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Standards of Professional Responsibility

The SEC now has new standards of conduct for attorneys practicing before the agency. Release No. 33-8185 (Jan. 29, 2003) http://www.sec.gov/rules/final/33-8185.htm. The rule becomes effective on August 5, 2003 and implements Section 307 of the Sarbanes-Oxley Act of 2002, which required the SEC to prescribe minimum standards of professional responsibility for attorneys appearing and practicing before the SEC.[1]

Background

Section 307 of the Sarbanes-Oxley Act required the SEC to adopt, by January 26, 2003, a rule setting forth minimum standards of professional conduct for attorneys appearing and practicing before the SEC in the representation of public companies (including companies engaged in public offerings under the Securities Act of 1933). The statute mandates the rule to "requir[e] an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or chief executive officer of the company (or the equivalent thereof)." It also specifies that the rule must provide that if the chief legal counsel or chief executive officer to whom the attorney reports the evidence does not appropriately respond, such as by adopting, as necessary, appropriate remedial measures or sanctions, the attorney must report the evidence to either the audit committee, another independent committee of the board, or the full board.

Section 307 was enacted in part to remind attorneys representing public companies that their fiduciary duties are owed to the entity itself, not its individual directors and officers. Senator John Edwards, one of Section 307's chief proponents, made this point on the Senate floor, saying that "[i]f you are a lawyer for a corporation, your client is the corporation and you work for the corporation." In this regard, the American Bar Association's Model Rules of Professional Responsibly state that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

In response to Section 307's enactment, the SEC released a proposed rule for public comment. Release No. 33-8150 (Nov. 21, 2002) http://www.sec.gov/rules/proposed/33-8150.htm. The proposal went beyond the "up the ladder" reporting requirements of the statute. First, it contained a "noisy withdrawal" provision requiring an outside attorney who does not receive an appropriate response to his or her reports to (i) resign from the representation, (ii) notify the SEC of the withdrawal, and (iii) disaffirm any false or misleading SEC filings that the attorney participated in preparing. Also, the proposal's broad scope would have subjected foreign attorneys and non-practicing in-house attorneys, among others, to the rule's requirements. Lastly, the proposal contained various other requirements that many legal practitioners believed went too far beyond the Sarbanes-Oxley Act's legislative mandate and threatened to chill the attorney-client relationship, such as requirements that attorneys make and keep written records of their reports of evidence of material violations.

[1] The rule creates a new Part 205 of Title 17 of the Code of Federal Regulations.

As a result of much of the negative commentary on the proposed rule, the SEC voted at its January 23, 2003 open meeting to adopt modified "up the ladder" reporting requirements, but defer action on the "noisy withdrawal" portions of the proposal. As adopted, the final rule follows the legislative mandate of Section 307 of the Sarbanes-Oxley Act, but narrows the rule from the initial proposal by exempting foreign attorneys who do not advise on U.S. law, as well as non-practicing in-house attorneys who do not provide legal advice to their employer. It also eliminates the proposal's controversial documentation requirements. Simultaneous with adoption of the final rule, the SEC released a modified "noisy withdrawal" proposal. This proposal, while still requiring an attorney to withdraw if he or she receives an inadequate response to his or her "up the ladder" reports, would shift the SEC notification requirement from the attorney to the company itself. It would also eliminate the requirement that such an attorney disaffirm any false or misleading documents filed with the SEC. This proposal will remain open for public comment until April 7, 2003.

Attorneys Subject to Rule

The final rule applies to "attorneys appearing and practicing before the Commission in any way in the representation of issuers."

Who is an Attorney?

The final rule's definition of attorney covers "any person who is admitted, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law." Subject to the provisions described below, it generally includes both outside and in-house attorneys, as well as attorneys practicing outside of the United States.

Appearing and Practicing Before the Commission

Under the final rule, an attorney will be "appearing and practicing before the Commission" if he or she (i) transacts any business with the SEC, including communicating with the SEC or its staff, (ii) represents an issuer in an SEC administrative proceeding or in connection with an SEC investigation or information request, (iii) provides securities law advice regarding any document that the attorney has notice will be filed or submitted to the SEC (including documents incorporated by reference), or (iv) advises an issuer as to whether information or a document need be filed with or submitted to the SEC.

