THE SEC ADOPTS A PROFESSIONAL CONDUCT RULE FOR LAWYERS

On January 23, 2003, the Securities and Exchange Commission (the "SEC") adopted a rule implementing Section 307 of the Sarbanes-Oxley Act (the "Act"), which requires that the SEC set "minimum standards of professional conduct for attorneys appearing and practicing before [it] in any way in the representation of issuers."[1] The rule requires that attorneys who appear and practice before the SEC in the representation of an issuer report evidence of material violations of law to the chief legal officer ("CLO") or chief executive officer (the "CEO") of the issuer. If the CLO or CEO does not respond appropriately to such report, the rule requires the attorney to report the evidence "up the ladder" to the issuer's audit committee, another committee of independent directors, or the full board of directors. The rule was published in the Federal Register on February 6, 2003 and becomes effective 180 days thereafter, on approximately August 5, 2003.

The rule differs in important respects from the proposed rule that the SEC released late last year which, the SEC noted, "generated significant comment and extensive debate."[2] The rule's scope has been narrowed and the triggering standard for reporting evidence of a material violation has been clarified. The SEC also eliminated the proposed rule's requirement that reports and responses made pursuant to the rule be documented.[3]

The rule does not, as yet, include the proposed rule's "noisy withdrawal" provision, which, in certain circumstances, would permit or require attorneys to withdraw from representation of an issuer, to notify the SEC of the withdrawal, and to disaffirm documents filed with or submitted to the SEC on behalf of the issuer. Shortly after adopting the rule, the SEC issued a separate release extending the comment period on the "noisy withdrawal" provision and proposing an alternative provision under which issuers, rather than lawyers, would be required to report to the SEC withdrawals made pursuant to the proposed provision.[4] The deadline for comments on the "noisy withdrawal" provision and the proposed alternative is April 7, 2003.

Attorneys Subject to the Rule

The rule applies to attorneys "appearing and practicing" before the SEC "in the representation of an issuer." Attorneys subject to the rule include any person who is, or holds themselves out to be, admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign.

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[1] SEC Press Release No. 2003-13 (January 23, 2003). The SEC released the text of the rule shortly thereafter. See SEC Release Nos. 33-8185, 34-4726, IC-25919 (January 29, 2003).

[2] Our memorandum of December 6, 2003 discusses the proposed rule.

[3] The SEC release nevertheless states that when reporting under the rule, "prudent counsel will consider whether to advise a client in writing that it may be violating the law" and "responsible corporate officials may direct that such matters be documented."

[4] SEC Release Nos. 33-8186, 34-47282, IC-25920 (January 29, 2003).

Lawyers licensed in foreign jurisdictions are within the rule's broad definition of "attorney." But, the SEC recognizes that foreign attorneys are subject to the ethical rules and standards of the jurisdictions in which they are licensed and that the requirements of the rule might conflict with these rules and standards. In the rule, the SEC addressed this concern in two ways.

First, "non-appearing foreign attorneys" are not subject to the rule. "Non-appearing foreign attorneys" are attorneys who are admitted to practice law in a jurisdiction outside the United States; do not hold themselves out as practicing, or giving legal advice regarding, U.S. law; and conduct activities that would constitute appearing and practicing before the SEC only incidentally to a foreign law practice, or in consultation with U.S. counsel.

A foreign attorney must satisfy all three criteria of the definition to be excluded from the rule. For example, foreign attorneys who do not hold themselves out as practicing U.S. law, but who engage in activities that constitute appearing and practicing before the SEC, are subject to the rule unless they appear and practice before the SEC only incidentally to a foreign law practice or in consultation with U.S. counsel.

Second, foreign attorneys are excused from complying with the rule where such compliance is prohibited by applicable foreign law.

"Appearing and practicing" before the SEC

"Appearing and practicing" before the SEC includes transacting any business with the SEC; representing an issuer in an SEC administrative proceeding or in connection with an SEC investigation, inquiry, information request, or subpoena; providing advice concerning U.S. securities laws or SEC rules or regulations regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document (including documents that are used only as exhibits to other documents) that will be filed with or submitted to, the SEC; or advising an issuer as to whether information is required to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the SEC.

