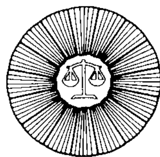

JAPAN FEDERATION OF BAR ASSOCIATIONS
1-3, KASUMIGASEKI 1-CHOME, CHIYODA-KU, TOKYO 100-0013 JAPAN
TEL: +81 (0) 3 3580 9841 FAX: +81 (0) 3 3580 2866 (International) TEL: 03 3580 9841 FAX: 03 3580 2866 (Japan)

IN/ 30 /2002
December 14, 2002

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

Dear Mr. Secretary:

Re: File No. 33-8150.wp
Comment to Proposed Rule: Implementation of Standards of Professional Conduct for Attorneys.

The Japan Federation of Bar Associations (*Nihon Bengoshi Rengokai*) (the "Federation") is a mandatory membership organization of all attorneys registered to practice law in Japan ("Japan Attorneys").

The intent of this letter is to address with you the Federation's concerns relating to the proposed rules under Section 307 of the Sarbanes-Oxley Act of 2002 for the implementation of standards of professional conduct for attorneys (the "Proposed Rules") with respect to attorneys appearing or practicing before the Securities and Exchange Commission (the "Commission").

It is our position that applying the Proposed Rules to foreign attorneys, and in particular Japan Attorneys, would be highly improper. Moreover, we believe that only attorneys practicing in the United States would have the ability to comply with the Commission's Proposed Rules to the extent that the Proposed Rules require judgments to be made under U.S. law. Last, the conflict between the attorney-client privilege rules in Japan and those set forth in the Proposed Rules would be problematic.

Infringement of the Autonomy of the Federation

The Commission's authority to supervise and discipline Japan Attorneys under the Proposed Rules would be inconsistent with the general power and autonomy of the Federation and various local bar associations in Japan.

The conduct of attorneys has always been a matter governed by the rules of the supervisory authority of the jurisdiction in which the attorney is licensed (in the case of Japan, the

Federation). This is, and should continue to be, recognized worldwide as a prevailing principle of international comity. The Federation, in conjunction with the local bar associations in Japan, is the autonomous body responsible for regulating Japan Attorneys independently of the Diet, the courts and government agencies. The Federation and the individual bar associations have the right to formulate rules and regulations for Japan Attorneys, including taking appropriate disciplinary action, pursuant to the Practicing Attorney Law of Japan (*Bengoshi-Ho*: Law No.205 of 1949, as amended). No Japanese governmental entity holds any disciplinary power over Japan Attorneys, apart from certain general authority with respect to criminal and other general administrative actions. Furthermore, the Japanese governmental authorities have historically respected the Federation's disciplinary power and autonomy.

The advantage of a system in which a regulatory body independently and autonomously regulates its attorneys is that of certainty. There can be no ambiguity as to which body of rules should be followed, and no attorney can become subject to the principles of professional responsibility of another jurisdiction without his or her prior knowledge and consent. The Proposed Rules purport to potentially apply to any person admitted to practice law in any jurisdiction, domestic or foreign, without providing for any reasonable limitations. For example, if the Proposed Rules required some stronger connection to the United States before attorneys were subject to its obligations, such as first requiring that Japan Attorneys be providing legal services through an office based in the United States, the Commission would seem to have a more reasonable basis for suggesting that Japan Attorneys should be subject to the statutes, rules and ethical standards adopted by the Commission. However, in the usual case, the role of the Japan Attorney is confined geographically to Japan and in scope to advising clients on Japanese law in connection with U.S. securities filings with the Commission. If the Proposed Rules were to apply to Japan Attorneys in such circumstances, the unfair, and presumably unintended, result would be to subject Japan Attorneys to Commission sanctions and penalties for assuming what could be a relatively subsidiary advisory role.

Therefore, the Proposed Rules have the potential of subjecting, unfairly, Japan Attorneys to inconsistent regulatory regimes. Thus, not only would the Proposal Rules be inconsistent with the principles of sovereignty and the comity of nations, but would also lead to multi-jurisdictional impracticalities for Japan Attorneys.

U.S. Legal Competence

Further, the Proposed Rules require foreign attorneys to interpret and make judgments as to U.S. law. This would be quite unreasonable and inappropriate given that Japan Attorneys would generally not have the expertise or capacity (nor the responsibility) to do so.

Most Japan Attorneys do not have the knowledge, ability or expertise to determine whether or not a Japanese issuer or its affiliates are in violation of U.S. law. To determine where a material violation exists under U.S. law (as the Proposed Rules purport to require) presumes that a foreign attorney is in a position to understand and advise on matters of U.S. law, and thus, in order for a foreign attorney to competently identify a "material violation of the securities laws" or a "material breach of fiduciary duty", the attorney should be qualified to practice in the U.S. Although there are some Japan Attorneys who are qualified to practice law in the U.S., as a practical matter, these Japan Attorneys do not practice U.S. law generally to the extent that familiarity with all U.S. federal law is not required for state bar membership

nor should they be expected to obtain the resources necessary to research U.S. federal and state securities law in order to make such determinations.

