GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Tel 202.955.8500
www.gibsondunn.com

Eugene Scalia
Direct: +1 202.955.8206
Fax: +1 202.530.9606
EScalia@gibsondunn.com

November 5, 2012

VIA HAND DELIVERY

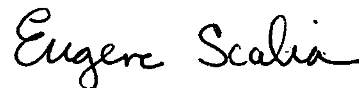
Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Room 10905
Washington, D.C. 20549
(202) 551-5400

Re: *Disclosure of Payments by Resource Extraction Issuers*, 77 Fed. Reg. 56,365 (Sept. 12, 2012)

Dear Ms. Murphy:

Enclosed for filing please find an original and three copies of the Reply in Support of the Motion for Stay of Rule 13q-1 and its Amendments to New Form SD by American Petroleum Institute, Chamber of Commerce of the United States of America, Independent Petroleum Association of America, and National Foreign Trade Council; as well as a Certificate of Compliance with the SEC's word limitations.

Very truly yours,



Eugene Scalia

Attachments

cc: Hon. Mary L. Schapiro, Chairman, SEC (via hand delivery w/enclosures)
Hon. Elisse B. Walter, Commissioner
Hon. Luis A. Aguilar, Commissioner
Hon. Troy A. Paredes, Commissioner
Hon. Daniel M. Gallagher, Commissioner
Mr. Mark D. Cahn, General Counsel

SECURITIES AND EXCHANGE COMMISSION
DISCLOSURE OF PAYMENTS BY RESOURCE EXTRACTION ISSUERS; FINAL RULE
Release Nos. 34-67717, 34-63549; File No. S7-42-10
RIN 3235-AK85
77 Fed. Reg. 56,365 (Sept. 12, 2012)

REPLY BRIEF IN SUPPORT OF MOTION FOR STAY OF RULE 13q-1 AND RELATED AMENDMENTS TO NEW FORM SD BY AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND NATIONAL FOREIGN TRADE COUNCIL

Of Counsel
Harry M. Ng
Peter C. Tolsdorf
American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005
Telephone: (202) 682-8500
Counsel for Petitioner American Petroleum Institute

Of Counsel
Robin S. Conrad
Rachel Brand
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-5337
Counsel for Petitioner Chamber of Commerce of the United States of America

Eugene Scalia
Counsel of Record
Thomas M. Johnson, Jr.
Ashley S. Boizelle
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
Counsel for Petitioners

TABLE OF CONTENTS

Page

INTRODUCTION 1

DISCUSSION 2

I. The Commission Has Authority To Stay The Extractive-Industries Rule. 2

II. Petitioners Are Entitled To A Stay Under Any Standard 5

A. Justice Requires That The Commission Grant A Stay 5

B. Petitioners Have Satisfied The Equitable Criteria For A Stay 7

1. Likelihood Of Success 7

2. Likelihood/Imminence Of Substantial Irreparable Harm 13

3. Harm To Other Parties 15

4. The Public Interest 17

III. The Commission Should Not Delay Further In Acting On Petitioners' Stay Request 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases **Page(s)**

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 10

Brady Campaign to Prevent Gun Violence v. Salazar, 612 F. Supp. 2d 1 (D.D.C. 2009) 17

Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068 (2011) 10

Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011) 12, 16

Chamber of Commerce of the United States v. SEC, 412 F.3d 133 (D.C. Cir. 2005) 11, 12

Digital Equip. Corp. v. Desktop Direct, 511 U.S. 863 (1994) 3

Doe by Fein v. District of Columbia, 93 F.3d 861 (D.C. Cir. 1996) 5

Farmers Union Cent. Exchange, Inc. v. Federal Energy Regulatory Comm'n, 734 F.2d 1486 (D.C. Cir. 1984) 11

Feinerman v. Bernardi, 558 F. Supp. 2d 36 (D.D.C. 2008) 13

Fund for Animals v. Norton, 281 F. Supp. 2d 209 (D.D.C. 2003) 16

Greyhound Corp. v. Interstate Commerce Comm'n, 668 F.2d 1354 (D.C. Cir. 1981) 7

I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Indus., Inc., 789 F.2d 21 (D.C. Cir. 1986) 16

In the Matter of the Motion of Business Roundtable and the Chamber of Commerce of the United States of America, 2010 SEC LEXIS 3275 (Oct. 4, 2010) 2, 6, 18

Indep. Bankers Ass'n v. Smith, 534 F.2d 921 (D.C. Cir. 1976) 17

N. Mariana Islands v. United States, 686 F. Supp. 2d 7 (D.D.C. 2009) 17

Nalco Co. v. EPA, 786 F. Supp. 2d 177 (D.D.C. 2011) 14

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 6

Natural Resources Defense Council v. EPA, 22 F.3d 1125 (D.C. Cir. 1994) 5

Natural Resources Defense Council, Inc. v. Reilly, 976 F.2d 36 (D.C. Cir. 1992) 4