"Appearing and practicing" does not include the activities of any attorney who conducts the activities listed above "other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship." Thus, people who are licensed to practice law but who do not provide legal services will not be covered by the rule, even if they engage in the activities listed above. And, attorneys who conduct any of the activities listed above and who do so in the context of providing legal services, will not be covered by the rule unless an attorney-client relationship exists between the attorney and the issuer.

According to the SEC release, the SEC intends that the issue of whether an attorney-client relationship exists will be a federal question and, "in general, will turn on the expectations and understandings between the attorney and the issuer." As a result, whether a particular relationship between an attorney and an issuer would be deemed an attorney-client relationship under state laws or ethics codes is relevant to, but not dispositive of, the issue. The SEC release also notes that, for purposes of the rule and consistent with prevailing law, an attorney-client relationship may exist in the absence of a formal agreement. Further, an attorney and an issuer may have an attorney-client relationship within the meaning of the rule even though the attorney-

client privilege would not be available with respect to communications between the attorney and the issuer.

In the representation of an issuer

Under the rule, an attorney acts "in the representation of an issuer"[5] when providing legal services for an issuer, regardless of whether the attorney is employed or retained by the issuer. As a result, attorneys who are employed or retained by companies that are not issuers may sometimes be covered by the rule. For example, an attorney employed by an investment adviser who prepares, or assists in preparing, materials for a registered investment company is appearing and practicing before the SEC "in the representation of an issuer" if the attorney has reason to believe that the materials will be submitted to or filed with the SEC by or on behalf of the registered investment company.

An attorney employed or retained by a non-public subsidiary of a public parent acts "in the representation of an issuer" whenever acting "on behalf of, or at the behest, or for the benefit of" the parent-issuer. The SEC release states that this encompasses any subsidiary covered by an agreement under which the attorney represents the parent company and its subsidiaries, and the attorney-client privilege extends to communications among the attorney, the parent, and its subsidiaries. Similarly, an attorney at a non-public subsidiary acts in the representation of an issuer when he or she is assigned work by the parent that will be submitted to the SEC by the parent, or if the attorney is performing work at the direction of the parent and becomes aware of evidence of misconduct that is material to the parent.

Reporting Requirements Under the Rule

Triggering the reporting requirements

The rule requires that when an attorney appearing and practicing before the SEC in the representation of an issuer becomes aware of evidence of a material violation of federal or state securities law, a material breach of fiduciary duty arising under federal or state law, or a similar material violation of federal or state law by any officer, director, employee, or agent of the issuer, the attorney must report the evidence to the issuer's CLO, or to both the issuer's CLO and CEO, "forthwith."

The rule defines "evidence of a material violation" as "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation" has occurred, is ongoing, or is about to occur.

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[5] The SEC release states that the definition for the term "issuer" incorporates the definition set forth in the Act, which, in turn, incorporates the definition in the Securities Exchange Act of 1934 (the "1934 Act"); this definition includes companies whose securities are registered under the 1934 Act, companies that are required to file reports under that act, and companies that have filed a registration statement under the Securities Act of 1933. For purposes of the terms "appearing and practicing" before the SEC and "in the representation of an issuer," "issuer" includes any person controlled by an issuer where an attorney provides legal services to that person for the benefit of or on behalf of an issuer.

The SEC release states that the determination of whether it is unreasonable not to conclude that it is reasonably likely that a material violation has occurred, is occurring, or is about to occur depends on the circumstances that exist at the time that the attorney becomes aware of the evidence. The SEC notes that "circumstances" include the attorney's professional skills, background and experience; the time constraints under which the attorney is acting; the attorney's previous experience and familiarity with the client; and the availability of other lawyers with whom the attorney may consult.

Fulfilling the "up the ladder" reporting requirements

If a report of evidence of a material violation is made, the CLO must undertake an appropriate inquiry to determine whether the material violation has occurred, is ongoing, or is about to occur. If the CLO determines that no material violation has occurred, is ongoing, or is about to occur, the CLO must notify the reporting attorney and advise the reporting attorney of the basis for that determination. Unless the CLO reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the CLO must take all reasonable steps to cause the issuer to adopt an appropriate response, and must advise the reporting attorney of those steps.

Unless a reporting attorney reasonably believes that the CLO or the CEO of the issuer has provided an "appropriate response" within a reasonable time, the attorney must report the evidence of the material violation "up the ladder" to the issuer's audit committee. If the issuer does not have an audit committee, then the attorney must report the evidence of the material violation to another independent committee.[6] If the issuer's board does not have another independent committee, then the attorney must report the evidence of the material violation to the full board.

