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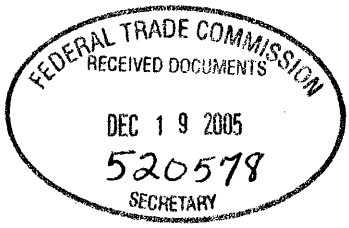
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

Cleared for Public Record



EXXON MOBIL CORPORATION'S
PETITION TO LIMIT CIVIL INVESTIGATE DEMAND

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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); s*ee 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

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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:

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