Nken v. Holder, 556 U.S. 418 (2009) 2

Philip Morris USA Inc. v. Scott, 131 S. Ct. 1 (2010) 14

Population Institute v. McPherson, 797 F.2d 1062 (D.C. Cir. 1986) 17

Salazar v. District of Columbia, 671 F.3d 1258 (D.C. Cir. 2012) 16

Sampson v. Murray, 415 U.S. 61 (1974) 3

Schiller v. Tower Semiconductor Ltd., 449 F.3d 286 (2d Cir. 2006) 7

Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942) 1, 2

Sierra Club v. Jackson, 833 F. Supp. 2d 11 (D.D.C. 2012) 2, 5

Sottera, Inc. v. FDA, 627 F.3d 891 (D.C. Cir. 2010) 13

Wisconsin Gas v. FERC, 758 F.3d 669 (D.C. Cir. 1985) 13

Statutes

5 U.S.C. § 705 .... 3, 5

15 U.S.C. § 78m(q) 1, 3, 4, 9, 10

15 U.S.C. § 78y(c) 3, 5

Rules

D.C. Cir. Rule 18 6

SEC Rule of Practice 401(b) 6

Regulations

17 C.F.R. § 240.24b-2(a) 9

Other Authorities

75 Fed. Reg. 80,978 (Dec. 23, 2010) 7

Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365 (Sept. 12, 2012) .... *passim*

Division of Corporation Finance Staff Legal Bulletin No. 1 (Feb. 28, 1997), *available at* http://www.sec.gov/interps/legal/slbcf1r.htm#n18 9

Final Rule, Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) 10

Petitioners respectfully submit this Reply Brief in support of their Motion for a Stay of Rule 13q-1 and the Amendments to New Form SD, in response to arguments raised in the brief filed last week by Oxfam America ("Oxfam"). *See* Response of Oxfam America to Motion for Stay (Nov. 1, 2012) ("Oxfam Br.").

INTRODUCTION

Oxfam opposes Petitioners' motion for a stay because it mistakenly believes the Commission lacks authority to grant one; disagrees with Petitioners on the merits of their claims; and disputes the Commission's own factual findings that Petitioners will suffer harm while the Commission's rule is in place. None of these arguments should prevent the Commission from exercising its discretion to grant a stay while the courts resolve the legal challenges raised by Petitioners to Section 13(q) of the Exchange Act and the Commission's rule. *See Disclosure of Payments by Resource Extraction Issuers,* 77 Fed. Reg. 56,365 (Sept. 12, 2012) (the "Rule").

The Commission's power to grant a stay under the Administrative Procedure Act ("APA") and Section 25(c) of the Exchange Act is well-established, and has its roots in equitable practice aimed at "sav[ing] the public interest from injury . . . while an appeal is being heard." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 15 (1942). Despite what Oxfam suggests, Section 13(q) does not strip the Commission of this longstanding power; to the contrary, it provides the Commission with discretion to set the Rule's "effective date" at some point "not earlier" than one year after the Rule's issuance. *See* 15 U.S.C. § 78m(q)(2)(F); *infra* pp. 3-5.

It is particularly appropriate here for the Commission to exercise its historic power to grant a stay. While the Commission may not agree with every argument raised by Petitioners on the merits, it cannot dispute that the Rule is controversial, among the costliest in its history, and indeed, was approved by fewer than half the Commissioners in a split 2-1 vote. The Adopting Release itself notes that the Commission does not typically regulate in this area (77 Fed. Reg. at

56,397/3), and estimates that public companies will incur $1 billion in initial compliance costs alone (*id.* at 56,398/1)—that is, costs incurred ***before*** the Rule takes effect. Oxfam trivializes these compliance costs as purportedly representing only a small fraction of those companies' total assets (Oxfam Br. 1), and dismisses as "unlikely and insubstantial" the billions of dollars in lost business that the Commission itself acknowledged would result from the Rule (*id.* at 17).

By contrast to these real and immediate costs, which could have a material impact on jobs, investors, and the broader U.S. economy, Oxfam is unable to point to any irreparable harm that could result from the Commission granting a stay while litigation is pending. In view of "all of the[se] circumstances," and consistent with its past practice, the Commission should grant a stay to "avoid[] potentially unnecessary costs, regulatory uncertainty, and disruption that could occur . . . during the pendency of a challenge to [the Rule's] validity." *See* Order Granting Stay, *In the Matter of the Motion of Business Roundtable and the Chamber of Commerce of the United States of America*, 2010 SEC LEXIS 3275, at *2 (Oct. 4, 2010).

DISCUSSION

I. The Commission Has Authority To Stay The Extractive-Industries Rule.

Oxfam first argues that Section 13(q) precludes the Commission from granting a stay of the Rule pending litigation. That is incorrect.

