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April 7, 2003

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: Comments of Public Citizen, Inc., on Implementation of Standards of Professional Conduct for Attorneys, File No. S7-45-02

Dear Sir:

We submit these comments on behalf of Public Citizen, Inc., in support of the Commission's proposal to amend 17 C.F.R. 205.3 by adding the "noisy withdrawal" provisions in proposed subsections (d)(1)-(3). Public Citizen's view is that the Commission's proposal:

- falls clearly within the authority conferred by Section 307 of the Sarbanes-Oxley Act of 2002;
- represents an appropriate exercise of federal government authority to regulate attorneys who appear before federal administrative agencies;
- is fully compatible with traditional and evolving views of the attorney-client relationship and the appropriate limits on the obligation to preserve client confidences; and
- is necessary and proper to protect investors and the public against corporate fraud.

Public Citizen, Inc., is a national, nonprofit advocacy organization with approximately 125,000 members nationwide. It is dedicated to the protection of consumers and the public against abuses of power by both government and corporations. In pursuit of these interests, Public Citizen regularly appears before judicial, legislative, and administrative bodies. Holding corporations accountable to the law has long been a central concern of Public Citizen, and we are therefore keenly interested in helping to ensure that the powers given the Commission by the

Sarbanes-Oxley Act are vigorously exercised to protect investors and to deter and remedy corporate misconduct.

In addition, Public Citizen has long been interested in matters concerning the regulation of the legal profession. Public Citizen's lawyers have been active in legal education and in bar organizations on both national and local levels and are familiar with (though they do not necessarily share) the concerns and interests of the organized bar. Public Citizen has opposed "legal ethics" rules that impose unwarranted limitations on lawyers' ability to serve their clients (for example, limits on truthful lawyer advertising and other communications with prospective clients and restrictive geographic limits on practice by lawyers). At the same time, however, Public Citizen has urged that rules of professional conduct that genuinely protect the public — for example, against conflicts of interest and self-dealing by lawyers — be vigorously enforced.

We believe that this perspective, which combines that of a "watchdog" consumer and public advocacy group with a sensitivity to, and familiarity with, issues of legal ethics and professional responsibility and, more broadly, the regulation of the legal profession, may be helpful to the Commission as it considers how to proceed with the implementation of the standards of professional conduct for lawyers mandated by the Sarbanes-Oxley Act.

THE STATUTE AUTHORIZES THE "NOISY WITHDRAWAL" PROVISIONS

Other commenters suggest that there is something suspect about the Commission's proposed subsection 205.3(d) because it goes beyond the Sarbanes-Oxley Act's requirement that the Commission's standards of professional conduct include a rule requiring attorneys to report misconduct within a corporation to responsible corporate officers and, if necessary, to the board of directors. The suggestion that the Commission lacks the authority under the statute to require the additional step of noisy withdrawal in appropriate circumstances flies in the face of the statute's unambiguous language.

Section 307 of the Sarbanes-Oxley Act, codified at 15 U.S.C. § 7245, provides that "the Commission shall issue rules" — plural — that "se[t] forth minimum standards" —again plural — "of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, *including* a rule" requiring internal reporting (emphasis added).

The idea that this statute *limits* the Commission to providing for internal reporting cannot be squared with its words. Section 307 plainly requires the Commission to establish a system of rules of professional conduct that are "in the public interest and for the protection of investors." The Commission's discretion is restricted in one respect: The rules *must* include a provision for internal reporting of evidence of wrongdoing to designated corporate officers (§ 307(1)) and, if the officers fail to take appropriate remedial action, to the board of directors or a committee of independent directors (§ 307(2)). But nothing in the text of Section 307 says that *only* an internal reporting rule may be issued. On its face, the requirement that internal reporting be *included* sets a floor for the Commission's standards, not a ceiling.

If Congress had simply required the Commission to issue *a rule* providing for the internal reports referred to in subsections (1) and (2) of § 307, there would be something to the argument that the Commission lacked authority to go further. But that is not what this statute says. Rather, it confers broad and general authority to issue "rules" setting forth "minimum standards of professional conduct"; and it provides that *one of these rules* must require internal reporting. Reading the statute to limit the Commission to issuing an internal reporting rule would turn the statutory language on its head. Indeed, if anything would violate the statute, it would be to *stop at* issuing an internal reporting rule, because doing no more than issuing such a rule would not comport with the statutory mandate for issuance of minimum *standards* that include, as one standard, an internal reporting rule.

