

**New Standards of Lawyer Responsibility in Commercial Transactions**

**Selected Sarbanes-Oxley Rules and Ethics Rules**

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## **Sarbanes-Oxley Rule 205 – Implementation of Standards of Professional Conduct for Attorneys**

### **Issuer**

- An SEC reporting Company under the Securities Exchange Act of 1934 or Company files or has filed a registration statement that has not yet become effective under Securities Act of 1933 and that has not been withdrawn
- Issuer includes person controlled by issuer, where attorney provides services to such person on behalf of, at behest of or for benefit of issuer

### **Issuer is Client (See also Ethics Rule 1.13: Organization as Client)**

- Issuer as organization is client to which attorney owes professional and ethical duties
- Duty is not to officers, directors or employees

### **Triggering Event: Duty to report evidence of a material violation**

- Attorney
- Appearing and practicing before SEC
- In representation of issuer
- Becomes aware of a material violation

### **Attorney**

- Includes domestic and foreign attorneys
- Includes anyone who holds self out as admitted, licensed or qualified to practice law
- Foreign attorneys may limit conduct or practice with U.S. attorney and not be deemed to be appearing and practicing before the SEC

### **Appearing and practicing before the SEC**

- Transacting any business with SEC
- Representing issuer in any SEC administrative proceeding or in connection with investigation, inquiry, information request or subpoena

- Providing advice “in respect of U.S. securities laws” regarding any document attorney has notice will be filed with or incorporated in document filed with SEC, including providing such advice in preparing document
- Advising issuer whether information, opinion or other writing is required under U.S. securities laws to be filed or incorporated in any document filed with SEC

**Appearing and practicing does not include:**

- Conducting activities described above other than in context of providing legal services to issuer with whom attorney has attorney-client relationship
- Non-appearing foreign attorney

**Representation of Issuer**

- Providing legal services as attorney for an issuer (whether attorney-client relationship exists for purposes of rule will be a federal question)
- Does not require employment or retention by issuer

**Evidence of Material Violation**

- Credible Evidence (more than gossip or hearsay, but less than more likely than not)
- 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

**Material Violation**

- Of an applicable U.S. federal or state securities law
- Material breach of fiduciary duty arising under U.S. federal or state law
- Similar material violation of any U.S. federal or state law (ERISA, tax, OSHA, environmental, antitrust? What is included?)

**Breach of Fiduciary Duty**

- Any fiduciary or similar duty to issuer
- Recognized under applicable federal or state statute or common law

- Includes:
  - Mifeasance
  - Nonfeasance
  - Abdication of duty
  - Abuse of trust
  - Approval of unlawful transactions

### **Duty to Report**

- If triggering event by issuer, officer, director, employee or agent
- Report to chief legal officer or both chief legal officer and chief executive officer
- Report includes in person, by telephone, by email, electronically or in writing

### **Duty of Chief Legal Officer (CLO)**

- Cause inquiry into evidence of material violation
- CLO must reasonably believe inquiry is appropriate to determine whether reported material violation has occurred, is ongoing or is about to occur
- Alternative – CLO report to Qualified Legal Compliance Committee (QLCC) if established

### **CLO Duties – Determines No Evidence of Material Violation**

- Notify reporting attorney
- Advise of basis for determination

### **CLO Duties – Evidence of Material Violation**

- Take all reasonable steps to cause issuer to adopt appropriate response
- Advise reporting attorney

### **Reporting Up**

- If reporting attorney does not reasonably believe CLO or CEO provided an appropriate response in a reasonable time
- Reporting attorney must report up to
  - Audit committee if one, or
  - Another committee of board that is independent if one, or
  - Full board

### **Appropriate Response – Reporting Attorney Reasonably Believes**

- No material violation occurred, is ongoing or about to occur (much higher standard than “credible” evidence required to trigger report); or
- Issuer has adopted appropriate remedial measures, including sanctions to stop ongoing material violations, to prevent a material violation or remedy one that has occurred and minimize likelihood of recurrence

### **Appropriate Response – Alternative**

- Issuer with consent of board, committee to whom report could be made or QLCC
- Retains or directs an attorney to review reported evidence, and either
  - Implements remedial recommendations after reasonable investigation and evaluation (reasonable investigation not defined, but must be of sufficient scope and not so full of assumptions and limitations to negate usefulness), or
  - Advised that attorney, consistent with professional obligations, may assert a colorable defense on behalf of issuer
- Reviewing attorney will be appearing and practicing before SEC but limitations on obligation to report

