79 Law Firms

April 7, 2003

Jonathan G. Katz, Secretary,
Securities and Exchange Commission,
450 Fifth Street, N.W.,
Washington, D.C. 20549-0609.

Re: Sarbanes-Oxley Act § 307 – Implementation of Standards of Professional Conduct for Attorneys - Parts 205, 240 and 249 (File No. S7-45-02)

Dear Mr. Katz:

We would like to express to the Commission our appreciation for (1) deferring for further comment and consideration the "noisy withdrawal" requirement of originally proposed Part 205, and (2) in adopting Part 205, carefully considering and in many cases responding effectively to the numerous comments on the original proposal.

We would now like to comment principally on two important aspects of the proposed "noisy withdrawal" requirement and the alternative attorney withdrawal and issuer notification proposal:

- We believe the alternative proposal suffers from the same fundamental shortcoming as the "noisy withdrawal" proposal and that both proposals are contrary to the interest of the investing public.
- We believe the scope of the withdrawal requirement is unclear and should be limited to withdrawal from the matter involved, so that if the client wishes to continue to use the lawyer or law firm on other matters, it may do so.

Additional matters will be addressed separately by the participating firms.

Alternative Proposal – Issuer Notice to Commission

The substitution of a notice of attorney withdrawal by the issuer for a notice of withdrawal by the attorney (as contemplated by the Commission's alternative proposal) does not address the basic and most serious problem of the impact on the free exchange of information between attorneys and clients of a required notice to the Commission and the adverse effect that will have on achieving the Commission's fundamental objective in the overwhelming majority of cases. It is quite clear that neither the original "noisy withdrawal" proposal nor the alternative issuer notification proposal is required by Sarbanes-Oxley § 307, and we believe that either would do more harm than good in protecting the investing public.

As an essential premise to understanding our position, we would like to emphasize something that the Commission itself said in both its proposing and adopting releases regarding auditor independence rules under Sarbanes-Oxley: The roles of independent public accountants and attorneys are very different.[1] As the title implies and the rules applicable to accountants specify, a public accountant for an issuer (i) is required to be independent (as defined at great length and in considerable detail), (ii) audits an issuer's financial statements, (iii) reports on the results of the audit to the issuer's shareholders and (iv) is relied on by the investing public. An attorney to an issuer on the other hand is ethically bound to act as a legal counselor to, and at times an advocate for, that issuer, is not independent or required to be, and only in very limited

[1] We recognize that some persons favor required notification to the Commission because they see it as analogous to rules related to the resignation of auditors. But we submit that such an analogy is misguided.

circumstances[2] provides advice that may be relied on by the investing public. Accordingly, there is no valid analogy that warrants regulating attorneys similarly to independent public accountants. While Sarbanes-Oxley § 307 requires the Commission to issue rules setting forth minimum standards of professional conduct for attorneys appearing and practicing before it, we believe that these rules, like Sarbanes-Oxley § 307, should take into account the very important differences in the roles of attorneys and public accountants.[3]

In our letter, dated December 18, 2002, we stated:

> In the vast majority of cases counsel enjoy the confidence of their clients and, given access to the facts by their clients, succeed in persuading their clients to refrain from actions that harm the investing public. If clients are afraid to confide candidly and completely in their counsel and instead proceed without the advice of counsel, the public will inevitably be harmed in some cases when it need not have been. Or clients may be prompted to avoid cautious and prudent counsel, with the same result. The basic force for conformance of business conduct to legal norms is a strong and independent Bar that enjoys the trust and confidence of its clients.

We believe that as a practical matter the chilling effect on the attorney-client relationship of a required notice of attorney withdrawal to the Commission will be equally adverse, *whether that notice is required to be given by the issuer or by the attorney*.[4] All clients

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[2] E.g., portions of filings with the Commission as to which the attorney, with his/her consent, acts as an "expert" and opinions as to validity of securities filed with the Commission.

[3] There is no suggestion in the legislation that Congress intended comparable treatment for attorneys and accountants.

