

# **Implementing the SEC's Standards of Professional Conduct for Attorneys**

by Stanley Keller

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*Stanley Keller is a partner in Palmer & Dodge LLP, Boston, Massachusetts. He is a liaison to the American Bar Association's Task Force on SEC Implementation of Section 307 of the Sarbanes – Oxley Act, and, in that capacity, had responsibility for the ABA's comments to the SEC. Until recently, he was chair to the ABA's Committee on Federal Regulation of Securities. He also was a special advisor to the ABA Task Force on Corporate Responsibility.*

## **I. Introduction**

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<sup>1</sup> Lawyers, law firms and law departments are busy interpreting and implementing the new rules. The Commission acted under Section 307 of the Sarbanes-Oxley Act of 2002, which requires the SEC to promulgate rules establishing minimum standards of professional conduct for attorneys, including a rule that obligates attorneys practicing before the Commission to report evidence of certain material violations “up the ladder” within the organization. In addition to adopting an up the ladder reporting rule, the Commission has sought to override inconsistent state ethics rules by authorizing an attorney to report to the Commission evidence of a material violation.

The Commission also originally proposed a “noisy withdrawal” rule under which an attorney whose client did not adequately address the attorney’s report of evidence of a material violation would be obligated to withdraw from representing the issuer, to notify the SEC of such withdrawal, and to disaffirm any misleading documents filed with the SEC. In January, the Commission proposed an alternative under which the attorney would be obligated to withdraw from representation of an issuer but the issuer, rather than the attorney, would be required to disclose the attorney’s withdrawal.

<sup>2</sup> Neither the noisy withdrawal approach nor the issuer disclosure alternative would apply if an issuer has enhanced its corporate governance structure by establishing a “qualified legal compliance committee” of the board (a “QLCC”). The Commission has left these proposals pending.

While the current focus is on the SEC rules establishing federal standards of professional conduct for attorneys who appear and practice before the SEC on behalf of public companies, it is important that attorneys keep in mind applicable state ethics rules

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<sup>1</sup> See Release No. 33-8185, “Final Rule: Implementation of Standards of Professional Conduct for Attorneys” (Jan. 29, 2003), *available at* <[www.sec.gov/rules/final/33-8185.htm](http://www.sec.gov/rules/final/33-8185.htm)>. The final rules are codified in Part 205 of Title 17 of the Code of Federal Regulations. They were proposed in Release No. 33-8150, “Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys” (Nov. 21, 2002), *available at* <[www.sec.gov/rules/proposed/33-8150.htm](http://www.sec.gov/rules/proposed/33-8150.htm)>.

<sup>2</sup> See Release No. 33-8186, “Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys” (Jan. 29, 2003), *available at* <[www.sec.gov/rules/proposed/33-8186.htm](http://www.sec.gov/rules/proposed/33-8186.htm)>.

and the relationship of the federal and state standards. For example, Rule 1.13 of the Model Rules of Professional Conduct and its counterpart adopted by each state require lawyers for a company who know of wrongdoing by company personnel likely to result in substantial injury to the company to proceed as is reasonably necessary in the best interest of the company, which may involve having to report up the ladder, potentially to the company's board of directors. Other provisions, such as Rule 1.6, deal with confidentiality of client information and the limited circumstances when confidential information may be revealed. Rule 1.16, along with Rules 1.2 and 4.1, deal with circumstances when a lawyer must withdraw from representation of a client.

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## **II. Rules Now In Effect**

### **A. Attorneys covered by the rules**

The SEC rules provide that an attorney represents the issuer as an organization and not the issuer's individual officers or employees whom the attorney regularly interacts with or advises. The rules also provide that they are intended to supplement standards of professional conduct of the jurisdictions in which attorneys are licensed to practice, but in the event of conflict with state standards the SEC rules provide that they govern.

The rules apply to an "attorney appearing and practicing before the Commission." An "attorney" is "any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as

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<sup>3</sup> The American Bar Association, upon the recommendation of its Task Force on Corporate Responsibility, recently adopted changes to Rules 1.6 and 1.13 to expand the exceptions to the basic confidentiality rule to permit disclosure when the lawyer's services are used by a client to assist a crime or fraud reasonably certain to cause substantial financial injury to a third person and to clarify a lawyer's obligation to report material violations of law by company personnel up the ladder and, under some circumstances, when the board persists in a clear violation of law, to report out to the extent necessary to protect the client organization.

admitted, licensed, or otherwise qualified to practice law.” This definition includes both in-house and outside counsel and U.S. and foreign attorneys (although certain foreign attorneys defined as “non-appearing foreign attorneys” are not covered by the rules, as described below).

