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A First Look at the Final Sarbanes-Oxley Regulations Governing Corporate Counsel

By John K. Villa
Author of *Corporate Counsel Guidelines*, published by ACCA and West

John K. Villa is a partner with Williams & Connolly LLP in Washington, DC. He specializes in corporate litigation (civil and criminal) involving financial services, directors', officers', and lawyers' liabilities, and related issues. He is an adjunct professor at Georgetown Law School and a regular lecturer for ACCA. He is also the author of *Corporate Counsel Guidelines*, published by ACCA and West. He is available at JVilla@wc.com.

On January 29, 2003, the U.S. Securities and Exchange Commission ("SEC") issued its final rule implementing § 307 of the Sarbanes-Oxley Act of 2002. The rule derives from the ABA's Model Rule 1.13, "The Organization as Client," which introduced the principle that a corporate lawyer may be required to go "up the corporate ladder" if the lawyer knows of serious misconduct by corporate officials.

No doubt, these rules will have a profound effect on attorneys who represent companies regulated by the SEC. The effect, however, will not be nearly as significant or as troublesome as it would have been if the SEC had promulgated the rule that it had initially proposed. In this environment, we should be grateful for even small gifts.

STATUTORY BACKGROUND AND THE PROPOSED REGULATIONS

On July 30, 2002, President Bush signed into law the legislation that is widely known as the Sarbanes-Oxley Act. Although the principal focuses of the Sarbanes-Oxley Act are increased disclosure by public companies, new oversight of the accounting profession, and reforms in corporate governance, one section of the Sarbanes-Oxley Act is directed at the securities bar. Section 307 of the Sarbanes-Oxley Act, codified at 15 U.S.C. § 7245, directed the SEC to issue regulations

> 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.[1]

The SEC was directed to issue such final rules within 180 days of the effective date of the Sarbanes-Oxley Act or no later than January 29, 2003.

Like a number of other federal regulatory agencies, the SEC has long maintained rules governing the conduct of professionals appearing before it.[2] Professionals who were disciplined under the SEC rules and thus suspended or disbarred from practicing before the SEC could find their careers severely limited, if their practice consisted of counseling public companies on compliance with the federal securities laws. Known colloquially as "2(e)," these rules prohibited but did not define "improper professional conduct." Although the SEC has used its 2(e) authority with some frequency against accountants,[3] the SEC has, for the past 20 years, been more restrained in using § 2(e) against lawyers, primarily because lawyers are regulated by state ethics authorities. When the SEC has moved against lawyers, it has primarily been to discipline attorneys who had already been found by another tribunal

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to have violated a criminal or ethical provision or to give guidance to the securities bar. The two most famous examples of this direction-giving are the SEC's decisions in *In re Carter and Johnson*,[4] involving the obligations of outside counsel when a client declined to take counsels' advice on issues of disclosure, and *In re John H. Gutfreund et al.*,[5] which arose out of the Salomon treasury bond trading scandal and examined the conduct of an inside general counsel presented with evidence of corporate misconduct.[6]

THE PROPOSED RULES ISSUED NOVEMBER 21, 2002

On November 21, 2002, the SEC issued proposed rules that would implement § 307 of the Sarbanes-Oxley Act.[7] The proposed rules addressed the two core principles in § 307: (1) requiring that counsel report evidence of material violations of securities laws or breach of fiduciary duty to the chief legal officer ("CLO") or chief executive officer ("CEO") of the company and (2) requiring, if the officers did not "appropriately respond," that counsel take the matter to the board of directors or a committee of the board "comprised solely of directors not employed directly or indirectly by the issuer." The proposed rules expressly went beyond what § 307 required by proposing an expansive definition to the concept of practicing before the SEC (a definition that even reached foreign attorneys who do not practice in the United States) and by requiring that lawyers who do not receive an appropriate response to their report from the company notify the SEC. These provisions and a number of others resulted in an outpouring of comments from the bar, including foreign lawyers. From the SEC's citations in the comments in the final rule, it appears that the comments in general were divided: practitioners and groups representing their interests pointed out problems and flaws in the proposed rules, while academics urged the SEC to promulgate even harsher regulations. State ethics regulators objected to the expansion of federal regulation over the ethical conduct of the bar, viewing regulation of the practice of law as their province.

