UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF	)	
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EXXON MOBIL CORPORATION	)	**File No. 051-0243**
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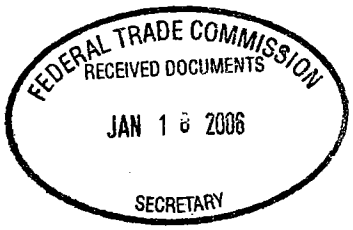

EXXON MOBIL CORPORATION'S REQUEST FOR REVIEW OF DENIAL OF PETITION TO LIMIT CIVIL INVESTIGATIVE DEMAND

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Pursuant to Section 2.7(f) of the Federal Trade Commission's ("FTC") Rules of Practice, Exxon Mobil Corporation ("ExxonMobil") respectfully requests that the FTC review the denial of ExxonMobil's petition to limit (the "Petition to Limit") Specification 26 of the Second Civil Investigative Demand (the "Second CID") served on it on November 28, 2005.[1] Specification 26 seeks the production of "Tax Expenditure" information that ExxonMobil "claimed." ExxonMobil's Petition to Limit was denied on January 10, 2006 by a ruling of Commissioner Pamela Jones Harbour, acting as the Commission's delegate (the "Ruling"), which was served on ExxonMobil on January 12, 2006. ExxonMobil hereby requests that the Commission vacate the Ruling and limit the Second CID to exclude Specification 26. ExxonMobil also requests that the Commission stay the Ruling's requirement that ExxonMobil respond to Specification 26 by January 20, 2006 until after it has decided the instant motion.[2]

The subject of the Petition to Limit is a single request for information. The FTC has issued to ExxonMobil dozens of requests for documents and information in three separate CIDs, calling for the production of thousands of pages of documents, data, and information.

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[1] The FTC issued an initial CID to ExxonMobil (the "First CID") containing 25 Specifications (plus subparts) on November 9, 2005.

[2] ExxonMobil hereby relies on and incorporates by reference all of the arguments and legal authority in its Petition to Limit the Second CID.

From the start, ExxonMobil has cooperated with the FTC to provide the agency the information it needs to complete its investigation of pricing behavior in the market for refined petroleum products. We are confident that this information will show that ExxonMobil acted responsibly at all times. ExxonMobil has already filed written responses to the three CIDs and has produced more than 8,000 pages of responsive documents. Other than Specification 26, ExxonMobil did not move to quash or limit any other information request in any of the CIDs. As explained below, however, there are multiple reasons why ExxonMobil should not be required to produce the information sought in Specification 26.

PROCEDURAL HISTORY

On November 22, 2005, President Bush signed an appropriations bill that required the FTC "to conduct an immediate investigation into nationwide gasoline prices in the aftermath of Hurricane Katrina." *See* Science, State, Justice, Commerce, And Related Agencies Appropriations Act, 2006, Pub. L. No. 109–108, 119 Stat. 2290, at § 632 (the "Pryor Amendment"). The Pryor Amendment further required the FTC to provide Congress with "a summary of tax expenditures (as defined in section 3(3) of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. § 622(3))" for "companies with total United States wholesale sales of gasoline and petroleum distillates for calendar 2004 in excess of $500,000,000" and any retail distributors of such products against which multiple formal complaints of price-gouging had been filed. *Id.*

The Pryor Amendment does not instruct the FTC how to obtain this information. What is clear, however, is that the Pryor Amendment does not require the FTC to provide Congress tax information that is identifiable to a specific company. Rather, it instructs the FTC

to provide only a "*summary*" of such information across a range of companies in the oil and gas industry.

On November 28, 2005, the FTC served on ExxonMobil the Second CID, with three specifications. Specification 26 was based on the mandate in the Pryor Amendment and provided:

> If [ExxonMobil] had 2004 wholesale sales of Light Petroleum Products greater than $500 million, identify [ExxonMobil's] *claimed* Tax Expenditures for tax years 2003 and 2004 in the form described below. (emphasis added)

Any determination of "Tax Expenditures" requires a calculation of overall Federal "revenue losses" that result from the application of "provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special tax credit, a preferential rate of tax, or deferral of liability." (Second CID at 4.) In this respect, both the Second CID and the Pryor Amendment are tied to the definition of Tax Expenditures in the Congressional Budget and Impoundment Act of 1974 (the "Budget Act"). *See* 2 U.S.C. § 622(3). The annual Federal budget contains an economic analysis of the impact on Federal revenue of various tax deductions, exceptions, and credits. *See, e.g.,* 2 U.S.C. § 632(e)(2)(E) (requiring estimate of Tax Expenditures in Congressional report accompanying concurrent budget resolution); 2 U.S.C. § 639(a)(1) (requiring report for any legislation creating changes to Tax Expenditure levels).

On December 19, 2005, ExxonMobil filed its Petition to Limit the Second CID to exclude Specification 26. (The Petition to Limit is attached hereto at Exhibit A). ExxonMobil raised three arguments. First, Sections 5 and 20 of the Federal Trade Commission Act (the "FTC Act"), which were specifically referenced in the Second CID, did not give the FTC authority to seek this information because there was no reasonable relation between the information the

Specification demanded and the FTC's investigation. Second, ExxonMobil could not respond to the Specification because it does not "claim" Tax Expenditures, did not maintain Tax Expenditure information and does not, and cannot reasonably, calculate such Expenditures. ExxonMobil explained that the FTC could obtain this information from the Department of Treasury, which includes the Internal Revenue Service ("IRS") (together, the "Agencies"), because the Agencies, unlike ExxonMobil, possess the data and economic assumptions and methodologies to calculate Tax Expenditures as Congress and the FTC defined that term. Third, because Congress asked the FTC to compile a "*summary*" of Tax Expenditure information, the FTC did not need company-specific tax information to fulfill the mandate of the Pryor Amendment. Moreover, to the extent that company-specific information was required, there was a statutory mechanism available to the FTC to obtain that information from the IRS in a way that would preserve ExxonMobil's taxpayer confidentiality.

Commissioner Pamela Jones Harbour, acting as the Commission's delegate, denied ExxonMobil's Petition to Limit on January 10, 2006 (the "Ruling"). (The Ruling is attached hereto at Exhibit B).

On January 10, 2006 -- the same day the Ruling was issued -- the FTC also issued the Order Requiring the Filing of a Special Report ("Special Report Order"). Styled as a "special report" rather than a civil investigative demand, and authorized pursuant to, *inter alia*, Section 6 of the FTC Act, the Special Report Order corrects the procedural problem with the Second CID identified by ExxonMobil in its Petition to Limit. That aside, the Special Report Order seeks the same Tax Expenditure information -- requiring the same calculations -- as that requested by Specification 26 of the Second CID. Notably, however, the Special Report Order no longer asks ExxonMobil to identify Tax Expenditures that it "claimed," but rather merely asks the company

to identify its Tax Expenditures. This change presumably reflects the FTC's acknowledgment that ExxonMobil does not, in fact, "claim" any Tax Expenditures, for the reasons outlined in the Petition to Limit.

SUMMARY OF ARGUMENT

First, ExxonMobil respectfully submits that the Ruling failed to address ExxonMobil's argument that ExxonMobil does not "claim" any "Tax Expenditures," has never done so, and cannot reasonably estimate such "Tax Expenditures." Contrary to the Ruling, the Commission has not in the past asked companies to make estimates of the kind that they do not make in the ordinary course of business and could not reasonably make in any event.

Second, the Ruling also does not address the argument that by requiring ExxonMobil to provide tax information directly to the FTC, Specification 26 would unnecessarily deny the company heightened confidentiality protections for tax information afforded every taxpayer. Moreover, the Ruling is incorrect in its belief that the Commission is unable to obtain from the Agencies the Tax Expenditure data that would enable it to respond to Congress.

Third, the Ruling inaccurately states that the requested data is "sufficiently related" to the Commission's law enforcement investigation to justify asking for the information as part of that investigation. The FTC concedes that it requested the Tax Expenditure information to comply with the Pryor Amendment, not with the FTC's original mandate to conduct its investigation. Moreover, there is no basis for the Ruling's conclusion that Tax Expenditures are related to ExxonMobil's margins (*i.e.*, its revenues less expenses), information the FTC has already requested and obtained from the company. Margins have nothing to do with

Tax Expenditures, and the FTC's assertion that the Tax Expenditure information is needed to calculate the sources of ExxonMobil's "profits" was manufactured after the fact.

Finally, given the issuance of the Special Report Order, Specification 26 should be excluded as moot, as the Ruling itself seems to acknowledge.

For these reasons, the Ruling should be vacated and the Second CID should be limited to exclude Specification 26. Furthermore, ExxonMobil requests that the Commission stay the Ruling's requirement that ExxonMobil respond to Specification 26 by January 20, 2006 until after it has decided the instant motion.

ARGUMENT

I. EXXONMOBIL DOES NOT HAVE THE INFORMATION NECESSARY TO RESPOND REASONABLY TO SPECIFICATION 26.

While Specification 26 asks the company to identify all Tax Expenditures it "claimed," ExxonMobil does not, and has never, "claimed" Tax Expenditures on its tax return. Like any taxpayer, it only claims statutorily authorized deductions, exclusions, etc. It therefore has nothing to provide in answer to Specification 26. The subsequently issued Special Report Order, apparently acknowledging that ExxonMobil does not "claim" Tax Expenditures, asks only for "Tax Expenditures." The Second CID therefore should be limited to exclude Specification 26.