The underlying presumption of the Proposed Rules is that every attorney is knowledgeable of U.S. laws and is similarly qualified to act in compliance with U.S. laws. This is certainly misguided and also troubling to the extent that Japan Attorneys would seemingly be required to make judgments as to whether their clients have committed material violations of the U.S. securities laws or of their relevant fiduciary duties, notwithstanding the clear dilemma that they may neither trained in U.S. law nor qualified to practice in the U.S. Japan Attorneys, including those qualified in the U.S., would not be competent to determine whether a certain set of facts would be sufficient to constitute a material violation requiring action under the Proposed Rules. Moreover, interpreting the Proposed Rules would entail interpreting various terms which cannot be easily construed on their face, such as the concepts of "reasonably prudent and competent", "appropriate response" and "substantial injury". The Commission's stance would seem to necessitate foreign attorneys to retain U.S. counsel to answer these and similar questions on a case-by-case basis each and every time a potential interpretation issue presents itself. It is thus both unrealistic and improper to expect Japan Attorneys to be competent to interpret U.S. law. In light of the often limited role of foreign attorneys in transactions triggering the requirements of the Proposed Rules, it seems appropriate that the Commission should limit its discretionary or supervisory power under the Proposed Rules to U.S. attorneys who act in a more principal role in dealings with the Commission.

Conflicting Requirements under Proposed Rules and Japan's Practicing Attorney Law

One of the most significant effects of the Proposed Rules stems from the conflicting obligations imposed by the Japanese and U.S. legal regimes with respect to attorney-client privilege.

Proposed Rule 205.3(d) requires that where an attorney who has reported evidence of a material violation under paragraph 3(b) does not receive a reasonable response to his or her report and the attorney reasonably believes that a material violation is ongoing or is about to occur and is likely to result in substantial injury to the financial interest or property of the issuer or of investors, attorneys retained or employed by the issuer must disaffirm any opinion, document, affirmation, representation, characterization, or the like in a document that was filed with or submitted to the Commission, or otherwise incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading.

This obligation to so report to the Commission however, would in most instances result in a breach of Article 23 of Chapter IV of the Practicing Attorney Law of Japan. Article 23 provides that:

> A practicing attorney or a person who was previously a practicing attorney shall have the right and duty to maintain the secrecy of any facts which he came to know in the performance of his profession; provided, however, that this shall not apply when otherwise provided for by any law.

Since Japanese law does not provide any exception to Article 23 which would permit a Japan Attorney to report violations under the Proposed Rules to the Commission without the client's

express consent, Japan Attorneys will be unable to comply with the Proposed Rules without being in violation of their duty of confidentiality under the Practicing Attorney Law of Japan. As U.S. attorneys and lawmakers can appreciate, Article 23 imposes a duty of confidentiality on all Japan Attorneys which requires them to keep any privileged information obtained in the course of performing legal duties confidential, unless otherwise required under Japanese law. This duty of confidentiality is regarded as one of the most important duties imposed on Japan Attorneys and is regarded as a fundamental prerequisite to the proper representation of clients and rendering of legal services. Exemptions from this duty are limited to those permitted by statute enacted by the Diet, not rules or regulations prescribed by an agency of the government or other rule-making body. Even in cases where exceptions to the privilege rules apply, disclosure of confidential information is left to the sole discretion of the Japan Attorney.

While the Proposed Rules do provide that certain notifications by an attorney will not breach the attorney-client privilege, including Proposed Rules 205.3(b), 205.3(d)(3) and 205.3(e), these exemptions are limited in their usefulness to attorneys licensed in the U.S. and they are not consistent with the duties of confidentiality that Japan Attorneys owe to their clients under Japanese law. For this reason, any exemptions made available to attorneys under U.S. law in respect of violating the general attorney-client privilege rules will be of no assistance to Japan Attorneys who could be in violation of the laws and professional requirements of their home jurisdiction.

A further consideration not limited in relevance to Japan but nonetheless important here, is that the Proposed Rules may further have the undesirable effect of causing Japanese issuers to become less forthcoming in disclosing potentially material adverse information to their attorneys in the future. To the extent that an issuer or other client seeks legal advice from its attorneys, the Proposed Rules would seemingly chill the disclosure of necessary information insofar as the Proposed Rules purport to require the attorney to potentially disclose such information at some future point in time. Therefore, effective consultation between an attorney and its client-issuer can only be achieved if the confidentiality of all relevant information is assured of being maintained.

The purpose of Part 205 can be achieved by applying the Proposed Rules only to US Attorneys

In practice, Japan Attorneys usually play only a supporting role in assisting U.S. attorneys in the submission of registration statements and other securities filings with the Commission. In other words, the central role is generally undertaken by U.S.-qualified attorneys, while Japan Attorneys for the most part are necessary to assist in the filing process in the role of local counsel to Japanese issuers. The services Japan Attorneys render to Japanese issuers are thus usually not so considerable in substance as to warrant such severe compliance with regulations such as the Proposed Rules. This is reinforced by the fact that their assistance is generally furnished from within the physical boundaries of Japan. Thus, the culpability of Japan Attorneys under the Proposed Rules is not proportionately tempered to take such factors into consideration, and the Proposal Rules would have a disparate effect on Japan Attorneys.

For the reasons set out above, we request that the Commission exempt foreign attorneys who are not qualified to practice in the United States from the attorney-reporting duties under the Proposed Rules.

Should you have any questions concerning this letter, please contact us, as we would welcome the opportunity to be of assistance.

Sincerely,

Tohru Motobayashi

President

Japan Federation of Bar Associations