November 25, 2002

Mr. Jonathan G. Katz
Secretary
United States Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D C. 20549-0609

Re: Comment of the Committee on Securities and Exchanges of the New York County Lawyers' Association on the Proposed Rules Relating to the Improper Influence on Conduct of Audits and Disclosure Required by Sections 404, 406 and 407 of the Sarbanes-Oxley Act of 2002

Dear Mr. Katz:

The Committee on Securities and Exchanges of the New York County Lawyers' Association submits the following comments in response to the above-referenced United States Securities and Exchange Commission's ("SEC" or "Commission") rule proposals regarding the implementation of the provisions of Sarbanes-Oxley Act of 2002 ("SOA"). The Committee on Securities and Exchanges of the New York County Lawyers' Association has over 100 members who are attorneys in private practice, in-house counsel for corporations and financial services companies and self-regulatory organizations. Many of our members are former SEC attorneys as well as attorneys from federal and state law enforcement agencies.[1]

Improper Influence on Conduct of Audits

In response to SOA Section 303(a), the SEC has proposed a new rule "to prohibit officers and directors of an issuer and persons acting under the direction of an officer or director, from taking any action to fraudulently influence, coerce, manipulate or mislead the auditor of the issuer's financial statements for the purpose of rendering the financial

[1] Members of the Committee employed by Self-Regulatory Organizations, federal and state government agencies, other regulatory agencies or private law firms express no opinion regarding any of the proposed rules. Individual members of the Committee may have views that differ from those presented. Moreover, this comment is solely that of the Committee on Securities and Exchanges, has not been approved by the Board of Directors of the New York County Lawyers' Association, and does not necessarily represent the views of the Board.

statements materially misleading."[2] The SEC is proposing to re-designate Exchange Act Rule 13b2-2 as Rule 13b2-2(a) and to add new Rule 13b2-2(b)

The SEC proposed these rules ostensibly to address certain fraudulent activities relating to issuers and their activities with their auditors. The SEC has suggested that the new rule delineates the scope of improper influence on auditors. The new rule would not permit an officer or director (or anyone acting on their behalf) to influence the issuer's audit.

The Committee members expressed a variety of opinion on this proposed rule. For example, one Committee member suggested that this new rule, unfortunately, reflects a sad commentary on our society that we need to impose a regulation where we have to announce that bribery is a breach of an officer or director's fiduciary obligation as well as an auditor's professional responsibilities. The Commission, however, believes that the proposed rule would provide it additional means to address this type of conduct. Nonetheless, the Committee believed that the new rule's stated purpose is somewhat redundant because the Commission already has the statutory authority to enforce and take action against those who improperly influence the audit process and the issuer's financial statements. Although the proposing release explains that the new rule provides the Commission with additional means to enforce the securities laws, it was clear to some members of our Committee that the Commission has not been aggressively pursuing the enforcement of pre-existing federal securities laws that regulate this conduct. Another thought from the Committee was that the new rule created a danger of micro-management of corporate behavior by the SEC, and that a more positive way of addressing this type of fraudulent activity would be the relaxation of the pleading and discovery requirements of the Private Securities Litigation Reform Act ("PSLRA") so that plaintiffs' attorneys could make such wrongdoers pay a tangible price for their fraudulent conduct. This could possibly be a more effective and economically efficient way of addressing the problem.

Additionally, another position espoused by a Committee member was that this proposed rule may eventually provide an additional cause of action for aggrieved investors to vindicate in civil litigation. However, no private right of action seemingly exists in this proposed new rule.

The Committee came to no clear consensus as to the disposition of this proposed new rule.

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[2] See Exchange Act Release Number 34-46685; Investment Company Release No. IC-25773.

Disclosure Required by Sections 404, 406 and 407 of the SOA

In response to SOA Sections 404, 406 and 407, the SEC requested comments on many of the specific proposed aspects of new rules as well as matters that it has not addressed with a new rule. The Committee members only chose to offer comment on certain proposals, and its lack of response or comment on a new rule proposal does not indicate anything regarding the Committee's opinion concerning the new rule or proposal.

