OFFICE OF THE PRESIDENT
CABINET DU PRESIDENT

December 13, 2002

File No. 33-8150

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Dear Sir:

Re: *Sarbanes-Oxley Act* and Proposed Rule: Implementation of Professional Standards for Attorneys

In my capacity as President of the Canadian Bar Association ("CBA"), I submit the response of the CBA to the SEC's Releases dated November 21, 2002. The CBA is grateful for the invitation by the SEC which gives an opportunity for comment to persons concerned by the proposed rules relating to the professional standards of lawyers practicing before the SEC.

The CBA represents over 38,000 lawyers, judges, notaries, law teachers and law students from across Canada. It is the voice of the Canadian legal profession. The objectives of the CBA include improvement of the law and the administration of justice, the promotion of fair justice systems and effective law reform and the protection and promotion of the rule of law and the independence of the legal profession. In the Canadian context, the CBA is distinguished from provincial law societies. Each law society is responsible for the regulation of the legal profession in its respective province. The law societies are generally interested in issues of governance and public protection. The CBA brings a broader perspective to the issues.

This submission was prepared by a Committee comprised of senior business and securities lawyers and members of the CBA's Standing Committee on Ethics and Professional Responsibility. The positions advanced here have been reviewed by the CBA's Legislation and Law Reform Committee and approved by all the Executive Officers of the CBA.

Introduction

The United States offers the most attractive and vibrant capital market in the world. As Canadians, we know that the special relationship between the capital markets of Canada and the

United States has had a positive impact on Canadian business. You may rest assured that the comments here repose on the premise that sound and responsible regulation is necessary to ensure reliable and efficient capital markets.

We fully recognize that, in the wake of the Enron and Worldcom scandals, there is a need to consider the standards of behaviour for professionals involved in bringing their clients to these capital markets. In fact, we applaud vigorous efforts to regain investor confidence with a swiftly rendered initiative.

It is our view, however, that the proposed rules would in some respects work against the desired result and that they do not in any event reflect the intent behind section 307 of the *Sarbanes-Oxley Act* ("Act"). In particular, we believe that the proposed "noisy withdrawal" requirement is a counterproductive and inappropriate response, which goes far beyond the letter and spirit of the Act. We are persuaded that, if the proposed "noisy withdrawal" rule is implemented, it will undermine both protection of investors and encouragement of robust capital markets.

We have read and support without reservation the letters of Meredith M. Brown and Edward H. Fleischman (written on his own behalf and, by specific authorization, on behalf of others), addressed, respectively, to Senator John Edwards and the SEC. We have also read and support without reservation the submissions, website statements and press releases of:

1. The International Bar Association ("IBA");

2. The Council of Bars and Law Societies of the European Union ("CCBE"); and

3. The Law Society of Upper Canada ("LSUC").

We propose only to focus on a key issue, the "noisy withdrawal" requirement.

The proposed "noisy withdrawal" requirement will have a chilling effect on the relationship between lawyers and their clients because it will discourage them from interacting freely and with candour. Lawyers have long been instrumental players in corporate actors' compliance with securities law. They have thus been adjuncts to healthy, efficient and reliable capital markets. We are certain that, rather than improving the health and efficiency of the capital markets of the United States and Canada, the proposed "noisy withdrawal" rule would harm and infect them.

Clients would be encouraged by such requirements to seek legal advice less often rather than more often, and to be selective about the information they choose to disclose when seeking the advice of counsel. Surely, the goal must be to encourage all public companies to seek every means to understand the rules which govern them and to comply with them. Making them leery of seeking appropriate and confidential advice cannot advance this cause.

Similarly, putting lawyers in the position of having to effect a "noisy withdrawal" whenever they come to an opinion or recommendation which is not immediately shared by the client is unlikely

to encourage those lawyers to express their opinions in clear and unreserved language. Clients will tend to receive opinions which do not push strongly and unreservedly in the direction the Act obviously seeks.