THE FINAL RULES

In the final rules, the SEC responded to some of the comments by practitioners, state ethics regulators, and foreign lawyers. The provisions necessary to implement the mandate of § 307 of the Sarbanes-Oxley Act survived, but the SEC deferred or eliminated some of the most controversial provisions that ventured beyond the Sarbanes-Oxley Act. The effective date of the new regulations has been deferred until 180 days after publication in the *Federal Register*.

Summary of the Final Rules

Summarizing the proposed rules has become a cottage industry for major law firms. Because the basic structure of the final rules does not depart significantly from that of the proposed rules, this article will review them only briefly and will compare the rules to the principles of the ABA's Model Rules, identify the major changes from the proposed rules, and highlight troublesome issues.

Reduced to their essentials, the new rules require lawyers who appear and practice before the SEC to report material violations of securities laws and breaches of fiduciary duties to the CLO or CEO of the issuer, to evaluate the response of the CLO or CEO, and, if that response is not, in the reporting lawyer's view, appropriate, to bring the matter to the board of directors of the issuer (or a designated committee of

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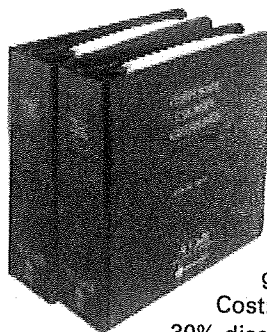

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outside directors). The rules also give companies the option of establishing a committee of outside directors, known as a "Qualified Legal Compliance Committee" ("QLCC"), to which such reports could be made—that is, in lieu of being made to the CLO or CEO. If the lawyer makes his report to the QLCC, the lawyer need not determine the appropriateness of the response and is relieved of taking further action.

Applicability of the New Rules

The final rules apply to attorneys "appearing and practicing before the Commission" "in the representation of an issuer." Section 205.2(a) defines "appearing and practicing before the Commission" broadly as any of the following:

- "Transacting any business with the Commission, including communications in any form."
- "Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena."
- "Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to . . . the Commission."
- "Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to . . . the Commission."

Under these final rules, "appearing and practicing before the Commission" does not include an attorney who is providing only nonlegal services or who is a "non-appearing foreign attorney," as that new term is defined.

Thus, in addition to the more obvious forms of practicing before the SEC, an attorney is "appearing and practicing before the Commission" if the attorney provides securities law advice relating to a document that the attorney has notice will be filed with the SEC, including participating in the drafting of the document, or if the attorney advises a company as to whether particular information is or is not required to be filed with the SEC.

Perhaps the most fundamental question raised by this definition is whether a lawyer who is appearing and practicing before the SEC in connection with an issuer is subject to the mandates of this rule for *all* of the lawyer's activities for that client. In other words, if a lawyer is clearly subject to the Sarbanes-Oxley Act rules for one matter for a client, must the lawyer follow the new SEC regulations in all other matters for the client if the other matters do not constitute "appearing and practicing before the Commission"? Illustratively, must a lawyer who gives advice on, for example, a proxy statement (and would therefore be subject to the rules for the proxy), be required to follow the § 205 rules for breach of fiduciary duty that was discovered in the defense of a wholly separate (not covered) civil litigation? Neither regulations nor commentary addresses this issue. Although we would hope that the answer is "no," the result is not free from doubt. This key issue is one on which SEC guidance is essential, particularly because the SEC regulations purport to preempt state ethics rules, which might well reach a different result.

Additional questions arise regarding the application of the term "appearing and practicing before the Commission." First, if the issuer has retained counsel to investigate a charge of "material violation" and also to defend an investigation or proceeding by the SEC or a third party for possible violation of the federal or state securities laws or breach of fiduciary duty, is counsel obliged to initiate internal Sarbanes-Oxley reporting procedures as to the specific matters already in litigation? As the commentary recounts,

> several commenters were concerned over a possible chilling effect on an attorney's representation of an issuer in a Commission investigation or administrative proceeding if the attorney were subject to reporting and disclosure requirements. Some noted that an issuer's disagreement in good faith with the Commission over a matter in litigation should not raise a reporting obligation under the rules.[8]

The final rules explicitly apply to defending SEC investigations and proceedings and decline to provide a blanket exemption for the internal investigations to determine whether such violations occurred or for the defense of SEC proceedings.[9] The investigator-litigator's salvation, if any, is in § 205.3(b)(6):

> An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:
>
> . . . .
>
> (ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer's board of directors [or a QLCC].

