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September 19, 2012

Elizabeth Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Dear Ms. Murphy:

Oxfam America, Inc. ("Oxfam America") is gravely concerned that opponents of the SEC's recently issued Rule on Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365 (Sept. 12, 2012) ("Disclosure Rule") will challenge the Rule in court and file a motion to the Commission to stay the effect of the Disclosure Rule, pending judicial review. As Oxfam America has substantial interests that will be severely prejudiced in the event of a stay, Oxfam America requests that this letter be included in the file relating to any such stay petition, and seeks to be notified of the filing of any such stay motion, and to be heard before the Commission resolves any stay request in any manner other than a summary rejection.

While justice requires that Oxfam be given the opportunity to respond to any stay petition, it is clear that the Commission cannot legally issue a stay of the Disclosure Rule because a stay would violate the timeframe mandated by Congress for the Disclosure Rule to take effect. Moreover, "the imposition of a stay pending judicial review . . . is an extraordinary remedy." *In the Matter of the Application of Richard L. Sacks*, Securities Exchange Act Rel. No. 35-57028 at 3 (Dec. 21, 2007). Issuance of such a stay would not meet the four-part test used by the Commission to evaluate whether "justice so requires . . . [.]" Exchange Act § 25(c)(2).

BACKGROUND

To ameliorate the financial crisis, and to prevent a recurrence of the practices that caused it, Congress passed, and on July 21, 2010 President Obama signed, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), amending *inter alia,* the Exchange Act to improve corporate accountability and foster consumer protection. Section 1504 of the Act directs the Commission to promulgate regulations requiring companies engaged in the commercial development of oil, natural gas or minerals to disclose payments they make to governmental entities for the purpose of commercial development of oil, natural gas, or minerals.[1]

[1] In this letter, the Exchange Act of 1934, 15 U.S.C.§ 78 *et seq.*, is referred to as "Exchange Act." The provisions of Section 1504 of the Dodd-Frank Act, which amended Section 13(q) of the Exchange Act, 15 U.S.C. § 78m(q), are designated as "Section 13(q)". The Commission's rule release in the Federal Register, Rel. No. 67717, *Disclosure of Payments by Resource Extraction Issuers*, 77 FR 56365 (Sept. 12, 2012), is referred to as the "Disclosure Rule."

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Section 13(q) mandates that the SEC issue final implementing regulations within 270 days, *id.* § (2)(A) – *i.e.*, no later than April 17, 2011 – and requires that as to each company the regulations "shall take effect on the date on which" the company "is required to submit an annual report relating to the fiscal year of the [company] that ends not earlier than one year after the date" the final regulations are issued. *Id.* § (2)(F). Because the Commission did not adopt the final regulations on or before the statutory deadline, Oxfam America filed a lawsuit in May 2012 seeking an order directing the Commission to comply.

Oxfam America has substantial interests in the Disclosure Rule in light of its position as an investor in several resource extraction issuers that are subject to the Disclosure Rule; its core mission to advance resource revenue accountability around the world; and its efforts in countries across Africa, Asia, and Latin America to ensure that government revenues from the extraction of natural resources are managed accountably, transparently, and in the public interest.

On August 22, 2012 the Commission approved a final Disclosure Rule, and the Rule was published in the Federal Register September 12, 2012. 77 Fed. Reg. 56,365. The Disclosure Rule requires issuers to file their first report as early as March 2014.[2] *Id.* at 56,418.

OXFAM AMERICA'S INTERESTS

Oxfam America has not located any guidance concerning the circumstances under which the Commission considers responses to a motion to stay filed pursuant to 15 U.S.C. § 78y(c)(2) and 5 U.S.C. § 705. Nonetheless, there are a number of Commission Stay Orders in which such responses were considered. *E.g., In the Matter of the Application of Marshall Spiegel*, Securities Exchange Act of 1934 Rel. No. 34-52611 (Oct. 14, 2005); *In re William J. Higgins*, Rel. No. 26148 (Oct. 3, 1988); *In the Matter of Applications of Chicago Mercantile Exchange et al.*, Rel. No. 26709 (May 12, 1989).[3] Oxfam America has substantial interests at risk should a stay be granted, and no one else would adequately represent those interests in a stay proceeding. *E.g. Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972). Moreover, given the importance of the Rule, it would be inappropriate for the SEC to grant a stay request without notifying the public and providing Oxfam America an opportunity to respond.