"The power to grant a stay pending review . . . [is] firmly imbedded in our judicial system, consonant with the historic procedures of federal appellate courts, and a power as old as the judicial system of the nation." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks omitted). Thus, Congress must "clearly express[]" a purpose to deprive a court, or an agency, of its "customary power to stay orders under review." *Id.* at 433; *see also Scripps-Howard*, 316 U.S. at 15 (Congress must "explicitly disclose[] . . . an intention" to deprive courts of power to grant a stay); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 25 (D.D.C. 2012).

There is no "clear evidence" of Congressional intent to preclude the Commission from granting a stay here. To the contrary, the Commission has two independent sources of authority for granting a stay. First, the Exchange Act itself provides that "the Commission may stay its order or rule pending judicial review if it finds that justice so requires." 15 U.S.C. § 78y(c)(2). Second, the APA states, in similar language, that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705; *see also Sampson v. Murray*, 415 U.S. 61, 68 n.15, 73 (1974) (power to grant stay under APA is part of an agency's "traditional equipment for the administration of justice").

Oxfam admits that "the Commission's authority to stay its rules is discretionary," but argues that Congress "divested" the Commission of that discretion by including statutory timeframes in Section 13(q). Oxfam Br. 2; *see also* 15 U.S.C. § 78m(q)(2)(A) (providing timeframe for Commission to "issue final rules"); *id.* at § 78m(q)(2)(F) (describing timeframe in which "the final rules issued under subparagraph (A) shall take effect"). But these provisions fall far short of a "clearly express[ed]" purpose to deprive agencies of their historic power to grant a stay. To the contrary, these provisions can easily be read in harmony with the stay provisions in the Exchange Act and the APA so as to give each meaning. *See, e.g., Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 879 (1994) ("courts should construe statutes . . . to foster harmony with other statutory and constitutional law").

First, whereas Section 13(q) provides that the Commission "shall issue" rules, Section 25(c) and the APA address steps the Commission may take once a rule ***has*** issued. Issuing a rule is indeed a necessary precondition to staying a rule; a requirement to issue a rule therefore does not address steps an agency may take afterward. Courts in fact have recognized that mandatory rules may be stayed. *See* Petitioners' Br. 2 & n.2.

Second, the "Effective Date" provision on which Oxfam relies actively undermines its claim that a stay here would be inconsistent with Congressional intent. In Section 13(q), Congress provided that the Rule "shall take effect on the date on which the [company] is required to submit an annual report relating to the fiscal year . . . that ends ***not earlier than 1 year*** after the date on which the Commission issues final rules . . . ." 15 U.S.C. § 78m(q)(2)(F) (emphasis added). This provision establishes a floor, not a ceiling: It prohibits the Commission from requiring companies to make disclosures with respect to any fiscal year that ends "earlier than" one year after the statutory issuance date. Apart from this one-year grace period—which Congress obviously included to provide companies with additional time to adapt to the new disclosure regime—Section 13(q) leaves it to the Commission's discretion to identify the first fiscal year covered by the Rule and to identify the "date" on which any "annual report" shall be due. Simply, a provision that provided the Commission with discretion to ***defer*** implementation of the Rule to avoid unnecessarily burdening regulated entities can hardly serve as evidence that Congress intended to foreclose a stay pending judicial review.

The cases that Oxfam cites to support its theory that the Commission lacks authority to stay the Rule are plainly inapposite. *Natural Resources Defense Council, Inc. v. Reilly*, 976 F.2d 36 (D.C. Cir. 1992), concerned the Clean Air Act, which permitted the EPA to grant a stay "only under carefully defined circumstances[,] and even then, [only] for a single period not to exceed three months." *Id.* at 40. Another provision provided that the EPA could stay certain emissions standards only if it made certain factual determinations in a formal rulemaking. *See id.* at 38-39. The stay the EPA granted in *Reilly* complied with ***neither*** statutory provision; rather, the EPA relied on its general authority to "prescribe such regulations as are necessary to carry out [its] functions." *Id.* at 40. Thus, the Court held that the EPA could not use this ***general rulemaking***

authority to circumvent the specific procedures required under the Act to stay a rule, but had to give effect to deadlines in the Act. *See id.* at 41. Under the Exchange Act, by contrast, the Commission has explicit authority to stay rules pending judicial review; it would not be relying on rulemaking authority to grant a stay of the Rule in this case.[1]

In any event, even the EPA in *Reilly* would likely have had authority to grant its stay order under the APA—a ground that for some reason "was not urged on appeal." *Id.* at 39.[2] In *Sierra Club v. Jackson*, 833 F. Supp. 2d 11 (D.D.C. 2012), which Oxfam relies on its brief at 4-5, a district court squarely addressed the issue left open in *Reilly*: It held that the Clean Air Act "does not by its terms or by logical implication limit the authority of . . . an agency or a court to exercise its traditional statutory authority under Section 705 of the APA to stay such rules or regulations pending judicial review." *Id.* at 24. Thus, a stay was not barred by a statutory deadline to issue a rule even though the deadline had been missed by more than ***ten years.*** *See id.* at 35. The same result applies here—Section 13(q) is silent as to whether the Commission may grant a stay under the APA, and therefore, the Commission retains that power.