As the commentary highlights, the "colorable defense" exception applies only in cases in which "the response is undertaken with the consent of the issuer's board of directors [or the

QLCC]."[10] This condition, according to the commentary, is to "protect against the possibility that a chief legal officer 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."[11]

Another major issue is whether the obligations embodied in the regulations extend beyond traditional securities lawyers to those who respond to auditors' "letters or prepare work product in the ordinary course unrelated to securities matters that may be used for that purpose and lawyers preparing documents that may eventually be filed as exhibits . . . ."[12] The ABA had protested that the definition in the proposed regulations could unfairly be read to reach such lawyers.

IN ASSESSING HOW BROADLY TO READ THESE PROVISIONS, HOWEVER, ONE MUST REMEMBER THAT AGENCIES ARE LOATHE TO CONSTRUE NARROWLY THEIR OWN JURISDICTION.

The SEC's response was helpful on several of the examples raised by the ABA, but, again, was not as explicit as it could have been. The SEC modified the definition appearing in § 205.2(a)(1)(iii) to reach those attorneys who provide advice on securities laws or SEC regulations "regarding any document that the attorney *has notice* will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing or participating in the preparing of, any such document . . . ."[13] The SEC's explanation "clarifies" that the rule is not intended to reach "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 as an exhibit or in connection with a filing . . . ."[14] How does this apply to, for example, counsel negotiating executive employment agreements or other contracts, which are often exhibits to securities filings? One would presume that such counsel would not be "appearing and practicing before the Commission" because they are not "providing advice in respect of the United States securities laws or the Commission's rules"—the first element of the definition—even if the lawyer/drafter knew that the document would be attached to an SEC filing. Likewise, a lawyer who responds to an inquiry from the client regarding the client's independent auditor presumably would be beyond the reach of the rule: although the lawyer may (but probably does not) have notice that the response may be incorporated into the auditor's opinion on the financial statements, the response is not "providing advice" on any securities law or SEC rule. A final question not directly addressed by the SEC's commentary is whether the definition reached a lawyer who negotiates or drafts a transaction that, because of its materiality, would reasonably be expected to be discussed in the issuer's securities filings or affect the issuer's reported financial statement. Is the lawyer within the scope of this rule because of the transactional work? Once again, the presumptive answer is "no," because the lawyer is not providing securities advice relating to the transaction.

In assessing how broadly to read these provisions, however, one must remember that agencies are loathe to construe narrowly their own jurisdiction. If experience here inside the beltway is any guide, a prudent lawyer would await more explicit guidance from the SEC before concluding that the SEC would not attempt to reach a lawyer in the gray areas identified above.

For the rule to apply, a lawyer who is "appearing and practicing before the Commission" must *also* be providing services "in the representation of an issuer." That term is defined in § 205.2(g) as "providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer." The definition of "issuer" reaches beyond the issuing company itself and includes "any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer."[15] The commentary states the SEC's intention is that this provision reach "an attorney employed or retained by a non-public subsidiary of a public parent issuer" if the attorney is acting "on behalf of, at the behest, or for the benefit of" the parent.[16]

Issuer's Counsel's Reporting Obligations

Assuming that the lawyer falls within the reach of the regulations, the lawyer's obligation is governed by § 205.3(b)(1), which provides in part that,

> "[i]f an attorney . . . becomes aware of evidence of a material violation by the issuer or by any officer, director, employee or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer . . . or to both the issuer's chief legal officer and its chief executive officer . . . forthwith . . . ."

Unpacking this sentence crystallizes several key issues. One of the most important issues is that subsection 3(b)(1) is not limited to information learned during the course of the attor-

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- SEC Final Rule: Implementation of Standards of Professional Conduct for Attorneys, at www.sec.gov/rules/final/33-8185.htm.
- SEC proposed rule on noisy withdrawals, at www.sec.gov/rules/proposed/33-8186.htm.

