

governing attorney conduct than the “noisy withdrawal” and disaffirmation requirements of proposed section 205.3(d)(1)–(3) described above and, if so, how; (10) whether alternative proposed section (d) is otherwise preferable to original proposed § 205.3(d)(1)–(3) as described above and in the Proposing Release; (11) whether alternative proposed section (d) is more compatible with foreign law governing attorney conduct than the “noisy withdrawal” and disaffirmation requirements of proposed § 205.3(d)(1)–(3) described above; if so, why; if not, why not; (12) whether an 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 is occurring or is about to occur before the attorney is required to withdraw or cease participation or assistance on a matter; (13) whether an attorney who is required to withdraw under this paragraph should be required to withdraw from all representation of the issuer, or only from representation on the matter concerning the material violation; (14) whether investors and issuers will receive adequate protection if the rule does not require attorneys to disaffirm any opinion, affirmation, representation or the like in a document the attorney or issuer filed with the Commission and that the attorney reasonably believes is or may be (or is reasonably likely to be) materially false or misleading; (15) whether investors and issuers will receive adequate protection if the rule contains no requirement that either an attorney or an issuer notify the Commission when the attorney withdraws or gives the issuer notice that he or she has not received an appropriate response to a report of a material violation; (16) whether an attorney who is prohibited from withdrawing or ceasing participation or assistance in a matter by a court or administrative body or other authority with jurisdiction over the attorney should be required to give notice to the issuer that, absent such prohibition, he or she would have taken such action or whether such a requirement is likely to be inconsistent with the attorney’s continuing representation of the issuer; and (17) whether the proposal’s withdrawal requirements would conflict with the obligations of attorneys not excluded by the “non-appearing foreign attorney” definition under applicable foreign law or professional standards of conduct.

## 2. Requiring an Issuer to Report an Attorney’s Written Notice of Withdrawal

As noted above, the Commission received many comments opposing the “noisy withdrawal” provisions of the proposed rule. One commenter suggested that the requirement would “risk destroying the trust and confidence many issuers have up to now placed in their legal counsel, creating divided loyalties and driving a wedge into the attorney-client relationship,”<sup>35</sup> and others expressed similar views.<sup>36</sup> Several commenters believed that the rule would not further the Commission’s goals because it would cause clients to exclude attorneys from discussions that might prompt the attorney to begin the up-the-ladder reporting process.<sup>37</sup> Foreign lawyers and law associations expressed concerns, both in written comments and at the Commission’s December 17, 2002 Roundtable on the International Impact of the Proposed Rules Regarding Attorney Conduct, that the “noisy withdrawal” requirements of the proposed rule would conflict with the laws and principles of confidentiality and attorney-client privilege recognized in certain foreign jurisdictions.<sup>38</sup> Some foreign commenters stated that it violated principles of international comity for the Commission to exercise jurisdiction over the legal profession outside the U.S.<sup>39</sup>

Accordingly, the Commission solicits comments on an alternative proposal that would require an issuer, rather than an attorney, to disclose publicly an attorney’s withdrawal under the rule. The Commission believes that this alternative approach to “reporting out,” by placing the responsibility on the issuer for such disclosure, addresses a number of the commenters’ concerns noted above (those related to attorney-client privilege and those of foreign lawyers), yet provides some assurance that issuers will respond appropriately to reports of material violations by attorneys. Requiring issuers to report attorney withdrawals in a public filing with the Commission may also provide protection to investors by alerting them

to the possibility of ongoing material violations by issuers. At least one commenter proposed requiring issuers, rather than attorneys, to report attorney resignations on Form 8-K, arguing that the proposed “noisy withdrawal” requirement “does little to warn investors about what is going on at the issuer.”<sup>40</sup> In addition, the Commission invites comment on whether, from a corporate governance perspective, there may be advantages to vesting the obligation to “report out” an attorney’s withdrawal for professional considerations in the board of directors of an issuer.

Proposed § 205.3(e) would require an issuer who has received notice from an attorney under alternative proposed § 205.3(d) to report the notice and the circumstances related thereto in an appropriate filing with the Commission. Proposed section 205.3(e) provides:

(e) *Duties of an issuer where an attorney has given notice pursuant to paragraph (d).*  
(1) Where an attorney has provided an issuer with a written notice pursuant to paragraph (d)(1), (d)(2), or (d)(3) of this section, the issuer shall, within two business days of receipt of such written notice, report such notice and the circumstances related thereto on Form 8-K, 20-F, or 40-F, as applicable.

Proposed § 205.3(e) provides that the filing must be made by the issuer on Form 8-K, 20-F or 40-F, as applicable. Accordingly, the Commission is proposing to amend Forms 8-K, 20-F and 40-F to require issuers to report an attorney’s written notice under alternative proposed paragraph (d) of the rule. These proposed amendments are described below.

In connection with proposed § 205.3(e), the Commission seeks comment on whether any circumstances exist in which an issuer should not be required to disclose an attorney’s written notice under the rule. The Commission specifically seeks comment on whether an issuer should be permitted not to disclose an attorney’s written notice where:

a committee of independent directors of the issuer’s board determines, based on the advice of counsel that was not involved in the matters underlying the reported material violation, (i) that the attorney providing such written notice acted unreasonably in providing such notice, or (ii) that the issuer has, subsequent to such written notice, implemented an appropriate response.

The Commission requests comment on the following questions: (1) Whether an issuer should be able to determine not to report an attorney’s notice if an independent committee of the issuer’s board of directors determines, based on

<sup>35</sup> Comments of the American Bar Association, at 26.

<sup>36</sup> See, e.g., Comments of 77 Law Firms, at 2; Comments of the American College of Trial Lawyers, at 2.

<sup>37</sup> See, e.g., Comments of Attorneys’ Liability Assurance Society, Inc., at 8.

<sup>38</sup> See, e.g., Comments of the International Bar Association, at 5–6; Comments of the Law Society of England and Wales, at 1; Comments of the Japanese Federation of Bar Associations, at 3–4.

<sup>39</sup> See Comments of De Brauw Blackstone Westbroek, at 2; Comments of Stibbe, at 2.

<sup>40</sup> Comments of Jeffrey L. Schultz, at 2.