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4TH AND 205: HOW A RUSH OF GLOBAL COMMENTS BLOCKED THE SEC'S FIRST ATTEMPTED PUNT OF ATTORNEY-CLIENT PRIVILEGE UNDER SARBANES-OXLEY

*John Paul Lucci*¹

“To ensure our financial integrity, Arthur Andersen
has auditors working right here in [the building].”
– Amber St. Pierre²

“A lawyer with his briefcase can steal more than a
hundred men with guns.”
– Mario Puzo, *The Godfather*³

In December 2001, Enron, one of the country's largest corporations, filed for bankruptcy protection.⁴ The bankruptcy came months after the company drastically restated earnings, and its share price fell from a high of ninety dollars to just twenty-six

¹ In memory of Robert and Coletta Schumacher. Special thanks to David S. Sokolow, Ian J. Kimbrell, and Angela M. Lucci for their insightful comments on this manuscript. B.A., *summa cum laude*, *Phi Beta Kappa* with honors in both Political Science and History; M.A. with honors in American Government, Case Western Reserve University. J.D., *magna cum laude*, *Order of the Coif*, Case Western Reserve University School of Law. This article is the third installment of John Paul's "Enron Trilogy." See also John Paul Lucci, Note, *New York Revises Ethics Rules to Permit Limited MDPs: A Critical Analysis of the New York Approach, the Future of the MDP Debate After Enron, and Recommendations for Other Jurisdictions*, 8 FORD. J. CORP. & FIN. L. 151 (2002) (discussing the multidisciplinary practice debate after Enron); John Paul Lucci, *Enron — The Bankruptcy Heard Around the World and the International Ricochet of Sarbanes-Oxley*, 67 ALB. L. REV. 211 (2003).

² *The Crooked E: The Unshredded Truth About Enron* (CBS television broadcast, Jan. 5, 2003) (film on file with author).

³ MARIO PUZO, *THE GODFATHER* 52 (1978).

⁴ Tom Hamburger et al., *Staff Saw Document Shredding at Enron*, WALL ST. J., Jan. 22, 2002, at A3.

cents in November of 2001.⁵ Unfortunately, Enron proved to be only the first of a series of corporate financial disasters.⁶ Scandals involving Enron, WorldCom, Qwest, Global Crossing, and Tyco cost shareholders a total of \$460 billion in a period of a few years.⁷

The initial Enron fallout had significant repercussions for several professions. Most of Enron's hired professionals paid an enormous price for their involvement with the company in the years preceding its bankruptcy.⁸ Enron's auditor, Arthur Andersen, was driven out of business.⁹ As a result, the "Big Five"¹⁰ accounting firms withered down to the "Final Four."¹¹ Its bankers, Citigroup and J.P. Morgan Chase & Company, were "pilloried repeatedly."¹² Only one group of professionals managed to escape the initial inquisition: Enron's lawyers.¹³ Joseph C. Dilg,

⁵ Robert L. Bartley, *Thinking Things Over: Enron: First, Apply the Law*, WALL ST. J., Feb. 11, 2002, at A23. For a brief summary of the Enron bankruptcy, see Lucci, *supra* note 1, at 190-92.

⁶ See, e.g., David L. Cotton, *Fixing CPA Ethics Can Be an Inside Job*, WASH. POST, Oct. 20, 2002, at B02 ("Once among the most-trusted professionals, some CPAs could exchange their pinstripes for prison stripes."). See also Lucci, *supra* note 1, at 211-12 (providing an overview of the collapse of Enron and the subsequent economic and political response to the scandal).

⁷ *Id.*

⁸ Mike France, *What About the Lawyers?*, BUS. WEEK, Dec. 23, 2002, at 58.

⁹ *Id.* See also *Global Accounting Code Is Necessary, KPMG Says*, CHINA POST, Dec. 7, 2002, at 1 (discussing the "Big 4" global accounting firms); Laura Tingle & Allesandara Fabro, *Auditors Face Tough Regime As APRA Attacks*, AUSTL. FIN. REV., Sept. 18, 2002, at 1 (observing that only the "Final Four" accounting firms remain).

¹⁰ See, e.g., Dean Calbreath, *As Audit Scandals Circle Globe, Trust in Western Model Wavers*, SAN DIEGO UNION-TRIBUNE, Feb. 21, 2002, at A1 (listing the "Big Five" accounting firms as Arthur Andersen, Deloitte & Touche, Ernst & Young, KPMG, and PricewaterhouseCoopers and Andersen).

¹¹ Tingle, *supra* note 9, at 1.

¹² France, *supra* note 8, at 58.

¹³ France, *supra* note 8, at 58 (providing a detailed account of the activities of Enron's lawyers and law firms and their relationships with Enron executives).

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managing partner of Vinson & Elkins, Enron's law firm, told the House Energy and Commerce Committee that, "[w]e never saw anything at Enron that we considered illegal."¹⁴ Many wondered if lawyers would be touched by corporate reforms set in motion by Enron's fall.

In an effort to end Enron-type scandals, Congress enacted the Sarbanes-Oxley Act of 2002,¹⁵ one of the most significant pieces of legislation governing U.S. securities markets since the 1930s.¹⁶ The Act, which became law a mere seven months after Enron filed for bankruptcy and was designed to "crack down on all the Enron-WorldCom-Global Crossing chicanery," provided tough criminal penalties for those who violate its provisions.¹⁷ When President Bush signed Sarbanes-Oxley into law on July 30, 2002,¹⁸ little attention was paid to Section 307,¹⁹ a relatively short passage in a bill of nearly 30,000 words. Section 307 directed the

¹⁴ See France, *supra* note 8, at 58, noting:

Are the lawyers as innocent as they claim? V&E and Enron's other outside law firms have taken far less heat than the company's accountants and bankers, but they played an equally important role in concocting the controversial transactions that allegedly concealed the company's true performance. Indeed, there's no way Enron's left hand could have sold so many assets to its right hand without creative input from both inside and outside counsel.

¹⁵ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of the U.S.C.).

¹⁶ Lucci, *supra* note 1, at 215.

¹⁷ Lucci, *supra* note 1, at 215.

¹⁸ Jeffrey S. Klein & Nicholas J. Pappas, *The Whistleblower Provisions of the Sarbanes-Oxley Act*, N.Y.L.J., Dec. 2, 2002, at 3 (discussing in part Sarbanes-Oxley Section 307 that requires the SEC to promulgate rules of professional conduct for attorneys practicing before it).

¹⁹ 15 U.S.C. § 7245 (2002).

Securities and Exchange Commission (the “SEC” or “the Commission”) to use its rulemaking authority to promulgate professional standards for lawyers practicing before it.²⁰ The goal of the provision was to prevent lawyers from ignoring or assisting in wrongdoing²¹ and, in doing so, to protect investors.²²

The SEC’s proposal and the international response to its efforts to alter the attorney client relationship are the subject of this article. This article is divided into six parts. Part I introduces the SEC’s initial proposal under Section 307. Part II reviews Sarbanes-Oxley, with emphasis on the statements of the sponsors of the amendment that led to the creation of Section 307. Part III reviews the SEC’s proposed Rule 205, promulgated under Section

²⁰ Section 307 provides:

Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule —

(1) requiring 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 the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

²¹ Paula Dwyer et al., *Year of the Whistleblower*, BUS. WEEK, Dec. 16, 2002, at 106.

²² *A New Dilemma for Attorneys*, CONN. L. TRIB., Dec. 16, 2002, at 23 (“The Securities and Exchange Commission must certainly know that new rules it has

307. Particular attention is placed on the rationale the SEC used to justify the drafting of a rule that appears to go beyond what Congress intended. Part IV looks at the response to this draft rule from commentators in the United States and those around the world. In looking at the international application of the SEC's proposal, the legal ethical rules in various foreign jurisdictions will be studied in order to find conflicts in the law. Particular attention will be paid to material received by the SEC during its formal comment process on this proposed rule. Part V examines the SEC's final rule. This part reviews not only the adopted up-the-ladder reporting requirements, but also looks at the SEC's retreat from a noisy withdrawal requirement and its plan for another round of comments on this controversial topic. Finally, Part VI concludes with a criticism of the SEC's alternative noisy withdrawal proposal as well as a recommendation for the regulation of lawyers.

I. THE APPROACHING STORM

In its first release discussing the proposed rule, the SEC hinted that it would interpret its mandate under Section 307 broadly.²³ Approximately four fiscal quarters after the Enron

proposed will limit the attorney-client privilege, but it has concluded that this is necessary to protect the investing public.”).

²³ Media Release, SEC Proposes Rules to Implement Sarbanes-Oxley Act Provisions Concerning Standards of Professional Conduct for Attorneys (Nov.

bankruptcy, the SEC released its proposed rule.²⁴ The proposed rule required both in-house and external lawyers of United States listed companies, including lawyers practicing outside the United States, to report “material violations” of the law to senior company officials.²⁵ This requirement that lawyers report violations of the law up the corporate hierarchy until an employee or board member takes action to correct the violation is known as the “up-the-ladder” requirement. The rule is “aim[ed] to force attorneys to alert a corporate client’s senior management, and ultimately its board, to evidence of wrongdoing.”²⁶

The SEC, however, added another more dramatic requirement not specifically called for in Sarbanes-Oxley or its legislative history. In addition to the up-the-ladder reporting

6, 2002), *available at* <http://www.sec.gov/news/press/2002-158.htm> (on file with author) [hereinafter SEC Rules].

²⁴ Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8150; 34-46868; IC-25829, 67 Fed. Reg. 71670 (prop. Dec. 2, 2002) (to be codified at 17 C.F.R. pt. 205), *available at* <http://www.sec.gov/rules/proposed/33-8150.htm> (on file with author) [hereinafter Standards of Conduct]. Proposed 17 C.F.R. pt. 205 will be known throughout this article as the “proposed rule” or “proposed Rule 205.”

²⁵ Antony Collins, *Lawyers Seek Exemptions on SEC Governance Powers*, LEGAL WEEK GLOBAL, Nov. 19, 2002, *available at* <http://www.legalweek.com/PrintItem.asp?id=11871> (observing lawyers will be required to effectuate a noisy withdrawal if corporate executives do not take remedial action to correct corporate wrongdoing); *see also* Larry Gondelman, *SEC’s Proposed Rules on Professional Conduct: The Impact on Attorney-Client Relationships and Related Privileges*, METRO. CORP. COUNS., Dec. 2002, at 16 (discussing a proposed rule requirement that attorneys “create and retain documentation of their efforts to report to the company’s chief legal officer or the chief executive officer their reasonable belief of a material violation of securities laws. . .”).

²⁶ Otis Bilodeau, *SEC Rules on Lawyers Draw Flak*, LEGAL TIMES, Nov. 11, 2002, at 01.

requirement, Part 205 included “other related provisions the Commission believe[ed were] important components of an effective reporting regime.”²⁷ One of the most controversial of these provisions was the SEC’s proposed addition of a “noisy withdrawal” requirement. Under a noisy withdrawal rule, a lawyer who took appropriate steps to report material violations of the law up-the-ladder and received an inappropriate response would be required to withdraw from the representation and report the alleged wrongdoing to the Commission.

Under the proposed “noisy withdrawal” rule, lawyers who uncover any wrongdoing in the company they represent would have to report it to either the chief legal counsel or the company’s chief executive.²⁸ If the company refused to take action, the lawyer would be required to report his or her client to the SEC.²⁹ In effect, corporate lawyers became whistleblowers.³⁰ The proposed noisy withdrawal rule operated similar to the rule that requires independent auditors who disagree with a company’s accounting to

²⁷ SEC Rules, *supra* note 23.

²⁸ Leo Lewis, *Lawyers Fear Becoming Grasses*, INDEPENDENT ON SUNDAY (London), Dec. 29, 2002, at 22 (“American and British lawyers have launched an assault on the Securities and Exchange Commission [SEC] over a law that would force them to ‘grass up’ their clients.”).

²⁹ *Id.* (reporting that the proposed new rule governs lawyers in response to the Enron scandal); see also Alex Novarese, *Under the Long Shadow of Enron*, LEGAL WEEK, Dec. 12, 2002, at 22 (calling the proposed rules “the rat-on-your-client” clause).

³⁰ Ysaiah Ross, *US Corporate Lawyers Asked to Become Whistleblowers*, AUSTL. FIN. REV., Oct. 25, 2002, at 57 (observing that the proposed rules “create national standards for all lawyers representing public companies”).

resign from the account and publicly state why they are terminating the professional relationship.³¹

The SEC invited interested parties to comment on the proposed Rule 205 as the Commission prepared to meet a January 26, 2003 deadline to issue the final rule.³² In the United States, academics,³³ attorneys,³⁴ corporations,³⁵ bar associations,³⁶ and law

³¹ Kathleen Pender, *Lawyers Object to Proposed SEC Rule*, SAN FRANCISCO CHRON., Dec. 17, 2002, at B1.

³² See, e.g., U.S. SEC, *Sarbanes-Oxley Rulemaking and Reports, SEC Proposes Rules to Implement Sarbanes-Oxley Act Provisions Concerning Standards of Professional Conduct for Attorneys*, Release No. 2002-158 (Nov. 6, 2002).

³³ See, e.g., Comments of Professor Susan P. Koniak, Boston University School of Law; Roger C. Cramton, Stevens Professor of Law Emeritus, Cornell Law School; George M. Cohen, Edward F. Howrey Research Professor, University of Virginia School of Law, et al., SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 17, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/skoniak1.htm> (on file with author) (including comments from individuals affiliated with the following institutions listed in order of initial appearance in the comment letter: University of Miami, University of California (Los Angeles), University of Virginia, Michigan State University, Northern Kentucky University, Yeshiva University, Quinnipiac University, University of California (Berkeley), Harvard University, Duke University, Pepperdine University, Columbia University, Duke University, Northwestern University, University of San Francisco, Georgetown University, Yale University, University of Texas, University of Pennsylvania, University of North Carolina, Marquette University, Rutgers University (Newark), Cornell Law School, University of Oklahoma, University of Minnesota, Boston University, St. Louis University, University of Colorado, University of Illinois, University of California (Davis), Stanford University, University of Pittsburgh, New York Law School, University of Memphis, Villanova University, Southern Methodist University, Fordham University, and the University of Denver).

