

SUPPLEMENTAL STATEMENT OF THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS (APRL) IN REGARD TO THE PROPOSED MODEL RULE FOR REGISTRATION OF IN-HOUSE COUNSEL

APRL submits this Supplemental Statement in regard to the Proposed Model Rule for Registration of In-House Counsel recommended by the Council of the ABA's Section on Legal Education and Admissions to the Bar. The committee of APRL that drafted APRL's original Statement in Support of the proposed Model Rule has reviewed the Statement of the Association of Corporate Counsel (ACC) concerning the proposed Model Rule. ACC is an organization whose members are directly and specifically affected by the proposed Rule, and it brings a depth and breadth of experience and knowledge developed in the course of addressing the expanding role played by in-house counsel in the legal profession. Accordingly, its concerns and suggestions on the subject of in-house counsel registration are entitled to particular attention. Its statement advances nine recommended changes to the proposed Model Rule. APRL will address each of these recommendations below.

Expanded Eligibility for Registration – Foreign Admitted Lawyers

APRL strongly supports ACC's recommended change number II, expanding eligibility for registration as in-house counsel to lawyers admitted in foreign jurisdictions on the same footing as lawyers admitted in other U.S. jurisdictions. This recommendation of ACC coincides with the recommendation made by APRL in its original Statement supporting the proposed Model Rule, and ideally should be accompanied by a corresponding change to Model Rule 5.5(d). To date, at least four jurisdictions have acted to bring foreign admitted lawyers within their in-house counsel registration systems: Washington, Virginia, Delaware, and most recently, Connecticut. These steps evidence a recognition that the legal needs of multi-national corporations require structures that facilitate the provision of legal services across international borders no less than state lines.

Amnesty

APRL also supports in substance ACC's recommended change number III, the proposed inclusion of an "amnesty" provision in the Model Rule. This recommendation parallels a suggestion made by APRL in its original Statement on the Model Rule calling for "transition rules" that, like ACC's amnesty recommendation, would make it clear that such prior tenure as in-house counsel could not be grounds for denying registration or the basis for disciplinary charges based on UPL. This recommendation follows from the clear articulation by the Section on Legal Education and Admissions to the Bar of the rationale for adopting a registration rule. In its Report accompanying the proposed Model Rule, the Section emphasized that what it is proposing is "not a *de facto* licensing process," but rather "a straightforward registration process" that will "encourage in-house counsel to come forward and register" because "registration will inure to the benefit of the bar as well as to the benefit of the public." This purpose could be undermined if in-house counsel fear that by coming forward to register they could not only be refused registration but targeted for disciplinary action for the time they have spent as in-house counsel prior to the adoption of the Rule.

Some who were involved in the development of the Model Rule believe that amnesty is implicit and understood from the wording of the very first sentence of subsection A of the Rule. It provides that an unadmitted lawyer “employed exclusively by a corporation, association, or other non-governmental entity... shall register as in-house counsel within [xx] days of the commitment of employment as a lawyer or if currently so employed then within [xx] days of the effective date of this rule”. (emphasis added) Notwithstanding, APRL concurs with ACC that express commentary to the Rule clarifying the amnesty intended would be beneficial.

Pro Bono Representation by In-House Counsel

APRL also supports ACC’s recommendation V, which would eliminate the language of subsection C of the proposed Model Rule that limits the pro bono organizations for which in-house lawyers can render pro bono services to those approved by the jurisdiction’s registration authority. Such a limitation should not be embodied in the Model Rule. Permitting and encouraging in-house counsel to fulfill their professional obligation to provide a broad range of pro bono publico legal services should be unequivocal and robust.

Transferability of Registration

APRL also strongly supports ACC’s recommendation VIII, which would provide easy transferability of registered in-house counsel status when a lawyer moves from one organizational employer to another. Such a provision was also suggested in APRL’s original Statement under the heading of “Mobility of In-House Counsel to Move Between Organizational Employers.”

In-House Counsel Provision of Legal Services to Employer-Sponsored Entities

ACC’s recommendation number IV would expressly provide in subsection B (1) that registered in-house counsel may provide legal services to “employer-sponsored entities and their fiduciaries,” as well as to “organizational affiliates” of the registrant’s employer. APRL supports this recommendation, which seeks to clarify that in-house counsel may provide legal services to, for example, a company’s benefit plans, which under ERISA must be independent of the sponsoring company.

APRL believes, however, that whether or not this change is adopted, the original language of the Model Rule is adequate to permit in-house counsel to provide services to such plans. This is because the phrase “organizational affiliates” is not used in sub-section B (1) in the narrow SEC sense of companies under common control. This is a reasonable reading because the word “including,” which introduces the phrase “entities that control, are controlled by, or under common control with the employer,” makes what follows it illustrative of and not an exhaustive list of the kinds of entities for which the in-house counsel may provide services. This view is supported by the language of Subsection A in its description of what an in-house lawyer is: a lawyer employed exclusively by “a corporation, association, or other non-governmental organization.” Of these three different types of entities, only a corporation has “affiliates” in the SEC sense of entities under common control. If an “association” or a generic “other non-

governmental entity” may also have “organizational affiliates,” this must mean that they need not be under common control like affiliates in the SEC sense. Therefore, an ERISA benefit plan, independent of the related employer company, may also be an “organizational affiliate.”

Remaining ACC Recommendations

APRL believes that recommendation IX, which would provide that time spent as registered in-house counsel qualifies as active practice in satisfying “5 of 7” or similar rules regulating admission on motion, is a good idea, but because it goes beyond the central focus of the in-house counsel registration Rule, it should be visited at a later time along with other issues involving the relationship between registered in-house counsel status and various parts of Model Rule 5.5.

APRL takes no position with respect to ACC recommendations I, VI, and VII.