The rules cover an attorney only to the extent the attorney is providing legal advice to an issuer where there is an attorney-client relationship. Thus, employees of an issuer who are licensed attorneys but who do not practice law on behalf of their employer are not subject to the rules. Neither are attorneys for third parties who review part of an issuer’s disclosure document or render a legal opinion to an issuer who is not their client. An “issuer” is a company whose securities are registered under Section 12 of the Securities Exchange Act of 1934 or that is required to file reports under Section 15(d) of that Act or that has a registration statement pending under the Securities Act of 1933. Foreign attorneys who (1) are admitted to practice in a jurisdiction outside of the United States, (2) do not give legal advice regarding U.S. law, and (3) conduct activities that would constitute “appearing and practicing” before the Commission only incidentally to foreign law practice or in consultation with U.S. counsel, are considered “non-appearing foreign attorneys” and are not covered by the rules. Accordingly, a foreign attorney can avoid being subject to the rules by consulting with a U.S. attorney.

There are two situations, however, where an attorney is subject to the rules even though not counsel for the issuer. First, an attorney employed by an investment adviser who prepares material for an investment company knowing it will be filed with the SEC is appearing and practicing before the Commission on behalf of the investment company. Second, because “issuer” is defined to include a person controlled by an issuer, an attorney for a controlled subsidiary can be deemed to be appearing and practicing before the Commission in the representation of the parent. For example, an in-house attorney for a controlled subsidiary can be covered if the attorney is acting for the benefit of the

parent or operating under an umbrella representation agreement.

***B. Appearing and practicing before the Commission***

An attorney is “appearing and practicing before the Commission” if the attorney is:

transacting any business with the Commission, including communications in any form;

representing an issuer in an SEC administrative proceeding or in connection with an SEC investigation, inquiry, information request or subpoena;

providing advice on U.S. securities laws or the SEC’s rules regarding any

document the attorney has notice will be filed or submitted to the SEC; or

advising an issuer as to whether information or a document is required under U.S. securities laws or the SEC’s rules to be filed with the SEC.

The reach of the rules can be quite broad, and can encompass non-securities lawyers in many situations. For example, a non-securities lawyer who participates in the preparation of a discrete section of a disclosure document could, in some circumstances, be “appearing or practicing.” Similarly, an attorney who prepares an agreement that will be filed as an exhibit with the SEC may be subject to the rules if the attorney has notice that it will be filed, but only if the attorney also provides some U.S. securities law advice, for example, on the need to file the document as an exhibit. On the other hand, merely responding to a routine auditor request for information should not constitute appearing and practicing. It may be possible for a non-securities specialist subject to the rules to fulfill a reporting obligation by conferring with a securities law specialist, who may be a “supervisory lawyer” as described below.

*C. Scope of issuer conduct covered by the rules*

The rules require reporting by an attorney who is aware of “evidence of a material violation” by the issuer or by any of its officers, directors, employees or agents (which could include an underwriter). The Commission stated in connection with the adoption of Rule 10b5-1 addressing trading on the basis of inside information that “aware” has the common meaning “having knowledge; conscious; cognizant.” Under this standard, a lawyer is not obligated to conduct an inquiry. It may, however, under certain circumstances, be prudent for an attorney to make further inquiry.

“Evidence of a material violation” means “credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.” This is primarily an objective standard: an attorney who is aware of information must act reasonably in deciding whether there is credible evidence of a material violation. It recognizes that there is a range of judgments an attorney may make without being unreasonable.

In determining whether an attorney has been reasonable, such factors as the attorney’s professional skills, background, experience and familiarity with the client may be taken into account. The violation need only be “reasonably likely,” which the SEC indicates is more than remote but less than “more likely than not.” Consequently, it is a relatively low trigger in order to promote reporting within the client so that the matter can be considered at the right level in the client organization.

