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SEC I: Commission Proposes Rules Regarding Director Nomination Process and Security Holder Communications with Directors

U.S. Securities and Exchange Commission, [Proposed Rule: Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors](#), Exchange Act Release No. 34-48301, Investment

Company Act Release No. IC-26145 (Aug. 8, 2003).

[Comments on Proposed Rule: Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors](#), File No. S7-14-03.

U.S. Securities and Exchange Commission, [SEC Proposes Disclosure Requirements Related to Director Nominations and Shareholder Communications](#), Release No. 2003-92 (Aug. 6, 2003).

U.S. Securities and Exchange Commission Division of Corporation Finance, [Staff Report: Review of the Proxy Process Regarding Nomination and Election of Directors](#) (Jul. 15, 2003).

On August 6, the SEC proposed new disclosure requirements and amendments to existing rules regarding disclosure requirements "to enhance the transparency of the operation of boards of directors." The proposals followed the release on July 15, 2003 of a report by the Division of Corporation Finance entitled: "[Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors](#)." The Commission reportedly is anxious to implement such disclosure "enhancements" in time for the 2004 proxy season. Thus, the Commission has established a short comment period which ends on September 15, 2003.

Proposed New Disclosures Regarding Nominating Process

The SEC's proposals would expand the disclosures currently required under Item 7(d)(2) of Schedule 14A dealing with proxy statements for meetings at which directors will be elected. The proposals would require issuers to disclose:

- Whether the company "has a standing nominating committee or a committee performing similar functions and, if the company does not have such a committee, a statement of the specific basis for

the view of the board of directors that it is appropriate for the company not to have such a committee and the names of those directors who participate in the consideration of director nominees."

- Whether the nominating committee has a nomination policy and, if so, what the principal provisions of that policy are as well as whether the nominating committee will consider shareholder-recommended director candidates.
- Whether there are specified "minimum qualifications that the nominating committee believes must be met by a nominating-committee-recommended nominee . . . any specific qualities or skills that the nominating committee believes are necessary for one or more of the company's directors to possess, and any specific standards for the overall structure and composition of the company's board of directors."
- A "description" of the committee's "process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether or not the nominee is recommended by a security holder."
- A "statement" of the source of the nomination (such as the name of an executive officer, director, or other individual who proposed the nomination except when the nominee is an executive officer of the company or is a member of the board of directors standing for re-election).

- Whether the company "pays a fee to any third party or parties to identify or assist in identifying or evaluating potential nominees" as well as a description of "the function performed by the third party".
- If the committee: "(a) receives a recommended nominee from a security holder or group of security holders who individually, or in the aggregate, beneficially owned greater than 3% of the company's voting stock for at least one year as of the date of the recommendation, and (b) the nominating committee decides not to nominate that candidate, disclosure of": the name or names of the security holder(s) who recommended the candidate and the specific reason(s) for the committee's decision not to include the candidate as a nominee.

***Proposed New Disclosures Regarding Security Holder
Communications with Board Members***

The SEC's proposal also would create new disclosure requirements regarding the ways in which shareholders may communicate with members of the company's board of directors. The proposals would require issuers to disclose in their proxy statements for meetings at which members of the board of directors will be elected the following:

- Whether the issuer's board of directors has a process through which security holders may communicate with members of the board and, if no such process exists, a "statement of the specific basis for the view of the board of directors that it is appropriate for the company not to have . . . such a process".
- A description of the process through which shareholders may

communicate with members of the board and the identities of board members to whom security holders may send communications.

- If such communications are screened so that only some are provided to members of the board, then a description of the process "for determining which communications will be passed on to board members".
- A description of material actions taken as a result of security holder communications with the board.

