SECURITIES AND EXCHANGE COMMISSION
DISCLOSURE OF PAYMENTS BY RESOURCE EXTRACTION ISSUERS: FINAL RULE
Release Nos. 36-67717, 34-63549; File No. S7-42-10
RIN 3235-AK85
77 Fed. Reg. 56,365 (Sept. 12, 2012)

NOTICE OF APPEARANCE

Pursuant to Rule 102 (d)(2) of the Commission's Rules of Practice, the attorneys identified below represent Respondent Oxfam America in the *Matter of the Motion of American Petroleum Institute et al. for Stay of Rule 13q-1 and Related Amendments to New Form SD*, File No. S7-42-10.

Respectfully submitted,

/s/ Jonathan G. Kaufman
Counsel of Record
jonathan@earthrights.org
Richard Herz
rick@earthrights.org
Marco Simons
marco@earthrights.org
EARTHRIGHTS INTERNATIONAL
1612 K St. NW Suite 401
Washington, DC 20009
Phone: 202-466-5188 x103
Fax: 202-466-5189
Counsel for Respondent Oxfam America

Howard M. Crystal
Meyer Glitzenstein & Crystal
1601 Conn. Ave., N.W. Suite 700
Washington, DC 20009-1056
Direct: 202-588-5206
hcrystal@meyerglitz.com
Fax: 202-588-5049
Counsel for Respondent Oxfam America

Richard J. Rosensweig
rrosensweig@goulstonstorrs.com
Derek B. Domian
ddomian@goulstonstorrs.com
GOULSTON & STORRS, P.C.
400 Atlantic Avenue
Boston, MA 02110-3333
T: (617) 482-1776
F: (617) 574-4112
Counsel for Respondent Oxfam America

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Howard M. Crystal
Meyer Glitzenstein & Crystal
1601 Conn. Ave., N.W. Suite 700
Washington, DC 20009-1056
Direct: 202-588-5206
hcrystal@meyerglitz.com
Fax: 202-588-5049
Counsel for Respondent Oxfam America

Richard J. Rosensweig
rrosensweig@goulstonstorrs.com
Derek B. Domian
ddomian@goulstonstorrs.com
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Marco Simons
marco@earthrights.org
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1612 K St. NW Suite 401
Washington, DC 20009
Phone: 202-466-5188 x103
Fax: 202-466-5189
Counsel for Respondent Oxfam America

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RESPONSE OF OXFAM AMERICA TO MOTION FOR STAY OF RULE 13q-1 AND RELATED AMENDMENTS TO NEW FORM SD

INTRODUCTION

On August 22, 2012, more than a year after the deadline established by Congress, the Securities and Exchange Commission ("SEC," or "Commission") voted to adopt the final rule implementing the so-called Cardin-Lugar Provision ("Cardin-Lugar"), Section 1504, of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Disclosure Rule"). The Commission took over two years to craft the rule and considered literally thousands of public submissions. The Final Rule is faithful to the purposes of Cardin-Lugar – to provide investors with crucial, material information about investment risks and to help communities in resource-rich communities combat the "resource curse." It accomplishes these goals at a cost estimated at between five-thousandths and four-hundredths of a percent of the total assets of the covered issuers, based on numbers provided by issuers themselves. SEC, *Disclosure of Payments by Resource Extraction Issuers*, 77 Fed. Reg. 56,408-10 (Sept. 12, 2012) (final rule).

As published, the Disclosure Rule will not take effect until fiscal years ending after September 30, 2013, more than a year after the "shall take effect" deadline established by Congress under Cardin-Lugar. Notwithstanding the delayed promulgation of the Disclosure Rule and the full year they will have to bring themselves into compliance with it, the American Petroleum Institute ("API") and others ("Petitioners") request the Commission to *further* delay the Disclosure Rule pending resolution of the judicial challenges they have initiated in the federal courts.

Oxfam America ("Respondent") opposes this effort. As discussed below, Petitioners' request is premature, unnecessary, and fundamentally at odds with the Commission's obligations under Cardin-Lugar, and its own precedent. Respondent also opposes Petitioners' efforts to needlessly rush the Commission's decision on the stay request and instead asks that the Commission set a reasonable timeline within which various interested parties can present their arguments and concerns.

DISCUSSION

1. The Commission Does Not Have Statutory Authority to Grant a Stay of the Final Rule

Under both the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, the Commission's authority to stay its rules is discretionary, but its authority to issue a stay is divested here by the dual deadlines enacted into law as part of Cardin-Lugar.

The Commission "*may*" stay its rules pending judicial review if finds that "justice so requires." *See* 15 U.S.C. §78y(b)(2); 5 U.S.C. § 705. However, the specific dictates of Cardin-Lugar override the Commission's general stay authority and divest the Commission of its authority to stay the Disclosure Rule in two important ways. First, Congress required the Commission to issue the Disclosure Rule by April 17, 2011. *See* 15 U.S.C. 78m(q)(2)(A). Second, Congress provided that the Disclosure Rule "shall take effect" when a resource extraction issuer is required to file its annual report for the first fiscal year ending after the issuance date identified in subparagraph (A). *See* 15 U.S.C. § 78m(q)(2)(F). Congress expected and required resource extraction issuers to be operating under the Disclosure Rule in fiscal years ending after April 17, 2012. The Commission's belated promulgation of the Disclosure Rule has inevitably put the Commission in violation of the "shall take effect" deadline. The Commission does not have the discretionary authority to prolong or aggravate that violation.