The difference between "deductions" and "Tax Expenditures" is more than a mere matter of semantics, however; it goes to the heart of the reason why ExxonMobil reasonably cannot answer Specification 26. When Congress asked the FTC to compile a "summary of tax expenditures," it explained precisely what it wanted. Tax Expenditures is a precise concept specifically defined by Congress in the Budget Act (2 U.S.C. § 622(3)). A calculation of Tax Expenditures that will meet Congress's definition can only be performed based on economic

assumptions, models, and methodologies that are known to, and used by, the Agencies charged with calculating that number. Indeed, the FTC tacitly acknowledges this point in both the Second CID and its subsequently issued Special Report Order. Both documents contain a footnote in which the Commission cites to a report, entitled *Analytical Perspectives: Budget of United States Government, Fiscal Year 2006*, Office of Management and Budget (2005) (hereinafter the "*Analytical Perspectives*"). That document states that its purpose is to "highlight specific subject areas or provide other significant data that place the [Federal] budget in context." *Id.* at 3. Notably, *Analytical Perspectives* contains an analysis of "Tax Expenditures," which is introduced as follows:

> This discussion describes and presents estimates of tax expenditures, which are defined as revenue losses from special exemptions, credits or other preferences in the tax code ... ***This section is prepared by the Department of the Treasury***.

Id. at 4 (emphasis added).

The body of the report then presents a lengthy analysis of the complexities behind Treasury's calculation of Tax Expenditures, including descriptions of the difficulties that arise from different accounting methodologies that might be applied in calculating Tax Expenditures (*i.e.*, "present value" as opposed to "outlay equivalents" calculations), different -- and potentially conflicting -- tax code "baselines" that might be used (*i.e.*, whether "normal law" or "reference law" baselines are used as opposed to "comprehensive income tax"), and the difficulty of cross-comparing different types of tax benefits across different businesses in an industry. *Id.* at 315–16, 330–31. Finally, after describing the various difficulties involved in calculating Tax Expenditures, the report performs the calculations for every aspect of the American economy, including the energy industry. *Id.* at 317–30. Indeed, the categories of energy industry Tax Expenditures calculated in the report are precisely the same as the categories of Tax Expenditure

information sought in the Special Report Order. *Id.* at 317. It is evident from this report -- cited by the FTC itself -- that Treasury routinely performs the Tax Expenditure calculations that the FTC is seeking in Specification 26.

Because ExxonMobil is not privy to these assumptions and methodologies of the Agencies, it can answer Specification 26 only by guessing at the calculations the Agencies would make. Surely, Congress has not asked the FTC to assemble information from individual companies with no knowledge of how to produce reasonable estimates, comparable across the range of affected businesses. Presumably, Congress included its request for Tax Expenditure information in the Pryor Amendment because it was interested in accurate, usable data, not highly qualified and speculative information that a range of companies derive differently based on differing -- and potentially conflicting -- assumptions.

In addition, calculation of a "summary" of Tax Expenditures requires an analysis of the impact on the *national budget* from the collective tax benefits that accrue to many companies in a given industry. Making that calculation is not something that any one company in an industry can competently do because it requires access to economic methodologies and assumptions about how individual tax decisions by a range of businesses across an entire industry affect the entire Federal budget. Individual companies do not have access to that information, and ExxonMobil is no different.

Indeed, courts generally recognize that subpoenas are not enforceable when the recipient "lacks the information necessary to comply." *EEOC v. C & P Telephone Co.*, 813 F. Supp. 874, 877 (D.D.C. 1993) (citing *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 313 (7th Cir. 1981) ("If a respondent lacks the information necessary to respond to part of a subpoena, of course it would be excused pro tanto."); *see also United States v. Morton Salt Co.*, 338 U.S. 632,

652–53 (1950) (government agency inquiry will be enforced only if it is "within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."). Here, ExxonMobil does not have the expertise or means necessary to calculate Tax Expenditures in any way that does not involve guessing. But there is nothing in the Pryor Amendment indicating that Congress wanted the FTC to base its "summary of tax expenditures" on a guess.

In fact, there is no reasonable way for ExxonMobil to make "estimates" and "assumptions" to answer Specification 26 without conducting independent research into how the Agencies prepared Tax Expenditures in the ordinary course of their administrative responsibilities. But courts -- in the context of assessing the burden on recipients of information requests in civil disputes -- have held that parties are not required to conduct independent research in responding to requests for information. *See, e.g., In the Matter of Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 5 F.C.C.R. 3533 (1994) ("[T]he interrogatories in question are overly broad and unduly burdensome in so far as they ask Bell Atlantic to conduct new research solely for the purpose of responding to discovery."); *Lugo v. Heckler*, 98 F.R.D. 709, 714 (E.D. Pa. 1983) ("Where an alternative is available, no party should be required to do independent research in order to acquire information with which to answer interrogatories."); *United States v. 216 Bottles, More or Less, Sudden Change by Lanolin Plus Lab. Div. Hazel Bishop Inc.*, 36 F.R.D. 695, 702 (E.D.N.Y. 1965) ("[I]t is unreasonable to require the claimant to search for facts and to compile outside data and citations to literature not within its possession or known to it, as the case may be."); *United States v. Columbia Steel Co.*, 7 F.R.D. 183, 184–85 (D. Del. 1947) (holding that a responding party "need not enter upon an independent research in order to acquire the information merely for the purpose of answering the interrogatory"). For the same reasons, ExxonMobil should not

be required to conduct independent research to make reasonable calculations of the Tax Expenditure information that Specification 26 demands.

The FTC's only response to these arguments -- as articulated in Commissioner Harbour's Ruling -- is that the FTC "regularly anticipates that CID recipients may need to provide estimates or make assumptions and calculations in responding to a CID. Instruction K of the CID and the Certification language clearly state that CID responses be accompanied by adequate explanations of the methods used in preparing responses." (Ruling at 5.) But, respectfully, this argument misses the point.

As explained above, ExxonMobil does not "claim" Tax Expenditures -- a fact the FTC has acknowledged in its Special Report Order -- and does not have access to the assumptions and methodologies by which those Expenditures could be reasonably estimated. Accordingly, any estimate the company provides would have to be based on information that is outside the control of the company and within the competence and possession of Agencies of the Federal government. Responding to Specification 26, therefore, would require far more than simply making certain estimates. It would require ExxonMobil to guess the assumptions that independent Agencies use -- but do not publish -- in making calculations about how claimed tax benefits impact the overall national budget. The Ruling does not cite a single instance in which the Commission has previously asked the recipient of a CID or subpoena to provide estimates under such circumstances.

Notably, the lesson the FTC purports to give on Instruction K of the Second CID fails to mention another -- and more relevant -- provision. The *Certification* to the Second CID anticipates that companies might be required to make some estimates to comply with an information request. Indeed, this is a standard provision contained in Certifications to every

CID. But the Certification makes plain that the FTC does *not* expect companies to guess or speculate when making these estimates. The Certification states that when estimates must be made because "books and records do not provide the required information," such estimates must be "*reasonable estimates*," not speculative estimates or unsupported estimates. Any estimates of Tax Expenditures that ExxonMobil would make based on information not in its possession would not be reasonable.

For all of the above reasons, Specification 26 is indefinite and poses an undue burden on ExxonMobil.[3]

II. THE COMMISSION'S REQUEST FOR TAX EXPENDITURE INFORMATION IGNORES THE CONFIDENTIALITY PROTECTIONS OF SECTION 6103 OF THE TAX CODE.

The Ruling does not address the heightened confidentiality concerns that attach to tax information. Rather, the Ruling concedes only a general confidentiality point, but notes that "Congress has the prerogative to request trade secret and other business confidences that the Commission acquires during the course of an investigation. Further, the Commission cannot restrict Congress's ultimate uses of such [confidential] information." (Ruling at 6.) That Congress might disseminate ExxonMobil's tax information is precisely the concern at issue.[4] The Ruling does not explain why the FTC, having *acknowledged* the prospect of such Congressional disclosure, would insist on obtaining the tax information from ExxonMobil directly when the same information can be obtained from the IRS in a way that would protect

[3] In the Ruling on ExxonMobil's Petition to Limit the Second CID, Commissioner Harbour maintained that "ExxonMobil does not claim ... that the preparation [of a response to the CID] is 'burdensome,' as that term is ordinarily understood." (Ruling at 5.) That assertion is incorrect. Responding to the request for Tax Expenditure information would unduly burden ExxonMobil precisely because it would force the company, without any expertise in the matter, to step into the shoes of the Agencies, conduct independent research, speculate as to the assumptions and methodologies they use to compute Tax Expenditures as part of the Federal budget process, and apply those speculative assumptions and methodologies to ExxonMobil's own taxpayer information.

[4] ExxonMobil's Petition to Limit provided a recent example of Congressional disclosure of internal ExxonMobil documents in 2002 by the U.S. Senate Permanent Subcommittee on Investigations. *See* Petition to Limit at 19.

against such a disclosure. As the FTC is aware, the Internal Revenue Code provides that any taxpayer information the FTC receives from the IRS may be disclosed to Congress only "in a form which *cannot* be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 26 U.S.C. § 6103(j)(4) (emphasis added).[5]

The Ruling simply ignores the fact that the confidentiality of ExxonMobil's tax information would be protected if the FTC were to obtain that information from the IRS. As more fully explained in ExxonMobil's Petition to Limit the Second CID, Section 6103(a) of the Internal Revenue Code provides that taxpayer returns and return information may not be disclosed in any manner that allows identification of the taxpayer.[6] But the protections of Section 6103 *only* apply to return information filed with, received by, or otherwise generated by the IRS. 26 U.S.C. §§ 6103(a), (b); *see also CFTC v. Collins*, 997 F.2d 1230, 1233 (7th Cir. 1993); *Stokwitz v. United States*, 831 F.2d 893, 896 (9th Cir. 1987) (the protections of Section 6103 apply only to information received directly from, or through, the IRS). ExxonMobil would therefore lose the confidentiality of its tax information if it is forced to provide it to the FTC.

Because of the strong confidentiality that attaches to tax information, the Federal Courts have been reluctant to compel production of tax information absent a strong and specific showing of need. Directly on point is *Collins*, 997 F.2d 1230, in which the Seventh Circuit (Posner, J.) held that it was an abuse of discretion for the District Court to enforce a subpoena

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[5] If Congress or a Congressional Committee specifically sought to have the same information the FTC receives from the IRS, it would likely be entitled to view it pursuant to Section 6103(f)(3). Even if Congress or a Congressional Committee received such taxpayer-specific information through that statutory provision, the confidentiality of the information would still be protected. Section 6103 in its entirety would still apply, and would restrict Congressional use of the taxpayer-specific information to closed sessions. *See* 26 U.S.C. §§ 6103(f)(3), (f)(4)(B).