Given the unambiguous language of the statute, the Commission would commit legal error if it were to attempt to engraft a limit onto its statutory authority by looking at isolated floor statements made by members of the House or Senate during the debates on the Sarbanes-Oxley Act. The legislative history cited by opponents of the "noisy withdrawal" proposal, at most, supports only the conclusion that the statute does not expressly *require* a rule involving disclosure outside the corporation, not that it does not *permit* such a rule. And in any event, where, as here, statutory language is clear, resort to legislative history to alter its meaning is impermissible. *Department of Housing & Urban Development v. Rucker*, 535 U.S. 125, 132-33 (2002). In particular, "floor statements … cannot amend the clear and unambiguous language of a statute"; statements reflecting only the views of particular members cannot override "the collective votes of both Houses, which are memorialized in the unambiguous statutory text." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002).

THE "NOISY WITHDRAWAL" PROVISION WILL NOT IMPROPERLY INFRINGE ON STATE AUTHORITY TO REGULATE THE LEGAL PROFESSION

Critics of the Commission's proposed rule have also suggested that it would undermine traditional state authority to regulate the legal profession and thus be damaging to principles of federalism. But there is nothing sacred about state authority over the legal profession. Indeed, the states have no inherent power to regulate the conduct of attorneys *before federal tribunals*, and state regulation of the legal profession has always been subject to the principle that the conduct of lawyers practicing before federal courts and agencies is also subject to regulation by those bodies. As the Supreme Court has put it, "The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included." *Theard v. United States*, 354 U.S. 278, 281 (1957).

Of course, federal tribunals have, historically, often chosen to exercise their independent authority over members of their bars lightly. For example, federal courts have often chosen to adopt by reference state-promulgated rules of professional conduct and to allow disciplinary authority to be exercised, at least in the first instance, primarily by state bar officials. Moreover, where state bar rules do not stand in conflict with the objectives of federal authority, states may discipline members of their bars for conduct committed before federal courts or tribunals. *See*, *e.g.*, *Kroll v. Finnerty*, 242 F.3d 1359 (Fed. Cir. 2001) (holding that a state may discipline a patent attorney for conduct committed in the representation of clients before the Patent and Trademark Office ("PTO")). In other words, there is at least a substantial measure of concurrent authority between state and federal tribunals over the conduct of lawyers who are members of both state and federal bars.

Nonetheless, where a federal court or agency has exercised the power to regulate the conduct of those who practice before it, inconsistent state bar regulations must give way to the preemptive force of federal law, notwithstanding the tradition of state regulation of the bar. The Supreme Court so held in *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963). *Sperry* involved an effort by the Florida bar to enforce its rules barring unauthorized practice of law against a non-lawyer who was admitted to practice before the PTO but was not admitted to the Florida bar (even though his office was located in Tampa). The Court held that, under the Supremacy Clause, the state's authority over the legal profession did not allow it to prohibit a prac-

tice that was permitted by the rules of the PTO. As the Court put it, "A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress." *Id.* at 385 (footnotes omitted). The Court held that, as long as Congress' creation of the PTO and its bar were within the scope of its Article I powers, federalism concerns were no obstacle to federal regulation of the bar, and conflicting state bar regulations were necessarily preempted even though they involved a "matter otherwise within the control of the State." *Id.* at 403.

The same principles apply here. Congress has now required that the Commission promulgate standards of professional conduct for attorneys appearing before it. Congress has undoubted Article I authority to regulate the securities markets and to create a federal regulatory agency to supervise those markets. To endow that agency with authority to supervise lawyers who practice before it is plainly "necessary and proper" to carry out the agency's purposes. U.S. Const., Art. I, § 8, cl. 18. Under familiar principles of federal preemption, rules adopted by the Commission in the exercise of the power delegated to it by Congress preempt all state laws to the extent that they actually conflict with the Commission's regulations. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-86 (2000). Thus, should the Commission conclude that a rule requiring "noisy withdrawal" by lawyers practicing before it is, in the words of § 307, "in the public interest and [appropriate] for the protection of investors," there is nothing novel about the proposition that bar rules promulgated by the state courts, which might otherwise prohibit such withdrawal, must give way. As *Sperry* teaches, federal authority "is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature." 373 U.S. at 403.