Already the beneficiaries of delay, Petitioners seek at least another year of inaction. Judicial review will be lengthy in this case because of the sheer number and complexity of legal challenges – including constitutional issues – Petitioners raise. Petitioners note that if this case proceeds in the D.C. Circuit in the first instance, they cannot expect a decision before Spring 2013, Mot. to Stay Rule 13q-1 and Related Amendments to New Form SD ("Mot.") at 18; notably, they ignore the likelihood of a petition for certiorari to the U.S. Supreme Court.[1] Judicial review is likely to last at least until the first disclosures are required – or to end so shortly before that time that it will be impossible for the Commission to require issuers to comply with the deadline.[2] A stay would violate the deadline mandated by Congress for when the Disclosure Rule must go into effect.

Petitioners' suggestion that the Commission may stay the Final Rule despite the deadline, Mot. at 2 n.1, is erroneous. Where Congress includes a mandatory effective date in a statute, agencies lose discretion to extend that deadline. *See Natural Res. Def. Council v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) (given "highly circumscribed schedule for the promulgation of regulations . . . we cannot conclude that section 301 provided the EPA with the authority to stay regulations that were subject to the deadlines"); *Natural Res. Def. Council v. EPA*, 22 F.3d 1125, 1135 (D.C. Cir. 1994) (EPA could not extend deadline for submission of materials because, "[g]iven the clear statutory submission deadline . . . we see no justification for granting extensions . . ."). The same reasoning precludes application of the stay provisions of the APA, 5 U.S.C. §705. Although *Reilly* did not explicitly address stays under the APA, the court knew

[1] In fact, the challenge will be *more* protracted, because the D.C. Circuit lacks jurisdiction to consider Petitioners' challenge, and the case must proceed in the District Court in the first instance. *See* Oxfam America's Opp. to Pets.' Emergency Mot. to Determine Jurisdiction, filed in *American Petroleum Inst. v. SEC*, No. 12-1398, Dkt. No. 1401564, (D.C. Cir. Oct. 25, 2012).
[2] Petitioners agree that litigation is likely to last until 2014 if litigation begins in the District Court. Mot. at 18.

that the APA was a basis for the EPA's stay order, 976 F.2d at 38, and it would defy logic for the court to have overturned that order if it believed it could be sustained under the APA.

This is not, as Petitioners suggest, a request at all like the one made to the Commission in *Matter of the Motion of Business Roundtable and the Chamber of Commerce of the United States of America*, Securities Exchange Act of 1934 Rel. No. 63031 (Oct. 4, 2010). Unlike the proxy access rules at issue there, the Disclosure Rule is mandatory, has explicit statutory deadlines, and is not subject to the same direct appellate review that promised to afford resolution "as quickly as possible" in the *Business Roundtable* matter.

2. Petitioners Are in any Event Not Entitled to a Stay

a. The Four-Factor Test Governs the Commission's Stay Authority

Even if the Commission were to find that it has the discretionary authority to violate Congressional mandates, its stay authority is controlled by the same four-factor test that control preliminary injunction requests:

> (1) whether there is a strong likelihood that a party will succeed on the merits in a proceeding challenging the particular Commission action (or, if the other factors strongly favor a stay, that there is a substantial case on the merits); (2) whether, without a stay, a party will suffer irreparable injury; (3) whether there will be substantial harm to any person if the stay were granted and (4) whether the issuance of a stay would likely serve the public interest.
> *Order Preliminarily Considering Whether to Issue a Stay Sua Sponte*, SEC Release No. 33870, File No. SR-MSRB-94-2 (Apr. 7, 1994)

The Petitioners' suggestion to the contrary, Mot. at 3, is manifestly erroneous. In *Sierra Club v. Jackson*, the Court reversed the EPA's grant of a stay pursuant to its "when justice so requires" authority under Section 705 of the APA because the EPA "neither employed nor mentioned" the same four-part test that governs a court's authority to stay actions. *See* 833 F.

Supp. 2d 11, 30 (D.D.C. 2012).[3] Concluding that the standard for issuing a stay pending judicial review is the same "whether a request is made to an agency or to a court," the Court found that the agency, like a court, "*must* set forth its considerations of the four factors and its attendant conclusions of law." *Id.* at 31 (emphasis in original).

The Court went on to state that "*even if* the EPA were not required as a matter of law to employ the four-part preliminary injunction test in granting a stay under Section 705 of the APA, the EPA previously has done so in its review of requests to stay rules." *Id.* at 31 (emphasis provided). Because it is established "that an agency, like a court, normally must adhere to its precedents in adjudicating cases before it," and because the EPA had provided "no justification whatsoever – much less reasoned decision-making – for its departure from prior precedents," the Court deemed the EPA's departure from that precedent in granting the stay arbitrary and capricious and reversed the EPA's stay decision. *Id*.

Likewise, the Commission's own precedent is to apply the four injunctive relief factors in deciding stay requests. *See* SEC Release No. 33870 at 1; *see also In the Matter of the Application of Richard L. Sacks*, Securities Exchange Act Rel. No. 35-57028 at 3 (Dec. 21, 2007) ("The Commission generally considers a request for a stay in light of four criteria" and listing preliminary injunction factors). Like the EPA's actions in *Sierra Club*, it would be arbitrary and capricious for the Commission to depart from its precedent. *See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("Unexplained inconsistency" may be

[3] This conclusion applies with equal force to the Commission, either under the APA or the Exchange Act: both provisions employ the same "when justice so requires" standard and derive from the same equitable authority of courts to maintain the status quo in the extraordinary circumstances defined under the four part test. This authority is not, as Petitioners contend, a matter of purely undefined and unconfined discretion.