FAQs on the New Rules Relating to Director Nomination Process and Security Holder Communications with Directors

RealCorporateLawyer.com is pleased to make available to its subscribers a memorandum regarding the SEC's proposals that addresses such FAQs as: (1) Would the proposed rules require a nominating committee to consider candidates recommended by a company's shareholders? (2) Would the nominating committee be required to have a written charter? (3) What disclosures would be required about the directors serving on the nominating committee? (4) What disclosures would be required for companies that do not have separate nominating committees? (5) How would the new disclosure requirements relate to existing and proposed NYSE and Nasdaq listing standards? (6) How would the proposed rules interrelate with companies' bylaw provisions relating to shareholder nominations? (7) Would the proposed rules require companies to institute any procedures to facilitate shareholder communications with directors? (8) Are there any comparable disclosure requirements under existing or proposed NYSE and Nasdaq listing standards? (9) Would the new disclosures apply to companies that are not subject to the proxy rules? and (10) Would the new disclosures apply to investment companies?

See Alston + Bird LLP, [SEC Proposes New Rules Relating to Director Nomination Process and Shareholder Communications with Directors](#) (Aug. 13, 2003).

SEC II: SEC's Office of the Chief Accountant Releases Auditor Independence FAQs

U.S. Securities and Exchange Commission, [Office of the Chief Accountant: Application of the January 2003 Rules on Auditor Independence Frequently Asked Questions](#) (Aug. 13, 2003).

U.S. Securities and Exchange Commission, [Final Rule: Strengthening the Commission's Requirement Regarding Auditor Independence](#) (Jan. 28, 2003).

U.S. Securities and Exchange Commission, [Corrections to Final Regulations: Strengthening the Commission's Requirements Regarding Auditor Independence](#) (May 7, 2003).

On August 13, 2003, the SEC's Office of the Chief Accountant released a list of 35 "FAQs" -- frequently asked questions -- regarding the application of the January 2003 rules on auditor independence. The FAQs are broken into the following eight categories: (1) Partner Rotation - Transition Questions; (2) Audit-Partner and Partner Rotation - Other Matters; (3) Nonaudit Services; (4) Audit Committee Pre-Approval; (5) Audit Committee Communications; (6) Fee Disclosures; (7) "Cooling Off" Period; and (8) Broker-Dealer and Investment Advisers.

Several of the Audit Committee Pre-Approval FAQs -- specifically FAQ Nos. 22

through 24 -- seem to have garnered the most attention. On August 20, for example, Gibson Dunn & Crutcher. LLP issued an alert to clients stating, in part, as follows:

Questions 22 through 24 of the FAQ address audit committee policies for pre-approving audit and non-audit services to be provided by a company's outside auditor. Specifically, these questions contain guidance on whether, in the view of the Office of the Chief Accountant, particular practices would satisfy the SEC's pre-approval rules. These rules, as set forth in Rule 2-01(c)(7) of Regulation S-K, provide that: (1) a pre-approval policy must be detailed as to the particular service to be provided; (2) the audit committee must be informed about each service; and (3) the policy must not delegate audit committee authority to management. The FAQ states that, although the level of detail that is appropriate in a pre-approval policy depends on a company's facts and circumstances, the establishment of monetary limits alone is not sufficient because these limits do not, without more, provide sufficient detail or adequately inform the audit committee. Similarly, policies that use "broad, categorical approvals" (the FAQ uses "tax compliance services" as an example), or that call upon management to make judgments about whether proposed services fit within categories of services that the audit committee has pre-approved, are not sufficiently detailed as to the particular services to be provided. In general, a pre-approval policy must be "designed to ensure that the audit committee knows precisely what services it is being asked to pre-approve." According to the FAQ, if the audit committee is presented with a schedule or cover sheet describing services to be pre-approved, that schedule or cover sheet must be accompanied by "detailed back-up documentation" regarding the

specific services to be provided by the outside auditor.

To read the entire alert as well as Gibson, Dunn's recommendations regarding the matters, see:

Gibson, Dunn & Crutcher. LLP, [SEC Issues Guidance on Audit Committee Pre-Approval Policies](#) (Aug. 20, 2003).