An appropriate response is a response such that the reporting attorney "reasonably believes" either that no material violation has occurred, is ongoing, or is about to occur, or that the issuer has taken proper remedial steps in response to the material violation. Proper remedial measures must be sufficient to allow the reporting attorney reasonably to believe that the issuer has adopted measures to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence;[7] or has directed an attorney to undertake an internal review of the evidence and has either substantially implemented any recommendations made by the investigating attorney or been advised that the

[6] In order to satisfy the requirement of independence, such a committee must consist "solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in Section 2(a)(19) of the Investment Company Act of 1940. This definition of independence is used throughout the rule. But, the January 29, 2003 SEC release notes that the definition will likely be conformed to the rules defining who is an "independent director" under Section 301 of the Act.

[7] The rule does not explicitly include restitution within the scope of an appropriate response. However, the SEC release states that the rule makes clear that an "issuer must adopt appropriate remedial measures . . . and consider the feasibility of restitution."

investigating attorney may, consistent with professional obligations, assert a colorable defense on behalf of the issuer in an investigation or proceeding relating to the reported evidence.[8]

A reporting attorney may consider all attendant circumstances, including the amount and weight of the evidence, the severity of the apparent violation and the scope of the investigation, when evaluating the appropriateness of the issuer's response. A reporting attorney is not required independently to investigate the issuer's response and may rely on reasonable representations and legal determinations made by the issuer's CLO or by others on whom a reasonable attorney would rely. But, the SEC release notes that the reporting attorney should consider an assurance given by the issuer's CLO that there was no material violation or that the issuer was responding to the violation as relevant to, but not dispositive of, the question of whether the issuer's response is appropriate.

As to the timeliness of the implementation of remedial measures, the SEC release states that while many measures, such as disclosures, can be accomplished quickly, some will take more time. As such, an acceptable period may include reasonable time for the issuer to complete ongoing remediation.

A reporting attorney who receives an appropriate and timely response will have fulfilled the reporting requirements of the rule and need do nothing more. A reporting attorney who concludes that the issuer's response was not appropriate and/or timely must explain the reasons for that conclusion to the CLO, the CEO, and any directors to whom the attorney reported evidence of a material violation.

The alternative reporting procedure

The rule allows an alternative to the reporting procedure described above. Under this alternative, an issuer may establish a qualified legal compliance committee (a "QLCC"), which would be responsible for carrying out the requirements of the rule.[9] As such, a QLCC can serve to relieve reporting attorneys and CLOs of certain responsibilities under the rule.

A QLCC must consist of at least one audit committee member (or, if the issuer has no audit committee, one member of any committee of independent directors) and two or more independent directors. It must adopt written procedures for the confidential receipt, retention,

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[8] The attorney retained or directed to conduct the evaluation must have been retained or directed with the consent of the issuer's board of directors, another independent committee, or a "qualified legal compliance committee." (A "qualified legal compliance committee" is described in the "alternative reporting method" section of this memorandum.) The SEC release states that the requirement of board approval is intended to "protect against the possibility that a CLO would avoid further reporting "up-the-ladder" by merely retaining a new attorney to investigate so as to assert a colorable, but perhaps weak, defense." For similar reasons, the rule authorizes an attorney to notify an issuer's board of directors or any committee thereof if the attorney reasonably believes that he or she has been discharged for reporting evidence of a material violation. This provision is designed to ensure that a CLO is not permitted to block a report to the issuer's board or other committee by discharging a reporting attorney.

[9] The SEC's rule makes clear that, for a matter to be referred to a QLCC, the issuer must have a QLCC in place and is not permitted simply to establish a QLCC to respond to a specific incident.

and consideration of any report of evidence of a material violation.[10] A QLCC must have authority and responsibility to notify the CLO of any report of evidence of a material violation; to cause an investigation (by the CLO or by an outside attorney) where necessary; to determine what remedial measures, if any, are appropriate; to report the results of the investigation to the CLO, the CEO, and the full board; to recommend to the board the adoption of remedial measures; and to notify the SEC if the issuer fails in any material respect to take any appropriate remedial measures.

