**Comment on § 240.21F-4(b)4(ii)**

In the exclusions from the definition of "original information", the exclusion for attorneys in § 240.21F-4(b)4(ii) should be no broader than necessary to comply with the applicable Rules of Professional Conduct. For example, under Rule 1.6 and Rule 1.9(c) of the New York Rules of Professional Conduct, lawyers are prohibited from using or revealing only "confidential information." Confidential information does not include all information "obtained" "as a result of the legal representation of a client" as § 240.21F-4(b)4(ii) appears to suggest. Under New York Rule 1.6:

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."

Both New York Rule 1.9(c)(1) and Model Rule 1.9(c)(1) also allow a lawyer to use protected information to the disadvantage of a former client "when the information has become generally known."

To be consistent with § 240.21F-4(b)4(i), the phrase "unless disclosure is authorized" in § 240.21F-4(b)4(ii) should be changed to "unless disclosure is permitted." This change is consistent with the approach in New York and Model Rules 1.6(a) and 1.9(c). Under New York Rule 1.6(a)(3) and Model Rule 1.6(a), a lawyer may reveal or use protected information if "the disclosure is permitted by paragraph (b)." Neither rule requires that the disclosure be "authorized." Similarly, both New York and Model Rules 1.9(c) allow a lawyer to reveal confidential information of a former client or use it to the disadvantage of the former client "as these Rules would permit..." Once again, the formulation is "permitted" not "authorized." If the proposed change is not made, the exception to the exclusion in § 240.21F-4(b)4(ii) could be construed more narrowly than that in § 240.21F-4(b)4(i). There is no reason for this.

In addition, § 240.21F-4(b)4(ii) should be revised to be consistent with New York and Model Rules 1.9(a) and (b). The definition of "original information" should not exclude information provided by a lawyer with respect to a former client about a matter that is not the "same" as or "substantially related" to the matter in which the lawyer represented the former client. Similarly, the definition of "original information" should not exclude information provided by a lawyer with respect to a client of the lawyer's former firm if the lawyer did not acquire protected information with respect to that client.