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November 7, 2008

Adam J. Szubin, Director
Office of Foreign Assets Control
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220
Attn: Request for Comments (Enforcement Guidelines)

Re: Preserving the Attorney-Client Privilege, the Work Product Doctrine, and Employee Legal Protections in Connection with Interim Final Rule, "Economic Sanctions Enforcement Guidelines," FR Doc. E8-20704, 73 Fed. Reg. 51933 (September 8, 2008)

Dear Mr. Szubin:

On behalf of the American Bar Association ("ABA") and its more than 413,000 members, I write to express our concerns over certain key provisions in the above referenced interim final rule, "Economic Sanctions Enforcement Guidelines," and to urge the Office of Foreign Assets Control ("OFAC") to add language to the rule that would better protect companies' attorney-client privilege, work product, and employee legal rights. As Chair of the ABA Task Force on Attorney-Client Privilege, I have been authorized to express the ABA's views on these important issues.[1]

The ABA urges OFAC to modify the interim final rule to clarify that OFAC and its staff may not pressure Subject Persons—defined by the rule as "individuals or entities subject to any of the sanctions programs administered or enforced by OFAC"—to waive their attorney-client privilege or work product protections or take certain unfair punitive actions against their employees during OFAC investigations and enforcement actions. Enclosed is specific proposed language that we believe would achieve these goals without impairing the effectiveness of the interim final rule in any way, and we respectfully urge you to consider incorporating this language into the rule.

## The Importance of the Attorney-Client Privilege, the Work Product Doctrine, and Employee Legal Rights

The attorney-client privilege enables both individual and organizational clients to communicate with their lawyers in confidence, and it encourages clients to seek out and obtain guidance in how to conform their conduct to the law. The privilege facilitates self-investigation into past conduct to

[1] The ABA previously filed comments with the General Services Administration on June 20, 2008 expressing its views regarding an analogous proposed rule titled "Contractor Compliance Program and Integrity Reporting," FAR Case 2007-006, 72 Fed. Reg. 64019 and 73 Fed. Reg. 28407, which the ABA believes would erode essential attorney-client privilege, work product, and employee legal protections during the federal contracting process. Those comments are available at http://www.abanet.org/poladv/priorities/privilegewaiver/2008jun20_farcase_gsaltr.pdf

identify shortcomings and remedy problems, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

The ABA strongly supports the preservation of the attorney-client privilege and the work product doctrine and opposes governmental policies, practices and procedures that have the effect of eroding the privilege or doctrine. In addition, the ABA believes that it is equally important to protect employees' constitutional and other legal rights—including the right to effective counsel and the right against self-incrimination—when a company or other organization is under investigation. Unfortunately, the broad cooperation standards in the interim final rule requiring Subject Persons making voluntary self-disclosures to provide OFAC with "all relevant information" regarding an apparent violation threatens to undermine these fundamental rights in several different ways.

**Problems with the "Disclosure of All Relevant Information" Requirements of the Rule**

In the interim final rule, OFAC sets forth the criteria that it will consider in determining whether, and to what extent, a Subject Person should be granted credit for providing voluntary self-disclosure of an apparent violation of U.S. economic sanctions laws[2] and otherwise cooperating with agency staff as OFAC determines the appropriate enforcement response. The rule lists a total of six separate factors that OFAC may consider in evaluating cooperation. *See* Interim Final Rule, subpart G of part III, "Cooperation with OFAC," 73 Fed. Reg. 51938.

Although several of these cooperation factors outlined in the interim final rule are reasonable and appropriate, the ABA is concerned that factor no. 2 (requiring a Subject Person to provide OFAC with "all relevant information regarding an apparent violation"), factor no. 3 (requiring a Subject Person to research and disclose "relevant information regarding any other apparent violations"), and factor no. 5 (requiring a Subject Person to "cooperate with and promptly respond to, all requests for information") could be read to require waiver of fundamental attorney-client privilege, work product, and employee legal protections. *See* 73 Fed. Reg. 51938. In addition, we are concerned that the overly broad and undefined terms "cooperate," "all relevant information," and "all requests for information" contained in the rule could embolden OFAC and its staff to demand such waiver from companies and other Subject Person entities during investigations and enforcement actions.

