

C. Alternative Proposal to "Noisy Withdrawal"

In response to comments received to date on § 205.3(d) as proposed in the Proposing Release and described above, the Commission also proposes, and solicits comments on, the following alternative proposal. The alternative proposal does not contain "noisy withdrawal" and disaffirmation requirements and requires attorney action only where the attorney reasonably concludes that there is substantial evidence that a material violation is ongoing or about to occur and is likely to cause substantial injury to the issuer.

Section 205.3(e) of the alternative proposal requires an issuer (rather than its attorney) to report to the Commission an attorney's written notice of withdrawal or failure to receive an appropriate response, as described in § 205.3(d) of the alternative proposal. In connection with § 205.3(e) of the alternative proposal, the Commission also proposes to amend Forms 8–K, 20–F, and 40–F to require issuers to disclose publicly an attorney's written notice of withdrawal within two business days of that notice.³⁴ Section 205.3(f) of the alternative proposal permits (but does not require) an attorney to inform the Commission of his or her withdrawal if the issuer does not comply with paragraph (e).

1. Requiring an Attorney to Provide Written Notice of Withdrawal to the Issuer Where the Attorney Does Not Receive an Appropriate Response to His or Her Report of a Material Violation

Alternative proposed § 205.3(d) requires an attorney retained by the issuer who has reported evidence of a material violation and has not received an appropriate or timely response to withdraw from representing the issuer and to notify the issuer, in writing, that the withdrawal is based on professional considerations. In the same circumstances, an attorney employed by the issuer is required to cease participating or assisting in any matter concerning the violation and to notify the issuer, in writing, that he or she believes the issuer has not provided an appropriate response.

Unlike the original proposed § 205.3(d)(1), this proposed paragraph does not require a withdrawing attorney to notify the Commission of his or her

withdrawal, and it does not require an attorney to disaffirm documents filed with the Commission. The proposed paragraph also does not require an attorney to withdraw or cease participation or assistance in a matter if he or she would be prohibited from doing so by order or rule of a court, administrative body, or other authority with jurisdiction over the attorney. Alternative proposed § 205.3(d) provides:

(d) *Actions required where there is no appropriate response within a reasonable time.* (1) Where an attorney who has reported evidence of a material violation under paragraph (b) of this section rather than paragraph (c) of this section (i) does not receive an appropriate response, or has not received an appropriate response in a reasonable time, and (ii) has followed the procedures set forth in paragraph (b)(3) of this section, and (iii) reasonably concludes that there is substantial evidence of a material violation that is ongoing or about to occur and is likely to cause substantial injury to the financial interest or property of the issuer or of investors:

(A) An attorney retained by the issuer shall withdraw from representing the issuer, and shall notify the issuer, in writing, that the withdrawal is based on professional considerations.

(B) An attorney employed by the issuer shall cease forthwith any participation or assistance in any matter concerning the violation and shall notify the issuer, in writing, that he or she believes that the issuer has not provided an appropriate response in a reasonable time to his or her report of evidence of a material violation under paragraph (b) of this section.

(2) An attorney shall not be required to take any action pursuant to paragraph (d)(1)(A) or (B) of this section if the attorney would be prohibited from doing so by order or rule of any court, administrative body or other authority with jurisdiction over the attorney, after having sought leave to withdraw from representation or to cease participation or assistance in a matter. An attorney shall give notice to the issuer that, but for such prohibition, he or she would have taken such action pursuant to paragraph (d)(1)(A) or (B), and such notice shall be deemed the equivalent of such action for purposes of this part.

(3) An attorney employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing shall notify the issuer's chief legal officer (or the equivalent thereof) forthwith.

(4) The issuer's chief legal officer (or the equivalent thereof) shall notify any attorney retained or employed to replace an attorney who has given notice to an issuer pursuant to paragraph (d)(1), (d)(2) or (d)(3) of this section that the previous attorney has withdrawn, ceased to participate or assist or has been discharged, as the case may be, pursuant to the provisions of this paragraph.

Interested persons are invited to comment on any aspect of alternative proposed section 205.3(d), including: (1) Whether requiring a different and higher evidentiary standard for withdrawal than for reporting up-the-ladder of the issuer, such as requiring an attorney to "conclude" there is "substantial evidence," will make the circumstances in which an attorney must withdraw (triggering an issuer's notification of the Commission) too narrow adequately to protect investors; (2) whether requiring an attorney to make a separate, more definitive, determination that evidence shows that a material violation "is" ongoing or "is" about to occur (rather than is likely to be ongoing or is likely to occur) too narrows the circumstances in which an attorney must withdraw (triggering an issuer's notification of the Commission) and fails adequately to protect investors; (3) whether requiring an attorney to make a separate determination of whether "substantial injury" is likely will make the circumstances in which an attorney must withdraw (triggering an issuer's notification to the Commission) too narrow adequately to protect investors; (4) whether the proposed alternative's requirement that the attorney make all three determinations addressed in the three preceding questions (higher level of evidence, more definitiveness, and substantial injury) so narrows the circumstances in which an attorney would withdraw (and an issuer would notify the Commission) so that the withdrawal and reporting requirements would be rendered ineffective; (5) whether an issuer's ability under the adopted rule to respond appropriately to a report of evidence of a material violation by retaining or directing an attorney to assert a colorable defense (should one exist), with the consent of the board of directors, would mitigate issuer concerns about withdrawal being required in situations where no violation actually has occurred; (6) whether failing to apply mandatory withdrawal (triggering an issuer's notification of the Commission) to past violations fails adequately to protect investors; (7) whether requiring an attorney to make a determination as to whether a violation "has occurred" or whether it "is ongoing" adequately protects investors; (8) whether the proposed rule should include a provision permitting or requiring withdrawal from representation when an attorney does not receive an appropriate response to his or her report of a material violation; (9) whether alternative proposed section (d) is more compatible with existing state standards

³⁴ On June 17, 2002, the Commission proposed to shorten the current deadlines for filing Form 8–K to two business days. "Additional Form 8–K Requirements and Acceleration of Filing Date," Release No. 33–8106. The Commission is still considering that rulemaking proposal and may address it separately from this release.