II. Petitioners Are Entitled To A Stay Under Any Standard

A. Justice Requires That The Commission Grant A Stay

Petitioners have also established that they are entitled to a stay under the applicable legal standard—whether "justice so requires." 15 U.S.C. § 78y(c)(2); 5 U.S.C. § 705. Oxfam argues

---

[1] *Natural Resources Defense Council v. EPA*, 22 F.3d 1125 (D.C. Cir. 1994), the only other case on which Oxfam relies, is even further afield. *NRDC v. EPA* did not concern a stay at all, but simply the EPA's error in granting states an extension to submit an implementation plan after expiration of a statutory deadline. *See id.* at 1135. The statute did not provide the EPA with authority to grant the relevant extension; by contrast here, the Exchange Act and the APA provide the Commission with authority to grant stays pending judicial review.

[2] While Oxfam argues that it would "defy logic" that the Court would fail to reach this argument, courts of appeals typically only decide issues raised by the parties. *See, e.g.*, *Doe by Fein v. District of Columbia*, 93 F.3d 861, 875 & n.14 (D.C. Cir. 1996).

that the Commission is necessarily constrained by the four-factor test that applies when courts rule on preliminary injunctions. Oxfam Br. 4-6. But by their plain terms, the governing statutory sections are not so restricted, and it would make no sense for an agency's ability to grant a stay to be contingent on its admitting that the rule it just adopted was substantially likely to be struck down in court.[3] Contrary to Oxfam's claim, the Commission has not invariably applied the four-part test before granting a stay. In its Order granting a stay of its proxy-access rules in the *Business Roundtable* case, for example, the Commission considered "all of the circumstances" and concluded that "a stay avoids potentially unnecessary costs, regulatory uncertainty, and disruption that could occur if the rules were to become effective during the pendency of a challenge to their validity." 2010 SEC LEXIS 3275, at *2-3. The Commission further noted that Petitioners sought expedited review of the rules, and therefore, their "validity will be resolved as quickly as possible." *Id.* at *3. The same criteria apply here: A stay would prevent U.S. companies from needlessly incurring up to $1 billion of initial compliance costs (and other expenses) during the pendency of this lawsuit (77 Fed. Reg. at 56,398/1), and the D.C. Circuit's expedited review will ensure prompt resolution of the appeal.

In any event, even Oxfam concedes (at 5) that the Commission would have discretion to deviate from the four-factor test if it provided a reasoned explanation for doing so. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). Here, the enormous cost of the Rule and the court of appeals' expedited consideration provide more than adequate justification for a temporary stay.

---

[3] Indeed, presumably for this reason, the D.C. Circuit's rules require consideration of the four-factor test in ruling on a request to stay agency action, *see* D.C. Cir. Rule 18, whereas the SEC's Rules of Practice provide simply that "[t]he Commission may grant a stay in whole or in part, and may condition relief . . . upon such terms, . . . ***as it deems appropriate***," SEC Rule of Practice 401(b) (emphasis added).

B. Petitioners Have Satisfied The Equitable Criteria For A Stay

As explained in their initial brief, Petitioners have also satisfied the equitable criteria that courts apply in weighing requests for stays. Oxfam's contrary arguments are either erroneous or wholly unpersuasive; Petitioners focus on a few of the more notable examples here.

1. Likelihood Of Success

First, Oxfam argues that the Commission had no responsibility to justify its refusal to grant a statutory exemption to companies in cases where foreign law prohibits the disclosures required by the Rule. Oxfam Br. 7. But as Oxfam repeatedly acknowledges, the Commission made a *discretionary decision* to consider exemptions to the Rule and ultimately to adopt a "no-exemptions policy." *Id.* at 8; *see also id.* at 6-7 (noting that Commission has "'considerable . . . discretion'" to consider exemptions and concluded that such exemptions here were "inconsistent with its statutory mandate") (citation omitted); 75 Fed. Reg. 80,978, 80,980/3 (Dec. 23, 2010) (soliciting comments on whether Commission should exercise exemptive authority). As with all discretionary decisions, the Commission had a responsibility to act "in a well-reasoned, consistent, and evenhanded manner." *Greyhound Corp. v. Interstate Commerce Comm'n*, 668 F.2d 1354, 1359 (D.C. Cir. 1981). As Oxfam acknowledges (at 7), this requires the Commission to consider whether "[an] exemption serves the public interest [while] at the same time leaving in place adequate investor protections." *Id.* (citing *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 296 (2d Cir. 2006)). The Commission failed to consider those criteria here—including the billions of dollars that could have been saved by exemptions, the effect of an exemption on those countries that forbid disclosures by law, and any potential alternative sources of payment information in those countries. *See* Petitioners' Br. 5-7. Indeed, as Oxfam acknowledges, the exemptions at issue would affect disclosures in "a mere four countries" (Oxfam Br. 17) out of

over 50 that may be affected by the Rule (Petitioners' Br. 5); the Commission could easily have granted this exemption to save costs without undermining the entire statutory disclosure regime.

