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**UP THE LADDER AND OUT THE DOOR  
How to Say “No” to the CEO**

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**STAYING THE COURSE IN STRONG CURRENTS: SAYING NO TO THE CEO AND  
THE ART & ETHICS OF ADVISING STRONG CORPORATE CLIENTS**

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Resist; resign or retire quietly, but not quite voluntarily; or be sued by shareholders. Are these the only outcomes for the Chief Legal Officer (“CLO”) confronted with management’s refusal to alter conduct that counsel reasonably concludes, upon credible evidence, to be illegal or a breach of fiduciary duty? Is there anything counsel can do to protect against an outcome that may result in an unexpected period of unemployment? If not, should federal securities law be revised to specifically provide that a form 8-K be filed with the SEC upon the departure of the CLO, advising the Commission and shareholders of a change in the leadership of the public company’s legal function?

Presently, the Securities and Exchange Commission’s protections extend to the CFO, but not the CLO. It remains true that a CEO may summarily dismiss the CLO at will, without cause, and absent board knowledge or shareholder approval. Notwithstanding this lack of protection, Congress, through its enactment of the Public Company Accounting Reform and Investor Protection Act of 2002 (“Sarbanes-Oxley” or “SOX”), has called upon in-house counsel, and the CLOs of US registrants in particular, to be the “gatekeepers” against malfeasance by senior corporate management.

This paper addresses why SOX, coupled with corresponding changes to the ABA’s Model Rules of Professional Conduct, has failed to prevent (as it was intended to do) what many believe to be a breathtaking level of corporate abuse leading to the near collapse of the US economy in late 2008.

To put into context the obligations of professional conduct imposed on lawyers by federal securities law and professional ethical rules (as reflected by the ABA Model Rules of Professional Conduct), let’s start with the following hypothetical:

During a visit to a multi-billion dollar mining project being undertaken for a privately owned minerals company, the Division General Counsel for the prime engineering, procurement and construction (“EPC”) contractor (whose state of incorporation is Delaware and whose headquarters is in California) learns that hundreds of thousands of dollars, and perhaps more, (internal audit pending) were paid to certain mid-level executives of the owner to secure the job. The monies came from a fund controlled by the President of the EPC contractor’s mining division which, in turn, came from “rebates” paid by certain vendors under “preferred” master service agreements. Given that the EPC contractor is multi-national, it maintains a unitary banking relationship with a major US banking institution in which monies from all subsidiaries are deposited and from which all payments originate.

Division General Counsel also learns through the course of her visit that tens of thousands of dollars, and perhaps more, (internal audit pending) were paid to various governmental officials to substantially expedite the receipt of business and professional licenses, building and environmental permits, and entry visas for highly trained and exceedingly efficient Thai and Polish welders. Counsel also learned that expensive cars, boats, and trips to Disneyland were supplied to union leaders to secure their consent to the use of the foreign labor and to avoid labor disturbances. The monies to fund these payments, all of which were funneled through intermediaries, came from accounts originating in the US. The monies came from “rebates” paid by private subcontractors in exchange for preferential selection by the EPC contractor to perform services to the project.

The payments to the client’s executives were critical to winning the work. Specifically, the payments to the government officials for business licenses, permits, and entry visas were essential to shorten the as-bid schedule completion date, making the contractor’s bid highly

competitive. Even with the payments to the client's executives, the contractor may not have been awarded the work. However, because the contractor presented a schedule that was two months better than the closest competitor, it gave the contractor a competitive advantage. Further, the importation of foreign welders was essential to improve labor efficiency and lower cost. Again, this gave the contractor a competitive advantage, without which the contractor may not have secured the work. Finally, the payments to the union officials were necessary to ensure the safety of the foreign labor and to avoid highly disruptive labor strikes. Without such payments, labor strikes would be inevitable, exposing the contractor, at a minimum, to huge liquidated damages for delay and, at worst, to termination for default for failure to maintain a safe work site and meet critical schedule milestones.

After walking the project with a couple of area superintendents and the lead project controls engineer, Counsel learns that the project's date for mechanical completion has been artificially held firm and that numerous logic ties in the CPM schedule provided to the client in hard copy have been broken to ensure that the completion date shown to the client remained the same over the past 9 months. Both superintendents and the lead controls engineer say that they have been instructed to do this by the executive project director, but that everybody has to know that the forecasted completion date is a complete fiction and that the project is at least 9–12 months late. When Counsel asks about the cost forecast, everybody laughs. The controls engineer says: "What do you think, a year late and costs don't rise? Is this the twilight zone or what?" With a bit of prodding, the controls engineer admits that he really doesn't know how much more the project will cost, because he has been told not to perform such an analysis. Rather, he has been told to develop claims against the client and subcontractors, because the executive project director is convinced that all delays are the responsibility of the client or its separate contractors and, even more importantly, the executive project director does not want to

report to corporate that the project is in major financial melt-down. Reporting such negative information would not only ruin his division's quarterly financial report, but it might also cause the company to take such a huge accounting charge that its banking covenants would be breached, imperiling the company's very existence.

Walking back to the administrative trailers, the lead controls engineer proceeds to explain to Counsel the methods by which he and his hand-picked claims consultant have calculated cost recovery claims in excess of \$90 million (representing about half of the total current projected cost overrun) and entitling the contractor to an 11-month extension of time. As the engineer talks, Counsel's eyes begin to glaze over—the drone of the engineer's voice reminds her of the sound of the engine of the airplane from which she just stepped off a few hours earlier. With great concentration, Counsel hears something to the effect that “none of it's our fault” and the “President has booked the claim value in the cost report.” Then, with a bit of mumble, the controls engineer says that without the extension of time, the contractor will be exposed to \$110 million in liquidated damages and a total project loss currently estimated to be \$180 million, if things don't get any worse. Outside, torrents of rain begin to fall, heralding an early start of the rainy season.

In order to assess Counsel's professional obligations, we must first determine whether any of the payments uncovered during her trip constitute illegal activity and why.

**I. The payment of commercial bribes to non-public foreign persons is illegal under the “Travel Act” if applicable state law proscribes such bribes.**

The Travel Act makes bribery of non-public officials within or outside of the United States a felony if commercial bribery of such persons is prohibited by applicable State law.<sup>1</sup> Thus, the Travel Act criminalizes the use of travel, mail, telephone, or wire transfer with the intent to

carry on or facilitate any unlawful activity, including specifically “*bribery . . . in violation of the laws of the State in which committed or of the United States.*”<sup>2</sup> Unlike the Foreign Corrupt Practices Act (FCPA), which directly criminalizes bribery of public officials for the purpose of inducing an act or decision that assists in the obtaining or retaining of business,<sup>3</sup> the Travel Act does not criminalize the bribe itself, but rather, the instrument used to carry out the bribe (e.g., international travel, telephone calls, or wire transfers).<sup>4</sup>