The ABA believes that a broad interpretation of this language in OFAC's interim final rule, like the more explicit waiver policies previously adopted by the Justice Department, the Securities and Exchange Commission ("SEC"), the Department of Housing and Urban Development ("HUD"), the Environmental Protection Agency ("EPA"), and other agencies[3], could lead to a number of

[2] The sanctions laws cited in the rule include the International Emergency Economic Powers Act, the Trading with the Enemy Act, the Foreign Narcotics Kingpin Designation Act and other statutes, executive orders, regulations, orders, directives, or licenses administered or enforced by OFAC. *See* Interim Final Rule, 73 Fed. Reg. 51936.

[3] The Justice Department's cooperation standards outlined in the 2006 "McNulty Memorandum" pressured companies to waive attorney-client privilege and work product protections in many cases in return for receiving cooperation credit during investigations. The standards also forced companies to take certain punitive actions against their employees in many cases—such as not sharing information with them, firing them for asserting their Fifth Amendment rights, or not

profoundly negative consequences.

First, the ABA believes that this language in the interim final rule could lead to the routine compelled waiver of attorney-client privilege and work product protections during OFAC investigations and enforcement actions. Although the rule does not explicitly state that waiver is required in every situation, the broad language in the rule requiring Subject Persons to provide "all relevant information" and respond to "all requests for information" is likely to encourage OFAC staff, directly or indirectly, to pressure them to waive their privileges in order to receive cooperation credit. From a practical standpoint, the "financial institutions, businesses, [and] other entities" referenced in the rule will have no choice but to waive when encouraged or requested to do so because the risk of being labeled as "uncooperative" will have a profound effect not just on OFAC's enforcement decisions, but on the companies' public disclosure obligations, credit worthiness, stock price, and image. Therefore, this broad language in the interim final rule will likely exacerbate the "culture of waiver" problem caused by the Justice Department, SEC, and other federal agency policies.[4]

Second, the ABA is concerned that the broad cooperation language in the rule, like the waiver policies previously adopted by the Justice Department and other federal agencies, will further weaken the attorney-client privilege between companies and their lawyers, erode the work product doctrine, and undermine the companies' internal compliance programs. By making the privilege uncertain in the corporate context, these policies discourage companies from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. In addition, by creating an environment in which companies are expected to "research and disclose relevant information" regarding apparent violations and thereby waive their work product protections, these policies discourage the companies from conducting internal investigations that are designed to quickly detect and remedy misconduct. The ABA believes that OFAC and its staff can obtain the information they need from companies and other Subject Persons without pressuring them to waive these protections. For all these reasons, the ABA believes that the interim final rule as currently written will undermine, rather than enhance, compliance with the law.

Third, the ABA is concerned that the cooperation language in the rule—like the cooperation standards previously adopted by other federal agencies—could result in the erosion of employees' constitutional and other legal rights by pressuring companies to secure the employees' cooperation by any means necessary. The interim final rule includes several very broad cooperation considerations such as, "Did the Subject Person [i.e., individuals and entities subject to these

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paying their attorneys fees—in return for cooperation credit. On August 28, 2008, the Second Circuit ruled in *U.S. v. Stein, 07-3042 (2nd Cir., Aug. 28, 2008)* that these types of actions against employees violated their constitutional rights and the court upheld the dismissal of all charges against thirteen former KPMG employees. On the same day, DOJ replaced the McNulty Memorandum with new cooperation standards barring prosecutors from pressuring companies to waive their privileges or take punitive actions against their employees in return for cooperation credit. Unfortunately, similar coercive waiver policies continue to remain in effect at the SEC, EPA, HUD, and other federal agencies. Copies of all these agency policies are available at http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

[4] According to a March 2006 survey of over 1,200 corporate counsels, almost 75% believe that a "culture of waiver" has evolved in which federal agencies believe that it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client or work product protections. The detailed survey results are available at http://www.acc.com/Surveys/attyclient2.pdf. Although DOJ reversed its waiver policy in August 2008, the similar waiver policies still in effect at the SEC, HUD, EPA, and other agencies continue to perpetuate the culture of waiver.

regulations] provide OFAC with all relevant information regarding an apparent violation (whether or not voluntarily self-disclosed)?" and "Did the Subject Person cooperate with, and promptly respond to, all requests for information?" *See* Interim Final Rule, subpart G of part III, cooperation factor nos. 2 and 5, 73 Fed. Reg. 51938.

