SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 205, 240 and 249

[Release Nos. 33–8186; 34–47282; IC–25920; File No. S7–45–02]

RIN 3235–AI72

Implementation of Standards of Professional Conduct for Attorneys

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is soliciting comments on proposed rules setting standards of professional conduct for attorneys who appear and practice before the Commission on behalf of issuers. Section 307 of the Sarbanes-Oxley Act of 2002 requires the Commission to prescribe minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers. The Commission in a companion release has adopted rules under Section 307. The Commission also is extending the comment period for certain other rules under Section 307. In particular, the Commission is extending the comment period for the provisions regarding an attorney's notification to the Commission (more commonly referred to as ''noisy withdrawal'') when an attorney, after reporting evidence of a material violation up-the-ladder of the issuer's governance structure, reasonably believes an issuer's directors have either made no response (within a reasonable time) or have not made an appropriate response. This release solicits additional comments on the ''noisy withdrawal'' provisions previously proposed and proposes an alternative approach. This release also solicits additional comments on the rules that the Commission adopted under Section 307.

DATES: Comments should be received on or before April 7, 2003.

ADDRESSES: To help us process and review your comments efficiently, comments should be sent by hard copy or by e-mail, but not by both methods.

Comments sent by hard copy should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Alternatively, comments may be submitted electronically to the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. S7–45–02; this file number should be included on the subject line if e-mail is used. All comment letters received will be available for public inspection and copying in the Commission's Public Reference Room at the same address. Electronically submitted comments will be posted on the Commission's Internet Web site (*http://www.sec.gov*).[1]

FOR FURTHER INFORMATION CONTACT: Laura Walker, Office of the General Counsel, U.S. Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549. Phone: (202) 942–0835.

SUPPLEMENTARY INFORMATION: The Commission is proposing amendments to Rule 205.3[2] of Title 17, Chapter II, of the Code of Federal Regulations, establishing standards of professional conduct for attorneys who appear and practice before the Commission in the representation of issuers, under the Securities Act of 1933,[3] the Securities Exchange Act of 1934,[4] the Investment Company Act of 1940,[5] the Investment Advisers Act of 1940,[6] and the Sarbanes-Oxley Act of 2002.[7] The Commission also is proposing new Rules 13a–17[8] and 15d–17[9] and amendments to Rules 13a–11[10] and 15d–11[11] and Forms 20–F[12], 40–F[13], and 8–K[14] under the Exchange Act.

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I. Background

Section 307 of the Sarbanes-Oxley Act of 2002 (the ''Act'') mandates that the Commission:

> shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—
>
> (1) Requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
>
> (2) If the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

On November 21, 2002, the Commission proposed rules under Section 307 to implement those provisions, including an up-the-ladder reporting system mandated by the Act.[15] On January 23, 2003, the Commission voted to approve the up-the-ladder reporting system.[16] In addition to the up-the-ladder reporting requirement, the Proposing Release proposed several corollary provisions in 205.3(d) that are not explicitly required by Section 307, but that the Commission considered potentially important minimum standards for attorneys appearing and practicing before the Commission in the representation of issuers. Under certain circumstances, these provisions would have permitted or required attorneys to withdraw from representation of an issuer, to notify the Commission that they have done so, and to disaffirm documents filed or submitted to the Commission on behalf of the issuer.

The Commission received numerous comment letters concerning these ''noisy withdrawal'' provisions. A number of commenters supported the proposal. They were of the view that the ''noisy withdrawal'' proposal is

[1] The Commission does not edit personal identifying information, such as names or electronic mail addresses, from electronic submissions. Interested person submitting comments should only submit information that they wish to make publicly available.

[2] 17 CFR 205.3.

[3] 15 U.S.C. 77a *et seq.*

[4] 15 U.S.C. 78a *et seq.*

[5] 15 U.S.C. 80a–1 *et seq.*

[6] 15 U.S.C. 80b–1 *et seq.*

[7] 15 U.S.C. 7201 *et seq.*

[8] 17 CFR 240.13a–17.

[9] 17 CFR 240.15d–17.

[10] 17 CFR 240.13a–11.

[11] 17 CFR 240.15d–11.

[12] 17 CFR 249.220f.

[13] 17 CFR 249.240f.

[14] 17 CFR 249.308.

[15] Release No. 33–8150 (December 2, 2002) [67 FR 71670] (the ''Proposing Release'').

[16] Release No. 33–8185 (Jan. 29, 2003) (the ''Adopting Release''). The effective date of the rule is 180 days following publication in the **Federal Register**. Until the effective date, those wishing to see the text of the rule should refer to the Adopting Release.

consistent with the Commission's mandate under Section 307 and is necessary to effectuate the up-the-ladder reporting rule, because it addresses the situation where an issuer inappropriately refuses to implement remedial measures.[17] One commenter not only thought the Commission's proposed rule was sound, but opined that ''considerably more demanding reporting obligations would be consistent with the most plausible interpretation of corporate interests in confidentiality.''[18] Other commenters supported the proposal but recommended certain modifications.[19]

On the other hand, a greater number of commenters opposed the ''noisy withdrawal'' provisions. Some commenters objected to the proposal because they are of the view that the Commission does not have the statutory authority to require ''noisy withdrawal.'' They pointed to legislators'' comments that, in their view, supported the position that Section 307 does not require the Commission to promulgate a rule mandating ''noisy withdrawal.'' [20] Other objectors were concerned that the provision would conflict with longstanding requirements under state ethics laws and therefore would infringe on the jurisdiction of state ethics-setting bodies.[21] One commenter argued that such a provision would subject attorneys to conflicting liability claims, whether or not they complied with the rule. Several commenters from outside the United States stated that compliance with the ''noisy withdrawal'' requirement would cause them to violate the laws of their home jurisdiction.[22] Finally, several commenters believed that the rule would not further the Commission's goals because it would cause clients to exclude attorneys from meetings where information was exchanged that could lead an attorney to believe a material violation had been committed.[23]

The vast majority of commenters suggested that the Commission defer action on a rule mandating ''noisy withdrawal'' and provide interested parties an additional opportunity to comment. Their principal concerns were that: The rule raises novel issues with respect to establishing ethical rules for attorneys that require reporting to a third party; the rules are complex and the period of time provided under Section 307 did not allow adequate time for the preparation of comments or for the Commission to consider those comments; and because Section 307 requires the Commission only to issue the up-the-ladder reporting requirements within 180 days, the Commission need not issue a ''noisy withdrawal'' provision at the time it adopts the up-the-ladder reporting system and can postpone its consideration of the issue.

