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REMARKS OF AN SEC ASSOCIATE GENERAL COUNSEL

Richard M. Humes, Esq.†

INTRODUCTION

I am going to focus on several significant current ethical issues confronting attorneys practicing before the Securities and Exchange Commission ("Commission" or "SEC"). I should warn you that I approach these issues from the perspective of a regulator. There is a distinct possibility that those of you who have an SEC practice might approach these issues from a different vantage point. In view of the significant public interest in detecting and preventing securities fraud, I think that both regulators and practitioners share an interest in ensuring that attorneys observe, at least, minimal ethical standards in their practice before the Commission.

First, I will address the types of recent cases the Commission has brought against attorneys. Second, I will bring you up-to-date on the status of the Commission’s up-the-ladder reporting rule promulgated under section 307 of the Sarbanes-Oxley Act ("Sarbanes-Oxley" or "SOX"), including the issues faced by in-house counsel who report evidence of a possible violation up-the-ladder and are then fired by their company and bring whistleblower claims under section 806 of Sarbanes-Oxley. Third, I will discuss the ethical considerations for attorneys representing issuers who want to share work-product or attorney-client materials with the Commission pursuant to a confidentiality agreement and the related question of whether the proposed

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I am obligated to advise you, as a member of the staff of the SEC, that the views I express today are my own, and not necessarily those of the Commission, any Commissioner, or my colleagues at the Commission.


new Rule 502 of the Federal Rules of Evidence, if adopted, would assuage these concerns.

INVESTIGATIONS AND PROCEEDINGS UNDER RULE 102(E)

Let me start with proceedings under Rule 102(e). Under this rule the Commission may bring professional disciplinary proceedings against an attorney found to be lacking in character, to have engaged in unethical or improper professional conduct, or to have willfully violated or willfully aided and abetted violations of the federal securities laws. And, under Rule 203.7 of the Commission’s rules relating to formal investigative proceedings, the officer conducting an investigation may refer to the Commission any instances in which counsel has been guilty of dilatory, obstructionist or contumacious conduct during the course of an inquiry for consideration of whether a Rule 102(e) provision is appropriate.

When an attorney has been found to have engaged in professional misconduct, he may be sanctioned under Rule 102(e). Those sanctions include censures and temporary or permanent suspensions of the privilege of appearing before the Commission. Of course, those attorneys who commit substantive violations of the securities laws are also subject to injunctive actions and cease-and-desist proceedings. Further, as I will discuss in more detail later, under the Commission’s up-the-ladder reporting rule, an attorney may be subject to discipline for failing to report evidence of a material violation within the company that the attorney represents. A general counsel, in turn, may be subject to discipline for failing to follow through on a report by conducting an inquiry or providing an appropriate response.

There are several contexts in which the professional misconduct of an attorney may put him on the Commission’s radar screen, and different remedies are needed to address the different concerns raised in these contexts. Injunctive and ancillary relief, as well as cease-and-desist orders, are necessary to stop a violation and, where appropriate, to make investors whole. In contrast, any sanction under Rule 102(e) is designed to protect the Commission and its processes by preventing lawyers who have engaged in unethical conduct from practicing before the agency. The Commission would not be fully protecting the investing public or its processes were it simply to stop illegal conduct

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5 Appearance and Practice Before the Commission, 17 C.F.R. § 201.102(e) (2006).
6 17 C.F.R. § 203.7 (2006).
and to permit the lawyer to continue to practice for the agency where he can do more harm to investors.

