

material violation has already occurred and is not ongoing. It provides:

(2) Where an attorney who has reported evidence of a material violation under paragraph (b) rather than paragraph (c) of this section does not receive an appropriate response, or has not received a response in a reasonable time, to his or her report under paragraph (b) of this section, and the attorney reasonably believes that a material violation has occurred and is likely to have resulted in substantial injury to the financial interest or property of the issuer or of investors but is not ongoing:

(i) An attorney retained by the issuer may:

(A) Withdraw forthwith from representing the issuer, indicating that the withdrawal was based on professional considerations;

(B) Give written notice to the Commission of the attorney's withdrawal, indicating that the withdrawal was based on professional considerations; and

(C) Disaffirm to the Commission, in writing, any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; and

(ii) An attorney employed by the issuer may:

(A) Notify the Commission in writing that he or she intends to disaffirm some opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; and

(B) Disaffirm to the Commission, in writing, any such opinion, document, affirmation, representation, characterization, or the like; and

(iii) The issuer's chief legal officer (or the equivalent) shall inform any attorney retained or employed to replace the attorney who has so withdrawn that the previous attorney's withdrawal was based on professional considerations.

Proposed § 205.3 (d)(3) restates what is largely settled law:

(3) The notification to the Commission prescribed by this paragraph (d) does not breach the attorney-client privilege.

Interested persons are invited to comment on any aspect of this proposal,³³ including: (1) Whether the proposed rule should include any provision permitting or requiring notification to the Commission when an attorney receives no response or an inappropriate response or whether this is a matter best left to state or local bar disciplinary processes; (2) whether a higher standard should apply to notification to the Commission than to

reporting up-the-ladder within the issuer and, if so, how much higher it should be and how should such a higher test be framed; (3) whether "noisy withdrawal" should be mandatory under some circumstances but permissive under others and, if so, what circumstances should make "noisy withdrawal" mandatory and what circumstances should make "noisy withdrawal" permissive, or whether "noisy withdrawal" should be mandatory under all circumstances covered by § 205.3(d) or should be permissive under all such circumstances; (4) whether it is appropriate to distinguish between material violations that are ongoing or impending and material violations that are past and have no continuing effect, and whether such a distinction would be meaningful to investors; (5) whether the attorney who has reported evidence of a material violation to which the issuer has not made an appropriate response must know that the reported material violation has occurred, is occurring, or is about to occur before the attorney is required, or permitted, to make a "noisy withdrawal"; (6) whether an attorney should be required, or permitted, to make a "noisy withdrawal" where the attorney has not received an appropriate response to reported evidence of a material violation, and the attorney reasonably believes that the reported material violation has occurred, is occurring, or is about to occur; (7) whether there is an appropriate basis for a "noisy withdrawal" under circumstances in which an attorney reasonably believes that the reported material violation is likely to have occurred, be ongoing, or be about to occur; (8) whether there is an appropriate basis for a "noisy withdrawal" under circumstances in which the attorney reasonably believes that it is reasonably likely that the reported material violation has occurred, is ongoing, or is about to occur; (9) whether substantial injury to the financial interest of investors is an appropriate prerequisite to a "noisy withdrawal"; (10) whether substantial injury to the financial interest of the issuer client is an appropriate prerequisite to a "noisy withdrawal" and, if so, whether such substantial injury to a financial interest must be reasonably certain, likely, or merely possible; (11) whether the rule should distinguish between outside attorneys and those employed by the issuer and, if so, under what circumstances, how, and why; (12) whether an attorney who is employed by an investment adviser or manager and who is appearing and

practicing before the Commission in the representation of the investment company should be treated as an outside attorney retained by the investment company under proposed paragraph (d)(1)(i) or should be treated as an in-house attorney under proposed paragraph (d)(1)(ii); (13) whether the rule should specify the content of a disaffirmance of an opinion or representation; (14) whether the rule should require that any disaffirmance be in writing; (15) whether there are any other actions the rule should require an attorney to take when the attorney does not receive an appropriate response to his or her report of evidence of a material violation (e.g., should an in-house attorney be required to cease participating in or assisting in any matter relating to the violation); (16) what is the appropriate length of time to permit an attorney to make a "noisy withdrawal"; (17) whether it is important to require any successor attorney to be notified that the previous attorney withdrew based on "professional considerations" and, if so, whether there is a better way to require such notification be made than is proposed in paragraph (d)(1)(iii); (18) whether such notification should be required where "noisy withdrawal" is merely permissive; (19) whether it is important to provide a "safe harbor" from civil suits for the attorney who notifies the Commission that he or she has withdrawn based on professional considerations under proposed paragraph (d) and/or disaffirmed a document; and (20) whether the "noisy withdrawal" provisions would create conflicts with applicable law for any attorneys (foreign or U.S.) not excluded by the definition of "non-appearing foreign attorney" (section 205.2(j) of the rule as adopted). Should "noisy withdrawal" apply to these attorneys? If not, why not? If the provisions would create conflicts for these attorneys, please describe the conflicts and how they appropriately may be resolved.

The Commission is particularly interested in learning commenters' views on how common it is for attorneys to alert their issuer-clients' management or directors to evidence of violations of law but to receive either no response or an inappropriate response. How often would attorneys be required to make a "noisy withdrawal" under this provision, if adopted? Should we revise the provision so that attorneys must make a "noisy withdrawal" less often or more often? If so, how?

³³ See also the solicitation of comments in the Proposing Release.