[6] Tax Expenditures, while not specifically listed on a company's tax returns, still constitute "return information" under the Internal Revenue Code, and are subject to the privacy protections therein. *See* 26 U.S.C. § 6103(b)(2)(A) (stating "return information" includes "any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return...").

issued by the Commodities Futures Trading Commission ("CFTC") for tax returns in an investigation involving alleged commodities law violations. Noting that the CFTC had "made no showing that it needed [the request] tax returns" in a commodities fraud case, the Court went on to say:

> We are not experts in the investigation of violations of the commodity laws, so we may have overlooked reasons why, despite appearances, the effectiveness of the Commission's investigation of the appellants depends on its having access to their tax returns. The Commission has not advanced any such reasons. It asked for and obtained the enforcement of the subpoenas as a matter of rote, upon its bare representation that the tax returns might contain information germane to the investigation. That is not enough, if an appropriate balance is to be struck between the privacy of income tax returns and the needs of law enforcement.

Id. at 1234; *see also Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975) (affirming order quashing subpoena for tax information; "a public policy against unnecessary public disclosure arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns."). The FTC has made no showing of need here.

Nor can it, because ExxonMobil is not even in a position to provide accurate information of the type that Congress and the Second CID requested. The Department of Treasury, which includes the IRS (*see* 26 U.S.C. §§ 7801-7803), on the other hand, is. The Agencies have access both to the raw data with which to perform the Tax Expenditure calculations and the unpublished assumptions and methodologies they use in making these calculations.

In addition, obtaining the Tax Expenditure information from the Agencies will ensure that the calculations are consistent across all companies for whom the FTC is seeking this information, and thus are in a form that is usable by the FTC to prepare its summary for Congress. Given this more appropriate and reliable source for the information that the FTC

seeks, there is no basis for the FTC's demand that ExxonMobil perform this calculation. *See Collins*, 997 F.2d at 1233.

The Ruling is incorrect in asserting that ExxonMobil "has not provided the Commission with either a factual or legal basis to believe that such agencies could or would provide the [Tax Expenditure] information." (Ruling at 5 n.13.) In its Petition to Limit, ExxonMobil cited authority demonstrating that the Agencies do have this information (*see* Petition to Limit at 12), and, as noted above, the Second CID itself cites authority indicating that the Department of Treasury routinely publishes Tax Expenditure information. *See Analytical Perspectives* (evidencing fact that Treasury performs the Tax Expenditure calculations that the FTC is seeking in Specification 26). Moreover, an IRS official has confirmed to ExxonMobil that the Agencies can provide the Commission with the aggregate data requested in the Pryor Amendment. We understand that, upon a request from the Chairman of the FTC to the Commissioner of Internal Revenue, the "summary of tax expenditures" requested by the Pryor Amendment can be provided in a timely fashion.[7] With the Agencies ready, willing, and able to provide the information that Congress has requested to the FTC, it is simply contrary to public policy for the Commission to proceed along a route that it knows will cause a company to forfeit its taxpayer confidentiality.

In short, by persisting in its demand for tax information from ExxonMobil directly rather than from the Agencies, the FTC would not only obtain information that will likely not satisfy the definition of "Tax Expenditures" fixed by Congress, and therefore that would be of little value to the Commission in fulfilling its obligations, but would obtain it in a way that would forfeit ExxonMobil's privacy rights in whatever tax information that is provided.

[7] We understand that data for 2003 is readily available in the Statistics of Income Division of the IRS. For 2004, the data is not yet centrally available to the IRS; the information must be extracted from the relevant tax returns, currently located in various IRS processing centers.

III. THE SPECIFICATION 26 DATA IS NOT RELEVANT TO THE FTC'S LAW ENFORCEMENT INVESTIGATION

Sections 5 and 20 of the Federal Trade Commission Act, the legal authority pursuant to which the Second CID was issued, do not provide a basis for the FTC to seek the information requested in Specification 26. The Commission clearly sought Tax Expenditure information to respond to a separate Congressional directive in the Pryor Amendment, and placing the request in a law enforcement CID is inappropriate, regardless of whether any relationship can be identified between the information sought and the law enforcement investigation. Moreover, contrary to the position taken in the Ruling, there simply is no relationship between Tax Expenditures and the investigation.

A. A Request For Tax Expenditure Information To Comply With The Pryor Amendment Is Not Appropriate In A Law Enforcement CID

In issuing Specification 26, the Commission was plainly seeking an aggregate summary of Tax Expenditures to comply with the Pryor Amendment and not as part of the Commission's law enforcement investigation. If the FTC in fact needed Tax Expenditure information as part of its investigation to determine the source of ExxonMobil's margins, it presumably would have asked for it in the *First CID* it issued on November 9, 2005. It did not. (The First CID was a response to Congress's direction to the FTC in the Energy Policy Act to conduct an investigation into possible manipulation of the pricing of gasoline products. *See* Ruling at 1–2.)

That the First CID omitted any mention of Tax Expenditures makes it clear that the FTC did not believe such information to be relevant to its investigation, and that the claim now that this information is relevant to ExxonMobil's margins -- as articulated in the Ruling -- is an after the fact rationalization. The FTC did not seek Tax Expenditure information until after

the Pryor Amendment became law on November 22, 2005. Indeed, the Ruling itself acknowledges that the aggregate Tax Expenditure information was sought for the purpose of complying with the Pryor Amendment. (Ruling at 5.)

We are aware of *no* antitrust investigation in which Tax Expenditure information was ever sought or claimed to be needed to conduct the investigation. A Lexis database search of all reported antitrust cases in the United States reveals that the relevance of Tax Expenditures to an antitrust claim or defense has never been raised. In fact, according to our search, the term "Tax Expenditures" has *never* been used before in *any* reported antitrust case.

If the purpose of obtaining the information is specifically to report to Congress, the Commission cannot use this type of after-the-fact argument to justify placing the request in a law enforcement CID. For this reason alone, the Ruling should be reversed.

B. Tax Expenditure Information Is Not Related To An Antitrust Law Enforcement Investigation, And Has Nothing To Do With The Margin Data the Commission Has Requested

The Ruling's position that Specification 26 is sufficiently related to the law enforcement investigation -- because it "will permit the [FTC] to make a more accurate assessment of whether ExxonMobil's profits were the product of tax expenditures or whether those profits were the result of other market-based forces" – is simply flawed.[8] First, knowing the amount of tax profit a company earns, including whether it comes from favorable tax treatment or favorable market prices, can tell the FTC nothing about whether or not the company has violated Section 5. One cannot infer collusion from the presence or absence of tax

[8] The Ruling maintains that "ExxonMobil has tacitly recognized that profitability information is relevant to this investigation because it has responded without objection to Specification 21" of the First CID. (Ruling at 4.) ExxonMobil has recognized no such thing. Specification 21 calls for the production of the company's revenue and expense information. Such information comprises the company's *margins*, not its tax profits. ExxonMobil did not object to this request because margin information might be related, however tangentially, to some legitimate examination of possible antitrust violations.

profitability. Nor is it possible to argue that the existence of tax profits is material to proof of an abuse of monopoly power.[9] And it is incorrect for the Ruling to state that the FTC needs the Tax Expenditure data to be sure it does not "mistakenly or reflexively ascrib[e] high profits to the illegal exercise of market power." (Ruling at 4.)

More to the point is the Ruling's concession that the FTC's real need for this information is to allow it to make determinations, as "directed by Congress," about the "profits" and "profitability" of these companies. This concession, however, clearly shows that this request lacks the necessary nexus to a true *law enforcement* purpose. Congress's "direction" in this regard, again, appears in the Pryor Amendment, which in addition to asking for Tax Expenditures also asks the FTC to provide Congress with "a comparison of, and an explanation of the reasons for changes in, *profit levels* of such companies." (Emphasis added). To the extent "profits" are relevant at all, they only relevant to the FTC's need to report to Congress on that subject, not any assessment of whether Section 5 of the FTC Act may have been violated.[10]

The Ruling attempts to surmount this obvious dilemma by equating "profits" with ExxonMobil's margins (*i.e.*, its revenue less expenses). Margins, however, are entirely unrelated to Tax Expenditures, which, as explained above (*supra* at 6–10), relate to the broader impact on

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[9] We are, of course, assuming that the potential Section 5 violation the FTC is allegedly investigating derives from these mainstream antitrust principles, rather than some form of alleged "price gouging." As Chairman Majoras recognized in her November 9, 2005, testimony before the Senate Committee on Commerce, Science and Transportation and Committee on Energy and Natural Resources, the FTC lacks jurisdiction to prosecute price gouging because it simply is not a violation of any federal statute. *See Energy Pricing and Profits, Panel II, J. Hearing Before the S. Commerce, Science and Transp. Comm. and the S. Energy and Natural Res. Comm.*, Fed. News Serv., Nov. 9, 2005.

[10] Moreover, Tax Expenditures are not even relevant to a determination of the source of ExxonMobil's profits. ExxonMobil's biggest "tax expenditure" is attributable to Internal Revenue Code provisions that permit the deduction of exploration and development costs (intangible drilling and development costs or "IDC") in earlier years than would otherwise be allowed under the general cost recovery provisions contained in the Code. This type of benefit is known as a "timing" benefit rather than a "permanent" benefit because the full tax will eventually be paid. Because ExxonMobil's reported profits for financial reporting purposes do not take into account timing benefits, the same amount of earnings will be reported whether or not a timing benefit is present. Because the amount of ExxonMobil's tax expenditures relating to exploration and development costs does not affect the level of reported corporate profits, it is not relevant to an investigation of such profit levels.

the national economy from the claiming of tax deductions or credits. The Ruling does not explain -- nor can it -- what ExxonMobil's company-specific margins have to do with, or how they can be derived from, the "revenue losses" to the entire Federal budget that are reflected in Tax Expenditure calculations.[11]

The discontinuity between the margin information sought in Specification 21 and the Tax Expenditures sought in Specification 26 is illustrated simply by comparing the *categories* of information that each Specification calls for. Such a side-by-side comparison reveals that the categories of margin information sought are unrelated to the categories of Tax Expenditure information sought. Any Tax Expenditure information obtained, therefore, would be useless in helping the FTC determine the nature and source of ExxonMobil's profits.