In recent years, the Office of the General Counsel has received referrals of allegations of professional misconduct by attorneys appearing before the agency, but it was not always that way. As we all know, there has been a fundamental attitudinal shift in the way prosecutors and regulators have approached the significant increase in the incidence of white-collar offenses and the lawyers who facilitate or engage in such conduct. Fortunately, from a programmatic standpoint, the Commission seems to, in picking up where it left off in 1981, following its decision in the *Carter and Johnson* case.\(^7\)

In its opinion in that case, the Commission reversed an initial decision by a Commission administrative law judge that concluded that two attorneys had aided and abetted their client’s violations of the federal securities laws by failing to correct misstatements contained in the client’s press releases and Commission filings concerning earnings.\(^8\) The Commission concluded that the existing ethics standards governing the conduct of attorneys did not, unambiguously, proscribe the behavior in question.\(^9\) Thus, the Commission announced that in the future it would interpret Rule 102(e) to require an attorney who learns that a client is not satisfying its disclosure obligations to take prompt action to end the client’s noncompliance to avoid violating professional standards. The Commission indicated that some prompt action that leads to the conclusion that the lawyer is engaged in efforts to correct the underlying problem is required, rather than the lawyer capitulating to the desires of a strong-willed but misguided client.\(^10\)

The Commission announced in its decision in *Carter and Johnson* that it would solicit public comments regarding whether the newly-articulated interpretation of the term “unethical or improper professional conduct” should be expanded or modified to provide clarity so that attorneys would know what their professional obligations are in these circumstances.\(^11\) However, the Commission’s announcement engendered strong opposition from the private bar, which argued that the Commission did not have express statutory authority to promulgate Rule 102(e), to regulate attorneys, or to sanction attorneys appearing before it who engage in professional misconduct. They concluded the Commission should leave such issues to the state bars. In

\(^{7}\) *In re* *Carter and Johnson*, SEC Release No. 34-17597 (Feb. 28, 1981).

\(^{8}\) *Id.*

\(^{9}\) *Id.*

\(^{10}\) *Id.*

\(^{11}\) *Id.*
the end, the Commission never amended Rule 102(e) to reflect its decision in *Carter and Johnson* as to what constitutes unethical or improper professional conduct.

Further, the Commission's then-General Counsel expressed concern in a speech regarding the Commission's lack of either the time or expertise to fashion a code of professional conduct for attorneys appearing before it.\(^2\) He further suggested that the Commission should focus its attention on bringing Rule 102(e) proceedings against attorneys when the alleged misconduct represents a violation of established state ethical or professional misconduct rules and has a direct impact on the Commission's internal processes. He also indicated that the Commission generally should not institute Rule 102(e) proceedings against attorneys absent a judicial determination that the lawyer has violated the securities laws.

Consequently, between 1981 and 2002, while the Commission brought actions against attorneys to enjoin violations of the securities laws, it did not adopt a comprehensive set of standards of professional conduct for attorneys. As we all know, this landscape changed dramatically with the enactment of Sarbanes-Oxley. The Act not only directed the Commission to promulgate the up-the-ladder reporting requirements, but also expressly authorized the Commission to promulgate minimum ethical standards for attorneys appearing before the agency in the representation of issuers.

Further, in section 602 of SOX, Congress amended section 4(c) of the Securities Exchange Act by specifically adopting the language of Rule 102(e) authorizing the Commission to discipline attorneys appearing before it who engage in unethical or improper professional conduct.\(^3\) In my view, Congress, by granting the Commission such broad authority, intended to empower the Commission to comprehensively address professional misconduct by attorneys appearing before the agency. Thus, the Commission can now reach conduct that violates substantive provisions of the securities laws, current Commission regulations regarding professional conduct, and any additional ethical standards the SEC determines in the future to promulgate under the authority granted by SOX.

Some have argued that the SEC should not take on the responsibility for enforcing ethics rules even when the violation occurs in connection with practice before the agency because the rules should be

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enforced by the state bar associations. They also argue that the SEC does not have the expertise to interpret or apply ethics provisions.

However, a violation of an ethics rule during an SEC proceeding has the potential to adversely affect the outcome of the proceeding and the Commission's processes. While the Commission has delegated authority to its Ethics Counsel to refer this type of misconduct to state bars for their consideration, discipline imposed by a state bar will not necessarily address the Commission's concern with protecting its processes from unethical attorneys. Further, any sanction imposed by the state bar may not include provisions that protect investors by, for example, suspending the attorney's privilege of appearing before the Commission.

