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July 19, 2002

BY FACSIMILE

Chief of Records
Attention: Request for Comments
Office of Foreign Assets Control
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: **Proposed Rules Governing Availability of Information**
(67 Federal Register 41658 (June 19, 2002))

~~Dear~~ Sir or Madam:

This letter responds to your Office's request for comments concerning the above-captioned proposed rule. I want to express appreciation for your Office's decision to make the proposed rule available for public comment and to urge that such action be taken in respect of other proposed rules of your Office. These personal comments are based on over 30 years of experience with your Office's programs and have benefitted from consultation with my colleagues whose practices involve your Office's regulations.

I respectfully submit that the proposed rule should be amended to provide that informal settlements of voluntary disclosure cases will be made public only in those cases in which the disclosure was submitted to your Office after publication of any final rule. Publishing such settlements made before the new rule becomes final could be potentially unfair to parties that made such disclosures.

Further, I also urge that the proposal not be published as a stand-alone final rule. Rather the proposed rule relates in significant respects to the disposition of voluntary disclosure cases that lead to informal settlements. Accordingly, I recommend that the proposed rule be incorporated in regulations of your Office establishing a voluntary disclosure program under Part 501 of Title 31 of the Code of Federal Regulations that would be applicable to all of the sanctions programs administered by your Office.

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Because of the shortness of the time afforded, these comments are necessarily limited in scope. I would be pleased to speak with members of the OFAC staff about this submission at their convenience.

1. Effective Date of Proposed Rule for Voluntary Disclosure Cases. The proposed rule should be amended to provide that it will apply only to settlements arising from voluntary disclosures in which the disclosure occurred after the final rule's effective date. Alternatively, the final rule should provide for publication ~~or~~ only informal settlements in such cases when the disclosure was made after the date of publication of the proposed rule in the *Federal Register* (i.e., June 19, 2002).

Absent this amendment, parties that made earlier voluntary disclosures and reach informal settlements will be subjected to publicity that they could not have taken into account in deciding to make the disclosure. While it is true that your Office sometimes in the past publicized some informal settlements, the rarity of such disclosures meant that parties making voluntary disclosures *did* so with the reasonable expectation that most such settlements would remain confidential.

It bears emphasis that in voluntary disclosure cases the parties have without any obligation to do so stepped forward to cooperate with your Office and have provided information on possible violations. Retroactive application of the new provision to voluntary disclosures made before the new rule becomes final would in my view be inconsistent with the spirit of cooperation underlying such action of regulated parties and also would not be representative of your Office's long-standing concerns with fairness.

2. Comprehensive Voluntary Disclosure Regulations. To the extent that the proposed rule addresses informal settlements in voluntary disclosure cases, that rule should be published only as part of new regulations of the Office of Foreign Assets Control governing voluntary disclosures. While your Office has an informal voluntary disclosure practice, it has never formalized its procedures with published regulations governing such disclosures and their consequences, I believe that informing the public of informal settlements arising from voluntary disclosures deserves attention as part of a well-formulated and comprehensive approach to voluntary disclosure similar to that adopted by other U.S. government agencies concerned with national security and foreign policy implementation,

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For many years the Department of Commerce, Office of Export Enforcement, and the Department of State, Office of Defense Trade Controls, have included comprehensive voluntary disclosure provisions in their regulatory programs that are analogous to the sanctions programs that your Office administers. These provisions appear, respectively, as follows: Export Administration Regulations, 15 C.F.R. § 764.5 and International Traffic in Arms Regulations, 22 C.F.R. § 127.12.

O Based on my experience, I am persuaded that the voluntary disclosure provisions of the Commerce and State Departments have contributed importantly to the effectiveness of the EAR and ITAR and have significantly reinforced U.S. national security and foreign policy objectives of each of those programs. Moreover, both of those offices publicly justify their respective voluntary disclosure programs on the basis that those programs strengthen U.S. national security and foreign policy. Publicity about informal settlements occurring under either program takes place within the context of these published procedures.

While the Office of Foreign Assets Control has followed an informal voluntary disclosure practice, I submit that this informal approach is neither as effective nor widely known as it could be. Further, there are compelling arguments in favor of formalizing such a program through published regulations that include a rule on publicity,

In view of the informal encouragement from some in your Office for my advancing this position, I would identify the following specific arguments in favor of your Office publishing voluntary disclosure regulations that would include a provision on publicity:

- Voluntary disclosure regulations permit parties considering such a disclosure to understand exactly what will be expected from them and what benefits can be derived from making the disclosure;
- Voluntary disclosure regulations furnish senior managers, especially those in publicly held companies, with internal justification with their boards of directors and with other doubtful colleagues concerning why the company's best interests are served by action that is not legally mandated and that may result in enforcement consequences that might otherwise be avoided;

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- **Voluntary disclosure regulations encourage parties to provide promptly information to the administering agency that may prevent conduct that is potentially damaging United States national security or foreign policy interests;**
- **Voluntary disclosure regulations allow regulated parties to know that the administering agency has an established procedure not only for receiving and evaluating the information that is submitted but also for investigating and taking any enforcement action as a consequence of the disclosed transactions or conduct;**
- **Voluntary disclosure regulations lead regulated parties to conduct internal investigations and, thus, provide to the administering agency full and accurate accounts of what has occurred;**
- **Voluntary disclosure regulations cause the parties making disclosures to implement promptly corrective measures and enhanced compliance programs, including internal training, because such actions are customarily stated to be a mitigating factor;**
- **Voluntary disclosure regulations give the administering agency an opportunity to be clear about what is not promised by virtue of the disclosure, thereby avoiding misunderstanding over the treatment to which those making disclosures are entitled;**
- **Voluntary disclosure regulations afford the administering agency an opportunity to identify what will be considered mitigating factors in final disposition of compliance cases;**
- **Voluntary disclosure regulations formalize the disclosure procedure and avoid for the administering agency the additional time devoted to responding to questions about how to make disclosures, what information to furnish, what procedures will be followed after the initial disclosure, etc.;**
- **Voluntary disclosure regulations foster settlements of compliance cases without time-consuming governmental investigations and legal proceedings;**

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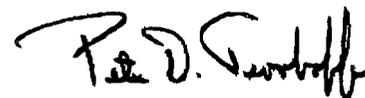
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- **Voluntary disclosure regulations typically do not provide protection from enforcement proceedings, including criminal referral, in cases arising from willful conduct and, therefore, do not compromise the important criminal enforcement discretion of the administering agency and the U.S. Justice Department; and**
- **Voluntary disclosure regulations announce what information the administering agency will make public about any settlements, which is the objective of OFAC's proposed rule.**

I also submit that the drafting and publication of voluntary disclosure regulations for your Office would not significantly delay the publication of the proposed rule insofar as it relates to informal settlements resulting from such disclosures. In view of the Commerce and State Department models and the experience with them, your Office could draft in a short period proposed regulations to address every required element of a voluntary disclosure program. I would urge that, once again, your Office afford a comment period for such proposed regulations, preferably during a 45-day period given the nature of such a proposal. I would be happy to assist members of the Office staff with ideas about such proposed regulations.

Sincerely yours,



Peter D. Trooboff