THE REVISED ROLE OF LAWYERS AFTER SARBANES-OXLEY©

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INTRODUCTION

With the passage of the Sarbanes-Oxley Act[1], Congress, for the first time, imposed specific professional responsibilities on attorneys who appear and practice before the Securities and Exchange Commission (SEC) and mandated that the SEC issue rules of professional conduct for such attorneys. Proposed rules were published in November 2002,[2] and final rules were adopted on January 23, 2003.[3]

Though short, Section 307 immediately provoked significant debate, first because of its first-time-ever statutory federal regulation of attorneys and because many believe it has imposed new and stronger obligations on attorneys representing the organization as client. Section 307 is a departure from the traditional method of regulating attorneys' professional responsibility through state authorities.

The SEC has long had regulations for those who represented clients before it,[4] but these spoke to specific conduct before the Commission. The Congressional mandate has taken the SEC in a new direction with respect to its responsibility to evaluate attorney conduct. Given long-standing rules governing confidentiality and the attorney-client privilege, one area of obvious importance is any requirement to provide evidence of an attorney's conduct inside the organization.

The final rules have not proven to be as draconian as was first feared, but recent events have confirmed that the SEC still sees a major role for lawyers as "gatekeepers." In a speech given on September 20, 2004, Stephen Cutler, the SEC's Director of Enforcement, described lawyers who advise companies on disclosure standards and their securities law requirements as being a part of the "sentries of the marketplace," [5] and a mere three days later an in-house lawyer was issued a $50,000.00 civil penalty for failing to live up to the SEC's expectations.[6]

The Sarbanes-Oxley Act of 2002 ("SOX") was a response to a series of perceived corporate scandals, most notably the collapse of Enron and WorldCom, but including several others. Higher standards were expected of corporate offices, including general counsel, and the SEC was emboldened to enforce these higher standards based on this newly granted authority. The SEC was not limited to SOX, however, and it also heightened the level of enforcement of existing statutes and regulations. In the same speech by Cutler, noted above, he said that the SEC had named 30 lawyers as respondents or defendants in SEC enforcement actions, and half of those were in-house counsel.

STATE STANDARDS AND THE SARBANES-OXLEY RULES.

In 1983 the American Bar Association adopted the Model Rules of Professional Responsibility based on the recommendations of a special commission headed by Robert Kutak.[7] Rule 1.13 is the rule addressing the organization as client. The revised Texas Rules of Professional Responsibility[8] became effective January 1, 1990. Rule 1.12 deals with the same subject. The SOX rules address the same areas as the state rules on the organization as client but with a specific focus on securities law matters. This portion of the article will go through the SOX rules on a section-by-section basis and attempt to reconcile or contrast them with the similar Texas rules.

§205.1 sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of the SOX rules.

The significant part of this section is the invocation of supremacy, i.e., "Where the standards of a state . . . jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern."

Early concern focused on the risk that the SOX rules might compel an attorney to take action that would be in direct contradiction of the obligations otherwise applicable to an attorney. As finally adopted, the SOX rules have not proven to be that difficult to reconcile with corresponding state rules.

§205.2 Definitions.

For purposes of this part, the following definitions apply:

(a) *Appearing and practicing before the Commission*:

(1) Means:

(i)Transacting any business with the Commission, including communications in any form;

(ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;

(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or

(iv) Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission; but

(2) Does not include an attorney who:

(i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(iv) of this section other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or

(ii) Is a non-appearing foreign attorney.

Every in-house counsel of an organization whose securities are registered with the SEC should assume that he or she is subject to the SOX rules. Certainly, anyone drafting or signing an SEC filing as an attorney is included in the definition.

Subsection (a)(1)(iii) is very expansive in the matters that could draw an in-house attorney into the coverage of the rules. In discussing the definition, the SEC attempts to reassure counsel about the limited breadth of the rule. The SEC specifically said: "[A]n attorney must have notice that a document he or she preparing or assisting in preparing will be submitted to the Commission to be deemed to be 'appearing and practicing' under the revised definition. The definition . . . clarifies that an attorney's preparation of a document (such as a contract) which he or she never intended to or had notice would be submitted to the Commission or incorporated into a document submitted to the Commission, but which subsequently is submitted to the Commission as an exhibit to or in connection with a filing, does not constitute 'appearing and practicing' before the Commission."[9] In-house counsel should be aware, however, that the expanded Form 8-K rules require many more filings with the SEC, and an easy way to satisfy the disclosure requirements for a material contract is to attach a copy of the contract to the 8-K filing.[10] Thus, a labor attorney who prepares a simple termination agreement for a corporate officer should generally assume that the contract will become part of the company's next 8-K.

The ABA comments expressed concern that the rule, as adopted, "could inappropriately encompass non-securities specialists who do no more than prepare or review limited portions of a filing, lawyers who respond to auditors' letters or prepare work product in the ordinary course unrelated to securities matters . . . ."[11] Notwithstanding the stated concern, the SEC rejected the ABA's proffered alternative definition that would have had the rule apply "only to those lawyers with significant responsibility for the company's compliance with United States securities laws . . . ."[12]

Clearly, if an in-house lawyer participates in the preparation of any portion of an SEC filing such as reviewing the accuracy of a transaction described in a Form 10-K, that lawyer is covered, but the lawyer may also be covered if he or she reviews pending litigation with the company's outside auditors, since the evaluation of litigation risk will be incorporated into the company's audited financials.

(b) *Appropriate response* means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

(1) That no material violation, as defined in paragraph (i) of this section, has occurred, is ongoing, or is about to occur;

(2) That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or

Title search: The Revised Role of Lawyers after Sarbanes-Oxley

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