Moreover, the concept that the needs of a specialized federal agency may require uniform rules for attorneys practicing before it is by no means unprecedented. The PTO has long subjected its bar to detailed rules that have significant points of difference from generally applicable state bar rules. Most notably, the PTO's rules, which are set forth at 37 C.F.R. Part 10 and occupy 30 full pages of the Code of Federal Regulations, subject patent practitioners to a rigorous duty of candor to the PTO — a duty that, among other things, specifically requires them to reveal to the PTO any fraud their clients have committed upon the agency, regardless of whether that

information would be considered a confidence or secret under state bar rules that might otherwise apply. 37 C.F.R. § 10.85(b); *see also id.* §§ 10.85(a), 10.23(a)(4) & (c)(2), and 10.57(c)(2). An attorney's failure to make such a disclosure is grounds for imposition of severe professional sanctions by the PTO. *See, e.g., Lipman v. Dickinson*, 174 F.3d 1363 (Fed. Cir. 1999). Indeed, the potential sanctions for violation of the PTO's rules, including its disclosure rules, include exclusion from practice before the PTO, the most severe professional sanction available against a patent attorney. 37 C.F.R. § 10.130(a).

The duty of candor in patent prosecutions, and the rules of attorney conduct that the PTO has developed to enforce it, are derived from the need to ensure that the PTO, in the ex parte proceedings leading to the issuance of a patent, is not wrongly induced to grant a valuable monopoly on the basis of false, misleading, or incomplete information. As the Supreme Court has explained:

> Public interest demands that all facts relevant … be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent patent monopolies. Only in that way can the Patent Office and the public escape from being classed among the "mute and helpless victims of deception and fraud."

Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 818 (1945).

Similar considerations apply in the context of federal securities regulation, where the Commission and the public necessarily rely on information submitted by public corporations. The proper functioning of the securities markets, and the protection of individual investors, depends in large measure on the accuracy of that information. Congress has now made the judgment that it is up to this Commission, and not to the states, to enhance the protection of the public by promulgating "minimum standards of professional conduct for attorneys appearing and practicing before the Commission." The Commission's exercise of that authority is no more troubling from the standpoint of the state's traditional authority over the legal profession than the PTO's longstanding regulation of its own bar.

THE "NOISY WITHDRAWAL" PROPOSAL IS CONSISTENT WITH THE EVOLVING ETHICAL PRECEPTS OF THE LEGAL PROFESSION

Opponents of the Commission's "noisy withdrawal" proposal assert that it will overturn established principles of client confidentiality and fundamentally alter the attorney-client relationship. The critics' "Chicken Little" view notwithstanding, the Commission's proposal is actually

quite modest and, allowing for variations in rules from state to state, fully consistent with the generally prevailing rules concerning client confidences and secrets. The Commission's proposal does *not* require attorneys to take actions that are generally *prohibited* by state ethics rules; rather, the principal difference between the Commission's proposed rule and generally prevailing state rules is that the Commission's rule would *require* attorneys to take a step that most state rules merely *permit*. That is likely to make a substantial difference in the actual conduct of attorneys, but it will not result in the revelation of information that clients currently can legitimately expect that their attorneys will keep confidential.

The essence of the Commission's proposed rule is that it *requires* an attorney who learns that a client is engaged in ongoing fraud or illegality (that has not been remedied as a result of the attorney's internal reporting) to withdraw from the representation and to disaffirm any document the attorney had a role in preparing that he or she now reasonably believes is false or misleading; and it *permits* but does not require such withdrawal and disaffirmance when an attorney learns that his or her services were used in a violation that is not ongoing.