SEC III: SEC Files and Settles Its First Civil Injunctive Actions Based on Sarbanes-Oxley Certification

U.S. Securities and Exchange Commission, [SEC Settles Sarbanes-Oxley Certification Case: SEC v. Rica Foods et al., Civ. Action No. 03-22191-Civ-King \(S.D. Fla.\) \(filed Aug. 15, 2003\)](#), Litig. Release No. 18293 (Aug. 18, 2003).

Securities and Exchange Commission v. Rica Foods, Inc., Calixto Chaves, and Gina Sequeira, Case No. 03-22121-CIV-KING, [Complaint for Injunctive and Other Relief](#) (S.D. Fla., filed Aug. 15, 2003).

On August 15, the SEC filed and settled civil injunctive actions against Rica Foods, Inc., its CEO (Calixto Chaves) and its CFO (Gina Sequeira) alleging violations of the CEO and CFO certification requirements of the Sarbanes-Oxley Act of 2002. The defendants consented to entry of a Final Judgment of Permanent Injunction and Other Relief without admitting or denying the allegations of the Commission's complaint. According to the Commission's announcement:

On January 13, 2003, Rica Foods filed a Form 10-K annual report with the Commission containing a purported unqualified independent auditor's report from Deloitte & Touche (Deloitte). The audit report represented that Rica Foods' consolidated financial statements were presented fairly and in conformity with Generally

Accepted Accounting Principles. At the time of the filing, however, Deloitte had not provided Rica Foods with a signed audit report, and Rica Foods' financial statements contained material classification errors.

Despite the lack of a signed audit report and the existence of these material errors, Chaves and Sequeira, personally certified in the annual report that the Form 10-K filing fairly and accurately presented Rica Foods' financial condition. Chaves and Sequeira signed these certifications pursuant to Section 302 of Sarbanes-Oxley, which required the Commission to adopt rules requiring an issuer's principal executive and financial officer each to certify the financial and other information contained in the issuer's quarterly and annual reports.

As part of the settlement, the Court issued a permanent injunction that will permanently enjoin Rica Foods from violating Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act as well as Rules 12b-20 and 13a-1 promulgated thereunder. The injunction also permanently enjoins Chaves and Sequeira from violating Section 13(b)(5) of the Exchange Act and rule 13a-14 thereunder and from aiding and abetting violations of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act (and Rules 12b-20 and 13a-1 promulgated thereunder). Chaves, but not Sequeira, will further be required to pay a \$25,000 civil penalty to the Commission.

SEC IV: SEC Files First Enforcement Proceeding Involving an Investment Company Sarbanes-Oxley Certification

U.S. Securities and Exchange Commission, [SEC Charges Irving David with Embezzlement and Filing a False Sarbanes-Oxley Certification; Criminal Charges Also Announced](#), Litig. Release No. 18300 (Aug. 21, 2003).

Securities and Exchange Commission v. Irving Paul David, 03-Civ. 6305, [Complaint](#) (KMW) (S.D.N.Y., complaint filed Aug. 21, 2003).

Only a few days after filing its very first enforcement proceeding based on Sarbanes-Oxley certification, the Commission filed its first enforcement proceeding involving an investment company Sarbanes-Oxley certification. On August 21, the Commission announced that it had filed an enforcement action against a former officer of two investment companies charging him with "embezzlement, breach of fiduciary duty, and filing a false certification required by the Sarbanes-Oxley Act of 2002." According to the Commission's announcement, "[t]his action is the first Commission enforcement proceeding involving an investment company Sarbanes-Oxley certification."

