

our rules that prohibit serving as a promoter or underwriter, making investment decisions on behalf of the audit client or otherwise having discretionary authority over an audit client's investments, or executing a transaction to buy or sell an audit client's investment, or having custody of assets of the audit client. The rule is substantially the same as the Commission's previous rule related to the provision of these types of services to audit clients. We are including unregistered broker-dealers within the rules because the nature of the threat to independence is unchanged whether the entity is or is not a registered broker-dealer.

Selling—directly or indirectly—an audit client's securities is incompatible with the accountant's responsibility of assuring the public that the company's financial condition is fairly presented. When an accountant, in any capacity, recommends to anyone (including non-audit clients) that they buy or sell the securities of an audit client or an affiliate of the audit client, the accountant has an interest in whether those recommendations were correct. That interest could affect the audit of the client whose securities, or whose affiliate's securities, were recommended. These concepts are echoed in the "simple principles" included in the legislative history to the Sarbanes-Oxley Act.⁸³ In such a situation, if an accountant uncovers an accounting error in a client's financial statements, and the accountant, in an investment adviser capacity, had recommended that client's securities to investment clients, the accountant performing the audit may be reluctant to recommend changes to the client's financial statements if the changes could negatively affect the value of the securities recommended by the accountant to its investment adviser clients.

Broker-dealers⁸⁴ often give advice and recommendations on investments

other ways, by receiving transaction-related compensation or by holding itself out as a broker-dealer. Involvement of accounting personnel as unregistered broker-dealers not only can impair auditor independence, but also would violate Section 15(a) of the Exchange Act.

⁸³ Floor Statement of Senator Sarbanes, 148 Cong. Rec. S7364 (July 25, 2002) " * * A public company auditor should not be a promoter of the company's stock or other financial interest (as it would be if it served as broker-dealer, investment adviser, or investment banker for the company)." To do so places the auditor in a position of serving as an advocate for his or her audit client.

⁸⁴ In the past, some have expressed concern that terms such as "securities professional" and "analyst" are not defined in the securities laws and of the terms could cause confusion. Because of that concern, we have not used those terms in these

and investment strategies. The value of that advice is measured principally by the performance of a customer's securities portfolio. When the customer is an audit client, the accountant has an interest in the value of the audit client's securities portfolio, even as the accountant must determine whether management has properly valued the portfolio as part of an audit. Thus, the accountant would be placed in a position of auditing his or her own work. Furthermore, the accountant is placed in a position of acting as an advocate on behalf of the client.

9. Legal Services

Our previous rule stated that an accountant is deemed to lack independence when he or she provides legal services to an audit client. The proposed rule provided that an accountant was not independent of an audit client if the accountant provides any service to the audit client that, under circumstances in which the service is provided, could be provided only by someone licensed, admitted or otherwise qualified to practice law in the jurisdiction in which the service is provided.

We believe that a lawyer's core professional obligation is to advance clients' interests. Rules of professional conduct in the U.S. require the lawyer to "represent a client zealously and diligently within the bounds of the law."⁸⁵ The lawyer must "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor * * * In the exercise of professional judgment, a lawyer should always act in a manner consistent with the best interests of the client."⁸⁶ We have long maintained that an individual cannot be both a zealous legal advocate for management or the client company, and maintain the objectivity and impartiality that are necessary for an audit.⁸⁷ The Supreme Court has agreed with our view. In *United States v. Arthur Young*, the Supreme Court emphasized, "If investors were to view the accountant as an advocate for the corporate client, the value of the audit function itself might well be lost."⁸⁸

rules. We note, however, that broker-dealers provide an array of services that may include certain analyst activities.

⁸⁵ See, e.g., D.C. Rules of Professional Conduct, Rule 1.3(a).

⁸⁶ *Id.* at Rule 1.5.

⁸⁷ In the Matter of Charles Falk, AAER No. 1134 (May 19, 1999) (formally disciplining an attorney/accountant who gave legal advice to an audit client of another partner in his accounting firm).

⁸⁸ *United States v. Arthur Young*, 465 U.S. 805 (1984) at 819–20 n.15.

Some commenters⁸⁹ believed that the prohibition on legal services should apply to all registrants, regardless of their jurisdiction. Others believed that certain accommodations should be made for foreign jurisdictions⁹⁰ or for routine or ministerial duties.⁹¹

The rules we are adopting are consistent with our proposal. Accordingly, an accountant is prohibited from providing to an audit client any service that, under circumstances in which the service is provided, could be provided only by someone licensed, admitted, or otherwise qualified to practice law in the jurisdiction in which the service is provided.

We recognize that there may be implications for some foreign registrants from this rule. For example, we understand that in some jurisdictions it is mandatory that someone licensed to practice law perform tax work, and that an accounting firm providing such services, therefore, would be deemed to be providing legal services. As a general matter, our rules are not intended to prohibit foreign accounting firms from providing services that an accounting firm in the United States may provide. In determining whether or not a service would impair the accountant's independence solely because the service is labeled a legal service in a foreign jurisdiction, the Commission will consider whether the provision of the service would be prohibited in the United States as well as in the foreign jurisdiction.

Evaluating and determining whether services are permissible may require a comprehensive analysis of the facts and circumstances. We are, however, sensitive to these issues and, as we have done in the past,⁹² we encourage accounting firms and foreign regulators to consult with the staff to address these issues.

10. Expert Services

The Sarbanes-Oxley Act includes expert services in the list of non-audit services an accountant is prohibited from performing for an audit client. As

⁸⁹ See, e.g., letter of Lynn E. Turner, dated January 13, 2003; letter from California Public Employees' Retirement System, dated January 10, 2003.

⁹⁰ See, e.g., letter from HSBC, dated January 10, 2003; letter from Institute of Chartered Accountants in England and Wales, dated December 24, 2002; letter from Institut der Wirtschaftsprüfer, dated December 27, 2002; letter from Federation des Experts Comptables Européens, dated January 13, 2003.

⁹¹ See, e.g., letter from KPMG, dated January 9, 2003.

⁹² Letter of Lynn Turner, Chief Accountant, SEC, to Commissione Nazionale per le Società e la Borsa re: statutory procedures (August 24, 2000).