

communications of “technical analysis concerning the demand and supply for a sector, index or industry based on trading volume and price.” The NASD does not believe it is consistent with the purposes of the rules to extend the exclusion to technical analysis of individual securities.⁸² The NASD also notes that the Commission similarly excluded from the definition of “research report” in Regulation AC only sector, index, and industry technical analysis.⁸³ The Commission believes that the SROs’ determination not to apply the exception to individual securities is reasonable.

Commenters argue that “quantitative” reports are based on objective criteria, such as mathematical models, and are therefore not subject to influence by virtue of a member’s conflicts.⁸⁴ The NASD believes the term “quantitative,” as applied to research, may be vague and open to many interpretations.⁸⁵ In fact, the NASD observes that many research reports typically labeled “quantitative” by members have raised conflicts concerns.⁸⁶ Further, the NASD does not agree that all mathematical models are inherently “objective.”⁸⁷ Many such models are based on subjective formulas where a person or persons selects the inputs; for example, a particular performance ratio or consensus earnings estimates. The NASD believes that such mathematical models can be manipulated to produce a particular desired result, depending on, for example, the ratios or other criteria selected, the universe of securities, and the formula employed.⁸⁸

Consequently, the NASD does not believe it appropriate or practicable to provide for a blanket exclusion of “quantitative research.”⁸⁹ The NASD acknowledges the possibility that certain “quantitative models” devised by members may effectively eliminate the role of a “research analyst” and sufficiently guard against any potential conflicts of interest to render them outside the definition of a “research report;” however, the NASD believes that such facts and circumstances are best considered on a case-by-case basis.⁹⁰

The Commission notes that the SROs have tailored their definitions of “research report” to the definition of

“research report” in the SOA and have indicated that they intend to review the exceptions to the definition provided in the Global Settlement, in order to provide additional guidance on the rules’ application where appropriate.⁹¹

The Commission believes that the SRO amendments to the definition of the term “research report” are consistent with Section 15D of the Exchange Act in that they do not require that there be a “recommendation.” The Commission also finds that the rules relating to research analyst involvement in solicitations for investment banking business are consistent with the Exchange Act, particularly Sections 6(b)(5), 6(b)(8), 15A(b)(6), and 15A(b)(9).

D. Definition of “Public Appearance” [NYSE Rule 472.50 and NASD Rule 2711(a)(4)]

The SROs amended their definitions of “public appearance” to include print media appearances. Several commenters were critical of this provision in light of the SROs’ guidance in the Joint Memorandum, which stated that research analysts should decline subsequent appearances with media outlets that previously edited out required analyst disclosures, absent assurances that the disclosures will no longer be edited out.⁹² Commenters expressed concern that the rules infringed upon the editorial discretion of the media by directing analysts to decline appearances with media outlets that previously have not included the analyst disclosures.⁹³

Commenters argued that the Joint Memorandum should be revised to reflect the NASD’s updated guidance in the Original Notice that an analyst would not violate the rule if he or she makes the required disclosures to the print, radio or television media in good faith, even if the media outlet does not print or broadcast the information.⁹⁴ A commenter also recommended that the proposed rules be clarified to make explicit that print journalists may, in their editorial discretion, and without penalty to their publications or imposing restrictions upon access to a research analyst, decline to publish the conflict disclosures provided by the analyst.⁹⁵

The SROs recognized that it is important that media audiences, as well as readers of research reports, receive disclosures of potential conflicts of interests.⁹⁶ In response to commenters’ concerns, however, the SROs modified their guidance to state that an analyst would not violate the rule if the analyst continues to make appearances with a media outlet that has, in the past, not printed or broadcast the disclosures, so long as the analyst makes the required disclosures in good faith.⁹⁷

In NYSE Amendment No. 2, the Exchange would require a research analyst that recommends securities in a print media interview, article prepared under his or her name, or broadcast, to prepare a record of such interview, article, or broadcast before the close of the next business day. Such record must contain pertinent information regarding the event and the required disclosures provided the media source. Further, such record must be made regardless of whether the media outlet publishes or broadcasts the required disclosures. In addition, the SROs require that the records of such interviews, articles, or broadcasts and the requisite disclosures must be maintained in a manner consistent with Rule 17a-4 of the Exchange Act.⁹⁸

While commenters supported the NYSE’s proposed interpretation, they were concerned that the new recordkeeping requirements for public appearances were impractical and failed to take into account the realities of research analysts’ business and travel schedules.⁹⁹ According to the commenters, the difficulty in requiring that research analysts themselves make the required records before the close of the next business day, would result in a reduction in the number of public appearances.¹⁰⁰

In response to commenters’ concerns, the NYSE amended its proposal to require that the record be made within 48 hours of such interview, article or broadcast, and would permit such record to be prepared by the research analyst, legal or compliance personnel, or research department management.¹⁰¹

In Amendment No. 3, the NASD also amended its rule proposal to explicitly

⁹⁶ See NASD Rule 2711(a)(4) and NYSE Rule 472.50.

⁹⁷ See NASD Amendment No. 1 and NYSE Amendment No. 2.

⁹⁸ Rule 17a-4 requires that records be preserved for a period of not less than three years, the first two in an easily accessible place. 17 CFR 240.17a-4.

⁹⁹ See Schwab June 30th letter, SIA June 26th letter, and Wilmer June 25th letter.

¹⁰⁰ See Wilmer June 25th letter.

¹⁰¹ See NYSE Rule 472(k)(1)/01.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See CSFB letter, Schwab March 20th letter, and SIA March 10th letter.

⁸⁵ See NASD Response to Comments.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See NASD Response to Comments and NYSE Amendment No. 3.

⁹² See Gibson letter, NAA letter, and SIA March 10th letter.

⁹³ See Bloomberg letter, Gibson letter, NAA letter, and SIA March 10th letter.

⁹⁴ See Gibson letter, Schwab March 20th letter, and SIA March 10th letter. See also Original Notice at 836.

⁹⁵ See Bloomberg letter.