IV. SPECIFICATION 26 OF THE SECOND CID IS MOOT

The Ruling should be reversed for the additional reason that Specification 26 of the Second CID has been rendered moot by the FTC's January 10, 2006 issuance of the Special Report Order. The Special Report Order asks for the same "Tax Expenditure" information sought by Specification 26, with one exception, presumably a response to our petition: while Specification 26 asks for information about "Tax Expenditures" that ExxonMobil "claimed," the Special Report Order deletes the word "claimed" and simply demands the identification of any ExxonMobil "Tax Expenditures."

The Ruling itself requires ExxonMobil to respond to Specification 26 even though it also asserts that the issuance of the Special Order Report "moots" ExxonMobil's relevance argument. Specifically, the Ruling states that ExxonMobil's relevance argument is moot because of the issuance of the Special Report Order pursuant to Section 6(b), that the Special Report

[11] The Tax Expenditure information sought is also not relevant to any analysis of the profits from the relevant part of ExxonMobil's business, because most of the requested Tax Expenditures relate to upstream exploration and production of crude oil and not to downstream gasoline production or sales.

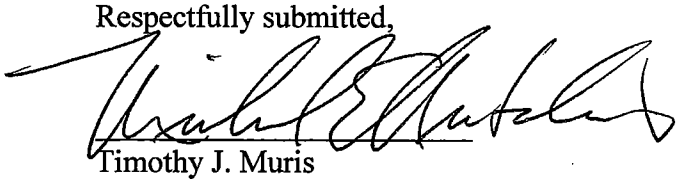
Order seeks the same information sought by Specification 26, and that compliance with the Special Report Order will obviate the need to comply with Specification 26. *See* Ruling at 4. Nonetheless, the Ruling orders ExxonMobil to comply with Specification 26. But if the Ruling is correct that the issuance of the Special Report Order moots ExxonMobil's argument that the information sought in Specification 26 is not relevant, it is to the Special Report Order, and not Specification 26, that ExxonMobil should be directed to make any response. Unless and until the FTC withdraws Specification 26, however, and formally relieves ExxonMobil of the obligation of compliance, the Second CID is very much alive and enforceable, and ExxonMobil ignores it at its peril. For these reasons, the Commission should stay the Ruling and not require ExxonMobil to respond to Specification 26 pending any decision on the instant motion and on the petition to quash the Special Order Report, which ExxonMobil will file tomorrow.

* * *

For the foregoing reasons, ExxonMobil's motion to limit should be granted on review. The Ruling should be reversed and Specification 26 of the Second CID should be excluded. Moreover, ExxonMobil requests that the Commission stay the Ruling's requirement that ExxonMobil respond to Specification 26 by January 20, 2006 until after it has decided the instant motion.

Dated: January 18, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Astri Kimball, hereby certify that I have, this 18th day of January 2006, caused copies of the foregoing Request for Review of Denial of Exxon Mobil's Petition to Limit Civil Investigative Demand to be served by hand delivery, on:

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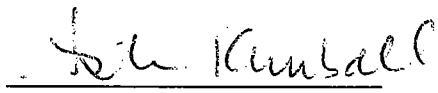

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EXHIBIT A

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF EXXON MOBIL CORPORATION	)	File No. 051-0243

EXXON MOBIL CORPORATION'S
PETITION TO LIMIT CIVIL INVESTIGATE DEMAND

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF EXXON MOBIL CORPORATION	)	File No. 051-0243

EXXON MOBIL CORPORATION'S
PETITION TO LIMIT CIVIL INVESTIGATE DEMAND

Pursuant to Section 2.7(d)(1) of the Federal Trade Commission's ("FTC") Rules of Practice and 15 U.S.C. § 57b-1(f)(1), Exxon Mobil Corporation ("Exxon Mobil") hereby moves to quash or limit the Civil Investigative Demand ("CID" or the "Second CID") served on it on November 28, 2005, for the grounds set forth below:

Preliminary Statement

Pursuant to Section 1809 of the Energy Policy Act, the Federal Trade Commission ("FTC") is conducting an investigation into the causes and effects of supply and pricing behavior in the market for refined oil products in the wake of Hurricanes Katrina and Rita (the "Investigation"). The FTC has chosen to pursue that inquiry as a formal investigation of possible violations of Section 5 of the Federal Trade Commission Act (the "FTC Act"). 15 U.S.C. § 45. Exxon Mobil acknowledges the importance of the Investigation, and is committed to assisting the FTC by providing information about Exxon Mobil's supply and pricing decisions. Moreover, Exxon Mobil is confident that the Investigation will demonstrate that Exxon Mobil acted responsibly and legally at all times.

The FTC has issued to Exxon Mobil 28 requests for documents and information – or "Specifications" – contained in two separate CIDs, calling for the production of thousands of

pages of documents, data, and information. From the start, Exxon Mobil has cooperated with the FTC to provide to the agency the information that it needs to complete its Investigation. Exxon Mobil has already filed a written response to the first CID – which contained 25 separate requests for information – and has already produced more than 8,000 pages of responsive documents. Exxon Mobil did not move to quash or limit any of the Specifications in the first CID.

The subject of this motion to limit is a single Specification – Specification 26 – contained in the Second CID that the FTC issued. Exxon Mobil has not moved to limit any of the remaining Specifications in this Second CID, and is compiling the documents and information they request. Specification 26 asks Exxon Mobil to identify any "Tax Expenditures" that it "claimed" for tax years 2003 and 2004. Neither Exxon Mobil nor any taxpayer claims Tax Expenditures on its income tax forms. The definition of "Tax Expenditures" in the Second CID – a definition that tracks language in a Congressional appropriations bill mandating the FTC to provide a "summary of tax expenditures" for certain oil and gas companies – is very specific. It requires a calculation of "those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption or deduction from gross income or which provide a special tax credit, a preferential rate of tax, or a deferral of tax liability...." *See* Second CID, at 4. By its express terms, this request calls for an analysis of the impact on the overall Federal budget – that is, Federal "revenue losses" – from certain tax deductions claimed, or benefits given, to Exxon Mobil.

Exxon Mobil moves to limit the Second CID to exclude Specification 26 for three reasons:

First, Sections 5 and 20 of the FTC Act, which were specifically referenced in both CIDs, do not give the FTC authority to seek this information. 15 U.S.C. §§ 45, 57b-1. These provisions give the FTC power to compel the production only of information that is relevant to the Investigation. But the FTC is not seeking Tax Expenditure information from Exxon Mobil in connection with the Investigation; it is seeking the information because Congress, in a specific directive, asked the FTC to compile a "summary of tax expenditures" for oil companies of a certain size. *See* Pub. L. No. 109-108, 119 Stat. 2290, at § 632. Because Specification 26 was issued in connection with a law enforcement investigation under Section 5 of the FTC Act, the FTC staff does not have the authority to seek information unrelated to its Investigation, and the Second CID should therefore be limited to exclude that Specification.

Second, regardless of the provision under which Specification 26 was issued, the Second CID should be limited because Exxon Mobil cannot respond accurately to the Specification. The Tax Expenditure information called for is specific and statutorily defined. It is not information that Exxon Mobil compiles in the ordinary course of its business or in filing its tax returns. Nor could Exxon Mobil reasonably do so, as it requires a calculation of the impact on the national economy of various tax exemptions and deductions it claims. Exxon Mobil does not perform such a calculation any more than an individual taxpayer would calculate the effect on national revenue from claiming a homeowners or charitable deduction. The Internal Revenue Service ("IRS"), the Office of Management and Budget ("OMB"), and the Department of Treasury ("Treasury") (collectively, the "Agencies") calculate Tax Expenditure as part of their administrative responsibilities, and they do not publish the assumptions and methodologies they use to make these calculations.

In asking Exxon Mobil to provide "Tax Expenditures," as that term is defined in the Appropriations Act, Specification 26 asks Exxon Mobil, in essence, to step into the shoes of the Agencies and make calculations it does not make, and has never made, by speculating about the numerous assumptions and methodologies these Agencies use. Because Exxon Mobil would have to guess to make these calculations, this is an exercise that will surely result in the creation of evidence that will not accurately reflect "Tax Expenditures" as Congress uses that term. Moreover, because the Specification calls for guesswork, each of the oil companies that has received a CID may perform at least some of these calculations differently. As a result, the information that the FTC will receive will not even be consistent among the companies that are responding to CIDs. Information that cannot be compared among those companies, moreover, is unusable because the point of Congress' request was to compile an *industry-wide summary* of Tax Expenditure data.

While Exxon Mobil cannot reliably calculate the Tax Expenditure information, the Agencies can. They, and not Exxon Mobil, have access to the definitive set of assumptions and methodologies used to compute this information in the ordinary course of their duties. The FTC should obtain this information from the Agencies in order to provide accurate and reliable information to Congress.

Finally, Exxon Mobil objects to Specification 26 on confidentiality grounds. Even though Tax Expenditures are not listed on tax returns, they still constitute "return information" under the Internal Revenue Code and are subject to privacy protections. *See* 26 U.S.C. § 6103(b)(2)(A). Of course, there would be no privacy problem if the FTC were to obtain Tax Expenditure information in a summary form – that is, in a way that does not identify individual taxpayers. Indeed, such summary information would plainly be sufficient to satisfy

Congress' request for a "summary tax of expenditures" across a range of companies. The FTC can obtain precisely such summary information from the IRS and the other Agencies.

If the FTC nevertheless insists on obtaining company-specific – rather than summary – Tax Expenditure information, Exxon Mobil, like any taxpayer, is entitled to important confidentiality protections under the tax code. These protections guard against the public disclosure of any tax information that the FTC receives. By asking Exxon Mobil to provide tax information directly, however, the FTC would force the company to forfeit a critical additional privacy protection: if Congress were to obtain tax data from the FTC received directly from Exxon Mobil, there would be no restriction on Congress' use – and possible disclosure to the public, inadvertent or otherwise – of that information. On the other hand, should the FTC obtain any needed company-specific tax information from the IRS, the Internal Revenue Code would place limitations on any Congressional disclosure of Exxon Mobil's tax information.

