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May 20, 2011

The Honorable Mary L. Schapiro  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

Re: Preserving the Attorney-Client Privilege and the Lawyer's Existing Duty to Maintain Client Confidentiality in the Commission's Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934; File No. S7-33-10; Release No. 34-63237

Dear Chairman Schapiro:

On behalf of the American Bar Association, which has nearly 400,000 members, I urge you and your fellow Commissioners to ensure that the final version of the SEC's proposed rules for implementing the whistleblower provisions of Section 21F of the Securities Exchange Act of 1934 referenced above (the "Proposed Rules")<sup>1</sup> continues to adequately protect the attorney-client privilege, the confidential attorney-client relationship, and the fundamental right to effective counsel. In particular, I would like to address an important aspect of the Proposed Rules that is essential to maintaining our system of justice and of concern to all lawyers: the implications of the Proposed Rules to the lawyer's duty to maintain and preserve client confidentiality.

The ABA appreciates that, in proposing the rules, the Commission remained sensitive to these concerns and understood that providing whistleblower awards to lawyers who disclose privileged information they have received from clients during the course of their professional engagement creates significant ethical issues and could undermine clients' fundamental attorney-client privilege and work product protections. Unfortunately, at least one recent commenter has suggested that the Commission's proposed exclusions of lawyers from eligibility for whistleblower awards are overly broad and that the final rules should allow lawyers to receive such awards under circumstances that we believe would violate their clear ethical duties and professional responsibilities.

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<sup>1</sup> On January 4, 2011, the ABA Business Law Section's Federal Regulation of Securities Committee (the "Committee") submitted a detailed comment letter to the SEC regarding the Proposed Rules, which is available at <http://sec.gov/comments/s7-33-10/s73310-253.pdf>. Although the Committee's comments were not approved by the ABA House of Delegates or Board of Governors and hence represent the views of the Committee only, the ABA strongly agrees with the Committee that the Proposed Rules must not result in the violation of any existing lawyer professional obligations, including the obligation to maintain client confidences. See, e.g., the Committee's comments at page 8.

The ABA has serious concerns regarding these suggested changes to the Proposed Rules, and we believe that the arguments underlying the suggestions are flawed in a number of respects.

First, the commenter has suggested that, rather than disqualifying a class of lawyers from award eligibility, the Commission should instead limit the exclusion to specific information that is privileged, while still allowing the lawyer providing information to receive a whistleblower award. The ABA believes that these proposals mischaracterize the scope and extent of a lawyer's legal duty to preserve client confidences.

The confidential relationship between the client and the lawyer is sacred, and lawyers are ethically bound to maintain all confidential client information, not just that which is privileged or protected by the work product doctrine. Court rulings allowing the government to obtain and use non-privileged information from whistleblowers do so in the context of information not arising from the confidential lawyer-client relationship; the lawyer is never allowed to be the source of confidential client information, except in very narrow circumstances. Thus, our professional rules extend more broadly to any information relating to a representation. Comments [2] and [3] to Rule 1.6 of the American Bar Association's Model Rules of Professional Conduct (the "Model Rules"), which clearly set forth the scope and extent of the lawyer's duty to preserve client confidentiality, provide as follows:

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. .... This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Second, the ABA disagrees with the suggestion that excluding all lawyers in a retained law firm from eligibility for whistleblower awards—even those who may not have individual knowledge of the represented client—inappropriately limits potential sources of information. It is an established

principle of professional responsibility that when a client engages a law firm, all of the firm's lawyers owe a range of professional duties to the client. These include, among other things, maintaining client confidences, as well as compliance with rules relating to conflicts of interest. A lawyer at a law firm, who becomes aware of confidential information regarding a firm client by reason of his or her work at the firm, is clearly not entitled to disclose that information to third parties just because the lawyer has not personally worked for that client and has no individual knowledge of the client. We are also of the view that significant issues are implicated if an attorney who independently obtains information regarding misconduct involving a firm client discloses that information as a whistleblower rather than considering his or her professional obligations to disclose such information to the client.<sup>2</sup> The ABA believes that such a position would undermine the client's expectations of confidentiality and professional responsibility, and could chill client communications with lawyers, harming the confidential lawyer-client relationship.

Third, the ABA opposes the suggested changes to the Proposed Rules because allowing a lawyer to receive a whistleblower award as a result of a breach of his or her duty of confidentiality to a client would create an objectionable conflict of interest. Rule 1.8 of the Model Rules provides that, subject to certain exceptions, "a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client." In their representation of clients, lawyers should be focused solely on providing the most competent and professionally responsible representation, not on the benefits they may obtain were they to use for personal gain the information they have been provided by their clients.

The ABA is concerned that any provisions in the final rules that would entitle whistleblowers to collect substantial awards may create a strong incentive for a lawyer to compromise his or her ethical obligations and undermine the client confidence that the U.S. Supreme Court recognized in the *Upjohn* case as critical to assuring the continued effectiveness of the attorney-client privilege and the work product doctrine. A client's awareness that its attorneys may use information provided confidentially to obtain large whistleblower awards could well prevent the free flow of information necessary to the client's right to effective counsel.

Even if this is not likely to occur on a frequent basis, publicity about lawyers who have breached their professional obligations in order to obtain whistleblower awards may cause clients to reconsider the scope of the information they are willing to disclose to counsel, to the ultimate detriment of the quality of the legal representation counsel can provide. Rather than seeking to mine the information known to lawyers as a result of their confidential client relationships, the

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<sup>2</sup> We note that such conduct would also be inconsistent with Section 205.3(b) of the Commission's attorney conduct rules, which provides that "If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith." In addition, many law firms have internal policies, applicable to all attorneys in the firm, dealing with attorney conduct relating to firm clients. These policies have been implemented in order to permit the firms to satisfy their legal and professional obligations to their clients.

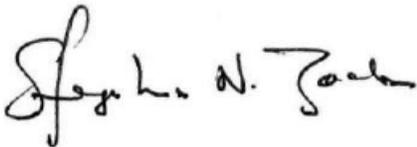
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Commission, in its final rules, should seek to protect the significant policy goals that confidentiality promotes.

We greatly appreciate the concern that the Commission has shown in many of its past policies to assure protection of client confidentiality, attorney-client privilege, and work product. As the Supreme Court noted in *Upjohn*, an uncertain privilege is little better than no privilege at all. Suggestions that attorneys can use information gained from their client relationships for the attorneys' own personal benefit would undermine the effectiveness of the privilege, deny the client's right to effective counsel, and would be contrary to the clear case law prohibiting such a use of confidential client information. We therefore urge the Commission to continue to be sensitive to this potential conflict in connection with its rulemaking.

Thank you for considering the views of the American Bar Association on this subject, which is of vital importance to our system of justice. If you have any questions regarding the ABA's concerns, please contact our Governmental Affairs Director, Thomas Susman, at (202) 662-1765, or the Chair of the ABA Business Law Section's Federal Regulation of Securities Committee, Jeffrey Rubin, at (212) 918-8224.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen N. Zack". The signature is fluid and cursive, with the first name "Stephen" being the most prominent part.

Stephen N. Zack

cc: The Honorable Luis A. Aguilar, Commissioner  
The Honorable Kathleen L. Casey, Commissioner  
The Honorable Troy A. Paredes, Commissioner  
The Honorable Elisse B. Walter, Commissioner  
Mark Cahn, General Counsel  
Robert Khuzami, Director, Division of Enforcement