Questions about the Commission's expertise in these matters is a legitimate one. Since the enactment of SOX and its mandate to promulgate standards of professional conduct for attorneys, the SEC has been working diligently to develop the expertise to address our newly-refounded responsibilities in this area.

Authority to investigate and prosecute ethics violations by attorneys continues to reside in the Office of the General Counsel. This reflects the consideration that the authority to pursue proceedings involving allegations of professional misconduct should not be viewed as augmenting the Division of Enforcement's mandate to investigate securities violations. While those of us at the Commission are confident that the Division would not use any responsibility to enforce ethical standards as a basis to obtain leverage against lawyers in pursuing and settling its cases, to avoid even the perception that this may be the case, the authority in this area rests with the General Counsel.

Accordingly, we have created a new unit in the office, headed by an Assistant General Counsel, to handle these matters. Of course, any formal investigation or order instituting proceedings against an attorney must still be approved by the Commission. In conducting our inquiries, we provide the same rights and procedures as the Division of Enforcement provides in conducting its inquiries. Indeed, earlier this year the Commission issued a rule that authorizes the Office of the General Counsel to conduct preliminary inquiries without a formal order so that immaterial allegations of attorney misconduct can be examined without a formal order of investigation.\(^\text{14}\)

While we have to do our job and conduct thorough investigations, we are sensitive to the fact that our inquiries can have a palpable affect on an attorney’s professional reputation and livelihood. This concern reminds me of the statement of the Christopher Plummer character in the movie *Syriana*, who said that “you are innocent until you are investigated.”\(^\text{15}\) Those of us at the Commission working on these cases adhere to a different notion: you are innocent until we can prove a violation.

In discharging our responsibilities in this area, we are very mindful of the fact that any actions we take may be interpreted by the private bar and their clients as designed to chill zealous advocacy by counsel in investigations and administrative proceedings. I can assure you, however, that this is not our goal. We are not focusing on creative but nonfrivolous legal arguments, reasonable contentions as to the facts, or innocent errors in legal judgment by an attorney that do not threaten the Commission’s processes or investors. Instead, we concentrate on cases in which an attorney appears to have engaged in intentional or, at least, reckless misconduct that also violates substantive or ethical obligations to which an attorney is subject.

A brief review of the recent cases the Commission has brought against attorneys bears this out. Earlier this year in *In re Rasmussen*,\(^\text{16}\) the Commission imposed a three-year suspension under Rule 102(e) against a former senior counselor at Enron for his role in a scheme to improperly accelerate the recognition of revenue from the sale of a construction contract, which resulted in Enron filing a false Form 10-K. In *In re Brown*,\(^\text{17}\) the Commission imposed a five-year suspension under Rule 102(e) against Brown, the former General Counsel of Management Systems Corporation, who reviewed financial statements filed with the Commission that materially misstated results of operations. In addition, he was responsible for providing the company’s auditors with inaccurate information.

Similarly, in recent cease-and-desist proceedings against attorneys the cases involved professional misconduct that threatened investors. In *In re Google*,\(^\text{18}\) the Commission entered a cease-and-desist order against David Drummond, the General Counsel of Google, for permitting Google to issue unregistered securities under its stock option plan. And, in *In re Isselman*,\(^\text{19}\) the Commission entered a cease-and-desist order against the formal General Counsel of Electro Scientific

\(^{15}\) *SYRIANA* (Warner Bros. Pictures 2005).


Industries, Inc. for failing to provide important information to the company's audit committee, board of directors, and auditors regarding a transaction that enabled the company to report a profit instead of a loss.

While I cannot comment publicly on the details of cases we are currently investigating, we would be interested in allegations of professional misconduct that involve obstructing our proceedings, such as attempting to suborn perjury, falsely certifying that document productions are complete, altering documents provided to the agency, or withholding documents that are responsive to agency subpoenas.