In the Representation of an Issuer

The initial proposal's definition of "in the representation of an issuer" would have covered any attorney acting at the behest or for the benefit of an issuer even in the absence of an explicit attorney-client relationship, which prompted comments that the term was too broad and imprecise. In response, the final rule's definition of

Foreign Attorney Exceptions

In response to numerous comments arguing that foreign attorneys should not be covered, the final rule's definition of "appearing and practicing" excludes "non-appearing foreign attorneys." A "non-practicing foreign attorney" is defined as an attorney who (i) is admitted to practice law in a jurisdiction outside the United States, (ii) does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws, and (iii) conducts activities that would constitute appearing and practicing before the SEC only incidental to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States. A foreign attorney also qualifies under the definition if he or she appears and practices before the SEC only in consultation with United States counsel. A foreign attorney who is not admitted in the United States, and who does not advise clients regarding U.S. law, as well as one who only provides legal advice regarding U.S. law in consultation with U.S. counsel, is therefore not covered by the rule. In addition, the rule does not cover an attorney representing a "foreign government issuer."

Even if a foreign attorney does not meet the definition of a "non-practicing foreign attorney," such an attorney is not required to comply with the rule to the extent that applicable laws in his or her home jurisdiction prohibit compliance. However, the SEC states in the final rule's release that such an attorney must comply "to the maximum extent allowed" by the regulations and laws to which he or she is subject.

this term requires an attorney to be "providing legal services as an attorney for the issuer." Although an attorney does not need be retained or employed by the issuer, he or she must be providing the legal services within the context of an attorney-client relationship. This portion of the definition will exclude from coverage an in-house employee who is licensed to practice law but does not work in the legal department and does not provide legal services within the context of an attorney-client relationship. Similarly, the final rule will not cover an attorney representing a party that may be assisting a public company in a securities transaction, such as counsel to an underwriter or auditor.

When is Reporting Required?

When an attorney appearing and practicing before the SEC in the representation of an issuer "becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer," the final rule's reporting obligations are triggered. The term "material violation" means any "material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law."

What Type of "Evidence" Triggers Reporting?

The rule adopts a wholly objective standard with respect to the determination of whether information is reportable and defines "evidence of a material violation" to mean "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur."[2] The inclusion of the word "credible" in the final rule, which had not been in the SEC's initial proposal, responds to concerns that the rule provided insufficient guidance to those determining whether they are aware of "evidence of a material violation."[3]

Although nearly all practicing lawyers commenting on the proposed rule called for a subjective standard requiring "actual belief" that a material violation has occurred, is ongoing or is about to occur, the final rule does not require that an attorney subjectively believe the evidence for the reporting obligation to be triggered. Nevertheless, an attorney's decision not to report evidence will not violate the rule if the decision was, under the circumstances, within the range of conduct in which an attorney may engage without being unreasonable. According to the SEC, relevant circumstances to be considered include such factors as (i) the attorney's professional skills, background and experience, (ii) the time constraints under which the attorney is acting, (iii) the attorney's previous familiarity with the client, and (iv) the availability of other lawyers with whom the lawyer may consult.

When is a Violation Material?

The SEC intends to apply the formulation established by the United States Supreme Court, by which information is deemed to be material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[4]

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[2] The release states that to be "reasonably likely" a material violation must be more than a mere possibility, but need not be "more likely than not."

[3] One commentator suggested that the proposed rule could require attorneys to report "gossip, hearsay and innuendo." *See* Comments of the Association of the Bar of the City of New York, at 10 http://www.sec.gov/rules/proposed/s74502/elmilonas1.htm.

[4] *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-232 (1988) (quoting *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

Initial Reporting Obligation

Upon becoming aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, an attorney representing the issuer must report the evidence to (i) the chief legal officer, or (ii) the chief legal officer *and* the chief executive officer (or their equivalents). Alternatively, the attorney may report the evidence to an independent board committee formed to investigate and resolve such matters (a “Qualified Legal Compliance Committee” or “QLCC”), if one has been formed (*see* “Optional Qualified Legal Compliance Committee Alternative” below).

The rule differs from the requirements mandated by Section 307 in two respects. First, reporting the violation solely to the issuer’s chief executive officer is not sufficient to satisfy the reporting obligation unless the information is also reported to the issuer’s chief legal officer. Second, it establishes an alternative reporting mechanism, which permits an attorney to report the evidence to a QLCC in lieu of reporting the evidence to the chief legal officer.