In the event the Commission determines it necessary to initially resolve whether Oxfam America may be heard, Oxfam America contends that it more than satisfies any prerequisites that may exist for its participation. Indeed, Oxfam America plainly meets the criteria under Federal Rule of Civil Procedure 24 that govern Oxfam America's intervention in any challenge to the Disclosure Rule – *i.e.* Oxfam America has unique, concrete and substantial interests in timely implementation of the Rule. *Trbovich*, 404 U.S. 528. Accordingly, Oxfam America should have an opportunity to be heard here.

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[2] The Disclosure Rule requires issuers to begin providing the disclosures in an annual report filed 150 days after the end of the fiscal year that ends following September 30, 2013. 77 Fed. Reg. 56, 391, 56,396. For issuers whose fiscal years end in October, the first disclosures would be made in March 2014.

[3] Persons may seek to participate as parties in Commission proceedings upon filing a motion setting forth their interests in the proceedings. 17 C.F.R. 201.210(b)(1).

A. Oxfam America Has Substantial Interests that Would Be Impaired by a Stay.

Oxfam America was founded in 1970, and is dedicated to international development and relief efforts. One of Oxfam America's core missions is to advance resource revenue accountability around the world, engaging with resource extraction issuers, governments and international organizations, as well as with local communities and civil society organizations to promote responsible and accountable stewardship of revenues from extractive resources. This mission reflects Oxfam America's core values and is integral to its activities and work around the world. Oxfam America advocated for the enactment of Section 13(q) and has also submitted detailed comments in the Commission's rulemaking process on Section 13(q). *See* SEC, Comments on Proposed Rule: Disclosure of Payments by Resource Extraction Issuers, *at* http://www.sec.gov/comments/s7-42-10/s74210.shtml.

As part of its mission, Oxfam invests in resource extraction issuers whose shares are registered under the Securities Act and publicly traded on national exchanges. These resource extraction issuers include: Kosmos Energy Ltd., AngloGold Ashanti Ltd., Barrick Gold Corp., CNOOC Ltd., Chevron Corp., and Newmont Mining Corp. Information required by the Disclosure Rule is critical to Oxfam America's participation as an informed and active investor in the governance of companies subject to Section 13(q).

Oxfam America engages in a variety of activities designed to advance resource revenue accountability in thirteen countries across Africa, Asia, and Latin America, including countries where extractive resource revenues are often corruptly diverted from poverty reduction and economic development. In many such countries, little or no information is available regarding the payments that oil, gas, and mining companies make in connection with the commercial development of natural resources. Accordingly, Oxfam America will rely heavily upon the disclosures mandated by the Disclosure Rule to advance its work in this area.

Oxfam America also devotes substantial resources to promote accountable stewardship of extractive resource revenues in developing countries. This includes addressing the consequences of the resource curse that results in part from the secrecy associated with these transactions.

Each of these substantial interests will be significantly impaired should a stay be issued, because it will lead to significant delays in the Rule's implementation. In commenting on the Disclosure Rule, the American Petroleum Institute ("API") claimed that if the Rule had been finalized in April 2011, it would take companies at least until 2014 to be able to collect the requisite information and report it in 2015. *See* API Comment at 43 (Jan. 28, 2011), *available at* http://www.sec.gov/comments/s7-42-10/s74210-10.pdf. Similarly, in delaying the earliest reporting until 2014, the Commission found that covered issuers "will need time to undertake significant changes to their reporting systems and processes to gather and report the payment information." 77 Fed. Reg. at 56,396. As explained *infra* at p. 4, any stay pending judicial review would likely last over a year. Accordingly, a stay of the rule *will translate into significant delays in the date on which covered issuers actually begin disclosing the information.*

These delays will impair Oxfam America's ability to participate as an informed and responsible investor in covered companies and to advance its resource revenue accountability mission, as it will significantly delay the date that these disclosures will begin. In the meantime, in

many countries where extractive resource revenues are being improperly diverted, Oxfam America and local civil society and advocacy organizations will have little or no information regarding the payments that oil, gas, and mining companies make in connection with the commercial development of natural resources. Oxfam America will instead be forced to continue to devote substantial resources to counteract the resource curse through other means.

The delay will also impair Oxfam America's interests as an investor in covered issuers. Plainly, access to the disclosures mandated by the Disclosure Rule will allow Oxfam America to better assess investment risks associated with extractive industry payments to governments, and participate as an active shareholder. But in the event of a stay, that information will not become available, at least not until after an even longer, wholly unwarranted delay.

Accordingly, Oxfam America's interests warrant participation in this stay proceeding.