Simultaneously with the filing of the SEC's enforcement action, the Office of the United States Attorney for the Southern District of New York announced the same individual's indictment on criminal charges arising from the alleged embezzlement. According to the SEC's announcement:

The Commission's Complaint, filed in the United States District Court for the Southern District of New York, alleges that [Irving Paul] David, formerly an employee of Citigroup Global Markets, Inc., f/k/a Salomon Smith Barney, Inc., ("Citigroup Global Markets"), stole funds from two affiliated registered investment companies: Consulting Group Capital Markets Funds (the "Consulting Group Fund"), and Smith Barney World Funds Inc. (the "Smith Barney World Fund") (collectively, the "Funds"). In addition, at the very time that he was embezzling from the Funds, David signed a certification pursuant to the Sarbanes-Oxley Act in which he falsely stated that he had disclosed to the Consulting Group Fund's auditors and audit committee any fraud, whether material or not,

involving management, when in fact he had made no such disclosure.

PCAOB I: Roundtable on Reporting on Internal Control

Public Company Accounting Oversight Board, [Public Company Accounting Oversight Board Roundtable on Reporting on Internal Control - Tuesday, July 29, 2003](#).

Public Company Accounting Oversight Board, [Archive of Webcast of Roundtable on Reporting on Internal Control](#) (Jul. 29, 2003).

On July 29, 2003, the Public Company Accounting Oversight Board conducted a Roundtable on Reporting on Internal Control. The proceedings were Webcast and a transcript is available, as indicated above, on the PCAOB Web site. The purpose of the roundtable was to debate, among other things, the depth with which public company auditors must inquire into the internal controls implemented by the companies they audit. The PCAOB, of course, must develop audit standards regarding auditors' attestations under Section 404 of Sarbanes-Oxley. Those board has indicated that it believes that such standards will be proposed, finalized and effective by year end. Roundtable participants debated whether auditors should be required to conduct direct evaluations of corporate internal controls rather than reviewing management's certifications regarding internal controls. The transcript indicates that one hot area of debate involves whether direct evaluations of corporate internal controls by auditors would put auditors in the position of internal managers and, perhaps, even compromise the auditors' independence as a consequence. Another topic of discussion regarding the hotly-contested issue of Section 404

attestation by auditors was the high costs that companies will face in the implementation of Section 404 requirements. The concern apparently is not merely that it will be expensive to implement. Rather, the concern seems to be that it will be so expensive as to divert resources from otherwise productive purposes with no meaningful additional benefit to investors.

Those who took the position that direct evaluation of internal controls is necessary argued that meaningful attestation requires an effective review and that such a review is the only way to restore investor confidence in corporate America. SEC staffers seemed to support such a view.

Corporate Governance I: Controversial Report Contains Recommendations for Improvement of MCI's Corporate Governance

Richard C. Breeden, [Restoring Trust: Report to The Hon. Jed S. Rakoff The United States District Court for the Southern District of New York on Corporate Governance for the Future of MCI, Inc.](#)
[Prepared by Richard C. Breeden, Corporate Monitor](#) (Aug. 2003).

MCI, Inc., [Report Reaffirms MCI's Progress and Commitment to Being a Model of Good Corporate Governance](#) (Aug. 26, 2003).

On August 26, the court-appointed "Corporate Monitor" of MCI, Inc. (Richard Breeden) filed with the United States District Court for the Southern District of New York a report entitled "Restoring Trust: Report to The Hon. Jed S. Rakoff The United States District Court for the Southern District of New York on Corporate Governance for the Future of MCI, Inc." Judge Rakoff is overseeing the bankruptcy reorganization of MCI.

The report has generated substantial controversy because it contains 78 corporate governance recommendations that, some say, would shift control over

running the day-to-day business away from management and in favor of shareholders and the board of directors. Below is a discussion of some of the principal recommendations of the report -- by no means all of them.

With regard to directors, the report proposes that all board members other than the CEO must be independent directors. The report proposes a 10-year term limit for all directors except the CEO and requires the election of one new board member each year. Stockholders would be permitted to suggest director nominees via a Web site to be maintained by the company. A non-executive Chairperson will head the board.