No Duty to Make Written Records of Reports

The SEC’s original proposal would have required an attorney reporting a material violation and a chief legal officer receiving such a report to document and retain the report. Commenters were overwhelmingly concerned with requirements to keep written records, with many observing the potential for chilling of communications between attorneys and clients. In response, the SEC eliminated all such documentation requirements from the final rule.

Obligations if Reporting Would Be Futile

If an attorney reasonably believes that it would be futile to report evidence of a material violation to the chief legal officer and chief executive officer, the attorney may report the evidence to the audit committee, or, if there is no audit committee, to another independent committee of the board, or, if there is no such committee, to the full board.

Obligations of Chief Legal Officer Upon Receipt of Report

The rule requires a chief legal officer receiving a report to make an inquiry into the evidence as reasonably appropriate to determine whether a material violation has occurred, is ongoing, or is about to occur. A chief legal officer who determines that there is no material violation must advise the reporting attorney of his or her finding. If he or she determines that a material violation has occurred, is ongoing, or is about to occur, the chief legal officer must take all reasonable steps to cause the issuer to adopt an appropriate response and must advise the reporting attorney thereof. The chief legal officer may bypass each of the foregoing requirements by referring the initial report of evidence of a material violation directly to a QLCC.

“Up the Ladder” Reporting Obligations

A reporting attorney who reasonably believes that the issuer has made an appropriate response within a reasonable time has no further obligations under the rule. On the other hand, an attorney not receiving an appropriate response in a reasonable time must report the evidence to the audit committee, or, if there is no audit committee, to another independent committee of the board, or, if there is no such committee, to the full board. A response is deemed appropriate if it leads the reporting attorney reasonably to believe (i) that no material violation has occurred, is ongoing, or is about to occur, (ii) that the issuer has adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence, or (iii) that the issuer, with consent of the board, the audit committee or a QLCC, has retained an attorney to review the evidence. The SEC has stated its view that receipt of an “inappropriate response” would be “truly extraordinary.”

Obligations if Response to "Up the Ladder" Reporting is Not Appropriate

If an attorney does not reasonably believe that he or she has received an appropriate response, within an appropriate time, to an "up the ladder" report to the audit committee, independent committee of the board or full board, such attorney must explain his or her reasons to the chief legal officer, the chief executive officer (or equivalent thereof), and directors to whom the attorney reported the evidence. Although the original release also would have required that an attorney, under certain circumstances, make a "noisy withdrawal" from representation by withdrawing and notifying the SEC of such withdrawal, the SEC has deferred action on imposing any such requirements. The SEC is currently accepting public comment on a proposal that would require attorneys who do not receive appropriate responses to withdraw from the representation if the material violation is ongoing or imminent and would be likely to result in substantial injury to the financial interest of the issuer or investors (*see* "SEC Defers Action on Noisy Withdrawal" below).

Optional Qualified Legal Compliance Committee Alternative

The rule permits issuers to form QLCCs to investigate evidence of material violations reported by attorneys. A reporting attorney who reports evidence of a material violation to a previously formed QLCC in lieu of reporting it to the chief legal officer fully satisfies all of his or her obligations under the rule, including all follow-up obligations.[5] In addition, a chief legal officer who receives a report of evidence of a material violation may refer the matter to a QLCC in lieu of personally investigating.

To be deemed a QLCC, a committee must consist of at least one member of the audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two members of the board who are not employed, directly or indirectly, by the issuer.[6] It must have adopted written procedures for the confidential receipt, retention and consideration of reports of material violations. The issuer's board of directors must bestow the QLCC with the authority and responsibility to (i) inform the chief legal officer and chief executive officer of such reports, (ii) determine whether an investigation into the evidence is necessary, (iii) notify the audit committee and/or board if it deems an investigation necessary, (iv) initiate an investigation conducted by the chief legal officer or outside attorneys, and (v) retain any experts it deems necessary. At the conclusion of the investigation, the QLCC must have authority to (i) recommend, by majority vote[7], that the issuer implement an appropriate response to any violation, (ii) inform the issuer's chief legal officer, chief executive officer and board of directors of the results of the investigation, and (iii) take other appropriate action, including notifying the SEC in the event that the issuer fails in any material respect to implement any appropriate response recommended by the QLCC.[8]

Application to Special Investigating Counsel

Although attorneys who are retained or directed by an issuer to investigate evidence of a material violation reported by another attorney are deemed to be appearing and practicing before the SEC, the final rule contains provisions that limit the obligations of investigating attorneys to make "up the ladder" reports. For instance, counsel retained by an issuer's chief legal officer to investigate a material violation

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[5] For a matter to be referred to a QLCC, the issuer must already have the QLCC in place. An issuer is not permitted simply to establish a QLCC to investigate a specific incident.