In light of these comments, the Commission has determined to extend the comment period on proposed § 205.3(d) of the proposed rule.[24] The Commission is soliciting comments on proposed alternative provisions, which prescribe attorney withdrawal in a narrower set of circumstances, and which require the issuer, rather than the attorney, to report to the Commission the attorney's withdrawal or written notice of failure to receive an appropriate response to a report of a material violation. The Commission also requests comment on whether any rules we are currently adopting under Section 307 should be revised if we adopt either of these proposals. The Commission is interested especially in receiving comments from interested parties outside the legal profession, such as issuers and investors, who might be affected by, or benefit from, the final rule or the proposals.[25]

II. The Role of Attorneys Who Appear Before the Commission

As discussed in more detail in the Proposing Release and the Adopting Release, attorneys play a varied and crucial role in the Commission's processes. Attorneys prepare, or assist in preparing, materials that are filed with or submitted to the Commission by or on behalf of issuers. Public investors rely on these materials in making their investment decisions. Thus, the Commission, and the investing public, must be able to rely upon the integrity of in-house and retained lawyers who represent issuers before the Commission. Attorneys also play an important and expanding role in the internal processes and governance of issuers, ensuring compliance with applicable reporting and disclosure requirements, including requirements mandated by the federal securities laws.

The actions of some attorneys have drawn increasing scrutiny and criticism in light of recent events demonstrating that at least ''some lawyers have forgotten their responsibility.'' [26] Moreover, existing state ethical rules have not proven an effective deterrent to attorney misconduct.[27] The July 16, 2002 *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility* (the ''Cheek Report'') noted that ''a disturbing series of recent lapses in corporations involving false or misleading financial statements and alleged misconduct by executive officers'' has compromised investors' confidence in both the ''quality and the integrity'' of public company governance.[28] Indeed, the Cheek Report concluded that ''the system of corporate governance at many public companies has failed dramatically.'' Moreover, the Cheek Report acknowledges that attorneys representing and advising corporate clients bear some share of the blame for this failure.[29]

[17] See, *e.g.*, Comments of Susan P. Koniak, *et al.*, at 23.

[18] *See* Comments of William Simon, at 2.

[19] *See, e.g.*, Comments of Richard Painter, at 2–3.

[20] *See* Comments of Attorneys' Liability Assurance Society, Inc., at 8; Comments of Frederick Lipman, at 1–3.

[21] *See* Comments of the Conference of Chief Justices, at 3; Comments of Attorneys' Liability Assurance Society, Inc., at 8.

[22] *See, e.g.*, Comments of Shearman & Sterling, at 3–7.

[23] *See* Comments of Attorneys' Liability Assurance Society, Inc., at 8.

[24] Proposed Part 205.3(d) should not be confused with Part 205.3(d) as adopted (''Issuer Confidences''). In the event that proposed Part 205.3(d), or an alternative thereto, is adopted, current Part 205.3(d) will be re-numbered.

[25] Persons who previously commented on proposed Part 205 need not re-submit the same comment letters. We will consider all relevant comment letters previously submitted, as well as any new comment letters we receive, in our deliberations on the rule.

[26] *See* remarks by Senator John Edwards, 148 Cong. Rec. at S6551 (July 10, 2002). *See also* Speech by SEC Chairman Harvey L. Pitt: Remarks Before the Annual Meeting of the American Bar Association's Business Law Section (Aug. 12, 2002) (''recent events have refocused our attention on the need for the profession to assist us in ensuring that fundamental tenets of professionalism, ethics and integrity work to ensure investor confidence in public companies''), available at *http://www.sec.gov/news/speech/spch579.htm.*

[27] *See* remarks by Senator Michael Enzi, 148 Cong. Rec. at S6555 (''I am usually in the camp that believes that [s]tates should regulate professionals within their jurisdiction. However, in this case, the [s]tate bars as a whole have failed. They have provided no specific ethical rule of conduct to remedy this kind of situation. Even if they do have a general rule that applies, it often goes unenforced'').

[28] *See* Cheek Report at 3–4.

[29] *See* Cheek Report at 7 (''It is a clear failure of corporate responsibility if executive officers aware of potential accounting irregularities sell millions of dollars of stock to public investors who are unaware of [earnings misstatements and self-dealing by corporate officers]. It is a clear failure of corporate responsibility for insiders to borrow enormous amounts from their companies without adequate security beyond inflated stock of the company itself. And it is a clear failure of corporate responsibility when outside directors, auditors and lawyers, who have important roles in our system of independent checks on the corporation's management, fail to avert or even discover—and sometimes actually condone or contribute toward the creation of—the grossest of financial manipulations and fraud'').

III. Discussion of Proposals

The proposals regarding ''noisy withdrawal'' contained in the Proposing Release, and the alternative provisions discussed below, are intended to further the purposes of the up-the-ladder requirement and enhance investor confidence in the financial reporting process. The proposed rules are designed to deter instances of attorney and issuer misconduct, and, where misconduct has occurred, reduce its impact on issuers and their shareholders.

At the same time, the Commission does not want the rule to impair zealous advocacy, which is important to the Commission's processes. The Commission also does not want the rule to discourage issuers from seeking and obtaining appropriate and effective legal advice. In this regard, the Commission today is proposing for comment alternative provisions to the ''noisy withdrawal'' provisions contained in the Proposing Release.

A. Part 205 as Adopted

In a companion release, we adopted rules under § 307 of the Act that mandate attorneys appearing and practicing before the Commission in the representation of an issuer to report evidence of a material violation up-the-ladder within the issuer.[30] The rules require an attorney to report such evidence to the issuer's chief legal officer, or to its chief legal officer and chief executive officer. The issuer's chief legal officer is required to inquire into the evidence of the material violation and, unless he or she reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she must take reasonable steps to cause the issuer to adopt an appropriate response to the attorney's report. Unless an attorney, who has made a report of evidence of a material violation, reasonably believes that the chief legal officer or chief executive officer has provided an appropriate response within a reasonable period of time to his or her report, the attorney shall report the evidence to an appropriate committee of the issuer's board of directors. An attorney who reasonably believes that the issuer has not made an appropriate response shall explain his or her reasons to the issuer's chief legal officer, chief executive officer, or board of directors. An attorney retained or employed by an issuer that has established a qualified legal compliance committee (''QLCC'') (a committee established to consider and investigate attorney reports under the rule and to recommend appropriate responses to such reports) may, as an alternative to the reporting requirements described above, report evidence of a material violation to the QLCC.

The final rule provides that members of the QLCC may not be ''employed, directly or indirectly, by the issuer.'' This language, which is also included in § 205.3(b)(3), is drawn directly from § 307 of the Sarbanes-Oxley Act. The Commission considers it appropriate and consistent with the mandate of the Act, however, to ensure a high degree of independence in QLCC members and members of committees to whom reports are made. Accordingly, we anticipate that these provisions will be amended to conform to final rules defining who is an ''independent'' director under § 301 of the Act, upon adoption of those rules.[31] We request comment on who should be considered independent in this context.

The rule as adopted does not require either an attorney or an issuer to report evidence of a material violation, or an issuer's response to such evidence, outside the issuer. We request additional comment on the rule as adopted. Commenters should consider whether any aspects of the rule, as adopted, should be revised if we adopt any of the proposals discussed in this release. If yes, how should they be revised? If not, why not?