Championed by then Attorney General Robert F. Kennedy in 1961, Congress passed the Travel Act in response to the activities of US organized crime syndicates engaged in gambling, prostitution, narcotics, shylocking (the charging of exorbitant interest collected by means of force and violence), and labor extortion.<sup>5</sup> As Attorney General Kennedy made clear in his testimony before Congress: “The main target of our bill is interstate travel to promote gambling. It also is aimed at the huge profits in the traffic in liquor, narcotics, prostitution, as well as the use of these funds for corrupting local officials and for their use in racketeering in labor and management.”<sup>6</sup> To make clear the intent of the proposed legislation, Attorney General Kennedy stated:

Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill. The travel that would be banned is travel ‘in furtherance of a business enterprise’ which involves gambling, liquor, narcotics and prostitution offenses or extortion or bribery. Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise.<sup>7</sup>

So how did the anti-racketeering legislation of the early 1960’s, tailored to stop the bribery of government officials by mobsters engaged in criminal business enterprises, morph into the commercial bribery corollary to the Foreign Corrupt Practices Act? We can thank the House-Senate Conference Committee that hammered out the final version of the Travel Act and the US Supreme Court’s 1979 decision in Perrin v. United States.<sup>8</sup>

Notwithstanding Kennedy's stated intent to target bribery by criminal enterprises engaged in one of the enumerated unlawful business enterprises, the Conference Committee struck this requirement.<sup>9</sup> As noted by one commentator, this was likely in response to then Deputy Attorney General (and future Supreme Court Justice) Byron R. White's letter of August 7, 1961, which protested the limitation because bribery and extortion practiced by organized criminals tends to be composed of discrete instances of improper influence.<sup>10</sup> Accordingly, as written, the Travel Act applies to any business enterprise (criminal or otherwise) that engages in "bribery."<sup>11</sup>

While the word "bribery" seems simple enough, there was a significant split within the Circuit Courts as to whether purely commercial bribery, rather than "common law" bribery (involving public officials) fell within the statute's purview.<sup>12</sup> By 1979, the Fourth<sup>13</sup> and Fifth<sup>14</sup> Circuits held that the Travel Act used the term "bribery" in a generic sense to mean "the act or practice of bestowing upon, or promising money or a favor to a person in a position of trust to pervert his judgment or corrupt his conduct."<sup>15</sup> The Second Circuit disagreed, holding that a defendant who demanded the payment of bribes by subcontractors as a condition to receiving contracts did not violate the Travel Act, limiting the statute to common law bribes.<sup>16</sup> The United State Supreme Court resolved the conflict, siding with the Fourth and Fifth Circuits, holding that "bribery" as used in the Travel Act included purely commercial bribery.<sup>17</sup> The Court stated that "Congress recognized in 1961 that bribery of private persons was widely used in highly organized criminal efforts to infiltrate and gain control of legitimate businesses, as an area of special concern of Congress in enacting the Travel Act."<sup>18</sup>

Fast forward 50 years, the Department of Justice has used the Travel Act to pursue foreign commercial bribery in about ten cases,<sup>19</sup> and lists the Act as a possible alternative charge

in its “Layperson’s Guide to the FCPA.”<sup>20</sup> Most recently, the Travel Act was used against Control Components, Inc., a California company that designs and manufactures service control valves for use in the nuclear, oil, gas, and power generation industries worldwide.<sup>21</sup> In 2009, the company pleaded guilty to a three-count criminal complaint which alleged, among other things, that from 2003 to 2007 CCI executives made 150 corrupt payments in more than 30 countries to skew technical specifications of competitive tenders in their favor and otherwise paid off officials of state-owned enterprises to influence the award of contracts.<sup>22</sup> CCI paid an \$18.2 million criminal fine and agreed to the retention of a compliance monitor for three years.<sup>23</sup> Since then, seven former CCI executives have pleaded guilty, the latest being David Edmonds, the former vice president of worldwide customer service, who entered a guilty plea on June 15, 2012.<sup>24</sup>

US companies doing business overseas who draw compliance policy distinctions between gifts and entertainment to private company employees and those of state-owned or affiliated enterprises may want to revise those policies, for ensnarement in the Travel Act is a possible outcome if applicable state law prohibits the payment of commercial bribes. One commentator has noted that about three-fifths of the states have laws prohibiting commercial bribery, including California, New York, Massachusetts, Delaware, Connecticut, Louisiana, and Texas.<sup>25</sup>

Applying the Travel Act to the facts of the hypothetical, the “hundreds of thousands of dollars” that were paid to executives of a publically traded company to secure the mining project violates the Travel Act because commercial bribery is illegal under the laws of Delaware (state of incorporation) and California (principal place of business) and the money came from a bank account in the US.



**II. Bribes paid to government officials to secure licenses and permits may be illegal under the FCPA if the intent is to produce an effect that would assist in obtaining or retaining business, subject to a “facilitating” defense.**

The Justice Department’s aggressive stance against foreign bribery in the construction, oil & gas, and aerospace industries is well known and has been widely publicized. Indeed, the FCPA<sup>26</sup> was enacted by Congress in 1977 in response to widespread bribery of foreign officials by defense contractors and oil companies who had made large payments to high government officials in Japan, the Netherlands, and Italy.<sup>27</sup>

Up until 2004, all of the reported FCPA cases dealt directly with monetary payments or the provision of things of value intended to obtain a foreign official’s approval of a bid for a new government contract or the renewal of an existing contract. What was not clear was whether illicit payments to foreign officials for the purpose of avoiding other obligations, such as the payment of customs duties and tax, could also run afoul of the FCPA.

As for the payment of bribes in consideration for the unlawful evasion of customs duties and taxes, the Fifth Circuit held in United States v. Kay that such conduct *could* fall within the purview of the FCPA’s proscriptions, provided that “the bribery was intended to produce an effect . . . that would ‘assist in obtaining or retaining business.’”<sup>28</sup>

David Kay and Douglas Murphy were executives at American Rice, Inc. (“ARI”), a Houston-based company that exported rice to various parts of the world, including Haiti, through Rice Corporation of Haiti (“RCH”).<sup>29</sup> In 1999, ARI retained a prominent Houston law firm to represent it in a civil suit.<sup>30</sup> In the course of preparing the case for trial, the lawyers asked Kay for background information on ARI’s rice business in Haiti.<sup>31</sup> With abundant cooperation and candor, Kay tells the lawyers that he and Murphy took various steps to reduce the costs of importing rice by purchasing licenses called “franchises” from government officials; permitting

charities to import food without duty; paying for a “service corporation” designation for RCH, which allowed the company to avoid paying sales and income taxes by claiming that it did not actually own the products it was importing; underreporting imports to reduce duties; paying officials to accept the underreporting; and paying officials to resolve another tax issue.<sup>32</sup> Kay contended that these actions were a routine part of doing business in Haiti which was, at least at that time, considered one of the most corrupt places in which to conduct business.<sup>33</sup>

Reading broadly the dictates of Rule 1.12 of the Texas Disciplinary Rules of Professional Conduct