### **Reporting Attorney – Reasonable Response Within Reasonable Time**

- Reporting attorney who receives what he or she reasonably believes is appropriate and timely response need do nothing more

### **Reporting Attorney – No Reasonable Response Within Reasonable Time**

- Explain reasons why reporting attorney does not believe response reasonable to CLO, CEO and directors to whom reported

### **Supervisory Attorney**

- An attorney supervising or directing another attorney who is appearing and practicing before the SEC
- Must make reasonable efforts to ensure subordinate attorney conforms to rule
- If subordinate attorney reports evidence of material violation, supervisory attorney is responsible for complying with reporting requirements

### **Subordinate Attorney (See also Ethics Rule 5.2: Responsibilities of a Subordinate Lawyer)**

- Under supervision or direction of another attorney (other than direct supervision of CLO)
- Must comply with rule

- Complies by reporting to supervisory attorney
- May take steps in rule if reasonably believes supervisory attorney fails to comply

## **QLCC**

- Committee of issuer (which may be audit committee)
- Consists of at least one member of audit committee, and
- Consists of two or more members of board who are independent
- Adopts written procedures for confidential receipt, retention and consideration of reports of material violations

## **Authority of QLCC**

- Established by board with authority and responsibility
  - To inform CLO and CEO of reports
  - To determine whether an investigation is necessary

## **Authority of QLCC if Investigation Necessary**

- Notify audit committee or full board
- Initiate investigation
- Retain experts
- At conclusion of investigation
  - Recommend by majority vote that issuer implement appropriate response
  - Inform CLO, CEO and full board of results and appropriate remedial measures to be adopted

## **QLCC Authority to Report to SEC**

- Has authority and responsibility to take appropriate action including notifying the SEC if issuer fails to implement recommended appropriate response

## **Report to QLCC**

- Reporting attorney who reports to QLCC has satisfied obligation to report and does not need to assess issuer's response
- CLO may refer report to QLCC instead of causing inquiry and inform reporting attorney
- QLCC then responsible for responding to evidence of material violation

### **Sanctions and discipline**

- Violation subjects to civil penalties and remedies for violation of securities laws
- Subject to disciplinary authority of SEC, may result in censure or being denied privilege of appearing and practicing before the SEC

### **No Private Right of Action**

- No private right of action created based on compliance or noncompliance
- Authority to enforce vested exclusively in SEC

### **Reporting to SEC (See also Ethics Rule 1.6: Confidentiality of Information)**

- May reveal confidential information without issuer consent to extent reasonably believe necessary
  - To prevent issuer from committing material violation likely to cause substantial injury to financial interest or property of issuer or investors
  - To prevent issuer from committing perjury or perpetrating fraud on SEC
  - To rectify consequences of material violation that has caused or likely to cause substantial injury to financial interest or property of issuer or investors where attorney's services used

**Text of Rule 205**

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

205.1 Purpose and scope.

205.2 Definitions.

205.3 Issuer as client.

205.4 Responsibilities of supervisory attorneys.

205.5 Responsibilities of a subordinate attorney.

205.6 Sanctions and discipline.

205.7 No private right of action.

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

**§ 205.1 Purpose and scope.**

This part 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 this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

**§ 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.

(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

(3) That the issuer, with the consent of the issuer's board of directors, a committee thereof to whom a report could be made pursuant to § 205.3(b)(3), or a qualified legal compliance committee, has retained or directed an attorney to review the reported evidence of a material violation and either:

(i) Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence;  
or

(ii) Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation.

(c) Attorney means any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.

(d) Breach of fiduciary duty refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable federal or state statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.

(e) Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

(f) Foreign government issuer means a foreign issuer as defined in 17 CFR 230.405 eligible to register securities on Schedule B of the Securities Act of 1933 (15 U.S.C. 77a et seq., Schedule B).

(g) In the representation of an issuer means providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer.

(h) Issuer means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) of that Act (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term "issuer" includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

(i) Material violation means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.