As the "noisy withdrawal" requirement is an extension of the "up the ladder" reporting requirement, we will begin below by expressing our views on the SEC's "up the ladder" proposal. A full statement of our objections to the "noisy withdrawal" requirement will follow. We will then make a brief statement of our concerns relating to the *General Agreement on Trade in Services* ("GATS") rules which apply to cross-border legal services, in light of the proposed imposition by the SEC of cross-border rules of ethics on foreign lawyers. Finally, we will end this submission by asking that, if you decide to implement the proposed rules relating to the professional standards of lawyers "appearing and practicing" before the SEC, a term very broadly defined in the proposed Rule, you recognize that domestic rules applying to Canadian lawyers form a comparable and acceptable code of conduct and need not be supplemented by the proposed rules. Subsidiarily, and less satisfactorily, we will ask that the proposed rules be made expressly subject to limitations imposed on a lawyer under applicable foreign law or professional confidentiality rules.

Canadian lawyers practice within a legal community as sophisticated as any other. The SEC may rest assured that we are already subject to Canadian rules of conduct which ensure that lawyers behave in a highly ethical manner. For example, Ontario's *Rules of Professional Conduct (*Rules*)* explicitly require "up the ladder" reporting. They also allow a lawyer representing an issuer who has engaged in corporate malfeasance to resign if the issuer takes no action in response to the lawyer's internal report of wrongdoing. The CBA's *Code of Professional Conduct* ("Code") places a lawyer under a duty to withdraw if the client demands that the lawyer act in a manner inconsistent with the lawyer's duty to the court. However, in a conscious effort to preserve the privileged relationship between lawyer and client and, indeed, the independence of the legal profession, neither the Rules nor the Code require the lawyer to report to a regulatory authority or to anyone outside the lawyer-client relationship.

The Proposed "Up the Ladder" Reporting Requirement

The LSUC's Rules trigger "up the ladder" reporting in circumstances in which the lawyer "becomes aware" of misconduct. In contrast, the SEC's proposed rule would trigger the obligation to report "up the ladder" when a lawyer becomes aware of information that would lead "*a reasonable attorney"* to believe that a material violation has occurred, is occurring, or is about to occur.

We object to the proposed use of this external standard as it opens the door to the application of hindsight to an evaluation of the lawyer's decision, in the heat of circumstances, to report or not to report "up the ladder". In our view, a subjective standard is more appropriate and more responsive to the intent of section 307 that lawyers report "up the ladder" when they become aware of evidence of a material violation.

It is in any event not appropriate to make the reasonableness of a Canadian lawyer's view, considered *ex post facto* by American authorities, subject to disciplinary action in the United States.

The Proposed "Noisy Withdrawal" Rule

We object strenuously to the proposed "noisy withdrawal" requirement. It is a dramatic departure from the fundamental premise of solicitor-client privilege and would have a significant negative impact on the solicitor-client relationship. The proposed "noisy withdrawal" rule threatens open and honest communications between lawyers and their clients. We are convinced that it would also have an adverse effect on society as a whole and that, far from achieving the objectives of the *Act* - the protection of investors and the strengthening of the capital market- it has the power to do them great harm.

The solicitor-client privilege is the sacred foundation upon which the law, fundamental liberties and business in the modern world have flourished for centuries. If corporate clients believe that their lawyers are obliged to report to the SEC when they disagree with the client's approach to resolving disclosure or compliance issues, they are likely to fear raising such critical issues with counsel. The lawyer's role will be radically altered in the mind of the client: no longer a trusted counsel, the lawyer will become a potential adversary, to be given information not openly and with a view to getting good, needed advice in a timely manner, but sparingly and with prudence. The lawyer's opinions will have correspondingly less value to the client and the lawyer will be in less of a position to act, as lawyers now do and have long done, as a motor towards compliance.

The proposed "noisy withdrawal" rule may also have an undesirable effect on the behaviour of lawyers. While lawyers have always felt comfortable giving full and clear advice to corporate clients, an obligation to report to the SEC should the client decline to follow that advice may cause lawyers to resist their inclination to counsel their clients firmly.