Oxfam has no response to these arguments, so it resorts to misrepresenting the record. For example, Oxfam suggests that no commenter advocated that the Commission exempt disclosures in only those countries where disclosure is currently prohibited by law. Oxfam Br. 8 n.7. To the contrary, multiple commenters advocated precisely that. *See, e.g.*, Statoil Comment Letter at 5-6 (Feb. 22, 2011) (arguing that exemption for foreign law should be targeted at "Existing Legal Prohibitions"); Vale Comment Letter at 3 (March 2011) (arguing that Commission could "limit[] the exception to those laws . . . in effect when the proposed rules are adopted"). Similarly, Oxfam claims that, in considering an exemption for contracts with non-disclosure provisions, the Commission "balanced the risk of competitive harm" against the benefits of disclosure and found that "mitigating factors" addressed any competitive risks. Oxfam Br. 8 (citing 77 Fed. Reg. at 56,373/1). Petitioners invite the Commission to read the cited discussion—it involves no "balanc[ing]" and no "mitigating factors" are identified. In short, Oxfam acknowledges that the Commission had an obligation to weigh commenters' concerns about competitive injuries against the purposes underlying Section 13(q), but it can identify no place in the record where such balancing occurred.

Second, Oxfam attempts to argue that the Commission had no discretion to reduce the competitive injuries on companies by allowing them to submit payment information confidentially and only publish a "compilation" of that data. *See* Oxfam Br. 9-10. But its own authorities undermine its claim. For example, it states that the Commission "*always*" requires that submissions in an "annual report" be made public. *Id.* at 9. But its cited authority (at n.8), entitled "Confidential Treatment Requests," details the well-established process whereby

companies that would suffer "competitive harm" from disclosing "required" information in "annual reports" may "request confidential treatment of information filed under the Securities Act and the Exchange Act." Division of Corporation Finance Staff Legal Bulletin No. 1 (Feb. 28, 1997), *available at* http://www.sec.gov/interps/legal/slbcf1r.htm#n18; *see also* 17 C.F.R. § 240.24b-2(a) (providing process whereby any filer of a "report" with the Commission may request confidential treatment). Further, Oxfam acknowledges that companies who participate in EITI may provide "reports" to an independent auditor who will then "publish[]" a reconciliation. Oxfam Br. 10. Section 13(q), which relied on EITI as a model, uses essentially identical language to distinguish between a company's submission of an annual "report" to the Commission and the Commission's subsequent "public[ation]" of aggregate data. 15 U.S.C. § 78m(q)(2)(A), (3). This language plainly provides the Commission with discretion to permit confidential submission of company-specific data, and it erred in concluding otherwise.

Oxfam also relies on the paragraph in the Act which says the Commission is to publish a "compilation" "to the extent practicable," and then adds: "Nothing in this paragraph shall require the Commission to make available online information other than the information required to be submitted under the [Commission's] rules." 15 U.S.C. § 78m(q)(3)(B). This provision ***protects*** U.S. companies by making clear that the Commission is not required to disclose anything beyond what it collects under Section 13(q). It does not, however, address the ***form* or *manner*** in which the submitted information is to be published. That is addressed in the preceding subparagraph, which—as noted—says the information is to be published in a "compilation," and only "to the extent practicable." *Id.* § 78m(q)(3)(A). Simply, a sub-clause saying that the "compilation" paragraph cannot be interpreted to require added disclosure burdens cannot be wielded as Oxfam attempts to do that very thing.

Finally, Oxfam's reliance on post-enactment comments by Senators Cardin and Lugar is misguided. *See* Oxfam Br. 10. Courts regularly decline to interpret statutes in light of statements made by individual legislators, particularly when those statements are made ***after*** the legislation is enacted. *See Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002) ("We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text."). The Commission should assign no weight to those statements here, just as it declined to accept post-enactment interpretations proffered by Senators regarding the conflict minerals rule. *See* Final Rule, Conflict Minerals, 77 Fed. Reg. 56,274, 56,318, 56,321 (Sept. 12, 2012).

Third, Oxfam characterizes Petitioners' objection to the Commission's failure to provide a definition of the critical term "project" in Section 13(q) as a mere policy "disagree[ment]." Oxfam Br. 11. That is incorrect; Petitioners object to the Commission's failure to provide a reasoned basis for its unwillingness to provide a definition or adopt commenters' suggestion to define "project" as a geologic basin or district. Consider Oxfam's own examples. It notes that the Commission rejected Petitioners' definition of project because it would supposedly be inconsistent with Section 13(q)'s requirement of "country-by-country reporting" (*id.*)—but Section 13(q) requires reporting at *both* the country *and* the project level. 15 U.S.C. § 78m(q)(2)(A)(i), (ii). The two are unrelated, and Oxfam does not explain the relevance of one to the other. Similarly, Oxfam cites the Commission's argument that the geologic basin definition may not "reflect" the "contractual arrangements" between a company and a foreign government, but again, it does not explain why that should matter. Oxfam Br. 11. Finally,

Oxfam attempts to gain traction by noting that the Commission "recited" all comments submitted on this issue. *Id.* at 10. But the Commission's *recitation* of submitted comments does not discharge its "duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *Farmers Union Cent. Exchange, Inc. v. Federal Energy Regulatory Comm'n*, 734 F.2d 1486, 1511 (D.C. Cir. 1984). The Commission failed to discharge that duty here.