Regarding executive compensation, all compensation must be set pursuant to serious corporate performance measures and should be paid principally in cash with a portion to be paid in restricted stock subject to performance targets and at least a 4-year vesting period. There would be an outright ban on stock options for 5 years. Unusually high compensation must be approved by shareholders and no one may be paid more than \$15 million without shareholder approval.

The company's governance committee would be required to establish a "town meeting" Web site through which shareholders who own at least 1% of MCI's voting shares can post resolutions for the consideration of all stockholders.

Resolutions posted to the site approved by some minimum percentage of shareholders would be placed in the company's proxy statement for consideration at the next annual meeting.

The proposal also would basically require corporate governance provisions to be included within the company's articles of incorporation so that they can be amended only by the shareholders -- not management.

Does Your Law Firm Have a Written Compliance Policy Regarding the SEC's Newly-Effective Rule Governing Attorney Conduct?

[Final Rule: Implementation of Standards of Professional Conduct for Attorneys,](#)

Release Nos. 33-8185; 34-47276 (Jan. 29, 2003).

[Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys](#), Release Nos. 33-8150, 34-46868 (Nov. 21, 2002).

[Comments on Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys](#)

The SEC's final attorney conduct rule promulgated under Section 307 of the Sarbanes-Oxley Act of 2002 (Implementation of Standards of Professional Conduct for Attorneys) became effective on August 5, 2003. For those of you affiliated with law firms, the important question now is: Does your firm have a written compliance policy regarding the SEC's newly-effective rule governing attorney conduct?

There are, of course, many ways to develop and implement such a written policy. Such a policy might include some or all of the following, which is not intended to be exhaustive:

Compliance with the Securities and Exchange Commission's Rule Governing Attorney Conduct

A. *The Rule.* The SEC has adopted Part 205 to Chapter 17 of the Code of Federal Regulations pursuant to Section 307 of the Sarbanes-Oxley Act of 2002 (the "Attorney Conduct Rule"). The Attorney Conduct Rule became effective August 5, 2003. It prescribes minimum standards of professional conduct for attorneys appearing and practicing before the SEC in the representation of an issuer. All attorneys affiliated with the Firm are required to comply in all respects with Part 205. To provide oversight and ensure such compliance, the Firm has established a Compliance Committee. The Compliance Committee is responsible for administering the Firm's policies concerning Part 205. Every Firm attorney must review and follow Part 205 and the Firm's compliance policies. If an attorney has questions regarding the Attorney Conduct Rule or these policies, the Compliance Committee encourages such attorney to consult promptly with a member of the Compliance Committee.

B. *Brief Summary of Principal Elements Of Attorney Conduct Rule.* The Firm requires that all attorneys become familiar with the scope and content of the

Attorney Conduct Rule, a copy of which is attached as Exhibit A to this compliance policy. The summary below is not intended as a substitute for a thorough review of the Attorney Conduct Rules, which is required of all attorneys.

The key requirements of the Attorney Conduct Rule are as follows :

The scope of the Attorney Conduct Rule is broad, applying to all attorneys "appearing and practicing" before the SEC "in the representation of issuers. All Firm attorneys should consider themselves to be covered by Part 205.

Under the Attorney Conduct Rule, representation of an issuer means providing legal services as an attorney for an issuer. An "issuer" is a company with securities registered under Section 12 of Securities Exchange Act of 1934, that is required to file reports with the SEC under Section 15(d) or that has filed a registration statement that has not yet become effective and has not been withdrawn. The definition also encompasses any person "controlled by" an issuer . Issuers do not include foreign government issuers.

"Appearing and practicing" before the SEC includes : (i) transacting any business with the SEC, including communications in any form; (ii) representing an issuer in a SEC administrative proceeding or in connection with a SEC investigation, inquiry, information request or subpoena; (iii) preparing, or participating in the process of preparing, any document which the attorney has notice will be filed with, or incorporated into a document that will be filed with, the SEC; or (iv) advising an issuer that information or a statement, opinion, or other writing is required (or is not required) to be filed with, submitted to, or incorporated into a document that will be filed with or submitted to, the SEC.