In short, the FTC has two ways to obtain Exxon Mobil tax information: from Exxon Mobil or from the IRS and other Federal Agencies, but only one – the latter – provides Exxon Mobil with complete confidentiality protection. Given the high priority placed on the privacy of taxpayer information, and the existence of a specific, Congressionally-prescribed mechanism for the FTC to obtain such information in a way that preserves that privacy, there is no basis for the FTC's demand that Exxon Mobil provide this information directly.

For these reasons, the Second CID should be limited to exclude Specification 26.

Procedural History

On November 9, 2005, the FTC issued Civil Investigate Demand FTC File No. 051-0243 (the "First CID") to Exxon Mobil. That CID was issued pursuant to a September 30, 2005 FTC Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation (the "Resolution"). According to the Resolution, the purpose of the investigation was "[t]o determine whether certain refiners, marketers, or others have adopted or engaged in practices that have lessened competition in the refining, distribution, and supply of gasoline in the United States, and whether these practices are in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended."

The First CID contained 25 separate requests for documents, data, and information, calling for the production of great volumes of Exxon Mobil information. Exxon Mobil immediately set to work to respond to the First CID, spending hundreds of man-hours to compile thousands of pages of responsive documents and information.

Moreover, Exxon Mobil took the FTC up on its invitation – extended in the CID itself – to discuss possible modifications to the First CID insofar as such modifications were "consistent with the Commission's need for documents and information." In November 2005, Exxon Mobil negotiated with the FTC staff about several proposed modifications to the First CID, and many of the proposed modifications were accepted.

Notwithstanding these negotiations, Exxon Mobil proceeded apace with its response to the First CID. On December 1 and 15, 2005, Exxon Mobil produced more than 8,000 pages of responsive documents, and on December 15, 2005, Exxon Mobil provided an extensive written response to the First CID. Exxon Mobil did not move to quash or limit any of the 25 Specifications in that CID.

On November 22, 2005, President Bush signed an appropriations bill that required the FTC, *inter alia*, to provide Congress with "a summary of tax expenditures (as defined in section 3(3) of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 622(3))" for "companies with total United States wholesale sales of gasoline and petroleum distillates for calendar 2004 in excess of $500,000,000." *See* Science, State, Justice, Commerce, And Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat. 2290, at § 632 (the "Appropriations Act").

The Appropriations Act does not instruct the FTC on how this Tax Expenditure information should be obtained, or from what source. One thing is clear, however: the Act does not require the FTC to provide Congress tax information identifiable to a specific company. Rather, it instructs the FTC to provide only a "*summary*" of such information across a range of companies in the oil and gas industry.

The FTC served the Second CID on Exxon Mobil on November 28, 2005, issued purportedly in furtherance of its original Investigation and under the same Resolution cited above. The Second CID includes three additional specifications, numbers 26 to 28. After receiving the Second CID, Exxon Mobil approached the FTC staff and objected to one – and only one – Specification: Specification 26. That Specification, which is based on the mandate in the Appropriations Act, provides:

> If [Exxon Mobil] had 2004 wholesale sales of Light Petroleum Products greater than $500 million, identify [Exxon Mobil's] claimed Tax Expenditures for tax years 2003 and 2004 in the form described below.

Exxon Mobil has objected to Specification 26 for the reasons stated below. Exxon Mobil has voiced the nature of its objections to the FTC staff. In a good faith effort to resolve the dispute over Specification 26, Exxon Mobil's counsel met with FTC staff on

December 13, 2005. Exxon Mobil was unable to reach an agreement with the FTC staff during this meeting, and the FTC has neither modified nor withdrawn the Specification, despite Exxon Mobil's objections.

The next day, Exxon Mobil sought an extension of the time to file this petition in the hopes of reaching an agreement. That request has been denied, forcing Exxon Mobil to file this petition to limit the Second CID.

ARGUMENT

The Second CID should be limited to exclude the request for information contained in Specification 26 for the following three reasons:

I. Specification 26 Requests Information Outside The Scope Of The FTC's Power To Issue Civil Investigative Demands Under Sections 5 And 20 Of The FTC Act.

Exxon Mobil's petition to limit should be granted because Specification 26 seeks information that the FTC has no authority to request pursuant to Sections 5 and 20 of the FTC Act – the provisions specifically mentioned in the Second CID. 15 U.S.C. §§ 45, 57b-1. The "Tax Expenditure" information sought by Specification 26 has nothing to do with the FTC's Investigation, and can have no possible bearing on the existence of any violation of the FTC Act. Rather, Specification 26 asks for Tax Expenditure information from certain oil companies as required by the Appropriations Act. Sections 5 and 20 of the FTC Act – which authorize the collection of evidence that is relevant to enforcement actions – are not the proper mechanisms for a general information request unrelated to an investigation. The Second CID should therefore be limited.

The FTC issued the Second CID pursuant to its broad enforcement power under Section 5 of the FTC Act to investigate "unfair methods of competition." 15 U.S.C. § 45; *see* Second CID. The Second CID itself – which references Section 20 of the FTC Act (the

provision authorizing the issuance of CIDs) – states that it was issued "in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the FTC by conduct, activities or proposed action [regarding the Gasoline Pricing Investigation]." *Id.* Section 20 of the FTC Act *only* allows the FTC to seek information by way of a CID when that information is "relevant to unfair or deceptive acts or practices in or affecting commerce…or to antitrust violations":

> Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, *relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), or to antitrust violations*, the Commission may, before the institution of any proceedings under this [Act], issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to submit such tangible things, to file written reports or answers to questions, to give oral testimony concerning documentary material or other information, or to furnish any combination of such material, answers, or testimony.

15 U.S.C. § 57b-1(c) (emphasis added); *see also* 16 C.F.R. §2.7(b) ("Civil investigative demands shall be the only form of compulsory process issued in investigations with respect to unfair or deceptive acts or practices within the meaning of FTC Act section 5(a)(1).").

Exxon Mobil's Tax Expenditures, as requested in Specification 26, are not relevant to the FTC's Investigation. The FTC has not articulated any connection – nor can it – between any such expenditures and its Investigation. Indeed, we are aware of no antitrust investigation in which the FTC has asked for information of this type. Nor has the FTC explained how the collection of Tax Expenditure information will advance its Investigation. The reason is simple: there is no relation whatsoever between the FTC's investigative mandate in this matter and its request for information in Specification 26.

Directly on point is *CFTC v. Collins*, 997 F.2d 1230, 1233-34 (7th Cir. 1993), in which the Seventh Circuit (Posner, J.) held that it was an abuse of discretion for the District Court to enforce a subpoena issued by the Commodities Futures Trading Commission ("CFTC") for tax returns in an investigation involving alleged commodities law violations. Noting that the CFTC had "made no showing that it needed [the request] tax returns" in a commodities fraud case, the Court went on to say:

> We are not experts in the investigation of violations of the commodity laws, so we may have overlooked reasons why, despite appearances, the effectiveness of the Commission's investigation of the appellants depends on its having access to their tax returns. The Commission has not advanced any such reasons. It asked for and obtained the enforcement of the subpoenas as a matter of rote, upon its bare representation that the tax returns might contain information germane to the investigation. That is not enough, if an appropriate balance is to be struck between the privacy of income tax returns and the needs of law enforcement.

Id. at 1234.

Like the CFTC in *Collins*, the FTC here has "made no showing that it need[s]" Exxon Mobil's tax information for any purpose "germane to [its] investigation." *Id.* To the contrary, the FTC is seeking the Tax Expenditure information solely because Congress, in the Appropriations Act, asked it to provide a "summary of tax expenditures." "[S]pecial reports" under Section 6(b) of the FTC Act would usually be the appropriate mechanism for obtaining information such as this, which is unrelated to a law enforcement investigation. 15 U.S.C. § 46(b).

Because the FTC has improperly requested Tax Expenditures from Exxon Mobil by relying on Sections 5 and 20 of the FTC Act, the Second CID should be limited to exclude Specification 26. As set forth in Section III below, however, Congress has prescribed a specific,

alternative mechanism for the FTC to use in seeking taxpayer data for use in a Congressionally-authorized survey.

II. Exxon Mobil Does Not Possess Tax Expenditure Information, Nor Can It Calculate Such Information Accurately In Compliance With The Appropriations Act; The FTC Can Easily Obtain Accurate Information From The Agencies.

While Specification 26 of the Second CID seeks the production of Tax Expenditures that Exxon Mobil "claimed" in 2003 and 2004, Exxon Mobil in fact does not maintain any such Tax Expenditure information, and does not "claim" any such expenditures. Exxon Mobil does not calculate such Expenditures in the ordinary course of its business. More importantly, Exxon Mobil cannot calculate this information in a way that will accurately reflect what Congress has asked for in the Appropriations Act. A calculation of Tax Expenditures that will meet Congress' definition can be performed based on economic assumptions, models and methodologies that are known to, and used by, the IRS, OMB, and Treasury – the Agencies. Because Exxon Mobil is not privy to these assumptions and methodologies, it can answer Specification 26 only by guessing at the calculations the Agencies would make. But Congress was not looking for guesses when it asked the FTC to collect Tax Expenditures. It was looking for accurate data. The appropriate source for that data is the Agencies, not Exxon Mobil.