B. Extension of Comment Period/ Solicitation of Comments for ''Noisy Withdrawal'' Provisions as Previously Proposed

As explained in the Proposing Release, proposed § 205.3(d) addresses what we hope is the rare situation in which an attorney reasonably believes an issuer has either made no response (within a reasonable time) or has not made an appropriate response to reported evidence of a material violation. The proposed section distinguishes between material violations that have already occurred and are not ongoing, and material violations that are either ongoing or are about to occur. The proposed section also distinguishes between outside attorneys retained by an issuer and in-house attorneys employed by an issuer. The section requires an attorney to withdraw from representing an issuer and/or to disaffirm documents filed with the Commission in some circumstances; it also requires a withdrawing attorney to notify the Commission in writing of his or her withdrawal.

As proposed in the Proposing Release, § 205.3(d)(1) prescribes actions by an attorney who has not received an appropriate response to his or her report of a material violation and who believes that a material violation is ongoing or about to occur.[32] It states:

(d) *Notice to the Commission where there is no appropriate response within a reasonable time.* (1) Where an attorney who has reported evidence of a material violation under paragraph 3(b) of this section rather than paragraph 3(c) of this section does not receive an appropriate response, or has not received a response in a reasonable time, to his or her report, and 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 of investors:

(i) An attorney retained by the issuer shall:

(A) Withdraw forthwith from representing the issuer, indicating that the withdrawal is based on professional considerations;

(B) Within one business day of withdrawing, give written notice to the Commission of the attorney's withdrawal, indicating that the withdrawal was based on professional considerations; and

(C) Promptly disaffirm to the Commission any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading;

(ii) An attorney employed by the issuer shall:

(A) Within one business day, notify the Commission in writing that he or she intends to disaffirm some opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; and

(B) Promptly disaffirm to the Commission, in writing, any such opinion, document, affirmation, representation, characterization, or the like; and

(iii) The issuer's chief legal officer (or the equivalent) shall inform any attorney retained or employed to replace the attorney who has withdrawn that the previous attorney's withdrawal was based on professional considerations.

Proposed § 205.3(d)(2) concerns situations in which the reported

[30] *See* Adopting Release. While we summarize here certain salient aspects of the rules as adopted, for a complete discussion, please review the Adopting Release.

[31] *See* Standards Related to Listed Company Audit Committees, Release No. 33–8173 (Jan. 8, 2003).

[32] Proposed § 205.3(d) would follow §§ 205.3(b) and (c) as adopted, which set forth the duty of an attorney to report evidence of a material violation up-the-ladder of the issuer's governance structure, and, if appropriate, to explain to the issuer his or her reasons for believing that the issuer has not made a timely or appropriate response.

material violation has already occurred and is not ongoing. It provides:

(2) Where an attorney who has reported evidence of a material violation under paragraph (b) rather than paragraph (c) of this section does not receive an appropriate response, or has not received a response in a reasonable time, to his or her report under paragraph (b) of this section, and the attorney reasonably believes that a material violation has occurred and is likely to have resulted in substantial injury to the financial interest or property of the issuer or of investors but is not ongoing:

(i) An attorney retained by the issuer may:

(A) Withdraw forthwith from representing the issuer, indicating that the withdrawal was based on professional considerations;

(B) Give written notice to the Commission of the attorney's withdrawal, indicating that the withdrawal was based on professional considerations; and

(C) Disaffirm to the Commission, in writing, any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; and

(ii) An attorney employed by the issuer may:

(A) Notify the Commission in writing that he or she intends to disaffirm some opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; and

(B) Disaffirm to the Commission, in writing, any such opinion, document, affirmation, representation, characterization, or the like; and

(iii) The issuer's chief legal officer (or the equivalent) shall inform any attorney retained or employed to replace the attorney who has so withdrawn that the previous attorney's withdrawal was based on professional considerations.

Proposed § 205.3 (d)(3) restates what is largely settled law:

(3) The notification to the Commission prescribed by this paragraph (d) does not breach the attorney-client privilege.

Interested persons are invited to comment on any aspect of this proposal,[33] including: (1) Whether the proposed rule should include any provision permitting or requiring notification to the Commission when an attorney receives no response or an inappropriate response or whether this is a matter best left to state or local bar disciplinary processes; (2) whether a higher standard should apply to notification to the Commission than to reporting up-the-ladder within the issuer and, if so, how much higher it should be and how should such a higher test be framed; (3) whether ''noisy withdrawal'' should be mandatory under some circumstances but permissive under others and, if so, what circumstances should make ''noisy withdrawal'' mandatory and what circumstances should make ''noisy withdrawal'' permissive, or whether ''noisy withdrawal'' should be mandatory under all circumstances covered by § 205.3(d) or should be permissive under all such circumstances; (4) whether it is appropriate to distinguish between material violations that are ongoing or impending and material violations that are past and have no continuing effect, and whether such a distinction would be meaningful to investors; (5) whether the 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 has occurred, is occurring, or is about to occur before the attorney is required, or permitted, to make a ''noisy withdrawal''; (6) whether an attorney should be required, or permitted, to make a ''noisy withdrawal'' where the attorney has not received an appropriate response to reported evidence of a material violation, and the attorney reasonably believes that the reported material violation has occurred, is occurring, or is about to occur; (7) whether there is an appropriate basis for a ''noisy withdrawal'' under circumstances in which an attorney reasonably believes that the reported material violation is likely to have occurred, be ongoing, or be about to occur; (8) whether there is an appropriate basis for a ''noisy withdrawal'' under circumstances in which the attorney reasonably believes that it is reasonably likely that the reported material violation has occurred, is ongoing, or is about to occur; (9) whether substantial injury to the financial interest of investors is an appropriate prerequisite to a ''noisy withdrawal''; (10) whether substantial injury to the financial interest of the issuer client is an appropriate prerequisite to a ''noisy withdrawal'' and, if so, whether such substantial injury to a financial interest must be reasonably certain, likely, or merely possible; (11) whether the rule should distinguish between outside attorneys and those employed by the issuer and, if so, under what circumstances, how, and why; (12) whether an attorney who is employed by an investment adviser or manager and who is appearing and practicing before the Commission in the representation of the investment company should be treated as an outside attorney retained by the investment company under proposed paragraph (d)(1)(i) or should be treated as an in-house attorney under proposed paragraph (d)(1)(ii); (13) whether the rule should specify the content of a disaffirmance of an opinion or representation; (14) whether the rule should require that any disaffirmance be in writing; (15) whether there are any other actions the rule should require an attorney to take when the attorney does not receive an appropriate response to his or her report of evidence of a material violation (*e.g.*, should an in-house attorney be required to cease participating in or assisting in any matter relating to the violation); (16) what is the appropriate length of time to permit an attorney to make a ''noisy withdrawal''; (17) whether it is important to require any successor attorney to be notified that the previous attorney withdrew based on ''professional considerations'' and, if so, whether there is a better way to require such notification be made than is proposed in paragraph (d)(1)(iii); (18) whether such notification should be required where ''noisy withdrawal'' is merely permissive; (19) whether it is important to provide a ''safe harbor'' from civil suits for the attorney who notifies the Commission that he or she has withdrawn based on professional considerations under proposed paragraph (d) and/or disaffirmed a document; and (20) whether the ''noisy withdrawal'' provisions would create conflicts with applicable law for any attorneys (foreign or U.S.) not excluded by the definition of ''non-appearing foreign attorney'' (section 205.2(j) of the rule as adopted). Should ''noisy withdrawal'' apply to these attorneys? If not, why not? If the provisions would create conflicts for these attorneys, please describe the conflicts and how they appropriately may be resolved.

