SEC Adopts Final Rules Under
Attorney Conduct Provisions of Sarbanes-Oxley

The SEC yesterday adopted final rules under Section 307 (standards of professional conduct for attorneys) of Sarbanes-Oxley. We have previously sent a Securities Alert that describes the Commission's initial proposal. That Securities Alert is also available on our web site at www.ropesgray.com under "News & Events". We have summarized below the major changes from the proposal as discussed at yesterday's SEC open meeting. The text of the new, final rule has not yet been made available.

Noisy Withdrawal

- The new rule will implement the "reporting up-the-ladder" (within the issuer) obligations required by the Act. The more controversial "reporting out" (notification to SEC or "noisy withdrawal") obligations set forth in the proposed rule was not adopted. However, this aspect of the proposal has been subjected to an additional 60-day comment period for further consideration of the issues and alternatives.

- Under an alternative formulation the staff will present for comment, a lawyer who learns of a material violation would be required to withdraw from the representation and provide written notification to the issuer of the absence of appropriate response by the issuer. The issuer would then be required to report such notice within two days thereafter on a Form 8-K. If an issuer did not comply with the new disclosure requirement, the attorney would be permitted, but not required, to inform the Commission that the attorney has withdrawn.

Narrowed Set of Attorneys Subject to Rule

- The definition of attorneys "appearing and practicing before the Commission" has been narrowed to cover only persons who are providing legal services to the issuer and who have an attorney-client relationship with the issuer. This excludes lawyers employed by issuers in non-legal positions. The revised rule will also stipulate that assisting in the preparation of documents submitted to the SEC is not sufficient grounds for inclusion unless the lawyer has notice that the documents will be submitted to the SEC.

- The term "nonappearing foreign attorney" will be introduced in such a way as to exclude most foreign attorneys from the requirements of the Act. Generally, attorneys who are not admitted to practice in the US and not providing advice on US law will not be covered by the rule. Foreign attorneys who provide legal advice regarding US law would be covered to the extent they are appearing and practicing before the Commission, unless they provide such advice in consultation with US counsel.

Evidence of a Material Violation

- An attempt has been made to narrow, and enhance the objective application of, the standard that triggers the reporting up obligations. The lawyer's obligation to report arises when the lawyer is

faced with 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 occurring or is about to occur.

Elimination of Documentation Requirements

- Unlike the proposed rule, the final rule will not require reporting attorneys to document each report of a material violation and the response received to such report.

Additional Changes

- The final rule will contain modifications, the specifics of which were not discussed, to address commentators' concerns that the proposed rule would limit issuers' abilities to conduct internal investigations and vigorously defend themselves in proceeding before the Commission.

- The final rule will include a safe harbor to clarify that Section 307 does not give rise to a private right of action and that authority to enforce the rule will be vested exclusively in the Commission.

Effective Date

- The new rule will become effective 180 days after it is published in the Federal Register.

Contact Information

If you have any questions or would like to learn more about the final rules, please contact the lawyer who normally represents you.