

April 18, 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: Rule 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 Oxfam's Rule 28(j) letter of April 12.

The EU's payment disclosure agreement, which is not yet law, is extra-record material that has no bearing on the legality of the Commission's decisionmaking. In *Amoco Oil v. EPA*, 501 F.2d 722 (D.C. Cir. 1974), which Oxfam cites, this Court prohibited the EPA from supplementing the record with submissions that post-dated the rule, because they "did not inform the agency decision-making which is the subject of review." *Id.* at 729 n.10. The only extra-record evidence the Court considered in that case was testimony from two industry representatives with experience implementing the rule—and only because the agency "formally reaffirmed [its] predictions" in the *Federal Register* following that testimony. *Id.* The circumstances here are not comparable.

The EU action is also legally irrelevant. The EU does not have the same obligation as the Commission to consider its actions' effects on efficiency and capital formation, and to avoid unnecessary burdens on competition. *Id.* §§ 78c(f); 78w(a)(2). Nor does it have a federal agency's obligation to review

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evidence submitted by the public, and to cogently explain its assessment of that evidence and justify its action in light of it.

In short, the Commission must defend its Rule on the grounds articulated below, *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), including its estimate that it will cost U.S. companies (and ultimately their shareholders) more than \$12.5 billion in competitive injuries, 77 Fed. Reg. 56,365, 56,398/1 (Sept. 12, 2012), with no determined benefits. The possibility that another regulatory authority may be poised to impose a similar economic burden, with comparable disregard for its effects, does not exculpate the actions of the Commission under the Exchange Act and the APA. Nor will it alleviate the competitive pressures that U.S. companies face from state-owned oil companies that dominate the market. Op. Br. 10. Indeed, European Commission staff estimate that 71% of the world's oil reserves are controlled by companies that will not be subject to the U.S. requirements or any final EU requirements. Commission Staff Working Paper at 35, available at http://ec.europa.eu/internal_market/accounting/docs/other/20111025-impact-assessment-part-2_en.pdf.

Respectfully submitted,

/s/ Eugene Scalia

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 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 18th day of April, 2013, service was accomplished on the following by the CM/ECF system:

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