No. 12-1398

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Petitioners,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,

Respondents,

and

OXFAM AMERICA,

Proposed Intervenor-Respondent.

OXFAM AMERICA'S RESPONSE TO PETITIONERS' EMERGENCY MOTION TO DETERMINE JURISDICTION

INTRODUCTION

Proposed Intervenor Oxfam America ("Oxfam") hereby submits this Response to Petitioners' Emergency Motion to Determine Jurisdiction (Dkt. No. 1399710, Oct. 15, 2012) ("Pet. Mot."), urging this Court to dismiss the Petition for

Review.[1] The American Petroleum Institute, *et al.* ("Petitioners") challenge the so-called Cardin-Lugar provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Cardin-Lugar" and "Dodd-Frank," respectively), Pub. L. No. 111-203, 124 Stat. 1376, 2220-22,[2] and the regulations enacted by the Securities and Exchange Commission ("SEC" or "Commission") pursuant thereto ("the Disclosure Rule"). *See* SEC Rule Release, published 77 Fed. Reg. 56,365 (Sept. 12, 2012). Petitioners claim that the Disclosure Rule is arbitrary and capricious and that both the Disclosure Rule and Cardin-Lugar violate their First Amendment rights. However, because the Securities Exchange Act of 1934, 15 U.S.C. §§ 78 *et seq*. ("Exchange Act"), does not authorize direct appellate review of Cardin-Lugar or the Disclosure Rule, and because facial First Amendment challenges to statutory enactments are not subject to direct appellate review, the Petition for Review should be dismissed for lack of subject matter jurisdiction.

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[1] Oxfam has filed a Motion seeking leave to intervene or, in the alternative, participate as *amicus curiae* in this action. (Dkt. No. 1401477, Oct. 24, 2012) ("Intervention Mot.").

[2] Cardin-Lugar is also known, and is referred to by Petitioners, as Dodd-Frank Section 1504.

ARGUMENT

No statute authorizes direct appellate review for administrative challenges to the Disclosure Rule or First Amendment challenges to *any* rule or statute.

The general rule is, as Petitioners concede, that "persons seeking review of agency action go first to district court rather than to a court of appeals." *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994); *Public Citizen, Inc. v. Nat'l Highway Transp. Safety Admin.*, 489 F.3d 1279, 1287 (D.C. Cir. 2007). Congress may provide for direct appellate review of agency rules and orders and has done so in a number of cases, including for some SEC actions. But Congress has clearly *excluded* direct appellate review of Cardin-Lugar rulemaking, and there is absolutely no authority for such review of First Amendment statutory challenges.

Petitioners fall back instead on this Circuit's jurisprudence holding that "when a statute . . . grant[s] direct review, but its application to the agency action in question is 'ambiguous,'" such ambiguities should be resolved in favor of direct appellate review. Pet. Mot. at 6. This argument fails, however, because the Exchange Act is crystal clear as to which agency actions are subject to direct review, and Cardin-Lugar rulemaking is excluded.

Section 25 of the Exchange Act sets out in detail the actions of the SEC that trigger direct appellate review. *See* 15 U.S.C. § 78y. First, SEC "orders" are reviewable by the United States Courts of Appeals, either in this Circuit or in the circuit in which the petitioner resides, if the petitioner files a Petition for Review

within sixty days of the entry of the order. 15 U.S.C. § 78y(a)(1). Second, SEC "rules" promulgated under the authority of Sections 6, 9(h)(2), 11, 11A, 15(c)(5) or (6), 15A, 17, 17A, or 19 of the Exchange Act are subject to direct appellate review under the same conditions. *Id.* § 78y(b)(1). No other section of the Exchange Act provides authority for direct appellate review. The SEC promulgated the Disclosure Rule under Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act. 77 Fed. Reg. at 56,417.

a. The Disclosure Rule was not enacted pursuant to the broker and dealer sub-sections of Section 15 of the Exchange Act that provide for direct appellate review.

Petitioners argue that the SEC's reference to Section 15 as authority for the Disclosure Rule may include subsections (c)(5) or (6) – the only subsections that trigger direct appellate review. Pet. Mot. at 7-8. On Petitioners' theory, the fact that the SEC refers to Section 15 in general without specifying whether its authority derives from subsections (c)(5) or (6) gives rise to ambiguity that should be resolved in favor of direct review. *Id*. at 7-9. But Sections 15(c)(5) and (6) do not remotely relate to Cardin-Lugar and are unambiguously *not* a basis for rulemaking authority in this case; rather, the only part of Section 15 providing that authority is subsection (d)(1), 15 U.S.C. § 78o(d)(1). Petitioners attempt to distinguish cases in which this Court and other circuits have disavowed jurisdiction under the Exchange Act, noting that in those cases the SEC did not refer at all to

any of the parts of the Exchange Act mentioned in Section 25(b)(1). Pet. Mot. at 8-9. But Petitioners cannot manufacture ambiguity where none exists.