[6] If it meets the requirements, an audit or other committee of the issuer may serve as a QLCC. As a result, an issuer is not required to form a QLCC as a new corporate structure so long as another committee meets all of the criteria for a QLCC and agrees to function as a QLCC.

[7] The final rule provides that a QLCC shall act upon majority vote, and that an individual member of a QLCC should not act contrary to the collective decision of the QLCC, even if he or she votes in the minority on an action taken by the QLCC.

[8] Although the SEC's initial proposal would have required QLCCs to have power to compel the board to take remedial measures, the final rule provides that a QLCC shall have the authority and responsibility to recommend that the issuer implement an appropriate response, but not to require the issuer to take action.

does not have any further reporting obligations if such counsel reports the results of his or her investigation to the chief legal officer and either (i) the counsel and the chief legal officer each reasonably believes there is no material violation or (ii) the chief legal officer reports the results of the investigation to the issuer's board or an independent committee thereof. In addition, no reporting obligations exist if counsel reports the results to the chief legal officer and the investigating attorney was retained or directed by the chief legal officer to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer in any investigation related to the reported evidence and the chief legal officer provides timely reasonable reports on the progress and outcome of the matter to the board or an appropriate committee thereof. An attorney retained or directed by a QLCC to investigate the matter or assert a colorable defense is also relieved of "up the ladder" reporting obligations. Each of these exemptions is premised on the notion that under such circumstances, no "up the ladder" obligations will be necessary because the issuer's board or independent board committee is already being kept abreast of the matter. These exceptions, combined with the SEC's decision to defer consideration of the "noisy withdrawal" provisions, appear to address many of the concerns raised by practitioners who fear that the rule will hamper issuers' abilities to conduct internal investigations.

Protection from Retaliatory Discharge

An outside or in-house attorney who reasonably believes he or she has been discharged for fulfilling or attempting to fulfill reporting obligations under the rule is permitted to notify the issuer's board or any committee thereof that he or she believes the discharge was for making such a report. This provision is designed to ensure that a chief legal officer is not permitted to block a report of evidence of a material violation by simply discharging the reporting individual.

Disclosure of Confidential Information

An attorney may use any reports he or she makes, responses received thereto, or any related contemporaneous records, to defend himself or herself against charges that he or she has not complied with the rule.[9] In addition, an attorney is permitted to reveal confidential information to the SEC, without the issuer's consent, to the extent reasonably necessary to

(i) prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors,

(ii) prevent the issuer, in an SEC investigation or administrative proceeding, from committing or suborning perjury, or committing any act likely to perpetuate a fraud on the SEC[10], or

(iii) rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

Several commenters raised concern that permitting disclosure of confidential information without the issuer's consent would undermine the trust between the issuer and its attorneys. In the adopting release for the final rule, the SEC responded to this concern, stating that "generalized concerns about impacting the attorney-client relationship must yield to the public interest where an issuer seeks to commit a material violation that will materially damage investors, seek to perpetuate a fraud upon the Commission in enforcement proceedings, or has used the attorney's services to commit a material violation." Furthermore, while the final rule is inconsistent with ABA Model Rule 1.6, which does not

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[9] This provision is consistent with ABA Model Rule 1.6(b)(2), which provides that an attorney may reveal such information to the extent necessary to defend against allegations concerning the representation in a proceeding.