The Commission is particularly interested in learning commenters' views on how common it is for attorneys to alert their issuer-clients' management or directors to evidence of violations of law but to receive either no response or an inappropriate response. How often would attorneys be required to make a ''noisy withdrawal'' under this provision, if adopted? Should we revise the provision so that attorneys must make a ''noisy withdrawal'' less often or more often? If so, how?

[33] *See also* the solicitation of comments in the Proposing Release.

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.

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,'' [35] and others expressed similar views.[36] 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.[37] 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.[38] 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.[39]

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.'' [40] 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

[35] Comments of the American Bar Association, at 26.

[36] *See, e.g.*, Comments of 77 Law Firms, at 2; Comments of the American College of Trial Lawyers, at 2.

[37] *See, e.g.*, Comments of Attorneys' Liability Assurance Society, Inc., at 8.

[38] *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.

[39] *See* Comments of De Brauw Blackstone Westbroek, at 2; Comments of Stibbe, at 2.

[40] Comments of Jeffrey L. Schultz, at 2.

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.[41]

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)[42] and 15d–11(b),[43] 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.[44] We are today

[41] 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).

[42] 17 CFR 240.13a–11(b).

[43] 17 CFR 240.15d–11(b).

[44] *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

proposing an additional amendment to Exchange Act Rules 13a–11(b) and 15d–11(b) that would subject registered investment companies to Form 8–K filing requirements for the purpose of meeting any filing obligations that arise under proposed section 205.3(e).

We solicit comments on all aspects of this proposal and the effects it would have on issuers and the benefits it would provide to investors. We ask the following additional questions: (1) Is Form 8–K the appropriate form to use for this type of disclosure or should the Commission adopt a new form exclusively for such reports; (2) should issuers be permitted to make such reports in their periodic filings, such as Form 10–Q [45] or Form 10–K; [46] (3) is two business days the appropriate amount of time in which to require issuers to make the filing? What other amount of time might be more appropriate and what factors should we consider in determining the right amount of time under this rule? Should the time calculation use calendar days or U.S. business days; (4) should we exclude registered investment companies from proposed requirements to disclose under section 205.3(e)? If so, what would be the rationale for the exclusion? If we exclude registered investment companies, should we require them to meet their filing obligations under proposed § 205.3(e) in some other manner, *e.g.*, by filing a new form specifically for registered investment companies, Form N–CSR, [47] or some other means? With regard to the proposed Form 8–K filing requirement, we request public comment on the applicability of this requirement to registered investment companies, as well as feasible alternatives that would reduce the reporting burdens on registered investment companies. In addition, we request comment on the utility to investors of the reports to the Commission in relation to the costs to registered investment companies and their affiliated persons of providing those reports.

2. Proposed Amendments to Forms 20–F and 40–F for Foreign Private Issuers

With the globalization of the U.S. capital markets, there has been a marked increase in the number of companies from non-U.S. jurisdictions registering securities with the Commission. At present, there are over 1,300 foreign private issuers [48] from 59 countries that are filing reports with the Commission under the Exchange Act, as compared with approximately 400 issuers from less than 30 countries in 1990. The Commission realizes that the application of Section 307 and the rules we are proposing under Part 205 to foreign law firms, multijurisdictional law firms, foreign lawyers employed by those law firms and foreign registrants, raises a number of significant and difficult issues. We are requesting comment on a broad range of questions in this area, including whether foreign law firms and foreign lawyers should be exempt from Part 205.

Foreign private issuers that are subject to the periodic reporting requirements under the Exchange Act generally are not required to file current reports on Form 8–K. [49] Rather, many of the disclosures required of foreign private issuers are made on either Form 20–F or Form 40–F (in the case of some Canadian issuers), which are integrated forms used both as registration statements for purposes of registering securities of qualified foreign private issuers under Section 12 of the Exchange Act [50] or as annual reports under Section 13(a) [51] or 15(d) [52] of the Exchange Act.

Our rules pertaining to attorney conduct apply to attorneys for foreign private issuers, and we believe that foreign private issuers should have the same reporting duties as those proposed for domestic issuers in the alternative proposed section 205.3(e). Accordingly, we propose to require foreign private issuers to file a report on either Form 20–F or 40–F, as applicable, in order to make these disclosures. The proposal to amend these forms is designed to respond to comments we received from foreign attorneys and regulators stating that the original proposed ''noisy withdrawal'' requirement may conflict with foreign standards of attorney conduct. The proposed amendments to these forms would require an issuer to report to the Commission an attorney's written notice of withdrawal or failure to receive an appropriate response. The foreign private issuer would be required to make the disclosure by filing the form within two business days of the attorney's written notice. The proposed amendments provide that a filing for this purpose may consist only of the facing page of the form, the information required under the appropriate item of the form, and a signature page; issuers would not be required to file a complete Form 20–F or 40–F each time they made a disclosure of an attorney's written notice. [53]

We solicit comments on all aspects of this proposal and the effects it would have on foreign private issuers and the benefits it would provide to investors. Furthermore, we ask the following additional questions: (1) Is it appropriate to require a filing on Form 20–F or 40–F in order to meet these new disclosure requirements, or should we require that this disclosure be made on some other form? Would it be more appropriate to require that this disclosure be made on Form 6–K? [54] Should the Commission create a separate disclosure form (similar to Form 8–K) for these reports by foreign private issuers; (2) will there be any additional consequences to requiring that this disclosure be made on Form 20–F or 40–F; (3) would this type of mandatory disclosure requirement impose undue burdens on foreign companies that have chosen to register their securities in the United States? What might those burdens be? Would it discourage foreign companies from registering their securities in the United States? If so, would a broad exception for foreign companies disadvantage U.S. companies? Would such an exception lead U.S. companies to relocate off-shore; (4) is two business days the appropriate amount of time to allow foreign private issuers to make the required filing? What other amount of time might be more appropriate and what factors should we consider in determining the right amount of time under this rule? Should the time calculation use calendar days or U.S. business days? Would it be sufficient to require foreign private issuers to report this information on an annual basis in their annual reports on Form 20–F or 40–F; (5) should we allow any exceptions for certain foreign private issuers to this new proposed rule in light of the differing regulatory regimes for foreign attorneys and foreign private issuers? Which foreign private issuers would need such an exception and when should it be granted? How would

beneficiaries from engaging in transactions involving issuer equity securities held in their plan accounts.

