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BUSINESS CONFIDENTIAL

By Hand Delivery

10/4/12 4:00

Adam J. Szubin, Esq.
Director, Office of Foreign Assets Control
U.S. Department of the Treasury
Treasury Annex, 1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: Request for Additional Interpretive Guidance Regarding U.S. Participation
in International Standards Development

Dear Mr. Szubin:

I am writing on behalf of our client, the American Petroleum Institute (“API” or “the Applicant”), a U.S. non-profit trade association representing America’s oil and natural gas industry, which respectfully requests interpretive guidance regarding licensing of intellectual property and the participation of U.S. persons in the international standards development process. API has received the Office of Foreign Assets Control’s (“OFAC”) Letter of August 14, 2012 (Case No. 1A-2012-293254-1) (“OFAC Letter”) responding to the American National Standards Institute’s (“ANSI”) March 29, 2012 Request for Interpretive Guidance Regarding U.S. Participation in International Standards Development (“ANSI Request”), and API seeks additional guidance and clarification as to whether, in the course of the international standards development process, U.S. entities are permitted or otherwise authorized under U.S. sanctions laws and regulations to:

- License pre-existing technical standards to the International Organization for Standardization (“ISO”) where ISO asserts on behalf of its members—which include representatives of U.S.-sanctioned countries such as Iran, Cuba, Syria, Sudan, Burma, Zimbabwe, Belarus, and North Korea—the right of the members to adopt, exploit, and modify those standards; and

- Participate in standards development committees and other closed working groups that may include participants from U.S.-sanctioned countries where the information exchanged may be non-public¹ and subject to regulation under the Commerce Department's Export Administration Regulations ("EAR," 15 C.F.R. Pts. 730 to 774), and/or where the U.S. person may engage in discussions of a technical nature regarding materials or concepts that may not ultimately be included in the subsequent written publications.²

I. Background

With over 500 members, API represents companies ranging from the largest major oil and natural gas companies to the smallest independent companies, and spanning all segments of the industry. In addition to serving as an advocate for the industry, sponsoring research, and providing certification and training services, API is a leader in the development of petroleum and natural gas equipment and operating standards. Currently, API maintains more than 600 standards and recommended practices, many of which have been incorporated into state and federal regulations.

API is considering licensing its existing standards to ISO, a federation of more than 100 standards groups based in Geneva, Switzerland. One of ISO's and its members' objectives is to achieve the widest possible dissemination and use of ISO publications throughout the world. ISO's members include countries subject to U.S. economic sanctions such as Iran, Cuba, Syria, Sudan, Burma, Zimbabwe, Belarus, and North Korea, and representatives from these countries may participate in ISO's standards development committees and working groups.³

II. Licensing the Right to Adopt, Exploit, or Modify API Standards

API has been engaged in negotiations to license certain API standards to ISO, which would then be marketed and made available by ISO to all of its members

¹ In this context, API is using "non-public" to refer to technical information that has not been previously published or otherwise released into the public domain.

² The factual information in this request was provided by API.

³ See International Organization for Standardization: ISO Members, http://www.iso.org/iso/home/about/iso_members.htm. API's request is limited only to committees working on standards for oil and natural gas operations and quality certifications programs, including ISO TC 28, "Petroleum Products and Lubricants," TC 67, "Materials, equipment and offshore structures for petroleum, petrochemical and natural gas industries," TC 193, "Natural gas," TC 176, "Quality management and quality assurance," and TC 207, "Environmental management."

(including members from U.S.-sanctioned countries) under the ISO brand name. It is API's understanding and belief that simply providing pre-existing standards to ISO for use by or distribution to its members, including representatives from U.S.-sanctioned countries, would be permissible under the "informational materials" exemption in the International Emergency Economic Powers Act ("IEEPA") (50 U.S.C. § 1702(b)(3)) and applicable provisions of the Foreign Assets Control Regulations.⁴ In the course of these negotiations, however, it has come to API's attention that one of the main benefits ISO grants its members is the right to revise and create derivative works from ISO's standards, and to adopt ISO publications as their own national standards. In particular, under ISO's Policies and Procedures for Copyright, Copyright Exploitation Rights and Sales of ISO Publications (ISO POCOSA 2005) (attached as **Appendix A**), and Guide on Regional or National Adoption of International Standards and other International Deliverables (ISO/IEC Guide 21-1) (attached at **Appendix B**), ISO grants its members the rights to:

- Adopt any ISO International Standard or other ISO normative publication as its own national standard (*See* ISO POCOSA 2005, Art. 1 (citing ISO/GEN 22, Art. 1.3); ISO POCOSA 2005, Art. 7.3);
- Exploit the content of ISO publications (ISO POCOSA, Art. 2.2); and