[10] The term "perpetuate a fraud" covers conduct involving the knowing misrepresentation of a material fact to, or the concealment of a material fact from, the SEC with the intent to induce the SEC to take, or to refrain from taking, a particular action.

permit such a disclosure to prevent fraud or other economic crimes, it comports with the majority of state ethical codes.[11]

Responsibilities of Supervisory and Subordinate Attorneys

The final rule addresses specific responsibilities of "supervisory attorneys" and "subordinate attorneys." An attorney who supervises or directs another attorney who is appearing and practicing before the SEC in the representation of an issuer is a "supervisory attorney."[12] An attorney who appears and practices before the SEC in the representation of an issuer under the supervision or direction of another attorney, other than under the direct supervision of the issuer's chief legal officer, is a "subordinate attorney." A supervisory attorney must make reasonable efforts to ensure that a subordinate attorney whom he or she supervises or directs complies with the rule. In addition, a subordinate attorney satisfies the rule's reporting obligations by informing his or her supervising attorney of evidence of a material violation. Such obligations are transferred to the supervising attorney in such circumstances.[13] A subordinate attorney who reasonably believes that his or her supervising attorney has not satisfied the rule's reporting requirements may, but is not required to, report the evidence "up the ladder" within the company.

Sanctions

The SEC has the sole power to enforce the rule; there is no private cause of action thereunder. Violations of the rule are subject to the civil penalties and remedies available to the SEC under the federal securities laws, such as SEC injunctive action, monetary penalties and cease-and-desist orders. In response to comments that the rule could subject attorneys to sanctions under inconsistent standards in some jurisdictions, the rule provides that attorneys who comply in good faith with the rule shall not be subject to discipline for violations of "inconsistent" (which the SEC uses to mean less rigorous) standards imposed by any state or other United States jurisdiction, although it is uncertain whether the SEC has authority to prevent such state disciplinary actions.

Comparison to ABA Model Rules of Professional Responsibility.

The rule's use of a reasonableness belief standard to trigger mandatory "up the ladder" reporting obligations sets a lower standard than the ABA's Model Rules of Professional Responsibility, while also limiting a lawyer's discretion in such a situation. Under Model Rule 1.13(b), such mandatory obligations are triggered only if the entity's lawyer *knows* that an officer or employee is violating a legal obligation to the entity or taking illegal action that might be imputed to the entity itself. The release states that the threshold set by the ABA's Model Rule "is too high." Under the ABA's Model Rules, an attorney in such a circumstance must "proceed as is reasonably necessary in the best interest of the organization." Although the ABA rule permits the attorney to refer the matter to higher authority in the organization, there is no specific requirement to report information "up the ladder."

Preemption

The final rule sets forth minimum standards of professional conduct and does not limit the ability of any state or other jurisdiction to impose more stringent obligations on an attorney. However, where the

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[11] As noted by the SEC in its final rule release, 37 states permit an attorney to reveal confidential client information in order to prevent the client from committing criminal fraud.

[12] An attorney who supervises or directs a subordinate attorney on matters unrelated to the subordinate's representation of the issuer before the SEC is not a supervisory attorney under the final rule.

[13] An attorney working directly for a chief legal officer is not a subordinate attorney, however. For this reason a report by such an attorney to the chief legal officer will *not* relieve that attorney of further "up the ladder" reporting requirements.

standards of a state jurisdiction conflict with the rule (i.e. set lower standards), the SEC intends for the final rule to preempt such conflicting standards.

Conclusion

After initially proposing standards of conduct that extended significantly beyond the directives of Section 307 of the Sarbanes-Oxley Act, SEC conformed its final rule much more closely to the specific dictates of the statute and thus raised fewer questions in terms of conflicts with state or other laws. In particular, the narrowing of attorneys to whom the rule applies provides greater certainty as to the rule's coverage. For instance, conditioning the rule's applicability on the existence of an attorney-client relationship with the issuer protects non-practicing in-house lawyers and removes any uncertainty regarding the rule's potential application to underwriter's and other third-party counsel. The elimination of the proposed rule's documentation requirements removes an impediment to honest and forthright communication between issuers and their attorneys. The clarification that the rule creates no private right of action also eliminates the potential for private litigation to enforce the rule, which ultimately would have imposed increased compliance costs on issuers and lawyers.

