JONES WALKER

E*ZINES
November 2002 Vol. 15

Corporate and Securities
www.jonesweker.com
corporatesecurities@joneswalker.com

ADMIRALTY & MARITIME
ANTITRUST & TRADE REGULATION
AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

NASD PROPOSES ADDITIONAL RULE REGARDING RESEARCH ANALYST CONFLICTS OF INTEREST

By Richard P. Wolfe and James E. A. Slaton

On October 25, 2002, NASD filed a proposed rule change with the SEC to expand upon recently approved NASD Conduct Rule 2711 governing research analyst conflicts of interest. The purpose of the proposed changes is to improve the objectivity of research and provide investors with more reliable information by imposing additional safeguards. The proposed amendments would, among other things: (1) further separate analyst compensation from investment banking influence; (2) effectively prohibit analysts from issuing "booster shot" research reports immediately before or after expiration of a lock-up agreement restricting insider brokerage sales; (3) prohibit analysts from participating in "bake-off" meetings with prospective investment banking clients prior to initial public offerings; (4) require members to publish a final research report when they terminate coverage of a subject company; and (5) impose registration, qualification and continuing education requirements on research analysts.

Analyst Compensation

The proposed amendments would require members to utilize a compensation committee for reviewing and approving analyst compensation at least annually. The NASD member's investment banking department could not be represented on the committee.

The analyst's contributions to the member's investment banking business could not be considered in determining compensation. Instead, the committee would have to consider:

- the research analyst's individual performance, including productivity and research quality;
- the correlation between the analyst's recommendations and stock price performance; and
- overall ratings of clients, sales force, and peers independent of the member's investment banking department.

JONES WALKER

E*ZINES
November 2002 Vol. 15

Corporate and Securities
www.joneswalker.com
corporatesecurities@joneswalker.com

Admiralty & Maritime
Antitrust & Trade Regulation
Aviation
Appellate Litigation
Bankruptcy, Restructuring & Creditors-Debtors Rights
Business & Commercial Litigation
Commercial Lending & Finance
Construction
Corporate & Securities
Employee Benefits, ERISA, & Executive Compensation
Energy
Environmental & Toxic Torts
ERISA, Life, Health & Disability Insurance Litigation
Gaming
Government Relations
Health Care Litigation, Transactions & Regulation
Intellectual property & E-Commerce
International
Labor Relations & Employment
Medical Professional & Hospital Liability
Mergers & Acquisitions
Products Liability
Professional Liability
Project Development & Finance
Public Finance
Real Estate: Land Use, Development & Finance
Tax (International, Federal and State)
Telecommunications & Utilities
Trusts, Esates & Personal Planning
Venture Capital & Emerging Companies
White Collar Crime

Once an analyst's compensation is determined, the committee would be required to document the basis for its decision. The member would have to attest annually to NASD that the committee reviewed and approved each analyst's compensation and documented the basis for the compensation.

Restrictions on Publishing Research Reports and Public Appearances

The proposed amendments would make several changes to the current Rule 2711 imposing "quiet periods" during which members may not publish research reports following an initial or secondary public offering of securities. The amendments would:

- extend the quiet period prohibitions to public appearances by research analysts;
- prohibit members that have acted as a manager or co-manager of a securities offering from publishing a research report or making a public appearance concerning a subject company for 15 days prior to or after the expiration, waiver or termination of a lock-up agreement, so-called "booster shot" research reports, except to comment on the effect of significant news or a significant event on the subject company; and
- require a member that terminates research coverage of a public company to publish a notice of the termination and a final rating or recommendation of the company's securities.

"*Bake-offs*"

The proposed amendments would prohibit a research analyst from issuing a research report or making a public appearance concerning a subject company if the research analyst communicated with the company in furtherance of obtaining investment banking business before the subject company had entered into a letter of intent or other written agreement designating the member as an underwriter of an initial public offering of the subject company. This provision would not apply to due diligence communications between an analyst and a subject company, where the sole purpose is to analyze the financial condition and business operations of the subject company.