As to withdrawal itself, there is nothing at all extraordinary about these requirements. Indeed, the ABA's Model Rules of Professional Conduct 1.2(d), 1.16(a)(1), and 4.1 provide that an attorney may not assist a client in violating the law and *must* withdraw from a representation if the representation will assist in an ongoing violation. Similarly, ABA Model Rule 1.16(b)(3) provides that an attorney *may* withdraw when "the client has used the lawyer's services to perpetrate a crime or fraud." State rules of professional conduct are generally, if not universally, in accord with the Model Rules on this point. *See, e.g.,* D.C. Rules of Professional Conduct 1.2(e) & Comment [7] thereto, 1.16(a)(1), and 1.16(b)(1)-(2); New York Code of Professional Responsibility, Disciplinary Rule 2-110(C)(1)(b)-(c).

The point of controversy is the additional requirement that the attorney provide notice of withdrawal based on "professional considerations" and disaffirm any false or misleading documents. This is the feature that, according to critics, threatens to subvert established principles of attorney-client confidentiality and to disrupt the cooperative relationship between corporate clients and attorneys. Such dire predictions, however, are hard to square with the reality that existing state rules offer clients little or no assurance that their attorneys will not make whatever limited disclosure of confidences "disaffirmance" may entail. Indeed, prevailing rules of profes-

sional conduct either permit, encourage, or even require such disclosures when an attorney withdraws because of a client's unlawful or fraudulent conduct.

The ABA Model Rules clearly permit if not require disaffirmance in such circumstances. Comment [3] to Model Rule 4.1, for example, states:

> Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) [of Model Rule 4.1] states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. *Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like*.

(Emphasis added.) Similarly Comment [6] to ABA Model Rule 1.6 — the ABA's basic rule on the attorney's obligation to preserve client confidentiality — expressly recognizes that "noisy withdrawal" is permissible and, perhaps, even required in some circumstances:

> If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted by Rule 1.6. *Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like*.

(Emphasis added.)

In its Formal Opinion 92-366, the ABA's Committee on Ethics and Professional Responsibility explained that, in its view, the comments stating that noisy withdrawal is permissible "correctly reflec[t] the need to interpret Rule 1.6's requirement of confidentiality in light of what Rules 1.2(d) and 1.16(a)(1) require of a lawyer in a situation where continued representation of the client will entail the lawyer's assisting in the client's continuing or future fraud and withdrawal is therefore mandatory." The Committee explained its reasoning as follows:

> Under the mandate of Rule 1.16(a)(1) that a lawyer shall withdraw if the "representation will result in a violation," the term "representation" must be read to include a lawyer's permitting the client's continued use of the lawyer's pre-existing work product. Similarly, under the injunction in Rule 1.2(d) that a lawyer shall not "assist a client in conduct the lawyer knows is criminal or fraudulent," the term "assist" must be reasonably construed to cover a failure to repudiate or otherwise disassociate herself from prior work product the lawyer knows or has reason to believe is furthering the client's continuing or future criminal or fraudulent conduct. It would follow from such a construction of these key terms in Rules 1.16(a)(1) and 1.2(d) that a lawyer's disavowal of work product would be an essential accompaniment to the lawyer's withdrawal from representation. *Indeed, it would also*

> *follow that such a disaffirmance might be necessary in order to make the withdrawal effective; that is, the lawyer may be required to do more than simply decline to perform further services in order to fully effectuate a "withdrawal" from representation under Rule 1.16(a)(1) and to avoid "assistance" under Rule 1.2(d).* In this view, where the client avowedly intends to continue to use the lawyer's work product, this amounts to a de facto continuation of the representation even if the lawyer has ceased to perform any additional work. The representation is not completed, any more than the fraud itself is completed. In order to fully effectuate the withdrawal mandated by Rule 1.16(a)(1), and to avoid assisting client fraud as mandated by Rule 1.2(d), *the lawyer may have to repudiate her preexisting work product in addition to refusing to perform any further work for the client*.

Id. (emphasis added; footnote omitted). Thus, the ABA in Formal Opinion 92-366 took the position not only that disaffirmance was *permitted* in circumstances similar to those addressed by the Commission's proposed rule, but also that it could be *required* by the Model Rules' prohibition on assisting a client's crime or fraud.