A. Congress Was Looking For Specific And Defined Information When It Asked For "Tax Expenditures."

Congress had something very specific in mind when it asked the FTC to compile a "summary of a tax expenditures" for certain oil companies. As defined in both the Second CID and the Appropriations Act, determination of "Tax Expenditures" requires a *calculation* of Federal "revenue losses" that result from the application of specified tax exemptions, deductions or credits, among other things, from Exxon Mobil's gross income. *See* Second CID at 4; Appropriations Act at § 632; 2 U.S.C. § 622(3). A "Tax Expenditure" is a concept defined, not

by the Internal Revenue Code – which deals with tax liabilities for individual taxpayers – but by the Congressional Budget and Impoundment Act of 1974. 2 U.S.C. § 622(3); *see also generally* 2 U.S.C. §§ 621–645(a). The annual Federal Budget contains an economic analysis of the impact on Federal revenue of various tax deductions, exemptions, and credits. *See* 2 U.S.C. § 632(e)(2)(E) (requiring estimate of Tax Expenditures in Congressional report accompanying concurrent budget resolution); 2 U.S.C. § 639(a)(1) (requiring a report for any legislation creating changes to Tax Expenditure levels); 31 U.S.C. § 1105(a)(16) (requiring the President's proposed budget to provide "the level of tax expenditures . . . for the fiscal year for which the budget is submitted, considering projected economic factors and changes in the existing levels based on proposals in the budget").

The Agencies, which compute Tax Expenditures apply various economic assumptions and methodologies to raw data that companies like Exxon Mobil provide as part of their tax returns. Exxon Mobil does not know what economic assumptions and methodologies the Agencies use to calculate these tax expenditures, as the Agencies do not publish that information.

B. Exxon Mobil's Calculation Of Tax Expenditures Can Only Guess At The Calculation Congress Has Requested.

By asking Exxon Mobil to calculate its own Tax Expenditures, the FTC is asking Exxon Mobil to step into the shoes of the Agencies, speculate as to the assumptions and methodologies they use to compute Tax Expenditures as part of the Federal budget process, and apply those speculative assumptions and methodologies to Exxon Mobil's own data. Such an exercise is plainly problematic and is, by definition, designed to result in the generation of data that does not, and cannot, constitute "Tax Expenditures," as Congress defined that term. It

would, at best, be a guess as to what a proper calculation of Tax Expenditures – which is what Congress seeks – would comprise.

By way of example only, in the case of a Tax Expenditure that permits a given cost to be deducted in the current year instead of being capitalized and deducted over a period of years, the calculation of the "revenue loss" attributable to such Tax Expenditure would involve the resolution of many questions, including: What should the period be over which the cost should be deducted? What method should be used to calculate how much of a deduction should be taken in each year? What discount rate should be used in determining the present value of the stream of deductions? Reasonable minds – even among experienced tax counsel – can disagree about how to answer these questions accurately.

Moreover, because the FTC is asking that a number of different oil and gas companies in addition to Exxon Mobil derive their own interpretation of how to calculate Tax Expenditures, each company will likely choose different – and potentially conflicting – assumptions and methodologies. With different companies making different assumptions, there can be no proper way for the FTC to compare the Tax Expenditure computations submitted by the CID recipients in any true "apples-to-apples" sense. And *sui generis* information that cannot be compared "apples-to-apples" would be useless in assisting the FTC in fulfilling its Congressionally-imposed mandate to collect a "*summary* of tax expenditures" from a range of large oil companies across the industry.

The multitude of questions and the various ways in which economic assumptions can – and must – be made to perform the tax expenditure calculations should give the FTC concern, as it gives Exxon Mobil concern, that no company can be confident that it can accurately and satisfactorily answer Specification 26 in the way that Congress has asked. That is

reason enough to limit the CID to exclude this Specification. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (holding a CID will be enforced only if "the inquiry is within the authority of the agency, *the demand is not too indefinite* and *the information sought is reasonably relevant*") (emphasis added).

Indeed, because any Tax Expenditure calculations performed by Exxon Mobil and other companies would, by necessity, be *ad hoc* in nature, any such information provided in response to Specification 26 cannot be truly relevant. *See id.; see also FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089–91 (D.C. Cir. 1992) (holding information requested in a CID must be relevant, and defining relevant as "not plainly incompetent or irrelevant to any lawful purpose" of the FTC) (internal citations omitted). The FTC's conclusions and findings should be based on the most reliable and accurate information available. For the foregoing reasons, relying on Exxon Mobil and other companies to make their own Tax Expenditure estimates would assuredly *not* achieve this result. The FTC should obviously not use information that it knows is likely unreliable to prepare the summary Congress seeks.[1]

The Certification to the Second CID, to be sure, provides that Exxon Mobil can make "reasonable estimates . . . [if] books and records do not provide the required information."

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[1] Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554) ("Data Quality Act") directed the Office of Management and Budget to issue government-wide guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." Section 515 also directed Federal agencies to issue their own implementing guidelines. The FTC Guidelines that became effective in October 2002 commit the agency to ensuring "that the information [it] disseminates, including factual or statistical data, meets basic standards of quality, including objectivity, utility, and integrity." FTC Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Federal Trade Commission, Section IV.A. For the reasons described in this petition, data that the FTC collects from Exxon Mobil and other companies in response to Specification 26 will not satisfy the standards in its Guidelines, the OMB guidelines, or Section 15 of the Data Quality Act.

Nevertheless, the fact that Exxon Mobil would be forced to make these calculations with no guidance and based, at best, on a guess of the assumptions used by various Federal Agencies demonstrates that its estimate would not be "reasonable."

C. The FTC Should Obtain This Information From The Agencies.

Although Exxon Mobil is not in a position to provide accurate information of the type that Congress requests, the Agencies are. Indeed, the Agencies have access both to the raw data with which to perform the Tax Expenditure calculations and the – unpublished – assumptions and methodologies they use in making these calculations. In addition, obtaining the Tax Expenditure calculations from the Agencies will ensure that the calculations are consistent among all the companies for whom the FTC is seeking this information, and thus are in a form most readily usable by the FTC to prepare its summary for Congress. Given this more appropriate and reliable source for the information that the FTC seeks, there is no basis for the FTC's demand that Exxon Mobil perform this calculation. *See Collins*, 997 F.2d at 1233 (refusing to enforce a subpoena requesting tax returns where "[t]he Commission made no showing that it needed the appellants' tax returns," because there were other means available for the CFTC to obtain the information it sought).

In short, if the FTC compiles the information sought in Specification 26 from individual companies, it is virtually certain that the aggregate Tax Expenditure totals will differ both among themselves and from the accurate, definitive, and consistent totals the Agencies can produce. Obtaining the data directly from the Agencies eliminates that risk.

III. The FTC Does Not Need Company-Specific Tax Information From Exxon Mobil To Satisfy Congress' Request; Any Such Company-Specific Information Would Be Subject to Statutory Privacy Protections.

There are strong practical and policy reasons against demanding individual tax return information from Exxon Mobil itself. The practical reason is that the FTC does not need company-specific tax information to satisfy its charge to compile a "summary of tax expenditures." The FTC can obtain summary tax information from the IRS and the other Agencies. As a matter of policy, the demand for individual tax returns from a taxpayer raises significant privacy concerns, and by proceeding in the manner it has chosen – rather than simply obtaining any tax information it needs from the IRS – the FTC would deny Exxon Mobil the benefit of certain privacy protections normally afforded every taxpayer. Courts – to encourage voluntary compliance with the tax laws and to protect the confidentiality of sensitive taxpayer information – have been reluctant to compel production of such information absent a strong and specific showing of need. *See Collins*, 997 F.2d at 1233; *Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975) (affirming order quashing subpoena for tax information; "a public policy against unnecessary public disclosure arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns."). The FTC has made no such showing here.

A. The FTC Can Meet Congress' Demand By Obtaining Summary Tax Information From The IRS And The Other Agencies.

Congress, in the Appropriations Act, asked the FTC to compile a "*summary* of tax expenditures" for a number of large oil companies in the industry. There is no reason that the FTC, in preparing that summary, would need to compel the production of company-specific tax information from Exxon Mobil itself. Rather, summary tax information that does not identify a particular taxpayer is sufficient to allow the compilation of the FTC's report. The FTC can

easily obtain such summary tax data from the IRS and the other Federal Agencies, which have in their possession the same the tax return information that Exxon Mobil has. Such summary information would not only allow the FTC to do its job, but would do so in a way that protects Exxon Mobil's taxpayer privacy.

B. Company-Specific Tax Information Is Subject To Privacy Protections That The FTC Would Force Exxon Mobil To Forfeit By Obtaining Such Information Directly From The Company, Rather Than The IRS.

To the extent that the FTC insists on obtaining Tax Expenditure information that identifies individual taxpayers, the privacy protections mandated by the Internal Revenue Code would apply. Tax Expenditures, while not specifically listed on a company's tax returns, still constitute "return information" under the Internal Revenue Code and are subject to the privacy protections therein. *See* 26 U.S.C. § 6103(b)(2)(A) (stating "return information" includes "any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return...").

Section 6103(a) of the Internal Revenue Code provides that taxpayer returns and return information may not be disclosed in any manner that allows identification of the taxpayer. That is an important privacy protection. However, the protections of Section 6103 *only* apply to returns or return information filed with, received by, or otherwise generated by the IRS. 26 U.S.C. §§ 6103(a), (b); *see also Collins*, 997 F.2d at 1233; *Stokwitz v. United States*, 831 F.2d 893, 896 (9th Cir. 1987) (the protections of Section 6103 apply only to information received directly from, or through, the IRS). Accordingly, if the FTC obtained tax information directly from Exxon Mobil, Exxon Mobil would not receive the benefit of Section 6103 protections.

Certainly, tax information provided directly by Exxon Mobil to the FTC would be protected from disclosure to the public pursuant to Freedom of Information Act ("FOIA") rules.[2] But FOIA does not provide "authority to withhold information from *Congress*." 5 U.S.C. § 552(d) (emphasis added). In fact, while the Federal Trade Commission Act ("FTC Act") generally protects the confidentiality of items produced to the FTC, disclosure to Congress is unrestricted:

> Except as otherwise provided in this section, while in the possession of the custodian, no documentary material, tangible things, reports or answers to questions, and transcripts of oral testimony shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material, things, or transcripts. *Nothing in this section is intended to prevent disclosure to either House of the Congress or to any committee or subcommittee of the Congress*, except that the Commission immediately shall notify the owner or provider of any such information of a request for information designated as confidential by the owner or provider.