Once an attorney is subject to the rules with respect to an issuer, the rules do not require that the information be obtained in connection with the representation or that a potential violation relate to the representation. However, depending on its nature, the representation of an issuer may have a temporal aspect, and information obtained after the

representation ends would not be required to be reported under the rule.

A “material violation” means a material violation of an applicable U.S. federal or state securities law, a material breach of fiduciary duty arising under federal or state statutory or common law, or a similar material violation of any U.S. or state law. A violation of foreign law is not considered a “material violation.”

The term “material” is not defined. Instead, “material” has its usual meaning under federal securities law. A determination of materiality will remain a difficult judgment under the lawyer reporting rules.

***D. Obligation to report up the ladder***

An attorney subject to the rules who becomes aware of evidence of a material violation has three alternatives for reporting that evidence. The basic requirement is that the attorney report the evidence “up the ladder,” starting with the issuer’s chief legal officer (the “CLO”) or both the CLO and the issuer’s chief executive officer (the “CEO”). CLO is not defined but will typically be a company’s general counsel, if it has one. There may be some flexibility for companies to determine who is the CLO under the rules. Alternatives may be an in-house lawyer or compliance officer, in the absence of the suitable in-house lawyer, an outside lawyer performing a general counsel’s role or, in the absence of a suitable lawyer, the CEO.

Although the rules require the report to be made “forthwith,” there is some flexibility for an evaluation of the situation and a determination of how best to deal with the matter before making a report. As an alternative, if the issuer has a QLCC, the attorney may instead satisfy his or her reporting obligation by reporting to the QLCC. Also, if the attorney is a subordinate attorney, he or she may report to a supervisory attorney, who then takes on the reporting responsibility. These alternatives are discussed further below.

Unlike the proposal, the rules do not have a requirement that a reporting attorney document the report of evidence of a material violation. However, lawyers will want to consider the desirability of maintaining a record of actions.

Once the CLO receives an attorney's report of evidence of a material violation, the CLO must cause an inquiry to be conducted into the possible violations reported. If the CLO determines that no material violation has occurred, is ongoing or is about to occur, the CLO must notify the reporting attorney and advise the reporting attorney of the basis for that determination. If the CLO cannot reasonably make that determination, the CLO must take all reasonable steps to cause the issuer to adopt an appropriate response.

A reporting attorney who receives what he or she reasonably believes is an appropriate and timely response to a report has satisfied his or her obligations under the rules. If the CLO does not provide an appropriate response within a reasonable time (which would include the time for the issuer to complete an ongoing investigation), the attorney must report the evidence of a material violation to (i) the issuer's audit committee; or (ii) if the issuer does not have an audit committee, to another committee consisting solely of directors who are not employed, directly or indirectly, by the issuer; or (iii) if the issuer does not have an audit committee or such an independent committee, to the issuer's board of directors. If the attorney reasonably believes it would be futile to report first to the CLO and CEO, the report may be made directly to the audit committee, the independent committee or the board of directors, as the case may be. Unfortunately, the rules do not recognize that the audit committee may not be the appropriate committee to receive the report in all cases.

An "appropriate response" is one that causes the attorney reasonably to believe (i) no material violation has occurred, is ongoing or is about to occur; (ii) the issuer has adopted appropriate remedial measures; or (iii) the issuer, with board or committee approval, has retained or directed an attorney to review the reported evidence and has

substantially implemented remedial recommendations made by the attorney after a reasonable investigation or has been advised by the attorney that a colorable defense may be asserted, consistent with the attorney's professional obligations, in any investigation or proceeding. A pending proceeding should not be necessary for the colorable defense prong of appropriate response to be available since self-investigations should be promoted by the SEC. In exercising professional judgment as to whether a response was appropriate, the attorney can consider the relevant circumstances, such as the amount and weight of evidence, the severity of the apparent violation, and the scope of the investigation, so long as the attorney's determination is reasonable. An attorney may also rely on factual representations and legal determinations where that reliance is reasonable.

The rules contemplate that an issuer may hire outside counsel or direct in-house counsel to investigate a report of evidence of a material violation. An attorney who is hired or directed to investigate a report does not have an up the ladder reporting obligation if (i) the CLO reports the results of such attorney's investigation to the board level; (ii) the attorney was retained to assert a colorable defense on behalf of the issuer in any investigation or proceeding relating to evidence of a material violation and the CLO provides reasonable reports on the progress and outcome of the proceeding to the board level; or (iii) such attorney was retained by the QLCC to investigate evidence of a material violation or to assert a colorable defense on behalf of the issuer in any investigation or proceeding relating to such evidence.