The Committee has offered comment on the following specific rule proposals in the order that these new requests and rules appear in the proposing release.[3] Initially, the Committee commented on the SEC's request for input into various aspects of the financial expert position. The proposed rules relate to Item 307 of Regulation S-K promulgated pursuant to the Securities Act of 1933. The Committee members were divided over the application of these new proposals in the current environment. Several Committee members expressed the belief that it was important to provide as much information to the public as possible while other Committee members believed there were problems that would ultimately cause financial experts not to serve on these audit committees. Specifically, one member believed that investors would benefit from both the name and number of the financial experts serving on the audit committees while another committee member believed that naming such financial experts would deter individuals from serving on the audit committees. The Committee came to no clear consensus on this new rule. [4]

However, Committee members were in agreement that the SEC should address the issue of the degree of individual liability and responsibility of these financial experts. The potential adverse affect of not addressing this liability issue may deter persons from serving as financial experts.

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[3] Securities Act Release No. 33-8138; Exchange Act Release No. 34-46701; Investment Company Release No. IC- 25775.

[4] A member of our Committee expressed the belief that it would benefit investors if the number and names of all financial experts were disclosed to better enable the investor to have a minimum level of comfort in the company's audit committee and the financial statements of that company. However, another position from the Committee was that, since it is difficult to find financial experts to serve on a company's audit committee, it does not serve the public interest to know the names of the financial experts because each member of the audit committee has equal responsibility to the company and its shareholders. If the SEC's proposal were to be accepted and financial experts recognized, it would give the impression that the financial expert has a higher level of responsibility when, in fact, these persons do not have such heightened responsibilities. Identifying that person gives the impression that they may have more responsibility and deter financial experts from serving on these committees. The Committee came to no clear consensus on this proposed new rule.

There was a divergence of views as to whether independence should be a requirement for financial experts. However, the Committee members pointed out that this proposal may only effect a limited number of companies since the SEC intends on requiring national securities exchanges and associations to have a completely independent audit committee for the those companies as a condition to listing on those entities.

Additionally, the SEC requested comment on the proposed definition or attributes of the financial expert. Several members of the Committee believed it is incumbent upon the Commission to ensure that there is a consistent definition of the term financial expert for SEC, national securities exchanges and associations purposes. These Committee members did not believe that it served the objectives of the SOA to have a person considered a financial expert for SEC purposes, and have different applications for individual companies on different national securities exchanges and associations. Other members of the Committee believed that national securities exchanges and associations should be given the freedom to strengthen or require higher standards for their listed companies to competitively distinguish themselves. The Committee came to no clear consensus on this proposed new rule.

The next proposal reviewed by the Committee related to the SEC's ethics policies proposals for public companies. Several Committee members pointed out that the SEC was not requiring public companies to adopt ethics' policies, instead, the SEC merely required those public companies who chose not to adopt an ethics policy to disclose such non-adoption to the public. Certain Committee members suggested that ethics policies, if adopted, should include provisions promoting the protection of employee investors. For example, some Committee members believed that the ethics code should contain provisions that protected corporate employees from Enron-like situations, where corporate insiders were touting the stock while in possession of information that was contrary to their representations. These Committee members believed that if you provided for an ethics code provision that protected corporate employees, this would promote a corporate culture that is respectful of investors in general. Other Committee members believed that there should be no distinction drawn between protecting employees and protecting others who are not employees from unethical corporate conduct. Some Committee members believed that the adoption of an ethics policy is nothing more than an amorphous concept where companies will adopt ethics polices without any meaning. One suggestion was that all officers in these companies would be required to sign and be bound by these ethics policies. The Committee came to no clear consensus on this proposed new rule.

Conclusion

We thank the SEC for the opportunity to respond to these proposals. If the Commission or you should have any questions, please do not hesitate to contact Ernest E. Badway at (973) 622-333 or any of the other Committee members listed below who responded to the SEC on behalf of the whole Committee.

Respectfully submitted,

Ernest E. Badway, Co-Chair
Suzanne E. Auletta, Co-Chair
Ronit V. Fischer
Richard Stelnik
Jason D. May
David U. Gourevitch