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Ms. Elizabeth M. Murphy
Secretary, U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Subject: Section 1504 of Dodd Frank, *Disclosure of Payments by Resource Extraction Issuers*, Release No. 34-63549, File Number S7-42-10

Dear Secretary Murphy:

The American Petroleum Institute (“API”) submits this letter to provide further comments on the implications of the Commission’s pending rulemaking to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹ API fully supports the disclosure of payments to governments for resource extraction activities, in accordance with the Extractive Industries Transparency Initiative, and supports a rule implementing Section 1504 that promotes government accountability and transparency while also protecting U.S.-listed companies from unnecessary competitive harm and conflicts with foreign law.

In our comment letter of January 19, 2012, API discussed recent judicial interpretations of the Commission’s obligations to consider the effects of its proposed rules on efficiency, competition, and capital formation. The Commission subsequently expressed its commitment to thorough and transparent economic impact analyses.² We encourage the Commission to faithfully implement this commitment by re-proposing the rule with a thorough and transparent economic impact analysis on which interested parties may comment.

In our January 19 letter, API also identified ways the Commission could mitigate the negative economic impacts of the final rule, when ultimately issued. Specifically, API identified the Commission’s definitional and exemptive authority under the Exchange Act to draft a final rule that provides a reporting exception under circumstances where a company’s reporting of its payments to the host government would cause the company to violate the laws of the host

¹ This letter supplements API’s previous comment letters submitted October 12, 2010, December 9, 2010, January 28, 2011, August 11, 2011, and January 19, 2012.

² *The SEC’s Aversion to Cost-Benefit Analysis: Hearing Before the H. Comm. on Oversight and Government Reform*, 112th Cong. (Apr. 17, 2012) (statement of Mary Schapiro, Chairman of the SEC); *Current Guidance on Economic Analysis in SEC Rulemakings*, Internal Commission Guidance (Mar. 16, 2012).

government.³ This letter discusses additional legal authorities that support a reporting exception under such circumstances.

The importance to the U.S. economy of considering international law in the regulatory process was recently underscored in an Executive Order signed by President Obama, titled “Promoting International Regulatory Cooperation.”⁴ This Executive Order recognizes that “differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts . . . might impair the ability of American businesses to export and compete internationally.”⁵ The Order imposes heightened responsibilities on federal agencies, including the requirement that agencies designate “significant regulations that the agency identifies as having significant international impacts.”⁶ Highlighting the importance of the matter to the competitiveness of U.S. businesses, Cass Sunstein, the head of the White House Office of Information and Regulatory Affairs, published an article in *The Wall Street Journal* on the day the Executive Order issued, explaining that “[i]n an interdependent global economy, diverse regulations can cause trouble for companies doing business across national boundaries,” and noted that “[u]nnecessary differences in countries’ regulatory requirements can cost money, compromising economic growth and job creation.”⁷

If the Commission were to issue a final rule that requires reporting even when it conflicts with foreign laws, such a rule would cause exactly the type of unnecessary competitive harm that the Executive Order seeks to avoid. The rule as currently proposed would create inconsistencies with the existing international disclosure standard promoted by the Extractive Industries Transparency Initiative.⁸ The proposed rule would also require some American companies operating abroad to make the Hobson’s choice between violating foreign laws (and subjecting themselves to civil or criminal penalties) or abandoning operations in foreign countries that prohibit disclosure.⁹ Such a rule “could result in companies abandoning new projects, or canceling existing projects, which will further constrain U.S. job creation and undermine economic growth.”¹⁰

To avoid such conflicts and their costly consequences, API and other commenters have suggested that the Commission use its definitional authority, and, if necessary, its exemptive authority to exempt the reporting requirement where reporting would cause a company to violate foreign law. Tailoring the rule in this manner would further the Administration’s goals of harmonizing regulatory approaches among nations and facilitating economic growth and job creation.

³ See API Comment Letter, at 5 (Jan. 19, 2012). For a discussion of conflict of payment disclosure with foreign laws, see API Comment Letter, at 25 (Jan. 28, 2011) (noting at least four countries where API members operate—Cameroon, China, Qatar, and Angola—that prohibit disclosure of payments as contemplated by the proposed rule); Exxon Mobil Corp. Comment Letter, at 1-2 (Mar. 15, 2011); Shell Comment Letter, at 1-2 (May 17, 2011); Reps. Bachus and Miller Comment Letter, at 1-2 (Mar. 4, 2011); Cravath, Swaine & Moore LLP *et al.* Comment Letter, at 2-3 (Nov. 5, 2010).