(j) Non-appearing foreign attorney means an attorney:

(1) Who is admitted to practice law in a jurisdiction outside the United States;

(2) Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and

(3) Who:

(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

(k) Qualified legal compliance committee means a committee of an issuer (which also may be an audit or other committee of the issuer) that:

(1) Consists of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more members of the issuer's board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19));

(2) Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under § 205.3;

(3) Has been duly established by the issuer's board of directors, with the authority and responsibility:

(i) To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in § 205.3(b)(4));

(ii) To determine whether an investigation is necessary regarding any report of evidence of a material violation by the issuer, its officers, directors, employees or agents and, if it determines an investigation is necessary or appropriate, to:

(A) Notify the audit committee or the full board of directors;

(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and

(C) Retain such additional expert personnel as the committee deems necessary; and

(iii) At the conclusion of any such investigation, to:

(A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and

(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and

(4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.

(l) Reasonable or reasonably denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.

(m) Reasonably believes means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

(n) Report means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

### **§ 205.3 Issuer as client.**

(a) Representing an issuer. An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

(b) Duty to report evidence of a material violation.

(1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

(2) The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing,

or is about to occur. If the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.

(3) Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

(i) The audit committee of the issuer's board of directors;

(ii) Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)) (if the issuer's board of directors has no audit committee); or

(iii) The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19))).

(4) If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such evidence as provided under paragraph (b)(3) of this section.

(5) An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(3), or (b)(4) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve an officer or director of the issuer to whom such evidence has been reported under paragraph (b)(1), (b)(3), or (b)(4) of this section from a duty to respond to the reporting attorney.

(6) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:

(i) The attorney was retained or directed by the issuer's chief legal officer (or the equivalent thereof) to investigate such evidence of a material violation and:

(A) The attorney reports the results of such investigation to the chief legal officer (or the equivalent thereof); and

(B) Except where the attorney and the chief legal officer (or the equivalent thereof) each reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the chief legal officer (or the equivalent thereof) reports the results of the investigation to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee; or

(ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee.

(7) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if such attorney was retained or directed by a qualified legal compliance committee:

(i) To investigate such evidence of a material violation; or

(ii) To assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation.

(8) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section need do nothing more under this section with respect to his or her report.

(9) An attorney who does not reasonably believe that the issuer has made an appropriate response within a reasonable time to the report or reports made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section shall explain his or her reasons therefor to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section.

(10) An attorney formerly 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 may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.

(c) Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee.

(1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under § 205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c).

(d) Issuer confidences.

(1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning

perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

#### **§ 205.4 Responsibilities of supervisory attorneys.**

(a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.

(b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in § 205.5(a), that he or she supervises or directs conforms to this part. To the extent a subordinate attorney appears and practices before the Commission in the representation of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.

(c) A supervisory attorney is responsible for complying with the reporting requirements in §205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.

(d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under §205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.

#### **§ 205.5 Responsibilities of a subordinate attorney.**

(a) An attorney who appears and practices before the Commission in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney.

(b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.

(c) A subordinate attorney complies with § 205.3 if the subordinate attorney reports to his or her supervising attorney under § 205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.

(d) A subordinate attorney may take the steps permitted or required by § 205.3(b) or (c) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under § 205.3(b) has failed to comply with § 205.3.

**§ 205.6 Sanctions and discipline.**

(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder.

(b) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission, regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices. An administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.

(c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

(d) An attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law.

**§ 205.7 No private right of action.**

(a) Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions.

(b) Authority to enforce compliance with this part is vested exclusively in the Commission.

## **Text of Pennsylvania Code of Ethics Rules 1.6, 1.13, 5.2**

### **Rule 1.6. Confidentiality of Information.**

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm or substantial injury to the financial interests or property of another;

(2) to prevent or to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to effectuate the sale of a law practice consistent with Rule 1.17.

(d) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

#### **Comment:**

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

#### *Authorized Disclosure*

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

#### *Disclosure Adverse to Client*

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends or learn that the client has caused serious harm to another person. However, to the extent that a lawyer is required or permitted to disclose a client's purposes or conduct, the client may be inhibited from revealing facts that would enable the lawyer effectively to represent the client. Generally, the public interest is better served if full disclosure by clients to their lawyers is encouraged rather than inhibited. With limited exceptions, information relating to the representation must be kept confidential by a lawyer, as stated in paragraph (a).