B. Oxfam America's Interests Will Not Be Adequately Represented Unless it Participates in Any Stay Proceeding.

Unless the Commission hears from Oxfam America, its substantial interest in whether a stay of the Disclosure Rule is issued will not be adequately represented. Indeed, it is for presumably this reason that, as noted, the Commission has in the past considered the views of other interested parties in resolving requests for a stay. *See supra.* Accordingly, Oxfam America should be heard in this proceeding because the arguments they will present – including, *inter alia*, that maintaining the Disclosure Rule's current effective dates pending judicial review *will not* in fact cause issuers substantial hardship or financial injury, but that further delaying the date on which disclosures will finally be required *will* substantially impair the very interests Congress sought to advance in passing Section 1504 of the Dodd-Frank Act – will not otherwise be heard.

A STAY WOULD BE CONTRARY TO LAW AND UNWARRANTED

A. A Stay Would Violate the Deadline for the Effective Date Set by Congress.

The Commission cannot legally issue a stay of the Disclosure Rule pending judicial review because the law requires disclosures to be filed in an annual report for the fiscal year following one year after the issuance of the rules. *See* Section 13(q)(2)(F). This deadline divests the Commission of its discretion under Section 25(c)(2) of the Exchange Act to consider whether to order the "extraordinary remedy" of a stay pending judicial review.

Judicial review will be lengthy because direct appellate review is not available. The Exchange Act § 25(b)(1) provides for direct appellate review only for rules enacted pursuant to Sections 6, 9(h)(2), 11, 11A, 15(c)(5) or (6), 15A, 17, 17A, or 19, but the Disclosure Rule was enacted under the authority of Sections 3(b), 12, 13, 15, 23(a), and 36. 77 Fed. Reg. 56,417. The only overlap between these sections – Section 15(c)(5) – is irrelevant to Section 13(q) disclosures and cannot be the part of Section 15 referred to in the Rule Release. Direct appellate review is only available where explicitly authorized by statute or under certain circumstances where the jurisdiction-conferring statute is ambiguous – which is not the case here. *See Int'l Swaps & Derivatives Ass'n v. CFTC*, 2012 U.S. App. LEXIS 1282 (D.C. Cir. Jan. 20, 2012). Petitioners' challenge must be brought instead in the district court, and will also be subject to appeal. Thus

judicial review is likely to last at least until the first disclosures are required.[4] A stay would therefore violate the deadline mandated by Congress for when the Disclosure Rule must go into effect.

The Disclosure Rule is different than the proxy access rules for which the Commission granted a stay pending judicial review in 2010. *In the 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). Those rules were discretionary and subject to direct appellate review; thus the Commission could expect that the challenge would be resolved "as quickly as possible." *Id.* at 2.[5] But in the instant case, judicial review would be protracted. Thus, a stay is not permissible because it will almost certainly impinge on Congress's deadline.

B. A Stay Would Be Inconsistent with the Commission's Standard Governing Petitions for Stays.

Given the broad presumption that agency action is legitimate, "the imposition of a stay pending judicial review . . . is an extraordinary remedy." Rel. No. 35-57028 at 3 (citing *Busboom Grain Co., Inc. et al. v. ICC et al.*, 830 F.2d 74, 75 (7th Cir. 1987)). While that remedy is generally discretionary, Congress removed the Commission's discretion to consider a delay of the Disclosure Rule by imposing deadlines by which it must be issued and become effective. *See* Section 13(q)(2)(A) and (F). In *Forest Guardians*, the 10th Circuit vacated a stay order requested by the Fish and Wildlife Service ("FWS") because Congress had imposed a firm deadline for the agency to act. *See Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999). Although that case involved the *court's* authority to stay litigation against the FWS, the principle applies with equal force here: both the judicial and administrative stay powers are discretionary and can be curbed by "clear expression" from Congress. *See id.* at 1187. Like the Congressional deadline that divested the Court of its authority to stay FWS's obligation to act, Section 13(q)'s unequivocal statutory deadlines divest the Commission of its discretionary authority here.

To determine whether "justice . . . requires" a stay pending review, Exchange Act § 25(c)(2), the Commission must consider (1) whether the petitioner has shown a strong likelihood that he will prevail on the merits on appeal; (2) whether the petitioner has shown that, without a stay, he will suffer irreparable injury; (3) whether there would be substantial harm to other parties if a stay were granted; and (4) whether the issuance of a stay would likely serve the public interest. *See, e.g.*, *Sacks*, Rel. No. 35-57028 at 3; *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). Because none of these factors favors a stay in this case, the Commission should not grant a stay even it had the discretion to consider such a request.