Under Part 205, an attorney who becomes aware of evidence of a material violation of federal or state securities laws, material breach of fiduciary duty, or similar material violation, must report such evidence to the issuer's chief legal

officer or to both that officer and the chief executive officer. Alternatively, as described below, if the issuer has established a "qualified legal compliance committee" ("QLCC"), the attorney may report such evidence to the QLCC.

An attorney becomes aware of evidence of a material violation when the attorney is aware of "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." In adopting Part 205, the SEC observed that the evidence of a material violation must be "credible," that there is a range of conduct in which an attorney may engage without being unreasonable, and that an attorney is not required or expected to report gossip, hearsay or innuendo. On the other hand, the SEC noted that it is not necessary for an attorney to have actual knowledge that a material violation of law has occurred, is occurring, or is about to occur before the attorney's reporting obligations are triggered.

Upon receiving a report of evidence of a material violation, the chief legal officer must conduct an inquiry, as he or she reasonably believes is necessary, into the reported evidence of a material violation, and, if necessary, take steps to ensure that the issuer adopts appropriate remedial measures.

If the reporting attorney reasonably believes that the chief legal officer or chief executive officer has not provided an "appropriate response," the reporting attorney must go "up the ladder" and report the evidence of the material violation to the issuer's audit committee, another committee of the board consisting solely of independent directors, or the entire board of directors.

As noted, Part 205 provides that an issuer may establish a "qualified legal compliance committee" ("QLCC"). A QLCC must consist of at least one member of the issuer's audit committee and two or more independent directors. If an

issuer has established a QLCC, an attorney who becomes aware of evidence of a material violation may report such violation directly to the QLCC. The QLCC must then ensure that an appropriate response is made. An attorney who reports evidence of a material violation to a duly appointed QLCC has no further obligations (either to evaluate the appropriateness of the issuer's response or to report further "up the ladder").

The Attorney Conduct Rule delineates the duties and obligations of both supervisory and subordinate attorneys . A supervisory attorney must make "reasonable efforts" to ensure that attorneys practicing under his or her supervision comply with the Attorney Conduct Rule. A subordinate attorney satisfies his or her reporting obligations by reporting evidence of a material violation to a supervisory attorney. Once the supervisory attorney receives a report from a subordinate, that supervisor becomes responsible for complying with the reporting requirements of Part 205. If the subordinate reasonably believes that the supervisory attorney failed to comply with Part 205, the subordinate may, but is not required to, report to the issuer's chief legal officer and/or chief executive officer or, if one has been established, to the issuer's QLCC.

A violation of Part 205 will subject an attorney to the civil penalties and remedies for a violation of the federal securities laws available to the SEC.

The Attorney Conduct Rule does not currently include a "noisy withdrawal" requirement. In the future, the SEC may adopt a form of "noisy withdrawal" requirement, two forms of which have previously been proposed for public comment. The "noisy withdrawal" provisions proposed to date generally would require an attorney who makes a report of evidence of a material violation and does not receive an appropriate response after reporting all the way "up the ladder" to withdraw from the issuer's representation. The withdrawal proposals would trigger some form of notification (either by the attorney notifying the SEC

of his or her withdrawal or, in the alternative proposal, by the issuer making a public filing disclosing the withdrawal).

C. Compliance Policies Applicable to All Firm Attorneys.

General considerations. It is important for all attorneys to comply in all respects with the reporting and other requirements of the Attorney Conduct Rule. For the reporting requirements of the Attorney Conduct Rule to apply, evidence of a material violation must be "credible" and not based on gossip, hearsay or innuendo. As a general matter, the fact that potential disclosure issues are identified in, for example, due diligence or as a result of reviewing draft securities filings will not give rise to a potential reporting situation under the Attorney Conduct Rule . These issues arise frequently and in virtually all cases are appropriately resolved initially through further consideration and analysis by Firm attorneys and/or further consultation with the client.