“a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.”).

a. Petitioners’ Challenge Does Not Show Any Likelihood of Success

Petitioners concede that the Commission is unlikely to determine that their judicial challenge will succeed on the merits. Mot. at 3. They are correct that they need not establish a mathematical *probability* of success. But they must show both that their challenge has at least a “substantial likelihood of success,” *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1294 (D.C. Cir. 2009); SEC Release No. 33870 at 1, and that the other factors weigh strongly in their favor. *See Washington Metropolitan Area Transit Com. v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Their challenge must fail because their contentions do not demonstrate a substantial likelihood of success on the merits.[4] Respondent considers each contention in turn.[5]

i. Petitioners will not succeed in their challenge to the SEC’s decision not to grant exemptions for foreign laws or contractual provisions

Petitioners’ challenge to the Commission’s decision not to grant exemptions in situations where foreign law might prohibit the required disclosures does not stand a substantial likelihood of success. Petitioners incorrectly attempt to create a burden on the Commission that is, in fact, the reverse of that indicated by the Exchange Act, which grants the Commission complete

[4] Despite Petitioners’ contention, Mot. at 4, the fact that one Commissioner disagreed with the majority vote is not a basis to find that Petitioners are substantially likely to succeed on the merits. The Commission cannot be expected to grant a stay every time its rules are approved by a split vote.

[5] Respondent does not discuss here Petitioners’ First Amendment claims because Petitioners do not raise them in their Motion except in the context of irreparable harm. *See Davis*, 517 F.3d at 1292 (considering only the three out of eleven claims advanced as basis for preliminary relief). It suffices to note that Petitioners question the entire basis of requiring financial disclosures for regulatory purposes, but “routine disclosure of economically significant information designed to forward ordinary regulatory purposes” does not implicate the First Amendment. *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005); *see also Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 849 (9th Cir. 2003). *See also* SEC Release No. 33870 at 2 (disclosure requirements are “‘least restrictive means’ of curbing” activity targeted by regulation).

discretion to deny exemptions even if it finds that an exemption would meet the legal criteria for granting one. 15 U.S.C. §78l(h). Regardless, the Commission carefully considered all comments and concluded that such exemptions would be unnecessary and inconsistent with its statutory mandate.[6]

The Commission "*may*" grant exemptions from provisions of the Exchange Act "if the Commission finds… that such action is not inconsistent with the public interest or the protection of investors." *Id.* (emphasis added). This permissive construction indicates "Congress intended to grant the Commission considerable regulatory discretion in this area." *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 296 (2d Cir. 2006). Thus the "most plausible reading" of § 78l(h) is that "the Commission *can* promulgate an exemption once it has determined that the exemption serves the public interest at the same time leaving in place adequate investor protections." *Id.* at 297 (emphasis added).

Petitioners suggest exactly the opposite: that the Commission must justify its *refusal* to exercise its exemptive authority. Mot. at 6. But there is no textual support for the proposition that the Commission is *required* to promulgate exemptions under any circumstances. Such a restraint on the Commission would be inconsistent with Congress's intent to give the Commission broad regulatory discretion with respect to exemptions. *Id.* at 296.

Moreover, the decision not to grant exemptions was consistent with the Commission's duty to avoid burdening competition unnecessarily, 15 U.S.C. § 78w(a)(2). The Commission examined all comments addressing exemptions. *See* 77 Fed. Reg. 56,370-72, 56,402. It also

[6] Petitioners' suggestion that exemptions would have furthered the intention for Cardin-Lugar to be implemented consistently with the Extractive Industries Transparency Initiative (EITI), Mot. at 8, is misleading. The section of Cardin-Lugar to which Petitioners refer is the definition "payments." 15 U.S.C. §78m(q)(1)(C)(ii). This provision does *not* relate to exemptions; no one has ever suggested that foreign laws or contractual provisions could take otherwise eligible revenue streams outside of the EITI's definition of payments.

balanced the risk of competitive harm from breaking contractual confidentiality provisions against the risks to Congress's transparency goals and decided that mitigating factors advanced by some commentators sufficiently addressed the competitive risks. *Id.* at 56,373. It also concluded that exemptions would be inconsistent with Cardin-Lugar and could facilitate evasion. *Id.* at 56,372-73, 56,402. Clearly, even if the no-exemptions policy did burden competition – which it does not – the decision to avoid a policy that would provide a roadmap for evasion of U.S. securities laws could fairly be characterized as "necessary or appropriate in furtherance of the purposes of the" Exchange Act. 15 U.S.C. § 78w(a)(2).[7]

Petitioners attempt to twist the record and the findings of the Commission to manufacture inconsistency in the Commission's decisions. Their contention, for example, that the Commission agreed that a no-exemptions policy would cost billions to industry, Mot. at 5, is false. Rather, the Commission evaluated the potential costs that might be incurred *if* issuers were required to liquidate assets under pressure of foreign law. *Id*. at 56,411. At no point did the Commission agree that *any* country or contract prohibits the required disclosures; nor did it predict that companies would be forced to catastrophically abandon projects if they *were* faced with foreign disclosure prohibitions. The Commission considered the concerns voiced by some commentators about the competitive costs of the rules without such exemptions but also noted evidence offered by other commentators that such concerns were overstated and that no foreign laws prohibit such disclosures. *Id.* at 56,372 & n.84. The Commission also extensively discussed

[7] Petitioners' suggestion that the Commission could have exempted only the four countries in which they identified disclosure prohibition laws makes little sense in light of the record. First, no commentator suggested this as an acceptable compromise, and second, in light of contrary evidence, the Commission never accepted Petitioners' contentions that such disclosure laws even *exist* in the relevant countries.

alternatives, as well as factors it believed would mitigate any competitive costs that might be incurred. *E.g.*, *id.* at 56,403.