³⁴ See, e.g., Comments of Barton S. Sacher, P.A.; Nancy Van Sant, Esquire; Roy M. Hartman, Esquire; Stan Beiley, Esquire; Marty Doyle, Esquire; Joseph Sacher, Esquire, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 17, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/bssacher1.htm> (on file with author) ("In our zeal to be expansive, creative and responsive . . . , we had best collectively 'stop, look and listen,' with our 'thinking caps on,' before we create an environment that makes the attorney/gatekeeper provisions so unworkable that the entire corporate governance apparatus is mixed in lawsuits. . . .").

firms³⁷ were quick to criticize Rule 205. Many argued that the proposed rule was “overreaching.”³⁸ As one bar association

³⁵ See, e.g., Comments of Scott W. MacKay, Associate General Counsel, Litigation & Compliance, Lockheed Martin Corporation, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 17, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/swmackay1.txt> (on file with author) (“[T]he definition of ‘appearing and practicing’ is overly broad and is beyond the statutory authority provided to the Commission by Section 307 of the Sarbanes-Oxley Act of 2002.”); Comments of Bart Schwartz, Senior Vice President and General Counsel, The MONY Group, Inc., SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 12, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/barschwartz1.txt> (on file with author) (“[T]he Proposed Section 307 Regulations go significantly beyond the requirements of the Edwards Amendment by inappropriately addressing other, far-reaching aspects of the attorney-client relationship.”).

³⁶ See, e.g., Comments of Timothy G. Hoxie, Chair, Business Law Section; Keith Paul Bishop, Co-Chair, Corporations Committee; Bruce Dravis, Co-Chair, Corporations Committee, Business Law Section, State Bar of California, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 16, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/tghoxiq1.htm> (on file with author) (“The Act provides no express authority for the Commission to adopt ‘reporting out’ or disaffirmance provisions in conflict with state laws. As a result, the conflicts between the Proposed Rules and state law requirements on attorney conduct are likely to be litigated. . .”).

³⁷ See, e.g., Comments of Skadden, Arps, Slate, Meagher & Flom LLP, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 16, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/skaddenarps1.htm> (on file with author):

[W]e respectfully submit that the Commission has gone well beyond the specified requirements and intended purpose of Section 307. The Commission is proposing an unprecedented and far-reaching body of rules governing attorney conduct that we believe will in significant respects undermine and be counterproductive to the key objectives of the Act, including Section 307. The Proposed Rules will so fundamentally alter the relationship between issuers and their attorneys that the level of consultation — and thereby the vital flow of information — between issuers’ senior management and business unit heads, on the one hand, and in-house and outside legal counsel, on the other hand, will inevitably and dramatically decrease.

³⁸ See, e.g., Comments of Loren S. Golden, President, Illinois State Bar Association, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-

observed, “the Commission has gone well beyond the Congressional intent, stretching the plain English of [Section] 307 by defining simple words and phrases to encompass conduct and actors in ways which were not contemplated and are not justified.”³⁹ Of all the criticisms contained in the comments submitted on the proposed Rule 205, none was more prevalent than the call to reconsider the noisy withdrawal requirement.⁴⁰ Commentators argued that the SEC should adopt only those provisions specifically required by Sarbanes-Oxley and defer those

02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/lsgolden1.htm> (on file with author).

³⁹ Comments of Gerald S. Backman, Chairman, Securities Regulation Committee, Business Law Section, New York State Bar Association, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/gesbackman1.htm> (on file with author).

⁴⁰ See Comments of David Smith, President, American Society of Corporate Secretaries, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/davsmith1.htm> (on file with author) (“We recommend that the Commission reconsider promulgation of the ‘noisy withdrawal’ provision as it appears to undermine the attorney-client privilege and the duty of confidentiality that attorneys have long owed their clients.”); *see also* Comments of Debevoise & Plimpton, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/debevoise1.htm> (on file with author) (“The Senators who proposed Section 307 were clear that this was what they contemplated would happen. They made no mention . . . of a requirement that an attorney not only go ‘up-the-ladder’ within the client, but also in essence make disclosure to the Commission through a ‘noisy withdrawal.’”); Comments of Simon M. Lorne, Munger, Tolles & Olson LLP, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/smlorne1.htm> (on file with author) (“The statute does, not, however, in any way suggest that the Commission should adopt a requirement that lawyers withdraw from representations, much less that they withdraw and notify federal regulatory authorities, and the legislative history, such as it is, is clearly to the contrary effect.”)

that would have a profound impact on the legal profession until further study and debate had occurred.⁴¹

American law firms with a multi-jurisdictional presence and many foreign law firms and bar associations criticized the proposed rule. For example, Clifford Chance and many others argued that Rule 205 presented three problems when applied to foreign lawyers.⁴² First, they argued Rule 205 created conflicting obligations for foreign lawyers that would try to comply with the rule and their own local ethics requirements.⁴³ Second, they argued that local foreign lawyers may not have the expertise to make determinations under United States law and the proposed Rule.⁴⁴ Third, they feared that the broad definition of “Practising before the Commission” in Rule 205 would unnecessarily ensnare many foreign lawyers who are rendering advice for clients that appears to be only tangentially related to American securities law.⁴⁵

The Council of Bars and Law Societies of the European Union (“CCBE”) called for the exemption of foreign lawyers from the coverage of the proposed rule.⁴⁶ The CCBE argued that

⁴¹ Comments of Attorneys’ Liability Assurance Society, Inc., A Risk Retention Group, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/alasi1.htm> (on file with author).

⁴² *See, e.g.*, Additional comments of Clifford Chance, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/clifford2.htm> (on file with author).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Comments of the Council of Bars and Law Societies of the European Union, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 16, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/ccberesponse.htm> (on file with author).

European Union (“EU”) lawyers are already strictly regulated in their home jurisdictions. Furthermore, the CCBE urged the SEC to recognize those regulations as equivalent to the stringent requirements of Sarbanes-Oxley.⁴⁷ For example, European lawyers have an existing duty to report-up-the-ladder upon discovering wrongdoing.⁴⁸

This approach is based on a recognition that the client is the company and not company officers, directors, and executives with whom the lawyer is in more direct contact.⁴⁹ Like many other commentators, the CCBE called upon the SEC to delay implementation of its noisy withdrawal requirement to allow more deliberative discourse on the matter.⁵⁰ As one commentator opined, “[t]here is no indication that the Commission has fully considered the possible conflict between the requirements of the rule and the professional standards that govern attorney conduct in foreign countries.”⁵¹

When the SEC issued the “final” version of the rule, the Commission followed the recommendation of commentators to delay portions of its wide-ranging proposal. While the SEC responded with slight changes and adopted the up-the-ladder reporting requirement, it delayed implementation of its noisy

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Comments of Wayne Kirk, Thelen Reid & Priest LLP, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 13, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/wkirk1.htm> (on file with author).

withdrawal proposal and extended the comment period to allow for discussion of this controversial issue.

II. THE LEGISLATIVE INTENT OF SARBANES OXLEY SECTION 307

During the Summer of 2002, Senator John Edwards, D-N.C., proposed amending Sarbanes-Oxley to require corporate lawyers to report securities law violations.⁵² This proposal became Section 307 of Sarbanes-Oxley. There was scarce discussion of the amendment or its rulemaking requirements.⁵³ However, this short section of Sarbanes-Oxley extended the SEC's authority to promulgate professional standards for lawyers, a power it had never held explicitly before.

⁵² Charles E. Ramirez, *Corporate Lawyers Balk at New SEC Rules: Attorney-Client Privilege Shattered Under Agency Changes*, DET. NEWS, Jan. 1, 2003, at 1E (quoting Patrick Daugherty, a partner at Foley & Lardner, who stated "[w]e're not corporate policemen . . . [w]e're counselors and advocates for our clients, and our clients are companies.").

⁵³ Robert S. Karmel, *A Bid to Regulate the Entire Bar*, N.Y.L.J., Dec. 19, 2002, at 3:

This provision was introduced as a rider to Sarbanes-Oxley by Sen. John Edwards, D-N.C., based on the suggestion of several law professors, to ensure that when a lawyer represents a public company the client is the corporation and not the CEO nor the chief financial officer. There was little discussion or examination of this amendment, and an unrealistic deadline of 180 days after passage of Sarbanes-Oxley was inserted for SEC rulemaking. It is hard to believe that in such a fashion, without debate or thoughtful consideration, Congress intended either to federalize the law of fiduciary duty and attorney-client privilege or to make attorneys quasi-government agents for the enforcement of securities laws by the SEC. Yet, this is precisely what the SEC has suggested it intends to do by proposing Rule 205 to implement §307 of Sarbanes-Oxley.

Senators John Edwards, Michael Enzi, and Jon Corzine added Section 307 by a floor amendment on July 20, 2002,⁵⁴ despite the ABA's objection.⁵⁵ The amendment's purpose was, stated Senator Enzi, to address failures by the bar associations to adequately police corporate lawyers.⁵⁶ The amendment directed the SEC to "adopt minimum standards of professional conduct" for attorneys appearing or practicing before it."⁵⁷ While many commentators agree that these senators did not have the expertise

⁵⁴ John C. Coffee Jr., *The Latest Sarbanes-Oxley Controversy: Section 307*, N.Y.L. J., Nov. 21, 2002, at 5 (providing an overview of the legislative history of Section 307).

⁵⁵ Gary Young, *ABA Moves to Work with SEC on New Conduct Rules*, NAT'L L. J., Nov. 18, 2002, at A31 (discussing how the ABA later began to work with the SEC by establishing a task force on November 13, 2002 to work with the commission as it puts the proposed regulation into final form).

⁵⁶ 148 CONG. REC. S6555 (daily ed. July 10, 2002) (statement of Sen. Enzi):

I am usually in the camp that believes States should regulate professionals within their jurisdiction. However, in this case, the State bars as a whole have failed. They have provided no specific ethical rule of conduct to remedy this kind of situation. Even if they do have a general rule that applies, it often goes unenforced. Most States also do not have the ability to investigate attorney violations involved with the complex circumstances of audit procedures within giant corporations.

Similarly, the American Bar Association's Model Rules of Professional Responsibility do not have mandatory rules for professional conduct for corporate practitioners which require them to take specific action. The ABA merely has a general rule that an attorney must represent the best interests of an organization and suggests a number of ways an attorney could respond, including reporting illegal conduct to a responsible constituent of the organization, such as the board of directors. But this does not mandate action.

⁵⁷ *The Proposed Rules Raise Three Critical Questions*, NAT'L L. J., Dec. 2, 2002, at B8 (observing that Section 307 was added to Sarbanes-Oxley late in its development by a floor amendment).

to regulate the legal profession properly, each sponsor of the amendment drew upon his legal or business experience to draft Section 307. Senator Edwards was a plaintiff's attorney; Senator Enzi was the Senate's lone accountant; and Senator Corzine was the Senate's lone investment banker.⁵⁸ While introducing this amendment, the senators "repeatedly expressed their collective view that the recent corporate scandals had not occurred without the participation of attorneys."⁵⁹ Two of the sponsoring senators argued that while attention should properly be paid to corporate executives and accountants while drafting reform legislation, measures should also seek to regulate legal counsel.⁶⁰

⁵⁸ Coffee, *supra* note 54, at 5.

⁵⁹ Coffee, *supra* note 54, at 5. See also Leslie Wharton, *Hazards for Attorney-Client Relationship*, N.Y.L.J., Nov. 18, 2002, at S1 ("In adopting § 307, Congress obviously anticipated that the new reporting requirement would increase the likelihood that fraudulent schemes would be detected and dealt with before they could have a serious impact on the corporation and its shareholders.").

⁶⁰ See, e.g., 148 CONG. REC. S6554 (statement of Sen. Enzi):

This amendment is designed to assure that attorneys are responsible for fully informing their corporate client of evidence of material violations of Federal securities law. That is what we are talking about through the whole accounting reform.

Over the past few months, Congress and the public have concentrated on the role of accountants and auditors involved in Enron, WorldCom, Global Crossing, and others. We have held hearings and drafted legislation intended to restore a high level of ethical behavior to corporate America and the accounting industry. This breach in ethical behavior led to the problems these companies are now experiencing. I have to say through all of those hearings, as an accountant, I felt the profession was very picked on, and the profession deserved to be picked on — not everybody in the profession. Again, it is that one-half of 1 percent or one-tenth of 1 percent who are fouling up everything for everybody. It happens in a lot of different professions.

As we beat up on accountants a little bit, one of the thoughts that occurred to me was that probably in almost every transaction there was a lawyer who drew up the documents involved in that procedure. I know as to the companies we looked at, that was the case. It seemed only right there ought to be some kind of an ethical standard put in place for the attorneys as well. All of the people who are involved should be looking at a new way of doing business.

As an accountant, I have been deeply disturbed by the action taken by some in my profession, and as a result I have taken a more personal interest than others might in drafting legislation which will ensure that accountants act professionally and responsibly, and which will protect the interests of corporate shareholders.

Following hearings on this matter, it has become clear that the role of attorneys who counseled these corporations and their accountants must be scrutinized as well. Just like accountants, these lawyers are expected to represent the corporation in the best interests of the shareholders. In doing so, these attorneys are hired to aid the corporation and its accountants in adhering to Federal securities law.

See also 148 CONG. REC. S6556 (daily ed. July 10, 2002) (statement of Sen. Corzine):

We have talked a lot in the wake of Enron and WorldCom about the responsibility of accountants and corporate managers. Rightly so, as we have seen far too much bending of the rules, breaking of the rules in pursuit of profit, pursuit of personal gain. In their wake, shareholders, employees, and frankly the whole economy, has suffered from the selfishness that we have seen demonstrated by the actions of many — the criminal actions, in some instances.