The rules actually adopted by the states are generally in accord with the view stated in the comments to the ABA Model Rules and in Formal Opinion 92-366. Even the District of Columbia's Rules of Professional Conduct, which generally take a more stringent position on client confidentiality than the Model Rules and other state ethics rules, state that a lawyer must withdraw if a client persists in a course of conduct that the lawyer reasonably believes is criminal or fraudulent, and that the lawyer in such a situation may give notice of withdrawal to an interested tribunal and may also "retract or disaffirm any opinion, document, affirmation, or the like that contains a material misrepresentation by the lawyer that the lawyer reasonably believes will be relied upon by others to their detriment." D.C. Rule of Professional Conduct 1.6, Comment [19]. To cite only a few other examples, the versions of the Rules of Professional Conduct adopted by Delaware, Illinois, and Maryland all state in the comments to Rule 1.6 that nothing in the rules "prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like."

New York, which likely has the largest concentration of securities practitioners of any state, has not adopted the Model Rules, but it has incorporated the concept of disaffirmance or "noisy withdrawal" in its Code of Professional Responsibility. Specifically, New York's Disciplinary Rule 4-101(C)(5) provides that "[a] lawyer may reveal … [c]onfidences or secrets [of a client] to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information

or is being used to further a crime or fraud." Although New York's rule is not mandatory, it clearly *permits* precisely the sort of limited disclosure contemplated by the Commission's proposed rule.

While the ABA Model Rules and those state ethics rules that adopt them generally permit (and may require) disaffirmance in the same circumstances as the Commission's proposal, a few states go further and permit or mandate even more extensive disclosures in such circumstances. Virginia, for example, provides that a lawyer may go beyond mere disaffirmance and "may reveal" otherwise privileged information "which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation." Va. Rule of Professional Conduct 1.6(b)(3). Virginia's rules also *require* disclosure of information establishing that a client has committed a fraud upon a tribunal (such as the Commission) if the client acknowledges the fraud to the lawyer. *Id.* 1.6(c)(2). Similarly, Texas' Rules 1.6(c)(7) & (8) provide that a lawyer may disclose otherwise confidential client information "[w]hen the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act" and/or "[t]o the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used." The Texas rules do not limit the disclosure to disaffirmance, as would the Commission's proposal.

In short, existing state ethics rules and ABA standards give clients no legitimate expectation that a lawyer will not disaffirm false or misleading documents when his or her withdrawal is necessitated by the discovery that his or her services have been used by the client to perpetrate a fraud or crime. There is no reason to believe that clients' potential exposure to whatever limited disclosure is inherent in "disaffirmance" has damaged attorney-client relationships nationwide. Nor is there any indication that attorneys and clients in Texas and Virginia, which permit even more extensive disclosures of client wrongdoing, have been irreparably harmed.

Thus, the Commission's proposed rules will not revolutionize attorney-client confidentiality by denying protection to information that clients currently can reasonably consider to be absolutely protected. The principal effect of the proposal is to make mandatory what is currently merely permitted. That will doubtless make disclosures more likely. For example, the fact that Texas rules would have *permitted* extensive disclosures of Enron's fraudulent activities by attorneys who had reason to know of them apparently did not result in such disclosures actually being

made, whereas a rule *mandating* disclosure might have had a different effect. But simply increasing the *likelihood* of desirable disclosures that existing state bar rules permit and encourage (and even arguably require, if the ABA's Formal Opinion 92-366 is taken seriously) is not the sort of disastrous sea-change that the proposal's critics suggest it is.

Doubtless, the Commission's proposed rule will present practitioners with some difficult decisions, such as determining whether a client's fraud is "ongoing" or has continuing effects. But existing state ethics rules generally pose equally difficult issues for practitioners, since under the ABA Model Rules and most state bar rules, whether withdrawal is mandatory or permissive in the face of unlawful or fraudulent client conduct depends on whether the conduct is ongoing or completed. *Compare* ABA Model Rules 1.2(d) and 1.16(a)(1) (together *requiring* withdrawal where the lawyer's services will assist a client in committing a crime or fraud), *with* ABA Model Rule 1.16(b)(3) (*permitting* withdrawal where a client *used* the lawyer's services to commit a completed crime or fraud). In short, the distinctions the Commission's proposal requires lawyers to make between completed and ongoing client misconduct are, or should be, distinctions that lawyers are already familiar with and that already shape the contours of lawyer-client relationships.