ON PAPER:

- John K. Villa, Corporate Counsel Guidelines (ACCA and West 1999, with annual updates).

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ney's representation. The SEC rule thereby differs from ABA Model Rule 1.13, which was its acknowledged model. Model Rule 1.13 can require an in-house lawyer to take action, including going "up the corporate ladder," if the lawyer learns certain facts, but it applies only to information "related to the [lawyer's] representation."

The second element of the operative language is that it applies if the lawyer "becomes aware of *evidence* of a material violation."[17] By way of comparison, Model Rule 1.13 requires action only in cases in which a lawyer

> *knows* that an officer [or] employee . . . is engaged in action, intends to act or refuses to act in a matter . . . that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization and is likely to result in substantial injury to the organization . . . .[18]

A lawyer governed by Model Rule 1.13 is not required to take any action unless the lawyer has reached a high level of certainty ("knows") that a violation has occurred. The corresponding standard in § 205.3(b)(1) requires action if the lawyer becomes aware of *evidence* of a material violation. The rule itself does not specify any required quantum, proportion, or persuasive effect of the evidence. The definition in the rules provides that "evidence of a material violation means 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."[19] The SEC's commentary explains that it has specifically rejected as "too high" the standard from the ethical rules that requires that the lawyer "know" that the conduct is a violation of law or legal duty to the corporation.[20] Instead, the SEC adopts a "reasonably likely" standard, which the SEC describes as "more than a mere possibility but it need *not* be 'more likely than not.'"[21] This loose standard is sure to present nightmares for counsel as they wrestle with its application to various factual scenarios.

Although the regulation contemplates an objective standard, the SEC's commentary seems to incorporate

contradictory objective and subjective elements. The commentary states that an attorney's decision of whether to initiate Sarbanes-Oxley reporting procedures will be measured by the "circumstances," which "may include, among others, the attorney's professional skills, background and experience, the time constraints in 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."[22] The references to the attorney's "professional skills" and "background and experience" strongly suggest a subjective standard that will vary from one lawyer to another. On the other hand, the introductory comments in the rule itself—whether "it would be unreasonable . . . for a prudent and competent attorney not to conclude"—clearly denotes an objective standard.[23]

The other major issue embedded in 205.2(e) is the meaning of the term "material violation." That term is defined as "a material violation of an applicable United States federal or state securities law, a material breach of a fiduciary duty arising under United State federal or state law, or a similar violation of any United States federal or state law." Whether this definition incorporates the definition of "material" that has been developed in securities case law or some other definition of material is not entirely clear.

Including "material breach of fiduciary duty" within the definition of a "material violation" is certain to cause problems, but those problems cannot be laid at the SEC's feet. Section 307 of the Sarbanes-Oxley Act expressly required that the rules reach "evidence of a material violation of securities law or *breach of fiduciary duty or similar violation*," so the SEC was required to extend the rule to breaches of fiduciary duty. Requiring lawyers to sit in judgment of corporate management and decide whether there is "evidence" that a corporate manager breached his or her fiduciary duty to the corporation is, candidly, an invitation for confusion and trouble. Lawyers are poorly equipped to evaluate whether, for example, a corporate manager has breached a duty of care—which inherently involves balancing risk and return. Presumably for that reason, the commentary to ABA Model Rules 1.13 (the original "up-the-corporate-ladder" rule) provides that, "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing substantial risk, are not as such in the lawyer's province."[24] Lawyers interpreting the Sarbanes-Oxley Act will wish that a similar principle governed their obligation.

It is reasonable to expect that the low threshold or quantum of evidence required by the new regulations, coupled with the vagaries of fiduciary duties, will bedevil issuers' counsel in many instances that were probably not contemplated or intended by the sage lawmakers who enacted § 307 of the Sarbanes-Oxley Act.