Where the client is or has been engaged in criminal or fraudulent conduct or the integrity of the lawyer's own conduct is involved, the principle of confidentiality may have to yield, depending on the lawyer's knowledge about and relationship to the conduct in question. Several situations must be distinguished:

First, a lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). To avoid assisting a client's criminal or fraudulent conduct, the lawyer may have to reveal information relating to the representation. Rule 1.6(c)(2) permits doing so. A lawyer has duties of disclosure to a tribunal under Rule 3.3(a) that may entail disclosure of information relating to the representation. Rule 1.6(b) recognizes the paramount nature of this obligation.

Second, a lawyer may have been innocently involved in past conduct by a client that was criminal or fraudulent. In such a situation, the lawyer did not violate Rule 1.2(d). However, if the lawyer's services were made an instrument of the client's crime or fraud, the lawyer has a legitimate and overriding interest in being able to rectify the consequences of such conduct. Rule 1.6(c)(2) gives the lawyer professional discretion to reveal information relating to the representation to the extent necessary to accomplish rectification.

Third, a lawyer may learn that a client intends prospective conduct that is criminal and likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another. Rule 1.6(c)(1) permits the lawyer to reveal information relating to the representation to prevent such harms when the lawyer "reasonably believes" that a client will cause a homicide or serious bodily harm. It is very difficult for a lawyer to "know" that a client will carry out such an intent, for the client may have a change of mind. The Rule must be based on the lawyer's discretion. Exercise of that discretion requires a lawyer to consider such factors as the nature of the lawyer's relationship to the client and with anyone who might be injured by the client and the lawyer's prior involvement in the situation. Where possible, the lawyer should seek to persuade the client to take suitable action. A disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose of prevention of harm.

A lawyer's considered decision not to make disclosures permitted by Rule 1.6(c) does not violate this Rule.

#### *Withdrawal*

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 clients' confidences, except as otherwise provided in 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.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

#### *Dispute Concerning Lawyer's Conduct*

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (c)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

#### *Disclosures Otherwise Required or Authorized*

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

It is recognized that the due diligence associated with the sale of a law practice authorized under Rule 1.17 may necessitate the limited disclosure of certain otherwise confidential information. However, as stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit

disclosure to those having a need to know it, and to obtain appropriate arrangements minimizing the risk of disclosure.

*Former Client*

The duty of confidentiality continues after the client-lawyer relationship has terminated.

**Code of Professional Responsibility Comparison:**

The principle of confidentiality is enlarged in several respects and narrowed in a few respects compared with the corresponding provisions of the Code.

The general principle is enlarged in the following respects: First, the confidentiality requirement applies to all information about a client “relating to representation.” Under the Code, DR 4-101, the requirement applies only to information governed by the attorney-client privilege and to information “gained in” the professional relationship that “the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” Rule 1.6 thus imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental. Furthermore, this definition avoids the constricted definition of “confidence” that appears in some decisions.

See *Allegaert v. Perot*, 434 F.Supp. 790 (S.D.N.Y. 1977); *Moritz v. Medical Protective Co.*, 428 F. Supp. 865 (W.D. Wis. 1977); *City of Wichita v. Chapman*, 521 P.2d 589 (Kan. 1974).

Rule 1.6(a) permits a lawyer to disclose information where impliedly authorized in order to carry out the representation. Under DR 4-101(B) and (C), a lawyer cannot disclose “confidences” unless the client first expressly consents after disclosure.

Second, paragraph (c) redefines the exceptions to the requirement of confidentiality. Under the Code, DR 4-101(C)(3), a lawyer “may reveal . . . The intention of his client to commit a crime and the information necessary to prevent the crime.” This option exists regardless of the seriousness of the proposed crime. Also, under DR 7-102(B), the lawyer is required to reveal information necessary to “rectify” a “fraud upon a person or tribunal.” DR 7-102(B) applies to past frauds and presumably to future frauds if the client goes on to commit them. DR 7-102(B), provides that disclosure is not permitted “when the information is protected as a privileged communication.” Technically, this exception would only apply if the lawyer is under compulsion of law to testify, for only then would the information be “privileged.” However, ABA Formal Opinion 341 (1975) construed the term “privilege” to include “confidences” as defined in DR 4-101(A).

Under Rule 1.6(c)(1), the lawyer may reveal information about a client to prevent the client from committing a crime that is likely to result in the specified serious consequences.

