

“reasonably believes” standard was inappropriate because it would impose on lawyers who are not expert in the securities laws a standard based on the “reasonable” securities law expert.¹³ Others opined that the standard should be modified to require the lawyer’s “actual understanding,” rather than reasonable belief, regarding a “clear” material violation,¹⁴ while others urged that the standard must be objective.¹⁵

Other commenters felt that the paragraph did not properly address situations, which the commenters felt would be frequent, where an issuer’s inquiry into the report of a possible material violation would be “inconclusive.”¹⁶ Others expressed the belief that the rule did not give a reporting lawyer sufficient guidance “such that a reporting attorney can with confidence, and without speculation, determine whether he or she has received an appropriate response.”¹⁷ Some comments questioned whether reporting attorneys would be able to judge whether discipline or corrective measures were sufficient to constitute an appropriate response.¹⁸ One suggested that the paragraph be modified to provide that an attorney has received an appropriate response when the chief legal officer (“CLO”) states that he or she has fulfilled the obligations set forth in Section 205.3(b)(3), unless the attorney is reasonably certain that the representations are untrue.¹⁹ Some

commenters found the term “and/or” in subparagraph (b)(2) of the proposed paragraph confusing.²⁰ Others questioned whether the provision that the issuer “rectify” the material violation should be read to contemplate restitution to injured parties, with one stating that it did not believe Congress intended to impose upon attorneys an obligation to require issuers to make restitution,²¹ while others read the proposed rule as “imply[ing] that the appropriateness of a response need not include compensation of injured parties,” and accordingly supported this standard.²² A few commenters noted that under subparagraph (b)(2) a response is appropriate only if the issuer has already “adopted remedial measures,” and thus apparently does not apply if the issuer is in the process of adopting them. They urged that the Commission provide that an appropriate response includes ongoing remedial measures.²³

A few comments were directed at the discussion accompanying the proposed rule. One suggestion was that the Commission make clear that the factors it will consider in determining whether an outside law firm’s response that no violation has occurred constitutes an appropriate response include a description of the scope of the investigation undertaken by the law firm and the relationship between the issuer and the firm. They also urged the Commission to expressly state that the greater or more credible the evidence that triggered the report, the more detailed an investigation into the matter must be.²⁴ One commenter also

reasonableness even though the attorney would not necessarily come out that way”); Comments of Skadden, Arps, Slate, Meagher & Flom, at 9–10 (reporting attorney should be able to rely upon the stated belief of the officer to whom he has reported the evidence of material violation that no material violation has occurred).

²⁰ Comments of JP Morgan & Chase, at 10–11; Comments of Debevoise & Plimpton, at 5.

²¹ Comments of JP Morgan & Chase, at 11; Comments of Debevoise & Plimpton, at 5–6.

²² Comments of the Corporation, Finance and Securities Law Section of the District of Columbia Bar, at 14.

²³ Comments of Carter, Ledyard & Milburn, at 3; Comments of Skadden, Arps, Slate, Meagher & Flom, at 9–10 (appropriate response should include a timely response that adequate measures are being taken).

²⁴ Comments of Susan P. Koniak *et al.*, at 13; Comments of Schiff Hardin & Waite, at 4–5 (criticizing the examples in the release of the proposed rule as undercutting the proposition that attorneys will be permitted to exercise their reasonable judgment, and stating that the Commission should clarify that the reasonableness of an issuer’s response will vary depending on the circumstances and will not necessarily depend on the existence of a written legal opinion from outside counsel to the issuer); Comments of the SIA/TBMA, at 18 (suggesting revisions to Section 205.2(b) that

suggested that the Commission withdraw the statement in the release of the proposed rule that Section 205.2(b) “permits” attorneys “to exercise their judgment,” finding that language both superfluous and conveying a signal that the Commission will be loathe to second-guess a lawyer’s judgment that a response is “appropriate.”²⁵

Several commenters suggested that the proposed rule should exempt internal investigations of reported evidence of a material violation.²⁶ Commenters were concerned that the reporting and disclosure requirements in the proposed rules might discourage issuers from obtaining legal advice and undertaking internal investigations and that, as a result, some violations might not be discovered or resolved.²⁷ Thus, some commenters urged that an issuer must be permitted “to retain counsel to investigate the claim and respond to it, including defense in litigation, without being at risk of violating the rule.”²⁸ Some commenters stated that “counsel conducting an internal investigation” should not be subject to the rule’s reporting and disclosure requirements.²⁹

The proposing release stated that “[i]t would not be an inappropriate response to reported evidence of a material violation for an issuer’s CLO to direct defense counsel to assert either a colorable defense or a colorable basis for contending that the staff should not prevail. Such directions from the CLO, therefore, would not require defense counsel to report any evidence of a material violation to the issuer’s directors.”³⁰ 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.³¹ Some noted

would state that an appropriate response should be reasonable under the circumstances, measured by the magnitude and quality of the evidence of the violation, the severity of the violation, and whether there is a potential for ongoing or recurring violation).

²⁵ Comments of Susan P. Koniak *et al.*, at 12.

²⁶ Comments of the SIA/TBMA, at 11 (stating that the Rules “should exempt outside counsel whom securities firms retain to conduct internal investigations”).

²⁷ Comments of Carter, Ledyard & Milburn, at 6 (noting risk that proposed rules “might discourage persons from seeking legal representation”); Comments of the SIA/TBMA, at 11.

²⁸ Comments of Weil Gotshal & Manges, at 7.

²⁹ Comments of the Corporation, Finance and Securities Law Section of the District of Columbia Bar, at 4; Comments of the American Bar Association, at 30.

³⁰ 67 FR 71683.

³¹ Comments of Akin Gump Strauss Hauer & Feld, at 7–8; Comments of Cleary, Gottlieb, Steen &

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¹³ Comments of the American Corporate Counsel Association, at 10. This concern was also expressed by commenters who asserted that foreign lawyers, in particular, would not have sufficient practical knowledge of United States laws to determine what constitutes an appropriate response. See, e.g., Comments of Nagashima Ohno & Tsunematsu, at 7; Comments of the SIA/TBMA, at 13 (reporting attorney’s judgment should be evaluated in light of that attorney’s training, experience and position).

¹⁴ Comments of Covington & Burling, at 3.

¹⁵ Comments of Susan P. Koniak *et al.*, at 12–13.

¹⁶ Comments of Covington & Burling, at 3.

¹⁷ Comments of Richard Hall, Cravath Swaine & Moore, at 6–7; Comments of the Association of the Bar of the City of New York, at 12; Comments of Carter, Ledyard & Milburn, at 3 (stating that requiring an attorney, in deciding whether an issuer has made an appropriate response, to determine whether a material violation is about to occur, is an “impossibly predictive standard”); Comments of the Japan Federation of Bar Associations, at 3 (opining that the term “appropriate response” cannot be easily construed on its face).

¹⁸ Comments of the SIA/TBMA, at 18; Comments of the Association of the Bar of the City of New York, at 12 (“[o]nce an attorney has reported and documented a possible violation, the attorney should be assured that good faith reliance upon the response protects the attorney”).

¹⁹ Comments of the Corporation, Finance and Securities Law Section of the District of Columbia Bar, at 14; Comments of the American Bar Association, at 22 (“[w]e believe it is important that the Commission recognize that a reporting attorney may rely on the considered judgment of the CLO so long as that judgment is in the range of