If, after reporting evidence of a material violation to the board level, the issuer has not made an appropriate response within a reasonable time, the reporting attorney must explain the reasons for believing there has not been an appropriate response to the CLO, the CEO and the directors to whom the report was made. Although the rules do not require that the response be reported, the reporting attorney will, as a matter of caution, want to follow up to determine if there has been an appropriate response.

If an attorney who was formerly employed or retained by an issuer and who has reported evidence of a material violation reasonably believes he or she has been discharged for making such a report, the attorney may notify the board of directors of the issuer or any committee of the board. An in-house attorney also might have the benefit of the whistleblower protections under Section 806 of the Sarbanes-Oxley Act.

***E. Qualified legal compliance committee alternative***

The rules provide an alternative process to up the ladder reporting that attorneys and issuers may use when investigating and reporting evidence of material violations. Under this alternative, an issuer may establish a QLCC, which consists of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more independent members of the issuer's board of directors.<sup>4</sup> A QLCC may be an existing committee, such as the audit committee, if it meets the requirements.

A QLCC must be in place before a reporting obligation is triggered and must have the authority and responsibility (i) to inform the CLO and CEO of any report of evidence of a material violation; (ii) to determine if an investigation is necessary, and if so, to conduct one; (iii) to recommend that the issuer implement an appropriate response at the conclusion of any investigation; and (iv) to take all appropriate action, including notifying the SEC, if the issuer fails to implement its recommended response. As now written for purposes of up the ladder reporting, the QLCC would not be required to notify the SEC.

Although QLCCs are not required, the Commission encourages use of such committees to strengthen corporate governance and indicates that QLCC members should

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<sup>4</sup> For these purposes, the Commission uses the statutory test of not being "employed, directly or indirectly, by the issuer," but indicated that it may adopt the more stringent independence requirement for audit committee members under Section 301 of the Sarbanes-Oxley Act.

not have increased liability under state law. It is surprising that the Commission requires that the QLCC be preexisting because this discourages the use of special board committees that otherwise would satisfy the requirements of a QLCC.

An attorney who reports evidence of a material violation to an existing QLCC fulfills his or her obligation to report such evidence and is not required to assess the issuer's response to the report. A CLO may also refer a report of a material violation to an existing QLCC in lieu of causing an inquiry into the report. Reporting to the QLCC should be permissible at any stage in the process since it gets the matter to the appropriate body within the company where it can be dealt with.

***F. Permissive disclosure of client confidences***

An attorney appearing and practicing before the Commission may reveal to the SEC confidential information related to the representation to the extent the attorney reasonably believes necessary to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or to rectify the consequences of such a violation in furtherance of which the attorney's services were used. An attorney also may reveal confidential information to prevent perjury or a fraud on the Commission. As the reporting is permissive, an attorney will have to consider applicable state ethical rules that may circumscribe the attorney's ability to disclose client confidential information and decide whether the SEC's effort to override conflicting state rules is effective.<sup>5</sup>

***G. Supervisory and subordinate attorneys***

An attorney who supervises or directs another attorney who is appearing and

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<sup>5</sup> The State of Washington Bar Association has indicated that, given the permissive nature of the SEC provision, an attorney must comply with the state ethics rules. The SEC General Counsel responded by disagreeing with the Washington Bar position and indicating that it is inconsistent with overriding federal requirements.

practicing before the Commission must make all reasonable efforts to ensure that the subordinate attorney complies with the rules. The rules make clear that only the supervisory attorneys who direct the subordinate attorneys that are appearing and practicing before the Commission are subject to the rules. In other words, the rules do not apply to every partner in a law firm. A CLO is deemed for this purpose to be a supervisory attorney. A subordinate attorney has an obligation to comply with the rules regardless of whether the subordinate attorney acted at the direction or under the supervision of another person.