If an issuer has a QLCC, the rule permits, but does not require, an attorney who becomes aware of evidence of a material violation to report to the issuer's QLCC, rather than to the CLO. Where an attorney does report to a QLCC, that attorney is relieved of any further obligation under the rule, including any obligation to determine whether the issuer has responded appropriately to the report. Similarly, the rule permits, but does not require, a CLO who receives a report of a material violation to refer that report to a QLCC instead of initiating an investigation into the reported evidence. After referring a report to a QLCC, the CLO must inform the reporting attorney of the referral. Thereafter, the CLO is relieved of any obligations under the rule and the QLCC is responsible for responding to the evidence of a material violation.

Responsibilities of attorneys retained or employed to investigate or assert a colorable defense

The rule provides that attorneys retained or directed by an issuer to investigate evidence of a material violation are appearing and practicing before the SEC and thus, are subject to the rule. Additionally, attorneys retained or directed by an issuer to assert a defense on behalf of the issuer in any investigation or proceeding relating to a report of evidence made pursuant to the rule are subject to the rule.

However, in certain circumstances, these attorneys are relieved of some reporting requirements. An attorney retained or directed by a CLO to investigate evidence of a material violation does not have any obligation to report evidence of a material violation if the investigating attorney reports the results of his or her investigation to the CLO and, unless the investigating attorney and the CLO agree that no material violation has occurred, the CLO reports the results to the issuer's board, an independent committee of the board, or a QLCC. Attorneys retained or directed by a CLO to assert a colorable defense on behalf of the issuer in any investigation or proceeding relating to a report made pursuant to the rule do not have any obligation to report evidence of a material violation if the CLO makes reasonable and timely reports on the progress of the investigation or proceeding to the issuer's board of directors, an independent committee of the board, or a QLCC.

Attorneys retained or directed by a QLCC to investigate evidence of a material violation or to assert a colorable defense on behalf of the issuer in any investigation or proceeding relating to a report made pursuant to the rule have no reporting obligations.

[10] An audit committee or any other committee may also serve as a QLCC, provided that the committee is properly constituted and is informed of and willing to carry out the responsibilities of a QLCC.

Confidentiality and Disclosures Under the Rule

In most cases, compliance with the reporting requirements of the rule will not require lawyers to breach the duty to maintain clients' confidences or the attorney-client privilege. The SEC release states that communicating information about evidence of material violations to an issuer's officers and directors should not constitute a breach of confidentiality or privilege.

However, the rule allows disclosures that are prohibited by ethics rules in some jurisdictions. The rule allows (but does not require) attorneys to reveal, without the issuer's consent, confidential information relating to the representation in three circumstances: to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial or property interests of the issuer or of investors; to prevent the issuer, in an SEC investigation or administrative proceeding, from committing or suborning perjury, falsifying or concealing a material fact, or making or using a false document;[11] and to rectify the consequences of a material violation by the issuer, in which the attorney's services were used, that caused, or may cause, substantial injury to the financial or property interests of the issuer or investors.

Also, an attorney may use any report made pursuant to the rule or any response to such a report, as well as any contemporaneous records of the report or response, in order to defend his or her conduct in any investigation or proceeding in which compliance with the rule is at issue.

With respect to these possible conflicts between conduct allowed under the rule but prohibited by state ethical codes, the rule provides that the SEC's rule governs. The SEC release states that a number of commenters questioned the SEC's authority to preempt state ethics rules. However, the release also states that some argued that the SEC does have such authority, under the Supremacy Clause and the Act's requirement that the SEC establish standards of conduct for attorneys practicing before it.

The rule does not include the proposed rule's "selective waiver" provision, which provided that the attorney-client privilege and any work-product protection would not be waived where an issuer revealed privileged information or work product to the SEC pursuant to a confidentiality agreement between the issuer and the SEC. The SEC release states that commenters, noting that the law is unsettled in this area, doubted that the SEC has authority under the Act to control privilege determinations by state and federal courts. However, the SEC release does make clear that the SEC "will continue to follow its policy of entering into confidentiality agreements where it determines that its receipt of information pursuant to those agreements will ultimately further the public interest, and will vigorously argue in defense of those confidentiality agreements where litigants argue that the disclosure of information pursuant to such agreements waives any privilege or protection."