It is not insignificant that even before this week, before there was so much focus on this issue, this year there had been roughly \$2 trillion worth of damage, value lost in the stock market, which is reflective of the discomfort that investors across the globe, as well as here at home, feel about where we stand.

As a former corporate leader, I tell you I am disgusted with many of the actions I have seen taken by some corporate managers when they betrayed shareholders' trust, employees' trust, and the public confidence in general. I think they have basically betrayed our whole Nation's economy. That is why I have been pleased to work on this critical legislation that Senator Sarbanes has proposed regarding the accounting industry's corporate responsibility.

During debate on the Section 307 amendment, Senator Enzi stated that the attorney reporting requirements were not as onerous as those imposed on accountants. Accountants are all required to ultimately report violations of the law to the SEC.⁶¹ In fact, Senator Enzi specifically stated that the amendment he was proposing *would not* require lawyers to report violations of the law by their corporate clients to the SEC.⁶² In a response to a question posed by Senator Sarbanes, Senator Edwards explained that a lawyer would not be required to report wrongdoing outside the corporation.⁶³ He observed that the intent of Section 307 was to require attorneys to report illegal activity to the clients.⁶⁴ As Senator Corzine observed, “[t]he lawyer’s client is the corporation’s shareholders, not the manager . . . when management

But I do not think that is enough. I think, as Senator Edwards said when he brought this to our attention, executives and accountants do not work alone. In fact, in our corporate world today — and I can verify this by my own experiences — executives and accountants work day to day with lawyers. They give them advice on almost each and every transaction. That means when executives and accountants have been engaged in wrongdoing, there have been some other folks at the scene of the crime — and generally they are lawyers.

⁶¹ 148 CONG. REC. S6555 (statement of Sen. Enzi) (“[S]uch a disclosure obligation is still less onerous than that imposed on accountants under section 10A of the 1934 Securities Exchange Act, which requires an auditor to report, both to the client’s directors and simultaneously to the SEC, an illegal act if management fails to take remedial action.”).

⁶² *Id.* (“The amendment I am supporting would not require the attorneys to report violations to the SEC, only to corporate legal counsel or the CEO, and ultimately, to the board of directors.”).

⁶³ 148 CONG. REC. S6557 (statement of Sen. Edwards) (“There is no obligation to report anything outside the client — the corporation.”).

⁶⁴ 148 CONG. REC. S6556 (statement of Sen. Corzine) (“[We] have crafted an amendment that will clarify that lawyers who know of wrongdoing by a corporation must report that wrongdoing to the client so it can be corrected”).

is engaged in fraud it harms the shareholders. That is why we need to ensure that lawyers who know of illegal acts report those acts to the board of directors which represent [sic] those shareholders.”⁶⁵

III. THE SEC PROPOSAL AND RATIONALE

In accord with Section 307 of Sarbanes-Oxley, the SEC issued its proposed Rule 205 to “establish standards of professional conduct for attorneys who appear and practice before the Commission on behalf of issuers.”⁶⁶ The proposed rule has two primary components. First, it “responds to Congress’ mandate that the Commission adopt an effective ‘up-the-ladder’ reporting system.”⁶⁷ Secondly, the proposed rule incorporates “several corollary provisions that are not explicitly required by Section 307,

⁶⁵ *Id.*

⁶⁶ Standards of Conduct, *supra* note 24; *see also* SEC Rules, *supra* note 23:

The proposed rule recognizes that attorneys interact with the Commission on behalf of issuer clients in a number of ways, and reflects that Section 307 was intended to protect investors by imposing the “up-the-ladder” reporting requirement on all attorneys who appear or practice before the Commission on behalf of an issuer. Accordingly, the proposed rule would adopt an expansive view of who is an attorney subject to the rule, covering all attorneys who are admitted, licensed or otherwise qualified to practice law whether employed in-house by an issuer or retained to perform legal work on behalf of an issuer. In addition, the proposed rule would cover attorneys licensed, or otherwise qualified to practice, in foreign jurisdictions who appear and practice before the Commission.

⁶⁷ Standards of Conduct, *supra* note 24.

but which the Commission believes are important components of an effective 'up-the-ladder' reporting system."⁶⁸

A. Up-the-Ladder Reporting Requirements

Proposed Section 205.3(b) imposes a duty on an attorney appearing before the Commission in the representation of an issuer to report evidence of a material violation.⁶⁹ It makes clear that the attorney is an employee of the board and shareholders, and ultimately responsible for their fiscal interests.⁷⁰ The rule's reporting requirement is triggered "only when an attorney becomes aware of information that would lead a reasonable attorney to believe a material violation has occurred, is occurring, or is about to occur."⁷¹ This qualifier was designed to limit the instances where an attorney must make such a report.⁷² At first, the attorney is directed to "report to the issuer's Chief Legal Officer ('CLO'), or to the issuer's CLO and chief executive officer ('CEO')."⁷³ The attorney is instructed to document any attempts to influence the

⁶⁸ Standards of Conduct, *supra* note 24.

⁶⁹ Standards of Conduct, *supra* note 24, defines a material violation as "a material violation of the securities laws, a material breach of fiduciary duty, or similar material violation."

⁷⁰ See, e.g., SEC Rules, *supra* note 23 which provides:

Subsection 205.3(a) would affirmatively state that an attorney representing an issuer represents the issuer as an entity rather than the officers or others with whom the attorney interacts in the course of that representation, and that the attorney is obligated to act in the best interests of the issuer and its shareholders.

⁷¹ Standards of Conduct, *supra* note 24.

⁷² Standards of Conduct, *supra* note 24.

⁷³ Standards of Conduct, *supra* note 24.

company to take corrective action and any response received by the attorney from the CLO or CEO.⁷⁴

B. Noisy Withdrawal

If a reporting attorney fulfills these requirements within a reasonable time and documents the response, the attorney has successfully satisfied all obligations under the rule.⁷⁵ If the attorney receives a negative response, he or she is required to report evidence of the violation to the issuer's audit committee, or to another committee of independent directors, or ultimately, to the full board.⁷⁶ If an attorney feels that a report to the CLO or CEO would be futile, the attorney may directly report to the issuer's audit or other independent committee.⁷⁷ In the alternative, issuers

⁷⁴ Standards of Conduct, *supra* note 24. The proposed release also outlines the steps a CLO must take when receiving a report from an attorney:

When presented with a report of a possible material violation, the rule obligates the issuer's CLO to conduct a reasonable inquiry to determine whether the reported material violation has occurred, is occurring, or is about to occur. A CLO who reasonably concludes that there has been no material violation must notify the reporting attorney of this conclusion. A CLO who concludes that a material violation has occurred, is occurring, or is about to occur must take reasonable steps to ensure that the issuer adopts appropriate remedial measures and/or sanctions, including appropriate disclosures. Furthermore, the CLO is required to report "up-the-ladder" within the issuer what remedial measures have been adopted or sanctions imposed and to advise the reporting attorney of his or her conclusions.

⁷⁵ Standards of Conduct, *supra* note 24.

⁷⁶ Standards of Conduct, *supra* note 24; *see also* Leslie Wharton, *Hazards for Attorney-Client Relationship*, N.Y.L.J., Nov. 18, 2002, at S1 ("If [counsel] suspect fraud — indeed, if they have any 'evidence of' a fraud or crime — they must report it to the General Counsel, CEO or the audit committee.").

⁷⁷ Standards of Conduct, *supra* note 24.

may establish a qualified legal compliance committee (QLCC).⁷⁸ Under this approach, an attorney could satisfy his or her reporting obligation by notifying the QLCC of the violation.⁷⁹ A QLCC must be comprised of at least one member of a corporation's audit committee and at least two members of the corporation's board. All members of the QLCC must be independent.⁸⁰

Rule 205.3(d) outlines the duties of an attorney who makes an internal disclosure but is ignored.⁸¹ The rule distinguishes between outside counsel and those attorneys employed by the issuer.⁸² Outside attorneys, such as those employed by a law firm, who (1) have made a report, (2) have not received a favorable response, and (3) "reasonably believe that a material violation is ongoing or is about to occur and is likely to result in substantial injury to the financial interests of the issuer or of investors," are required to take several steps.⁸³ The attorney is required to

⁷⁸ Standards of Conduct, *supra* note 24.

⁷⁹ Standards of Conduct, *supra* note 24.

⁸⁰ See SEC Rules, *supra* note 23 ("[A] qualified legal compliance committee (QLCC) [is] comprised of at least one member of the issuer's audit committee, and two or more members of the issuer's board, all of whom must be independent, for the purpose of investigating reports made by attorneys of evidence of a material violation.").

⁸¹ Standards of Conduct, *supra* note 24; see also SEC Rules, *supra* note 23.

⁸² Standards of Conduct, *supra* note 24; see also *Editorials*, N.J.L. J., Nov. 18, 2002, at 1 ("The rules apply to both in-house and retained attorneys who appear or practice before the commission . . .").

⁸³ Standards of Conduct, *supra* note 24; see also SEC Rules, *supra* note 23, explaining:

The proposed rule would not require an attorney to 'know' that a violation has been committed. The rule's reporting obligation would be triggered when an attorney 'reasonably believes' that a material violation has occurred, is occurring or is about to occur, limiting the instances in which the reporting

withdraw, notify the SEC, and disaffirm submissions to the SEC that are tainted by the violation.⁸⁴

Similarly situated in-house lawyers are required to disaffirm any documents they have participated in drafting that are tainted by the violation, but are *not* required to resign.⁸⁵ If the material violation has “already occurred and has no ongoing effect,” the attorney is permitted, but not required, to take the above steps.⁸⁶ In-house lawyers who are discharged for compliance with this reporting obligation may report the discharge to the SEC and disaffirm in writing any submissions to the SEC.⁸⁷ In other words, the in-house lawyer is not required to report against his or her employer.

duty prescribed by the rule will arise to those where it is appropriate to protect investors.

⁸⁴ Standards of Conduct, *supra* note 24; see also Jeff Blumenthal, *SEC Disclosure Plan Has Attorneys on Edge*, THE LEGAL INTELLIGENCER, Nov. 8, 2002, at 1 (“[T]he . . . ‘noisy withdrawal’ option . . . [requires] a lawyer with a reasonable belief of client violation of SEC law who has exhausted the chain of command . . . [to] withdraw from the representation of the client and . . . inform the SEC that he or she is quitting.”).

⁸⁵ Standards of Conduct, *supra* note 24.

⁸⁶ Standards of Conduct, *supra* note 24.

⁸⁷ Standards of Conduct, *supra* note 24. The rule also sets forth the specific circumstances under which an attorney is authorized to disclose confidential information and details the respective responsibilities of supervisory and subordinate attorneys. See also SEC Rules, *supra* note 23 (“Subsections 205.4 and 205.5 would detail the respective responsibilities of supervisory and subordinate attorneys, both those employed in-house by the issuer and those serving as outside counsel retained by the issuer.”).

C. Sanctions for Violations

Section 205.6 of the proposed rule describes how the violations of the rule will be addressed by the SEC.⁸⁸ Violations are treated similarly to those under the Exchange Act, and injunctions and cease-and-desist orders are all possible sanctions.⁸⁹ A lawyer who is in violation of Rule “205 will have engaged in improper professional conduct and [is] . . . subject to administrative disciplinary proceedings.”⁹⁰ The end result could be suspension from practicing before the Commission.⁹¹ Discipline is available for intentional or reckless violations of the rule as well as negligent conduct when there is an instance of highly unreasonable conduct.⁹² The rule permits the SEC to impose disciplinary sanctions “even when the attorney is subject to discipline in the [jurisdiction] where he or she practices or is admitted.”⁹³

IV. ATTACK OF THE COMMENTATORS — THE LEGAL COMMUNITY’S RESPONSE

Commentators in the United States, as well as those in many foreign countries, criticized the SEC’s proposed rule. Many

⁸⁸ Standards of Conduct, *supra* note 24.

⁸⁹ Standards of Conduct, *supra* note 24.

⁹⁰ Standards of Conduct, *supra* note 24.

⁹¹ Standards of Conduct, *supra* note 24.

⁹² Standards of Conduct, *supra* note 24.

⁹³ Standards of Conduct, *supra* note 24.

asserted that the SEC had exceeded its mandate by legislating a noisy withdrawal requirement.

A. American Criticism of the Proposed Rule

In release numbers 33-8150 and 34-46868, the SEC invited comments on its proposed attorney professional conduct standards.⁹⁴ The SEC received comments from law firms, lawyers,⁹⁵ bar associations,⁹⁶ academics, corporations, and in-house counsels.⁹⁷ More than seventy of the nation's law firms asked the SEC to reconsider its controversial proposal that would force

⁹⁴ John F. X. Peloso & Stuart M. Sarnoff, *Securities Litigation and Enforcement — Attorney-Client, Work Product Privileges Under SEC Proposed Rules*, N.Y.L.J., Dec. 18, 2002, at 3.

⁹⁵ See, e.g., Sarah Laitner & Adrian Michaels, *New Set of Rules for SEC Heralds Wave of Reforms*, FIN. TIMES (London), Jan. 16, 2003, at 9 (“Lawyers are incensed that the SEC has proposed going beyond Sarbanes-Oxley, asking attorneys to report to the regulators certain instances of misconduct or disagreements with their client if the company and its board are not receptive to the complaints.”).

⁹⁶ See, e.g., Comments of Abba David Poliakoff, Chair, Kenneth B. Abel, Scott Freed, Eugene C. Holloway, Committee on Securities, Business Law Section, Maryland State Bar Association, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), available at <http://www.sec.gov/rules/proposed/s74502/adpoliakoff1.htm> (on file with author) (“By proposing Rule 205.3(d) the Commission has entered — gratuitously — an arena of huge controversy, a controversy that is far from settled and regarding which States have developed different approaches.”).

