

However, tying an analyst's compensation to the performance of a quantitative or technical model would indicate that the report is the product of the analyst's subjective views (reflected by the design of the model employed). In that case, that analyst must certify the report containing the model's results in accordance with Rule 501 of Regulation AC.

C. Certifications or Disclosures During Public Appearances

We requested comment on what, if any, disclosures should be required during public appearances by analysts. The four commenters that addressed this issue generally were opposed to requiring certifications during analyst public appearances.³² We have determined not to require certifications during public appearances by analysts.

The Commission believes that the proposed quarterly certification requirements in connection with analyst public appearances are sufficient. If the analyst does not provide a certification in connection with public appearances, Rule 502 of Regulation AC requires the broker-dealer to provide readers of research reports that it distributes, as well as the broker-dealer's designated examining authority, with notice that the analyst did not provide the certifications.³³ A Rule 502(b) notice in a research report must be in plain English.

D. Compendium Reports

The Commission requested comment on whether Regulation AC should make allowances for compendium research reports covering six or more securities. Commenters that discussed the treatment of certifications in compendium research reports believed that Regulation AC should permit the required disclosures to appear in a place other than the report itself.³⁴ Most of these commenters specifically supported treatment of compendium reports for the purpose of Regulation AC similar to the treatment allowed under SRO rules. Under SRO rules, members are not obligated to include disclosures in compendiums if the report directs readers to a toll-free number or postal address to write for required disclosures.³⁵ Electronic compendiums may instead include a hyperlink and paper compendiums may also include a web address where disclosures are

located. Two commenters suggested the use of a combined certification that each analyst referenced in the report certifies that the analysis attributed to him or her accurately reflects his or her views.³⁶

The Commission has determined not to permit treatment of compendium research reports in a manner similar to that permitted by the SROs because, unlike the SRO rules, the certifications required by Regulation AC are very concise. Nonetheless, when a research report covers more than one company and each research analyst required to certify with respect to the views expressed in a portion of the report is able to certify that: (a) the views expressed in the research report accurately reflect such research analyst's personal views about the subject securities and companies; and (b) that no part of his or her compensation was, is, or will be directly or indirectly related to the specific recommendation or views contained in the research report, the firm may comply with Regulation AC by including one clear and prominent combined certification that, as to each company covered, the respective research analyst (or analysts) certifies as to (a) and (b) above.³⁷

E. Application of Regulation AC to Investment Advisers and Banks

Regulation AC is directed at brokers, dealers, and covered persons, because we believe that these entities are subject to the greatest conflicts. Therefore, investment advisers and banks, among others, may be required to comply with the regulation if they are covered persons of a broker-dealer. The Commission noted in the Proposing Release that the term "research analyst" would not include personnel of an investment adviser, such as a mutual fund portfolio manager, who are not principally responsible for preparing research reports, even if the individuals are registered persons of a broker-dealer (similar to the guidance provided by the SROs in the joint interpretive memorandum).³⁸ The Commission requested comment on whether the regulation should cover banks that are not associated persons and other independent entities, and whether the rule should explicitly exclude investment advisers.

Commenters who addressed the application of Regulation AC to investment advisers generally opposed the rule's coverage of investment advisers and investment advisory personnel.³⁹ Some commenters called for the specific exclusion of investment advisers.⁴⁰ Commenters who addressed the application of Regulation AC to banks generally opposed the rule's coverage of banks.⁴¹ One commenter favored the application of Regulation AC to investment advisers and banks.⁴²

The Commission has determined that Regulation AC should not exclude all investment advisers or banks that are associated with broker-dealers. However, as discussed above, the definition of "covered person" substantially narrows the scope of persons associated with a broker-dealer, such as investment advisers and banks, that are subject to Regulation AC. Where the broker-dealer has informational and structural separations from its associated person, the rule does not apply to that associated person. Where the protections are lacking, however, with respect to a person associated with a broker-dealer, that person is a covered person.⁴³ Accordingly, if an investment adviser or bank is a covered person and publishes, circulates, or provides research reports, the research report certification provisions of Regulation AC will apply. We believe those investment advisers and banks that do not meet the independence criteria that would exclude them from the definition of "covered person" may be subject to greater conflicts than are other investment advisers and banks. Specifically, a broker-dealer's investment banking department could pressure these investment adviser or bank affiliates to comment favorably in a research report or public appearance about a client or prospective client. Moreover, if associated persons that are covered persons were not subject to the certification requirements of Regulation AC, broker-dealers could attempt to funnel research through them to avoid complying with Regulation AC.⁴⁴

³⁹ See Alliance, ICAA, ICI, Investorside, SIA, SSB, Sullivan, and Thomson Financial.

⁴⁰ See, e.g., ICAA and ICI.

⁴¹ See Investorside, SSB, Sullivan, and Thomson Financial.

⁴² See NASAA.

⁴³ As discussed above, Regulation AC requires a broker-dealer to inform its associated persons as to whether or not it maintains and enforces the informational barriers described in Regulation AC.

⁴⁴ Regulation AC is directed at those regulated persons that prepare research reports, as well as persons associated with regulated persons who might be used if attempts were made to improperly circumvent the rule. See also Exchange Act section 20(b), 15 U.S.C. 78t(b).

³² See AIMR, Goldman, SIA, and SSB.

³³ The Commission believes that merely citing to the rule provision would not constitute an adequate notice.

³⁴ See CSFB, Cleary, Goldman, SIA, SSB, and Schwab.

³⁵ See CSFB, Cleary, SIA, SSB, and Schwab.

³⁶ See SIA and SSB.

³⁷ This certification must be in plain English. The Commission would expect that broker-dealers would be able to demonstrate that the combined certification in the report is accurate.

³⁸ See NYSE Information Memo No. 02-26 (June 26, 2002), and NASD Notice to Members 02-39 (July 2002).