

received by the member and affiliates to be disclosed in public appearances, to the extent that the analyst knows or has reason to know of such compensation in the past 12 months.<sup>164</sup> This requirement, unlike current SRO rules, mandates disclosure of investment banking compensation in public appearances.<sup>165</sup>

The SOA mandates the establishment of rules that require disclosure of whether a subject company currently is, or was, a client of the broker or dealer during the 1-year period preceding the appearance or date of distribution of the research report, and if so, a statement of the type of services provided to the client.<sup>166</sup> This is broader than the current SRO rules which require a research analyst to disclose during a public appearance (when such research analyst knows or has reason to know) if the subject company is an investment banking services client of the member.<sup>167</sup>

In order to meet the mandates of the SOA, the proposed SRO amendments would provide for disclosure by a member in research reports, and by a research analyst during a public appearance (if the analyst knows or has reason to know), of whether a subject company is a client of the member and the types of services provided to the client.<sup>168</sup> The types of services have been categorized into: Investment banking services (which are required to be disclosed under current SRO rules); non-investment banking securities-related services; and non-securities services.<sup>169</sup>

Commenters expressed concerns regarding the client disclosure provisions that were similar to those noted above regarding the compensation disclosure provisions.<sup>170</sup> Commenters suggested that the client disclosure provision should be amended to require broker-dealers to disclose only those services most likely to present an actual or potential conflict of interest.<sup>171</sup>

Commenters also requested guidance as to what would constitute a client relationship.<sup>172</sup> In response to commenters' concerns, the SROs have clarified that a subject company is a

client of the member if they have received compensation from the subject company, or if the member has entered into an agreement to provide services.<sup>173</sup>

Commenters argued that the proposals should be modified to require broker-dealers to provide disclosures regarding services provided to subject companies on an annual basis, and should be linked to the receipt of compensation for non-investment banking, securities-related, or non-securities services.<sup>174</sup>

NYSE believes that requiring disclosure of whether a subject company is a client and the types of services provided, including non-investment banking services, should provide investors with potentially more meaningful insight into the nature of the relationship between the subject company and the member and the potential conflicts attendant to such relationships.<sup>175</sup> NYSE, for example, observes that it might be more beneficial for an investor, in determining whether a firm has real conflicts of interest inherent in conducting investment banking on behalf of a subject company, to know that a member is also providing non-investment banking securities-related services to a subject company.<sup>176</sup>

While there is some overlap between disclosure of the receipt of compensation from a subject company and a client relationship, the SROs have declined to modify their proposals to link or merge the receipt of compensation provision to the client disclosure provision.

The SROs also modified their proposals to require disclosure of client relationships and types of services provided to the issuer, as of the end of the month immediately preceding the date of publication of the research report, or sooner, if the analyst or influential employee possess actual knowledge of such member non investment banking compensation.<sup>177</sup> The Commission believes this would provide firms with additional time to identify and aggregate the required information, while providing investors with relevant disclosure information and complying with the requirements of Section 15D of the Act.<sup>178</sup>

In requiring that firms and their research analysts identify the types of services provided to subject companies, the SROs recognize that there is a

possibility that this could result in the dissemination of material non-public information.<sup>179</sup> This issue was raised when the Commission considered amendments to the NASD and NYSE's analyst rules in 2002.<sup>180</sup> The rules, approved by the Commission, require disclosure of prospective investment banking compensation.<sup>181</sup> In light of this concern, the SROs had structured the disclosure of information related to investment banking services to mitigate the possibility of disclosing material non-public information by requiring a general disclosure of investment banking compensation received from the subject company in the past 12 months, along with a three-month forward-looking investment banking compensation disclosure if the member "expects to receive or intends to seek" compensation for investment banking services from the subject company in the next three months.<sup>182</sup>

The SROs believe that they have also addressed concerns regarding the disclosure of material non-public information with the proposed new disclosure requirements.<sup>183</sup> The amendments provide for an exemption from the proposed compensation and client disclosure provisions to the extent that such disclosure would reveal material non-public information regarding specific potential future investment banking services transactions of the subject company.<sup>184</sup> The SOA explicitly authorized us to permit an exception for material non-public information regarding specific potential future investment banking services transactions of the subject company in the compensation disclosure provision.<sup>185</sup> The Commission notes that this exception applies only to *specific* potential *future* transactions of an *investment banking* nature and that relate to a particular issuer. The SROs have determined that such an exception should also apply to the client disclosure provision.<sup>186</sup> The Commission finds that providing for such an exception in the client disclosure provision is consistent with the SOA's compensation disclosure provision. Further, the exception as to

<sup>164</sup> See NYSE Rule 472(k)(2)(i)(c)(2) and NASD Rule 2711(h)(2)(B)(i).

<sup>165</sup> *Id.*

<sup>166</sup> See 15 U.S.C. 78o-6(b)(3).

<sup>167</sup> See NYSE Rule 472(k)(2)(i)(c)(1) and NASD Rule 2711(h)(2)(B)(iii).

<sup>168</sup> See NYSE Rule 472(k)(1)(i)(d)(1) and NASD Rule 2711(h)(2)(A)(iii)(b).

<sup>169</sup> *Id.*

<sup>170</sup> See SIA June 26th letter and Wilmer June 25th letter.

<sup>171</sup> *Id.*

<sup>172</sup> See Schwab June 30th letter and SIA June 26th letter.

<sup>173</sup> See NASD Response to Comments and NYSE Amendment No. 3.

<sup>174</sup> *Id.*

<sup>175</sup> See NYSE Amendment No. 3.

<sup>176</sup> *Id.*

<sup>177</sup> See NYSE Rule 472(k)(1)(i)(d)(1) and NASD Rule 2711(h)(2)(A)(iii)(b).

<sup>178</sup> See 15 U.S.C. 78o-6(b)(3).

<sup>179</sup> See NASD Response to Comments and NYSE Amendment No. 3.

<sup>180</sup> See May 2002 approval order.

<sup>181</sup> *Id.* at 34972.

<sup>182</sup> See NYSE Rule 472(k)(1)(i)(a)(2) and (3), and NASD Rule 2711(h)(2)(A)(ii)(b) and (c); See also May 2002 approval order.

<sup>183</sup> See NASD Response to Comments and NYSE Amendment No. 3.

<sup>184</sup> See NYSE Rule 472(k)(3)(i) and NASD Rule 2711(h)(2)(c).

<sup>185</sup> See 15 U.S.C. 78o-6(b)(2).

<sup>186</sup> See NASD Response to Comments and NYSE Amendment No. 3.