⁴ *See* 50 U.S.C. § 1702(b)(3) (stating that the authority of the President granted under that section does not include the authority to regulate or prohibit, directly or indirectly, "the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials . . ."); 31 C.F.R. § 560.210(c) (Iranian Transactions Regulations) (noting that "[t]he importation from any country and the exportation to any country of information and informational materials . . . are exempt from the prohibitions and regulations of this part . . . [except that] [t]his section does not exempt from regulation or authorize transactions related to information and informational materials not fully created and in existence at the date of the transactions, or to the substantive or artistic alteration or enhancement of informational materials, or to the provision of marketing and business consulting services"); *see also* 31 C.F.R. § 537.210(b) (Burmese Sanctions Regulations); 31 C.F.R. § 515.206(a) (Cuban Assets Control Regulations); 31 C.F.R. § 538.212(c) (Sudanese Sanctions Regulations); 31 C.F.R. § 542.206(b) (Syrian Sanctions Regulations); 31 C.F.R. § 541.206(b) (Zimbabwe Sanctions Regulations).

- Reprint, translate, or redraft ISO standards adopted as the member's national standard by the "republication method," without any duty to report changes or pay royalties to ISO (ISO/IEC Guide 21-1, Art. 5.3).⁵

ISO insists that, under the terms of the licensing agreement subject to negotiation between API and ISO, it and its members have the unencumbered right to adopt, exploit, modify, and publish the API-licensed standards as their own standards, without notification to or approval by API. Accordingly, API seeks guidance from OFAC as to whether the transfer of the aforementioned rights to ISO (and, in turn, the various ISO members subject to U.S. economic sanctions) is permissible under the "informational materials" exemption in IEEPA and the applicable Foreign Assets Control Regulations, or whether the licensing arrangement would be prohibited as a transaction related to the substantive alteration or enhancement of informational materials.

III. Participation in ISO Committees and Working Groups

As noted, API has received OFAC's August 14 letter responding to ANSI's Request for Interpretive Guidance Regarding U.S. Participation in International Standards Development. ANSI's submission requested guidance as to whether the participation of U.S. persons in international standards development committees, subcommittees, and working groups which may include participants from OFAC-sanctioned countries, and particularly Iran, would be permissible or otherwise authorized under the applicable OFAC sanctions regulations. Noting that the international standards development process, as described by ANSI, would involve the exchange of pre-existing information between representatives from different countries and collaboration on the development of a uniform technical standard, OFAC opined that such activities would appear to involve either "(1) exempt exportation of informational materials [under 31 C.F.R. § 560.210(c)] or (2) licensed collaboration on the creation and enhancement of written publications . . . with representatives of an Iranian research institution as authorized [under 31 C.F.R. § 560.538]." OFAC Letter, p. 2.

⁵ The right to reprint, translate, or redraft ISO publications derives from the right of ISO members to adopt ISO standards as their national standards via the "republication" method. Under ISO POCOSA 2005, Art. 7.3, ISO members may adopt ISO standards in their national systems of standards by the republication or endorsement method. When an ISO member adopts an ISO standard via the "republication" method and republishes the text with its own national foreword, designation, and copyright claim, the provisions of the POCOSA (*i.e.*, ISO's assertion of exclusive ownership, copyright, and trademark rights, and related royalty payment requirements) do not apply. Members are therefore permitted to create derivative works from ISO's standards and claim their own copyrights to these new works.

Notably, in describing U.S. person participation in international standards development committees, subcommittees, and working groups where personnel from U.S.-sanctioned countries are present, the ANSI Request (and accordingly, OFAC's response) focused on the creation of new international standards through the sharing of general technical knowledge and other existing information that "may be regarded as public and open information" because of the absence of "restrictions on those participating to keep it confidential." ANSI Request, pp. 8-9; OFAC Letter, p. 1. In this regard, ANSI's submission does not explicitly address whether exchanges of information not "fully created and in existence" at the date of the transactions, and non-public information subject to export regulation, are authorized under the general license for publishing activities⁶ and/or the informational materials exemption.

Likewise, the ANSI request focused on the potential participation of U.S. persons in committee or working group activities directly related to the drafting or revision of international standards; it did not address the potential for U.S. persons to participate in other committee or working group activities in which representatives from U.S.-sanctioned countries may be involved, which could include the review of industry technical research, committee technical discussions that may or may not result in the development of an international standard, and decisions as to whether or not to develop an international standard in a particular area.