With regard to Rule 1.6(c)(3), DR 4-101(C)(4) provides that a lawyer may reveal “confidences or secrets necessary to establish or collect his fee or to defend himself or his employers or associates against an accusation of wrongful conduct.”

### **Rule 1.13. Organization as Client.**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer’s efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

## **Comment:**

### *The Entity as the Client*

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. “Other constituents” as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer’s province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization’s interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization’s highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

### *Relation to Other Rules*

The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, and 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

#### *Government Agency*

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purpose of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

#### *Clarifying the Lawyer's Role*

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

#### *Dual Representation*

Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

#### *Derivative Actions*

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

### **Code of Professional Responsibility Comparison:**

There is no counterpart to this Rule in the Disciplinary Rules of the Code. EC 5-18 states that "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such a case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24 states "Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5-107(B) provides that "A lawyer shall not permit a person who . . . employs . . . him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

### **Rule 5.2. Responsibilities of a Subordinate Lawyer.**

(a) A lawyer is bound by the Rules of Professional Conduct even when the lawyer acts at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

### **Comment:**

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they

are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

**Code of Professional Responsibility Comparison:**

There is no counterpart to this Rule in the Code.

## **Other Sarbanes-Oxley Sections**

### **Section 303: Improper influence on conduct of audits (Rule 240.13b2-2)**

Unlawful, in contravention of rules adopted by SEC, for an officer or director of an issuer, or a person acting under direction of an officer or director, to take any action to coerce, manipulate, mislead or fraudulently influence the auditor of the issuer's financial statements, if know or should have known that such action, if successful, could result in rendering financial statements materially misleading.

### **Section 802: Criminal Penalties for Altering Documents (not limited to public companies)**

- Section 802 of the Act added a broad new section to the Criminal Code, at 18 U.S.C. § 1519, addressing the destruction, concealment and falsification of documents. This new section makes it a crime, punishable by fine and/or imprisonment for up to 20 years, for anyone
  - knowingly
  - to alter, destroy, mutilate, conceal, cover up, falsify or make a false entry in any records, document or tangible object
  - with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any U.S. department or agency or bankruptcy case; or
  - in relation to or contemplation of any such matter or case.

### **Section 806: Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud**

Section 806 of the Act prohibits an employer from engaging in retaliation or discrimination against employees who report suspected accounting or financial fraud, and establishes a new system by which aggrieved employees can bring an action for damages against their employer before the Department of Labor or in federal District Court.

Section 806 of the Act establishes a system for whistleblower protection for employees of publicly traded companies. That provision provides that no public company or any officer, employee, contractor or agent of such company “may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee” (1) to provide information or otherwise assist in an investigation conducted by a federal regulatory or law enforcement agency, Congress, or company personnel regarding any conduct which the employee “reasonably believes” constitutes a violation of SEC rules and regulations or fraud statutes; or (2) to file, testify, participate in, or otherwise assist in a proceeding – pending or about to be filed – relating to an alleged violation.

Virtually any personnel action taken against any employee, including a demotion or suspension, can potentially be actionable under this provision. Moreover, if the experience under other whistleblower statutes is applied in the Sarbanes-Oxley context, the SEC and DOL

will broadly construe what actions of an employee are protected. The Act does seek to avoid frivolous complaints by at least requiring that the employee have a “reasonable” belief that the practice constitutes a violation.

**Section 1102: Tampering with a Record or Otherwise Impeding an Official Proceeding (not limited to public companies)**

- Section 1102 of the Act added a new section 18 U.S.C. § 1512(c), which also addresses destruction of documents, as well as obstruction of justice more generally. This section makes it a crime, punishable by fine and/or imprisonment for up to 20 years, for anyone
  - corruptly
  - to alter, destroy, mutilate, or conceal a record, document or other object
  - with the intent to impair the object’s integrity or availability for use in an official proceeding; or
  - corruptly
  - to otherwise obstruct, influence, or impede any official proceeding.

**Section 1107: Retaliation Against Informants (not limited to public companies)**

- Section 1107 of the Act created protections for government informants against retaliation, specifically targeting employers. The new provision, 18 U.S.C. § 1513(e), makes it a crime punishable by fine and/or imprisonment for up to 10 years, for anyone
  - knowingly, with intent to retaliate
  - to take any action harmful to any person, including interference with the lawful employment or livelihood of any person,
  - for providing to a law enforcement officer truthful information about the commission or possible commission of any Federal offense.