Where Congress has seen fit to provide such explicit and detailed instructions on direct appellate review that it differentiates between second-level sub-clauses of the same Section of a single statute, this Court should read the provisions in question to determine whether they apply. Contrary to Petitioners' mischaracterization, Pet. Mot. at 9 n.4, this is consistent with *International Swaps and Derivatives Ass'n v. CFTC*, No. 11-1469, 2012 U.S. App. LEXIS 1282 at *2 (Jan. 20, 2012). In that case, this Circuit found it had no jurisdiction over a direct challenge to the CFTC's rule on position limits, which had been authorized by Section 4a of Dodd-Frank, later codified under Section 2 of the Commodities Exchange Act ("CEA"), 7 U.S.C. § 2. The CEA was, as Petitioners assert, "silent with regard to judicial review of Commission actions like the Rule at issue in that petition." But Petitioners omit from their argument that the CEA *did* provide direct appellate review for "different, specified Commission actions." *Int'l Swaps*, 2012 U.S. App. LEXIS 1282 at *2. In fact, just as in Cardin-Lugar, the CFTC in *International Swaps* claimed an entire Section of the CEA as authority for its action, *see* 76 Fed. Reg. 71,683 (rule release for position limits, amending authority citation for general regulations under the CEA to include, *inter alia*, 7 U.S.C. § 2, as modified by Dodd-Frank). Just as Section 15 of the Exchange Act,

Section 2 of the CEA *does* include a sub-clause – 7 U.S.C. § 2(a)(1)(C)(v)(VI) – that is explicitly subject to direct appellate review. But the Court did not assume that the CFTC's assertion of Section 2 authority for the position limit rule referred to 7 U.S.C. § 2(a)(1)(C)(v)(VI), presumably because that sub-clause addresses margin requirements for stock index futures contracts, not position limits.

Similarly, subsections 15(c)(5) and (6) have *absolutely no connection* to extractive payment disclosures or the Disclosure Rule; these provisions prohibit securities brokers and dealers from engaging in transactions that circumvent regulations on dealing, and the system for settlements and clearances, respectively. The subsection of Section 15 to which the SEC refers in the Disclosure Rule is (d)(1), 15 U.S.C. § 78o(d)(1), which requires certain issuers to file supplementary and periodic reports with the Commission as required by Section 13 of the Exchange Act, in which Cardin-Lugar has been codified. There is no ambiguity on whether the Disclosure Rule was enacted subject to Section 15(c)(5) or (6) of the Exchange Act; it manifestly was *not*.[3]

[3] Respondent SEC agrees that the relevant part of Section 15 is Section 15(d). *See* SEC Resp. to Pet. Mot. ("SEC Resp.") (Dkt. No. 1401968, Oct. 23, 2012), at 2 ("the relevant subsection in this case is Section 15(d) . . . not Sections 15(c)(5) or (6).").

b. Section 25(a)(1) also does not provide authority for direct appellate review of the Disclosure Rule.

Section 25(a)(1) does not apply to the Disclosure Rule either. Specifically, despite Petitioners' and the SEC's contention, Pet. Mot. at 9-11 & SEC Resp. at 2-4, the fact that Exchange Act Section 25(a)(1) provides direct appellate review for SEC "orders" does *not* mandate direct review for SEC *rules*.

The Exchange Act's review provisions differentiate sharply between orders and rules. Thus this Court "is not at liberty to displace, or to improve upon, the jurisdictional choices of Congress[.]" *Five Flags Pipe Line Co. v. Dept. of Transp.*, 854 F.2d 1438, 1441 (D.C. Cir. 1988). If the provision regarding orders, 15 U.S.C. § 78y(a)(1), encompassed all rules, it would render superfluous the provision regarding rules, *id.* § 78y(b)(1), and negate the choice of Congress to reserve direct appellate review only for rules promulgated under enumerated sections of the Exchange Act. Courts must "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (canon against superfluity is a "cardinal principle of statutory construction").

