

April 4, 2002

David M. Becker  
General Counsel  
Securities and Exchange Commission  
Washington, D.C. 20549

Dear Mr. Becker:

Thank you for your letter of March 28 responding to the letter that I and other law professors sent to Chairman Harvey Pitt concerning the role of lawyers in securities fraud. The serious attention that you and Chairman Pitt have given to our concerns is much appreciated.

While I understand the Commission's reluctance to commence additional Rule 102(e) proceedings, the Commission still should clarify what it believes a lawyer should do when faced with securities fraud. Given the important role of lawyers in facilitating compliance with securities laws, and the fact that Rule 102(e) applies to "any person," it is important that securities lawyers know what the Commission expects of them. This is true regardless of whether the Commission intends to commence additional Rule 102(e) proceedings or to encourage responsible lawyering through other means.

My 1996 law review article that you reference in your letter did recommend that Congress pass legislation clarifying the responsibilities of lawyers who know about securities fraud. The reason the article recommends that Congress act is that the Commission has not articulated clear rules in this area. The article was not intended to argue that the Commission should not promulgate its own rules in the absence of Congressional legislation.

Even if the Commission were to retreat from the jurisdiction over securities lawyers that it asserted in *Carter and Johnson*, this issue could still be addressed through the Commission's jurisdiction over registered companies. A Commission rule could thus require that registrants provide written instructions to their securities counsel (and perhaps to other professionals such as consultants) that they must inform the board of directors about securities law violations that senior management fails to rectify. While violation of such client instructions would probably be grounds for sanction under Rule 102(e), I do not believe the Commission would have to take this additional step to achieve compliance.

At a minimum, the Commission should consider requiring registrants to disclose whether or not they have instructed their lawyers to inform the board of directors about securities law violations that senior management fails to rectify. Such a disclosure requirement would be analogous to the requirement in Items 510 and 512(h) of Regulation S-K that registrants disclose indemnification agreements that they have entered into.

I commend Chairman Pitt for speaking out on the responsibilities of securities lawyers for facilitating compliance with the securities laws. I look forward to seeing the Commission take whatever steps it believes are appropriate to make this conception of the role of the securities bar, that I believe we all share, a reality.

Very truly yours,

Richard W. Painter  
Professor of Law  
(217) 333-0712