

maximum extent allowed by the regulations and laws to which they are subject.

Section 205.7—No Private Right of Action

(a) Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions.

(b) Authority to enforce compliance with this part is vested exclusively in the Commission.

In the proposing release, the Commission expressed its view that: “nothing in Section 307 creates a private right of action against an attorney. * * * Similarly, the Commission does not intend that the provisions of Part 205 create any private right of action against an attorney based on his or her compliance or non-compliance with its provisions.”¹²⁴ Nevertheless, the Commission requested comments on whether it should provide in the final rule “a ‘safe harbor’ from civil suits” for attorneys who comply with the rule.¹²⁵ Numerous commenters agreed that the final rule should contain such a provision.

Several commenters suggested that the final rule contain a safe harbor similar to that provided for auditors in Section 10A(c) of the Exchange Act, 15 U.S.C. 78j-1(c), which provides that “[n]o independent public accountant shall be liable in a private action for any finding, conclusion, or statement expressed in a report” to the Commission made by an issuer whose auditor has reported to its board a failure to take remedial action.¹²⁶ Other commenters recommended that the Commission adopt language similar to that in the Restatement (Third) of Law Governing Lawyers, Standards of Care section 52, which provides that “[p]roof of a violation of a rule or statute regulating the conduct of lawyers * * * does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty * * *.”¹²⁷ And others noted that the ABA Model Rules, Scope, ¶ 20, provides that “[v]iolation of Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal

duty has been breached.”¹²⁸ Finally, numerous other commenters were of the view that a safe harbor should be created to protect lawyers from liability where they have attempted in good faith to comply with this part.¹²⁹

The Commission is persuaded that it is appropriate to include an express safe harbor provision in the rule, which is set forth in new Section 205.7, No Private Right of Action. Paragraph (a) makes it clear that Part 205 does not create a private cause of action against an attorney, a law firm or an issuer, based upon their compliance or non-compliance with the part. The Commission is of the view that the protection of this provision should extend to any entity that might be compelled to take action under this part; thus it extends to law firms and issuers. The Commission is also of the opinion that, for the safe harbor to be truly effective, it must extend to both compliance and non-compliance under this part.

Paragraph (b) provides that only the Commission may enforce the requirements of this part. The provision is intended to preclude, among other things, private injunctive actions seeking to compel persons to take actions under this part and private damages actions against such persons. Once again, the protection extends to all entities that have obligations under this part.

III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (“PRA”)¹³⁰ requires the agency to obtain approval from the Office of Management and Budget (“OMB”) if an agency’s rule would require a “collection of information,” as defined by the PRA. As set forth in the proposing release, certain provisions of the rule, such as the requirement of written procedures for QLCCs, meet the “collection of information” requirement of the PRA. The information collection is necessary to implement the Standards of Professional Conduct for Attorneys prescribed by the proposed rule and required by Section 307 of the Sarbanes-Oxley Act of 2002. Specifically, the collection of information is intended to ensure that evidence of violations is communicated to appropriate officers and/or directors of issuers, so that they can adopt appropriate remedies and/or impose appropriate sanctions. In the

rare cases in which a majority of a QLCC has concluded that an issuer did not act appropriately, the information may be communicated to the Commission. The collection of information is, therefore, an important component of the Commission’s program to discourage violations of the federal securities laws and promote ethical behavior of attorneys appearing and practicing before the Commission.

The final rule would impose an up-the-ladder reporting requirement when attorneys appearing and practicing before the Commission become aware of evidence of a material violation by the issuer or any officer, director, employee, or agent of the issuer. An attorney must report such evidence to the issuer’s CLO or to both the CLO and CEO. A subordinate attorney complies with the rule if he or she reports evidence of a material violation to his or her supervisory attorney (who is then responsible for complying with the rule’s requirements). A subordinate attorney may also take the other steps described in the rule if the supervisor fails to comply.

If the CLO, after investigation, determines that there is no violation, he or she must so advise the reporting attorney. Unless the CLO reasonably believes that there is no violation, he or she must take reasonable steps to cause the issuer to adopt an appropriate response to stop, prevent or rectify any violation. The CLO must also report on the remedial measures or sanctions to the reporting attorney.

The rule also requires attorneys to take certain steps if the CLO or CEO does not provide an appropriate response to a report of evidence of a violation. These steps include reporting the evidence up-the-ladder to the audit committee, another committee consisting solely of independent directors if there is no audit committee, or to the board of directors if there is no such committee. If the attorney believes that the issuer has not made an appropriate response to the report, the attorney must explain the reasons for his or her belief to the CEO, CLO or directors to whom the report was made.

Alternatively, if an attorney other than a CLO reports the evidence to a QLCC, he or she need take no further action under the rule. The QLCC must have written procedures for the receipt, retention and consideration of reports of material violations, and must be authorized and responsible to notify the CLO and CEO of the report, determine whether an investigation is necessary and, if so, to notify the audit committee or the board of directors. The QLCC may also initiate an investigation to be

¹²⁴ 67 FR 71697.

¹²⁵ 67 FR 71691.

¹²⁶ See Comments of Attorney’s Liability Assurance Society, Inc., at 20; Comments of the Association of the Bar of the City of New York, at 5.

¹²⁷ See Comments of the American Bar Association, at 33–34; Comments of Morrison & Foerster and eight other law firms, at 21.

¹²⁸ *Id.* Comments of the American Bar Association, at 33–34.

¹²⁹ See, e.g., Comments of Skadden Arps Slate Meagher & Flom, at 29; Comments of the SIA/TBMA, at 21; Comments of the Investment Company Institute, at 7.

¹³⁰ 44 U.S.C. 3501 *et seq.*