THE COMMISSION'S PROPOSED "NOISY WITHDRAWAL" RULE IS APPROPRIATE AND SHOULD BE ADOPTED WITH SOME MODIFICATIONS

Given the lack of merit of these criticisms of the Commission's proposal, the question is whether the "noisy withdrawal" rule meets the statutory criteria of being "in the public interest and for the protection of investors." Public Citizen believes that the answer is plainly yes.

First, the issue of what standards should govern attorneys who learn of unlawful, fraudulent conduct by issuers and cannot obtain appropriate remedial action through internal corporate reporting is one that should have a national answer, and should not depend on variations in the bar rules of states where particular attorneys happen to be licensed. The securities markets are national in scope, and investors have an entitlement to expect uniform protections to be established by the Commission. Moreover, the Commission, and not state bar authorities, is in a position to establish credible enforcement mechanisms concerning securities lawyers, both because of the Commission's greater familiarity with the substantive principles of securities law that will be implicated in any attempt to discipline an attorney in connection with fraudulent conduct by an

issuer client, and because of the general propensity of bar authorities not to bring ethics charges against attorneys in large law firms with sophisticated practices.

Second, a rule mandating disaffirmance in these circumstances is appropriate. By generally *permitting* and even encouraging disaffirmance in like circumstances, prevailing norms of legal ethics establish that disaffirmance does not violate any *legitimate* client expectations of confidentiality. At the same time, however, it is evident from the experience of the past two years that merely permitting attorneys to disaffirm fraudulent documents does not bring about the needed results. Left to their own devices, lawyers are unlikely to put themselves at cross purposes with clients even when they are permitted to do so. Only if they are required to disaffirm, and will face exposure to serious economic sanctions if they do not, are lawyers likely to take such a step.

Third, the disaffirmance rule is an appropriate adjunct to the rule requiring internal reporting. By putting corporations on notice that, if they do not take appropriate measures in response to an attorney's up-the-ladder internal report, the lawyer may be required to take additional measures, it is more likely that internal reporting will be effective (and thus less likely that disaffirmance will actually be necessary). Moreover, while many or most public corporations may have responsible managements and truly independent boards, the ones most likely to engage in misconduct are the ones whose senior officers are themselves implicated and whose boards are either passive, coopted, or unduly influenced by management. Thus, internal reporting by itself is likely to be least effective in those instances where it is needed most. And, in any event, even if it were to turn out that internal reporting were 100% effective, the consequence would most likely be that disaffirmance would not occur. The availability of "noisy withdrawal" as a fail-safe mechanism might turn out to be unnecessary, but it would not be harmful.

Fourth, the prospect that the "noisy withdrawal" rule will chill attorney-client communications and cause corporations to withhold needed information from attorneys seems remote. To begin with, disaffirmance is generally permitted even under existing rules, and so corporate officers worried that their malfeasances may be exposed by conscientious lawyers already have the same incentive to conceal them. In other words, the very worst offenders are likely to attempt to conceal wrongdoing from reputable attorneys already. The primary impetus for retaining reputable lawyers and providing them the information they need to do their work in this context is not the belief of clients that lawyers can be relied upon to conceal wrongdoing, but that the complexity of corporate and securities law makes lawyers an indispensable part of the process of is-

suing securities and making filings with the Commission. Moreover, issuers know that their lawyers will not be able to do their job if they are not given the needed information. The Commission's "noisy withdrawal" rule will not change that.

Finally, the Commission's alternative proposal, which would shift to the issuer the duty to make some of the disclosures that the "noisy withdrawal" proposal would require of attorneys, strikes us as a less satisfactory alternative. If the "noisy withdrawal" proposal were, as its critics suggest, a genuinely harmful distortion of the attorney-client relationship, simply shifting the disclosure obligation to the client would do little to solve the problem except in a very formal sense (*i.e.*, the lawyer would not be disclosing anything under the alternative proposal). Moreover, the alternative proposal is more complex in operation, requiring two steps to accomplish less than what the "noisy withdrawal" rule would accomplish in one. And it relies to a significant degree on disclosure by a client that has already demonstrated its unwillingness to take appropriate remedial measures. The alternative proposal is also flawed in that it contains no analogue to the "disaffirmance" requirement, which is essential to rectifying the ongoing effects of an attorney's involvement in preparing materials that further a crime or fraud. In addition, alternative subsection 205.3(d)(2), which provides that an attorney need not withdraw if any court rule would prevent withdrawal, unnecessarily would allow any state bar standards to preempt the requirement of withdrawal. For all these reasons, the original "noisy withdrawal" proposal is greatly preferable.