Fourth, Oxfam's analysis of Petitioners' cost-benefit argument misrepresents the record. For example, Oxfam claims that the Commission properly used data submitted by individual companies to derive industry-wide estimates of the Rule's costs associated with divestment of assets in countries that prohibit the required disclosures. *See* Oxfam Br. 13. To the contrary, as Petitioners pointed out (at 14), the Commission ***failed to provide an industry-wide estimate***. *See also* 77 Fed. Reg. at 56,412/1 (noting that Commission's analysis was "limited to just three issuers"). Nor is it true, as Oxfam claims, that the Commission "used what little quantitative data it was given" to calculate the Rule's costs. Oxfam Br. 13 (citing *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005)). The Commission ventured an industry-wide estimate with respect to initial and ongoing compliance costs despite not having access to every company's financial information; it could have done the same, but did not, with respect to expected losses in foreign countries—particularly since it knew that at least 51 companies had investments in these countries and knew the extent of the foreign assets for at least 11. *See* 77 Fed. Reg. at 56,411/3 (and chart). For the three companies the Commission chose to analyze, it supplemented data in the record with publicly-available information, but made no effort to look for such data with respect to any other company. *See id.* at 56,412/1-2. Given this, the Commission did not discharge its "statutory obligation to do what it can to

apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure." *Chamber of Commerce*, 412 F.3d at 144.

Similarly, Oxfam errs in claiming (at 14) that the Commission's analysis of the Rule's benefits was tailored to comply with the D.C. Circuit's decision in *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011). In *Business Roundtable*, the Commission had identified "some intangible, or at least less readily quantifiable, benefits," associated with its proxy-access rule, but "relied upon insufficient empirical data," including "two unpersuasive studies," in concluding that the Rule would produce the claimed benefits. *Id.* at 1149-51. The Commission's vague description of the Rule's expected benefits here is no more specific than it was in *Business Roundtable*. *See* Oxfam Br. 14 (collecting citations). If anything, the Commission provides ***less*** support for the benefits expected from its current Rule than it did for proxy access—it cited no empirical studies, and it rejected calls from commenters to adopt a disclosure regime more in keeping with the established EITI standards. And while the Commission conceded that this is not an area in which it typically regulates (77 Fed. Reg. at 56,397/3), it now has an obligation to develop and apply the expertise necessary to make an informed decision as to whether the extremely costly Rule will actually result in the intended benefits. *See, e.g.*, *Chamber of Commerce*, 412 F.3d at 144. It failed to do so here, and as a result performed a cost-benefit analysis more deficient than in any of the cases Oxfam cites, for it has imposed billions of dollars of costs with no clear benefit despite what Oxfam concedes to have been the "discretion" to exempt a "mere" four countries and thereby avert significant harm to U.S. companies and investors.

2. Likelihood/Imminence Of Substantial Irreparable Harm

With respect to irreparable harm, by the Commission's own calculations, initial compliance costs alone will amount to at least $1 billion. 77 Fed. Reg. at 56,398/1. These costs are being incurred now, as companies modify their payment recording systems to prepare for compliance with the Rule by the end of next year.

Oxfam attempts to downplay these astronomical costs by characterizing them as "economic" and therefore not "irreparable," but in advancing this argument, Oxfam mischaracterizes the case law. It contends that "courts have refused to consider economic loss as irreparable harm unless it is so great as to 'threaten[] the existence of the movant's business.'" Oxfam Br. 15 (citing *Wisconsin Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). But what the Court actually said in *Wisconsin Gas* is that "[*r*]*ecoverable* monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Id.* In that case, the alleged harm could be recovered from other private entities after judicial review. *See id.* at 675. By contrast, here, if a court ultimately vacates the Rule, the damage caused to scores of U.S. companies would be irreparable because the money cannot be recovered from the government or other parties. Indeed, companies may be required to incur even more costs if, for example, the Commission subsequently adopts a new definition of "project" that requires companies to re-tool the compliance systems that they put in place while litigation was pending.