A subordinate attorney who reports evidence of a material violation to a supervisory attorney is deemed to have complied with the up the ladder reporting requirements of the rules. A supervisory attorney who receives such a report from a subordinate attorney is then responsible for reporting the evidence up the ladder in accordance with the rules. An attorney under the direct supervision of a CLO (an issuer's deputy general counsel, for example) is not a subordinate attorney for purposes of being able to satisfy reporting obligations by reporting to the CLO as the supervisory attorney. Rather, such an attorney has to follow the up the ladder reporting requirements. A subordinate attorney is permitted under the rules to report to the client if the subordinate attorney reasonably believes that the supervisory attorney to whom the report was made failed to comply with the reporting requirements of the rules.

It is likely that the supervisory attorney alternative will be interpreted flexibly in order to give law firms and law departments the ability to design their own procedures for compliance with the rules. For example, a senior attorney who is not a securities specialist should be able to report to a more junior securities expert as a supervisory attorney.<sup>6</sup>

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<sup>6</sup> There has been some confusion over whether an outside attorney could satisfy the reporting obligations by reporting to an in-house attorney below the CLO level as a supervisory attorney. This approach seems (continued...)

## ***H. Penalties for failure to comply***

The rules subject a non-complying attorney to the civil penalties and remedies available to the SEC under federal securities laws. These include civil injunctions, money penalties, and cease and desist orders. An attorney also is subject to discipline and potential suspension under the SEC's rules of practice based on prevailing Commission standards for disciplining attorneys. Attorneys that violate the rules are not subject to criminal liability for that violation.

The rules apply to individual attorneys, and their violations should not result in a violation of the rules by the attorney's law firm or the company that employs the attorney. However, there may be other bases on which the SEC could sanction law firms and companies in appropriate cases.

As stated above, the rules are intended to override inconsistent state rules of professional conduct. The rules provide that if an attorney complies with the provisions of the rules in good faith, that attorney will not be subject to discipline under inconsistent standards imposed by any state. The effectiveness of this provision remains to be determined.<sup>7</sup> Foreign attorneys are not required to comply with the rules to the extent compliance is prohibited by applicable foreign law.

The rules expressly state that they do not create a private right of action against any attorney, law firm, or issuer based upon compliance (or noncompliance) with the rules. The authority to enforce the rules is solely with the SEC.

## **III. Proposed Rules Regarding Mandatory Withdrawal and Reporting Out**

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(...continued)

inconsistent with the thrust of the rules to bring evidence of a material violation to the attention of the CLO and is unlikely to be an available alternative. On the other hand, it may be appropriate for an outside attorney to act in consultation with an in-house attorney. Similarly, there has been some confusion over whether general counsel has supervisory attorney responsibility to ensure compliance by the company's outside counsel. As a general rule, supervisory responsibility should apply only within an organization.

<sup>7</sup> See note 5 above.

Because of the controversy surrounding its noisy withdrawal proposal, the Commission deferred action on it and proposed an alternative that requires the issuer, rather than the attorney, to notify the Commission in the event an attorney withdraws from representation due to a failure of the issuer to remedy a material violation. Comments to the noisy withdrawal proposal raised concerns over the adverse impact the proposal would have on the attorney – client relationship and the ability of lawyers to effectively advise clients regarding legal compliance. Comment letters also noted the potential inconsistency of the proposal with confidentiality requirements under state ethics rules.

**A. *Noisy withdrawal by attorney***

The original proposed rule would require that if an outside attorney does not receive an appropriate response (or a response within a reasonable time) to a report of evidence of a material violation, and if the attorney reasonably believes that a material violation is ongoing or is about to occur and is likely to result in substantial injury to the financial interest or property of the issuer or investors, the attorney must withdraw from representing the issuer and notify the issuer of such withdrawal. The attorney must also notify the Commission within one business day of withdrawal, indicating that the withdrawal was based on professional considerations, and must disaffirm to the Commission any document filed with the Commission that the attorney assisted in preparing that the attorney reasonably believes may be materially false or misleading. If the material violation has already occurred and is not ongoing, an attorney may, but is not obligated to, effect a noisy withdrawal. The proposal did not address whether withdrawal was required from the particular matter, all related matters or all matters, or how the withdrawal requirement would apply in a law firm setting.

In contrast to outside counsel, the proposed rule would not require an in-house attorney to withdraw from representing his or her employer. Instead, in-houses lawyers

must disaffirm any document filed with the Commission that they reasonably believe may be materially false or misleading.