Notwithstanding these improvements, the rule may cause some significant changes in the manner in which issuers and their attorneys communicate. Although the rule's requirement that evidence be "credible" provides more guidance than the proposed rule, the wholly-objective standard, with no explicit consideration of an attorney's experience level and familiarity with securities law, raises the specter that an attorney making an honest effort to comply with the rule will nevertheless be subject to discipline. In addition, the "up the ladder" reporting requirements and internal obligations imposed upon chief legal officers receiving reports, do not sufficiently provide guidance for the potentially common scenario when reasonable inquiry into reported evidence leads to inconclusive results. In an effort to comply with this portion of the rule, many conscientious lawyers may feel compelled to press doubtful cases "up the ladder," and conscientious chief legal officers may feel compelled to take unnecessary responsive measures. Lastly, while the SEC's decision to defer action on the proposed "noisy withdrawal" provisions has temporarily eliminated the most controversial aspect of the initial proposal, the proposed alternate withdrawal requirement that issuers notify the SEC of attorney withdrawal is likely to have a chilling effect on attorney-client communications similar to that which would have resulted from enactment of the original proposal.

The precise scope and impact of the final rule will continue to evolve during the coming years as the SEC's enforcement stance adds insight into the rule's practical effects. Notwithstanding the additional scrutiny that Enron's collapse and recent accounting scandals have placed on the legal profession, attorneys should take some comfort in the fact that, historically, SEC disciplinary action against practitioners has been reserved for egregious cases of intentional misconduct. In addition, statements by SEC officials discussing the final rule express the view that the SEC has no intention to prosecute attorneys who honestly and diligently attempt to fulfill their professional obligations.

SEC Defers Action on Noisy Withdrawal

In response to a storm of criticism from legal practitioners and bar associations, the SEC has deferred action on its proposal to require attorneys to make a "noisy withdrawal" if they do not receive appropriate responses to "up the ladder" reports. Under the original proposal, outside attorneys who did not receive appropriate responses would have been required to withdraw from representation if the violation were ongoing or imminent and would have been likely to result in substantial injury to the financial interest of the issuer or investors. In addition to notifying the issuer, an attorney would have been required to notify the SEC within one day of the withdrawal that the attorney has withdrawn for professional considerations. The attorney also would have been required to disaffirm false and misleading filed documents he or she helped prepare. An in-house attorney would not have been required to resign, but would nevertheless have been required to disaffirm false and misleading filed documents if he or she helped prepare the documents and the violation were ongoing or imminent and likely to result in substantial injury to the financial interest of the issuer or investors. If the material violation had already occurred and were not ongoing, an in-house lawyer would have been permitted to take the foregoing steps but would not required to do so.

Many comments on the original proposal expressed concern that the rule would have a chilling effect on attorney-client communications. In addition, many foreign attorneys expressed concern that the requirements would be in conflict with the laws of their home jurisdiction. In response to these concerns, the SEC, in addition to deferring consideration of the original "noisy withdrawal" provisions, released an alternate proposal designed to respond to these concerns. Release No. 8186 (Jan. 29, 2003) http://www.sec.gov/rules/proposed/33-8186.htm.

Under the alternate proposal, absent an order or rule to the contrary by an authoritative body (such as a court or administrative order, or in the case of a foreign attorney, a law of his or her home country), attorneys would be required to notify the issuer in writing that they are withdrawing from the representation for "professional considerations" if they do not receive an appropriate response to their "up the ladder" reports and the violation is ongoing or imminent and would be likely to result in substantial injury to the financial interest of the issuer or investors. Although the attorney would not be required to notify the SEC of his or her withdrawal, nor to disaffirm SEC filings, the issuer itself would be required to notify the SEC of the withdrawal, within two business days, by filing a Current Report on Form 8-K (or Form 20-F or 40-F, if applicable).

Although the SEC has not formally abandoned the original proposal, public comments by the SEC's commissioners appear to indicate preliminary support for the alternate proposal (which is open for public comment until April 7, 2003). By providing that attorneys need not violate rules or orders of an authoritative body, the alternate proposal addresses the concern of foreign attorneys who might otherwise have been required to violate laws of their home country in order to comply with the rule. However, by requiring issuers to report withdrawals publicly on Form 8-K, the alternate proposal raises the same concerns as the original proposal with respect to the potential chilling effect on attorney-client communications.

David B.H. Martin
Brian C. O'Fahey

If you would like to learn more about the Securities Practice Group at Covington & Burling, please call any of the following:

Washington	David B.H. Martin	202.662.5128
	D. Michael Lefever	202.662.5276
New York	Bruce C. Bennett	212.841.1060
San Francisco	Andi Vachss	415.591.7069
London	Kelly Vance	44.20.7067.2040