⁹⁷ See, e.g., Comments of Barry Nagler, Chairman of the Advocacy Committee of ACCA's Board of Directors, Senior Vice President and General Counsel, Hasbro, Inc. et al., SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), available at <http://www.sec.gov/rules/proposed/s74502/bnagler1.htm> (on file with author) (“The breadth and ambiguity of the Commission's proposed definition of ‘practicing before’ the Commission is ill-advised, and may create significant problems within U.S. and non-U.S.-based legal departments”).

lawyers to disclose evidence of client wrongdoing.⁹⁸ These firms,⁹⁹ like many other commentators, urged the SEC to take no action in implementing a noisy withdrawal requirement or applying these rules to lawyers outside the United States.¹⁰⁰

⁹⁸ Jeff Blumenthal, *Firms Pen Letters to SEC Against Proposed Rules*, THE LEGAL INTELLIGENCER, Dec. 18, 2002, at 1.

⁹⁹ Akin Gump Strauss Hauer & Feld LLP; Alston & Bird LLP; Arnold & Porter; Baker Botts LLP; Ballard Spahr Andrews & Ingersoll, LLP; Brobeck, Phleger & Harrison LLP; Bryan Cave LLP; Cadwalader, Wickersham & Taft; Cahill Gordon & Reindel; Chadbourne & Parke LLP; Cleary, Gottlieb, Steen & Hamilton; Clifford Chance; Covington & Burling; Cravath, Swaine & Moore; Davis Polk & Wardwell; Day, Berry & Howard LLP; Debevoise & Plimpton; Dechert; Dewey Ballantine LLP; Dorsey & Whitney LLP; Drinker Biddle & Reath LLP; Faegre & Benson LLP; Fenwick & West LLP; Foley & Lardner; Fried, Frank, Harris, Shriver & Jacobson; Fulbright & Jaworski LLP; Gardner Carton & Douglas; Gibson, Dunn & Crutcher LLP; Goodwin Procter LLP; Hale and Dorr LLP; Hogan & Hartson LLP; Hughes Hubbard & Reed LLP; Hughes & Luce, LLP; Hunton & Williams; Jones Day; Katten Muchin Zavis Rosenman; Kaye Scholer LLP; Kilpatrick Stockton LLP; King & Spalding; Latham & Watkins; LeBoeuf, Lamb, Greene & MacRae LLP; Linklaters; Mayer, Brown, Rowe & Maw; McDermott, Will & Emery; Milbank, Tweed, Hadley & McCloy LLP; Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.; Morgan, Lewis & Bockius LLP; Morris, Manning & Martin, LLP; Munger, Tolles & Olson LLP; O'Melveny & Myers LLP; Orrick, Herrington & Sutcliffe LLP; Osler, Hoskin & Harcourt LLP; Palmer & Dodge LLP; Paul, Weiss, Rifkind, Wharton & Garrison; Pepper Hamilton LLP; Pillsbury Winthrop LLP; Piper Rudnick LLP; Powell, Goldstein, Frazer & Murphy LLP; Preston Gates & Ellis LLP; Proskauer Rose LLP; Ropes & Gray; Schiff Hardin & Waite; Shearman & Sterling; Sidley Austin Brown & Wood LLP; Simpson Thacher & Bartlett; Skadden, Arps, Slate, Meagher & Flom LLP; Squire, Sanders & Dempsey LLP; Sullivan & Cromwell; Testa, Hurwitz & Thibault, LLP; Torys LLP; Wachtell, Lipton, Rosen & Katz; Weil, Gotshal & Manges LLP; White & Case LLP; Willkie Farr & Gallagher; Wilson Sonsini Goodrich & Rosati, PC; Winston & Strawn; and Wolf, Block, Schorr and Solis-Cohen LLP. Firm names are reproduced as they appear in Comments of 77 Law Firms, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/77lawfirms1.htm> (on file with author).

¹⁰⁰ *Id.*

The ABA also commented on Rule 205,¹⁰¹ having recently studied corporate governance. In July 2002, the ABA released a preliminary report recommending that lawyers have greater freedom to report on clients in cases of corporate malfeasance¹⁰² and called upon the ABA to consider revisions to the Model Rules of Professional Conduct. The report concluded that the ABA should adopt stronger ethics rules requiring lawyers to report corporate wrongdoing.¹⁰³ However, the ABA refused to ultimately adopt its own recommendations and elected to do nothing.¹⁰⁴ When the SEC issued its rule, the ABA said it would harm the public interest by interfering with a lawyer's ability to counsel clients.¹⁰⁵ As a solution to this criticism, the ABA called for a delay in implementing any provisions of Rule 205 that went beyond those specifically mandated by Section 307 of Sarbanes-Oxley.¹⁰⁶

¹⁰¹ Comments of Alfred P. Carlton, Jr., President, American Bar Association, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/apcarlton1.htm> (on file with author).

¹⁰² John Malpas, *IBA Launches Post-Enron Governance Taskforce*, LEGAL WK, Oct. 21, 2002 (discussing the creation of taskforce to address challenges facing international lawyers in the wake of Enron's collapse by the International Bar Association).

¹⁰³ *Id.*

¹⁰⁴ *Id.* See also Renee Deger, *Law Professors Led Fight for New SEC Rules*, THE RECORDER, Dec. 2, 2002 (reporting that after the ABA elected to take no action to revise its model rules more than 40 academics signed a letter to the SEC calling on the agency to assert its authority over securities lawyers).

¹⁰⁵ Patti Waldmeir, *Lawyers Object to Informing on Clients SARBANES-OXLEY ACT*, FIN. TIMES (London), Dec. 19, 2002, at 8 (observing that several bar associations have pointed out that the SEC's proposed rule goes well beyond what is required under Sarbanes-Oxley).

¹⁰⁶ *ABA Urges SEC Not to Exceed Sarbanes-Oxley Mandate Without Extended Comment Period*, DAILY RECORD OF ROCHESTER, Dec. 26, 2002, at 2 (reporting

Commentators argued that the SEC's proposed rule went well beyond the mandate given to the SEC in Sarbanes-Oxley¹⁰⁷

that ABA President Alfred P. Carlton, Jr. called on the SEC to defer its proposals to "allow sufficient time for careful consideration and broad comment").

¹⁰⁷ See, e.g., Comments of James P. Melican, Executive Vice President, Legal and External Affairs, International Paper Company, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 24, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/jpmelican1.htm> (on file with author) ("[M]any provisions of the proposed rule clearly extend far beyond the requirements of Section 307."); Comments of Anthony J. Horan, Secretary, JPMorganChase, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 20, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/jpmorganchase122002.htm> (on file with author) ("[W]e believe that these provisions of the proposed rule [mandating a noisy withdrawal] are unwarranted by Section 307. They go beyond the express language of the statute and the legislative history."); Comments of Henry A. McKinnell, Ph.D., Chairman of the Board and CEO, Pfizer Inc., Vice Chairman-Corporate Governance Task Force, Chairman-SEC Subcommittee, The Business Roundtable, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 20, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/hamckinnell1.htm> (on file with author) noting:

We are concerned, however, about the many areas in which the Commission's proposal goes beyond the internal reporting requirements set forth in Section 307. For example, the proposal would impose a 'reporting out' obligation on attorneys who do not believe the board has appropriately responded to evidence of misconduct, and it sets forth a number of circumstances under which attorneys would be authorized to disclose confidential information relating to the representation of an issuer. Neither the 'reporting out' requirement nor the disclosure provision is included in Section 307.

See also Comments of Dechert, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/dechert1.htm> (on file with author) ("In drafting Section 307 of the Sarbanes-Oxley Act of 2002, Senators Sarbanes, Edwards and Enzi unequivocally rejected notification to the SEC and they made that clear in their discussion of the Section reported in the Congressional Record."); Jonathan D. Glater, *A Legal Uproar Over Proposals to Regulate The Profession*, N.Y. TIMES, Dec. 17, 2002, at C1 (observing that corporate lawyers view the proposed rules violating legal privilege and compromising confidential conversations between lawyers and clients); Otis Bilodeau,

and accused the Commission of legislating.¹⁰⁸ In fact, Senator Enzi, one of Section 307's sponsors, observed during debate on the provision that all of a lawyer's reporting obligations were confined entirely "within the corporation."¹⁰⁹ While commentators note that

Richard Painter Argued for Years That Corporate Law Needed Policing, Enron Gave Him His Opening, LEGAL TIMES, Dec. 30, 2002 ("[T]he SEC has proposed going further than the Sarbanes-Oxley expressly requires."); Tamara Loomis, *77 Big Firms Deliver Objection to Proposed Rules Implementing Sarbanes-Oxley*, BROWARD DAILY BUS. REV., Dec. 20, 2002, at A19 ("But to the bar's dismay, the SEC's proposal . . . stretched the disclosure requirements well beyond what was contemplated by Congress."); Susan Hackett, *SEC Takes Aim, Misfires; Proposed Regs Mistake the Public for the Client, Turning Lawyers Into 'Police,'* LEGAL TIMES, Dec. 16, 2002, at 20 ("The recently released proposed regulations . . . go further than the legislation by suggesting that Section 307 reporting should not end at the board."); *SEC Proposes More Rules to Prevent Corporate Fraud*, THE ACCT., Nov. 19, 2002, at 2 (observing that the "noisy withdrawal" provision "is not required under the corporate governance law"); Chris Merritt & Kate Marshall eds., *Hearsay*, AUSTL. FIN. REV., Nov. 15, 2002, at 58 (observing that the SEC "may have gone a great deal further than initially expected").

¹⁰⁸ Comments of Nashville Bar Association, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 13, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/nashville1.htm> (on file with author) ("[W]e have a concern that the proposed rule goes far beyond establishing standards of professional conduct, and, instead, has created vague and complex 'legislation' of its own that would potentially expose attorneys to criminal prosecution for ethical violations.").

¹⁰⁹ 148 CONG. REC. S6555 (statement of Sen. Enzi):

This amendment instructs the Commission to establish rules that require an attorney, with evidence of material legal violation by the corporation or its agent, to notify the chief legal counsel or the chief executive officer of such evidence and the appropriate response to correct it. If these officers do not promptly take action in response, the Commission is instructed to establish a rule that the attorney then has a duty to take further appropriate action, including notifying the audit committee of the board of directors or the board of directors themselves, of such evidence and the actions of the attorney and others regarding this evidence. It is all within the corporation. This amendment is simple. It requires the attorney to contact specific persons who are part of the

Section 307 contains specific language calling for an up-the-ladder reporting requirement, there is no similar provision in the Section specifically permitting noisy withdrawal.¹¹⁰ As a result, commentators criticized the noisy withdrawal requirement as going “beyond anything explicitly or implicitly required by the Edwards amendment to the Sarbanes-Oxley Act.”¹¹¹

Commentators argued that a noisy withdrawal requirement creates several difficulties. First, many feared that the noisy withdrawal requirement would deter clients from seeking legal advice,¹¹² and make lawyers “agents of the Commission.”¹¹³ “This provision, which effectively requires an attorney to become a ‘whistleblower’ (although without content to the disclosure), will be counter-productive to full disclosure under the securities laws by undermining the ability of securities attorneys to obtain a frank

management hierarchy and explain the problem. If that fails to correct the problem, the attorney must contact the audit committee or the board of directors.

¹¹⁰ See, e.g., Comments of Richard Hall, Cravath, Swaine & Moore, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), available at <http://www.sec.gov/rules/proposed/s74502/csmoore121802.htm> (on file with author) (“Section 307 does not require mandatory noisy withdrawal.”).

¹¹¹ Comments of Edward H. Fleischman and 29 individuals, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Nov. 25, 2002), available at <http://www.sec.gov/rules/proposed/s74502/ehfleischman1.htm> (on file with author).

¹¹² Alfred P. Carlton Jr., Letter to the Editor, *ABA Examines Lawyer-Client Controversy*, CRAIN'S CHI. BUS., Nov. 18, 2002, at 10 (“Honoring the lawyer-client privilege preserves the trust clients need to be open in consulting their lawyers.”).

¹¹³ Comments of Sullivan & Cromwell, New York, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), available at <http://www.sec.gov/rules/proposed/s74502/sullivan1.htm> (on file with author).

and full relationship with management of registrants.”¹¹⁴ They contend that a lawyer should focus on representing client needs and not protecting himself or herself from the Commission’s wrath.¹¹⁵ Second, there was concern that the noisy withdrawal requirement would deter lawyers from learning as much as possible about their corporate clients’ activities.¹¹⁶ “If the final rule issued by the SEC does not protect the confidentiality provisions in state ethical rules, [a] lawyer’s ability to properly advise and represent clients in a variety of adversarial contexts, including before the SEC, will be compromised.”¹¹⁷ Third, while Sarbanes-Oxley was designed in part to restore investor confidence,¹¹⁸ commentators feared the proposed Rule 205 would harm investors if the rule directly caused an increase in Commission

¹¹⁴ Comments of Frederick D. Lipman, Blank Rome Comisky & McCaulley LLP, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Nov. 27, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/fdlipman1.htm> (on file with author).

¹¹⁵ Comments of Elliot G. Sagor, Chair, Ethics Committee, New York Council of Defense Lawyers, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/egsagor1.htm> (on file with author) (“Lawyers should not have to look to protect themselves in dealing with the agency. . .”).

¹¹⁶ Comments of Jennifer T. Nijman, President, Chicago Bar Association, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/jtnijman1.htm> (on file with author) (“Lawyers may be reluctant to learn too much about a client’s activities. The result will be irreparable damage to the most effective means of promoting compliance with law - the informed advice of a lawyer.”).

¹¹⁷ Comments of Joseph B. Levan, Varnum, Riddering, Schmidt & Howlett LLP, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/jblevan1.htm> (on file with author).