Given the historic practices of the Department of Justice and other federal enforcement agencies, the ABA is concerned that this type of generalized cooperation standard, without any restrictions, could allow Treasury enforcement officials to insist that companies extract cooperation from their employees by not paying their legal fees during investigations in violation of the employees' Sixth Amendment right to counsel, firing the employees unless they waive their Fifth Amendment rights against self-incrimination, or taking other punitive actions against the employees long before any guilt has been established—all in the name of "prompt" cooperation.[5] As a result, the actual implementation of the interim final rule is likely to weaken the presumption of innocence, overturn basic corporate governance principles, and violate the Constitution.

The ABA Task Force on Attorney-Client Privilege has prepared suggested changes to the interim final rule that would preserve fundamental attorney-client privilege, work product, and employee legal protections during OFAC investigations and enforcement actions while ensuring the agency's continued ability to obtain the important factual information it needs to effectively enforce the law.

The proposed amendment to the interim final rule enclosed herewith would accomplish these objectives by: (1) preventing OFAC and its staff from seeking privilege waiver from companies and other Subject Persons during investigations and enforcement actions; (2) preserving OFAC's ability to request important factual information from companies and other Subject Person entities as a sign of full cooperation without implicating broader privilege waiver concerns; (3) clarifying that a waiver of privilege should not be considered when assessing whether the company or other Subject Person provided full cooperation; and (4) recognizing that full cooperation credit can be given for providing factual information. The proposed amendment also would clarify that while OFAC and its staff may consider a company's reasonable efforts to secure its employees' cooperation as a factor in determining whether the company has fully cooperated during an investigation or enforcement action, the company should not be asked or expected to punish any employee who chooses to assert his or her legal rights.

We believe that the proposed amendment, if adopted by OFAC, would strike the proper balance between effective law enforcement and the preservation of essential attorney-client privilege, work product, and employee legal protections, and we urge you to consider it.

If you or your staff have any questions or need additional information about this vital issue, please ask your staff to contact me at (404) 527-4650 or Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098.

Thank you for considering the views of the American Bar Association on this subject, which is of such vital importance to our system of justice.

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[5]For a full discussion of the Justice Department's previous McNulty Memorandum and other similar federal agency waiver policies that remain in effect, please see the ABA's September 18, 2007 statement to the Senate Judiciary Committee, pgs. 11-15, available at http://www.abanet.org/poladv/priorities/privilegewaiver/20070918_mcnulty.pdf

Sincerely,

R. William Ide, III, Chair
ABA Task Force on Attorney-Client Privilege

enclosure

cc: Thomas M. Susman, Director, ABA Governmental Affairs Office
R. Larson Frisby, Senior Legislative Counsel, ABA Governmental Affairs Office

**PROPOSED AMENDMENT TO OFAC INTERIM FINAL RULE TITLED "ECONOMIC SANCTIONS ENFORCEMENT GUIDELINES," FR DOC. E8-20704, 73 FED. REG. 51933 (SEPTEMBER 8, 2008)**

**PREPARED BY THE AMERICAN BAR ASSOCIATION TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE**

(Excerpts of the interim final rule are reprinted below to provide context; proposed additions are underlined in blue; proposed deletions are struck through in red

**NOVEMBER 7, 2008**

## PART 501—REPORTING, PROCEDURES AND PENALTIES REGULATIONS

### …III. General Factors Affecting Administrative Action

The type of enforcement action undertaken by OFAC will depend on the nature of the apparent violation and the harm caused to the relevant sanctions program and its objectives. As a general matter, OFAC will consider some or all of the following General Factors in determining the appropriate administrative action in response to an apparent violation of U.S. sanctions by a Subject Person, and, where a civil monetary penalty is imposed, in determining the appropriate amount of any such penalty:

…*G. Cooperation with OFAC:*

1. *The nature and extent of the Subject Person's cooperation with OFAC.* Among the factors OFAC may consider in evaluating cooperation with OFAC are:

~~1.~~ a. Did the Subject Person voluntarily self-disclose the apparent violation to OFAC?