[4] We do, however, believe that an attorney may, to the extent permitted in the rules governing his/her professional conduct, notify the Commission of his/her withdrawal from representation of an issuer and/or disaffirm documents filed with

will understand that a notification of attorney withdrawal will inevitably result in an adverse market reaction (and, potentially, related securities litigation) and at least an informal inquiry by the Commission staff, even under circumstances in which the clients' position was reasonable. Indeed, it would be surprising if the Commission's staff did not feel obligated to look into every notification. Significantly, clients will understand the potential adverse consequences of consulting counsel and thereafter having an honest disagreement with that counsel.

We believe that the possibility (even if remote) of such consequences to issuers creates a serious risk that some issuers may begin to err on the side of less rather than more consultation with their attorneys about potentially difficult situations. More importantly, we believe that this is likely to occur at an early stage in the process – indeed before any "up-the-ladder" reporting issue arises. The chilling effect could infect the decision whether in difficult situations to involve counsel (whether inside or outside counsel) at all. If counsel is involved or retained, some issuers may shy away from attorneys with more conservative reputations on reporting and similar issues. And regardless of which attorneys are brought in, some clients may simply confide less in them.

We believe mandatory reporting under either alternative is thus detrimental to the attorney-client relationship and the objective of investor protection. Furthermore, it is not necessary to achieve the Commission's objective – because that

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the Commission – in order to enable him/her to deal appropriately with extreme cases.

objective can be fully achieved by the "up-the-ladder" provisions of Part 205 as already adopted. The existing "up-the-ladder" requirements will prove effective, since directors will either seek the advice of new counsel or put themselves in a position of significantly increased risk. In the event that an attorney concludes that he/she has not received from management within a reasonable time an "appropriate response" to a report of a material violation (within the meaning of clauses (1) and (2) of the definition), he/she would advise a previously-formed QLCC or another appropriate committee of the board, consisting solely of independent directors (an "appropriate committee"), of the material violation. If the appropriate committee, without consultation with or favorable advice from new counsel, concludes that there has been no material violation or that the issuer's response has been appropriate, then, in the event of a subsequent Commission investigation of the possible violation, the issuer, each member of the appropriate committee and management will all run the risk of being charged with willfully or recklessly causing or condoning a material violation of law. A prudent appropriate committee will instead either proceed in accordance with such counsel's advice or retain new counsel. If the new counsel does not believe there is a colorable defense to an allegation of material violation, then it is a foolhardy committee indeed that will permit the issuer to proceed. Assuming new counsel advises there is a colorable defense, the issuer should be entitled to proceed without mandatory disclosure to the Commission or to the public (as it would be under Part 205, as already adopted, had it consulted such new counsel upon receipt of the report of a material violation).[5]

[5] While we recognize that the issuer could have provided an "appropriate response"

We believe the approach of "up-the-ladder" reporting without mandatory notification to the Commission would be more consistent with the protection of shareholders and investors because it would not prompt issuers to avoid careful counsel and should be adequate in virtually all cases to induce issuers to reach the right conclusion. We also believe the "up-the-ladder" reporting approach without mandatory notification is more consistent with the logic of the Commission's approach in Section 205.3(c), as adopted, which permits a reporting attorney to defer absolutely to the judgment of a QLCC.

We recognize that some persons favor required notification of the Commission on the basis that investor protection is more important than an issuer's right to unfettered advice of counsel, and they refer to recent notorious accounting financial frauds. But we submit that they are reacting to specific cases involving egregious facts and missing or ignoring the potentially far more detrimental consequences to investors of their remedy. Both the noisy withdrawal proposal and alternative approach would impact a multitude of close questions being addressed by honest issuers and reputable counsel. In either case, it is counterproductive from the standpoint of investor protection to impose a requirement that will stifle or discourage complete candor between an issuer and its attorney or discourage the use of careful counsel or the provision of wise advice.

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by obtaining an opinion of a colorable defense from new counsel upon receipt of the report of a material violation from the initial counsel, we believe the option of obtaining a favorable opinion from new counsel should not be available only prior to the initial counsel concluding it has not received an appropriate response.

We suggest that the SEC monitor the effectiveness of the "up-the-ladder" requirement over the next few years. Adjustments can be made should it prove necessary or desirable. Any action by the Commission with respect to withdrawal and notice thereof should be deferred until there is more experience with the "up-the-ladder" requirement, which is entirely consistent with the legislative mandate.