Assuming that an issuer's counsel concludes that a report is required under § 205.3(b)(1), the report must be made either to the CLO (or CLO and CEO) or, if the issuer had established a QLCC, to it.[25] If the report is made to the QLCC, the reporting lawyer's obligation ends. On the other hand, if the report is made to the CLO or CLO and CEO, then the corporate executive receiving the report must make inquiry into the matter and must take appropriate action. That action must be reported back to the counsel who first raised the issue.[26]

Unless the reporting counsel "reasonably believes that the [CLO or CEO] has provided an appropriate response within a reasonable time, the attorney shall report the evidence . . . to" the audit committee or other equivalent committee or to the full board of directors.[27] This last provision is exceptionally ticklish and reverses the roles of in-house and outside counsel. As such, it has been the focus of considerable comment since it was first proposed, but it has not materially changed in the final regulations. The significant deletion from the proposed rules, noted below, is that counsel is no longer required or permitted to go beyond the issuer's board of directors to the SEC to make a "noisy withdrawal."

Major Deletions from the Proposed Rules

Several significant trial balloons contained in the proposed rules have thus far deflated. Although these provisions have been eliminated from this final rule, it is likely that the SEC will revisit these issues in the near future. These deleted provisions relate to matters that are not expressly mandated by the statutory directive in § 307 of the Sarbanes-Oxley Act.

Foremost among the deleted provisions is language that would have obligated outside counsel to engage in a "noisy withdrawal"—withdrawing from the representation of an issuer if the issuer failed to take what counsel believed to be an appropriate response to evidence of a material violation *and notifying the SEC of that withdrawal.* In light of the strongly negative response to this proposal, the SEC did not adopt that proposal and is "extending the comment period on the 'noisy withdrawal' and related provisions of the proposed rule and is issuing a separate release soliciting comments on this issue."[28] The separate release proposes an alternative procedure: if the attorney withdraws from the representation of

the issuer for failing to receive an adequate response, the SEC is proposing that "the issuer would be required to disclose its counsel's withdrawal as a material event." This change is obviously to blunt the criticism that the "noisy withdrawal" requirements in the proposed regulations would conflict with ethics rules in a number of jurisdictions. By cleverly shifting the burden of disclosure from counsel to the issuer client, the SEC hopes that this conflict may be relieved. The procedure appears analogous to the familiar requirements that an issuer report as a material event the resignation of its auditor.

A second major change is the withdrawal or elimination of the recordkeeping requirement formerly in § 205.3(b)(2) of the proposed rule. Under that proposal, lawyers were required to prepare and maintain documentation of their reports of material violations to the issuer and of the issuer's response. The SEC acknowledged that the comments received were "almost unanimously in opposition" to this proposal and that many comments asserted that it "could be an impediment to open and candid discussions."[29] Some comments correctly observed that "the documentation requirement might increase the issuer's vulnerability in litigation" and would be "a treasure trove of selectively damning evidence."[30]

A third significant modification from the proposed regulations is the tighter limitations on the circumstances in which an issuer's lawyer may provide information to the SEC. The final regulation, § 205.3(d)(2), has been modified to more closely parallel the more liberal disclosure principles adopted by the ethics rules of a number of states. Specifically, an issuer's lawyer *may* but is not required to disclose, without the issuer's consent, confidential information *to the SEC* to the extent that the attorney reasonably believes that it is necessary to "prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest of the issuer or investors," to prevent the issuer from committing perjury, suborning perjury, or making false statements in any SEC investigation or proceeding, and to rectify the consequences of a material violation by an issuer that caused substantial injury to the financial interest of the insured or investors "in furtherance of which the attorney's services were used." A similar provision in the proposed regulations permitted disclosure but authorized disclosure for any "illegal acts" rather than "material violations" that caused substantial financial loss to the issuer or investors. This proposed provision was controversial not so much for the standards espoused, which are similar to those adopted by a number of states, but because the SEC would be preempting contrary state ethics rules that would prohibit disclosure in other jurisdictions. That problem remains.