In sum, the Commission acted well within its discretionary authority in deciding not to grant exemptions and it provided detailed, reasoned explanations for its decision that go well beyond what was required. Accordingly, Petitioners' first contention does not demonstrate a substantial likelihood of success on the merits.

ii. Petitioners will not succeed in their challenge to the public disclosure requirement

Petitioners' similarly fail to establish a substantial likelihood of success in their challenge to the Commission's decision to require public disclosure of issuers' reports. Petitioners allege that the Commission incorrectly read 15 U.S.C. § 78m(q)(3) to require public disclosure of issuers' reports, claiming instead that the Commission was merely required to make a "compilation" available and only "as practicable." Mot. at 9-10. But the language of the statute itself forecloses this contention. That language speaks directly to the question at issue and therefore satisfies "*Chevron* Step One," despite Petitioners' obfuscation. *See Chevron Corp. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

First, issuers are required to include their disclosures "in an annual report," 15 U.S.C. § 78m(q)(2)(A), and the Commission *always* considers required submissions in annual reports to be public disclosures.[8] Second, Petitioners conveniently overlook 15 U.S.C. § 78m(q)(3)(B), which establishes that "[n]othing in [Section 13(q)(3)] shall require the Commission to make available online information *other than the information required to be submitted under the rules*

[8] *See* Division of Corporation Finance Staff Legal Bulletins Nos. 1 (February 28, 1997) and 1A (July 11, 2001, as amended), *available at* http://www.sec. gov/interps/legal/slbcf1r.htm ("Except in unusual circumstances, disclosure required by Regulation S-K or any other applicable disclosure requirement is not an appropriate subject for confidential treatment, regardless of the availability of an exemption under FOIA.")

issued [pursuant to 15 U.S.C. § 78m(q)(2)(A)] . . . ." (emphasis added). Petitioners choose to simply ignore this conclusive language, which makes plain Congress's requirement that the Commission make disclosures publicly available.

Given this clear language, the Commission did not need to *infer* the intent of Congress regarding disclosure. Regardless, the Commission also had primary evidence of that intent; Senators Cardin and Lugar, along with other congressional supporters, wrote to the Commission to explain that the public compilation envisaged in 15 U.S.C. §78m(q)(3)(A) would be *in addition to*, not instead of, the original company data. 77 Fed. Reg. 56,390 & n.386.

Petitioners' argument that companies' reports to EITI are not made directly public is inapposite. While EITI and Cardin-Lugar are meant to complement each other, they work in completely different ways and serve somewhat different functions: EITI receives both company reports and government reports and publishes a reconciliation, *see* EITI, *EITI Rules* at 27 (2011), *available at* http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf, while Cardin-Lugar provides merely for issuers to report their payments and therefore has no corresponding reconciliation function. Since the statute's language and intent were clear, the Commission's interpretation was justified and correct, and Petitioners' challenge does not have a substantial likelihood of success.

iii. *Petitioners' challenge to the SEC's approach to the definition of "project" is also not likely to succeed*

Nor are Petitioners substantially likely to prevail on their claim that the Commission erred by not requiring a rigid definition of "project" and by declining to define the term as a geological basin or province. Mot. at 12. The Commission recited and considered all relevant comments bearing on the definition of the term "project." 77 Fed. Reg. 56,383-85. Consistent with EITI, the Commission ultimately chose to leave the term "project" without a rigid definition because it believed that flexibility would allow businesses to report depending on their varying sizes, industries, and contexts. *Id.* at 56,385. The Commission did, however, offer guidance on what it believed to be the most common usage of the term and explained why certain alternative definitions would *not* be consistent with the term "project." This accommodating approach is far from the "inconsistent reasoning" with which Petitioners charge the Commission, Mot. at 12, and provides ample but flexible guidance to issuers that should enable them to define projects appropriately.

In considering Petitioners' suggestion that "project" should be defined at the geological basin or provincial level, the Commission noted that a geological basin may span more than one country, "which would be counter to the country-by-country reporting required by Section 13(q)." *Id.* Furthermore, such a definition did not necessarily "reflect how resource extraction issuers enter into contractual arrangements for the extraction of resources, which define the relationship and payment flows between the resource extraction issuer and the government." *Id.* The Commission thus made a reasoned decision based on its understanding of the statute and the realities of natural resource extraction. This choice is not "legally vulnerable" simply because Petitioners disagree.

iv. *Petitioners' cost-benefit analysis challenge is also unlikely to succeed*

Petitioners' contention that the Commission's evaluation of the costs and benefits of the rule was insufficiently rigorous similarly lacks legal merit. In fact, the Commission chose between alternatives only after careful analysis, during which it drew upon every bit of information provided by all commentators, and meticulously identified which costs and benefits it was able to quantify.