While for the foregoing reasons we strongly urge the Commission not to adopt either the original "noisy withdrawal" proposal or the alternative proposal, we do wish to address two aspects of the alternative proposal on which the Commission specifically sought comment. In our view, unless these aspects are improved, the alternative proposal is in certain respects inferior to the original "noisy withdrawal" proposal.

Standard for Notification. First, we wish to address the Commission's inquiry regarding whether an issuer should be relieved of a duty to notify the Commission of an attorney's withdrawal only if a committee of independent directors determines, based on the advice of another attorney, that the withdrawing attorney acted "unreasonably". If a duty of notification to the Commission or other public notice of an attorney's withdrawal is implemented, we believe the standard for being relieved of such duty based upon advice of new counsel should be consistent with the standard utilized for a second counsel opinion in the definition of "appropriate response". An issuer should not be required to notify the Commission or provide public notice if it obtains advice from new counsel that the issuer can assert a "colorable defense" (as presently contemplated by Part 205). We see no principled justification for imposing a higher

standard to avoid the consequences of withdrawal than the standard applicable to obviate withdrawal. It may be entirely reasonable for an issuer to believe that its pre-withdrawal response to a report of a material violation is appropriate without the need for a second opinion. The issuer should not effectively lose the ability to seek a second opinion simply because the initial counsel disagrees with the appropriateness of the issuer's response and withdraws.

To require notification to the Commission unless a board committee finds that the withdrawing attorney has acted "unreasonably" is, in our view, also counterproductive in achieving the Commission's goal of investor protection. In effect, the standard provides that the withdrawing attorney's opinion will prevail unless the committee is able to determine that the opinion is unreasonable. But if an issuer knows that the view of the first counsel it consults will be given such presumptive weight, it may be less likely to consult initially with prudent and competent counsel. The Commission's recognition in the adopted definitions of "appropriate response" and "evidence of a material violation" that there is frequently a range of reasonable opinions and that an issuer and counsel are acting appropriately so long as they are acting within that range should apply equally in the case of a withdrawal.

While some may argue that an issuer can avoid this result by forming a QLCC or by obtaining a second opinion when first notified of a potential violation (in which case a "colorable defense" standard would apply), we respectfully submit that it is inappropriate to penalize an issuer, through imposition of a much higher standard, for proceeding in a manner that is permitted by the rules and may well be a reasonable

response at the time and in light of the circumstances, e.g., if time does not permit an investigation by a second counsel or if the issuer believes that it is otherwise responding appropriately.

If the issuer obtains advice from counsel that the issuer can assert a "colorable defense" and the directors and senior management of the issuer are prepared to go forward based upon that advice (having the benefit of the views of the withdrawing counsel), that should be the end of the matter (as is presently contemplated by Part 205). The purpose of Sarbanes-Oxley § 307 – bringing matters to the attention of independent directors and senior management – will have been served because withdrawal will have been preceded by the presumably close call having risen "up the ladder". On the other hand, contrary to the interests of investors, the matter is unlikely ever to come to the attention of the independent directors and senior management if the issuer avoids advice of counsel or advice of prudent and competent first counsel for fear of receiving a reasonable but perhaps overly cautious response. As with required notification, we believe that the goal of protecting the investing public is far better served by rules that do not create potential disincentives to seeking the advice of careful counsel.

We also believe the proposed standard is completely inconsistent with the adopted definition of "appropriate response" (Section 205.2(b)(3)). In that definition, the Commission looked to the "colorable defense" standard, which should continue to apply here. If an appropriate committee receives advice from a second attorney that, consistent with the attorney's professional obligations, the attorney may assert a "colorable defense" on behalf of the issuer, the issuer should be entitled to proceed without risk that

withdrawal by the first attorney would compromise that defense. Of course, many appropriate committees will choose not to rely on a "colorable defense" standard and act consistently with the views of the first counsel, but that merely reinforces that the purposes of Section 307 and "up-the-ladder" reporting will have been served.