Petitioners' cases are inapposite in this regard. Pet. Mot. at 10-11. In *Investment Co. Institute v. Board of Governors of the Federal Reserve System*, the court found that the direct appellate review provision for orders in Section 9 of the Bank Holding Company Act was meant to refer to rules as well. 551 F.2d 1270,

1277-78 (D.C. Cir. 1977). The Court only came to this conclusion, however, because review provisions for rules were not included expressly in the statute. Specifically, noting that "orders" are sometimes differentiated from regulations – including in other sections of the same Act – the Court concluded that "orders" in Section 9 included rules because the legislative history on that section was "completely silent with respect to the forum in which Board regulations would be reviewable." *Id.* at 1278. In *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), the Court did not address jurisdiction, and the fact that it assumed jurisdiction is not binding on this court. *See Independent Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 597 (D.C. Cir. 2001) (Courts are "not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio.*"). Moreover, unlike the Exchange Act, the statute cited as a basis for jurisdiction in *Storer Broadcasting* – 5 U.S.C. § 1032 – referred solely to FCC orders and did not make separate provision for rules. Together, the cases cited by Petitioners stand only for the proposition that where a statute provides for direct review of orders but does not make provision for rules, it may be appropriate to provide for APA rule challenges to be heard directly by the appellate courts.

Petitioners also note that this Circuit assumed direct jurisdiction in *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), in which the SEC took the position that 15 U.S.C. § 78y(a)(1) authorized jurisdiction in the appellate courts.

Pet. Mot. at 10. The SEC's position, which is erroneous, is beside the point here; the SEC in that case had acted, *inter alia*, under Section 43(a) of the Investment Company Act of 1940, 15 U.S.C. § 80a (*see* 75 Fed. Reg. 56,780 (Sept. 16, 2010)), which, like the statutes at issue in *Investment Co. Institute* and *Storer Broadcasting*, contains a judicial review provision that is silent on review of rules and speaks only to review of orders. 15 U.S.C. § 80a-42(a). Thus, even though the *Business Roundtable* court did not address jurisdiction, it could have assumed jurisdiction under the Investment Company Act consistently *Investment Co. Institute*, 551 F.2d at 1276-78 and *Five Flags*, 854 F.2d at 1441, because, unlike the Exchange Act, that statute does not clearly and separately allocate jurisdiction for review of rules.

Respondent SEC argues that the clearly bifurcated structure of Section 25 is a relic of an outdated, unduly exclusive interpretation of the term "order" that was overruled in 1977, after Section 25(b) was enacted. SEC Resp. at 3-4. *Investment Co. Institute*, 551 F.2d at 1277-78, on which the SEC relies, did discard the final remaining vestiges of *United Gas Pipeline v. Federal Power Commission*, 181 F.2d 796, 798 (1950), which established a bright line between orders and rules. However, it could not overrule Congress's decision to provide appellate review *only* of those rules "'promulgated under' the specified provisions of the Exchange Act." SEC Resp. at 4 (quoting Senate Report for 1975 Exchange Act amendments).

In fact, Congress continued to recognize limitations on direct appellate review of SEC rules long after *Investment Co. Institute* was decided. Specifically, in 1990, Section 25(b)(1) was amended to include Section 9(h)(2) of the Exchange Act. This action makes no sense if all SEC rules were already subject to direct appellate review under Section 25(a)(1). *See* Market Reform Act of 1990, Pub. L. No. 101-432, § 6(b), 104 Stat. 963, 975 (1990). Thus, even if, as SEC claims, direct appellate review of *all* Exchange Act rules is preferable as a policy matter, this Court does not have jurisdiction; it may not second guess Congress's jurisdictional choices, "no matter how compelling the policy reasons for doing so." *Five Flags*, 854 F.2d at 1141; *see also Int'l Swaps*, 2012 U.S. App. LEXIS 1282 at *2-3.

c. Petitioners' First Amendment challenge is also not subject to direct appellate review.

Petitioners gloss over the fact that their Petition for Review also includes a First Amendment challenge to Cardin-Lugar itself. *See* Petition For Review (Dkt. No. 1399167, Oct. 10, 2012), at 2. Oxfam has found no precedent for direct appellate review of a First Amendment facial challenge to a statutory enactment. To the contrary, appellate courts have treated as-applied rule challenges and facial statutory challenges differently. For example, this Court has previously held that a statute providing direct appellate review of an agency's regulations does not apply to a constitutional challenge to the underlying statute. *Time Warner Entm't Co.*,

L.P. v. FCC, 93 F.3d 957, 964-65 (D.C. Cir. 1996). Petitioners therefore cannot bring their facial challenge to Cardin-Lugar directly in the Court of Appeals.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Petition for Review for lack of subject matter jurisdiction.

Dated: October 25, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2012, I electronically filed the foregoing Oxfam America's Response to Petitioners' Emergency Motion to Determine Jurisdiction, with the clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I certify that all participants in the case are CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I have caused 4 copies to be hand delivered to the Clerk's office.

/s/ Howard M.Crystal