Significant issues also arise from the manner in which the proposed rule would require the lawyer to exit the relationship "forthwith" and to report to the SEC. First, the lawyer would be required to notify both the client and the SEC that his or her withdrawal is based on "professional considerations". The lawyer must then promptly disaffirm any opinion, affirmation, representation or characterization in a document filed with or submitted to the Commission, or incorporated into such a document, that the lawyer prepared or assisted in preparing and that he or she reasonably believes "is or <u>may be</u> materially false or misleading". The SEC has suggested that a withdrawal based on "professional considerations" will keep confidential the facts that underlie the withdrawal. We believe this view to be quite wrong. Rather, we believe it is clear that such a "loud" exit would amount to a professional "slamming of the door" and that it would undoubtedly cause the SEC to feel compelled to investigate the client and the related issues. It would both alert investors and creditors who might draw completely unwarranted conclusions and deprive the issuer of timely access to knowledgeable counsel prepared to assist in the regularization of matters.

The proposed "noisy withdrawal" rule also endangers the independence of the legal profession. It contemplates that lawyers will be disciplined by the SEC, a regulatory authority distinct from the law society or bar to which the lawyer answers on matters of professional ethics. In addition, it places Canadian lawyers in direct conflict with their domestic rules of conduct which specifically require lawyers to keep all matters relating to the business and affairs of their clients strictly confidential, and to leave their clients, when they leave, without causing them undue hardship. While these rules do obligate lawyers to divorce themselves from their clients in certain circumstances, they do not require lawyers to report to a regulatory authority or another outside entity if the client fails to follow advice. We believe that lawyers should be subject only to the rules of ethics imposed by the law society or bar in their own jurisdiction.

GATS

All World Trade Organization (WTO) signatory states are currently in negotiations towards new international disciplines to govern the rules which apply to trade in services, including lawyers' services. We submit that it is not an appropriate time for the SEC to seek to take unto itself a jurisdiction to set out the ethical behaviour of lawyers outside the jurisdiction of the United States, especially jurisdictions like Canada, where the ethical rules measure up very well to any other jurisdiction's and where there is no apparent reason to doubt the ethical standing of lawyers.

In addition, it is passing strange to envisage American rules requiring non-American lawyers to report violations, and even possible violations, by their own clients, of securities law, even though American securities law may not be these lawyers' field of expertise. This can only tend toward discrimination against non-American counsel, a clear violation of the national treatment philosophy underlying the GATS.

Relief

We wish to reiterate that the SEC can safely rely upon the fact that Canadian lawyers are already subject to rules of conduct which ensure that they will behave in a highly ethical manner. Canadian lawyers have long acted, in accordance with these rules, to assist in an orderly, reliable and honest access to capital markets in the United States and elsewhere.

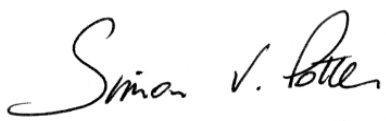
We therefore ask that if, despite the objections expressed here and by others, you decide to implement the proposed rules, you restrict the application of the rules to attorneys practicing in the United States or expressly recognize that domestic rules applicable to Canadian lawyers form a comparable and acceptable code of conduct which need not be supplemented by the proposed rules. This form of recognition would not be dissimilar to the mutual recognition foundation of the Multi-jurisdictional Disclosure System already in place between Canada and the United States. Subsidiarily, though less satisfactorily, the proposed new rules could be made expressly

subject to limitations imposed on a lawyer under applicable foreign law or professional confidentiality rules.

At a minimum, the proposed rules should not apply to lawyers tangentially or peripherally involved in a client's dealings with the SEC. It is impossible to see how a requirement of "noisy withdrawal" could apply to lawyers who give tax advice but who are not involved in the client's securities filings, or to litigation attorneys who are not involved in those filings but who have a quibble with the way in which litigation cases are reported.

We thank you again for your invitation to express our views. Please feel free to contact me should you have any questions in connection with this submission.

Yours truly,



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