁴ In this regard, the NASD notes that the Commission adopted the SOA definition of "research report" in Regulation AC, and declined to incorporate interpretations suggested by commenters that would continue to require a recommendation or subjective conclusion.⁶⁵

Commenters also suggested several other measures to narrow the scope of the proposed "research report" definition, such as limiting the definition of "research report" to communications "furnished by the firm to investors in the U.S."⁶⁶ The SROs believe that all research reports produced by members, irrespective of where or to whom they are distributed, should embody the same standards of integrity.⁶⁷ The NASD notes that some aspects of NASD 2711 may reflect a more restrictive policy than the terms agreed to by the many parties, including NASD, to the Global Settlement, because the purposes behind NASD Rule 2711 may differ from the objectives in seeking a resolution to an enforcement matter.⁶⁸ For this reason, the SROs decline to modify their proposals to apply only to research that relates either to a U.S. company or a non-U.S. company for which a U.S. market is the principal equity trading market as provided in the Global Settlement.⁶⁹

Some commenters noted that Regulation AC applies only to "covered persons," generally exempting from the rule, among others, those affiliates of a broker or dealer that have no officers or employees in common with the broker or dealer.⁷⁰ Commenters also requested that the SROs narrow the scope of their rules to carve out "departments or divisions that have a sufficient level of independence from the member firm" and are not subject to pressure from investment banking.⁷¹

The NASD does not believe it necessary or appropriate to adopt a "covered persons" definition.⁷² The NASD also notes that the Commission's jurisdiction is broader than the NASD, whose jurisdiction extends only to their members.⁷³ As such, research produced by non-member affiliates is already excluded from the scope of SRO analyst rules, except in cases where members distribute research produced by non-member affiliates. To the extent that commenters' concerns are more specifically about the application of the rules to investment advisers, the SROs note that the Joint Memorandum, which provides members with guidance regarding the operation of the analyst rules, explains that those advisers are

excluded from the definition of "research analyst."⁷⁴

Several commenters requested that the SROs restate their previous guidance set forth in their Joint Memorandum, which excluded certain communications from the definition of "research report."⁷⁵ Commenters requested that the SROs exclude from the definition certain additional communications excepted by Regulation AC or the Global Settlement.

The Commission understands that the SROs intend to review existing interpretive guidance for continued applicability, and note their belief that the guidance in the Joint Memorandum excluding certain communications from the definition of "research report" would remain effective.⁷⁶ Moreover, the SROs have indicated agreement that certain additional categories of communications, discussed in the release adopting Regulation AC, would not fall within the amended definition of "research report."⁷⁷ The SROs determined that an analysis prepared for a specific person or a limited group of fewer than fifteen persons; and periodic reports or other communications prepared for investment company shareholders or discretionary investment account clients discussing past performance or the basis for previously made discretionary investment decisions, would not fall within the definition of "research report."⁷⁸ The NASD continues to note that whether a particular communication falls within the definition of "research report" depends on specific facts and circumstances.⁷⁹

Some commenters asserted that all "technical analysis" and "quantitative" research should be excluded from the definition of "research report."⁸⁰ However, the NASD does not agree that such exclusions are appropriate beyond current interpretations.⁸¹ Neither NASD or NYSE modified their proposals in response to this comment. The NYSE did not further elaborate on its reasoning for this determination. The Joint Memorandum excludes from the definition of "research report"

⁷⁴ See NYSE Information Memorandum. No. 02-26 (June 26, 2002) and NASD Notice to Members 02-39 (July 2002) ("Joint Memorandum").

⁷⁵ See BOA letter, Schwab June 30th letter, SIA June 26th letter, and Sullivan letter (e.g., research reports commenting on trading conditions).

⁷⁶ See NASD Response to Comments and NYSE Amendment No. 3.

⁷⁷ *Id.*; See note 14 *supra*.

⁷⁸ See NASD Response to Comments and NYSE Amendment No. 3.

⁷⁹ See NASD Response to Comments.

⁸⁰ See CSFB letter, Schwab March 20th letter, and SIA March 10th letter.

⁸¹ See NASD Response to Comments.

⁵⁶ See 15 U.S.C. 78o-6(c)(2).

⁵⁷ See SIA March 10th letter.

⁵⁸ See Wilmer March 11th letter.

⁵⁹ For example, Wilmer's June 25th comment letter, Wilmer suggested that communications such as prospectuses, trading commentary or company profiles could be deemed research reports under the proposed definition.

⁶⁰ See ICI March 10th letter and Wilmer March 11th letter.

⁶¹ See NASD Response to Comments and NYSE Amendment No. 3.

⁶² See NASD Response to Comments.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* Regulation AC defines "research report" as "a written communication (including an electronic communication) that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision." See Regulation AC.

⁶⁶ See Sullivan letter.

⁶⁷ See NASD Response to Comments and NYSE Amendment No. 3.

⁶⁸ See NASD Response to Comments.

⁶⁹ See NASD Response to Comments and NYSE Amendment No. 3.

⁷⁰ See Sullivan letter.

⁷¹ *Id.*

⁷² See NASD Response to Comments.

⁷³ *Id.*