

December 13, 2002

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

RE: Comments by the National Organization of Bar  
Counsel on Proposed Sarbanes-Oxley Act Rules

Dear Mr. Katz:

This letter is in response to the Commission's request for public comment on its Proposed Rules for Implementation of Standards of Professional Conduct for Attorneys.

The National Organization of Bar Counsel (NOBC) applauds and supports in principal the Proposed Rule: 17 CFR Part 205. In a short period of time the SEC and its staff have done a remarkable job of addressing the issues raised by the Sarbanes-Oxley Act. Subject to our comments, which follow, we are gratified to see that an outside reporting requirement has been included. It is absolutely necessary to adequately protect the public we both serve.

1. Rules governing the conduct of individuals must be the product of a process perceived as legitimate by those being regulated.

It is unfortunate that the Sarbanes-Oxley Act required the creation of these proposed rules in such a short time with a resulting abbreviated comment period. As to those rules, which are directly mandated by congress, the short time frame is unavoidable. However the "reporting out" requirement which was not addressed specifically by the act and the short comment period

could create at least two problems. Comments from all segments of the profession could reduce the possibility of unintended consequences and more importantly result in a rule, which is viewed to be the result of a legitimate process. Rules that are difficult to accept by those regulated are more frequently violated, more difficult to enforce, and consume more time and resources in the enforcement process.

This having been said, let it be clearly understood that we do not back away one inch from our support of a “reporting out” provision. We are persuaded that protection of the public makes this requirement mandatory. It is only to say that a more comprehensive comment period will produce a rule that is more capable of being enforced because it will contain fewer surprises and be more easily accepted.

NOBC would suggest that the “reporting out” rules be removed from the current proposal and treated as a stand-alone proposal. We also suggest that the consideration of a “reporting out” rule follow immediately after adoption of the rules presently under consideration.

2. We have several specific comments and suggestions directed to the language of the proposal. They are as follows:
  - A. Comment on Section 205.2 Definitions – (a) Appearing and practicing.

The definition should be limited in such a way as to exclude not only attorneys who are representing other attorneys in actions brought by the Commission but also attorneys representing issuers during the course of investigations and actions brought by the Commission. To accomplish this we suggest you consider the following language:

- (6) However, this term shall not include an attorney who is representing an attorney or an issuer charged with a violation of this rule.
  - B. Comment on Section 205.3 Issuer as client –(d)(3).

The language provides that the notification prescribed by 205.3(d) does not breach the attorney-client privilege. This causes some confusion when read in the context of the section-by-section discussion found at page 43 of the proposed rules. The discussion suggests that because many states have adopted language in their disciplinary rules permitting disclosure under a circumstance akin to those covered by the proposed rule, notification does not violate attorney-client privilege. The discussion then refers to the Kutak Commission, which drafted a model set of disciplinary rules.

Confusion results because the attorney-client privilege is an evidentiary concept, arises only in a litigation context and is addressed by rules of evidence. It is much

narrower than the rule of confidentiality, which is a disciplinary concept and applies to litigation, transactional practice and the entirety of the client-lawyer relationship. It is the concept of confidentiality that appears in the disciplinary rules not the attorney-client privilege. Thus if (d)(3) is meant to address the evidentiary issue the references to disciplinary rules and the Kutak Commission should be eliminated. On the other hand if the purpose of (d)(3) is to give lawyers comfort that they will not be in violation of their states disciplinary rules<sup>1</sup> by complying with the Commissions rules we would suggest that the following language would be preferable:

“3) The notification to the Commission prescribed by this paragraph (d) does not breach the lawyer’s duty of confidentiality.”

3. Accommodation or Preemption.

There are inherent difficulties associated with adopting rules at the federal level that are in conflict with rules at the state level. While the “reporting out” requirement is consistent with the rules in many jurisdiction there are many in which the adoption will place lawyers in a difficult if not impossible position. Because of the difference in the two sets of rules lawyers will be caught between the SEC Scylla and the state Charybdis.

If it is the desire of the Commission to give a measure of comfort to the lawyers it seeks to regulate it should address the “reporting out” issue in one of two ways. Either it should reach an accommodation with the Conference of Chief Justices on the issue of enforcement in those instances where the rules conflict or it should address head on the issue of preemption. Unless the Commission can reach an accommodation or articulate a compelling preemption argument there will be those jurisdictions where attorneys will face a Hobson’s choice. A complete examination of the preemption issue will be forthcoming. It seems to us that the party to take this burden is the Commission in as much as it is their rule that is creating the problem. To place this burden on the first lawyer to be caught between the two violates fundamental fairness.

It will also create a problem for regulators both on the state and federal level. The agency regulators will have to face the defense that the lawyer could not comply with the rules because (1) they do not preempt state regulations, and (2) to comply would be to risk discipline from the entity issuing their license. State regulators would be faced with the defense that (1) the agency regulations preempt the state rules and that (2) failure to disclose would bring upon them severe penalty for the agency.

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<sup>1</sup> See the last sentence in proposed rule 205.3(b).

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We again compliment the agency for its effort to address a most difficult issue. If we can be of assistance in accomplishing the goal of better public protection please call on us.

Very truly yours,

Barbara L. Margolis  
President, NOBC

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