[45] 17 CFR 308a.

[46] 17 CFR 310.

[47] 17 CFR 249.331 and 17 CFR 274.128.

[48] The term ''foreign private issuer'' is defined in Exchange Act Rule 3b–4(c) [17 CFR 240.3b–4(c)].

[49] *See* Exchange Act Rules 13a–11(b) and 15d–11(b) [17 CFR 240.13a–11(b) and 240.15d–11(b)].

[50] 15 U.S.C. 78*l*.

[51] 15 U.S.C. 78m(a).

[52] 15 U.S.C. 78o(d).

[53] Similarly, the report would not need to be certified by the issuer's principal executive officer or principal financial officer under Exchange Act Rules 13a–14 and 15d–14 [17 CFR 240.13a–14 and 240.15d–14].

[54] 17 CFR 249.30b. *See generally* Release No. 33–8106, ''Proposed Rule: Additional Form 8–K Disclosure Requirements and Acceleration of Filing Date'', for a discussion of the types of information reported on Form 6–K and for our solicitation of comment as to whether the requirements of that form should be otherwise modified.

any exceptions we might grant affect the benefits to investors that would otherwise accrue from the application of this rule to foreign private issuers; (6) would the disclosure requirements of proposed paragraph (e) effect a waiver of the attorney-client privilege by a foreign private issuer or present other special problems for foreign private issuers under applicable foreign law?

IV. General Request for Comments

The Commission requests comments on the rules and amendments proposed in this release, whether any further changes to our rules or forms are necessary or appropriate to implement the objectives of our proposed amendments, and on other matters that might have an effect on the proposals contained in this release.

V. Paperwork Reduction Act

The proposed rules and form amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA''). [55] We are submitting the proposed rules and form amendments to the Office of Management and Budget (''OMB'') for review in accordance with the PRA. [56] The title for the proposed collection of information with respect to the proposed amended Rule 205.3 is ''Notifications Under Part 205.'' The titles for the collections of information with respect to the proposed form amendments are ''Form 20–F'' (OMB Control No. 3235–0288), ''Form 40–F'' (OMB Control No. 3235–0381) and ''Form 8–K'' (OMB Control No. 3235–0060).

The Commission has adopted rules to impose an up-the-ladder reporting requirement when attorneys appearing and practicing before the Commission become aware of evidence of a material violation by the issuer or any officer, director, employee or agent of the issuer. The information collections in the proposed amendments to the rules are necessary to implement the Standards of Professional Conduct for Attorneys prescribed by the proposed rule. Specifically, the collections of information are intended to ensure that in the rare cases in which issuers do not act appropriately after being informed of possible violations, the information would be communicated to the public and the Commission, so that the Commission could take appropriate action. The collection of information is, therefore, an important component of the Commission's program to discourage violations of the federal securities laws and promote ethical behavior of attorneys appearing and practicing before the Commission.

The respondents to the proposed collections of information would be lawyers, issuers, and officers, directors and committees of issuers. We cannot estimate with precision how many attorneys will be subject to the ''noisy withdrawal'' requirements, if adopted. There are approximately 18,200 issuers that may employ or retain attorneys that would be subject to the rule. [57] These issuers may employ in-house attorneys, outside counsel, or a combination of both. We believe, however, that it will be the rare occasion when, as a last resort, a disclosure will be made to the Commission. In the vast majority of cases, we expect that problems will be resolved at the corporate level, and the Commission will not be notified. We therefore estimate for the purposes of the PRA that approximately 10 attorneys, CLOs, CEOs, or QLCCs will make one disclosure to the Commission per year. Depending on the circumstances, the disclosure could consist of a notice of withdrawal (and, in some cases, a similar notice to the issuer and a CLO's notice to successor attorneys), a notice of material violations, a notice of discharge, a notice of disaffirmation, a disaffirmation, or some combination thereof. The burden hours for the disclosure will obviously vary depending on the circumstances. We believe that none of the components of the disclosure, however, would require a significant amount of time to compile. We therefore estimate, for purposes of the PRA, that on average, each disclosure would require 10 burden hours. Under these assumptions, this aspect of the collection of information would impose approximately 100 annual burden hours. Assuming half the burden hours will be incurred by outside counsel at a rate of $300 per hour, the total cost would be $15,000.

Lawyers under the alternative proposal would not be required to report out, but they would be required, if they do not receive an appropriate response to a report of a material violation, to notify the issuer in writing that their withdrawal is based on professional considerations or that they believe that the issuer has not provided an appropriate response in a reasonable time period to their report. In addition, in the cases where a lawyer provides notice to an issuer, the CLO will be required to notify the successor attorney of the predecessor lawyer's withdrawal. For purposes of the PRA, we estimate that 10 lawyers or CLOs will make such written notifications each year and that each notification will require one hour. Proposed § 205.3(f) permits, but does not require, a withdrawing attorney to notify the Commission if the issuer does not comply with proposed § 205.3(e). For purposes of the PRA, we estimate that five lawyers will make a voluntary submission under § 205.3(f) and that each report would impose a burden of 10 hours.

We therefore estimate that this collection of information will have a total annual burden of 100 hours if the ''noisy withdrawal'' proposal is adopted and a total annual burden of 60 hours if the alternative proposal is adopted.

As we stated above, we estimate that there are approximately 18,200 issuers that would be subject to the proposed rule. We cannot estimate with precision how many issuers will be subject to the alternative rule's requirements or, if adopted, how frequently they will be required to notify the Commission that their attorney has notified them that they withdrew or that they did not receive an appropriate response to a report of a material violation. Under those circumstances, the issuer must file a form with the Commission. We estimate for the purposes of the PRA that approximately eight U.S. issuers, one Canadian issuer and one foreign private issuer per year will make one disclosure to the Commission. We estimate, for purposes of the PRA, that on average, each disclosure would require five burden hours. Under these assumptions, this aspect of the collection of information would impose approximately 40 annual burden hours to file Form 8–K, five hours to file Form 40–F and five hours to file Form 20–F. We assume that 25% of the burden hours for issuers that file on Form 8–K, and 75% of the burden hours for issuers that file on Form 20–F or 40–F, will be incurred by outside counsel at a rate of $300 per hour. [58] Using these assumptions, we estimate this aspect of these collections of information would result in a cost of $5,250.

[55] 44 U.S.C. 3501 *et seq.*

[56] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[57] This estimate is based, in part, on the total number of operating companies that filed annual reports on Form 10–K (8,484), Form 10–KSB (3,820), Form 20–F (1,194) or Form 40–F (134) during the 2001 fiscal year, and an estimate of the average number of issuers that may have a registration statement filed under the Securities Act pending with the Commission at any time (100). In addition, we estimate that approximately 4,500 investment companies currently file periodic reports on Form N–SAR.

[58] This allocation of the burden is consistent with our recent PRA submissions for Exchange Act Reports. See, *e.g.*, Release No. 33–8098 (May 10, 2002) [67 FR 35620].