(Organization as Client) well before SOX’s passage,<sup>34</sup> the external lawyers retained to represent ARI in the civil case informed ARI’s directors of Kay’s and Murphy’s somewhat questionable Haitian activities.<sup>35</sup> The directors, in turn, self-reported these activities to government regulators.<sup>36</sup> Indictments were soon brought against Kay and Murphy, charging them with bribery in violation of the FCPA.<sup>37</sup> Upon the defendants’ motion to dismiss, the district court concluded as a matter of law that “payments to foreign government officials made for the purpose of reducing customs duties and taxes [do not] fall under the scope of ‘obtaining or retaining business’ pursuant to the text of the FCPA.”<sup>38</sup>

The Fifth Circuit reversed and remanded the case for trial, holding that illicit payments to evade duties and taxes “*could* fall within the purview of the FCPA’s proscription,” but that “it still must be shown that the bribery was intended to produce an effect—here, through tax savings—that would assist in obtaining or retaining business.”<sup>39</sup> At trial, both defendants were convicted on the uncontroverted evidence that “ARI ensured, through bribery, that it could continue to sell its rice without having to pay the full tax and customs duties demanded of it” and that “ARI believed these payments were necessary to compete with other companies that paid lower or no taxes on similar imports—in other words, in order to retain business in Haiti, the

company took measures to keep up with the competitors.”<sup>40</sup> As noted by the Fifth Circuit, “[t]he fact that other companies were guilty of similar bribery during the 1990’s does not excuse ARI’s actions; multiple violations of a law do not make those violations legal or create vagueness in the law.”<sup>41</sup>

Applying the teachings of Kay to the hypothetical, the “tens of thousands of dollars” spent to “substantially expedite the receipt of business and professional licenses, along with building and environmental permits, and entry visas” *could* run afoul of the FCPA if the business nexus element is satisfied and if such payments are not construed to be “facilitating” payments—an exception to the FCPA’s bribery proscriptions.<sup>42</sup> The business nexus element is likely satisfied, given the facts stated in the hypothetical that the payments to “substantially expedite” the licenses, environmental permits, and entry visas for the foreign labor were essential to shorten the as-bid schedule completion date, lowering the price of the offering and, thus giving the contactor a competitive advantage, without which the contractor may not have secured the work.

No doubt the contractor in its defense would strenuously argue that payments to expedite permits, visas, and licenses are legal “facilitating payments” to speed up routine government actions. What does and does not constitute a facilitating payment is well beyond the scope of this paper as it is a topic of some debate. Suffice it to say that the size of the so-called facilitating payment (“tens of thousands of dollars” or more as opposed to a few hundred pesos) might spell the difference between freedom and incarceration.

### **III. Payments or the provision of luxury items to union officials are illegal under US law and may violate both The Travel Act and the FCPA.**

On any self-perform, direct hire project, obtaining the cooperation of labor and maintaining labor harmony is mission critical. Securing labor stability in challenging locales where there are often competing unions with distinctly different political agendas, such as in Venezuela, often requires a “carrot and stick” approach, with the carrot sometimes coming in the form of “special treatment” for one union and its officials who are in competition with another union. Moreover, in emerging economies there may be an absence of highly skilled craftsmen, such as welders or pipefitters, requiring extensive training of the local labor force, the importation of skilled labor from other countries, or both. Ensuring the safety of imported labor and preventing labor disturbances once such labor appears at site may also require “special treatment.”

In the US, securing union peace through monetary payments or the provision of things of value (such as motor vehicles) has long ago been outlawed by the Taft-Hartley Act of 1947, which makes it unlawful to “pay, lend, or deliver or agree to pay, lend or deliver, any money or other thing of value” to labor representatives, labor unions, or to any officer or employee thereof for the “purpose of” or with the “intent to influence any of his actions, decisions, or duties.”<sup>43</sup> As the regulations implementing Taft-Hartley make clear, “[t]he applicability of the Act is limited to the activities of persons or organizations within the territorial jurisdiction of the United States.”<sup>44</sup>

Accordingly, as implemented, Taft-Hartley does not have extra-territorial reach—*or does it?*

Recall that under the Travel Act, “bribery,” which is defined generally to mean bestowing something of value to a person “to pervert his judgment or corrupt his conduct,” is illegal if done “in violation of the laws of the *State* in which committed *or of the United States*.”<sup>45</sup> While there is yet no case on point, it is conceivable that the Department of Justice

may apply the Travel Act in the event foreign union officials or on-site union representatives are provided things of value by a US citizen or a US domiciled company (or foreign subsidiary of a US domiciled company) to secure a benefit, such as to avert a strike or to secure agreement to import foreign labor. Such payments would clearly violate Taft-Hartley, thus potentially providing the predicate US law violation to support a Travel Act charge.

A further complicating factor in labor relations outside of the US is the fact that in certain countries, most notably China, there is little, if any, distinction between the Government and the union. Specifically, the All-China General Labor Federation (the sole national trade union consisting of 193 million members) is deeply intertwined with the Chinese Communist Party and is not considered by the International Confederation of Free Trade Unions to be independent of the Government of China.<sup>46</sup> As such, the provision of anything of value to the All-China General Labor Federation with the intent to obtain or retain business<sup>47</sup> (such as acquiescence to the importation of skilled labor from other countries in order to meet schedule guarantees) could be construed as a corrupt practice under the FCPA.

Applying our hypothetical, providing pay-offs, automobiles, and trips abroad in exchange for labor peace or importation of foreign labor could trigger a Travel Act charge and, if the union is so intertwined with the government itself, a FCPA violation.

#### **IV. When confronted with material violations of law, breach of fiduciary duty, or other similar violations, what are the ethical obligations of counsel under Sarbanes-Oxley and the ABA Model Rules?**

A large part of the rationale underpinning the 2002 passage of SOX in the wake of the Enron, Arthur Andersen, and Tyco corporate implosions was the widely held view that lawyers, and particularly in-house lawyers, shared a large portion of the blame. Many believed that these lawyers not only failed to interdict the fraud occurring under their noses, but were also either

actively or passively complicit in the fraudulent acts. For example, Enron’s Court-Appointed Bankruptcy Examiner went to some lengths to single out the company’s CLO, as well as four other high-ranking in-house lawyers, concluding in his Final Report that they had all “committed malpractice” and were in “breach of their fiduciary duties.”<sup>48</sup> According to the Bankruptcy Examiner, Enron’s CLO “rarely provided legal advice to the Enron Board . . . and failed to inform himself of the facts and the governing law so as to enable proper execution of his responsibilities.”<sup>49</sup> As to the other senior Enron lawyers, one reaped a whopping \$994,174 windfall when she invested, without disclosure, \$5,826 in an Enron fund called “Southampton” that returned \$1 million in proceeds.<sup>50</sup> Another lawyer actively participated in the manipulation of Enron’s financial statements by creating hedging transactions that the Examiner found to be “lacking any economic substance or rational business purpose.”<sup>51</sup>

In a twist of historic irony, Senators John Edwards and Jon Corzine introduced an amendment to the Public Company Accounting Reform and Investor Protection Act then being debated in the Senate in order to establish a federal “minimum standard of professional conduct” for lawyers “appearing and practicing” before the SEC and empower the Commission to discipline lawyers who transgress those standards.<sup>52</sup> In the words of Senator Edwards:

