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March 25, 2013

VIA ELECTRONIC FILING

Mr. Mark Langer
Clerk of the Court
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: 28(j) Letter – American Petroleum Institute et al. v. Securities and Exchange Commission, No. 12-1398

Dear Mr. Langer:

Petitioners submit this letter in response to a question raised at oral argument.

As noted in the SEC's March 23rd letter, the 1975 amendments to the Exchange Act added some new rulemaking authorities that were not included in Section 25(b). In addition to the provisions identified by the SEC, Petitioners have identified three others: Sections 8(c) [now 15 U.S.C. § 78h(b)], 12(l) [*id.* § 78l(l)], and 31 [*id.* § 78ee(f)]. Petitioners regret that they did not have this information to answer the Court's question at argument.

The Senate report to the 1975 amendments explains that Section 25(b) provides for direct appellate review of rules adopted under new or amended provisions "directly relating to the operation or regulation of the national market system, a national clearing system, or the SEC's oversight of the self-regulatory organizations"; *i.e.*, "the major policy determinations the Commission [would] be called upon to make" under the 1975 amendments. S. Rep. No. 94-75, at 36-37 (Apr. 14, 1975). The report states that the appellate courts are the "most appropriate forum for this review in light of the fact that the District Court's fact finding function is rarely necessary and the questions

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subject to review are likely to end up in the higher court anyway.” *Id.* at 37. Referring, presumably, to D.C. Circuit law at the time, the report states that “at the present time, there is no Exchange Act provision for review of Commission rules.” *Id.* at 36.

Section 25 is not a “firm indication that Congress intended” to depart from the “sound policy” of immediate appellate court review. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985). Rather, it was this Court that made that departure, excising “rules” from “orders” in its *United Gas* decision. Against that backdrop Congress acted to cabin the error, not codify it. This Court should do the same. Among other things, doing so will reduce the likelihood that the ghost of *United Gas* haunts future rules that, as here, cite as their basis rulemaking authorities that may be—but are not clearly—listed in Section 25(b). Pets. Br. 30-31.

Respectfully submitted,

/s/ Eugene Scalia

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2013, I electronically filed the foregoing Rule 28(j) Letter with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

On this 25th day of March, 2013, service was accomplished on the following by the CM/ECF system:

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