

205.2(h) provides:

(h) *Issuer* means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) of that Act (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term “issuer” includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

The definition for the term “issuer” we adopt today incorporates the definition set forth in Section 2(a)(7) of the Act, which in turn incorporates the definition contained in the Exchange Act. The definition has been modified to specifically exclude foreign government issuers, defined above.⁵⁷

The definition also has been modified to make clear that, for purposes of the terms “appearing and practicing” before the Commission and “in the representation of an issuer,” the term “issuer” includes any person controlled by an issuer (e.g., a wholly-owned subsidiary), where the attorney provides legal services to that person for the benefit of or on behalf of an issuer. We consider the change important to achieving the objectives of Section 307 in light of the statutory reference to appearing and practicing “in any way” in the representation of an issuer. Under the revised definition, an attorney employed or retained by a non-public subsidiary of a public parent issuer will be viewed as “appearing and practicing” before the Commission “in the representation of an issuer” whenever acting “on behalf of, or at the behest, or for the benefit of” the parent. This language, consistent with the Commission’s comment in the

proposing release (although now limited to persons controlled by an issuer) would encompass any subsidiary covered by an umbrella representation agreement or understanding, whether explicit or implicit, under which the attorney represents the parent company and its subsidiaries, and can invoke privilege claims with respect to all communications involving the parent and its subsidiaries. Similarly, an attorney at a non-public subsidiary appears and practices before the Commission in the representation of an issuer when he or she is assigned work by the parent (e.g., preparation of a portion of a disclosure document) which will be consolidated into material submitted to the Commission by the parent, or if he or she is performing work at the direction of the parent and discovers evidence of misconduct which is material to the parent. The definition of the term is also intended to reflect the duty of an attorney retained by an issuer to report to the issuer evidence of misconduct by an agent of the issuer (e.g., an underwriter) if the misconduct would have a material impact upon the issuer.⁵⁸

205.2(i) provides:

(i) *Material violation* means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.

The definition we adopt today modifies the definition set forth in the proposed rule by adding the phrases “United States federal or state” and “arising under United States federal or state law.” This modification clarifies that material violations must arise under United States law (federal or state), and do not include violations of foreign laws. The final rule does not define the word “material,” because that term has a well-established meaning under the federal securities laws⁵⁹ and the Commission intends for that same meaning to apply here.

205.2(j) provides:

(j) *Non-appearing foreign attorney* means an attorney:

- (1) Who is admitted to practice law in a jurisdiction outside the United States;
- (2) Who does not hold himself or herself out as practicing, and does not give legal

advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and

(3) Who:

(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

The final rule provides that a “non-appearing foreign attorney” does not “appear and practice before the Commission” for purposes of the rule. In brief, the definition excludes from the rule those attorneys who: (1) Are admitted to practice law in a jurisdiction outside the United States; (2) do not hold themselves out as practicing, or giving legal advice regarding, United States law; and (3) conduct activities that would constitute appearing and practicing before the Commission only (i) incidentally to a foreign law practice, or (ii) in consultation with United States counsel. A non-United States attorney must satisfy all three criteria of the definition to be excluded from the rule.

The effect of this definition will be to exclude many, but not all, foreign attorneys from the rule’s coverage. Foreign attorneys who provide legal advice regarding United States securities law, other than in consultation with United States counsel, are subject to the rule if they conduct activities that constitute appearing and practicing before the Commission. For example, an attorney licensed in Canada who independently advises an issuer regarding the application of Commission regulations to a periodic filing with the Commission is subject to the rule. Non-United States attorneys who do not hold themselves out as practicing United States law, but who engage in activities that constitute appearing and practicing before the Commission, are subject to the rule unless they appear and practice before the Commission only incidentally to a foreign law practice or in consultation with United States counsel.

Proposed Part 205 drew no distinction between the obligations of United States and foreign attorneys. The proposing release requested comment on the effects of the proposed rule on attorneys who are licensed in foreign jurisdictions or otherwise subject to foreign statutes, rules and ethical standards. The Commission recognized that the proposed rule could raise difficult issues for foreign lawyers and

FR 71678–79, and below in the discussion of Section 205.3(b), an attorney employed by an investment adviser who becomes aware of evidence of a material violation that is material to an investment company while thus representing that investment company before the Commission has a duty to report such evidence up-the-ladder within the investment company. For the reasons explained in the proposing release and noted below, however, such reporting does no violence to the attorney-client privilege. See *Restatement (Third) of the Law Governing Lawyers*, section 75 and cmt. d (explaining that in a subsequent proceeding in which the co-client’s interests are adverse there is normally no attorney-client privilege regarding either co-client’s communications with their attorney during the co-client relationship).

⁵⁷ We also note that the changes should address concerns expressed that counsel to underwriters or similar persons might be covered by the rule.

⁵⁸ An attorney who represents a subsidiary or other person controlled by an issuer at the behest, for the benefit, or on behalf of a parent issuer who becomes aware of evidence of a material violation that is material to the issuer should report the evidence up-the-ladder through the issuer, as set forth in Section 205.3(b) of the rule.

⁵⁹ See *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–36 (1988); *TSC Indus. v. Northway, Inc.*, 426 U.S. 438 (1976).