The "anti-bake-off" rule (new paragraph (c)(4) of Rule 2711) raises the following questions. First, the rule fixes no time limitation on its prohibition against an analyst's issuing a research report on a company whose IPO investment banking business the analyst helped solicit for his

Admiralty & Maritime
Antitrust & Trade Regulation
Aviation
Appellate Litigation
Bankruptcy, Restructuring & Creditors-Debtors Rights
Business & Commercial Litigation
Commercial Lending & Finance
Construction
Corporate & Securities
Employee Benefits, ERISA, & Executive Compensation
Energy
Environmental & Toxic Torts
ERISA, Life, Health & Disability Insurance Litigation
Gaming
Government Relations
Health Care Litigation, Transactions & Regulation
Intellectual property & E-Commerce
International
Labor Relations & Employment
Medical Professional & Hospital Liability
Mergers & Acquisitions
Products Liability
Professional Liability
Project Development & Finance
Public Finance
Real Estate: Land Use, Development & Finance
Tax (International, Federal and State)
Telecommunications & Utilities
Trusts, Esates & Personal Planning
Venture Capital & Emerging Companies
White Collar Crime

firm. Does that mean the analyst is prohibited for as long as 20 years from publishing a research report on a company, if he helped solicit the company's IPO business? Second, suppose the analyst's solicitation of the IPO work was unsuccessful, and the company engaged a competing investment banking firm to handle the IPO. Is the analyst nevertheless subject to the rule's prohibition of research reports concerning the company, even though his firm did not handle the company's IPO? Third, the "anti-bake-off" rule applies by its terms only to IPOs. It therefore appears to leave analysts free to participate as part of an investment banking team soliciting follow-on secondary offering work from a public company following its IPO.

Registration, Qualification and Continuing Education of Research Analysts

The proposed amendments would require all persons that function as research analysts with a member to register as analysts with NASD, pass an analyst qualification exam and participate in the regulatory and firm elements of the member's continuing education program. The firm element program would have to include research analysts' training and education in ethics, professional responsibility and the requirements of Rule 2711.

Definitions

The proposed amendments would revise the definition of "research analyst" solely for purposes of the personal trading restrictions of Rule 2711 (g) to include supervisors of research analysts, including directors of research and members of supervisory committees.

Additionally, the definition of "public appearance" would be revised to include interviews with print media and the writing of a print media article.

The full text of the proposed rule is available by clicking here.

JONES WALKER

E*ZINES
November 2002 Vol. 15

Corporate and Securities
www.joneswalker.com
corporatesecurities@joneswalker.com

ADMIRALTY & MARITIME
ANTITRUST & TRADE REGULATION
AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

NASDAQ SUBMITS FORMAL CORPORATE GOVERNANCE RULE FILINGS TO SEC

By Robert Joseph Parkey, Jr.

On July 24, 2002, the board of directors of the NASDAQ Stock Market approved more than 25 new corporate governance reform proposals. Although NASDAQ did not publish the text of the proposals at that time, as the proposals have evolved with SEC input, several summaries have been released, most recently on October 10, 2002. After discussion with the SEC, NASDAQ has submitted formal rule filings with respect to many of those proposals. The following is a summary of the significant differences between the proposals originally approved by the NASDAQ board and the rule filings that NASDAQ has submitted to the SEC.

Independence of Directors

- Rule changes that would require issuers to modify the composition of their boards to meet NASDAQ's proposals for increased board independence will apply to issuers' first annual meeting of stockholders occurring after January 1, 2004. The original proposal provided that the rule changes would apply to the first annual meeting that occurs at least 120 days after SEC approval of those rule changes.

- Payments in excess of $60,000 by an issuer to family members of a director would only cause the director to be subject to the three-year "cooling off" period if the family member is not an employee of the issuer.

- A three-year "cooling off" period would also apply to any director that is employed as an executive officer of another entity where any of the issuer's executive officers serve on the compensation committee of such other entity.

- "Controlled companies," which are defined as companies of which more than 50% of the voting power is held by an individual, group or another company, would be exempt from the requirements for a majority independent board, executive sessions of independent directors and independent compensation and nominating committees. A controlled company relying