In general, the Commission noted that both costs and benefits could be significant but were difficult to quantify due to an absence of "reliable, empirical evidence." 77 Fed. Reg. 56,398, 56,403. As a result, its analysis focused on the overall costs of the Final Rules, while explaining how its choices might offset costs or increase benefits. *E.g.*, *id.* at 56,403. The Commission did provide careful estimates of the overall compliance burden by extrapolating from the few estimates provided by corporate commentators. *Id.* at 56,408-11. It also estimated the potential costs to companies if they were forced to sell their assets in a country due to their inability to obtain exemptions from hypothetical disclosure prohibitions. *Id.* at 56,411-13.

The Commission's analysis was carefully calibrated to avoid pitfalls that the D.C. Circuit has identified in recent years. For example, in *Business Roundtable v. SEC,* the court found that the Commission ignored contrary evidence and predicted cost reductions based on mere speculation. 647 F.3d 1144, 1150 (D.C. Cir. 2011). Here, by contrast, the Commission considered all available evidence and suggested the possibility of reductions in cost burdens based on evidence in the record. *See*, *e.g.*, 77 Fed. Reg. 56,403, 56,413.

In *Chamber of Commerce of the United States v. SEC*, the Court found that the Commission acted arbitrarily by ignoring alternatives that were not "frivolous or out of bounds." 412 F.3d 133, 145 (D.C. Cir. 2005). Here, the Commission exhaustively addressed the alternatives and arguments set forth in every substantive comment and made choices based on Congress's intent and its mandate to minimize competitiveness and compliance burdens where possible without frustrating the statute. *See*, *e.g.*, 77 Fed. Reg. 56, 383.

In *Business Roundtable*, 647 F.3d at 1150, and *Chamber of Commerce*, 412 F.3d at 143, the Commission was criticized for failing to "make tough choices" about competing estimates. In *Business Roundtable*, the court insisted that the Commission quantify costs to the best of its ability, or explain why it was impossible to do so. 647 F.3d at 1149. The Commission followed precisely this guidance in the Disclosure Rule, recognizing that it could not quantify some costs and benefits due to the lack of reliable information, *cf. Business Roundtable*, 647 F.3d. at 1149, and used qualitative descriptions instead. *E.g.*, 77 Fed. Reg. 56,398, 56,403. In *Chamber of Commerce*, the court suggested estimating a range of costs, even if the estimates would be imprecise. 412 F.3d at 143-144; *see also Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1221 (D.C. Cir. 2004). This is precisely what the Commission did here, using the cost estimates provided by commenters as upper and lower bounds to estimate the total reporting burden for large companies, small companies, and the entire sector. 77 Fed. Reg. 56,408-11.

Petitioners fault the Commission for calculating the potential costs of foreign law-induced divestments only with respect to certain individual issuers and using those costs to derive industry-wide estimates for the effect on efficiency and competition. Mot. at 14.[9] Yet the Commission was merely following the dictates of *Chamber of Commerce*, which directed that when the Commission could not estimate costs to the mutual fund industry as a whole, it should consider costs to individual funds, which would shed light on the efficiency and competitiveness effects for the industry as a whole. 412 F.3d at 144. With respect to the Disclosure Rule, the Commission used what little quantitative data it was given by issuers to calculate the costs to those individual issuers. The Commission was following the Court's clear instructions in using this information to inform its estimate of industry-wide costs that were otherwise incapable of estimation.

[9] As noted *supra* Part 2.b.i, the Commission calculated these costs in order to evaluate Petitioners' claims prospective competitive harm but never concluded that such prohibitions exist, or that withdrawal was likely even if they did.

Petitioners' further claim that the Commission "made passing, indeterminate observations" about the Final Rule's benefits, Mot. at 14-15, is flatly wrong and ignores the Commission's extensive discussion of the benefits the Rule would create. The Commission describe the nature of the benefits associated with the Rule at length. And, consistent with *Business Roundtable*, 647 F.3d at 1149, the Commission specifically addressed why the benefits of the Rule "cannot be readily quantified with any precision[.]" 77 Fed. Reg. 56,397, 56,398 & n.141 (disclosures could promote U.S. transparency efforts, improve investor modeling and decision making, and empower civil society); *id.* at 56,399 (disclosures may promote capital formation).

In short, the Disclosure Rule embodies a careful approach to rulemaking that uses all available evidence, declines to engage in speculation, and minimizes competitive costs while hewing closely to the words and intent of Congress to promulgate regulations that are specifically mandated by law. Petitioners' challenge to the adequacy of the cost-benefit analysis is unlikely to succeed and cannot support a stay.

b. None of the Other Three Factors Favors a Stay

Because Petitioners concede that the Commission would not find them likely to win on the merits, they must show that the other three factors weigh strongly in of a stay. *Holiday Tours*, 559 F.2d at 843. They have failed to make the required showing for *any* of those factors.

i. Petitioners have not shown the likelihood or imminence of substantial irreparable harm.

In order to meet the test for irreparable harm, Petitioners must show that the harms they allege are "both certain and great" – that "the injury complained of [is] of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Wisconsin Gas Co. v. Federal Energy Regulatory Com.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Although Petitioners allege harms in terms that sound daunting, they have in fact failed to show the likelihood of *any* harm that is substantial or imminent. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) (irreparable harm must be "likely"; mere possibility of harm is inadequate).