⁴ Exec. Order No. 13,609, *Promoting International Regulatory Cooperation*, 77 Fed. Reg. 26,413-15 (May 1, 2012).

⁵ *Id.* at 26,413.

⁶ *Id.* at 26,414.

⁷ Cass Sunstein, *The White House v. Red Tape*, Wall St. J., May 1, 2012, at A13.

⁸ See, e.g., API Comment Letter, at 2 (Jan. 28, 2011).

⁹ See *id.* at 25.

¹⁰ Reps. Bachus and Miller Comment Letter, at 1 (Mar. 4, 2011).

In addition to this Executive Order, longstanding principles of international law require agencies to construe statutes to avoid conflicts with foreign laws. The Restatement (Third) of Foreign Relations Law—often cited approvingly by U.S. courts—provides that, in general, “a state may not require a person . . . to do an act in another state that is prohibited by the law of that state.”¹¹ The Restatement extends this principle to executive agencies engaging in statutory construction:

[I]f one construction of a United States statute would . . . subject a person to conflicting commands, while another construction would avoid such a conflict, the latter construction is clearly preferred, if fairly possible. ***This rule of construction applies not only to courts, but also to Executive Branch officials and regulatory bodies in interpreting the authority granted to them in legislation . . .***¹²

The same rule of construction flows from the doctrine of comity. The Supreme Court explained in the seminal *Charming Betsy* case that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”¹³ The Court recently reiterated this longstanding principle, explaining that courts should:

construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. . . . This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world.¹⁴

Accordingly, courts will interpret statutes so as to avoid conflicts with foreign laws, and regulatory agencies appropriately adhere to the same interpretive principle.¹⁵

In short, the Commission should construe Section 1504 to avoid imposing conflicting commands on regulated entities, if such a construction is fairly possible. And it *is* fairly possible. In Section 1504, Congress sought to require resource extraction issuers to disclose to the Commission their payments to foreign governments. But Congress left to the Commission’s discretion the requisite level of specificity of those disclosures, as well as how disclosures would be made available to the public. Perhaps most importantly, and as many commenters have observed, Congress crafted Section 1504 to allow the Commission to exercise its definitional authority, and, if necessary, its exemptive authority to promulgate a final rule that avoids conflicts with foreign laws. The Commission should exercise that authority to avoid the sorts of

¹¹ *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 60 (2d Cir. 2004) (quoting Restatement (Third) of Foreign Relations Law § 441).

¹² *Id.* § 403 cmt. g (internal citations omitted; emphasis added).

¹³ *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

¹⁴ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004).

¹⁵ See, e.g., *South African Airways v. Dole*, 817 F.2d 119, 125-26 (D.C. Cir. 1987); *FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1323 (D.C. Cir. 1980).

“[u]nnecessary differences in countries’ regulatory requirements” that the Administration so recently decried.¹⁶

* * *

The legal doctrines described above reflect a legal landscape and tradition that seek to respect the laws of foreign nations and to harmonize legal rules among nations where possible. In this rulemaking, the Commission has the opportunity and authority to develop a final rule that is consistent with the legal disclosure framework established by EITI (and supported by at least 18 countries, including the United States and the European Union), as well as with the specific laws of foreign states that prohibit disclosure.¹⁷ Particularly in light of the Administration’s recent emphasis on the importance of international regulatory harmony to U.S. economic development, the Commission should carefully consider the implications with respect to foreign law of its Section 1504 rulemaking as it promulgates the final rule.

API appreciates the opportunity to submit these comments, and welcomes the opportunity to meet with any of the Commissioners or their staff to discuss these issues or any other issues of interest to the Commissioners.

Sincerely,



Harry Ng

Vice President, General Counsel, and Corporate
Secretary, American Petroleum Institute

Cc:

The Hon. Mary L. Schapiro, Chairman
The Hon. Elisse B. Walter, Commissioner
The Hon. Luis A. Aguilar, Commissioner
The Hon. Troy A. Paredes, Commissioner
The Hon. Daniel M. Gallagher, Commissioner

Mr. Mark Cahn, General Counsel
Ms. Meredith Cross, Director, Division of Corporation Finance

¹⁶ See Sunstein, *supra* note 7.

¹⁷ See, e.g., API Comment Letter, at 25 (Jan. 28, 2011); Exxon Mobil Corp. Comment Letter, at 1-2 (Mar. 15, 2011); Shell Comment Letter, at 1-2 (May 17, 2011).