In those situations that may appear more problematic, a variety of informal and practical means should be pursued very promptly to resolve the matter. Such successive informal steps should include, for example, involving the partner in charge of the matter in discussions about any possible reporting situations; full discussion of the situation with the person at the client (whether a business person or in-house lawyer) responsible for the transaction, litigation or other matter; if necessary, a request to that person to involve the chief legal officer of the client in further dialogue about the situation; and full discussion with the chief legal officer.

Importantly, in exhausting such informal and practical means, all attorneys are expected to consult with other attorneys so that no individual partner or associate alone considers whether the matter has been resolved and whether further action is required .

Compliance Committee. As noted above, the Firm has established the Compliance Committee to provide oversight and help ensure compliance with the Attorney Conduct Rule. When a partner or associate notifies the Compliance Committee (or one of its members) that he or she has become aware of evidence

of a material violation of law (as defined in the Attorney Conduct Rule) in connection with representation of an issuer, the Compliance Committee will be responsible for determining, among other things : (i) whether an actual reporting situation exists and therefore whether to make an initial report of such evidence to the client (either to the chief legal officer and/or chief executive officer or to the QLCC if one has been established by the client); (ii) whether, in non-QLCC situations, and in light of the client's response to such a report, the Firm must go "up the ladder" and report such evidence to the audit committee or board of directors; and (iii) whether, in non-QLCC situations, and in light of the response of the audit committee or full board, the Firm should or is required to withdraw from the client's representation and, in the event the SEC adopts a "noisy withdrawal" requirement, how to satisfy that requirement. The Compliance Committee will consult with appropriate Firm attorneys in making such determinations.

Associate Attorneys. The Attorney Conduct Rule distinguishes between the obligations of "supervisory" attorneys and "subordinate" attorneys. All associate attorneys should consider themselves, for purposes of compliance with the Attorney Conduct Rule, "subordinate" attorneys.

Accordingly, if an associate becomes aware of evidence of a material violation of law (as defined in the Attorney Conduct Rule), the attorney is required promptly to report orally or in writing such evidence to the partner in charge of the particular matter . If that partner is not available, the attorney is required to report such evidence to a member of the Compliance Committee. To avoid misunderstandings, in communicating with the partner in charge of the particular matter or a member of the Compliance Committee, the associate must make clear that he or she is making an actual report of evidence of a material violation under the Attorney Conduct Rule. A subordinate attorney who makes such a report has no further obligations under the Attorney Conduct Rule.

If the associate concludes that the partner in charge of the matter has not appropriately responded to his or her report of evidence of a material violation or

otherwise believes that the situation should be reported to the Compliance Committee in addition to the partner in charge of the matter, the attorney should so notify a member of the Compliance Committee.

Partners. All partners should consider themselves, for purposes of compliance with the Attorney Conduct Rule, "supervisory" attorneys . Moreover, all partners remain responsible for complying with the Attorney Conduct Rule irrespective of any notification they may provide to the Compliance Committee or the subsequent determinations made by the Compliance Committee.

If a non-partner attorney reports to a partner that he or she believes that a particular situation presents an actual reporting situation under the Attorney Conduct Rule, the partner receiving such a report must promptly notify a member of the Compliance Committee and thereafter consult with the Compliance Committee in relation to the report.

If an associate reports to a partner that he or she believes that a particular situation presents a potential reporting situation under the Attorney Conduct Rule, and/or if circumstances lead a partner to believe a particular situation involves a potential reporting situation, the partner receiving such a report and/or forming such belief must promptly gather any appropriate facts, consult with other partners about the situation, and make a determination whether the situation involves an actual reporting situation.

In evaluating a potential reporting situation, if the partner concludes that an actual reporting situation exists, the partner must promptly notify a member of the Compliance Committee and thereafter consult with the Compliance Committee in relation to the matter.