***B. Issuer notification of withdrawal***

Under the alternative proposal, an outside attorney must withdraw from representing the issuer and notify the issuer of such withdrawal if the attorney has reported evidence of a material violation up the ladder and there has not been an appropriate response and the attorney reasonably concludes that there is substantial evidence of a material violation that is ongoing or about to occur and is likely to result in substantial injury to the financial interest or property of the issuer or investors. Similar to the noisy withdrawal proposal, in-house attorneys are not required to withdraw from representing their employers, but must cease participation in any matter concerning the material violation and notify the issuer that there has not been an appropriate response.

Once an issuer has received such notice from either outside counsel or an in-house lawyer, the issuer must, within two business days, report such notice and the circumstances related to it to the Commission on Forms 8-K, 20-F or 40-F, as applicable. Note that unlike the noisy withdrawal proposal, which requires private reporting to the SEC, the alternative proposal would require the issuer to report publicly. If the issuer does not so report, the attorney may inform the SEC of the withdrawal for professional considerations. The Commission has asked whether the attorney should be required to inform the Commission if the issuer has not reported the withdrawal. The Commission also has asked whether there are circumstances that should excuse an issuer from having to report an attorney's withdrawal and whether the issuer should be able to report non-publicly to the SEC.

The withdrawal and issuer reporting requirements do not apply if the report of a material violation has been made to an existing QLCC.

The alternative proposal does not obligate an attorney to withdraw from representing an issuer if such withdrawal is prohibited by the rules of any court or other administrative body having jurisdiction over the attorney. In such a case, however, the attorney must notify the issuer that but for such rules, the attorney would have taken action to withdraw from representation.

The alternative proposal requires an in-house attorney who believes that he or she was discharged because of reporting evidence of a material violation to report to the CLO. The CLO must notify any successor attorney of the prior attorney's withdrawal.

#### **IV. Implementation**

Now that the rules adopted by the Commission are in effect, lawyers and public companies are learning to operate under them. Law firms and law departments are establishing procedures and policies to implement compliance and putting in place educational programs. In establishing compliance procedures and policies, law firms and law departments will want to consider a number of questions, including those identified below. Procedures and policies will differ depending on the organization, its culture and its other policies in place.

Should the policy be limited to compliance with the SEC rules or should it be broader and cover other professional obligations, such as those under state ethics rules?

Who should be covered by the policy? For example, should it cover all lawyers or only those likely to be appearing and practicing before the Commission? In my judgment, most organizations will want to surface potential problems and therefore will adopt policies that apply broadly. As a result, the fine distinctions regarding who may be appearing and practicing will be of less significance in implementing the rules.

What threshold should be established to trigger application of the policy?

Consistent with surfacing potential problems for consideration, most organizations will have low thresholds for internal action.

What actions should the policy cover, such as determining whether a report is required, whether there has been an appropriate response, whether reporting to the board level is required, whether a report should be made to a QLCC if there is one, etc.?

Does the policy require clearance or does it focus on consultation? Approaches will vary but an organization should be mindful that the SEC rules impose responsibility on the individual lawyer.

Is there a group or person within the organization who will administer the policy?

What process should be followed when a matter is surfaced? For example, will reports be made directly to the designated group or person or will they be made up the chain of command or both?

Will supervisory attorneys be identified or will this be handled on a case by case basis?

How will the organization deal with foreign attorneys?

What documentation requirements will be put in place and how will reports be tracked to ensure appropriate follow up?

How will the policy coordinate with the organization's policy on responses to auditor requests for information?

What coordination is appropriate between companies and their law firms regarding compliance procedures and policies?

What educational measures regarding the rules and the organization's compliance procedures and policies should be undertaken?

Companies will want to review their corporate governance structure and consider whether to establish a QLCC, particularly if the Commission were to adopt a reporting out requirement that can be avoided if a QLCC is in place. As noted, a QLCC may be an existing committee, such as the audit committee, if it meets the requirements for a QLCC or a new committee.

By enacting Section 307, Congress responded to the question: “Where were the lawyers?” The SEC has implemented the Congressional response and is considering whether further implementation is necessary. The response of the profession to the new rules and proposed changes to state professional conduct rules may be influential on the Commission. The burden now shifts to lawyers, both in-house and outside, and to public companies to address compliance with this new lawyer regulatory regime.

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