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[4] For the twelve months terminating on September 30, 2011, the median time for disposing of cases in D.D.C. was 7.2 months. U.S. Courts, *Federal Case Management Statistics – District Courts* (Sept. 2011), *at* http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx. The median time for the D.C. Circuit was 10.3 months. U.S. Courts, *Federal Case Management Statistics – Courts of Appeals* (Sept. 2011), *at* http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx. Thus the total time for a challenge in the D.C. federal courts – assuming petitioners do not petition for Supreme Court review – is almost 1.5 years. As issuers must begin filing Section 13(q) disclosures beginning 150 days after September 30, 2013 (depending on their fiscal cycles), the first disclosures will be due roughly at the same time that the courts resolve the judicial challenge.

[5] Even in that case, the D.C. Circuit took ten months to resolve the appeal. By their own assertions, even a ten-month delay in the rules would pose a problem for issuers to comply with the congressional deadline. *See, e.g.*, Exxon Mobil Comment at 46 (Jan. 31, 2011), *available at* http://www.sec.gov/comments/s7-42-10/s74210-11.pdf.

1. Opponents of the Rules Are Unlikely to Win a Legal Challenge to the Final Rule

A plaintiff is not likely to win a legal challenge, which would have to show that the rule is arbitrary and capricious -- that the Commission had failed to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission also has a duty to minimize where possible "the impact any such rule would have on competition." Exchange Act § 23(a)(2).

The Disclosure Rule is the product of over two years of notice and comment, during which the Commission received over 150 "unique" comment letters and over 149,000 form letters. 77 Fed. Reg. 56,367. The Commission painstakingly considered all the arguments in the comment letters, determined as best it could the economic implications of each option – noting explicitly where it had to rely on qualitative considerations in the absence of reliable quantitative data – and sought actively to minimize any competitive burden that it did not deem necessary in furtherance of the purpose of the Exchange Act, including Section 13(q) itself.

a. The Commission Exhaustively Considered Key Rule Sections

The Commission undertook the necessary analysis in considering each section of the Disclosure Rule, including (but not limited to):

Definition of "Resource Extraction Issuer" and Exemptions

In promulgating rules defining "issuers" and relating to exemptions, the Commission first reviewed exhaustively the commenters' arguments. 77 Fed. Reg. 56,369-71. It rejected two alternatives as premature and unwarranted based on available data suggesting that the disclosure regimes or threats that purportedly justified exemptions did not exist. *Id.* at 56,372, 56,373. It further rejected some alternatives based on the potential for competitive harm. *Id.* at 56,371-72. Finally, it rejected other alternatives, acknowledging the possibility of such harm, but concluding that such effects were unavoidable given the intent of Congress. *Id.* at 56,372-73 (denying exemptions for foreign disclosure prohibitions and contractual confidentiality clauses).[6]

Despite not receiving any quantifiable information on the costs issuers would incur if the Disclosure Rule were to force them to violate host country disclosure prohibitions, *id.* at 56,411, the Commission calculated the losses companies might incur if they had to sell their assets in relevant countries under various circumstances. *Id.* at 56,411-13. Its decision to deny exemptions despite these potential costs was based on its determination that to grant exemptions would frustrate Congress's mandate to support international transparency efforts. *Id.* at 56,413.

[6] Significantly, in making both of these choices, the Commission also concluded that there was at least some reason to believe that the competitiveness risks were either non-existent or exaggerated by the commenters asserting them. Disclosure Rule, 77 Fed. Reg. 56,372, 56,373, 56,413.

"Not De Minimis" Definition

In promulgating rules related to the definition of "not de minimis" payments, the Commission likewise considered all relevant comments. 77 Fed. Reg. 56,381-82. It rejected a $1 million threshold largely based on evidence suggesting that such a high threshold would omit important payment streams. *Id.* at 56,383. It rejected thresholds in the "low thousands" – which Oxfam America advocated and continues to support – and relative thresholds because it believed the compliance and competitiveness burdens would be too high. *Id.* It rejected defining "de miminis" as "material" after acknowledging the possibility of competitive harm and an increased compliance burden but concluding that the statutory text and Congressional purpose precluded it. *Id.* at 57,382-83. Its choice to define "de minimis" at $100,000 represents a balance between compliance, competitive risks, the need for clarity, and Congress's intent. *Id.* at 56,405-06.