¹¹⁸ *France Will Call for Regulation of Ratings Firms*, WALL ST. J. (EUR.), Nov. 22, 2002, at M3 (“The Sarbanes-Oxley is a corporate governance law introduced July 30 in the U.S. to restore investor confidence following the wave of alleged corporate fraud cases.”).

investigations.¹¹⁹ Finally, in one of the more creative arguments, one commentator suggested noisy withdrawal would violate the Fifth Amendment by depriving executives of the right to counsel.¹²⁰

Several commentators focused on a conflict between management and shareholders under a regime of noisy withdrawal.¹²¹ For example, an issuer's attorney may be asked to provide counsel on management's decision whether to declare dividends.¹²² In this particular instance, one can envision a scenario where what is in management's best interest may not align with the interest of shareholders.¹²³ An attorney owing a duty to both the company and shareholders is presented with a potential

¹¹⁹ See Comments of Chadbourne & Parke LLP, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/chadbourne1.htm> (on file with author) (“[N]oisy withdrawal likely would lead to a Commission investigation, which may or may not be warranted, as well as attendant negative publicity, loss of investor confidence and decline in stock price or increased market volatility.”).

¹²⁰ Comments of W. Wayne Withers, Senior Vice President, Secretary and General Counsel, Emerson Electric Co., SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/wwwwithers1.htm> (on file with author) (“Compliance with these requirements would effectively deny issuers due process under the Fifth Amendment to the Constitution by depriving them of their right to counsel.”).

¹²¹ See, e.g., Comments of Christopher T. Bradford, President, Beverly Hills Bar Association, Bar Association of San Francisco, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/ctbradford1.htm> (on file with author) (“An attorney owes a duty to his or her client first and foremost. Representing another person or entity with interests adverse to the client is in direct violation of the rules of ethics governing lawyers.”).

¹²² *Id.*

¹²³ *Id.*

conflict.¹²⁴ These commentators argued that while the regulation of attorneys under Proposed Rule 205 is intended to protect the investor, the attorney's primary fiduciary obligation is to act in the best interests of the corporate entity, not the interests of shareholders.¹²⁵

Many corporations and bar associations protested the broad definition of "appearing and practicing before the Commission" that was included in the proposed rule.¹²⁶ For example, Lockheed Martin argued that the proposed rule would improperly apply to employees with law degrees working in a strictly nonlegal capacity.¹²⁷ Commentators questioned the fairness of holding an employee with a license to practice law to a higher standard than a regular employee if the attorney is not engaged in the practice of law.¹²⁸ This standard would unjustly punish an employee simply

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Standards of Conduct, *supra* note 24.

¹²⁷ Comments of Scott W. MacKay, Associate General Counsel, Litigation & Compliance, Lockheed Martin Corporation, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/swmackay1.txt> (on file with author) ("[T]he definition of 'appearing and practicing' is sufficiently broad to include an employee of an issuer who has a law degree but works outside the issuer's legal department in a non-legal capacity.").

¹²⁸ Comments of Charlotte M. Bahin, Director of Regulatory Affairs, Senior Regulatory Counsel, America's Community Bankers, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/cmbahin1.htm> (on file with author) ("We do not believe that attorneys who are not acting in a legal capacity at a company should be covered by the rule even if they are admitted, licensed or otherwise qualified to practice law.").

for keeping his or her law license active.¹²⁹ Furthermore, the provision could also apply to lawyers who are not securities lawyers but whose documents are submitted to the SEC as an attachment to a filing.¹³⁰ For example, a lawyer preparing an employment agreement which he or she “has reason to believe” would be an exhibit to a periodic filing would be “appearing or practicing before the Commission.”¹³¹

The broad definition of “material violation”¹³² also received criticism. In its comment letter to the SEC, OppenheimerFunds, Inc. expressed concern that the proposed definition would engulf more than criminal or fraudulent conduct.¹³³ Furthermore, OppenheimerFunds argued that it could encompass substantive

¹²⁹ *Id.*

¹³⁰ Comments of Carter, Ledyard & Milburn, New York, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/carterled1.htm> (on file with author) (“The term ‘practicing and appearing’ before the Commission, for example, would extend to attorneys who are not securities lawyers and who are not retained as such by an issuer, including a lawyer who negotiates or reviews a contract later filed with the Commission as an exhibit to a periodic report.”).

¹³¹ Comments of Henry Sill Bryans, Drinker, Biddle & Reath, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/hsbryans1.htm> (on file with author) (discussing the problems of a broad interpretation of the definition of lawyers practicing or appearing before the Commission).

¹³² See Standards of Conduct, *supra* note 24, explaining: “The rule defines the term ‘material violation’ to clarify that the term ‘material’ in Section 307(b) modifies all three succeeding references to violations (i.e., ‘violation of securities law,’ ‘breach of fiduciary duty,’ and ‘similar violation’), and that only evidence of material misconduct triggers the rule’s reporting obligation.”

¹³³ Comments of Mitchell J. Lindauer, Vice President & Assistant General Counsel, Oppenheimer Funds, Inc., SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/mjlindauer1.htm> (on file with author).

regulatory violations that are not the result of bad faith acts.¹³⁴ For example, the proposed rule would include violations of the broad affiliated transactions prohibitions, the daily pricing provisions of the Investment Company Act of 1940, or violations of the fiduciary duty of care.¹³⁵ The investment company industry, argued OppenheimerFunds, has successfully resolved these problem areas through internal procedures and the related investigations are dependent upon the confidentiality of the attorneys conducting them.¹³⁶ Furthermore, investment companies would incur significant compliance costs because they often utilize the talents of individuals not directly employed by investment companies.¹³⁷

B. Global Criticism of the Proposed Rule

The SEC also received comments on its proposed rule from foreign corporations, law firms, and offices of American law firms

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*; see also Comments of Craig S. Tyle, General Counsel, Investment Company Institute, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), available at <http://www.sec.gov/rules/proposed/s74502/cstyle1.htm> (on file with author) (“[T]he Investment Company Act requires advisers, at least annually, to furnish sufficient information to fund boards to enable them to evaluate the investment advisory contract. Moreover, numerous rules under the Investment Company Act require directors to be provided with various types of information.”).

¹³⁷ Comments of Debra M. Brown, Brown & Associates, Self Audit, Inc., SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 12, 2002), (“These are virtual companies and do not employ individuals directly. The cost of compliance with each of these rules will ultimately pass on to the investors, whereby, the U.S. investors continue to pay the price for the corporate scandals.”), available at <http://www.sec.gov/rules/proposed/s74502/dbrown1.htm> (on file with author).

located abroad.¹³⁸ Representatives of lawyers from Australia,¹³⁹ Brazil,¹⁴⁰ Canada,¹⁴¹ Germany,¹⁴² Japan,¹⁴³ the Hong Kong Special

¹³⁸ See, e.g., Comments of Tokyo Branch Offices of Three U.S. Law Firms, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 20, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/tokyo-offcs.htm> (on file with author).

¹³⁹ See, e.g., Comments of Ronald F Pol, President, Corporate Lawyers' Association of New Zealand; Peter Turner, Chief Executive Officer & General Counsel, Australian Corporate Lawyers Association, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002) *available at* <http://www.sec.gov/rules/proposed/s74502/rfpoll.htm> (on file with author) noting:

[W]e have three main areas of concern: The proposed rules create a trap for the 'unwary innocent'; They may inadvertently constrain the effectiveness of in-house lawyers in detecting and remedying inappropriate behaviour; and their apparent definitional and jurisdictional over-reach creates inconsistency and conflict with existing rules, and may inadvertently constrain the principled development of international best practice governance principles.

For additional overseas criticism of Sarbanes-Oxley generally, see Lucci, *supra* note 1.

¹⁴⁰ See, e.g., Comments of Nadine S. M. Baleeiro Teixeira, Renata Neeser, Maria Fernanda L.de Mello, Demarest & Almeida, members of the Brazilian Bar Association, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/nsmbaleeiro1.htm> (on file with author) noting:

Historically, the regulation of the legal profession in Brazil has been the responsibility of OAB [the Brazilian Bar Association]. Given the central role of the legal profession for the functioning of the court system in Brazil, the adoption of standards of professional conduct for attorneys practicing law in Brazil should remain the exclusive responsibility of OAB. We believe it would be inappropriate for the Commission to regulate attorneys admitted to practice and practicing law in Brazil solely because they may from time to time act on behalf of clients whose securities are listed on a U.S. stock exchange or traded on a U.S. inter-dealer quotation system or because they are in the process of conducting a public offering of securities in the United States. Therefore, we urge the Commission, in deference to long-standing principles of international comity, to refrain from attempting to exercise jurisdiction over the legal profession in Brazil or in other jurisdictions outside the United States.

Administrative Region of the People's Republic of China,¹⁴⁴

¹⁴¹ See Comments of Stikeman Elliott, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/jmbartos1.htm> (on file with author) (“[I]f applicable to non-U.S. lawyers proposed Part 205 would constitute an abrogation of the solicitor-client privilege which is codified under the rules of the various provincial law societies in Canada.”).

¹⁴² See, e.g., Comments of Dr. Dombek, German Federal Bar, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 17, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/dombek1.htm> (on file with author) noting:

[T]he extra-territorial impact of the proposed rules on German professional rules (Bundesrechtsanwaltsordnung) may result in a dilemma situation for attorneys in Germany. On the one hand attorneys are bound to particular secrecy rules set by the home country. In Germany for example, section 43b subparagraph II of the German Lawyers Act requires: ‘The Lawyer is bound by professional secrecy obligations. This duty refers to information that the lawyer became aware of in the course of the exercise of his profession. This does not apply to facts which are public or do not require secrecy according to their significance.’

At the same time the lawyer would be obliged by the ‘noisy withdrawal’ principle under certain circumstances prescribed by the proposed rules. That of course contravenes drastically with the aforementioned understanding of the German lawyer-client privilege.

¹⁴³ See, e.g., Comments of Nishimura & Partners, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/nishimura.htm> (on file with author) (“[The proposed rule would] infringe upon the autonomous authority of the JFBA [Japan Federation of Bar Associations] to regulate and discipline the conduct of attorneys that are qualified to practice law in Japan.”); Comments of Nagashima Ohno & Tsunematsu, Tokyo, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/nagashima1.htm> (on file with author) (“Our fundamental concern is that only attorneys qualified to practice law in the United States will have the resources and ability to comply with the obligations under the Proposed Rule.”).

¹⁴⁴ See, e.g., Comments of Peter J. Curley, David Johnson, Jeffrey Maddox, Hong Kong Special Administrative Region, People's Republic of China, Hong Kong, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/pjcurley1.htm> (on file with author) noting:

Israel,¹⁴⁵ Mexico,¹⁴⁶ the Netherlands,¹⁴⁷ New Zealand,¹⁴⁸ Portugal,¹⁴⁹

The legal system in Hong Kong has a well-established history of judicial independence recognized by U.S. courts and protected by provisions of the Basic Law. The PRC legal system is in transition with steps being taken to recognize the rule of law and the role of attorneys, but there exists no clear precedent under which U.S. courts have recognized the judicial findings of courts in the PRC under principles of comity. The combination of two distinct legal systems in one country is unusual, with relatively little precedent. In our view, is not reasonable to ignore the significant differences that exist between the two systems or the differences between the PRC and the U.S. legal systems.

We respectfully suggest that, due to the absence of clear U.S. precedents recognizing judicial findings of courts in the PRC under principles of comity, at this time it is not sufficiently clear that attorneys licensed to practice law only in the PRC can be expected to assist the Commission in achieving the objectives of Section 307 of the Act. Therefore, persons licensed to practice law only in the PRC should be excluded from the definition of attorney in paragraph (c) of proposed Section 205.2.

¹⁴⁵ See, e.g., Comments of Carl M. Sherer, Adv., Jerusalem, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/cmsherer1.htm> (on file with author) noting:

I urge the Commission not to subject attorneys in Israel and other foreign countries to the new rules. The new rules are designed to work with the American legal system and not with the legal systems in effect in foreign countries. Subjecting foreign attorneys to the new rules would likely have a chilling effect on offerings in the United States securities markets by foreign companies and by United States companies with mostly foreign operations.

See also Comments of Alex Hertman, Adv., Chairman, Ethics Committee, Israel Bar, Tel Aviv, Israel, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/ahertman1.htm> (on file with author) ("In short, attorneys practicing in Israel are subject to a rigorous regime of rules of professional ethics, some of which overlap with those of Part 205 and some of which conflict with provisions of Part 205.").

¹⁴⁶ See, e.g., Comments of C.P. Jorge Familiar Calderón, Vicepresidente de Supervisión Bursátil; Lic. Héctor Tinoco Jaramillo, Vicepresidente de Normatividad, National Banking and Securities Commission, Mexico, SEC

Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/jfcalderson1.htm> (on file with author) (“In addition, we are concerned that application of the proposed rules to attorneys practicing law in Mexico would be unnecessarily disruptive to the relationship between them and their clients without significantly enhancing the protection of investors.”).

¹⁴⁷ See, e.g., Comments of Robbert van der Vlist, General Attorney, Royal Dutch Petroleum Company, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/vandervliet1.htm> (on file with author) noting:

The wording of Section 307 of the Act already creates considerable problems and dilemmas for foreign in-house lawyers in particular. We are of the view that the Securities & Exchange Commission (“SEC”) should not adopt a rule which goes beyond the wording of section 307 of the Act and that any rule adopted should take account of the difference in position between a US lawyer, US securities lawyers in particular, and a foreign lawyer.

See also Comments of Allard C. Metzelaar and Derk J.R. Lemstra, Stibbe P.C., SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/acmetzelaar1.htm> (on file with author) noting:

For the following reasons we believe the Proposed Rules should not apply to Dutch attorneys. First, the Commission should not attempt to regulate the legal profession in countries other than the United States. Second, Dutch attorneys would encounter irreconcilable conflicts (of legal obligations) and could face disciplinary, civil and criminal sanctions under Dutch law if compelled to comply with the Proposed Rules under certain circumstances. Third, the Proposed Rules would be unnecessarily disruptive to the Dutch client-attorney relationship. Fourth, we query whether including Non-US attorneys would enhance the protection of investors.