One additional point in this area that may give some comfort, even where the Commission has imposed a suspension under Rule 102(e), is that there is usually an opportunity for re-entry upon a showing that the attorney has fully complied with the Commission's order and has not engaged in any other conduct in the meantime that would bear on his fitness to resume practicing.

**UP-THE-LADDER REPORTING UNDER SECTION 307 OF SARBANES-OXLEY**

Let me bring you up-to-date on the current status of the rules under section 307 of the Sarbanes-Oxley Act and what lawyers who are whistleblowers are experiencing. In section 307 of SOX, Congress directed the Commission to promulgate a rule requiring an attorney for an issuer to report evidence of a material violation up the corporate ladder to the chief legal officer, the audit committee, or another committee of the board until he obtains an appropriate response. The final rule became effective in August 2003. The Commission did not, at that time, resolve the prickly issue of whether to require attorneys to withdraw and report evidence of the violation to the Commission in the event the issuer does not provide an appropriate response. Instead, the Commission asked for further public comment on alternative proposals on whether it should promulgate a mandatory reporting out rule.

The first alternative was to require reporting out by retained counsel when the violations are ongoing, and to have permissive reporting out as to past violations. The second alternative was the so-called Form 8-K approach: when an attorney has reported a violation

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and has not received an appropriate response, the issuer must file a Form 8-K disclosing that its counsel has withdrawn for professional reasons. The rationale for this alternative was that it should assuage the concerns of attorneys that even the reporting to the Commission of a withdrawal would be deemed a violation of the attorney-client privilege.

The Commission received numerous comments on these proposals. As one would predict, most attorneys in private practice and bar groups argued against the reporting out; whereas, most academics and groups representing investors urged that we adopt such a rule. To date, the Commission has not taken final action on the proposal and no meeting to do so has been scheduled. In the meantime, we can observe how effective the existing rules are in getting the evidence to the appropriate corporate officials and whether these officials are acting responsibly.

Currently, the Commission has not brought any enforcement actions under its section 307 rules. I do not find that particularly surprising, as we never thought that once the rules became effective, we would start looking solely at conduct by attorneys that might be problematic. Instead, we thought we would only see a Section 307 case after the Division of Enforcement conducted an investigation and found corporate misconduct. At that point, we would ask whether the lawyers knew about the misconduct, and if they did, what actions did they take? Personally, I would be perfectly satisfied if the Commission never had occasion to bring a case under the section 307 rules because to the extent that our rules successfully move the corporate culture in the direction of expecting and encouraging employees to report potential violations, then the rule will have been effective even in the absence of any proceeding against an individual attorney. There is considerable evidence that this is occurring. Many issuers have put in place internal reporting requirements that are at least as stringent as those in our section 307 rules and they generally apply to all employees, not just to attorneys. Further, most law firms with a significant SEC practice have also put in place procedures to address their obligations under the rules.

There is also anecdotal evidence that the rules are working. My colleagues and I at the Commission have been advised that attorneys have reported situations in which they have had difficulty convincing clients to make disclosures they believe are required by the securities laws, but when they advised the clients they had to discuss with their other partners and upper management their obligations under section 307 rules, the clients agreed to make the disclosures.
One issue that arose when the rule became effective was whether it preempted inconsistent state ethics rules. There are a number of states that have rules that would prohibit an attorney from making a permissive report to the Commission of an ongoing violation as permitted under our rule. Washington State has such a rule, and the Washington State Bar Association was considered amending its rules to provide specifically that attorneys should not comply with our rules. In its view, because our rules permit reporting out of ongoing violations and Washington's rules prohibit it, there was no conflict because the attorney can elect not to report out. In response, the Commission's General Counsel wrote a letter that is posted on our website stating his view that our rules preempt Washington's rules because Supreme Court precedent establishes that where a state rule prohibits what a federal rule permits, the state rule is preempted because it would interfere with the discretion provided under the federal regime.