Accordingly, as detailed below, API respectfully requests additional guidance and/or clarification from OFAC as to whether a U.S. person's participation in, or leadership of, an ISO oil and natural gas standards committee, subcommittee, or working group in which a U.S.-sanctioned country representative participates is permissible under the general license for publishing activities and/or the informational materials exemption (for pre-existing information) where:

- The information exchanged is non-public technical data not otherwise specifically controlled as defense, dual-use, or nuclear-related technology (*i.e.*, EAR99 for purposes of the EAR) disclosed in a closed environment (as further described below);
- The information exchanged is not fully created and in existence at the date of the transaction (as further described below); and

⁶ See 31 C.F.R. § 537.526 (Burmese Sanctions Regulations); 31 C.F.R. § 515.577 (Cuban Assets Control Regulations); 31 C.F.R. § 560.538 (Iranian Transactions Regulations); 31 C.F.R. § 538.529 (Sudanese Sanctions Regulations).

- U.S. persons participate in activities that are only indirectly related to the collaboration on the creation and enhancement of written publications, such as evaluating proposals as to whether or not to develop a particular standard, committee technical discussions which may or may not result in a standard being developed, and participating in committees not directly related to standards development.

A. Exchange of Non-Public Technical Information

As outlined in detail in the ANSI Request, ANSI members (which include API as well as certain U.S. government agencies) and their personnel may participate in ISO committees, subcommittees, or working groups that include participants— typically the national organization “most representative of standardization for [that] country”— from U.S.-sanctioned countries. ANSI Request, p. 6, 8-12. As noted above, the ANSI Request focused on the presumed “public and open” nature of the information exchanged in the standards development process. Although a large majority of the information shared during the standards development process may be in the public domain and shared freely amongst ISO members, there may be some instances in which non-public, EAR99 information is shared in restricted environments such as closed working groups, where participation is limited to identified working group members, although they are under no confidentiality or non-disclosure obligation.

The general license for publishing activities—which is available under the Burmese, Cuban, Iranian, and Sudanese sanctions regulations—authorizes U.S. persons “to engage in all transactions necessary and ordinarily incident to the publishing and marketing of manuscripts, books, journals, and newspapers in paper or electronic format (collectively, “written publications”) . . . [including] collaborating on the creation and enhancement of written publications.”⁷ Pursuant to subsection (d) of each of the applicable regulatory provisions, however, the general license does not authorize:

- (4) The exportation of any item (including information) subject to the EAR where a U.S. person knows or has reason to know that the item will be used, directly or indirectly, for a prohibited end-use or by a prohibited end-user designated under Parts 744, 764, or 766 of the EAR; or

⁷ See 31 C.F.R. § 537.526 (Burmese Sanctions Regulations); 31 C.F.R. § 515.577 (Cuban Assets Control Regulations); 31 C.F.R. § 560.538 (Iranian Transactions Regulations); 31 C.F.R. § 538.529 (Sudanese Sanctions Regulations).

- (5) The exportation of information subject to licensing requirements under the ITAR or exchanges of information that are subject to regulation by other government agencies.⁸

API believes that, read together, these provisions should not exclude non-public, EAR99 information from the scope of the general license so long as such information is not destined for a prohibited end-use or end-user, as defined in the provision. However, as the phrase “exchanges of information that are subject to regulation by other government agencies” in section (d)(5) could be read to encompass the exchange of non-public, EAR99 information as information that is “subject to regulation” by the Department of Commerce, API seeks to confirm whether the general license for publishing activities authorizes the exchange of such non-public, EAR99 information by U.S. persons in the course of their participation in closed committees, subcommittees, or working groups which may include representatives from OFAC-sanctioned countries for which the general license is available.

Further, notwithstanding the availability of the general license for publishing activities, API seeks clarification on whether such exchanges of non-public, EAR99 information — if fully created and in existence at the time of the transaction— would be permissible under the informational materials exception.

B. Exchange of Information Not Fully Created or In Existence

Regardless of whether the information exchanged is public or non-public EAR99 information, API requests clarification on whether the general license for publishing activities (and in particular the provision relating to collaboration on the creation and enhancement of written publications) is available to authorize transactions related to information that is not fully created or in existence at the time of the transaction, where the general license’s required criteria are otherwise satisfied. An example would be non-public EAR99 information that is exchanged during discussion at an ISO meeting concerning industry technical research or at committee technical discussions and working group meetings, where it may not be possible in each instance to know whether ideas and concepts that are shared were in existence prior to their being expressed at such meetings.