The proposed rules' extension of jurisdiction to foreign attorneys prompted extensive controversy and ultimately resulted in another significant change. The SEC's proposed rules would have included many foreign attorneys within the definition of attorneys "appearing and practicing before the Commission." In response to comments and to meetings with groups representing foreign attorneys, the SEC relented and adopted § 205.2(j), which defines "Non-appearing foreign attorneys." To be a "non-appearing foreign attorney," (1) a lawyer must be admitted to practice outside of the United States and must not hold himself out as practicing or giving advice on federal or state securities laws (except as permitted in this rule), and (2) his appearance and practice before the SEC must be (a) incidental to and in the course of practice in a foreign country or (b) only in consultation with a licensed American lawyer. As the commentary observes, the "effect of this definition will be to exclude many, but not all, foreign attorneys from the rule's coverage."[31]

CONCLUSION

The foregoing review touches a number of the major issues arising out of the new rules, but it is far from comprehensive. Although many attorneys will be unhappy with the SEC's new rules under § 307, it is only fair to recognize that the basic elements of the rules were dictated by the Sarbanes-Oxley Act and that the SEC did respond sensibly to the overwhelmingly negative response from the practicing bar. The SEC promulgated rules that are substantially narrower and less burdensome on the attorney-client relationship than the rules that it had initially proposed. Now, it is for the bar to press for elimination of the ambiguities and learn to live with the rule.

NOTES

1. 15 U.S.C. § 7245.
2. *See* 17 C.F.R. § 201.102(e)(1)(2002).
3. *See, e.g.*, Checkosky v. SEC, 139 F.3d 221 (D.C. Cir. 1998) (ordering SEC proceedings against accountants to be dismissed and stating that "the Commission's statements come close to a self-proclaimed license to charge and prove improper professional conduct whenever it pleases, constrained only by its own discretion" and that "the Commission's opinion yields no clear and coherent standard for violations of Rule 2(e)(1)(ii)").
4. SEC Rel. No. 34-17591 [1981 Transfer Binder] Fed. Sec. L. Rep. ¶82,847 (Feb. 28, 1981).
5. SEC Rel. No. 34-31554, Fed. Sec. L. Rep. (CCH) ¶85,067 (Dec. 3, 1992), 52 SEC 2849.
6. An excellent summary of the use of § 2(e) in proceedings involving lawyers is in Lorne and Calcott, *Administrative Actions against Lawyers before the SEC*, 50 Bus. L. 1293 (1995).

7. The proposed rules were published in the *Federal Register* on Dec. 2, 2002. 67 Fed. Reg. 71669 (Dec. 2, 2002).
8. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6299–6300 (Feb. 6, 2003) (footnotes omitted).
9. *See* § 205(b)(5) ("An attorney retained or directed by an issuer to investigate evidence of a material violation reported under [this section] shall be deemed to be appearing before the Commission . . . .").
10. 68 Fed. Reg. at 6301.
11. *Id.* The commentary also discusses the meaning of "colorable defense":

    The term "colorable defense" does not encompass all defenses, but rather is intended to incorporate standards governing the positions that an attorney appropriately may take before the tribunal before whom he or she is practicing. For example, in Commission administrative proceedings, existing Rule of Practice 153(b)(1)(ii), 17 CFR 201.153(b)(1)(ii), provides that by signing a filing with the Commission, the attorney certifies that "to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." An issuer's right to counsel is thus not impaired where the attorney is restricted to presenting colorable defenses, including by requiring the Commission staff to bear the burden of proving its case. Of course, as some commenters noted, an issuer has no right to use an attorney to conceal ongoing violations or plan further violations of the law.
12. *Id.* at 6297–98.
13. (Emphasis supplied).
14. 68 Fed. Reg. at 6298.
15. Section 205.2(h).
16. 68 Fed. Reg. at 6303 n. 58.
17. (Emphasis supplied).
18. (Emphasis supplied).
19. Section 205.2(e).
20. 68 Fed. Reg. at 6302.
21. *Id.* (footnote omitted) (emphasis supplied).
22. *Id.*
23. The commentary states that "[t]his revised definition of 'evidence or a material violation' clarifies aspects of the objective standard that the Commission sought to achieve in the definition originally proposed." *Id.* at 6301 (footnote omitted).
24. Model Rule 1.13, cmt 3.
25. Defined generally by § 205.2(k) to be a committee consisting entirely of directors who are not employed directly or indirectly by the issuer.
26. *See* § 205.3(b)(2).
27. Section 205.3(b)(3).
28. 68 Fed. Reg. at 6297.
29. *Id.* at 6306.
30. *Id.* at 6307.
31. *Id.* at 6303.