~~2.~~ b. Did the Subject Person provide OFAC with all relevant information regarding an apparent violation (whether or not voluntarily self-disclosed) other than information that is entitled to protection under the attorney-client privilege or work product doctrine?

~~3.~~ c. Did the Subject Person research and disclose to OFAC relevant information regarding any other apparent violations caused by the same course of conduct other than information that is entitled to protection under the attorney-client privilege or work product doctrine?

~~4.~~ d. Was the information provided voluntarily or in response to an administrative subpoena?

~~5.~~ e. Did the Subject Person cooperate with, and promptly respond to, all requests for information in a manner that does not result in a waiver of the attorney-client privilege or work product doctrine?

~~6.~~ f. Did the Subject Person agree to a statute of limitations waiver or tolling agreement, if requested by OFAC (particularly in situations where the apparent violations were not immediately notified to or discovered by OFAC)?

2. *Protection of Attorney-Client Privilege, Work Product, and Employee Legal Rights*.

a. OFAC staff responsible for investigations and enforcement actions ("OFAC staff") shall not take any action or assert any position that directly or indirectly demands, requests or encourages a Subject Person or a Subject Person's attorneys to waive the attorney-client privilege or the protections of the work product doctrine.

b. In assessing a Subject Person's cooperation with OFAC, OFAC staff shall not draw any inference from the Subject Person's preservation of the attorney-client privilege and the protections of the work product doctrine. At the same time, the voluntary decision by a Subject Person to waive the attorney-client privilege or the work product doctrine shall not be considered when assessing whether the Subject Person provided effective cooperation. OFAC staff may consider, however, in assessing whether a Subject Person has provided effective cooperation, the degree to which the Subject Person has provided factual information to the OFAC staff in a manner, to be worked out by the Subject Person and the OFAC staff, that preserves the protections of the attorney-client privilege and work product doctrine to the fullest extent possible.

c. Notwithstanding the general rule set forth in subsections 2.a. and 2.b. above, OFAC staff may, after obtaining in advance the approval of OFAC's Director of Enforcement or his/her designee, seek materials otherwise protected from disclosure by the attorney-client privilege or the work product doctrine if the Subject Person asserts, or indicates that it will assert, an advice of counsel defense with respect to the matters under investigation. Moreover, OFAC staff also may seek materials respecting which there is a final judicial determination that the privilege or doctrine does not apply for any reason, such as the crime/fraud exception or a waiver. In circumstances described in this subsection 2.c., OFAC staff shall limit their requests for disclosure only to those otherwise protected materials reasonably necessary and which are within the scope of the particular exception.

d. Although OFAC staff may consider whether a Subject Person that is an entity has asked its current or former officers, directors, employees, or agents ("Employees") to cooperate with OFAC staff or whether the Subject Person has made reasonable efforts to secure such cooperation as factors in determining the Subject Person's degree of cooperation, a Subject Person should not be asked, encouraged, or expected to take any of the following punitive actions against its Employees in return for cooperation credit:

(i) terminating or otherwise sanctioning an Employee who exercised his or her Fifth Amendment rights against self-incrimination in response to an OFAC or other federal agency request for an interview, testimony, or other information;

(ii) declining to provide legal counsel to an Employee or pay for such legal counsel;

(iii) declining to enter into or ceasing to operate under a joint defense, information sharing and common interest agreement with an Employee or other represented party with whom the Subject Person believes it has a common interest in defending against the investigation; or

(iv) declining to share its records or other historical information relating to the matter under investigation with an Employee.