Petitioners insist that they would suffer competitive harm, compliance costs, and potential losses if forced to violate host country disclosure prohibitions. Mot. at 16-17. However, these are merely economic harms. The Commission has repeatedly held that "the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay." *Sacks*, Securities Exchange Act Rel. No. 35-57028 at 4. In *Sacks*, no irreparable injury was found even where petitioner would have to shutter his business pending review of a contested rule, because he could reopen his business if the rule were eventually overturned. Likewise, the 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," *Wisconsin Gas*, 758 F.2d at 674. Petitioners do not allege that the Disclosure Rule threatens their existence.

Moreover, Petitioners have not shown that their alleged injuries are likely, substantial, or imminent. *See Mass. Coalition of Citizens with Disabilities v. Civil Def. Agency & Office of Emergency Preparedness*, 649 F.2d 71, 74 (1st Cir. 1981); *Wisconsin Gas*, 758 F.2d at 674. Compliance costs, for example, are unlikely to impose substantial harm on issuers. The Commission estimated compliance costs for the Disclosure Rule, concluding that initial compliance costs may range between 0.002% and 0.021% of total assets, and that ongoing compliance costs may fall between 0.003% and 0.02% of total assets, 77 Fed. Reg. 56,408, 65,410. Even the upper estimates would not constitute a substantial economic impact justifying a stay. *See, e.g., Coalition for Common Sense in Government Procurement v. U.S.,* 576 F.Supp.2d 162, 168, 169 n.3 (D.D.C. 2008) (lost profits totaling 0.01% of company's annual revenues not sufficiently grave to constitute irreparable harm, even if not recoverable through litigation); *Apotex, Inc. v. FDA*, 2006 WL 1030151, 17 (D.D.C. 2006) (one-year loss in sales of $9.9 million out of total annual revenues of $700 million not irreparable harm); *Bristol-Myers Squibb Co. v. Shalala*, 923 F.Supp. 212, 220-21 (D.D.C. 1996) (loss of less than 1% of total sales resulting from increased competition not irreparable harm).

Competitive harms are also unlikely to be substantial, as the likelihood of severe economic impact is demonstrably low. *See Holiday Tours*, 559 F.2d at 843 n.3 ("the mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact."); *In the Matter of Applications of Chicago Mercantile Exchange* et al., SEC Release No. 26709 (May 12, 1989). For example, in China and Angola – both countries that industry commenters claimed to prohibit disclosures – issuers covered by the Disclosure Rule won lucrative contracts after the enactment of the Dodd-Frank Act. *See* ERI Comment at 13-14 (Sept. 20, 2011), *available at* http://www.sec.gov/comments/s7-42-10/s74210-111.pdf (Statoil in Angola); Moran Zhang, "Royal Dutch Shell, CNPC Ink First Chinese Shale Gas Production-Sharing Deal," *International Business Times*, Mar. 21, 2012, *at* http://www.ibtimes.com/royal-dutch-shell-cnpc-ink-first-chinese-shale-gas-production-sharing-deal-427992 (Shell in China).

Since the Disclosure Rule was issued, covered issuers have announced major developments in countries notorious for opposing transparency. *See, e.g.*, "US and Chinese duo to close acreage deal," *Upstream Online*, Oct. 26, 2012 (Chevron and CNOOC close to deal for Chinese oil block); "Murphy Oil says optimistic on Equatorial Guinea PSC," *Reuters*, Oct. 30, 2012, *at* http://af.reuters.com/article/investingNews/idAFJOE89T01T20121030; Jeannie Kever, "Marathon Oil extends work in Ethiopia," *Chron*, Oct. 31, 2012, *at* http://www.chron.com/business/energy/article/Marathon-Oil-extends-work-in-Ethiopia-3917498.php.

The harms issuers may suffer for violating host country disclosure prohibitions are likewise unlikely and insubstantial. Industry commentators identified a mere four countries in which they claimed disclosure prohibitions were operative, but other commentators analyzed these legal regimes and concluded that none prohibits disclosures. *See* 77 Fed. Reg. 56,372 n.84. Thus, the likelihood of incurring costs due to foreign disclosure prohibitions is low. And even if disclosure does violate some countries' laws, the likelihood of serious harm is low. Some issuers have regularly disclosed payments in at least two countries claimed by industry commenters to prohibit disclosure, apparently without penalty. *See* PWYP Comment at 3, 4 (Dec. 20, 2011), *available at* http://www.sec.gov/comments/s7-42-10/s74210-118.pdf. Thus the possibility of foreign disclosure prohibitions is not harming issuers. *Accord Wisconsin Gas*, 758 F.2d at 675 (claim of irreparable harm rejected in part because petitioner could not show that industry participants had been harmed in asserted way in similar situations).

Finally, even if the asserted harms were substantial and likely, they are contingent, not imminent; nothing prevents Petitioners from renewing their motion if they actually *do* face conflicting legal requirements and will suffer substantial harm as a result. *See Ocean Spray Cranberries v. Pepsico, Inc.*, 160 F.3d 58, 62-63 (1st Cir. 1998); *Bristol-Myers Squibb*, 923 F.Supp 212, 221 (denying injunction in part because no showing that sales would be affected during pendency of litigation). Petitioners attempt to show imminence by insisting that filers must "immediately begin determining how to record, collect, and report the payment information required," Mot. at 16, but they do not specify whether they will begin to incur costs for those activities in the immediate future, and if so whether those immediate costs will be significant, or even how difficult "begin[ning]" to take these actions might be in the near term.