The truth is that executives and accountants do not work alone. Anybody who works in corporate America knows that wherever you see corporate executives and accountants working, lawyers are virtually always there looking over their shoulder. If executives and/or accountants are breaking the law, you can be sure that part of the problem is that the lawyers who are there and involved are not doing their jobs. . . . With Enron and WorldCom, and all the other corporate misconduct we have seen, it is again clear that corporate lawyers should not be left to regulate themselves no more than accountants should be left to regulate themselves.<sup>53</sup>

The essential thrust of the Edwards Amendment requires lawyers (both internal and external) to report material violations of securities law up the corporate ladder—first to the CLO,

then to the CEO, and finally, if such reporting would be futile or otherwise absent “an appropriate response” within a “reasonable time,” to the board of directors.<sup>54</sup> In sum and substance, SOX section 307 is intended to place lawyers, and CLOs in particular, in the role of “gatekeepers” of corporate legality. This design was based on the assumption that these lawyers are “independent professionals who are so positioned that, if they withhold their consent, approval, or rating, the corporation may be unable to effect some transaction or to maintain some desired status.”<sup>55</sup>

In light of the near collapse of the US economy commencing in late 2008 (the effects of which reverberate to this day), it is fair to say that the SOX imposed role of lawyer as “gatekeeper” has utterly failed to rein in, prevent, or in any respect avoid fraud—particularly in the financial sector. The same can be said of the ABA’s half-hearted amendments to Rules 1.13 (“Organization as Client”) and 1.6 (“Confidentiality of Information”) of the Model Rules of Professional Conduct in 2003, which were adopted in the hopes of avoiding even more severe federal intervention in the regulation of attorney professional conduct.<sup>56</sup>

To attempt to understand why the SOX “gatekeeper” function has failed, we must first examine how the SEC implemented SOX section 307 and then understand the realities of in-house legal practice.

As implemented, the “gatekeeper” responsibilities apply only to lawyers (in-house and external) “appearing and practicing” before the SEC.<sup>57</sup> As defined in section 205.2 of the implementing regulations, “appearing and practicing” is very broadly defined to mean the transaction of business with; the representation before; or the preparation, incorporation, and submittal of information to the SEC in any type of document.<sup>58</sup> As a practical matter for in-

house counsel of publically traded corporations, such a definition covers virtually everyone in the legal department. In one form or another, each attorney in the legal department will submit information that will be incorporated into documents filed with the SEC.

What triggers an “up the ladder” reporting obligation is “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 ongoing, or is about to occur.”<sup>59</sup> Plain English, this is not, for the standard contains a double negative, making it difficult to understand and nearly impossible to actually enforce, placing upon the Commission the herculean task of proving two negatives.<sup>60</sup> Moreover, while the term “violation” is broadly defined to mean “a violation of US, federal or state securities law, a material breach of fiduciary duty arising under any federal or state law, or a similar material violation of any federal or state law,”<sup>61</sup> the term “material” is not defined. In its public release, the SEC advised that the term should be read as understood under federal securities laws; namely, a fact is material if there is “a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”<sup>62</sup> Again, this is not exactly clear and unambiguous guidance.

The further qualification that the “material violation” be “reasonably likely” adds additional murkiness to the applicable standard. Again, referring back to the SEC’s adopting release, “[t]o be ‘reasonably likely’ a material violation must be more than a mere possibility, but it need not be ‘more likely than not.’”<sup>63</sup> As reported by one commentator, “SEC staff members in 2003 unofficially stated publicly that ‘reasonably likely’ means less than ‘more probable than not’ and that conduct in the 20%–40% range of likelihood should trigger a report.”<sup>64</sup> Relying on the oral statements of certain SEC staff members made at a long forgotten loss prevention



seminar in 2003 does not exactly instill enduring confidence that the professed meaning would be adopted by the Commission or a court.

The ABA's reluctant amendments to Rules 1.13 and 1.6 of the Model Rules of Professional Conduct likewise provide little in the way of unambiguous guidance when Counsel is confronted with what she believes to be credible evidence of illegal conduct or breach of fiduciary duty. In the wake of the public's perception that lawyers contributed to the spectacular corporate implosions of Enron, Tyco, and Worldcom, among others, the ABA formed a Task Force on Corporate Responsibility which recommended certain revisions to the ABA House of Delegates who, by a slim margin, adopted the Task Forces' recommendations.<sup>65</sup> The revised Model Rule 1.13(a) emphasizes that in the context of organizational representation, the attorney represents the entity, not management.<sup>66</sup> While this is an easy statement to make, in practice it is nearly impossible to apply, for the corporate entity is a legal fiction that cannot act independently of management. Moreover, in-house attorneys, particularly the CLO, report to management, who reviews and determines, among other things, compensation and job performance. Conflating management with the corporate entity is the inevitable byproduct of the fact that management, particularly the CEO, holds singular power over the career trajectory and pecuniary well-being of the CLO.

Rule 1.13(b) then requires that when the lawyer "knows" that a constituent of the organization is committing, or intends to engage in, a violation of law that "reasonably might be imputed to the organization," and is "likely to result in substantial injury" to the organization, the lawyer shall report the matter to a "higher authority," unless the lawyer "reasonably believes that it is not necessary in the best interest of the organization not do so."<sup>67</sup> Parsing the language of Rule 1.13(b), one can readily see that the Rule contains a great deal of ambiguity, creating uncertainty as to when counsel must report up the ladder.

In particular, Rule 1.13(b)'s knowledge requirement is exceedingly narrow. As defined by the Model Rules, the term "knows" means "actual knowledge of the fact in question."<sup>68</sup> Given this definition, counsel is not necessarily obligated to independently investigate the veracity of managements' representations, which runs counter to a lawyers' basic instinct to assume that a declarant is, if not exactly lying, at least coloring the truth to fit his or her perception or otherwise painting a picture in a light most favorable. Experienced counsel know that getting closer to some semblance of objective fact inevitably requires the asking of questions not only directed to the declarant, but to others with knowledge of the circumstances in question, which the ABA Model Rules do not require.

The concept that the act or decision in question "reasonably might be imputed to the organization" is also highly subjective and ambiguous, giving individual counsel wide latitude to subjectively determine what may or may not be imputed. The "substantial injury," requirement further constricts the applicability of the Rule. While the Rule does not explicitly define what "substantial injury" means, the ABA Task Force described the circumstances as "[an] extraordinary circumstance of a significant failure of governance that puts or threatens to put the interest of the organization into serious jeopardy."<sup>69</sup>

But the greatest loophole of all is the final qualifier of Rule 1.13(b); namely that reporting up the ladder is not required if the lawyer "reasonably believes it is not necessary in the best interest of the organization not do so."<sup>70</sup> As is often the case, public reporting of adverse financial information (such as significant cost overruns on a lump sum turnkey project) will have a significant negative effect on share price. It is not difficult to foresee that a bright lawyer who

prides him or herself on innovative problem solving might conclude that it is not in the best interest of the “organization” to go up the ladder and over the heads of senior *project* managers to senior *corporate* managers, such as the CEO or COO, to tell them what they should already know, but may be refusing to recognize.