¹⁴⁸ See, e.g., Comments of Mark Verbiest, Group General Counsel, Telecom Corporation of New Zealand Limited, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/mverbiest1.htm> (on file with author):

Currently, lawyers and their clients can engage in vigorous confidential debate as to the appropriate course when faced with challenging factual circumstances. Yet under the proposed rules, such debate will be stifled if lawyers are perceived as in effect having a veto power through the threat of ‘noisy withdrawal’ and the debate itself ultimately being made public, irrespective of whether the lawyer’s opinion might subsequently be proved wrong.

Spain,¹⁵⁰ Switzerland,¹⁵¹ the United Kingdom,¹⁵² and Venezuela¹⁵³

See also Comments of Christine Grice, President, New Zealand Law Society, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/cgrice1.htm> (on file with author) ("It is inherently inappropriate for lawyers, and in particular non-US, non- securities lawyers, to perform a 'policing' function.").

¹⁴⁹ *See, e.g.*, Comments of Rui Silveira, Chief Legal Officer; Francisco Vieira da Cruz, Internal Attorney; João Gomes da Silva, Internal Attorney, Banco Espírito Santo, S.A., SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/rsilveira1.htm> (on file with author) ("Furthermore, the Portuguese Attorneys statute imposes Portuguese attorneys, in general, to held secrecy from every information given by a client. In principle, only a court can order Portuguese attorneys to do the contrary.").

¹⁵⁰ *See, e.g.*, Comments of Rodrigo Uría Meruéndano, uría & menéndez, Madrid, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 17, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/ruimeruendano1.htm> (on file with author) noting:

[C]ompanies with a presence in the U.S. securities market receive close guidance from (and are subject to due diligence investigations by) their U.S. counsel with respect to their documents filed with the Commission and their compliance with U.S. securities laws on disclosure and corporate governance matters. Making clear that the responsibility for identifying and reporting evidence of violations of U.S. securities law rests solely with an issuer's U.S. lawyers, who are qualified for this task and are directly involved in the preparation of information filed or submitted with the Commission, would be more effective than creating the false impression that non-U.S. lawyers practicing their home country law are also enforcing U.S. securities laws.

¹⁵¹ *See, e.g.*, Comments of Urs P. Roth, A. Hubschmid, Swiss Bankers Association, Basel, Switzerland, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/uproth1.htm> (on file with author) noting:

Under Art. 398 of the Swiss Code of Obligations and Art. 12 of the Swiss Attorney Law, Swiss outside counsels are obligated to perform their mandate carefully and faithfully. A Swiss counsel must act in the best interest of his/her client. Art. 13 of the Swiss Attorney Law requires that all information entrusted to the counsel by his/her client must be treated as confidential. According to Art. 321 of the Swiss Penal Code it is a criminal offence to disclose any confidential

have stated that the rules would create a conflict between the SEC's demand for disclosure of wrongdoing and other nations' regulations that punish lawyers for violating confidentiality.¹⁵⁴ The proposed rule made it clear that in conflicts between state ethics rules¹⁵⁵ and Rule 205, 205 would control. However, it was unclear from the proposal how foreign ethics rules would be treated in a similar conflict. Furthermore, many foreign ethics codes directly conflict with the obligation imposed on attorneys under proposed

information. Breaching these rules can lead to disbarment, suspension and fines.

¹⁵² See, e.g., Comment, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002) (discussing problems proposed Rule 205 poses in England and Wales, France, Germany, Italy, Spain, and Sweden).

¹⁵³ See, e.g., Comments of Palacios, Ortega y Asociados, Caracas, Venezuela, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), available at <http://www.sec.gov/rules/proposed/s74502/palacios1.htm> (on file with author) noting:

Historically, the regulation of the legal profession in Venezuela has been the responsibility of the Congress, by means of the law; and Venezuelan bar associations. Given the central role of the legal profession for the functioning of the court system in Venezuela, the adoption of standards of professional conduct for attorneys practicing law in Venezuela should remain exclusively upon Venezuelan law. We believe it would be inappropriate for the Commission to regulate attorneys admitted to practice and practicing law in Venezuela solely because they may from time to time act on behalf of clients whose securities are listed on a U.S. stock exchange or traded on a U.S. inter-dealer quotation system or because they are in the process of conducting a public offering of securities in the United States.

¹⁵⁴ Robert Schmidt, *Non-U.S. Regulators, Lawyers Ask Relief on SEC's Audit Rules*, BLOOMBERG NEWS, Dec. 17, 2002, (reporting that some legal experts urged the SEC to narrow the proposed requirements to prevent conflicts with the rules of other countries).

¹⁵⁵ See Comments of Marshall L. Small, Morrison & Foerster LLP et al, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 17, 2002), available at <http://www.sec.gov/rules/proposed/s74502/mlsmall1.htm> (on file with author) (chart of listing ethics requirements in the states).

Rule 205.¹⁵⁶ And foreign ethics codes often declare that they supercede any foreign regulations, including those of the United States.¹⁵⁷ International lawyers argue that this new rule “could turn them into policemen and jeopardizes client confidentiality.”¹⁵⁸ Several commentators argued that the rule should contain a safe harbor for foreign lawyers complying with their own country’s ethics codes.¹⁵⁹

The proposed rule’s broad definition of “practicing or appearing before the Commission” presents problems for foreign lawyers. For example, many foreign lawyers draft documents under the laws of the country of their residence.¹⁶⁰ Often it is

¹⁵⁶ See Comments of Allen & Overy, Freshfields Bruckhaus Deringer, Herbert Smith, Linklaters, Lovells, and Norton Rose, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 17, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/allenfresh1.htm> (on file with author) (chart detailing proposed Rule 205 conflicts with the laws of Brazil, England, Germany, France, Italy, the Netherlands, Hong Kong, Singapore).

¹⁵⁷ *Id.*

¹⁵⁸ Sarah Laitner & Bob Sherwood, *SEC to Hear Foreign Groups' Concerns on Sarbanes-Oxley*, FIN. TIMES (London), Dec. 17, 2002, at 12, explaining:

For lawyers, section 307 of the act has sparked most concern. It requires lawyers who suspect a breach of ‘fiduciary duty’ or of US securities laws to report their concerns ‘up-the-ladder’ to management of the client company. That in itself is not too controversial. But what has raised hackles is the requirement for lawyers to conduct a ‘noisy withdrawal’ if they are unhappy with the response from the client. In that case, they must cease acting for the client and, crucially, tell the regulator [the SEC].

¹⁵⁹ See, e.g., Comments of Nancy B. Rapoport, Dean and Professor of Law, University of Houston Law Center, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/nbrapoport1.htm> (on file with author) (discussing the SEC’s authority to promulgate safe harbors).

¹⁶⁰ See, e.g., Comments of Torys LLP, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at*

difficult for these lawyers to determine in advance whether these documents will ultimately become part of an SEC filing in the United States.¹⁶¹ Furthermore, in drafting documents in accordance with the laws of one country, the documents may nonetheless conflict with United States law.¹⁶² Finally, foreign commentators fear that the rule's application to foreign lawyers could create difficulties for many attorneys who do not practice securities law on a regular basis¹⁶³ or are unfamiliar with American law.¹⁶⁴

C. Statements of Support for the Proposed Rule

Some commentators expressed support for portions of proposed Rule 205. Many comments endorsed the up-the-ladder

<http://www.sec.gov/rules/proposed/s74502/torys1.htm> (on file with author) noting:

[W]e commonly prepare documents for submission to Canadian securities regulatory authorities. We recognize that, on occasion, these documents might later be used by other attorneys in preparing documents for filing with the Commission. But in preparing and filing these documents, we are acting solely in our capacity as Ontario lawyers, bound to act in accordance with Canadian law and Canadian regulatory and ethical requirements. Any subsequent use of these documents is a matter for the attorneys responsible for filings with the Commission.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Comments, *supra* notes 139, 149.

¹⁶⁴ Comments of Tomotsune & Kimura, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/tomotsune1.htm> (on file with author) ("This aspect of the proposed rules is particularly troubling because the vast majority of attorneys practicing law in Japan are not admitted to practice law in the United States, and, accordingly, have no accurate knowledge of the U.S. securities laws.");

reporting requirement and stated that it would “be a useful complement to the corporate governance and disclosure reforms which the [Sarbanes-Oxley] Act [of 2002] mandates.”¹⁶⁵ Furthermore, commentators argued that it would assist attorneys to better serve the interests of shareholders, rather than those of corporate executives.¹⁶⁶ A few proponents concluded that the proposed rule would not violate most state ethics rules and that noisy withdrawals, even if they occurred, would be very rare.¹⁶⁷ Commentators argued that “[l]awyers should not aid and abet clients who are involved in criminal wrongdoing behind corporate doors,”¹⁶⁸ and that the noisy withdrawal requirement was necessary to implement the fundamental purpose of Section 307.¹⁶⁹

¹⁶⁵ Comments of Weil, Gotshal & Manges LLP, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/weilgotshall.htm> (on file with author).

¹⁶⁶ Comments of Fritz Heimann, Chairman and Nancy Zucker Boswell, Managing Director, Transparency International-USA, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/transintl121802.htm> (on file with author) (“We concur that a rule requiring attorneys to report violations to the highest level of authority within the organization would help ensure that an attorney acts in the best interest of the company and its shareholders, rather than that of corporate management.”). *Cf.* Comments of Latham & Watkins, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/latham1.htm> (on file with author) (“The duty of an attorney representing an issuer is to the issuer, and not to the shareholders or any other constituency. . .”).

¹⁶⁷ Waldmeir, *supra* note 105.

¹⁶⁸ Editorial, *Lawyers Should Not Aid, Abet Wrongdoers; State Disciplinary Boards Are Doing a Miserable Job Holding Attorneys Accountable*, SAN ANTONIO EXPRESS-NEWS, Dec. 29, 2002, at 2H (reporting that HALT, an organization for legal reform, discovered that only 3 percent of investigations by state bar associations resulted in public sanctions).

¹⁶⁹ Comments of Richard W. Painter, Visiting Professor of Law, University of Illinois College of Law, SEC Release Nos. 33-8150; 34-46868; IC-25829; File

V. THE SEC'S ALMOST FINAL RULE & A NEW HOPE FOR NOISY WITHDRAWAL

At first, there was little reaction from the SEC concerning the negative comments and calls for delay of the implementation of the noisy withdrawal requirement. Then, on January 14, 2003, the SEC hinted publicly for the first time that it might retreat from its noisy withdrawal requirement.¹⁷⁰ Individuals close to the proposed

No. S7-45-02 (Dec. 12, 2002) *available at* <http://www.sec.gov/rules/proposed/s74502/painter1.htm> (on file with author) noting:

Congress, when it directs the Commission to determine what rules are in the public interest and appropriate for the protection of investors, does not intend that the Commission should only do the absolute minimum required in the statute. Indeed, for the Commission to limit itself to the absolute minimum, when faced with a statutory mandate as broad as Section 307, would frustrate the intent of Congress.

See also Comments of Mark Hennessey, William F. Hogsett, David M. O'Loughlin, Gregory A Smith, Law Department, Eaton Corporation, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/mhennessey1.htm> (on file with author) ("With the exception of the requirements to withdraw and notify the Commission of the withdrawal, the 'up-the-ladder' reporting requirements will, to the extent issuers and their counsel do not already engage in vigorous internal debate over matters involving corporate conduct, be beneficial."). *See also* Comments of Mark Hennessey, William F. Hogsett, David M. O'Loughlin, Gregory A Smith, Law Department, Eaton Corporation, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/mhennessey1.htm> (on file with author) ("With the exception of the requirements to withdraw and notify the Commission of the withdrawal, the 'up-the-ladder' reporting requirements will, to the extent issuers and their counsel do not already engage in vigorous internal debate over matters involving corporate conduct, be beneficial.").

¹⁷⁰ Kathleen Day, *SEC Mulls Retreat on Forcing Disclosure; Lawyers Protest Agency's Proposal*, WASH. POST, Jan. 14, 2003, at E04:

The Securities and Exchange Commission, in the face of protests from securities lawyers, is considering dropping a

rule commented that the addition of the noisy withdrawal requirement was proving “complicated” and that some of the SEC commissioners had been swayed by arguments against the proposal.¹⁷¹

After much speculation, the SEC issued a media release on January 23, 2003 summarizing its final rule promulgated under Section 307.¹⁷² This final rule release made effective the up-the-ladder reporting requirement and also clarified definitions in the December 2002 proposed release.¹⁷³ The SEC also issued a second proposed rule under Section 307 and extended the comment period for another sixty days on the issue of noisy

proposal that would make attorneys blow the whistle on their corporate clients, sources at the agency say. . . . Now a majority of the five-member SEC is weighing whether to drop the noisy-withdrawal requirement, sources say. Instead, lawyers' responsibility would end once suspected wrongdoing is reported to the head of a company. Then responsibility for acting — and for alerting regulators — would fall to the company, particularly the board of directors. . . . The new wording being weighed by the SEC would also permit voluntary reporting to the agency, sources said.

See also Terry Maxon, *Lawyers May Not Be Forced to Report Fraud; SEC Probably Will Ask Them to Voice Concerns With Board, Analyst Says*, DALLAS MORNING NEWS, Jan. 22, 2003, at 1D (“The [SEC] may delay its proposal to force attorneys to tell on clients they believe are violating federal securities laws.”); *SEC Under Fire From Accountancy Tied Firms*, THE LAWYER, Jan. 20, 2003, at 3 (“[I]t has been rumored that the SEC has caved in to demands to drop provisions for a so-called ‘noisy withdrawal’ by lawyers who uncover client’s financial wrongdoings.”).

¹⁷¹ Adrian Michaels & Patti Waldmeir, *SEC Could Delay ‘Noisy Withdrawal,’* FIN. TIMES (London), Jan. 20, 2003, at 6.

¹⁷² Media Release, SEC Adopts Attorney Conduct Rule Under Sarbanes-Oxley Act, Jan. 23, 2003, *available at* <http://www.sec.gov/news/press/2003-13.htm> (on file with author).