Similarly, the State of California contacted us and asked us not to enforce our rule as to California attorneys because compliance could put them in jeopardy of being subject to discipline by California authorities. We responded that any jeopardy was being created by California threatening its attorneys if they complied with our rules. We urged California to stand down as our rule is, presumptively, valid and their rule is, presumptively, preempted.

Eventually, California put out an alert advising lawyers not to comply with our rules without expert legal guidance. On the other hand, North Carolina recently announced that it deemed its ethics rules preempted by the part of Rule 307 on the issue of permissive reporting out. It seems to me the preemption issue has been resolved by court decisions over the past several years that establish that inconsistent state ethics rules are preempted. In particular, in *Jevne v. Superior Court*, the California Supreme Court held that state ethics rules for arbitrators were preempted by SEC-approved National Association of Securities Dealers Code of Arbitration Procedure ethics provisions for two reasons: first, because the SEC had the statutory authority to approve those rules; and second, I think more importantly, although it was not impossible to comply with both sets of rules, attempts to comply with both would impede compliance with

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22 *WASHINGTON RULES OF PROF'L CONDUCT R. 1.13(c) (2006).*
24 111 P.3d 954 (Cal. 2005).
the SEC-approved rules. There have been similar decisions on this issue in other cases and they have agreed with our view. Although these cases are not one hundred percent on point, I think the case for preemption is even stronger as to the section 307 rules, because they were specifically mandated by Congress.

PROTECTIONS FOR ATTORNEY WHISTLEBLOWERS UNDER SECTION 806 OF SOX

Another ethical dilemma for attorneys arises as a result of the intersection of the section 307 rules and section 806 of Sarbanes-Oxley, which provides whistleblower protections for persons, including lawyers, who report evidence of violations within an issuer. Section 806 prohibits an issuer from discriminating against an employee in the terms and conditions of employment in retaliation for lawfully providing information to Congress, the SEC, or any supervisor that the employee reasonably believes constitutes a violation of any SEC rule relating to fraud against shareholders. An issuer that violates this provision is subject to civil and criminal sanctions. SOX places responsibility for administering these proceedings on the Secretary of Labor.

The SOX whistleblower protections are critical for an attorney who may report a violation by his issuer or client but fears that reporting the violation would expose him to retaliation, including the possible loss of his job. But any attorney who makes a report under the section 307 rules runs the risk that in any proceeding challenging any retaliation in which the attorney seeks to use his report and/or the client's response, the attorney will be accused of improperly disclosing client confidences, thereby exposing him to charges that he has violated state ethics rules. The attorney also runs the risk that his report and management's responses—perhaps the best evidence of his whistleblowing activity—will be excluded as privileged.

This squarely raises the issue of the scope of the permissible use of a section 307 report by an attorney in SOX whistleblower litigation. Clearly, if attorneys who comply with our rules cannot introduce evidence of their compliance, then section 806 will be rendered a nullity as far as lawyers are concerned. In a number of section 806 cases that are pending before the Secretary of Labor, we have seen threats by former employers against lawyers if they use their reports in the proceedings. Fortunately, section 205.3(d)(1) of our section 307

25 Id. at 969-71.
rules expressly provides that any report or response thereto “may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney’s compliance with this part is in issue.”

At least one court decision has reached this precise issue and concluded that an attorney may use client confidences in these proceedings. In Willy v. Administrative Review Board, the Fifth Circuit Court of Appeals correctly started its analysis by concluding that federal law governs the issue and not state ethics rules. The court concluded that the Model Rules specifically provide that a lawyer may reveal information relating to the representation to the extent the lawyer believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, and that a whistleblower proceeding was the type of dispute between a lawyer and client contemplated by the Model Rules.