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to reduce the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collections of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, with reference to File No. S7–45–02. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–45–02, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services. OMB is required to make a decision concerning its review of the collections of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is assured of having its full effect if OMB receives it within 30 days of publication.

An agency may not conduct or sponsor, and a person is not required to respond to, a collections of information unless it displays a currently valid control number. Compliance with the collections of information requirements is, as described above, in some cases mandatory and in some cases voluntary depending upon the circumstances. There is no mandatory record retention period. Responses to the requirements to make disclosures to the Commission will not be kept confidential.

VI. Costs and Benefits

We are proposing amendments to section 205.3 and Forms 8–K, 20–F and 40–F to more fully implement Section 307 of the Sarbanes-Oxley Act and recently adopted Part 205. Part 205 affects all attorneys who appear and practice before the Commission in the representation of an issuer and who become aware of evidence of a material violation of the federal securities laws, a material breach of fiduciary duty, or a similar material violation by the issuer or an officer, director, agent or employee of the issuer that has occurred, is ongoing, or is about to occur. We are sensitive to the costs and benefits of our proposal. We discuss these costs and benefits below.

Part 205 imposes an up-the-ladder reporting requirement for attorneys representing an issuer before the Commission who become aware of potential misconduct of which a reasonably prudent investor in the issuer would want to be informed. It is expected that, in the vast majority of instances of such reports, the situation will be addressed and remedied before it causes significant harm to investors. Where the potential impropriety is ongoing and not taken care of internally following a report mandated by the rule, we are proposing an alternative means of providing notice to the Commission and the public. Previously, we have proposed that the attorney, if retained by the issuer, effectuate a ''noisy withdrawal'' from representation of the issuer and disaffirm to the Commission any tainted documents, which will alert the Commission to investigate the issuer. In this release we are proposing that the attorney would have to inform the issuer and the issuer would be required to inform the Commission.

A. Benefits

Many commenters on our original proposal noted that a ''noisy withdrawal'' may violate the attorney-client privilege, chill the zealous advocacy of lawyers and create an incentive for issuers not to seek legal advice on certain matters. Our alternative therefore allows the attorney to withdraw without notifying the Commission. Instead, the issuer must report the attorney's withdrawal to the Commission in a public filing. Thus, the Commission and the public obtain the benefit of the information of the attorney's withdrawal (at least when the issuer acts properly) where a violation of the law is likely, the lawyer may preserve the attorney-client privilege and the issuer has the opportunity to remedy the situation before disclosure is required. In addition, attorneys licensed in foreign jurisdictions would not be required to violate applicable professional obligations. These benefits are difficult to quantify. Interested persons are invited to comment upon this benefits analysis. Are there other foreseeable benefits? What is the likely economic impact of these benefits? Can the benefits be quantified in any meaningful way? If so, how, and what conclusions should be drawn?

B. Costs

The proposed form amendments will impose costs on issuers. Issuers would be subject to the additional cost of preparing and filing a brief report to the Commission on Forms 8–K, 20–F or 40–F, as applicable. This may require the issuer to report its own potentially illegal act to the Commission (although an issuer accused of wrongdoing may be less likely to report itself than the withdrawing attorney may be). Investors may treat the news that an attorney has resigned as proof of wrongdoing before any formal proceedings are brought. The issuer's cost of capital may increase. Unlike the ''noisy withdrawal'' proposal, this proposal would not require the attorney to disaffirm any corporate filings that he or she participated in drafting, which would provide clearer information about what the withdrawal signifies.

Issuers that receive notice that their lawyers have withdrawn for professional considerations will be required to file a Form 8–K (or comparable forms by foreign private issuers). For purposes of the PRA, we estimated that ten issuers will file such a report each year and that each form will impose a burden of five hours. Using estimates derived from our Paperwork Reduction Analysis, we estimate that the incremental impact of our proposals will result in a total cost of $8,825.[59] In addition, the withdrawing lawyer will be required to notify the issuer and may notify the Commission. For purposes of the PRA, we estimated that lawyers will make ten such required notifications and five such permissive notifications a year, for a combined burden of 60 hours. Assuming a cost of $300 an hour, this paperwork burden imposes a cost of $18,000.

Interested persons are invited to comment upon this costs analysis. Are there other foreseeable costs? What is the likely economic impact of these costs? Can the costs be quantified in any meaningful way? If so, how, and what conclusions should be drawn? Interested persons are invited to address

[59] For purposes of the Paperwork Reduction Act, we estimate that the proposals would result in 32.5 burden hours and $5,250 in external costs. Assuming a cost of $110/hour for in-house professional staff, the total cost of the burden would be $8,825. The $110/hour estimate is derived from *The SIA Report on Management and Professional Earnings for the Securities Industry* (Oct. 2001).

all aspects of costs and benefits attributable to proposed Part 205. The Commission requests data to quantify the expected costs and the value of the anticipated benefits.

VII. Effect on Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act (15 U.S.C. 78w(a)(2)) requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 2(b) of the Securities Act,[60] Section 3(f) of the Exchange Act,[61] and Section 2(c) of the Investment Company Act[62] require us when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The proposals should boost investor confidence in the financial markets. We anticipate that these proposals would enhance the proper functioning of the capital markets and promote efficiency by reducing the likelihood that illegal behavior would remain undetected and unremedied for long periods of time. Proposed section 205.3(d)–(f) would apply to all issuers and attorneys appearing before the Commission and is therefore unlikely to affect competition.

Interested persons are invited to comment upon any aspect of this analysis. We request comment on whether proposed section 205.3(d)–(f), if adopted, would impose a burden on competition. For example, would U.S. lawyers face a competitive disadvantage because attorneys practicing outside the U.S. would not be required to comply with the proposal's withdrawal requirements to the extent that such compliance is prohibited by applicable foreign law? Commenters are requested to provide empirical data and other factual support for their views if possible.

VIII. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603.

A. Reasons for the Proposed Action

We are proposing section 205.3 to more fully implement Section 307 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7245 *et seq.*) (''the Act'') and recently adopted Part 205 of Title 17 of the Code of Federal Regulations.

B. Objectives

Section 307 of the Act requires the Commission to prescribe ''minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers.'' The standards must include a rule requiring an attorney to report ''evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the company or any agent thereof'' to the chief legal counsel or the chief executive officer of the company (or the equivalent); and, if they do not respond appropriately to the evidence, requiring the attorney to report the evidence to the audit committee, another committee of independent directors, or the full board of directors. This proposal is designed to address those circumstances where the attorney withdraws from representation due to professional considerations. We originally proposed to require the attorney to report such a withdrawal to the Commission; we are still considering that option. However, we are now also proposing an alternative whereby the withdrawing attorney would notify the issuer and the issuer would be required to notify the Commission. An objective is to provide notice of such an event to both the Commission and the public without unduly intruding on the attorney-client relationship.