15 U.S.C. § 57b-2(b)(3)(C) (emphasis added).

Therefore, the FTC would be required to provide the taxpayer information to Congress upon request, and that information could identify Exxon Mobil. Congress would have no statutory limitation on the use of that information, and courts are unlikely to provide any tangible limitation on any such use in deference to the separation of powers. *See, e.g., Exxon Corp. v. FTC*, 589 F.2d 582, 589 (D.C. Cir. 1978) ("The courts presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected

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[2] 5 U.S.C. §§ 552(a)(3), (b)(3). The Federal Trade Commission Act provides that any material that the FTC receives in any investigation pursuant to compulsory process is exempted from FOIA disclosure to the public generally. 15 U.S.C. § 57b-2(f).

parties [citations omitted]."). As a practical matter, therefore, there would be nothing to prevent Congress from disclosing Exxon Mobil's tax information, inadvertently or otherwise.

The prospect of a public disclosure by Congress is not theoretical. For example, Congress disclosed internal Exxon Mobil information (and information from other oil companies) in connection with an investigation of gasoline prices in 2002 by the U.S. Senate Permanent Subcommittee on Investigations (the "Subcommittee"). The Subcommittee's hearing identified and quoted from the contents of internal Exxon Mobil documents (as well as documents from other companies) that the FTC had given to Congress. *See Gas Prices: How Are They Really Set? Hearing Before The Senate Permanent Subcomm. on Investigations, Comm. on Governmental Affairs*, 107th Cong., S. Hrg. 107-509 (May 2, 2002).

There is nothing in the Appropriations Act that requires the FTC to proceed in a way that would forfeit Exxon Mobil's statutory right to confidentiality. Nor is there anything in the FTC's mandate to conduct this Investigation that either allows or compels it to obtain confidential taxpayer information from Exxon Mobil in a way that could compromise the confidentiality and disclosure protections to which taxpayers are entitled. This is especially true when the FTC can obtain precisely the same information from the IRS, and in so doing would protect the confidentiality of the information.

The IRS is in possession of the same tax documents that Exxon Mobil has. The only difference is that if the FTC obtains the requested information from the IRS – rather than Exxon Mobil directly – the information cannot be subsequently given to Congress in a way that will identify Exxon Mobil as the taxpayer. Specifically, the FTC is permitted to provide taxpayer information it receives from the IRS to Congress only "in a form which *cannot* be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 26 U.S.C. §

6103(j)(4) (emphasis added).[3] In this way, the confidentiality of Exxon Mobil tax information would be preserved.

Moreover, the IRS is required by law to provide such individual taxpayer information to the FTC upon request. While the Internal Revenue Code provides that tax return information is confidential and restricts the release of such information by the IRS to other parties (*see* 26 U.S.C. § 6103), Section 6103(j)(2) of the Code provides an exception that mandates that the IRS release such information to the FTC upon request:

> Upon request in writing by the Chairman of the Federal Trade Commission, the Secretary shall furnish such return information reflected on any return of a corporation with respect to the tax imposed by chapter 1 to officers and employees of the Division of Financial Statistics of the Bureau of Economics of such commission ....

26 U.S.C. § 6103(j)(2).

The IRS would have no right to contest or dispute such a request by the FTC. *Id.* ("Upon request ... *shall* furnish ....") (emphasis added). To receive tax information from the IRS under this provision, the FTC need only restrict access to the information and maintain records of who accessed it. *See* 26 U.S.C. § 6103(p)(4).

In sum, receiving the tax information directly from the IRS, rather than through Exxon Mobil, would not impede the FTC's use of the information for its summary to Congress, but will protect the continued confidentiality of the information in a way that would not be possible if the FTC obtains that information directly from Exxon Mobil.

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[3] If Congress or a Congressional Committee specifically sought to have the same information the FTC receives from the IRS, it would likely be entitled to view it pursuant to Section 6103(p)(4)(C). However, even if Congress or a Congressional Committee received such taxpayer-specific information through that statutory provision, the confidentiality of the information would still be protected. Section 6103 in its entirety would still apply, and would restrict Congressional use of the taxpayer-specific information to closed executive sessions. *See* 26 U.S.C. §§ 6103(f)(3), (f)(4)(B).

Conclusion

For the foregoing reasons, Exxon Mobil respectfully requests that:

1. The FTC limit Specification 26 of the Second CID such that Exxon Mobil would not be required to provide the information requested in that Specification; and

2. The FTC obtain any information it seeks based on Exxon Mobil's tax returns from the IRS and the other Federal Agencies.

Dated: December 19, 2005

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF EXXON MOBIL CORPORATION	)	File No. 051-0243

STATEMENT OF BILAL SAYYED PURSUANT TO SECTIONS 2.7(D)(2) AND 3.22(F) OF THE CODE OF FEDERAL REGULATIONS

I am Counsel with O'Melveny & Myers LLP ("O'Melveny"), counsel for Exxon Mobil Corporation ("Exxon Mobil"). I submit this statement pursuant to Sections 2.7(d)(2) and 3.22(f) of the Code of Federal Regulations in connection with Exxon Mobil's Petition to Limit the Civil Investigate Demand Issued to Exxon Mobil (the "Petition"). On November 9, 2005, the FTC issued Civil Investigate Demand FTC File No. 051-0243 (the "First CID") to Exxon Mobil. On November 28, 2005, the FTC served a second CID (the "Second CID") to Exxon Mobil, which contained Specification Number 26, the subject of the Petition.

I, along with my colleague Timothy J. Muris, have negotiated with FTC representatives in good faith in an effort to reach agreement as to Specification 26, to which Exxon Mobil has raised an objection. Specifically, Mr. Muris and I met with Peter Richman, Lead Staff Attorney at the Bureau of Competition, and Gabe Dagen, Assistant Director in Accounting and Financial Analysis at the Bureau of Economics, at the FTC's offices on December 13, 2005. We raised objections that Exxon Mobil had to Specification 26. We were, however, unable to reach an agreement as to Exxon Mobil's objections to Specification 26, and the FTC neither modified nor withdrew the Specification. On December 14, 2005, I asked both Peter Richman and Phil Broyles, Assistant Director in the Bureau of Competition, for an

extension of the date within which Exxon Mobil was required to file any petition to quash or limit the CID to permit further negotiation with respect to Exxon Mobil's objections to Specification 26. That request was denied.

Dated: December 19, 2005

Bilal Sayyed, Esq.
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

CERTIFICATE OF SERVICE

I, Astri Kimball, hereby certify that I have, this 19th day of December 2005, caused copies of the foregoing Petition to Limit Civil Investigative Demand Issued to Exxon Mobil and the Statement of Bilal Sayyed Pursuant to Sections 2.7(d)(2) and 3.22(f) of the Code of Federal Regulations to be served by hand delivery, on:

Marc W. Schneider
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, DC 20580

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Bureau of Competition
Federal Trade Commission
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Counsel for Exxon Mobil Corporation

EXHIBIT B

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

January 10, 2006

VIA EMAIL AND EXPRESS MAIL

Exxon Mobil Corp.
c/o Timothy J. Muris, Esquire
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, DC 20006

Re: *Exxon Mobil Corporation's Petition to Limit Civil Investigative Demand,* File No. 051-0243

Dear Mr. Muris:

This letter advises you of the disposition of Exxon Mobil Corporation's ("Exxon Mobil" or "the Company") Petition to Limit Specification 26 of the Civil Investigative Demand ("CID") issued to it on November 23, 2005. For the reasons stated herein, the Commission denies the Petition to Limit. Pursuant to 16 C.F.R. § 2.7(e), Exxon Mobil is ordered to comply with Specification 26 of the CID on or before January 20, 2006 at 5:00 p.m. E.S.T.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[1]

I. BACKGROUND AND SUMMARY

Section 1809 of the Energy Policy Act of 2005 ("Energy Act") directs the Commission to "conduct an investigation to determine if the price of gasoline is being artificially manipulated by reducing refiner capacity or by any other form of market manipulation or price gouging practices."[2] Accordingly, the Commission is conducting an investigation to "determine whether

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[1] This letter decision is being delivered by email and express mail. The email copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established by this decision.

[2] Energy Policy Act of 2005, Pub. L. No. 109-058 § 1809, 119 Stat. 594 (2005).

certain oil refiners, marketers, or others have adopted or engaged in practices that have lessened competition in the refining, distribution, and supply of gasoline in the United States, and whether these practices are in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended."[3] On November 8, 2005, the Commission issued CIDs to a number of companies, including Exxon Mobil, containing 25 separate specifications. Petition to Limit at 2. Exxon Mobil did not object to the first CID.

On November 22, 2005, the President signed the fiscal 2006 appropriations bill for the Departments of State, Justice, Commerce, and related federal agencies, including the Commission. Section 632 of the act ("Pryor Amendment") requires the Commission to investigate post-Hurricane Katrina gasoline prices and to report on industry profits, tax incentives, and the overall effects of increased gasoline prices on the economy.[4] Subsequent to this legislation, the Commission issued a second set of CIDs to a number of companies, including Exxon Mobil, containing an additional three specifications (Specifications 26-28).[5] The Petition to Limit only challenges Specification 26 of the second CID. Specification 26 requires Exxon Mobil to provide the Commission with its "claimed Tax Expenditures for tax years 2003 and 2004[.]" *Id.*

Exxon Mobil timely filed its Petition to Limit on December 19, 2005. Exxon Mobil claims that Specification 26 should be limited for three reasons: (1) the tax information sought by Specification 26 is not relevant to the Commission investigation, and therefore the Commission lacks authority under the FTC Act to seek this information;[6] (2) "Exxon Mobil cannot respond accurately to the Specification" because the Company does not compile this information in the

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[3] Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, File No. 051-0243 (Sept. 30, 2005).