11 The rule defines these activities by reference to other federal statutes. Committing perjury is defined as in 18 U.S.C. § 1621; suborning perjury is defined as in 18 U.S.C. § 1622; and falsifying or concealing a material fact and making or using a false document are defined as in 18 U.S.C. § 1001.

Responsibilities of Supervisory and Subordinate Attorneys

An attorney who directs or supervises a subordinate attorney appearing and practicing before the SEC is a supervisory attorney under the rule. However, a senior attorney who supervises or directs a subordinate on matters unrelated to the subordinate's appearing and practicing before the SEC is not a supervisory attorney under the rule. Also, a senior attorney who has supervisory authority over, but does not actually direct or supervise, a subordinate attorney appearing and practicing before the SEC is not a supervisory attorney under the rule. An issuer's CLO is always a supervisory attorney.

An attorney who appears and practices before the SEC in the representation of an issuer on a matter under the supervision or direction of another attorney is a subordinate attorney. But, an attorney who appears and practices before the SEC in the representation of an issuer under the direct supervision of the issuer's CLO is not a subordinate attorney.

A subordinate attorney complies with the rule by reporting, to his or her supervisory attorney, evidence of material violations of which the subordinate attorney becomes aware in appearing and practicing before the SEC. Where a subordinate attorney reports evidence of a material violation to a supervisory attorney, the supervisory attorney is responsible for complying with the reporting requirements of the rule.

A subordinate attorney may (but is not required to) report such evidence to the issuer's CLO or QLCC if the subordinate attorney reasonably believes that the supervisory attorney to whom the subordinate reported the same evidence has failed to comply with the rule.

Sanctions and Discipline

The release states that the SEC "intends to proceed against individuals violating [the rule] as it would against other violators of the federal securities laws." And, the rule provides that an attorney in violation of the rule is subject to the civil penalties and remedies for a violation of the federal securities laws. But, exclusive authority to enforce the rule is vested with the SEC. The rule explicitly provides that it creates no private right of action against an attorney, law firm, or issuer, based on their compliance or non-compliance with the rule. This protection against private liability extends to all entities that having obligations under the rule.

An attorney who violates the rule is also subject to the disciplinary authority of the SEC, regardless of whether the attorney is also subject to discipline in a jurisdiction where that attorney is admitted. Remedies may include censure or temporary or permanent denial of the privilege of appearing or practicing before the SEC.

The rule provides that, where it conflicts with state ethics rules, an attorney who complies in good faith with the rule "shall not be subject to discipline or otherwise liable" for violating the standard of "any state or other United States jurisdiction where the attorney is admitted or practices."

The Proposed Amendment to the Rule

In a January 29, 2003, release, the SEC proposed amending the rule to include either the original "noisy withdrawal" provision of the proposed rule or an alternative withdrawal provision. An

attorney who reports evidence of a material violation to a QLCC would be exempt from either provision.

The original "noisy withdrawal" provision

The original "noisy withdrawal" provision is identical to that proposed by the SEC in November 2002. The original provision permits, and sometimes requires, an attorney who has reported all the way "up the ladder" within the issuer and has not received an appropriate and timely response to make a "noisy withdrawal" or to disaffirm tainted submissions to the SEC with or without withdrawal. The requirements under the original provision differ depending on whether the reporting attorney is in-house or outside counsel, and whether the violation is ongoing or prospective or is in the past.

If an outside attorney reasonably believes that an issuer either has made no response or has not made an appropriate response and the attorney reasonably believes that a material violation is ongoing or is likely to occur, and is likely to result in substantial injury to the financial interests of the issuer or investors, then the original "noisy withdrawal" provision requires that the attorney (i) withdraw "forthwith" from the representation and indicate that the withdrawal is based on "professional considerations," (ii) notify the SEC of the withdrawal within one business day and indicate that it was based on "professional considerations," and (iii) "promptly" disaffirm any document filed with or submitted to the SEC that the attorney has prepared or participated in preparing if the attorney reasonably believes the document is or may be materially false or misleading.[12] In addition, the original provision requires the CLO to inform the reporting attorney's successor that the reporting attorney's withdrawal was based on "professional considerations."[13]

The obligations of in-house attorneys under the original "noisy withdrawal" provision are similar except in-house attorneys are not required to resign. Where an in-house attorney reasonably believes that the violation is ongoing or is likely to occur, and is likely to result in substantial injury to the financial interest of the issuer or investors, then the original provision requires that the attorney notify the SEC of the intention to disaffirm within one business day of concluding that the issuer's response is inappropriate or unreasonably delayed and "promptly" disaffirm any document filed with or submitted to the SEC that the attorney has prepared or participated in preparing if the attorney reasonably believes the document is or may be materially false or misleading. Where an in-house attorney has not prepared or participated in the preparation of a document that is or may be materially false or misleading, the attorney is not required to notify the SEC.

