March 7, 2002

The Honorable Harvey Pitt
Chairman
Securities and Exchange Commission
450 5'th Street, N.W.
Washington, D.C. 20549

Dear Chairman Pitt:

As professors of securities regulation and/or professional responsibility, we are concerned about the role of professionals in the Enron matter and other frauds on investors. While regulation of accountants has been discussed extensively at the SEC, in Congressional hearings and in the press, we believe that attention should also be given to the role of lawyers in representing public corporations, and in particular to whether lawyers should inform a client corporation's directors about violations of the securities laws. We believe that, if senior management will not rectify a violation, lawyers who are responsible for the corporation's securities compliance work should be required to make such a report.

Model Rule 1.13 of the ABA Model Rules of Professional Conduct requires a lawyer representing an organization to represent the best interests of the organization. If a lawyer believes that harm to an organizational client could result from the organization acting illegally, Model Rule 1.13 suggests a number of ways in which the lawyer could respond, including reporting the illegal conduct to a responsible constituency of the organization, reporting the illegal conduct to the organization's board of directors and resigning. Nowhere, however, does Model Rule 1.13 require a lawyer to take a specific course of action. Indeed, in the aftermath of litigation over Kaye, Scholer's representation of Lincoln Savings and Loan in the early 1990's, an ABA working group stated that among the Office of Thrift Supervision's "novel theories of professional responsibility" in the Kaye, Scholer case was the notion that lawyers have an obligation to report misconduct to superiors, going "all the way to the client's board of directors." See Working Group on Lawyers' Representation of Regulated clients, ABA Report to the House of Delegates 2 (1993). The ABA Working Group's interpretation of Model Rule 1.13 is troublesome to say the least.

However one interprets Model Rule 1.13 as currently drafted, we believe that, as a matter of public policy and corporate governance, a lawyer should inform a corporate client's directors, including its independent directors, of prospective or ongoing illegal conduct that senior management refuses to rectify. Under corporate law, a corporation is run by or under the authority of its board of directors (see e.g. Del. Gen. Corp. Law 141(a)). Directors might also have a duty to monitor corporate conduct and to assure that information about illegal activity is reported to the board. See In Re Caremark International, Inc. Derivative Securities Litigation, 698 A.2d 959 (Del. Ch. 1996). Thus, it is the right and responsibility of directors to be informed about corporate conduct and legal consequences of that conduct. A lawyer who represents a corporation in turn is ethically bound to communicate with the corporation's directors about matters concerning the representation of which they should be aware (see ABA Model Rule 1.4

requiring a lawyer to communicate with a client concerning the subject matter of the representation). It does not suffice for the lawyer to limit communication to senior management in circumstances in which senior management refuses to rectify the violation. The directors have a right to know that the corporation is violating the law and the corporation's lawyers have a duty to tell them.

SEC Rule 102(e) authorizes the Commission to disbar or suspend from practice before it a lawyer or other professional who violates the securities laws, assists in someone else's violation or otherwise engages in unprofessional conduct. Rule 102(e), or another Commission rule, should also expressly require a lawyer who represents a corporation in connection with its securities law compliance to inform the client's board of directors if the lawyer knows that the client is violating the securities laws and senior management does not promptly rectify the violation. After promulgating such a rule requiring the lawyer in such a situation to go up the ladder all the way to the board of directors, the Commission should enforce it vigorously and consistently.

The disclosure obligation we suggest that the SEC expressly impose on lawyers – to tell clients' directors when they are violating the law – is substantially less demanding than the disclosure obligation expressly imposed by federal law on accountants. Under Section 10A of the 1934 Securities Exchange Act (added by the 1995 Securities Litigation Reform Act) an auditor is required to report both to the client's directors and simultaneously to the SEC an illegal act if senior management fails to take remedial action. While some of us believe that in certain circumstances a lawyer also should be required to do more than report to a client's board of directors, others of us do not (particularly in view of the fact that lawyers and auditors have different roles in a representation). We do, however, all agree that a lawyer should be required to report illegal acts to the highest authority within a client organization.

We appreciate your effort to address the loss of investor confidence that has resulted from the Enron matter, and to rectify abuses within the accounting industry. We hope that the SEC will also insist that lawyers professionally represent their clients in connection with disclosure obligations under the securities laws.

Very truly yours,

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