While the facts in Willy predated our Rule 205.3, and thus the court could not rely on our rule, Rule 205.3 is just the kind of federal law that the Fifth Circuit was referring to as guiding its analysis. Thus, we are cautiously optimistic that, going forward, attorneys will not be hindered in establishing section 806 cases by claims that in doing so they are improperly disclosing client confidences. However, it still remains to be seen whether Willy will be followed in whistleblower cases that arise in jurisdictions outside the Fifth Circuit. We know that the issue has been raised in a number of other cases, and we are monitoring them for possible amicus participation by the Commission.

CONFIDENTIALITY AGREEMENTS TO PROTECT WORK-PRODUCT

Next I would like to address confidentiality agreements to protect work-product and proposed Rule 502 of the Federal Rule of Evidence. For a number of years issuers under investigation have provided materials to the Commission staff, pursuant to confidentiality agreements that provide that the issuer is not waiving privileges for the information. In exchange, the Commission agrees that it will not contend that the production constitutes a waiver of any applicable privileges as to third parties and as to additional documents not produced.

28 423 F.3d 483 (5th Cir. 2005).
29 Id. at 499-501.
The materials that have been of the most interest and benefit to the Commission are the internal reports prepared by retained attorneys for issuers examining problems with financial reporting. These reports usually fall within the scope of the work-product doctrine and often include memoranda or attorney interviews with company employees. Reports may also reflect communications protected by the attorney-client privilege.

The Commission has argued in a number of amicus briefs that state and federal courts should find that companies under investigation by the SEC do not waive work-product protection as to third parties by disclosing such internal reports to the Commission pursuant to a confidentiality agreement. The Commission has taken this position because allowing companies under investigation to produce privileged information without waiving privileges serves the public interest, as it significantly enhances the Commission's ability to conduct expeditious investigations and to obtain relief for defraud investors.

Although the Commission must verify that these internal reports are accurate and complete and must conduct its own independent investigation, doing so is far less time consuming and less difficult than conducting investigations without the internal reports. Even the majority opinion in the *Columbia/HCA* decision from the Sixth Circuit Court, which declined to recognize such an agreement and instead found a waiver, acknowledged that permitting companies to disclose privileged information to government investigators results in considerable savings in time and fiscal expenditure and encourages both self-policing by companies and settlement of disputes.

However, the government has enjoyed only limited success in convincing the courts to recognize these agreements. The courts that have accepted them have done so primarily because they believe it is in the public interest for companies to be able to share privileged information with the government without waiving privileges as to third parties. Those courts that have rejected them have done so primarily because they can not reconcile allowing a company under investigation to reveal work-product to a potential adversary with the historical purpose of the work-product doctrine to keep an attorney's trial preparation materials out of the hands of its adversary.

The Tenth Circuit Court's recent decision in *In re Qwest* has cast further doubt on the viability of these confidentiality agreements. There, the district court presiding over a private action against Qwest

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31 Id. at 303.
32 *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179 (10th Cir. 2006).
declined to give affect to an agreement between the Department of Justice and Qwest covering a report of potential corporate wrongdoing prepared by its retained counsel because it found that Qwest waived work-product and attorney-client protections by sharing the documents with the government. The Tenth Circuit Court affirmed the district court, rejecting the argument that if courts do not recognize such agreements companies will cease cooperating with law enforcement officials absent protection under the selective waiver doctrine. The court found it significant that Qwest had disclosed to the government 220,000 pages of protected materials, knowing that the private action was pending against it, in the face of what it saw as almost unanimous circuit court rejection of the selective waiver doctrine and the absence of any Tenth Circuit precedent to support it.

These developments raise at least two distinct issues for securities lawyers. First, can lawyers tell their corporate clients in good faith that they should execute these confidentiality agreements with any realistic expectation that they will be given effect by a court presiding over a private action against the company in which the internal report is sought? Second, assuming there is a basis for companies to continue to enter into these agreements, should the companies and the bar resist entering into these agreements because they undermine the attorney-client privilege?

