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March 2, 2011

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, Northeast
Washington, D.C. 20549-1090

RE: ***File Number S7-42-10 — Proposed Rules for Disclosure of Payments By Resource Extraction Issuers***[1]

Dear Secretary Murphy:

We are pleased to provide comments on the Securities and Exchange Commission's ("SEC" or "Commission") proposed rules regarding Disclosures of Payments by Resource Extraction Issuers pursuant to Section 13(q) of the Securities Exchange Act of 1934, adopted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

The Commission proposes to promulgate rules and policies requiring certain oil and gas companies to provide information on payments made to the United States and Foreign Governments for the commercial development of oil, natural gas, and minerals. This comment recommends that the Commission revise its proposed rule, and related definitions, to limit any possible anticompetitive effects of the public release of specific, disaggregated payment data.

Item 105 of Regulation S-K (Disclosure of Payments Made by Resource Extraction Issuers) requires the following information to be included in a reporting person's annual report:

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[1] This comment reflects the authors' independent views; we have consulted with Exxon Mobil Corporation on these and other issues.

(1) The type and total amount of such payments made for each project ... relating to the commercial development of oil, natural gas, or minerals;

(2) The type and total amount of such payments made to each government;

(3) The total amounts of the payments, by category;

(4) The currency used to make the payments;

(5) The financial period in which the payments were made;

(6) The business segment of the resource extraction issuer that made the payments;

(7) The government that received the payments, and the country in which the government is located; and,

(8) The project of the resource extraction issuer to which the payments relate.

The proposed rule (and related definitions and instructions for the publication of this data) requires companies to provide detailed information on certain payments – including royalties, fees, production entitlements, and bonuses – made to governments in support of exploration for, and extraction, processing, or exporting of oil, natural gas, and minerals. These payments constitute both price and cost information; the antitrust laws recognize that such information is competitively sensitive. For example, knowing how much a competitor bids for access to, or processing of, resources may lead a firm to lower its future bids or payments. Alternatively, access to this information may also allow participants in a cartel to identify deviations from a collusive agreement; cartels are stronger and more long-lasting when participants can more readily observe deviations from an intended collusive outcome.

The public release of payment data can be analogized to an information exchange agreement between competing firms, which, "without appropriate safeguards ... may facilitate collusion ... resulting in increased prices." 1996 DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE ("STATEMENT"), *available at* http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf.) Because the exchange or publication of price and cost information may have anticompetitive effects, the Federal Trade Commission and the Department of Justice (the "Antitrust Agencies") and the courts are sensitive to the conditions under which price and cost data are disclosed. The Statement (noted above) identifies a safe harbor for exchanges of these data:

> (i) the exchange must be managed by a third-party; (ii) the information provided by survey participants is at least three months old; and (iii) there are at least five providers reporting data ... [and] no [firm's] data represents more than 25% on a weighted basis of that statistic, and any information disseminated is **sufficiently aggregated** such that it would not allow recipients to identify the ... compensation paid by any particular [firm]. (emphasis added) (STATEMENT at 6.A., 49-50.)

These conditions "are intended to ensure that an exchange of ... cost data is not used by competing [firms] for discussion or coordination of [firm] prices or costs." Exchanges that occur outside the safe harbor are evaluated on a case-by-case basis, with the Antitrust Agencies reviewing whether any anticompetitive effect of the exchange is outweighed by the procompetitive justifications for the exchange. (STATEMENT at 6.B., 50.) It is, in fact, textbook antitrust law that "the competitive effects of an exchange will vary ... depending on what data are exchanged, how firms react to the information, and the structure of the industry where the exchange take place." (E. Thomas Sullivan, H. Hovenkamp, and H. Shelanski, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS (6th Ed. 2009) at 189.)

We encourage the SEC to reflect on the possible competitive concerns associated with the sharing of price and cost information as it considers the scope and implementation of the proposed rule, and to issue a final rule that does not require issuers to publicly disclose disaggregated data. For example, the final rule could define "project" sufficiently broadly to make it impossible for an individual or firm to identify how much another individual or firm compensated a government for any particular step in the commercial development of oil, natural gas, or minerals. Additionally, the Commission should reconsider its proposed requirement that each issuer publicly report its payments on a project basis; maintaining such a requirement is inconsistent with the Antitrust Agencies safe harbor requirement that no one firm's reporting constitute more than 25 percent of the reported data. The current proposal requires that each reporting firm report 100 percent of its specific data on its public report. There is no proposed aggregation of this data.

Failing to incorporate these limitations in the SEC's final rule will require the Commission to consider and identify those market conditions in which an issuer's provision of highly specific transaction price and cost data will have, or could have, anticompetitive effects, and to provide alternative reporting rules for those situations. This approach would be administratively difficult, and it could be subject to significant error.

Similarly, the Commission should consider the Statement's safe harbor requirements should it determine that it is appropriate to publish a compilation of payment data other than that included in the filings on the Commission's EDGAR filing

system. Such an approach would be consistent with that taken by the Energy Information Administration ("EIA"). The EIA collects firm-specific operational data in a broad range of categories, including reserves, production, storage, sales, and cost data. (*See* Department of Energy, Energy Information Administration, Survey Forms, *available at* http://eia.gov/survey/.) The EIA aggregates the data received and reports it in a number of weekly, monthly, and annual reports, but takes care not to publish data that can be used to identify an individual firm. Rather, when the reported statistics do not include a sufficient number of reporting persons, a "W" (for withheld) is included in the relevant table. *See, e.g., Petroleum Marketing Monthly*, Table HL1 (U.S. Refiner Prices and Volumes of Petroleum Products); Table IE1 (Prices for Selected Crude Oil and Petroleum Products by Sales Type and PAD District). The SEC should exhibit the same care.

CONCLUSION

We support the transparency initiative that underlies proposed Item 105 of Regulation S-K. The objectives of a disclosure to implement the requirements of new Exchange Act Section 13(q) can be met without the collection and publication of individual firm-specific and transaction-specific competitively sensitive information. To avoid the potential anticompetitive effects of releasing such information publicly and to avoid the additional administrative costs of implementing a rule that could require additional market analysis for each release of this information, we urge the Commission to adopt a rule that will not require covered persons to provide and publish disaggregated price and cost information for operations related to the commercial development of oil, natural gas, and mineral products.

Respectfully submitted,

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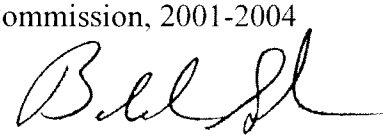
Chairman, Federal Trade Commission, 2001-2004



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