¹⁷³ *Id.*

withdrawal.¹⁷⁴ On January 29, 2003, the SEC posted on its website two releases: a final release which made effective the up-the-ladder reporting requirement¹⁷⁵ and another proposed rule soliciting additional comment on the noisy withdrawal requirement.¹⁷⁶

¹⁷⁴ *Id.*

¹⁷⁵ Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8185; 34-47276; IC-25929, 68 Fed. Reg. 6296 (codified at 17 C.F.R. 205), *available at* <http://www.sec.gov/rules/final/33-8185.htm> (on file with author) provides:

The [SEC] is adopting a final rule establishing standards of professional conduct for attorneys who appear and practice before the Commission on behalf of issuers. Section 307 of the Sarbanes-Oxley Act of 2002 requires the Commission to prescribe minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers. The standards must include a rule requiring an attorney to report evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the issuer up-the-ladder within the company to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and, if they do not respond appropriately to the evidence, requiring the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors. Proposed Part 205 responds to this directive and is intended to protect investors and increase their confidence in public companies by ensuring that attorneys who work for those companies respond appropriately to evidence of material misconduct. We are still considering the “noisy withdrawal” provisions of our original proposal under section 307; in a related proposing release we discuss this part of the original proposal and seek comment on additional alternatives.

¹⁷⁶ Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8186; 34-47282; IC-25920, 68 Fed. Reg. 6324 (to be codified as 17 C.F.R. Parts 205, 240 and 249), *available at* <http://www.sec.gov/rules/proposed/33-8186.htm#discussion> (on file with author) provides:

The [SEC] is soliciting comments on proposed rules setting standards of professional conduct for attorneys who appear and practice before the Commission on behalf of issuers. Section 307 of the Sarbanes-Oxley Act of 2002 requires the Commission to prescribe minimum standards of professional conduct for attorneys appearing and practicing before the

*A. The Final Rule*¹⁷⁷

The SEC received a total of 167 timely comment letters: 123 from domestic parties and 44 from foreign parties.¹⁷⁸ As a result, “the final rule . . . has been significantly modified in light of these comments and suggestions.”¹⁷⁹ The Commission adequately addressed the concerns of commentators in several areas. For example, the SEC clarified that Rule 205 “does not preempt ethical rules in United States jurisdictions that establish more rigorous obligations than imposed by this part.”¹⁸⁰ At the same time, the Commission reaffirmed that its rules prevail over conflicting or

Commission in any way in the representation of issuers. The Commission in a companion release has adopted rules under Section 307. The Commission also is extending the comment period for certain other rules under Section 307. In particular, the Commission is extending the comment period for the provisions regarding an attorney’s notification to the Commission (more commonly referred to as ‘noisy withdrawal’) when an attorney, after reporting evidence of a material violation up-the-ladder of the issuer’s governance structure, reasonably believes an issuer’s directors have either made no response (within a reasonable time) or have not made an appropriate response. This release solicits additional comments on the ‘noisy withdrawal’ provisions previously proposed and proposes an alternative approach. This release also solicits additional comments on the rules that the Commission adopted under Section 307.

¹⁷⁷ This section discussing the final rule is not intended to be all inclusive of the dozens of new requirements contained in the rule and its release. Rather, this section looks at those aspects of the proposed rule that received the most comment now that they have appeared in their final form.

¹⁷⁸ Standards of Conduct Release, *supra* note 175, at 6297.

¹⁷⁹ Standards of Conduct Release, *supra* note 175, at 6297.

¹⁸⁰ Standards of Conduct Release, *supra* note 175, at 6297.

inconsistent laws of a state or other United States jurisdiction in which an attorney is admitted or practices.¹⁸¹

The Commission also made numerous changes narrowing broad definitions contained in the proposed rule. For example, an attorney must have notice that a document he or she is drafting will be submitted to the Commission to be deemed “appearing and practicing” under the revised definition.¹⁸² The definition further clarifies that an attorney’s preparation of a document, such as a contract, which he or she never intended or had notice would be submitted to the Commission, does not constitute “appearing and practicing” before the Commission.¹⁸³ Under the final rule, an attorney is not required to actively practice law to be included under this definition.¹⁸⁴ However, a question of whether an attorney is appearing before the Commission will be determined based on an analysis of the relationship between the parties.¹⁸⁵

The final rule responded to calls for special foreign exemptions. As the Commission observed, “commentators suggested that it was inappropriate to apply the rule to foreign attorneys, arguing that foreign attorneys, and attorneys . . . employed by multijurisdictional firms, are subject to statutes, rules, and ethical standards in those foreign jurisdictions that are different from, and potentially incompatible with, the requirements

¹⁸¹ Standards of Conduct Release, *supra* note 175, at 6297.

¹⁸² Standards of Conduct Release, *supra* note 175, at 6297.

¹⁸³ Standards of Conduct Release, *supra* note 175, at 6298.

¹⁸⁴ Standards of Conduct Release, *supra* note 175, at 6298.

¹⁸⁵ Standards of Conduct Release, *supra* note 175, at 6298.

of this rule.”¹⁸⁶ The revised rule significantly narrows the originally proposed definition of “attorney” and “appearing before the commission”¹⁸⁷ and adds a definition, “non-appearing foreign

¹⁸⁶ Standards of Conduct Release, *supra* note 175, at 6298.

¹⁸⁷ Standards of Conduct Release, *supra* note 175, at 6301:

[T]he definition excludes from the rule those attorneys who: (1) are admitted to practice law in a jurisdiction outside the United States; (2) do not hold themselves out as practicing, or giving legal advice regarding, United States law; and (3) conduct activities that would constitute appearing and practicing before the Commission only (i) incidentally to a foreign law practice, or (ii) in consultation with United States counsel. A non-United States attorney must satisfy all three criteria of the definition to be excluded from the rule.

The effect of this definition will be to exclude many, but not all, foreign attorneys from the rule’s coverage. Foreign attorneys who provide legal advice regarding United States securities law, other than in consultation with United States counsel, are subject to the rule if they conduct activities that constitute appearing and practicing before the Commission. For example, an attorney licensed in Canada who independently advises an issuer regarding the application of Commission regulations to a periodic filing with the Commission is subject to the rule. Non-United States attorneys who do not hold themselves out as practicing United States law, but who engage in activities that constitute appearing and practicing before the Commission, are subject to the rule unless they appear and practice before the Commission only incidentally to a foreign law practice or in consultation with United States counsel.

...

Section 205.2(j) and the final definition of “appearing and practicing before the Commission” under section 205.2(a) together address many of the concerns expressed by foreign lawyers. Foreign lawyers who are concerned that they may not have the expertise to identify material violations of United States law may avoid being subject to the rule by declining to advise their clients on United States law or by seeking the assistance of United States counsel when undertaking any activity that could constitute appearing and practicing before the Commission. Mere preparation of a document that may be included as an exhibit to a filing with the Commission does not constitute ‘appearing and practicing before the Commission’ under the final rule, unless the attorney has

attorney,”¹⁸⁸ designed to address many of the concerns expressed regarding the application of the rule to foreign attorneys.¹⁸⁹

Finally, in response to near unanimous opposition, the Commission dropped several proposals. For example, in the proposed release, an attorney making an up-the-ladder report was required to document his or her efforts to notify management, and ultimately the Board, of any violations.¹⁹⁰ The comments on this documentation requirement “were almost unanimously in opposition to its inclusion in the final rule.”¹⁹¹ Some asserted that this documentation requirement would stymie communications

notice that the document will be filed with or submitted to the Commission and he or she provides advice on United States securities law in preparing the document.

Id. at 3603-04.

¹⁸⁸ 17 C.F.R. § 205(2)(j) (2003) provides:

(j) Non-appearing foreign attorney means an attorney:

(1) Who is admitted to practice law in a jurisdiction outside the United States;

(2) Who 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 (except as provided in paragraph (j)(3)(ii) of this section); and

(3) Who:

(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

¹⁸⁹ Standards of Conduct, *supra* note 24.

¹⁹⁰ See Standards of Conduct, *supra* note 74 and accompanying text; see also Standards of Conduct Release, *supra* note 175 at 6306 (“Under the proposed rule, a lawyer would have been required to document his or her report of evidence of a material violation.”).

¹⁹¹ Standards of Conduct, *supra* note 24.

between attorneys and clients while others argued that it would create conflicts among lawyers and their clients.¹⁹²

B. The SEC Strikes Back – A Second Noisy Withdrawal Proposal

Responding to the wave of criticism, the SEC delayed implementation of the noisy withdrawal requirement and extended the comment period¹⁹³ by offering two formulations of the noisy withdrawal requirement. The first version is essentially the same text offered in December 2002. The second proposal is an alternative formulation requiring the company to notify the Commission if an attorney withdraws from representation.¹⁹⁴ Recognizing the complexity of these noisy withdrawal requirements, the SEC invited comment on twenty aspects of its proposal¹⁹⁵ and seventeen aspects of its new alternative.¹⁹⁶

¹⁹² Standards of Conduct, *supra* note 24.

¹⁹³ Patti Waldmeir, *SEC Retreats on Sarbanes-Oxley Measures for Company Lawyers*, FIN. TIMES (London), Jan. 24, 2003, at 27 (“[T]he commissioners shied away from immediately ruling on what lawyers should do when reporting to the board does not solve the problem.”).

¹⁹⁴ Standards of Conduct, *supra* note 24, at 6324.

¹⁹⁵ Standards of Conduct, *supra* note 24, at 6327:

(1) whether the proposed rule should include any provision permitting or requiring notification to the Commission when an attorney receives no response or an inappropriate response or whether this is a matter best left to state or local bar disciplinary processes; (2) whether a higher standard should apply to notification to the Commission than to reporting up-the-ladder within the issuer and, if so, how much higher it should be and how should such a higher test be framed; (3) whether “noisy withdrawal” should be mandatory under some circumstances but permissive under others and, if so, what circumstances should make “noisy withdrawal” mandatory and what circumstances should make “noisy withdrawal”

permissive, or whether “noisy withdrawal” should be mandatory under all circumstances covered by section 205.3(d) or should be permissive under all such circumstances; (4) whether it is appropriate to distinguish between material violations that are ongoing or impending and material violations that are past and have no continuing effect, and whether such a distinction would be meaningful to investors; (5) whether the attorney who has reported evidence of a material violation to which the issuer has not made an appropriate response must know that the reported material violation has occurred, is occurring, or is about to occur before the attorney is required, or permitted, to make a “noisy withdrawal”; (6) whether an attorney should be required, or permitted, to make a “noisy withdrawal” where the attorney has not received an appropriate response to reported evidence of a material violation, and the attorney reasonably believes that the reported material violation has occurred, is occurring, or is about to occur; (7) whether there is an appropriate basis for a “noisy withdrawal” under circumstances in which an attorney reasonably believes that the reported material violation is likely to have occurred, be ongoing, or be about to occur; (8) whether there is an appropriate basis for a “noisy withdrawal” under circumstances in which the attorney reasonably believes that it is reasonably likely that the reported material violation has occurred, is ongoing, or is about to occur; (9) whether substantial injury to the financial interest of investors is an appropriate prerequisite to a “noisy withdrawal”; (10) whether substantial injury to the financial interest of the issuer client is an appropriate prerequisite to a “noisy withdrawal” and, if so, whether such substantial injury to a financial interest must be reasonably certain, likely, or merely possible; (11) whether the rule should distinguish between outside attorneys and those employed by the issuer and, if so, under what circumstances, how, and why; (12) whether an attorney who is employed by an investment adviser or manager and who is appearing and practicing before the Commission in the representation of the investment company should be treated as an outside attorney retained by the investment company under proposed paragraph (d)(1)(i) or should be treated as an in-house attorney under proposed paragraph (d)(1)(ii); (13) whether the rule should specify the content of a disaffirmance of an opinion or representation; (14) whether the rule should require that any disaffirmance be in writing; (15) whether there are any other actions the rule should require an attorney to take when the attorney does not receive an appropriate response to his or her report of

evidence of a material violation (e.g., should an in-house attorney be required to cease participating in or assisting in any matter relating to the violation); (16) what is the appropriate length of time to permit an attorney to make a “noisy withdrawal”; (17) whether it is important to require any successor attorney to be notified that the previous attorney withdrew based on “professional considerations” and, if so, whether there is a better way to require such notification be made than is proposed in paragraph (d)(1)(iii); (18) whether such notification should be required where “noisy withdrawal” is merely permissive; (19) whether it is important to provide a “safe harbor” from civil suits for the attorney who notifies the Commission that he or she has withdrawn based on professional considerations under proposed paragraph (d) and/or disaffirmed a document; and (20) whether the “noisy withdrawal” provisions would create conflicts with applicable law for any attorneys (foreign or U.S.) not excluded by the definition of “non-appearing foreign attorney” (section 205.2(j) of the rule as adopted). Should “noisy withdrawal” apply to these attorneys? If not, why not? If the provisions would create conflicts for these attorneys, please describe the conflicts and how they appropriately may be resolved.