The amendments to Model Rule 1.6, which expand the exceptions specifying the instances in which client confidences may be disclosed beyond the avoidance of “certain death or substantial bodily harm,”<sup>71</sup> are of no use to the lawyer seeking guidance on how to faithfully discharge the gatekeeper functions of SOX 307 and Model Rule 1.13(b). As revised, Model Rule 1.6 provides that a lawyer may (but is not required) to reveal confidential information to the extent the lawyer reasonably believes necessary: (1) “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another”; and (2) “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud.”<sup>72</sup>

What makes revised Rule 1.6 practically useless is the fact that the right to divulge confidential information is only triggered if the client has used the lawyer’s services to further the crime or fraud. While there certainly have been cases in which counsel is directly involved in malfeasance, it is far more typical that counsel becomes aware of the circumstance and is then confronted with the quandary of what to do about it. Rule 1.6 provides absolutely no guidance in this scenario.

Read by the light of self-interest (when counsel is compensated by stock grants and options) and in the spirit of being an executive management “team player” and “loyal agent,” of the CEO, it is not hard to imagine that some in-house counsel will likely find it not to be in the

best interest of the organization to report damaging information up the ladder (or out to a third-party)—particularly if there is a way to manage the problem with delicacy and inventiveness. The convoluted “up the ladder” reporting standard of SOX 307, which contains the double negative of being “unreasonable” for a prudent and competent lawyer “not to conclude” that it is reasonably likely that a material violation has occurred, provides further disincentives to discharge the intended gatekeeper function.

But beyond the many language flaws of SOX 307 and the Model Rules, in-house attorneys are strongly incentivized by the realities of human nature and in-house practice to manage problems in such a way as to avoid reporting up, particularly if that means going over the head of the CEO to the Board, for it will inevitably strain—if not outright destroy—the implicit bond of trust between general counsel and the CEO which may be fatal to counsel’s employment position. The enormous ambiguities of SOX 307 and Model Rules 1.13 and 1.6 simply gives permission, should in-house counsel so choose, to avoid taking a proactive stance, thus significantly diminishing (but by no means extinguishing) the likelihood that counsel will discharge the role of “gatekeeper.”

The undeniable fact that in-house counsel strive to add value to business operations and are under enormous pressure to find solutions does not mean, as some commentators argue, that “inside counsel’s situation—of being a mere employee, faithful agent, and team player—makes unethical behavior, at least in the form of acquiescence, likely.”<sup>73</sup> As discussed below, it is not so much the position or compensation structure of in-house counsel as employee, team player, and faithful agent and the attendant pressures of in-house practice that arise therefrom, nor the poorly drafted provisions of SOX 307 or the half-hearted amendments to the Model Rules, that have combined to ensure the failure of the SOX-intended counsel as “gatekeeper function.” Rather,

the gatekeeper function has failed because SOX 307 and most state employment laws afford *absolutely no protection* to the in-house counsel who faithfully serves as the gatekeeper and, as a result, reaps the ire of “the boss,” who has unfettered power to terminate at will the bothersome lawyer guarding the gate. In the words of one commentator:

Unlike outside lawyers, inside lawyers may get into employment disputes with their client, sometimes leading to their discharge by a co-agent. While outside lawyers also may be terminated by their clients, rarely do such acts threaten their livelihood as lawyers in private practice are typically diversified. Inside lawyers, on the other hand, may be faced with the dilemma of doing the right thing and losing one’s job, or obeying one’s boss and violating the law or other ethical mandates. The moral dilemma is exacerbated by the fact that, in many jurisdictions, inside lawyers have no legal redress against management retaliation.<sup>74</sup>

Unlike auditor and CFO terminations, a CEO may dismiss his CLO without having to provide notice to the Board or to shareholders pursuant to SEC Rule 8-K. For his or her part, the CLO cannot disclose the reasons for dismissal, for that would likely run afoul of Rule 1.6, which has led many courts to prohibit in-house counsel from contesting their discharge as wrongful, if that would require the disclosure of confidential information.

#### **V. Up the ladder and out the door. The fatal flaw in the “Gatekeeper” function.**

In our hypothetical, in-house Counsel has been confronted with credible evidence of commercial bribery (payments to private parties to secure a job and union officials to buy labor peace); potential governmental bribery, subject to a “facilitating” defense (payments to secure licenses, permits and visas); and schedule delays and cost overruns that if, unrecovered in substantial part, may breach the company’s banking covenants, threatening its very existence.

On the way to the airport to return home, the executive project director instructs Counsel not to breathe a word of what’s going on at the project to corporate, for he assures Counsel that all is under control as he has an “oral understanding” with his client counterpart that the client

will “take care of the contractor.” He calls this “*elegant currency*.” During the flight home, Counsel reviews the report of the hand-picked claims consultant, quickly concluding that while it is long on narration, it falls woefully short on analysis and evidentiary support. From her experience, and given what the area superintendents and controls engineer have told her, Division General Counsel concludes that the chances of successfully recovering in an arbitration all or substantially all of the amounts claimed and the required schedule extension are not high.

Mindful of the executive project director’s instruction not to breathe a word to corporate, Counsel meets with the CLO, who sent her on the exploratory mission to the project in the first place. After hearing her report, both lawyers then meet with the company’s COO, whose face begins to redden, and whose hands begin to shake as the lawyers report their findings. At the end of the report, the COO (who is visibly angry) says “you lawyers need to stick to practicing law, and leave project development and execution to those who know what they are doing.”

The COO then begins to savage the lawyers, saying, in a raised voice that “paying a few dollars to entertain private citizens isn’t illegal in their country and whoever heard of the Travel Act, which sounds like a bad Harlem Globe Trotter show. Paying a bit of grease to speed up visas, permits, and licenses is expressly permitted under the FCPA, so don’t come in here with heavy handed allegations of FCPA violations. As for buying off the union, that’s done all of the time. You said it yourself, while US law might make that a problem, the Feds say it won’t be applied outside of the US. Finally, neither of you have engineering degrees. You wouldn’t know how to put together a CPM schedule to save your life. So who are you to say that the project is a year late and over budget?” Without ceremony, the COO tosses the lawyers out of his office, with a stern warning that they need to keep their noses out of his business, for lawyers

“know nothing about how projects really come together,” and he has “all the faith and confidence in the executive project director who will make things right.”

What should the lawyers do now? Should they go straight to the CEO? Should they gather more facts by talking to other project personnel? Can they follow the instructions of the executive project director and the COO to keep their noses out of the project’s business, relying on their representations that matters will be made right?

Ideally, we would expect Counsel to gather additional facts before providing any findings to the CEO, even though Model Rule 1.13 could be read as not requiring independent investigation. Applying SOX 307’s “up the ladder” trigger, can it be said on the facts currently known that Counsel has “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 ongoing, or is about to occur”? Even if this standard can be understood, do payments made to private parties and to foreign union and government officials to ensure labor peace and facilitate routine services amount to “material violations” of “securities law, breaches of fiduciary duties or similar violations”? Perhaps, but further investigation probably would be prudent before the CLO runs to the CEO with his “hair on fire.”