Petitioners further speculate that governments "may" begin to discriminate against filers now for future contracts, *id*. at 16-17, and raise the possibility that they will have to withdraw from operations prior to the effective date of the Disclosure Rule. *Id.* at 17-18.[10] However, such purely speculative injury is inadequate to support preliminary relief, and is certainly insufficient to demonstrate that such relief is necessary *immediately*. *Wisconsin Gas*, 758 F.2d at 674 ; *see also Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12,19 (1st Cir. 1996). Indeed, Petitioners avoid claiming that any of the scare scenarios they posit *will* in fact happen. Nor do they identify any specific situation in which they are likely to *ever* happen – let alone soon.

Rather than provide probative evidence that harms will occur, Petitioners fall back on assertions made in their own unsworn comment letters to the Commission.[11] However, even in doing so, Petitioners mischaracterize the Commission's views on those assertions, as set forth in the Rule Release. As noted *supra* Part 2.b.i, Petitioners falsely assert that the Commission agreed that issuers would be forced to liquidate assets due to foreign disclosure prohibitions. To the contrary, the Commission noted that commentators had raised questions as to the very existence of disclosure prohibitions in other countries. *Id*. at 56,370-71. The Commission also concluded that some factors might mitigate the risk of competitive harm, noting that the documents submitted by industry participants raised the possibility of obtaining authorizations

[10] Petitioners also raise their claimed First Amendment injury, Mot. at 19, but they appear to concede that it will only arise – if at all – after disclosures begin in 2014.

[11] Pursuant to Rule 401(a) of the Commission's Rules of Practice, Petitioners could have included affidavits or other sworn statements attesting to the actuality of these injuries, which are clearly disputed and were not accepted as fact by the Commision.

from foreign governments to make disclosures. *Id.* at 56,403. Thus, Petitioners have failed to substantiate imminent injury.[12]

ii. Petitioners Ignore Harms to Respondent, Other Parties, and the Public

Petitioners do not give serious consideration to the substantial harms a stay pending litigation would cause to other parties – including Respondent – and the public. Such harms – unlike those that Petitioners allege, are substantial, imminent, and irreparable.

1. Petitioners' allegations on harm to investors and the public are cursory and false

Petitioners' contention that a stay would protect investors from billions of dollars in losses without any "countervailing identifiable harm," Mot. at 20, is belied by comments from investors with over one trillion dollars in assets under management championing all the principles that the Commission eventually codified into the Final Rule, *see* SEC, *Comments on Proposed Rule: Disclosure of Payments by Resource Extraction Issuers, at* http://www.sec.gov/comments/s7-42-10/s74210.shtml, and the Commission's extensive discussion of the benefits transparency would bring to investors and resource-rich communities alike. 77 Fed. Reg. 56,397, 56,398-99. Petitioners' suggestion that the benefits of Cardin-Lugar are already available because "many US companies already comply with the EITI standards,"

[12] Notably, a stay would not afford Petitioners the benefits they claim to seek. Specifically, the primary immediate injury they allege is prospective competitive injury that would not be mitigated even if a stay were granted. If foreign governments were discriminating against issuers or forcing liquidations based on their future transparency practices – which they are not – a stay would not offer relief because it would not change the outcome of the litigation. Moreover, given recent indications that the European Union will adopt a disclosure rule that follows SEC's lead, a stay is unlikely to alleviate compliance burdens for issuers that are subject to European regulation. *See* Ed Crook & Tom Burgis, "Rift in push for oil industry transparency," *Financial Times*, Oct. 28, 2012.

Mot. at 20, is similarly unavailing. As Petitioners admit in their Motion, EITI company reports are *not* available to the public. Mot. at 11.

2. <u>Oxfam will suffer irreparable and imminent harm from a stay</u>

Respondent will suffer serious and irreparable harms if disclosures are delayed due to a stay pending a judicial challenge. Respondent is a shareholder of many covered issuers and is an international relief and development organization dedicated to finding lasting solutions to international poverty and related injustice. Declaration of Paul O'Brien ("O'Brien Decl."), ¶ 1, attached as Annex A. One of Respondent's core missions is to advance resource revenue accountability by engaging with companies, governments, international organizations, local communities, and civil society organizations to promote responsible and accountable stewardship of these revenues. *Id*. at ¶ 2.

Respondent has spent more than $1 million during 2011-12 on global initiatives related to extractive industry revenue transparency, including researching payment information in select countries; supporting civil society organizations and national campaigns to improve these transparency efforts; and publishing reports. *Id*. at ¶¶ 5-10. If Cardin-Lugar disclosures are delayed by a stay, Respondent will be forced to divert resources to research and advocacy intended to achieve such disclosures rather than using them for other activities to alleviate poverty and combat the resource curse.

Moreover, as an owner of securities issued by several resource extraction issuers subject to the Disclosure Rule, *id.* at ¶ 14, Respondent will use the Section 1504 disclosures to better assess investment risks in these companies. *Id*. As an active shareholder, Respondent will also use the information to inform its participation in the governance of these companies. *Id*. at ¶ 14-16. Respondent is currently hindered in its ability to participate in corporate governance as an informed shareholder because of the absence of Cardin-Lugar disclosures. Any delay in the disclosures mandated by the Disclosure Rule will perpetuate this hindrance. *Id.* Respondent's lost ability to influence corporate policy, as well as any investment decisions made in the absence of disclosures that Respondent otherwise would not have made, are non-compensable.