Indeed, the monetary losses in this case are "irreparable *per se*" because the government cannot be made to pay damages to redress them. *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008); *see also Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010). Although "[n]ormally the mere payment of money is not considered irreparable, . . . that is because money can usually be recovered from the person to whom it is paid." *Philip Morris USA Inc. v. Scott*,

131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers). That is not the case here, where the public companies' compliance costs "cannot be recouped." *Id.*[4]

If the Rule is permitted to take effect, it also will impose incalculable opportunity costs on market participants, as countries that forbid disclosure of payments will forego contracts with companies subject to the Rule. *See Nalco Co. v. EPA*, 786 F. Supp. 2d 177, 188 (D.D.C. 2011) (finding irreparable harm where company argued that regulation would cause disruption to its customers' mills and "a customer would be unlikely to incur voluntarily such cost and disruption a second time to return to [plaintiff's] product"). While Oxfam describes these costs as "unlikely and unsubstantial" (at 17), they were expressly acknowledged by the Commission. 77 Fed. Reg. at 56,410/1-2 n.620; *see also id.* at 56,412/1 (finding that commenters' concerns that the impact of host country laws "could add billions of dollars of costs to affected issuers . . . ***appear warranted***") (emphasis added). To downplay these costs, Oxfam cites two articles from the period after Dodd-Frank was enacted to suggest that companies are still doing business in Angola and China (Oxfam Br. 16), but these articles were published ***before*** the Commission promulgated the Rule and are therefore inapposite. Likewise, Oxfam cites three articles from the period after the Rule was issued, but two of them concern Ethiopia and Equatorial Guinea, neither of which was identified as a country that prohibits disclosure of payments, while the third merely indicates that Chevron and China were "close" to a deal. Oxfam Br. 16-17. This assortment of cherry-picked articles stands in sharp contrast to the Commission's ***actual finding*** that at least 51 companies conduct business in Angola, Cameroon, China, and Qatar, where

---

[4] Moreover, Oxfam's claim that $1 billion in compliance costs is *de minimis* and cannot constitute irreparable harm conflicts with its later assertions that unquantified losses to investors and the loss of a mere $1 million of its own money spent on advocacy for initiatives related to the Rule, ***do*** constitute irreparable harm. Oxfam Br. 20, 21. If a loss of $1 million can constitute irreparable harm, surely a loss of $1 billion does too.

disclosure is prohibited, and that three of those companies alone can expect to experience losses totaling $12.5 billion. 77 Fed. Reg. at 56,411/3; 56,412/1. Given the massive costs claimed by commenters and acknowledged by the Commission, and the inability of companies covered by the Rule to recover their economic losses in the event the Rule is struck down, the Commission should stay the Rule pending judicial review.[5]

3. Harm To Other Parties

A stay is also warranted because no other parties will be harmed if the Rule is stayed pending a determination of its legality by a federal court. Oxfam offers no evidence that immediate implementation of the Rule is necessary to avoid harm to investors, the citizens of foreign countries, or Oxfam in particular, nor could Oxfam make such a showing. First, the Commission conspicuously declined to make a finding that this information will benefit investors. *See, e.g.*, 77 Fed. Reg. at 56,399/1 ("There also *may* be *a* benefit to investors given the view expressed by some commentators that new disclosure requirements would help investors assess the risks faced by resource extraction issuers operating in resource-rich countries. . . . [T]he rules *could* improve informational efficiency.") (emphases added). As the Commission presumably recognized, it would have been absurd to conclude that rule causing billions of dollars in corporate losses would nonetheless benefit investors, indeed, the Commission found that compliance costs associated with the Rule's disclosure requirements would ***harm*** investors. *See, e.g.*, 77 Fed. Reg. at 56,403/2 ("[T]he cost of compliance for this provision will be borne by the shareholders of the company thus potentially diverting capital

---

[5] Oxfam's contention (at 19 n.12) that the European Union's current consideration of disclosure rules supports the Commission's denial of a stay is speculative and confuses policy proposals with law. The European Union has not yet acted and its ***potential*** regulatory decisions cannot be used to justify the denial of a stay in this case.

away from other productive opportunities which may result in a loss of allocative efficiency."). Thus, Oxfam cannot claim that a stay would harm shareholders; the opposite is true.

To be sure, Oxfam claims that its ability to influence corporate policy and make investment decisions based on the disclosure information will be harmed by a stay of the Rule (Oxfam Br. 20-21), but that interest is not one that is likely to be shared by investors as a class, whose common objective is to maximize the value of their investments. *See Business Roundtable*, 647 F.3d at 1152 (observing that union and pension fund investors have distinct interests from other shareholders and "can be expected to pursue self-interested objectives rather than the goal of maximizing shareholder value," thereby "caus[ing] companies to incur costs"). Any loss to Oxfam of the information provided by the Rule would be more than outweighed by the gains enjoyed by the ordinary shareholder who invests in companies with the hope of increasing the value of his holdings. And in any event, Oxfam's purported harm from any delay in the disclosures is speculative, particularly in light of the availability of payment information via EITI's existing transparency regime.[6]

Ultimately, Oxfam has not shown that immediate implementation of the Rule is necessary to avoid any harm it or others may suffer as a result of a stay. *See, e.g.*, *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 237 (D.D.C. 2003) ("While defendants identify an equally strong public interest in preservation and restoration of Chesapeake Bay . . . [they] have not met their burden of demonstrating why reduction of the mute swan population in Maryland