Assume that additional facts have been gathered and they show, among other things, that payments to the private parties amounted to more than two million dollars; that the so-called facilitating payments totaled nearly \$5 million; and that the “perks and presents” to the union officials totaled more than a million dollars. When briefed on the massive size of the payments, external counsel advises that there is potential exposure to the Travel Act and FCPA, though external counsel views are only “preliminary.”

As for schedule delay and cost increases, a “red team” independently formed and led by the corporate head of project controls (a one legged crusty former iron worker who went back to college after a horrific fall that nearly cost him his life) assessed the project to be more than a year late, and over budget by at least \$350 million—and rising, since the rainy season has come early. The rain has also been worse than usual, but not beyond a 100-year storm level, providing no chance to successfully claim *force majeure*. Combined with the liquidated damages of \$110 million, the company would be in breach of its banking covenants unless delays and cost overruns are recovered by way of claims. The red team evaluated the claims prepared by the claims consultant and while some components have some merit, many others do not. Worse still, it is based on a “total cost” approach, which cannot succeed under applicable law. Must Counsel report up the ladder now?

Armed with the new information, the CLO believes he has no choice but to inform the CEO of the factual investigation and red team findings and the preliminary views of external counsel on the Travel Act and FCPA. The CLO makes an appointment to see the CEO the following week—when the boss comes back into the office from his summer home. Walking into the CEO’s cavernous office, the CLO is surprised to see the head of human resources.

The head of HR demands the CLO’s corporate ID, credit card, office keys and iPhone, and escorts him out the door, explaining that the CEO struggled over the weekend, but in the end concluded that “you just don’t fit in.”

This is not a wholly unheard of situation. For example, in December of 2008 the General Counsel of Bank of America was summarily terminated without explanation and told to leave immediately when he sought to discuss the Bank’s obligations to disclose to shareholders the massive additional losses that Merrill Lynch (who Bank of America was about to acquire) was



forecasted to incur.<sup>75</sup> In the words of the Bank’s CLO, Mr. Mayopoulos: “I was stunned. I had never been fired from any job, and I had never heard of the general counsel of a major company being summarily dismissed for no apparent reason with no explanation.”<sup>76</sup> Bank of America later explained that “firing of the GC was just a corporate downsizing.”<sup>77</sup> If Mr. Mayopoulos wanted to contest his dismissal, what recourse would he have? Answer: not much, which is the fatal flaw in the gatekeeper function foisted upon general counsel by SOX and Model Rule 1.13.<sup>78</sup>

As originally proposed, SOX 307 contained a “noisy withdrawal” provision, which would have required that counsel withdraw from the representation of the client in the event that remedial steps were not taken when presented with credible evidence of illegal activity, notify the SEC of the withdrawal, and disaffirm any possibly tainted documents.<sup>79</sup> As originally proposed, counsel would have been permitted to disclose to the SEC confidential information under certain conditions.<sup>80</sup> Under vigorous opposition from the ABA and the securities bar, “noisy withdrawal” was dropped from SOX.<sup>81</sup>

Even more troubling is the significant uncertainty as to whether the whistleblower provisions of SOX (sections 806 and 1107) apply to in-house counsel. The US Department of Labor (DOL) is the agency with jurisdiction over all SOX 806 whistleblower cases.<sup>82</sup> In a case filed by an in-house lawyer against his former employer, the DOL determined that the discharged lawyer was not permitted as a matter of federal common law to use any privileged or confidential information learned in the course of his representation to prove his claim.<sup>83</sup> On appeal, the Federal District Court for the Southern District of Texas affirmed the DOL’s decision.<sup>84</sup> The Fifth Circuit reversed in part on jurisdictional grounds.<sup>85</sup> Whether in-house counsel may sue for retaliatory discharge is a matter left to state law, which is a patchwork of

conflicting opinions. For example, New York has refused to recognize a wrongful discharge claim for inside counsel if client confidences must be disclosed to prove the claim.<sup>86</sup> In a formal ethics opinion, the ABA has determined otherwise.<sup>87</sup>

One commentator explains the reason why a majority of courts have refused to allow the pursuit of wrongful discharge claims if client confidences are involved thusly:

[C]ourts fear that the recognition of the tort of retaliatory discharge would significantly impair the special relationship of trust between attorneys and their de facto clients by chilling communications. Accordingly, inside lawyers' special role as employees and, thus, being lawyer-advocates requires them to potentially sacrifice their economic livelihood in order to protect the "integrity of the legal profession".<sup>88</sup>

While a noble, if not anachronistic notion, falling on one's sword for the "integrity of the legal profession" is little solace to the spouses, sons, daughters and other dependent family members of the lawyer summarily dismissed for no good reason and now bereft of income and employment opportunity, all because counsel was fool enough to accept what Congress and the ABA told him to do: act as gatekeeper against management malfeasance.<sup>89</sup> Adding to the untenable position of in-house counsel is the growing risk that institutional shareholders will sue internal counsel, along with other officers and directors, when malfeasance, such as foreign bribery, comes to light. One recent example of this is the California State Teachers Retirement System's derivative suit against the officers and directors of Wal-Mart (including three in-house lawyers), which arose from allegations of widespread bribery in Mexico. However this case turns out, it demonstrates that in-house counsel are between the proverbial "rock and a hard place." Even more recently, the General Counsel to Joe's Crab Shack, Edward Engel, was sued by shareholders over a number of accounting errors in the registration statement for the Joe's Crab Shack \$80 million initial public offering.<sup>90</sup> As is evidenced from these examples, counsel is effectively forced to either take up the role as "gatekeeper" against malfeasance, risking

summary termination without right of redress, or acquiesce in the malfeasance and be sued by shareholders. Either way, counsel's career (if not his reputation) will be forever altered. Even if SOX permitted a noisy withdrawal, and state law recognized claims for wrongful discharge, many, if not most, lawyers would do all they could to avoid taking such actions, for to do so could likely forever stigmatize them within the legal community, effectively forcing them out of their chosen profession.

So, what can be done for what appears to be an “up the ladder and out the door” outcome for those poor souls unfortunate enough to find themselves having to act as the gatekeeper? CLOs must be accorded the same protections as CFOs and auditors. The SEC should require that a Form 8-K be filed upon the departure of the CLO. More than anything, this will stay the capricious hand of a mercurial or recalcitrant CEO in search of more uninterested and pliable counsel. It will also strengthen the resolve of CLOs to do what they have been educated and trained to do, and what their character and integrity compels them to do: stand firm against material violations of securities law, breaches of fiduciary duties, or other similar violations of law.

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<sup>1</sup> The Travel Act provides:

- a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—
  - 1) Distribute the proceeds of any unlawful activity; or
  - 2) Commit any crime of violence to further any unlawful activity; or
  - 3) Otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,And therefore performs or attempts to perform—
  - A. An act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
  - B. An act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.
- b) As used in this section
  - i. “Unlawful activity means
    - 1) Any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of

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- the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States,
- 2) Extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or
  - 3) Any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and
- ii. The term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.
- c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Attorney General.

Travel Act, 18 U.S.C. § 1952 (2006).

