

prospectus delivery requirements under Rule 174 under the Securities Act<sup>126</sup> pursuant to which brokers or dealers refrain from issuing research on exchange-listed or National Market System securities for 25 days after a registration statement becomes effective or bona fide public trading begins, to avoid the risk that such communications may be deemed prospectuses that do not meet the requirements of Section 10 of the Securities Act.<sup>127</sup>

The SRO proposals would amend the quiet period provisions in two other ways. First, the proposals would prohibit a member that has acted as a manager or co-manager of a securities offering from distributing a research report or making a public appearance concerning a subject company 15 days prior to and after the expiration, waiver, or termination of a lock-up agreement that restricts the sale of securities held by the subject company or its shareholders after the completion of a securities offering.

Commenters argued that this provision would raise difficult compliance issues, since co-managing underwriters often have no knowledge of a lead manager's waiver of a lock-up agreement.<sup>128</sup> Commenters also expressed concern that this provision could dissuade issuance of lock-up waivers prior to their normal expiration time.<sup>129</sup> One commenter suggested, as an alternative, that the SROs bar firms and their analysts from issuing research reports "for the purpose, in whole or in part, of affecting the price of the issuer's securities for the benefit of a selling shareholder."<sup>130</sup>

The SROs determined not to modify the proposals in this regard. The SROs believe that the concern regarding a co-managing underwriter's lack of knowledge of a lead manager's waiver of a lock-up agreement can be addressed through a provision in an underwriting agreement to require a lead or co-managing underwriter to notify the other managers or co-managers of its intention to grant such a waiver a specified number of days prior to doing so.<sup>131</sup> The SROs believe that such a notification would avoid the inadvertent issuance of research reports or making of public appearances within the blackout periods surrounding waivers of lock-up agreements.<sup>132</sup>

Several commenters requested that the blackout period regarding lock-up agreements not apply to the publication of research reports pursuant to Securities Act Rule 139<sup>133</sup> regarding a subject company with "actively traded securities," as defined in SEC Regulation M,<sup>134</sup> or to public appearances regarding such companies.<sup>135</sup> These commenters noted that, because the quiet period following secondary offerings does not apply to these types of companies, the quiet period surrounding waivers or expirations of a lock-up agreement also should not apply.

After consideration of commenters' concerns, the SROs modified their proposals to apply the exception for actively traded securities to the provisions prohibiting "booster shot" research reports. The SROs note that such an exception would not be appropriate in the context of an IPO, where there is not a developed secondary trading market or widespread research coverage.<sup>136</sup> The SROs agree that, for certain seasoned issuers and actively traded securities, the proposed blackout surrounding the expiration of lock-up agreements is not necessary.<sup>137</sup> Accordingly, the SROs have amended this provision to provide for such an exception.

Second, the SRO proposals also extend the current 40 and 10-day quiet period provisions to public appearances by research analysts regarding securities that are covered by a research report blackout during the same period of time.<sup>138</sup> Commenters did not oppose this proposal. The SRO amendments define "date of the offering" for all quiet period provisions to mean the later of the effective date of the registration statement or the first date on which the security was bona fide offered to public.<sup>139</sup>

The Commission believes that the SRO rules relating to quiet periods will encourage market forces to determine the price of the security in the aftermarket following an offering unaffected by research reports and public appearances by firms with the most substantial interest in the offering—those firms that are a part of the underwriting syndicate. The Commission believes that the SROs'

proposals to extend the current quiet period provisions to cover public appearances is a reasonable extension of the prohibition on research reports during the same period of time.

The Commission believes that the proposed 25-day quiet period provisions satisfy the requirements of Section 15D(a)(2) of the Exchange Act because they are reasonably designed to "define periods during which brokers or dealers who have participated, or are to participate, in a public offering of securities as underwriters or dealers should not publish or otherwise distribute research reports relating to such securities or to the issuer of such securities." The Commission finds that the quiet period provisions are consistent with the Exchange Act, particularly Sections 6(b)(5), 6(b)(8), 15A(b)(6) and 15A(b)(9).

#### *I. Disclosure of Compensation and Client Arrangements [NYSE Rule 472(k) and NASD Rule 2711(h)]*

The SOA requires that rules be adopted reasonably designed to require that firms disclose in research reports and public appearances any compensation received by the broker-dealer or its affiliates from the subject company that is known or should have been known by the research analyst or broker-dealer at the time the research report is issued and at the time the public appearance is made.<sup>140</sup>

Current SRO rules require firms to disclose investment banking compensation received from a subject company or its affiliates in the past 12 months.<sup>141</sup> The SROs have not proposed to change this provision. However, in NASD Amendment No. 2 and in NYSE Amendment No. 2, the SROs proposed amendments to expand the required compensation disclosures to mandate disclosure in research reports and public appearances of any non-investment banking compensation received by a member or its affiliates from the subject company. In addition, the SRO amendments would require separate disclosure of investment banking compensation and non-investment banking compensation received from the subject company or its affiliates in research report disclosures.<sup>142</sup>

While the SOA does not specify a look-back period for the compensation disclosure provision, the SROs proposed a 12-month retrospective

<sup>126</sup> 17 CFR 230.174.

<sup>127</sup> 15 U.S.C. 77j.

<sup>128</sup> See SIA March 10th letter.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See NASD Response to Comments and NYSE Amendment No. 3.

<sup>132</sup> *Id.*

<sup>133</sup> 17 CFR 230.139.

<sup>134</sup> 17 CFR 242.101(c)(1).

<sup>135</sup> See Sullivan letter.

<sup>136</sup> See NASD Response to Comments and NYSE Amendment No. 3.

<sup>137</sup> *Id.*

<sup>138</sup> See NYSE Rule 472(f)(1) and (2), and NASD Rule 2711(f)(1)(A) and (B).

<sup>139</sup> See NYSE Rule 472.120 and NASD Rule 2711(f)(3).

<sup>140</sup> See 15 U.S.C. 78o-6(b)(2).

<sup>141</sup> See NYSE Rule 472(k)(1)(i)(a)(2) and NASD Rule 2711(h)(2)(A)(ii)(b).

<sup>142</sup> See NYSE Rule 472(k)(1)(i)(a)(2) and (K)(1)(i)(d)(2), and NASD Rule 2711(h)(2)(A)(ii)(b) and (iii)(a).