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[12] According to the SEC release, the distinction between "forthwith," "within one business day," and "promptly" simply recognizes that an attorney may not be able to accomplish withdrawal, notification, and disaffirmance in a single day.

[13] The proposed provision explicitly provides that notification to the SEC does not breach the attorney-client privilege. The SEC reasons that the use of the phrase "professional considerations" to explain the withdrawal keeps confidential particular facts underlying the withdrawal while alerting the SEC and others to the possibility that "something is wrong."

The original "noisy withdrawal" provision permits, but does not require, in-house or outside attorneys to withdraw from the representation of an issuer and/or to disaffirm documents filed with or submitted to the SEC on behalf of that issuer if the violation at issue is likely to have caused substantial injury to the financial interest of issuers or investors, but has already occurred, and has no ongoing effect.

The alternative withdrawal provision

Under the alternative withdrawal provision, an outside attorney must withdraw from a representation of an issuer and notify the issuer in writing that the withdrawal is based on "professional considerations" if the attorney has reported evidence of a material violation all the way "up the ladder," has not received an appropriate response, and reasonably concludes that there is substantial evidence that a material violation is occurring or is about to occur and that violation is likely to cause substantial injury to the financial interest of issuer or of investors.

Where an in-house attorney has reported all the way "up the ladder," has not received an appropriate response, and reasonably concludes that there is substantial evidence of a material violation that is occurring or about to occur and is likely to cause substantial injury to the financial interest of the issuer or investors, the attorney must "cease forthwith" any participation in a matter concerning the violation and notify the issuer, in writing, that the attorney believes that the issuer has not provided an appropriate response to the attorney's report of evidence of a material violation.

If an attorney withdraws from a representation, ceases to participate in a matter, or is discharged pursuant to the alternative withdrawal provision, the alternative withdrawal provision would require the issuer's CLO to notify any replacement attorney that the previous attorney withdrew from the representation, ceased to participate in the matter, or was discharged, pursuant to the proposed provision.

The alternative withdrawal provision requires that an issuer who has received notice from an attorney pursuant to the alternative withdrawal provision report the notice, and the circumstances related to it, to the SEC by filing a Form 8-K, Form 20-F, or Form 40-F. If an issuer fails to notify the SEC that an attorney has given notice pursuant to the provision, the alternative withdrawal provision permits (but does not require) the withdrawing attorney to do so.

The SEC's request for comments

The SEC is soliciting comments on whether any provision requiring withdrawal and notification to the SEC is a desirable addition to the rule. Additionally, the SEC is requesting comments on the specifics of such a provision, including whether it should be mandatory or permissive, whether the triggering standard should be higher than that for "up the ladder" reporting, and whether attorneys should be required to withdraw from all representation of the issuer or only from representation on those matters having some relation to the underlying report of a material violation.

With respect to the alternative withdrawal provision, the SEC is interested in comments discussing the consequences associated with a requirement that the issuer notify the SEC that an attorney has given notice pursuant to the proposed provision. Specifically, the SEC is asking for

comments addressing whether the issuer's notification to the SEC (which should include the "circumstances" under which the attorney's notice was given) will constitute a violation of the attorney-client privilege. Also, the SEC is soliciting comments discussing whether an issuer's public disclosure of an attorney's giving notice pursuant to the proposed provision will serve to harm the issuer and whether the proposed provision should be revised to allow an issuer privately to notify the SEC. In addition, the SEC is requesting comments on whether the alternative withdrawal provision should be revised to allow an issuer to avoid completely the notification requirement where an independent committee of the issuer's board determines either that the attorney's withdrawal was unreasonable or that the issuer, after the attorney's withdrawal, implemented an appropriate response.

If you wish to obtain additional information regarding the SEC's rule concerning standards of professional conduct for attorneys, please contact Joseph T. Baio (212-728-8203), Benito Romano (212-728-8258), or Elizabeth S. Stong (212-728-8272).

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