¹⁹⁶ Standards of Conduct, *supra* note 24, at 6328-29:

1) whether requiring a different and higher evidentiary standard for withdrawal than for reporting up-the-ladder of the issuer, such as requiring an attorney to “conclude” there is “substantial evidence,” will make the circumstances in which an attorney must withdraw (triggering an issuer’s notification of the Commission) too narrow adequately to protect investors; (2) whether requiring an attorney to make a separate, more definitive, determination that evidence shows that a material violation “is” ongoing or “is” about to occur (rather than is likely to be ongoing or is likely to occur) too narrows the circumstances in which an attorney must withdraw (triggering an issuer’s notification of the Commission) and fails adequately to protect investors; (3) whether requiring an attorney to make a separate determination of whether “substantial injury” is likely will make the circumstances in which an attorney must withdraw (triggering an issuer’s notification to the Commission) too narrow adequately to protect investors; (4) whether the proposed alternative’s requirement that the attorney make all three determinations addressed in the three preceding questions (higher level of evidence, more definitiveness, and substantial injury) so narrows the circumstances in which an attorney would withdraw (and an issuer would notify the

Commission) so that the withdrawal and reporting requirements would be rendered ineffective; (5) whether an issuer's ability under the adopted rule to respond appropriately to a report of evidence of a material violation by retaining or directing an attorney to assert a colorable defense (should one exist), with the consent of the board of directors, would mitigate issuer concerns about withdrawal being required in situations where no violation actually has occurred; (6) whether failing to apply mandatory withdrawal (triggering an issuer's notification of the Commission) to past violations fails adequately to protect investors; (7) whether requiring an attorney to make a determination as to whether a violation "has occurred" or whether it "is ongoing" adequately protects investors; (8) whether the proposed rule should include a provision permitting or requiring withdrawal from representation when an attorney does not receive an appropriate response to his or her report of a material violation; (9) whether alternative proposed section (d) is more compatible with existing state standards governing attorney conduct than the "noisy withdrawal" and disaffirmation requirements of proposed section 205.3(d)(1)-(3) described above and, if so, how; (10) whether alternative proposed section (d) is otherwise preferable to original proposed section 205.3(d)(1)-(3) as described above and in the Proposing Release; (11) whether alternative proposed section (d) is more compatible with foreign law governing attorney conduct than the "noisy withdrawal" and disaffirmation requirements of proposed section 205.3(d)(1)-(3) described above; if so, why; if not, why not; (12) whether an attorney who has reported evidence of a material violation to which the issuer has not made an appropriate response must know that the reported material violation is occurring or is about to occur before the attorney is required to withdraw or cease participation or assistance on a matter; (13) whether an attorney who is required to withdraw under this paragraph should be required to withdraw from all representation of the issuer, or only from representation on the matter concerning the material violation; (14) whether investors and issuers will receive adequate protection if the rule does not require attorneys to disaffirm any opinion, affirmation, representation or the like in a document the attorney or issuer filed with the Commission and that the attorney reasonably believes is, or may be (or is reasonably likely to be) materially false or misleading; (15) whether investors and issuers will receive adequate protection if the rule contains no requirement that either an attorney or an issuer notify the Commission when the attorney withdraws or

The SEC's alternative proposal shifts the burden of reporting an attorney's withdrawal from the attorney to the company.¹⁹⁷ Like the Commission's first proposal, the alternative continues to distinguish between lawyers working within an issuer and lawyers working within a firm or other entity providing legal counsel to an issuer.¹⁹⁸ Under this alternative proposal, the issuer, rather than the attorney, would be *required* to report a withdrawal if an attorney did not receive a favorable response to a report of a violation.¹⁹⁹ An issuer would report the withdrawal and the

gives the issuer notice that he or she has not received an appropriate response to a report of a material violation; (16) whether an attorney who is prohibited from withdrawing or ceasing participation or assistance in a matter by a court or administrative body or other authority with jurisdiction over the attorney should be required to give notice to the issuer that, absent such prohibition, he or she would have taken such action or whether such a requirement is likely to be inconsistent with the attorney's continuing representation of the issuer; and (17) whether the proposal's withdrawal requirements would conflict with the obligations of attorneys not excluded by the "non-appearing foreign attorney" definition under applicable foreign law or professional standards of conduct.

¹⁹⁷ Elliot Blair Smith, *Corporate Reforms May Not Measure Up*, USA TODAY, Jan. 24, 2003, at 3B.

¹⁹⁸ Standards of Conduct, *supra* note 24, at 6328:

(A) An attorney retained by the issuer shall withdraw from representing the issuer, and shall notify the issuer, in writing, that the withdrawal is based on professional considerations.

(B) An attorney employed by the issuer shall cease forthwith any participation or assistance in any matter concerning the violation and shall notify the issuer, in writing, that he or she believes that the issuer has not provided an appropriate response in a reasonable time to his or her report of evidence of a material violation under paragraph (b) of this section.

¹⁹⁹ Standards of Conduct, *supra* note 24, at 6329:

(e) Duties of an issuer where an attorney has given notice pursuant to paragraph (d). Where an attorney has provided an issuer with a written notice pursuant to paragraph (d)(1),

surrounding circumstances on form 8-K, 20-F, or 40-F within two days of receiving the attorney's notice.²⁰⁰ If a company failed to make this disclosure, the alternative proposal would permit the attorney to report the failure to the SEC.²⁰¹

VI. CRITICISMS, ANALYSIS, AND RECOMMENDATIONS

The SEC has repeatedly acknowledged that Rule 205, in all of its proposed versions, goes beyond the requirements of Sarbanes-Oxley.²⁰² While the up-the-ladder approach was contemplated in the legislative history, no such deliberation occurred with respect to the noisy withdrawal requirement. While the Commission cites the Congressional Record several times in its

(d)(2) or (d)(3) of this section, the issuer shall, within two business days of receipt of such written notice, report such notice and the circumstances related thereto on Form 8-K, 20-F, or 40-F (§§ 249.308, 220f or 240f of this chapter), as applicable.

²⁰⁰ Standards of Conduct, *supra* note 24, at 6329.

²⁰¹ Standards of Conduct, *supra* note 24, at 6335:

(2) An attorney shall not be required to take any action pursuant to paragraph (d)(1) of this section if the attorney would be prohibited from doing so by order or rule of any court, administrative body or other authority with jurisdiction over the attorney, after having sought leave to withdraw from representation or to cease participation or assistance in a matter. An attorney shall give notice to the issuer that, but for such prohibition, he or she would have taken such action pursuant to paragraph (d)(1) or (d)(2), and such notice shall be deemed the equivalent of such action for purposes of this part.

²⁰² See, e.g., SEC Rules, *supra* note 23 ("The Commission voted to propose a new Part 205 to 17 CFR, Standards of Professional Conduct for Attorneys Appearing and Practicing before the Commission, that includes: (1) 'up-the-

proposed release,²⁰³ it is unable to point to where noisy withdrawal rules were considered. In drafting Sarbanes-Oxley, Senators Sarbanes, Edwards, and Enzi unequivocally rejected notification to the SEC, and they were explicit in their discussion of Section 307 reported in the Congressional Record.²⁰⁴ At best, the SEC is only able to use the legislative history as evidence that Congress did not specifically forbid a noisy withdrawal requirement. However, such logic is inherently inconsistent with the statements of Section 307's sponsors.²⁰⁵ In fact, the SEC acknowledges that "the proposed rule incorporates several corollary provisions that are not explicitly required by Section 307, but which the Commission believes are important components of an effective 'up-the-ladder' reporting system."²⁰⁶ The SEC's proposed rule fundamentally alters the role of lawyers making them "policemen"²⁰⁷ without a Congressional mandate.

Furthermore, the SEC's proposal is a federal encroachment on states' rights²⁰⁸ and interferes with the regulation of lawyers in many foreign jurisdictions.²⁰⁹ The SEC's noisy withdrawal and

ladder' reporting, and (2) other related provisions the Commission believes are important components of an effective reporting regime.").

²⁰³ See, e.g., France, *supra* note 8, at nn. 5 - 7, 25, 26, 35, 37, 57.

²⁰⁴ Comments of Dechert, Inc., SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 19, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/dechert1.htm> (on file with author) (reporting on statements made by senators as reported in the congressional record about Section 307).

²⁰⁵ See *supra* part I.

²⁰⁶ Standards of Conduct, *supra* note 24, at 71,673.

²⁰⁷ SEC Release, *supra* note 32.

²⁰⁸ Pender, *supra* note 31.

²⁰⁹ See, e.g., Comments of Sherron J. L. Dickson, Q.C., President, Federation of Law Societies of Canada, SEC Release Nos. 33-8150; 34-46868; IC-25829;

disaffirmance provisions could force lawyers to violate state supreme court ethics rules on client confidentiality.²¹⁰ While states permit noisy withdrawal, there is no national consensus on the issue, and forty-one states permit, but do not require it, “when [lawyers] think a client’s actions will inflict economic harm on investors or others.”²¹¹ Until the Commission proposed Rule 205, ethics rules were a function of the state governments.²¹² By attempting to impose noisy withdrawal the SEC is usurping the rights of states to regulate their respective legal professions.

File No. S7-45-02 (Dec. 16, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/sjldickson1.htm> (on file with author):

In Canada, the regulation of the practice of law and of the legal profession is a matter of provincial or territorial jurisdiction. Provincial or territorial statutes vest a provincial or territorial law society or equivalent with the responsibility to regulate lawyers, and membership in a law society is required to practice law. Each law society is mandated to govern lawyers in the public interest by insuring the independence, integrity and honour of its members and establishing standards for the professional conduct and competence of its members. Each law society promulgates rules of conduct that speak to the fundamental ethical duties and obligations of a lawyer.

²¹⁰ Daily Record, *supra* note 106.

²¹¹ Kathleen Day, *Lawyers as Stool Pigeons?; SEC May Force Attorneys to Blow Whistle on Corporate Clients*, WASH. POST, Jan. 9, 2002, at E01.

²¹² Comments of American College of Trial Lawyers, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 17, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/amercollege.htm> (on file with author) (“[T]he Proposed Rule is an unprecedented, unwise and unnecessary intrusion by the federal government into matters – to wit, the articulation of lawyers’ professional duties and the sanctions for violating those duties – that have been the regulatory province of the states and their respective judiciaries since our nation was founded”).

The noisy withdrawal requirement may actually defeat the purpose of Section 307.²¹³ While the up-the-ladder reporting requirement is designed to force attorneys to represent the best interests of a corporation rather than management, the noisy withdrawal requirement may actually have the opposite effect.²¹⁴ “When clients fear that their secrets are unsafe, they may not seek or obtain legal advice that heads off behavior that harms the public.”²¹⁵ If clients are unwilling to confide in counsel, lawyers will be hampered in their ability to effectively represent their clients.²¹⁶ Furthermore, the noisy withdrawal requirement forces an attorney’s ultimate allegiance to be to the SEC rather than the corporation.²¹⁷ When this occurs, Rule 205 defeats the purpose of Section 307.²¹⁸ The Commission should not force attorneys to be their de facto agents.²¹⁹ Simply put, Congress did not authorize the

²¹³ Comments of Roberta S. Karmel, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 12, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/karmel1.htm> (on file with author):

After targeting accountants and audit committees as gatekeepers who should compel public corporations to be more honest in their financial reporting, the SEC has now decided to enlist lawyers as key law enforcement officials, changing their allegiance from their clients to the SEC. This is opposite to the intent of Section 307 which was supposed to reinforce an attorney’s allegiance to the corporate client.

²¹⁴ *Id.*

²¹⁵ Day, *supra* note 211 (quoting M. Peter Moser, chair of the ABA task force on corporate governance).

²¹⁶ Karmel, *supra* note 213.

²¹⁷ Karmel, *supra* note 213.

²¹⁸ Karmel, *supra* note 213.

²¹⁹ *See, e.g.*, Comments of Sullivan & Cromwell, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), *available at* <http://www.sec.gov/rules/proposed/s74502/sullivan1.htm> (on file with author) (“By effectively requiring attorneys to police and pass judgment on their clients, the basic attorney-client dynamic is altered fundamentally — instead of viewing

SEC to “make an attorney an informant on his or her client.”²²⁰

The Commission’s new proposal still places the burden of coming forward on the attorney and fails to adequately address the fact that a noisy withdrawal requirement exceeds an explicit Congressional mandate. One commentator observed that under this new proposal, “[t]he onus will be on the company involved to report to the SEC that its legal adviser has terminated the relationship.”²²¹ This is incorrect. Under the proposal, to trigger a reporting requirement the attorney must first withdraw. In other words, the reporting requirement, no matter how egregious a violation of the law, is only triggered once the *attorney* makes the first move. Without the attorney’s action, nothing happens. While this proposal spares the attorney from the awkward task of notifying the Commission of his or her withdrawal, the burden is still on the attorney and not the corporation.

Because noisy withdrawal in the corporate context will continue to be debated for years to come, even after the Commission adopts its second final rule, I propose a solution. The

attorneys as confidential advisors, clients may begin to view their attorneys as also being agents of the Commission.”).

²²⁰ Comments of Ernest E. Badway, Co-Chair; Suzanne E. Auletta, Co-Chair; Matthew Levine, Vice-Chair; Audra Acquavella; Robert Evans; Ronit V. Fischer; ; Helen Mangano; Lance Myers; Marc D. Powers, Committee on Securities and Exchanges, New York County Lawyers’ Association, SEC Release Nos. 33-8150; 34-46868; IC-25829; File No. S7-45-02 (Dec. 18, 2002), available at <http://www.sec.gov/rules/proposed/s74502/eebadway1.htm> (on file with author).

²²¹ *SEC Backs Down Over ‘Noisy Withdrawal’ Rule*, THE LAWYER, Jan. 27,

Commission should drop all together its proposal for a noisy withdrawal requirement without an express congressional mandate. If such a requirement is eventually deemed useful for effective corporate governance, Congress has the authority to legislate its creation. In place of this noisy withdrawal requirement, the Commission should follow the model set forth in state ethics codes. For example, under the laws of most states, an attorney's work product cannot be used to facilitate the commission of an ongoing crime or fraud. By making this the standard for withdrawal, an attorney will only be required to withdraw if, and only if, the attorney knows that his or her work product will be used to commit a crime. This would substantially limit the number of instances where an attorney would have to withdraw. Furthermore, this requirement, which is currently the law in many jurisdictions, would not materially alter the attorney-client relationship. Finally, it would return responsibility for wrongdoing to those responsible — the corporation and its senior employees and directors.

A paternalistic reporting requirement is not the solution to restoring investor confidence. Rather, the SEC should place the onus of coming forward with wrongdoing on those responsible and not require lawyers to fundamentally alter their role from one of serving clients to one of acting as secret agents for the Commission.

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