⁸ See 31 C.F.R. § 537.526(d)(4) and (5) (Burmese Sanctions Regulations); 31 C.F.R. § 515.577(d)(4) and (5) (Cuban Assets Control Regulations); 31 C.F.R. § 560.538(d)(4) and (5) (Iranian Transactions Regulations); 31 C.F.R. § 538.529(d)(4) and (5) (Sudanese Sanctions Regulations).

As noted above, the general license for publishing activities authorizes U.S. persons “to engage in all transactions necessary and ordinarily incident to the publishing and marketing of manuscripts, books, journals, and newspapers in paper or electronic format (collectively, “written publications”) . . . [including] collaborating on the creation and enhancement of written publications.” In contrast to the informational materials exemption, the general license does not expressly require that the information exchanged be created or in existence at the time of the transaction. Indeed, the general license appears to contemplate that information will be created when it encompasses collaboration on “the creation and enhancement of written publications.” Although API believes that the creation and exchange of non-public EAR99 information should be permitted in these circumstances because the general license for publishing activities does not require information to be fully created and in existence at the time of the transaction, API seeks to confirm from OFAC that the exchange of such information is authorized.

C. Participation in Activities Indirectly Related to the Creation and Enhancement of Written Publications

Further, API requests guidance on whether certain ISO committee activities not specifically enumerated in the ANSI Request would be authorized under the general license for publishing activities, where available. This specifically includes evaluating proposals as to whether or not to develop or update a particular standard,⁹ discussion of background industry technical research conducted by third parties, committee technical discussions which may or may not ultimately result in a standard being developed, and participating in committees not directly related to standards development (such as a technical committee chairman’s forum where chairs of multiple committees are invited to participate and provide advice to the Secretary General and to the Council on various matters).

In its prior request, ANSI noted that the general license for publishing activities authorizes U.S. persons to engage in “all transactions necessary and ordinarily incident to the publishing and marketing of [written publications],” and specifically “[c]ollaborating on the creation and enhancement of written publications”; “augmenting written publications through the addition of items such as photographs, artwork, translation, and explanatory text”; and “substantive editing of written publications,” and therefore “applies to all activity undertaken by ISO as a publisher of international

⁹ See International Organization for Standardization: Stages of the Development of International Standards, Proposal Stage, http://www.iso.org/iso/home/standards_development/resources-for-technical-work/stages_of_the_development_of_international_standards.htm.

standards.” ANSI Request, p. 17. API agrees that this characterization describes ISO’s primary activities. In addition to these primary activities, ISO committees and working groups at times engage in activities that are preparatory or that are indirectly related to, but are nonetheless associated with, the development of ISO’s standards. Accordingly, API seeks clarification as to whether such preparatory or supplementary activities would be authorized as “transactions necessarily or ordinarily incident to the publishing and marketing of [written publications].”

IV. Conclusion

In conclusion, API seeks guidance on the following questions:

- Can a U.S. entity grant an intellectual property license to ISO where ISO asserts on behalf of its members (including representatives of U.S.-sanctioned countries such as Iran, Cuba, Syria, Sudan, Burma, Zimbabwe, Belarus, and North Korea) the right of the members to adopt, exploit, and modify pre-existing technical standards?
- Can U.S. entities share technical information that is non-public and/or not fully created and in existence as participants in the following closed ISO committee activities which may include representatives from sanctioned countries such as Iran, Cuba, Syria, Belarus, and Zimbabwe?
 - Creating or updating a particular ISO standard;
 - Evaluating proposals as to whether or not to develop or update a particular ISO standard;
 - Discussing background industry technical research conducted by third parties;
 - Engaging in ISO committee technical discussions which may or may not ultimately result in a standard being developed; and
 - Participating in committee meetings not directly related to standards development.

* * *

If you or your staff has any questions about the API request or require additional information, please contact me at (202) 662-5163 or pflanagan@cov.com.

COVINGTON & BURLING LLP

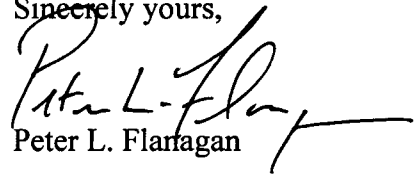
Adam J. Szubin, Esq.

October 4, 2012

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Please be advised that this letter contains commercial and financial information about API and its businesses that is privileged and confidential and which is, therefore, exempt from the public access provisions of the Freedom of Information Act, 5 U.S.C. § 552. Such information, if disclosed, could adversely affect the financial and competitive position of the API and the normal conduct of its business operations. Accordingly, API requests that this letter be withheld in the event of a demand for its disclosure. API understands that in the event of such a demand your Office will give it prompt notice and opportunity to be heard prior to taking any action to disclose.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Peter L. Flanagan", with a long horizontal flourish extending to the right.

Peter L. Flanagan