---

[6] Similarly, Oxfam refers to unspecified "research and advocacy" costs that it will have to expend to obtain the desired disclosures if a stay is granted. Oxfam Br. 20. This appears to be nothing more than a thinly-veiled reference to the costs of participating in litigation, which courts have frequently admonished cannot be used to claim irreparable harm. *See, e.g.*, *Salazar v. District of Columbia*, 671 F.3d 1258, 1265 (D.C. Cir. 2012); *I.A.M. Nat'l Pension Fund Benefit Plan A v. Cooper Indus., Inc.*, 789 F.2d 21, 25 (D.C. Cir. 1986).

absolutely must begin at this time in order to achieve this long-term goal . . . ."). And any speculative harm that Oxfam and other third parties may incur is plainly outweighed by the concrete irreparable financial harm that Petitioners will sustain absent a stay. *See Population Institute v. McPherson*, 797 F.2d 1062, 1082 (D.C. Cir. 1986).

4. The Public Interest

Finally, despite Oxfam's protestations to the contrary, the public interest is ***served*** by staying the Rule and maintaining the status quo pending judicial review. *See, e.g.*, *Indep. Bankers Ass'n v. Smith*, 534 F.2d 921, 951 (D.C. Cir. 1976) ("[A] *fait accompli* is hardly in the public interest."). The Rule imposes enormous costs on U.S. companies, to the detriment of the overall economy and the U.S. markets for oil, gas, and minerals. It was approved by less than a majority of the Commission in circumstances where, as shown above, there is at minimum a "serious legal question" whether the objections of Petitioners and the dissenting Commissioner are correct. The public interest will not be served by imposing significant, unnecessary burdens on an economy still in the midst of a fragile recovery—particularly given that there is no finding in the record that such burdens are outweighed (or even mitigated) by countervailing benefits. To the contrary, "[t]he public . . . has an interest in ensuring that the Final Rule promulgated by the [Commission] does not give way to unintended . . . consequences that have not (but should have) been evaluated." *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 26 (D.D.C. 2009); *see also N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) ("The public interest is served when administrative agencies comply with their obligations under the APA.").

III. The Commission Should Not Delay Further In Acting On Petitioners' Stay Request

Petitioners requested a ruling on their stay request by Thursday, November 1. Petitioners appreciate that government offices were closed for two days last week due to severe weather, and that this may have delayed the Commission's ability to act on their stay request. However, Petitioners respectfully request that the Commission act now without further delay, so that Petitioners may proceed to Court if necessary.

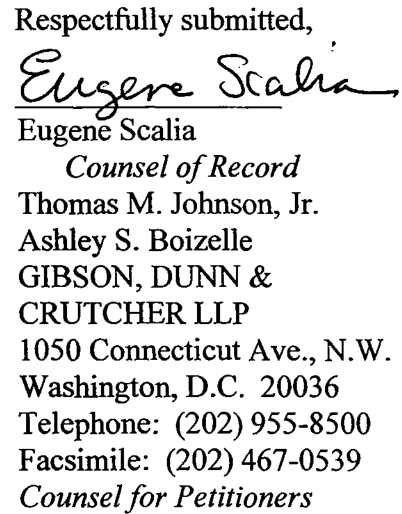
Oxfam has provided no reason why the Commission should delay resolution of Petitioners' stay motion to allow for an additional 30-day public comment period. The existing comment record on the final Rule is already robust, and Oxfam has offered no concrete evidence that it or other interested members of the public would suffer irreparable harm if the Rule were stayed. By contrast, a delay to allow further comments would only create further regulatory uncertainty and impose unnecessary costs on U.S. companies while litigation is pending. *Cf.* Order Granting Stay, *Business Roundtable*, 2010 SEC LEXIS 3275, at *2-3. In any event, now that the D.C. Circuit has decided to review the Rule on an expedited basis, it is appropriate for the Commission to act expeditiously on Petitioners' request.

CONCLUSION

For the reasons stated above and in Petitioners' initial brief, Petitioners respectfully request that their Motion for a Stay be granted.

Dated: November 5, 2012

Respectfully submitted,



Eugene Scalia
Counsel of Record
Thomas M. Johnson, Jr.
Ashley S. Boizelle
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
Counsel for Petitioners

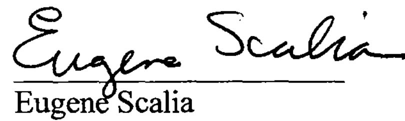
Of Counsel
Harry M. Ng
Peter C. Tolsdorf
American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005
Telephone: (202) 682-8500
Counsel for Petitioner American Petroleum Institute

Of Counsel
Robin S. Conrad
Rachel Brand
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-5337
Counsel for Petitioner Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rule 154(c) of the Commission's Rules of Practice, the undersigned hereby certifies that the foregoing Reply in Support of Petitioners' Motion to Stay Rule 13q-1 and its Related Amendments to New Form SD complies with the Commission's length limitations for motions and contains 5,934 words.

Dated: November 5, 2012



Eugene Scalia