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**From:** Brugato, Thomas [tbrugato@cov.com]  
**Sent:** 4/19/2018 6:01:46 PM  
**To:** Elliott, Don [DElliott@cov.com]; Leopold, Matt [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4e5cdf09a3924dada6d322c6794cc4fa-Leopold, Ma]  
**CC:** Raburn, Janice [Janice.Raburn@bp.com]; Baptist, Erik [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=10fc1b085ee14c6cb61db378356a1eb9-Baptist, Er]; Gunasekara, Mandy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=53d1a3caa8bb4ebab8a2d28ca59b6f45-Gunasekara,]; Wehrum, Bill [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=33d96ae800cf43a3911d94a7130b6c41-Wehrum, Wil]; Stout, Robert [Robert.Stout@bp.com]; Stutz, Rachel [Rachel.Stutz@bp.com]; Guzy, Gary [GGuzy@cov.com]; Long, Robert [rlong@cov.com]  
**Subject:** RE: Thank you and BP letter to EPA  
**Attachments:** 2018-04-19 RVP Paper.pdf

Matt, Bill, Erik, and Mandy,

Please find attached one other follow-up item from our discussion on Monday: the short paper addressing whether statutory authority exists to extend the 1 PSI RVP waiver to blends containing more than 10% ethanol.

Thank you again for the meeting on Monday.

Best regards,

Thomas

### Thomas Brugato

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## COVINGTON

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**From:** Elliott, Don  
**Sent:** Thursday, April 19, 2018 11:44 AM  
**To:** Leopold, Matt <Leopold.Matt@epa.gov>  
**Cc:** Raburn, Janice <Janice.Raburn@bp.com>; Baptist, Erik <Baptist.Erik@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Wehrum, Bill <Wehrum.Bill@epa.gov>; Stout, Robert <Robert.Stout@bp.com>; Stutz, Rachel <Rachel.Stutz@bp.com>; Brugato, Thomas <tbrugato@cov.com>; Guzy, Gary <GGuzy@cov.com>; Long, Robert <rlong@cov.com>  
**Subject:** Re: Thank you and BP letter to EPA

Matt, Bill, Erik, and Mandy,

Following up on Mr. Sparkman's letter about BP's concerns about the broad-based exemptions of small refiners from the RFS that EPA has issued recently, I wanted to call to your attention a relevant case involving one of our favorite topics: *Chevron* deference and exceptions to same. The case is the Supreme Court's decision in *MCI Telecomm. Corp. v.*

AT&T, 512 US 218 (1994), <https://supreme.justia.com/cases/federal/us/512/218/case.html> . It strongly suggests that attempts to “even substantially” de-regulate the small refiner segment from the RFS would be illegal, as well as that a competitor not so favored has standing to challenge wholesale exemption of competitors from requirement that still apply to it.

In the *MCI v. AT&T* case, the statute required communications common carriers to file tariffs, but authorized the FCC to “modify any requirement” of same. 47 U.S.C. §203(b)(2). The FCC attempted to use its modification authority to make tariff filing optional for one part of the industry, the “non-dominate long-distance carriers.” In an early application of what is now called the “important questions” exception to *Chevron* deference, the Supreme Court held in an opinion by Justice Scalia that the agency’s interpretation of the word “modify” was not entitled to deference because the word only applied to minor matters and could not be used to make “fundamental changes” in the regulatory scheme (512 U.S. at 228) or to “introduc[e] ... a whole new regime of regulation ... [that] is not the one that Congress established.” (512 U.S. at 234).

In words that clearly resonate with the numerous exemptions that EPA has recently granted from the RFS, the Court went on to state that “[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or *even substantially*, rate-regulated to agency discretion.” (512 U.S. at 231 (emphasis supplied)).

It is clearly arguable that the numerous exemptions that EPA has already granted violate the principles of *MCI Telecomm. Corp. v. AT&T*, but certainly blanket de-regulation of the entire small refinery segment as some have advocated would do so. See also *UARG v. EPA*, 573 U.S. — (2014), <https://supreme.justia.com/cases/federal/us/573/12-1146/> (“When an agency claims to discover in a long-extant statute an unheralded power to regulate “a significant portion of the American economy,” *Brown & Williamson*, 529 U.S., at 159 , we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast “economic and political significance.” *Id.*, at 160 ; see also *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 , 231 (1994); *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 , 645-646 (1980) (plurality opinion).”)

Thank you for meeting with us on Monday and for this opportunity to share my views with you on this important topic.

Don Elliott

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On Apr 17, 2018, at 05:31, Leopold, Matt <[Leopold.Matt@epa.gov](mailto:Leopold.Matt@epa.gov)> wrote:

Thank you for the briefing.

Regards, Matt Leopold

Sent from my iPhone

On Apr 16, 2018, at 5:17 PM, Raburn, Janice <[Janice.Raburn@bp.com](mailto:Janice.Raburn@bp.com)> wrote:

Bill, Matt, Mandy, and Erik,

Thank you for taking the time to meet with us today and listen to BP's perspective on the RFS.

Attached is the letter I referenced during the meeting from Doug Sparkman/BP to US EPA regarding concerns with RFS small refinery exemptions. (The letter is also being delivered via FedEx to Bill Wehrum tomorrow.)

Please let me know if you have any questions for BP.

Best regards,  
Janice

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<20180416 BP Letter to EPA - RFS exemptions.pdf>