CERTAIN MINOR MODIFICATIONS WOULD IMPROVE THE COMMISSION'S PROPOSED "NOISY WITHDRAWAL" RULE

In general, we support the Commission's "noisy withdrawal" proposal as framed, including the proposal's definitions of the criteria triggering the duty to withdraw and disaffirm. We do have some modest suggestions with respect to the proposal. First, as to in-house attorneys, the rule should require, as an analogue to withdrawal by outside counsel, that the in-house attorney cease working on the matter as to which he or she has given notice to the Commission and "disaffirmed." This is necessary both to avoid the inherent ethical problem of the attorney's continuing to further a fraud or crime, and to obviate the conflict of interest that would result from the attorney's attempting to keep working on a matter where he or she has taken steps that are directly contrary to the objectives of the client.

Second, as to proposed subsection 205.3(d)(3), which states that the attorney's withdrawal and disaffirmance "does not breach the attorney-client privilege," we suggest a change in wording. The "attorney-client privilege" is, strictly speaking, a rule of evidence, and one that the Commission is not necessarily in a position to control. We believe what the Commission intends by its statement is that the required actions "shall not be deemed a breach of the attorney's duty of confidentiality to his or her client under any state or federal law, rule, or common-law principle." We would propose that that phrase or some substantial equivalent be substituted.

Third, we suggest that subsections 205.3(d)(1) and (2) should be revised to make clear that the requirement or permission to "disaffirm" applies to attorneys who have been discharged by the client as well as those who themselves withdraw from an ongoing representation under subsections 205.3(d)(1)(i)(A) or (d)(2)(i)(A). As currently written, the rule might suggest that disaffirmance is only required or permitted in connection with withdrawal by the attorney, and, therefore, that if the client discharges the attorney before he or she can withdraw, the client can prevent a "noisy withdrawal" and the accompanying disaffirmance. The potential for abuse and circumvention of the rule if it were so construed is obvious. Thus, we suggest that a sentence be added to subsections 205.3(d)(1)(i)(C) and 205.3(d)(2)(i)(C) stating that the requirement or permission to disaffirm applies fully to attorneys discharged from a representation by an issuer before they could withdraw. Similarly, and for the same reason, subsections 205.3(d)(1)(ii)(B) and 205.3(d)(2)(ii)(B) should also be amended with the addition of a sentence stating that the requirement or permission to disaffirm applies to attorneys who have been discharged from employment by an issuer.

Finally, we believe that the regulation should include a safe harbor provision protecting attorneys who withdraw and disaffirm under the rule from liability for those actions under any state or federal law (including common law) if the actions were taken on the basis of a good-faith belief that they were required by the Commission's rules. Attorneys are likely to be reluctant enough to take the actions called for by the proposed rule as it is, and the threat of lawsuits by clients if they do is likely to prevent the rule from having its intended effect.

CONCLUSION

We have submitted these comments not only because we believe that the Commission's proposed "noisy withdrawal" rule is an appropriate means of implementing the Sarbanes-Oxley Act

and will provide useful protections for investors, but also because many of the criticisms of the proposal present an exaggerated and highly misleading picture to the Commission both of the existing state of the law governing the legal profession and of the likely effect of the Commission's rule. Such criticisms are, perhaps, to be expected when a proposed rule threatens the economic interests of a powerful profession (and the clients on whom its members depend). A proper understanding of relevant legal principles reveals that adoption of the Commission's proposed rule will not, in fact, result in the sky falling on securities lawyers and their clients but may help keep it from falling on investors, as more often occurs. We therefore urge the Commission to proceed with the adoption of its proposed rule.

Respectfully submitted,

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Alan B. Morrison

Attorneys for Public Citizen, Inc.