

American Federation of Labor and Congress of Industrial Organizations

March 7, 2003

BY ELECTRONIC AND U.S. MAIL

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Re: File No. S7-45-02

Dear Mr. Katz:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), I am writing to offer comments on Securities and Exchange Commission (the "Commission") proposal, S7-45-02, regarding the Implementation of Standards of Professional Conduct for Attorneys. In particular, I welcome this opportunity to respond to the Commission's request for comments from interested parties outside the legal profession, such as issuers and investors, on the "noisy withdrawal" provisions, and on the alternative provisions, in the Commission's proposal.

The AFL-CIO is the federation of America's labor unions, representing more than 66 national and international unions and their membership of more than 13 million working women and men. Union members participate in the capital markets as individual investors and through a variety of benefit plans. U.S. workers' benefit plans have over \$5 trillion in assets. Union-sponsored pension plans account for \$400 billion of that amount.

We commend the Commission for its January 23rd vote to adopt rules establishing minimum standards of professional conduct for attorneys, including an "up-the-ladder" reporting system. This up-the-ladder system, which was mandated by the Sarbanes-Oxley Act of 2002, represents an important part of a reporting mechanism with the potential to protect issuers and their investors from material violations of the law. The rules adopted by the Commission, however, are incomplete without a mandatory reporting-out mechanism, and we favor the proposed noisy withdrawal provisions as the best approach.

A. Noisy Withdrawal provides key protections to company and its shareholders

The proposed noisy withdrawal provisions require an attorney to notify the Commission, and disaffirm relevant documents filed with the Commission, when the attorney has not received an appropriate response to evidence of a material violation reported up-the-ladder to a company's directors, and the attorney reasonably believes that the reported material violation is occurring or is about to occur.

We believe that these provisions will serve two critical functions. First, their mere existence gives corporate directors strong incentive to respond to evidence of wrongdoing rather than expose their company to Commission scrutiny. Second, the up-the-ladder requirements alone cannot protect investors in those most egregious situations in which a corporation's executives and directors fail to adequately respond to evidence of fraud. In such instances, we believe the proposed requirements are entirely consistent with the attorney's duty to faithfully represent the interests of his or her client, which is the issuer corporation and not its executives or directors.

Like the Commission, we hope that these situations are rare. But recent scandals at Tyco, Enron and WorldCom demonstrate that fraud can and does occur at the highest echelons of a corporation, often with devastating consequences for the company and its shareholders. We estimate, for example, that worker funds lost over \$35 billion in Tyco and Enron alone.

We believe evidentiary standard defined in the proposal is appropriate, and that the provisions appropriately require the attorney, rather than the issuer, to notify the Commission of his or her noisy withdrawal¹. To strengthen the proposal, we believe that noisy withdrawal should also be required, not merely permitted, when the attorney has not received an appropriate response to reported evidence of a material violation that the attorney reasonably believes has occurred. In addition, we believe the final rule should not distinguish between outside attorneys and those employed directly by the issuer.

Finally, in addition to requiring attorneys to notify the Commission, we encourage the Commission to also consider requiring issuers to report the written resignation of attorneys for "professional reasons" on form 8-K. We believe that shareholders are entitled to disclosure of such material information with the potential to substantially impact the value of our investments.

B. Noisy Withdrawal is consistent with word and spirit of attorney-client privilege

We understand that the Commission's noisy withdrawal proposal has provoked strong opposition from the legal profession, with many attorneys viewing it as a breach of attorney-client privilege. While we appreciate that the Commission has already rejected this argument on legal grounds, stating that it is "largely settled law" that the provisions do

¹ For those situations in which a noisy withdrawal would create conflicts under applicable foreign law, we are prepared to support an exception to the rule that placed the reporting burden on the issuer rather than the attorney. The mechanism could be similar to that proposed as part of the alternative provisions, but with the evidentiary standard required under noisy withdrawal.

not breach attorney-client privilege, we would like to add a shareholder perspective to further support the Commission's position.

In our view, the issuer corporation is the client in any attorney-client relationship covered under S7-45-02. Therefore, if an issuer's executives and directors fail to respond appropriately on behalf of that issuer to evidence of a material violation that is likely to result in substantial injury to the issuer and its shareholders, we believe it is entirely consistent with an attorney's duty to his or her client (i.e. the issuer) to notify the Commission. In fact, failure to do so would seem to violate the attorney's duty to faithfully represent the interests of the client.

C. Proposed alternative provisions too narrow to adequately protect shareholders

While we view the Commission's alternative provisions as a good faith effort to respond to the legal profession's concerns with noisy withdrawal, we believe the alternative provisions as proposed fail to provide shareholders with adequate safeguards. In particular, the alternative provisions only require action by the attorney where the attorney reasonably concludes that there is substantial evidence that a material violation is ongoing or about to occur and is likely to cause substantial injury to the issuer. We believe that this evidentiary standard, which is higher than the Commission's standard for reporting up-the-ladder, is too high.

The AFL-CIO raised this alternative structure at a Commission roundtable as a means of resolving a specific dilemma involving attorneys who are subject to non-U.S. rules governing legal ethics. We strongly support this structure for dealing with this particular problem so long as the evidentiary standard is identical to that proposed for noisy withdrawal.

In general, however, we favor noisy withdrawal, in part because it places the mandatory reporting-out burden on the attorney rather than the issuer. We would be prepared to support the alternative provisions in the general case, however, if (1) the evidentiary standard were identical to that proposed for noisy withdrawal, and (2) an attorney is required, rather than permitted, to notify the Commission in the event that the issuer fails to file the required form 8-K announcing the attorney's withdrawal.

D. Conclusion

We commend the Commission for adopting rules establishing minimum standards of professional conduct for attorneys, including an up-the-ladder reporting system mandated by the Sarbanes-Oxley Act of 2002. We urge the Commission to now adopt an effective reporting-out mechanism to ensure that these rules fully protect issuers and their investors from fraud. In particular, as stated above, we support the Commission's original noisy withdrawal proposal.

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We thank you for this opportunity to comment on this important proposal to provide investors with meaningful protections, and hope that the Commission will consider our comments in formulating its final rule.

Sincerely,

Richard L. Trumka
Secretary-Treasurer

cc (by U.S. mail)

William H. Donaldson, Chairman
Paul S. Atkins, Commissioner
Roel C. Campos, Commissioner
Cynthia A. Glassman, Commissioner
Harvey J. Goldschmid, Commissioner