As to the first issue, it is worth noting that the district court handling the class action against McKesson recently accepted one of these agreements. While a lawyer would have an obligation to advise his client as to the state of the law in any particular district court or circuit, there has been no definitive judicial decision rejecting such agreements. Besides, as the Tenth Circuit Court recognized in Qwest, these cases are fact-specific. The Qwest court noted repeatedly that it was deciding the case on the basis of the record before it and seemed to be particularly skeptical of Qwest's arguments because the agreement was entered into when Qwest was already in private litigation concerning the same subject matter and thus knew that the documents were likely to be subpoenaed and that the risk of finding a waiver was substantial.

Under different circumstances, such as when there is no pending private action at the time of the agreement or, if there is a pending action, it is in a jurisdiction in which there is support for the doctrine, then the outcome may well be different. Further, several of the courts

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33 Id. at 1194.
34 In re McKesson HBOC Inc. Sec. Litig., 126 F. Supp. 2d 1248 (N.D. Cal. 2000).
addressing these issues have appropriately distinguished between requests for attorney-client materials and those seeking solely work-product. It is universally recognized that sharing attorney-client materials with a potential adversary waives the privilege. On the other hand, there are a number of situations in which potential adversaries may share work-product without waiving the protection, such as when parties have a common interest or a joint defense agreement. While the Commission has not maintained in its amicus briefs that it has a common interest with those persons it investigates, corporate parties to these agreements have made such arguments.

In April 2006, the Commission provided to the advisory committee on the Federal Rules of Evidence testimony on proposed Rule 502. That rule, if adopted, will provide that a person under investigation may voluntarily disclose attorney-client and work-product materials to federal agencies without waiving privileges, even in the absence of a written confidentiality agreement. On August 10, 2006, the advisory committee published for comment a revised version of the proposed rule that would provide these protections, and it specifically invited public comment on whether the proposed rule would promote cooperation with the government and decrease the cost of government investigation and prosecutions. The comment period ran until February 15, 2007.

There is opposition to this proposed rule from the private bar which has expressed concern since the mid 1990’s that the principal government law enforcement agencies have developed policies and guidelines that are designed to induce corporations and other business entities to waive or not assert privileges and the result has been a marked increase in the compelled, requested, or suggested voluntary waivers of privileges. In their view, there has emerged a culture of waiver in which government agencies expect a company under investigation to waive privileges, and many companies now do so without even being asked, believing there is the no practical alternative. But the Commission has concentrated its efforts on obtaining reports prepared by retained counsel after the discovery of potentially fraudulent conduct when reports are prepared at that behest of the board of directors or the audit committee with full knowledge that they are likely to be shared with the SEC. The Commission has not generally sought legal advice provided contemporaneously with the conduct under investigation. While an issuer may make the determination that it is in

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the entity’s best interest to produce the record of contemporaneously provided legal advice—such as when the privileged communications were with former management that may have engaged in misconduct and have been ousted—that is not a waiver that the Commission staff has generally sought.

Second, the bar is concerned that, with respect to the internal reports that are of interest to the staff, companies no longer have the predictable protections of confidentiality because, realistically, they do not have the option to maintain privileges without being viewed as uncooperative. This position ignores the fact that current management may appropriately determine to disclose privileged evidence of misconduct by prior management because it is in the best interest of the entity. And even when the privileged evidence of misconduct may concern present management, it may still be in the best interest of the entity to disclose this information because it may show self-policing and address the concerns of investors, shareholders, and the Commission about possible management misconduct. The company may appropriately put the entity’s best interest ahead of those of a current officer who may be guilty of misconduct and would prefer the entity to assert the privilege to protect his own personal interest.

To conclude, it is evident we are in an era of dynamic change regarding the ethical obligations facing attorneys representing corporate clients in SEC proceedings. Achieving the proper balance on these complex issues is challenging for regulators as we seek to harmonize protecting corporate clients’ legitimate interests in zealous representation with the need for effective law enforcement for the protection of investors.