C. Legal Basis

We are proposing the new rules and amendments under the authority set forth in Sections 7, 10 and 19 of the Securities Act of 1933, Sections 3(b), 4C, 12, 13, 15 and 23(a) of the Securities Exchange Act of 1934, Sections 30, 38 and 39 of the Investment Company Act of 1940, Section 211 of the Investment Advisers Act of 1940, and Sections 3(a), 307 and 404 of the Sarbanes-Oxley Act of 2002.

D. Small Entities Subject to Proposed Part 205

The proposed additions to Part 205 would affect issuers that are small entities. Exchange Act Rule 0–10(a) (17 CFR 240.0–10(a)) defines an issuer, other than an investment company, to be a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year. As of October 23, 2002, we estimated that there were approximately 2,500 issuers, other than investment companies, that may be considered small entities. For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[63] We estimate that there are 211 small investment companies that would be subject to the proposed rule. The proposed revisions would apply to any small entity that is subject to Exchange Act reporting requirements.

The proposed additions to Part 205 also would affect law firms that are small entities. The Small Business Administration has defined small business for purposes of ''offices of lawyers'' as those with under $6 million in annual revenue.[64] Because we do not directly regulate law firms appearing before the Commission, we do not have data to estimate the number of small law firms that practice before the Commission or, of those, how many have revenue of less than $6 million. We request data on that issue.

E. Reporting, Recordkeeping, and Other Compliance Requirements

Lawyers who believe that their issuer client is engaged in ongoing illegal conduct would be required to notify their client and withdraw from the representation. Issuers who receive such notices would be required to notify the Commission and the successor lawyer of the withdrawal. The time required for the actual preparation of a report would vary, but should not be extensive.

F. Duplicative, Overlapping, or Conflicting Federal Rules

Proposed § 205.3 would not duplicate, overlap, or conflict with other federal rules. There are no other statutory federal requirements that small entities make similar reports or provide similar information.

G. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed rule, we considered the following alternatives: (a) The establishment of differing compliance or

[60] 15 U.S.C. 77b(b).

[61] 15 U.S.C. 78c(f).

[62] 15 U.S.C. 80a–2(c).

[63] 17 CFR 270.0–10.

[64] 13 CFR 121.201.

reporting requirements that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of the reporting requirements for small entities; (c) an exemption from coverage of the requirements, or any part thereof, for small entities; and (d) the use of performance rather than design standards.

The Act does not contain any exemption or other limitation for small entities. We believe that utilizing different reporting or other compliance requirements for small entities would seriously undermine the effective functioning of the proposed reporting regime. The proposed rule is designed to help restore investor confidence in the reliability of the financial statements of the companies they invest in—if small entities were not subject to such requirements, investors might decline to invest in their securities. Further, we see no valid justification for imposing different standards of conduct upon small law firms than would apply to others who choose to appear and practice before the Commission. We also believe that the proposed reporting and recordkeeping requirements will be at least as well understood by small entities as would be any alternate formulation we might propose to apply to them. Therefore, it does not seem necessary or appropriate to develop separate requirements for small entities. We nevertheless solicit comment on whether small entities should be subject to different requirements.

H. Solicitation of Comments

Interested persons are invited to comment upon any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments concerning: (1) The number of law practices that constitute small entities; (2) the number of small entities that may be affected by proposed section 205.3; (3) the existence or nature of the potential impact of the proposed rule on small entities; and (4) how to quantify the impact of the proposed revisions. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule is adopted, and will be placed in the same public file as comments on the proposed rule itself.

IX. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''),[65] we must advise the OMB as to whether the proposed rule constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in an annual effect on the economy of $100 million or more (either in the form of an increase or a decrease); a major increase in costs or prices for consumers or individual industries; or significant adverse effects on competition, investment, or innovation. Where a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review. We request comment on the potential impact of the proposed rule on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

X. Statutory Basis and Text of Proposed Amendments to Parts 205, 240 and 249

The proposals contained in this document are being proposed under the authority in Sections 3, 307, and 404 of the Sarbanes-Oxley Act of 2002,[66] Sections 7, 10 and 19 of the Securities Act of 1933,[67] Sections 3(b), 4C, 12, 13, 15 and 23 of the Securities Exchange Act of 1934,[68] Sections 30, 38 and 39 of the Investment Company Act of 1940,[69] and Section 211 of the Investment Advisers Act of 1940.[70]

List of Subjects

17 CFR Part 205

Standards of conduct for attorneys.

17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, the Commission proposes to amend Title 17, Chapter II, of the Code of Federal Regulations to read as follows:

PART 205—STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS APPEARING AND PRACTICING BEFORE THE COMMISSION IN THE REPRESENTATION OF AN ISSUER

1. The authority citation for Part 205 continues to read as follows:

Authority: 15 U.S.C. 77s, 78d–3, 78w, 80a–37, 80a–38, 80b–11, 7202, 7245, and 7262.

2. Amend § 205.3 by:

a. Redesignating paragraph (d) as paragraph (g); and

b. Adding new paragraphs (d), (e) and (f).

The additions read as follows:

§ 205.3 Issuer as client.

* * * * *

(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 a response in a reasonable time,

(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 is 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) 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 this paragraph (d)(1) or (d)(2), 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

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[65] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C., and as a note to 5 U.S.C. 601).

[66] 15 U.S.C. 7202, 7245, 7262.

[67] 15 U.S.C. 77g, 77j and 77s.

[68] 15 U.S.C. 78c(b), 78d–3, 78*l*, 78m, 78o and 78w.

[69] 15 U.S.C. 80a–29, 80a–37, 80a–38.

[70] 15 U.S.C. 80b–11.

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.

(e) *Duties of an issuer where an attorney has given notice pursuant to paragraph (d).* 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 (§§ 249.308, 220f or 240f of this chapter), as applicable.

(f) *Additional actions by an attorney.* 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.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for Part 240 is amended by adding the following citations in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

Section 240.13a–11 is also issued under Secs. 3(a) and 307, Pub. L. 107–204, 116 Stat. 745.

* * * * *

Section 240.13a–17 is also issued under Secs. 3(a) and 307, Pub. L. 107–204, 116 Stat. 745.

* * * * *

Section 240.15d–11 is also issued under Secs. 3(a) and 307, Pub. L. 107–204, 116 Stat. 745.

* * * * *

Section 240.15d–17 is also issued under Secs. 3(a) and 307, Pub. L. 107–204, 116 Stat. 745.

* * * * *

4. Section 240.13a–11 is amended by revising paragraph (b) to read as follows:

§ 240.13a–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.13a–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such investment companies are required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter, or

(2) A notice regarding an attorney withdrawal pursuant to § 205.3(e) of this chapter.

5. Add § 240.13a–17 to read as follows:

§ 240.13a–17 Reports of foreign private issuers pursuant to § 205.3(e) of this chapter.

Every foreign private issuer which is subject to § 240.13a–1 shall make reports pursuant to § 205.3(e) of this chapter. If a foreign private issuer is filing a report on Form 20–F (§ 249.220f of this chapter) or Form 40–F (§ 249.240f of this chapter) solely to provide information pursuant to § 205.3(e) of this chapter, the foreign private issuer is not required to include the certifications required by § 240.13a–14 in such report.