3. Investors would suffer imminent and irreparable harm from a stay

Given that a stay would prolong the absence of information on extractive issuers' payments to governments, investors would suffer irreparable harm. The injury from continued deprivation of this information is certain and great, as it prevents investors from assessing material investment risks. The magnitude of this deprivation is attested to by the fact that investors representing over $1 trillion in assets under management submitted public comments to support the Final Rule.

4. A stay would not be in the public interest

Congress enacted Cardin-Lugar primarily in order to provide investors, like Respondent, with crucial information on investment risks, *see, e.g.*, 156 Cong. Rec. S5870-02 (daily ed. July 15, 2010) (statement of Sen. Ben Cardin), and to disclose natural resource payments to communities in resource-rich countries. *See* 156 Cong. Rec. S5870-02 (daily ed. May 17, 2010) (statement of Sen. Richard Lugar). A stay would frustrate those goals without providing commensurate benefits. Moreover, the Commission "cannot ignore the judgment of Congress," *Pan Am Flight 73 Liaison Group v. Dave*, 711 F. Supp. 2d 13, 38 (D.D.C. 2010) (quoting *United States v. Oakland Cannabis Buyers' Coop*, 532 U.S. 483, 497-98 (2001)), as the views of "Congress, the elected representatives of the entire nation," are a "sense by which public interest should be gauged." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). By imposing clear deadlines by which the Final Disclosure Rule must be issued and become effective, 15 U.S.C. § 78m(q)(2)(A) & (F), Congress clearly indicated that the public interest does not favor a stay that could delay implementation of the rules.

3. Interested Parties Should Have at Least 30 Days to Respond to the Petition, and Petitioners Have Not Shown Any Emergency or Grounds For Expedited Consideration

Respondent objects to Petitioners' request for a resolution of their Motion by November 1, 2012. Petitioners cannot support their position that injuries will accrue to filers absent an immediate stay. Given the wide range of commentators from all over the world who helped to craft the Disclosure Rule, the Commission should establish a reasonable timeframe of no less than thirty (30) days for interest parties to respond.

a. The Commission Cannot Properly Consider and Balance the Interests and Potential Harms of a Stay to All Affected Parties in Just One Week

The Commission worked on the Disclosure Rule for over two years and received thousands of submissions, including over one hundred unique, substantive letters. The commentators were unusually diverse, including industry representatives, U.S. and foreign civil society organizations, Senators and Congressional Representatives, foreign governments, investors, concerned citizens, entrepreneurs, academics, and trade unions. Not only is it unrealistic for the Commission to consider and balance the interests involved in such a short period of time, it would be unfair to many constituents – especially to investors and communities in resource-rich countries, who were the intended primary beneficiaries of Cardin-Lugar – if the Commission were to make a decision affecting their interests without allowing them to be heard. The Commission should provide at least thirty days for responses, to ensure that the stay process is as transparent and inclusive as was the process for drafting the Disclosure Rule.

b. Petitioners Allege Only Contingent, Speculative Harm in the Near Term That Does Not Support Expedited Relief

As explained *supra* Part 2.c.i, Petitioners fail to show that their alleged injuries are imminent, and even less support for the notion that the relief they seek should be granted on an expedited basis, before interested parties have the opportunity to participate and provide probative evidence. Petitioners have not shown that their injuries are unavoidable unless the Commission declines to establish an orderly process to consider their petition. Thus the Commission should deny Petitioners' request for a response by November 1, and allow at least thirty days for persons and groups that would be affected by a stay to be heard.

CONCLUSION

For the foregoing reasons, the Commission should deny Petitioners' stay request and, at a minimum, allow thirty days for all interested persons to be heard.

Dated: November 1, 2012

Respectfully submitted,

/s/ Jonathan G. Kaufman

Howard M. Crystal Meyer Glitzenstein & Crystal 1601 Conn. Ave., N.W. Suite 700 Washington, DC 20009-1056 Direct: 202-588-5206 hcrystal@meyerglitz.com Fax: 202-588-5049 *Counsel for Respondent Oxfam America*	Richard J. Rosensweig rrosensweig@goulstonstorrs.com Derek B. Domian ddomian@goulstonstorrs.com GOULSTON & STORRS, P.C. 400 Atlantic Avenue Boston, MA 02110-3333 T: (617) 482-1776 F: (617) 574-4112 *Counsel for Respondent Oxfam America*	*Counsel of Record* jonathan@earthrights.org Richard Herz rick@earthrights.org Marco Simons marco@earthrights.org EARTHRIGHTS INTERNATIONAL 1612 K St. NW Suite 401 Washington, DC 20009 Phone: 202-466-5188 x103 Fax: 202-466-5189 *Counsel for Respondent Oxfam 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 Response to Motion for Stay of Rule 13q-1 and Related Amendments to New Form SD complies with the Commission's length limitations for briefs in opposition to motions, and contains 6,993 words.

/s/ Jonathan G. Kaufman
Counsel of Record
jonathan@earthrights.org
EARTHRIGHTS INTERNATIONAL
1612 K St. NW Suite 401
Washington, DC 20009
Phone: 202-466-5188 x103
Fax: 202-466-5189
Counsel for Respondent Oxfam America