<sup>2</sup> *Id.* (emphasis added).

<sup>3</sup> Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, et seq. (1999).

<sup>4</sup> Travel Act, 18 U.S.C. § 1952 (2006).

<sup>5</sup> D. Bruce Gabriel, *The Scope of Bribery Under the Travel Act*, 70 J. CRIM. L. & CRIMINOLOGY 337, 341–42 (1979).

<sup>6</sup> See Robert F. Kennedy, Att’y Gen. for the United States, Statement Before Subcommittee No. 5 of the House Committee on the Judiciary in Support of Legislation to Curb Organized Crime and Racketeering 4 (May 17, 1961), available at <http://www.justice.gov/ag/rfkspeeches/1961/05-17-1961.pdf>.

<sup>7</sup> S. REP. NO. 644, at 3.

<sup>8</sup> *Perrin v. United States*, 444 U.S. 37 (1979).

<sup>9</sup> Gabriel, *supra* note 6, at 337–38.

<sup>10</sup> *Id.* at 338 n.9.

<sup>11</sup> Travel Act, 18 U.S.C. § 1952 (2006).

<sup>12</sup> Gabriel, *supra* note 6, at 338.

<sup>13</sup> *United States v. Pomponio*, 511 F.2d 953, 956–57 (4th Cir. 1975) (holding that payments made to a bank officer for the purpose of influencing his conduct with respect to loans made by his employer bank to corporations owned or controlled by defendants violated the Travel Act).

<sup>14</sup> *United States v. Perrin*, 580 F.2d 730, 734 (5th Cir. 1978) (holding that payments to an employee of a geophysical company in exchange for confidential geological exploration data from the employer violated the Travel Act).

<sup>15</sup> *Pomponio*, 511 F.2d at 956.

<sup>16</sup> *United States v. Brecht*, 540 F.2d 45, 50 (2d Cir. 1976).

<sup>17</sup> The UK Bribery Act of 2010 similarly applies not only to public officials, but also to anyone exercising any function connected with a business or performed in the course of employment. Bribery Act, 2010, c. 23, §§ 1, 3 (Eng.).

<sup>18</sup> *Perrin v. United States*, 444 U.S. 37, at 48.

<sup>19</sup> The UK Bribery Act 2010 similarly applies to foreign commercial bribery. The UK Bribery Act applies to any entity which “carries on a business” in the UK. While there remains some uncertainty as to precisely what is required to satisfy this test, the UK Serious Fraud Office, which is responsible for enforcing the Bribery Act, has suggested that it will treat foreign parent companies as subject to the Bribery Act simply by virtue of having a local subsidiary in the UK. Provided that a company has a local subsidiary in the UK, it can be held liable under the UK Bribery Act for any bribes paid on its behalf for any “associated person” anywhere in the world. Bribery Act, 2010, c. 23, §§ 7, 12 (Eng.).

<sup>20</sup> Mike Emmick, *The Travel Act – The FCPA’s Red-Haired Stepchild*, THOMSON REUTERS NEWS & INSIGHT, Feb. 1, 2012, available at [http://newsandinsight.thomsonreuters.com/Legal/Insight/2012/02\\_-\\_February/The\\_Travel\\_Act\\_%E2%80%93The\\_FCPA\\_s\\_red-haired\\_stepchild/](http://newsandinsight.thomsonreuters.com/Legal/Insight/2012/02_-_February/The_Travel_Act_%E2%80%93The_FCPA_s_red-haired_stepchild/).

<sup>21</sup> *United States v. Control Components, Inc.*, No. 09-00162 (C.D. Ca. 2009).

<sup>22</sup> Plea Agreement at 2, *United States v. Control Components*, No. 09-00162 (C.D. Ca. 2009).

<sup>23</sup> *Id.* at 11, 13.

<sup>24</sup> C.M. Matthews, *Seventh CCI Exec Pleads Guilty in FCPA Case*, June 15, 2012, available at <http://blogs.wsj.com/corruption-currents/2012/06/15/seventh-cci-exec-pleads-guilty-in-fcpa-case/>.

<sup>25</sup> *Id.*

<sup>26</sup> The FCPA makes it a crime to (1) “willfully”; (2) “make use of the mails or any means or instrumentality of interstate commerce”; (3) “corruptly”; (4) “in furtherance of an offer, payment promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to”; (5) “any foreign official”; (6) “for purposes of [either] influencing any act or decision of such foreign official, political party, or candidate, in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage”; (7) “in order to assist such [corporation] in obtaining or retaining business for or with, or directing business to, any person.” Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-2, 78ff (1999).

<sup>27</sup> *United States v. Kay*, 359 F.3d 738, 746 (5th Cir. 2004).

<sup>28</sup> *Kay*, 359 F.3d at 756.

<sup>29</sup> *Id.* at 740, 762.

<sup>30</sup> *United States v. Kay*, 513 F.3d 432, 439 (5th Cir. 2007).

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Similar to ABA Model Rule 1.13 (Organization as Client), TRPC 1.12 provides, *inter alia*, that “...the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization (b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that: (1) an officer, employee or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization; (2) the violation is likely to result in substantial injury to the organization; and (3) the violation is related to a matter within the scope of the lawyer’s representation of the organization.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.12 (2005).

<sup>35</sup> *Kay*, 513 F.3d at 439.

<sup>36</sup> *Id.* Under the UK Bribery Act, while lawyers working in-house are likely to be subject to the internal notification obligations embedded in their employment contracts, they are generally not subject to any requirement to notify suspected criminal activity to law enforcement agencies. The only circumstance in which such a positive disclosure obligation arises is under UK money laundering legislation (the Proceeds of Crime Act 2002). Lawyers working in the “regulated sector,” which includes transactional property or corporate work, are required to file “suspicious activity reports” (SARs) if they have reasonable grounds to suspect that another person, whether or not their client, has been engaged in money laundering. Proceeds of Crime Act, 2002, c. 29 § 330, sch. 9 (Eng.).

<sup>37</sup> *Id.* at 439–40.

<sup>38</sup> *United States v. Kay*, 200 F. Supp.2d 681, 682, 687 (S.D. Tex. 2002).

<sup>39</sup> *Kay*, 359 F.3d at 756.

<sup>40</sup> *Kay*, 513 F.3d at 441–42 (discussing trial testimony).

<sup>41</sup> *Id.* at 442.

<sup>42</sup> Unlike the US FCPA, the UK Bribery Act does not include any carve-out or defense in respect of facilitation payments, which are therefore illegal under English law. Nevertheless, the UK authorities, including the SFO, recognize the practical realities of doing business in certain jurisdictions and have strongly hinted that, while they cannot condone facilitation payments, they are unlikely to be the subject of enforcement action, and particularly so where there is evidence that the company in question has done what it reasonably can to phase out such payments and/or to minimize their incidence. Richard Alderman, Director, Serious Fraud Office, Address at the 2011 Russia Legal Seminar (June 9, 2011), *available at* <http://www.sfo.gov.uk/about-us/our-views/director-s-speeches/speeches-2011/russia-legal-seminar-2011,-london.aspx>.