JONES WALKER

E*ZINES
November 2002 Vol. 15

Corporate and Securities
www.joneswalker.com
corporatesecurities@joneswalker.com

ADMIRALTY & MARITIME
ANTITRUST & TRADE REGULATION
AVIATION
APPELLATE LITIGATION
BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
BUSINESS & COMMERCIAL LITIGATION
COMMERCIAL LENDING & FINANCE
CONSTRUCTION
CORPORATE & SECURITIES
EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
ENERGY
ENVIRONMENTAL & TOXIC TORTS
ERISA, LIFE, HEALTH & DISABILITY INSURANCE LITIGATION
GAMING
GOVERNMENT RELATIONS
HEALTH CARE LITIGATION, TRANSACTIONS & REGULATION
INTELLECTUAL PROPERTY & E-COMMERCE
INTERNATIONAL
LABOR RELATIONS & EMPLOYMENT
MEDICAL PROFESSIONAL & HOSPITAL LIABILITY
MERGERS & ACQUISITIONS
PRODUCTS LIABILITY
PROFESSIONAL LIABILITY
PROJECT DEVELOPMENT & FINANCE
PUBLIC FINANCE
REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
TAX (INTERNATIONAL, FEDERAL AND STATE)
TELECOMMUNICATIONS & UTILITIES
TRUSTS, ESATES & PERSONAL PLANNING
VENTURE CAPITAL & EMERGING COMPANIES
WHITE COLLAR CRIME

on this exemption would be required to disclose in its annual meeting proxy that it is a controlled company and the basis for that determination.

Stock Option Plans

- The exemptions to the stockholder approval requirement for adoption and material modification of stock option plans have been clarified to apply to non-discriminatory employee benefit plans (e.g., plans that meet the requirements of Section 401(a) or 423 of the Internal Revenue Code) or parallel nonqualified plans, provided such plans are approved by the issuer's compensation committee or a majority of the issuer's independent directors.

Non-U.S. Issuers

- The proposal that would have required non-U.S. issuers to file with the SEC and NASDAQ all interim reports required to be filed in their home country have been eliminated for now.

- Proposals that would require (1) non-U.S. issuers to satisfy certain SmallCap initial and continued listing requirements applicable to domestic issuers and (2) non-U.S. issuers with listed ADRs to satisfy the same publicly held shares and shareholder requirements that are applicable to domestic issuers have been eliminated for now.

Other Proposals

- NASDAQ would presume that a change of control will occur, for purposes of the shareholder approval rules, once an investor acquires 20% of an issuer's outstanding voting power, unless a larger ownership and/or voting position is held by (1) a shareholder, or an identified group of shareholders, unaffiliated with the investor, or (2) the issuer's directors and officers that are unaffiliated with the investor.

- NASDAQ would have specific authority to deny re-listing to an issuer based upon a corporate governance violation that occurred while that issuer's appeal of the delisting was pending.

JONES WALKER

E*ZINES

November 2002 Vol. 15

Corporate and Securities

www.joneswalker.com

corporatesecurities@joneswalker.com

Admiralty & maritime

Antitrust & Trade Regulation

Aviation

Appellate Litigation

Bankruptcy, Restructuring & Creditors-Debtors Rights

Business & Commercial Litigation

Commercial Lending & Finance

Construction

Corporate & Securities

Employee Benefits, ERISA, & Executive Compensation

Energy

Environmental & Toxic Torts

ERISA, Life, Health & Disability Insurance Litigation

Gaming

Government Relations

Health Care Litigation, Transactions & Regulation

Intellectual property & E-Commerce

International

Labor Relations & Employment

Medical Professional & Hospital Liability

Mergers & Acquisitions

Products Liability

Professional Liability

Project Development & Finance

Public Finance

Real Estate: Land Use, Development & Finance

Tax (International, Federal and State)

Telecommunications & Utilities

Trusts, Esates & Personal Planning

Venture Capital & Emerging Companies

White Collar Crime

Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities practice group:

L. Richards McMillan, II
Jones Walker
201 St. Charles Ave., 51st Fl.
New Orleans, LA 70170-5100
ph. 504.582.8188
email rmcmillan@joneswalker.com

Corporate and Securities Practice Group

Brad J. Axelrod
Allison C. Bell
Lisa Manget Buchanan
Monique A. Cenac
Izabela M. Chabinska
Scott David Chenevert
Douglas N. Currault, II
Carl C. Hanemann
Curtis R. Hearn
William B. Masters
Meredith Guthrie Maxwell
L. Richards McMillan, II
Richard B. Montgomery
Margaret F. Murphy
Kenneth J. Najder
Amos John Oelking, III
Robert Joseph Parkey, Jr.
Andrew D. Pilant
Celeste Elizabeth Rasmussen
Dionne M. Rousseau
Kelly C. Simoneaux
James Edward Appell Slaton
Richard P. Wolfe

To subscribe to other E*Zines, visit www.joneswalker.com/news/ezine.asp