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June 17, 2013

VIA CM/ECF

The Honorable John D. Bates
United States District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *American Petroleum Institute et al. v. Securities and Exchange Commission*, No. 12-1688 (D.D.C.)

Dear Judge Bates:

Plaintiffs write in response to the SEC's June 10, 2013 letter regarding Section 13(f) of the Exchange Act, 15 U.S.C. § 78m(f). The Commission (at 1) describes Section 13(f) as "consistent with the presumption of public disclosure" under the Act, but the Commission badly misses the point.

Section 13(f) in fact illustrates that not all "reports" submitted to the Commission are public (and indeed, the Commission's reference to a "presumption" of disclosure concedes as much). Section 13(f) requires institutional investment managers to "file reports with the Commission," providing certain specified information. *Id.* § 78m(f)(1). Under the statute's terms, the report itself is not required to be public, but "the information *contained therein*" shall be made public, subject to certain exceptions. *Id.* § 78m(f)(4) (emphasis added). Particularly, Congress provided the Commission with discretion to "delay or prevent public disclosure of any . . . information" contained in those reports in accordance with FOIA exemptions, "as it determines to be necessary or appropriate in the public interest or for the protection of investors." *Id.* Congress also expressly *prohibited* the disclosure of information identifying securities held by a natural person, estate, or trust, and provided the Commission with authority to "exempt, conditionally or unconditionally, any institutional investment manager or security" from the disclosure requirements. *Id.* § 78m(f)(3), (4).

Perhaps aware that Section 13(f) undermines its argument that SEC "reports" by definition are made public, the Commission argues (at 2) that Section 13(f) reports are different from extractive industry reports under Section 13(q) because the Commission makes internal use of 13(f) data, but not of 13(q) data. That again misses the point, which is that, as Section 13(f) illustrates, an SEC report is not a document that invariably and *by definition* is public. Whether a report (or the "information contained therein") is public may

vary based on statutory language, the report's purpose, and other factors—such as the risk of competitive harm. Therefore, the practice associated with 10-K's, 10-Q's, and other public SEC reports is not determinative of how to treat a new type of report that serves a very different function, such as an "extractive industries" report under Section 13(q).

Rather, Section 13(q) presupposes that the Commission will not disclose information that could be harmful to U.S. companies or investors. Under that provision, public companies first submit an "annual report" to the Commission. 15 U.S.C. § 78m(q)(2). Then, in a separate paragraph titled "Public Availability of Information," the Commission is required to make available to the public a "compilation of the information required to be submitted," but only "[t]o the extent practicable." *Id.* § 78m(q)(3). This provision, like Section 13(f), plainly provides the Commission with the ability and (in conjunction with its duties to consider costs and benefits *and* not to impose unnecessary competitive burdens, *see* Section 23(a)(2), 15 U.S.C. § 78w(a)(2)) the *responsibility* to avert the harm to companies and investors that might come from full disclosure of a "report." This authority is consistent with the Commission's own regulations, which recognize that "reports" may be exempted from disclosure where, for example, they contain commercially sensitive information. *See, e.g.*, 17 C.F.R. § 240.24b-2(a).

In short, Sections 13(f) and 13(q) illustrate different ways in which Congress has given the Commission the ability and responsibility to tailor public disclosures in order to serve the interests of public companies and investors while furthering the purposes of the Act. It was clear error for the Commission to conclude that Congress's use of the word "report" compelled public disclosure of the report itself as a matter of law.

Respectfully submitted,

/s/ Eugene Scalia
Eugene Scalia

cc: William K. Shirey (via CM/ECF)
Jonathan Kaufman (via CM/ECF)

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2013, I caused the foregoing Response to the Securities and Exchange Commission's Notice Regarding Section 13(f) of the Securities Exchange Act to be electronically filed with the Clerk of Court for the United States District Court for the District of Columbia using the CM/ECF system.

Service was accomplished on the following by the CM/ECF system:

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Dated: June 17, 2013

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