<sup>43</sup> Taft-Hartley Act, 29 U.S.C § 186 (1947).

<sup>44</sup> 29 C.F.R. § 451.6.

<sup>45</sup> Travel Act, 18 U.S.C. § 1952 (2006) (emphasis added).

<sup>46</sup> *Membership Required: Global Firms Operating in China Are Being Pressured to Sign Up With a Government-Affiliated Union Now, Or Pay More Later*, THE ECONOMIST, July 31, 2008, *available at* <http://www.economist.com/node/11848496>.

<sup>47</sup> Here, once more, the UK Bribery Act differs from the US FCPA in that it contains no intent requirement. Rather, under the UK Bribery Act, companies are held strictly liable for any bribes and can only avoid conviction if they can establish an affirmative defense of having “adequate procedures” in place to prevent bribes from being paid on their behalf. This provision gives the company the opportunity to prevent that a rogue individual was responsible, or that it was a “one off” incident rather than an overarching organizational failure. Bribery Act 2010, 2010, c. 23, § 7 (Eng.).

<sup>48</sup> Final Report of Neal Baston, Court-Appointed Examiner, *In re Enron Corp.*, No 01-16034 at 52–55 (Bankr. S.D.N.Y. Nov. 4, 2003), *available at* [www.concernedshareholders.com/CCS\\_ENRON\\_Report.pdf](http://www.concernedshareholders.com/CCS_ENRON_Report.pdf).

<sup>49</sup> *Id.* at 52–54.

<sup>50</sup> *Id.* at 53.

<sup>51</sup> *Id.*

<sup>52</sup> Sung Hui Kim, *The Banality of Fraud: Re-Situating The Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1035–36 (2005).

<sup>53</sup> 148 CONG. REC. 12,519 (2002)

<sup>54</sup> Kim, *supra* note 49, at 1037–38.

<sup>55</sup> Kim, *supra* note 49, at 986 n.11.

<sup>56</sup> *Id.* at 1036 n.337.

<sup>57</sup> Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205 (2003).

<sup>58</sup> The text of section 205.2 reads, in part, that “Appearing and Practicing before the Commission means “(i) transacting any business with the Commission, including communications in any form; (ii) representing an issuer in an SEC investigation, inquiry, information request, or subpoena; (iii) providing advice in respect to securities laws, rules or regulations regarding any document that the attorney has noticed will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advise in the context of preparing or participating in the preparation of, any such document; or (iv) advising an issuer as to whether information or a statement, opinion, or other writing is required . . . to be filed with or submitted or incorporated into any document that will be filed with or submitted to, the

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Commission.” Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205.2 (2003).

<sup>59</sup> *Id.* § 205.2(e) (emphasis added).

<sup>60</sup> As written, the standard violates the SEC’s “plain English” rules, which requires the Commission to “. . . draft the language . . . so that at a minimum it substantially complies with each of the following plain English writing principles: . . . (vi) No multiple negatives.” Presentation of Information in Prospectuses, 17 C.F.R. § 230.421 (2011); *see also*, Kim, *supra* note 17, at 1049.

<sup>61</sup> Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205.2(i) (2003).

<sup>62</sup> Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 33-8185, 79 SEC Docket 1351 (Jan 29, 2003).

<sup>63</sup> *Id.* at 1727.

<sup>64</sup> Kim, *supra* note 49, at 1050.

<sup>65</sup> Caroline Harrington, *Attorney Gatekeeper Duties in an Increasingly Complex World: Revisiting the Noisy Withdrawal Proposal of SEC Rule 205*, 22 GEO. J. LEGAL ETHICS 893, 900 (2009).

<sup>66</sup> MODEL RULES OF PROF’L CONDUCT R. 1.13 (2004).

<sup>67</sup> *Id.*

<sup>68</sup> MODEL RULES OF PROF’L CONDUCT R. 1.0(f) (2004).

<sup>69</sup> AM. BAR ASS’N, REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE LIABILITY 45 (2003).

<sup>70</sup> MODEL RULES OF PROF’L CONDUCT R. 1.13(b) (2004).

<sup>71</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 (2004).

<sup>72</sup> *Id.*

<sup>73</sup> *See* Kim, *supra* note 49, at 1026.

<sup>74</sup> *Id.* at 1064.

<sup>75</sup> Debra Cassens Weiss, *How B of A’s GC Got Fired: Leave Now, and Leave Your BlackBerry Behind*, A.B.A. J., Nov. 17, 2009, available at [http://www.abajournal.com/news/article/how\\_b\\_of\\_as\\_gc\\_get\\_fired\\_leave\\_now\\_and\\_leave\\_your\\_blackberry\\_behind/](http://www.abajournal.com/news/article/how_b_of_as_gc_get_fired_leave_now_and_leave_your_blackberry_behind/).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Lest tears be shed for Mr. Mayopoulos, he became CEO of Fannie Mae on June 18, 2012.

<sup>79</sup> David Waters, *The Wisdom of Whistleblowing: Sarbanes-Oxley Act of 2002 and the “Noisy Withdrawal” Provision*, 34 J. LEGAL PROF. 411, 412 (2010).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> OSHA Fact Sheet, Filing Whistleblower Complaints under the Sarbanes-Oxley Act, available at <http://www.osha.gov/Publications/osha-factsheet-sox-act.pdf> (advising employees to file whistleblower complaints with the Department of Labor).

<sup>83</sup> Willy v. The Coastal Corp., ARB Case No. 98-060, at 34–36 (Dep’t of Labor Feb. 27, 2004), *rev’d in part sub nom.* Willy v. Admin. Review Bd., 423 F.3d 483 (5th Cir. 2005).

<sup>84</sup> Willy v Coastal Corp., 647 F.Supp. 116, 118 (S.D. Tex 1986), *rev’d in part on other grounds*, 855 F.2d 1160 (5th Cir. 1988).

<sup>85</sup> Willy v Coastal Corp., 855 F.2d 1160, 1171–72 (5th Cir. 1988).

<sup>86</sup> Wise v Consol. Edison Co. of N.Y., Inc, 282 A.D.2d 335, 335–36 (N.Y. App. Div. 2000).

<sup>87</sup> ABA Comm. On Ethics and Prof’l Responsibility, Formal Op. 01-424 (2001) (“A Former In-House Lawyer May Pursue a Wrongful Discharge Claim Against Her Former Employer and Client as Long as Client Information Is Properly Protected. . . . We conclude that a retaliatory discharge claim or similar claim by an in-house lawyer against her employer is a ‘claim’ under Rule 1.6(b)(2).”).

<sup>88</sup> Kim, *supra* note 49, at 1065.

<sup>89</sup> In one recent highly publicized case of alleged corporate malfeasance; namely, the bribery scandal embroiling Wal-Mart in Mexico which involves allegations of direct complicity by in-house lawyers in rampant governmental bribery, on in-house counsel resigned because the allegations were buried and no action was taken. *See* David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 22, 2012, at A1.

<sup>90</sup> Complaint at 6, *Campton v. Ignite Restaurant Group, Inc.*, No. 4:12-cv-2196 (S.D. Tex. July 23, 2012).