Required Disclosure. Second, we strongly believe the contemplated requirement of the alternative proposal that the issuer make public the fact of, and the "circumstances" relating to, an attorney's withdrawal is unworkable. The mandated disclosure of the "circumstances" is likely to result in a harmful loss of attorney-client privilege and the loss by the issuer of any practical ability to assert its defenses. But the solution to this problem is not simply to require public disclosure of the fact of withdrawal, without the "circumstances". Such limited disclosure would in most situations convey no useful (or indeed, possibly misleading) information to investors. Given these difficulties, we think the best answer is simply not to require disclosure at all.

Even under the original "noisy withdrawal" proposal, notice was only to the Commission, and an issuer could make its case to the Commission before any public disclosure of the withdrawal. Under the alternative proposal, damaging public disclosure could be required, even under circumstances in which the issuer is acting reasonably, prior to the issuer having an opportunity to make its case to the Commission.

Attorney Withdrawal

The application of the withdrawal requirement to law firms is unclear in both the original "noisy withdrawal" proposal and in the alternative approach proposal. The Commission specifically requests comments on whether a retained attorney required to withdraw should be required to withdraw from all representation of the issuer or only from representation on the matter concerning the material violation. Many issuers entrust a wide variety of matters to a single law firm and, on occasion, to a single lawyer. Such matters may include general corporate work, securities work, litigation, tax advice, labor, criminal matters, IP etc. Requiring withdrawal from all matters goes far beyond what is required to achieve the Commission's purposes and may seriously harm the issuer. If a client, even after the difficult stresses occasioned by a withdrawal, still wishes to retain the withdrawing lawyer or law firm, then we believe that option should be available. As to litigation, the exception to withdrawal based on court order, rule etc. after seeking leave to withdraw is much too cumbersome in the middle of a lawsuit, e.g., in the midst of discovery or trial. In fact, requiring withdrawal from all matters can be so harsh to both the issuer and the law firm as to have the counterproductive effect of putting great pressure on both issuer and law firm to conclude that the violation is not material, not ongoing or likely to occur, or not likely to cause substantial injury to the financial interest or property of the issuer or of investors. Existing ethical rules, which do require mandatory withdrawal in certain circumstances, are in general limited to "matter-specific" withdrawal. Accordingly, we strongly believe that, at least in the context of a law firm, the required withdrawal should apply only to the matter concerning the material

violation, as has been proposed with respect to an attorney who is an employee of the issuer.

Respectfully submitted,

Akin Gump Strauss Hauer & Feld, LLP
Alston & Bird LLP
Arnold & Porter
Baker Botts L.L.P.
Ballard Spahr Andrews & Ingersoll, LLP
Bryan Cave LLP
Cadwalader, Wickersham & Taft LLP
Cahill Gordon & Reindel
Chadbourne & Parke LLP
Clifford Chance US LLP
Cooley Godward LLP
Covington & Burling
Cravath, Swaine & Moore
Davis Polk & Wardwell
Day, Berry & Howard LLP
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Dewey Ballantine LLP
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Gardner Carton & Douglas LLC
Gibson Dunn & Crutcher LLP
Goodwin Procter LLP
Hale and Dorr LLP
Heller Ehrman White & McAuliffe LLP
Hogan & Hartson L.L.P.
Hughes Hubbard & Reed LLP
Hughes & Luce, LLP
Hunton & Williams
Katten Muchin Zavis Rosenman
Kaye Scholer LLP
Kilpatrick Stockton LLP

King & Spalding LLP
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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
Morrison & Foerster LLP
Munger, Tolles & Olson LLP
Nixon Peabody LLP
O'Melveny & Myers LLP
Orrick, Herrington & Sutcliffe LLP
Osler, Hoskin & Harcourt LLP
Palmer & Dodge LLP
Paul, Weiss, Rifkind, Wharton & Garrison LLP
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 L.L.P.
Sullivan & Cromwell LLP
Testa, Hurwitz & Thibeault, LLP
Torys LLP
Wachtell, Lipton, Rosen & Katz
Weil, Gotshal & Manges LLP
White & Case LLP
Willkie Farr & Gallagher
Wilmer, Cutler & Pickering
Wilson Sonsini Goodrich & Rosati, Professional Corporation
Winston & Strawn
Wolf, Block, Schorr and Solis-Cohen LLP

cc: Hon. William H. Donaldson, Chairman
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