6. Section 240.15d–11 is amended by revising paragraph (b) to read as follows:

§ 240.15d–11 Current reports on Form 8–K (§ 249.308 of this chapter).

* * * * *

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6–K (17 CFR 249.306) pursuant to § 240.15d–16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file periodic reports pursuant to § 270.30b1–1 of this chapter under the Investment Company Act of 1940, except where such investment companies are required to file:

(1) Notice of a blackout period pursuant to § 245.104 of this chapter, or

(2) A notice regarding an attorney withdrawal pursuant to § 205.3(e) of this chapter.

7. Add § 240.15d–17 to read as follows:

§ 240.15d–17 Reports of foreign private issuers pursuant to § 205.3(e) of this chapter.

Every foreign private issuer which is subject to § 240.15d–1 shall make reports pursuant to § 205.3(e) of this chapter. If a foreign private issuer is filing a report on Form 20–F (§ 249.220f of this chapter) or Form 40–F (§ 249.240f of this chapter) solely to provide information pursuant to § 205.3(e) of this chapter, the foreign private issuer is not required to include the certifications required by § 240.15d–14 in such report.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

8. The authority citation for Part 249 is amended by revising the sectional authority for §§ 249.220f, 249.240f and 249.308 to read as follows:

Authority: 15 U.S.C. 78a, *et seq.,* unless otherwise noted.

* * * * *

Section 249.220f is also issued under secs. 3(a), 202, 208, 301, 302, 306(a), 307, 401(a), 401(b), 406 and 407, Pub. L. 107–204, 116 Stat. 745.

Section 249.240f is also issued under secs. 3(a), 202, 208, 301, 302, 306(a), 307, 401(a), 406 and 407, Pub. L. 107–204, 116 Stat. 745.

Section 249.308 is also issued under 15 U.S.C. 80a–29, 80a–37 and secs. 3(a), 306(a), 307, 401(b) and 406, Pub. L. 107–204, 116 Stat. 745.

* * * * *

9. Amend Form 20–F (referenced in § 249.220f) by:

a. Adding a paragraph on the cover page before the line beginning with the phrase ''Commission file number'';

b. Adding paragraph (d) to General Instruction A;

c. Removing the word ''annual'' in each place where it appears in paragraphs (a) and (b) of General Instruction D;

d. Adding Item 16E; and

e. Removing the phrase ''[annual report]'' in the paragraph after ''Signatures'' and adding in its place ''[report]''.

The additions read as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 20–F

* * * * *

Or

[ ] Report Pursuant to Rules 13a–17 and 15d–17 Under the Securities Exchange Act of 1934

Commission file number * * *

* * * * *

General Instructions

A. Who May Use Form 20–F and When It Must Be Filed

* * * * *

(d) A foreign private issuer must file a report on this Form within two business days after receipt of an attorney's written notice pursuant to 17

CFR 205.3(d)(1), (d)(2) or (d)(3). Such filing may consist only of the following: the facing page, the information required by Item 16E of this Form and the signature page. If such filing is made solely to provide information pursuant to 17 CFR 205.3(e), the foreign private issuer is not required to include the certifications required by 17 CFR 240.13a–14 or 17 CFR 240.15d–14 in the report.

* * * * *

Item 16E. Receipt of an Attorney's Written Notice Pursuant to 17 CFR 205.3(d)

Upon receipt of written notice from an attorney (as defined in 17 CFR 205.3(d)), provide the information specified in 17 CFR 205.3(e). You do not need to provide the information called for by this Item 16E unless you are using this form pursuant to General Instruction A.(d).

* * * * *

10. Amend Form 40–F (referenced in § 249.240f) by:

a. Revising the line on the cover page that begins with the phrase ''For the fiscal year ended'';

b. Adding paragraph (5) to General Instruction A;

c. Adding paragraph (15) to General Instruction B;

d. Removing the word ''annual'' in each place where it appears in paragraphs (7) and (8) of General Instruction D;

e. Removing the phrase ''[annual report]'' in the paragraph after ''Signatures'' and in its place adding ''[report]''; and

f. Removing the word ''annual'' in the first sentence of Instruction A to ''Signatures.''

The revisions and additions read as follows:

Note: The text of Form 40–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 40–F

* * * * *

For the fiscal year ended * * *

Or

[ ] Report Pursuant to Rules 13a–17 and 15d–17 Under the Securities Exchange Act of 1934

Commission file number * * *

* * * * *

General Instructions

A. Rules as to Use of Form 40–F

* * * * *

(5) If the Registrant uses Form 40–F to file reports with the Commission pursuant to Section 13(a) of the Exchange Act (15 U.S.C. 78m(a)) and Rule 13a–3 thereunder (17 CFR 240.13a–3) or pursuant to Section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) and Rule 15d–4 thereunder (17 CFR 240.15d–4), the Registrant must file a report on this Form 40–F within two business days after receipt of an attorney's written notice pursuant to 17 CFR 205.3(d)(1), (d)(2) or (d)(3). Such filing may consist only of the following: the facing page, the information required by General Instruction B.(15) of this Form 40–F and the signature page. If such filing is made solely to provide information pursuant to 17 CFR 205.3(e), the Registrant is not required to include the certifications required by 17 CFR 240.13a–14 or 17 CFR 240.15d–14 in the report.

* * * * *

B. Information To Be Filed on This Form

* * * * *

(15) Receipt of an Attorney's Written Notice Pursuant to 17 CFR 205.3(d). Upon receipt of written notice from an attorney (as defined in 17 CFR 205.3(d)), provide the information specified in 17 CFR 205.3(e). You do not need to provide the information called for by this General Instruction B.(15) unless you are using this form pursuant to General Instruction A.(5).

* * * * *

11. Form 8–K (referenced in § 249.308) is amended by:

a. Removing the word ''and'' after the phrase ''Rule 15d–11'' and in its place adding a comma and adding the phrase ''and for reports of an attorney's written notice required to be disclosed by 17 CFR 205.3(e)'' before the period at the end of General Instruction A;

b. Adding a sentence to the end of General Instruction B(1); and

c. Adding Item 13 under ''Information to be Included in the Report.''

The additions read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

General Instructions

* * * * *

B. Events To Be Reported and Time for Filing of Reports

1. * * * A report on this form pursuant to Item 13 is required to be filed within two business days after receipt of an attorney's written notice pursuant to 17 CFR 205.3(d)(1), (d)(2) or (d)(3).

* * * * *

Information To Be Included in the Report

* * * * *

Item 13. Receipt of an Attorney's Written Notice Pursuant to 17 CFR 205.3(d)

Upon receipt of written notice from an attorney (as defined in 17 CFR 205.3(d)) provide the information specified in 17 CFR 205.3(e).

Dated: January 29, 2003.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 03–2520 Filed 2–5–03; 8:45 am]

BILLING CODE 8010–01–P