* * * *

There are, of course, many other issues that may be considered in connection with the creation of any such policy. The materials above merely exemplify some of the issues that may need to be addressed in developing and implementing any such policy.

ABA Adopts New Lawyer Ethics Rules Based on Proposals from the ABA Task Force on Corporate Responsibility

American Bar Association, [New Rule 1.6: Confidentiality of Information](#) (Aug. 12, 2003).

American Bar Association, [New Rule 1.13: Organization as Client](#) (Aug. 12, 2003).

American Bar Association, [ABA Adopts New Lawyer Ethics Rules, Urges Fairness in Military Commission Trials Policies Also Address USA Patriot Act, Funding for First Responders to Terrorism](#) (Aug. 12, 2003).

ABA Presidential Task Force on Corporate Responsibility, [Recommendation to Amend Rule 1.6\(b\) of the ABA Model Rules of Professional Conduct and to Amend the Related Comments.](#)

ABA Presidential Task Force on Corporate Responsibility, [Recommendation to Amend Rule 1.13 of the ABA Model Rules of Professional Conduct and to Amend the Related Comments.](#)

On August 12, 2003, the American Bar Association House of Delegates voted 239 to 147 to adopt new lawyer conduct rules in response to recent corporate scandals. The House of Delegates approved three proposals from the ABA Task Force on Corporate Responsibility.

The first proposal adopted by the House of Delegates amends Rule 1.6 of the ABA Model Rules of Professional Conduct to permit a lawyer to reveal

confidential client information if the client is using the lawyer's services to commit a crime or fraud that would cause financial harm to others. The second proposal that was adopted amends rule 1.13 of the Model Rules to permit a lawyer representing an organizational client to report up the corporate ladder violations by corporate officers of laws or legal duties that would harm the organization. The third proposal adopted by the House of Delegates endorsed structural and procedural reforms to improve corporate governance.

COMINGS AND GOINGS: Who's Doing and Saying What and Where?

On August 14, SEC Chairman **William H. Donaldson** named **Donald T. Nicolaisen** as the Commission's Chief Accountant. Mr. Nicolaisen comes to the Commission from his position as a senior partner at PricewaterhouseCoopers LLP where he has served in a variety of positions including head of the Firm's national office for accounting and SEC services. He also has served as a member of FASB's Emerging Issues Task Force and chaired PricewaterhouseCoopers' financial services practice for broker-dealers, investment banking, mutual funds, banking, insurance and real estate. See U.S. Securities and Exchange Commission, [Donald Nicolaisen Named SEC Chief Accountant](#), News Release 2003-97 (Aug. 14, 2003).

On August 18, NASD announced that former U.S. Comptroller General and head of the GAO **Charles A. Bowsher** has joined the NASD Board of Governors. Mr. Bowsher also was associated with Arthur Andersen & Co. for 25 years and served as Assistant Secretary of the Navy for Financial Management and Chairman of the Public Oversight Board. See NASD, [Charles A. Bowsher Joins NASD's Board of Governors](#), News Release 03-035 (Aug. 18, 2003).

On August 21, the SEC's Office of Economic Analysis announced the selection of **Leslie Boni** as a visiting scholar for a one-year term. Professor Boni arrives at

the Commission from the University of New Mexico where she is a faculty member.

Former SEC Chairman **Harvey Pitt** reportedly has agreed to write a monthly column for the publication Compliance Week on corporate governance and compliance issues. See Compliance Week, [Former SEC Chairman Harvey Pitt To Write Monthly Column For Compliance Week](#), Business Wire (Sept. 2, 2003).

What Are the Commissioners Saying? SEC Chairman **William H. Donaldson** delivered his "[Opening Statement before Open Commission Meeting](#)" regarding the recommendations by the Division of Corporation Finance to propose amendments to the Commission's proxy rules on August 6.

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