

the advice of counsel, that subsequent to the attorney's notice, the issuer has implemented an appropriate response, or whether such a provision would be undesirable because the rule already provides issuers with sufficient opportunity to implement an appropriate response; (2) whether an issuer should be able to determine not to report an attorney's notice if an independent committee of the board of directors determines, based on the advice of counsel, that the attorney providing such notice acted unreasonably, or whether this provision would undermine the objectives of the rule; (3) whether, if an issuer should be able to determine not to report an attorney's notice to the Commission if an independent committee of the issuer's board of directors makes the appropriate determination, it is necessary to require the committee to obtain the advice of counsel not involved in the matters underlying the material violation; (4) whether there should be an alternative standard identifying when a board of directors could determine not to report an attorney's notice; (5) whether, with regard to foreign private issuers, "an independent committee of the issuer's board of directors" is the right group to make the determination that an attorney had acted unreasonably in providing a notice pursuant to § 205.3(d) or that the issuer had implemented an appropriate response subsequent to the notice and, if so, why? If not, what other bodies or groups at a foreign private issuer, or with oversight or audit responsibilities for the foreign private issuer, might be more appropriate? The Commission also requests comment on whether such an issuer should be required to inform the reporting attorney in writing of a decision by a committee of independent directors of the issuer's board not to report the attorney's written notice in a filing with the Commission.<sup>41</sup>

Interested persons are invited to comment on any other aspect of alternative proposed § 205.3(e), including: (1) Whether an issuer should be required to report an attorney's notice under paragraph (d)(1), (d)(2) or (d)(3); (2) whether a requirement that an issuer report an attorney's notice is preferable to the "noisy withdrawal" requirement in the original proposed rule; (3) whether investors will receive adequate protection if neither the issuer nor the attorney is required to report to

the Commission an attorney's withdrawal or other notice of failure to receive an appropriate response; (4) whether it is inconsistent with the attorney-client privilege to require an issuer to report the circumstances related to an attorney's notice under paragraph (d)(1) or (d)(2), and whether an issuer should instead be permitted to report only the fact of the attorney's notice; (5) whether, if issuers should be required to report the circumstances related to an attorney's notice, and if the rule should specify which circumstances must be reported, which circumstances should be reported; (6) whether an issuer's report to the Commission under paragraph (e) should be confidential (e.g., in the form of confidential correspondence) or public; (7) whether there are circumstances in which requiring a public filing under paragraph (e) could harm an issuer or its shareholders; (8) whether investors will receive adequate protection if issuer reports to the Commission under paragraph (e) are confidential; and (9) whether the requirement that a foreign private issuer report an attorney's notice of withdrawal would conflict with applicable foreign law or foreign principles of attorney-client privilege or corporate governance.

### 3. Permitting an Attorney To Inform the Commission Where an Issuer Has Not Complied With the Issuer Reporting Requirements

Proposed § 205.3(f) would permit an attorney, if an issuer had not complied with paragraph (e), to inform the Commission that he or she had provided the issuer with notice under paragraph (d)(1), (d)(2) or (d)(3). The Commission proposes, in this paragraph, making attorney notification to the Commission permissive in light of the numerous comments it received that were critical of "noisy withdrawal." Proposed § 205.3(f) states:

(f) *Additional actions by an attorney.* (1) An attorney retained or employed by the issuer may, if an issuer does not comply with paragraph (e) of this section, inform the Commission that the attorney has provided the issuer with notice pursuant to paragraph (d)(1), (d)(2), or (d)(3) of this section, indicating that such action was based on professional considerations.

Interested persons are invited to comment on any aspect of alternative proposed § 205.3(f), and to address the following questions in particular: (1) Would it be more consistent with the protection of investors to require, rather than permit, an attorney to inform the Commission of his or her written notice

where an issuer does not comply with the issuer disclosure requirement? Would mandatory, rather than permissive, "reporting out" under these circumstances raise the same concerns as "noisy withdrawal"? If not, why not? If so, which ones; (2) assuming an issuer were permitted not to disclose an attorney's written notice if an independent committee of the issuer's board of directors were to make an appropriate determination, should an attorney be permitted to inform the Commission that he or she has provided the issuer with notice pursuant to paragraph (d) where the attorney disagrees with the independent committee's determination, or should the attorney be permitted to inform the Commission that he or she has provided the issuer with notice only where the issuer fails to report the notice without the required determination by the independent committee?

### D. Proposed Amendments to Forms

#### 1. Proposed Amendment to Form 8-K

The Commission proposes to amend Form 8-K to add a new item specifically designed for issuer disclosure, under alternative proposed § 205.3(e), of an attorney's written notice under alternative proposed § 205.3(d). Form 8-K prescribes information, such as material events or corporate changes, that an issuer subject to the reporting requirements of Sections 13(a) or 15(d) of the Exchange Act must disclose on a current basis. The proposed amendment to Form 8-K would require an issuer to report an attorney's written notice of withdrawal or failure to receive an appropriate response under alternative proposed § 205.3(e) within two business days of receiving the written notice.

Proposed § 205.3(e) also would apply to issuers that are registered investment companies. Exchange Act Rules 13a-11(b)<sup>42</sup> and 15d-11(b),<sup>43</sup> however, generally exempt registered investment companies from Form 8-K filing requirements. We recently amended those rules to require registered investment companies to file on Form 8-K in order to meet any filing obligations that might arise under Regulation BTR.<sup>44</sup> We are today

<sup>42</sup> 17 CFR 240.13a-11(b).

<sup>43</sup> 17 CFR 240.15d-11(b).

<sup>44</sup> See Release No. 34-47225 (Jan. 22, 2003). Regulation Blackout Trading Restriction (BTR) under the Exchange Act (17 CFR 245.100-104) clarifies the scope and application of Section 306(a) of the Sarbanes-Oxley Act of 2002, which prohibits any director or executive officer of an issuer from, directly or indirectly, purchasing, selling or otherwise acquiring or transferring any equity security of the issuer during a pension plan blackout period that prevents plan participants and

<sup>41</sup> Such a provision may be necessary in light of the proposal (discussed below) to permit an attorney to notify the Commission where an issuer has not complied with the issuer's reporting requirement in proposed § 205.3(e).