[4] Petition to Limit at 7; and Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub.L. No.109-108 § 632, 119 Stat. 2290 (2005). The so-called "Pryor Amendment" to this act directs that not less than $1 million of funds appropriated to the Commission must be used "to conduct an immediate investigation into nationwide gasoline prices in the aftermath of Hurricane Katrina: Provided, That the investigation shall include: (1) any evidence of price-gouging by companies with total United States wholesale sales of gasoline and petroleum distillates for calendar 2004 in excess of $500,000,000 and by any retail distributor of gasoline and petroleum distillates against which multiple formal complaints . . . of price-gouging were filed in August or September, 2005, with a Federal or State consumer protection agency; (2) a comparison of, and an explanation of the reasons for changes in, profit levels of such companies during the 12-month period ending on August 31, 2005, and their profit levels for the month of September, 2005 . . . ; [and] (3) a summary of tax expenditures (as defined in section 3(3) of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 622(3)) for such companies. . . ."

[5] *Id.* The second CID was served on Exxon Mobil on November 28, 2005.

[6] *Id.* at 3 and 9.

ordinary course of business;[7] and (3) the Commission should seek tax expenditure information from the IRS and other federal agencies, rather than demand it from Exxon Mobil, in order to afford the Company greater confidentiality protection.[8]

II. THE INFORMATION REQUESTED IS RELEVANT TO THE COMMISSION'S INVESTIGATION

Exxon Mobil claims in essence that there is no nexus between the information requested in Specification 26 and the law enforcement purpose of the investigation as stated in the Resolution authorizing the use of compulsory process.[9] We disagree. The information sought by Specification 26 is sufficiently related to the investigation. In any event, this argument has been rendered moot by the Commission's issuance of an Order Requiring the Filing of a Special Report pursuant to Section 6(b) of the FTC Act, 15 U.S.C. § 46(b).

The Commission is entitled to require respondents to provide any information that is "not plainly incompetent or irrelevant to any lawful purpose of the [agency] . . . and not unduly burdensome to produce[.]" *Federal Trade Commission v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (internal quotations and citations omitted). Moreover, "the agency's own appraisal of relevancy must be accepted so long as it is not obviously wrong." *Id.* (internal quotations and citations omitted). Furthermore, "the Commission has no obligation to establish precisely the relevance of the material it seeks in an investigative subpoena by tying that material to a particular theory of violation." *Id.* at 1090 (*citing Federal Trade Commission v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977). Determination of relevancy in an investigation is "more relaxed than in an adjudicat[ion]." *Id.* The material requested "need only be relevant to the *investigation* – the boundary of which may be defined quite generally, . . . as it was in the Commission's resolution here." *Id.*

The Resolution authorizing the CID implements an investigation to determine whether a violation of Section 5 of the FTC Act may have occurred. Note 3, *supra*. Accordingly, the information sought by Specification 26 is relevant to that purpose if it is of some assistance to the Commission in deciding whether there is reason to believe that Section 5 has been violated and whether an enforcement action should be commenced. *Invention Submission Corp.*, 965 F.2d at 1090. Exxon Mobil's assertion that there can be no relevance is mistaken. The material required by Specification 26 will permit the Commission to make a more accurate assessment of whether

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[7] *Id.* at 3.

[8] *Id.* at 1819 ("Therefore, the FTC would be required to provide the taxpayer information to Congress upon request, and that information could identify Exxon Mobil. Congress would have no statutory limitation on the use of that information, and courts are unlikely to provide any tangible limitation on any such use in deference to the separation of powers. . . . As a practical matter, therefore, there would be nothing to prevent Congress from disclosing Exxon Mobil's tax information, inadvertently or otherwise.").

[9] Note 3, *supra*.

Exxon Mobil's profits were the product of tax expenditures or whether those profits were the result of other market-based forces. Thus, the information requested by Specification 26 clearly falls within the "more relaxed" standard of relevance applicable to investigative subpoenas. *Id.* Indeed, Exxon Mobil has tacitly recognized that profitability information is relevant to this investigation because it has responded without objection to Specification 21 of the November 8 CID.[10]

Exxon Mobil correctly observes that the Commission's antitrust investigations do not routinely request information regarding tax expenditures. Petition to Limit at 9. However, this investigation is somewhat different from most Commission antitrust investigations. In the ordinary investigation, the Commission would identify a suspicious practice and inquire whether it contributed to higher consumer prices. In this investigation, by contrast, the inquiry begins, as directed by Congress, with the existence of higher prices and the Commission is investigating whether specific company practices have led to artificially maintained higher prices, or whether those prices are part of a properly functioning long-term competitive landscape.

Because this investigation begins, as directed by Congress, with the premise that prices and profits are high, the Commission must guard against mistakenly or reflexively ascribing high profits to the illegal exercise of market power. The information requested by Specification 26 will allow the Commission to gauge the portion of profitability attributable to Exxon Mobil's business efforts and the portion attributable to tax expenditures. Ultimately this information will allow the Commission to make a more accurate assessment of whether or not Exxon Mobil's profits are the product of market-based forces. We therefore find that the information requested by Specification 26 is sufficiently relevant to the law enforcement purposes of the Commission's investigation.

In any event, even if there were merit to Exxon Mobil's relevance argument, that argument is moot. As Exxon Mobil recognizes, Section 6(b) of the FTC Act, 15 U.S.C. § 46(b), provides a means whereby the Commission may obtain information even if that information is not related to a law enforcement investigation. *See* Petition to Limit at 10. Pursuant to Section 6(b), the Commission has now served Exxon Mobil with an Order Requiring the Filing of a Special Report. That Order seeks the same information sought by Specification 26 of the CID. Exxon Mobil's compliance with that Order, to which its relevance argument does not apply, will obviate its compliance with Specification 26.[11]

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[10] Specification 21 requested monthly revenue and cost data for Exxon Mobil's wholesale motor fuels sales.

[11] Although compliance with the Order Requiring the Filing of a Special Report obviates compliance with Specification 26, thus mooting Exxon Mobil's Petition to Limit, this letter nonetheless responds to all the arguments raised in the Petition lest Exxon Mobil seek to quash the Order.

III. EXXON MOBIL HAS NOT ESTABLISHED THAT COMPLIANCE WITH SPECIFICATION 26 IS UNDULY BURDENSOME

Exxon Mobil does not claim that it would be unable to prepare a response to Specification 26 or that the preparation is "burdensome," as that term is ordinarily understood. *See, e.g., Federal Trade Commission v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979) (target of compulsory process must show that compliance threatens to unduly disrupt or seriously hinder operation of its business). Rather, Exxon Mobil claims that it does not prepare the information requested in its ordinary course of business and would have to make assumptions and calculations in responding and that such assumptions and calculations might differ from those made by other respondents to similar CIDs. Petition to Limit at 4.

The Commission regularly anticipates that CID recipients may need to provide estimates, or make assumptions and calculations in responding to a CID. Instruction K of the CID and the Certification language clearly state that CID responses be accompanied by adequate explanations of the methods used in preparing the responses.[12]

Nor does Exxon Mobil establish undue burden with its contention that other federal agencies could provide the Commission with the information it seeks. The Commission is not obligated to exhaust all other potential sources for information before issuing a CID to a respondent.

The Pryor Amendment requires both a company-specific comparison of profitability and an aggregate summary of tax expenditures, for a group of firms with gasoline and distillate sales above a dollar threshold, or that have been the subject of recent price-gouging complaints. Exxon Mobil has not shown that other federal agencies could, in fact, provide equally probative information to the Commission.[13] More importantly, even if responsive information were

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[12] Instruction K of the CID expressly directs Exxon Mobil that:

> Whenever a Specification requests the submission of data: (i) provide documents sufficient to show the data used and all sources for such data; (ii) explain each step in the Company's calculations in sufficient detail to permit replication of the Company's calculations from the source documents submitted; and (iii) explain why the methodology used represents the most accurate estimate the Company can make.

CID at 4.

[13] Exxon Mobil has made an unsupported assertion that other federal agencies could provide the Commission with the information required of Exxon Mobil by Specification 26. Even if that were a sufficient ground for relief, Exxon Mobil has not provided the Commission with either a factual or legal basis to believe that such agencies could or would provide the information. Indeed, the Commission believes that such agencies could not provide the Commission with information of comparable probative value to that which can be provided by Exxon Mobil. That

available from alternative sources, Exxon Mobil cannot be permitted to determine the course of the Commission's investigation. Rather, the Commission must remain free to structure its investigations, including the selection of the sources from which it seeks information, in the manner it deems most appropriate. Accordingly, Exxon Mobil's second argument provides no grounds for relief.

IV. EXXON MOBIL'S CONCERN ABOUT CONGRESSIONAL DISCLOSURE DOES NOT RAISE A VALID CLAIM OF PRIVILEGE

The Commission appreciates Exxon Mobil's confidentiality concerns, but Congress has the prerogative to request trade secret and other business confidences that the Commission acquires during the course of an investigation. Further, the Commission cannot restrict Congress's ultimate uses of such information. Under the Commission's rules, if Congress requests confidential information from the Commission, notice will be given to the person who provided such information to the Commission and the Commission will advise Congress that the person who provided the information to the Commission considers it to be confidential. 16 C.F.R. § 4.11(b). If fear of Congressional use or disclosure of information provided a legitimate ground for limiting a CID, however, the Commission would be deprived of its ability to acquire the confidential business information that often is central to its investigations, especially given that Congress often requests the initiation of agency investigations in the first instance. Therefore, Exxon Mobil's concern about Congress's possible use or disclosure of the Company's confidential business records does not create a legitimate basis for limiting the CID.

V. CONCLUSION AND ORDER

Accordingly, no grounds having been established by Exxon Mobil to warrant limiting Specification 26 of the CID, **IT IS ORDERED THAT** Exxon Mobil's Petition to Limit should be, and it hereby is, **DENIED.**

IT IS FURTHER ORDERED THAT Exxon Mobil shall respond to Specification 26 of the CID on or before January 20, 2006 at 5:00 p.m. E.S.T.

By Direction of the Commission.

Donald S. Clark
Secretary

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being the case, Exxon Mobil has not satisfied its burden of demonstrating that it is entitled to relief. *Rockefeller*, 591 F.2d at 190 ("the burden of showing that an agency subpoena is unreasonable remains with the respondent . . .").