Definition of "Project"

The Commission recited and considered all relevant comments bearing on the proper definition of the term "project." 77 Fed. Reg. 56,383-85. The Commission then chose not to give the term "project" a rigid definition because it believed that flexibility would allow businesses to report appropriately depending on their varying sizes, industries, and contexts. *Id.* at 56,385. The Commission did, however, offer guidance by explaining why certain approaches would *not* be consistent with the term "project." It rejected at least defining "project" as geological basin as contrary to the evidence provided. *Id.* at 54,606. It rejected defining "project" as material project, reporting unit, or country, after acknowledging that these definitions might result in lower compliance burdens or effects on competition but concluding that such definitions were inconsistent with a plain reading of the statutory text and the Commission's understanding of congressional intent. *Id.* at 56,385-86, 56,406.

Overall calculation of costs and benefits

The Commission's overall evaluation of the costs and benefits of the rule was similarly rigorous. In general, the Commission was unable to attach numbers to the benefits of the rule, or to the economic costs of some of its specific regulatory choices, noting that both could be quite significant but that they were difficult to quantify and that there was an absence of "reliable, empirical evidence." 77 Fed. Reg. 56,398, 56,403. Therefore, its analysis generally focused on the overall costs of the Final Rules, while explaining how its choices might offset those costs or increase the benefits. *E.g.*, *id.* at 56,403. The Commission did, however, provide careful estimates of the overall compliance burden by extrapolating from the few detailed estimates provided by corporate commenters. *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.

b. The Commission's Final Rule Meets the Criteria Established Under D.C. Circuit Precedent

In a number of recent cases the D.C. Circuit has identified pitfalls to Commission rulemakings. *E.g. Business Roundtable v. SEC,* 647 F.3d 1144, 1150 (D.C. Cir. 2011). However, as a threshold matter, these cases do not apply to the Disclosure Rule because they all involved rules promulgated under discretionary authority. Here, by contrast, the Disclosure Rule was issued

pursuant to a clear Congressional mandate, and the rule adheres closely to the statute. Accordingly, these cases are inapposite here.

In any event, the Commission's careful analysis satisfies statutory requirements and avoids the errors criticized by the D.C. Circuit. In *Business Roundtable v. SEC*, for example, 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 solely on evidence in the record. *See, e.g.*, 77 Fed. Reg. at 56,413 (noting factors tending to reduce risks associated with denying exemptions for foreign disclosure prohibitions). The Commission never relied solely on an unsubstantiated benefit to justify a rule choice that might create compliance or competitiveness burdens; such decisions were based on a judgment that the choice was necessary in order to effectuate the intent of Congress. *E.g.*, *id.* at 56,405 (rejecting higher thresholds for "de minimis" as necessary to effectuate transparency goals of Congress).

In both *Business Roundtable*, 647 F.3d at 1150, and *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005), the Commission was criticized for failing to "make tough choices" about competing estimates. 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. In *Business Roundtable*, the court insisted that the Commission must 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 using qualitative measures instead for these matters. It then used 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.

In *Am. Equity Inv. Life Ins. Co. v. SEC*, the D.C. Circuit struck down a rule primarily because the Commission had not performed baseline studies on whether the existing regime was adequate. 613 F.3d 166, 178-179 (D.C. Cir. 2010). In the case of Section 13(q), by contrast, the Congress mandated rules requiring disclosures that previously were neither required nor available. It would have been illogical—and impermissible—for the Commission to second-guess Congress by considering whether the required disclosures were already available.

Finally, in *Chamber of Commerce*, the court found that the Commission had acted arbitrarily by ignoring alternatives that were not "frivolous or out of bounds." 412 F.3d at 145. By contrast, the Commission here 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 burdens where possible without frustrating the statute.

In short, the Disclosure Rule embodies a careful approach to rulemaking that uses all available evidence, declines to engage in ungrounded speculation, and minimizes competitive costs while hewing closely to the words and intent of Congress to promulgate regulations that are specifically mandated by law. Any lawsuit therefore has little chance of success.

2. Issuers Cannot Demonstrate Irreparable Harm Absent a Stay

A stay should not be granted because no issuer will suffer irreparable harm if the stay is not granted. In their comments, industry participants insisted that they would suffer competitive harm, compliance costs, and potential costs if forced to violate host country disclosure prohibitions. However, these are merely economic harms, and 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*, Rel. No. 34-57028 at 4.

Even if these costs were not considered purely financial detriments, they cannot be shown to be likely, substantial, or imminent. *See Wisconsin Gas Co. v. Federal Energy Regulatory Com.*, 758 F.2d 669, 674 (D.C. Cir. 1985). Compliance costs, for example, are unlikely to impose substantial harm on issuers. The Commission has 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 estimate would hardly constitute a substantial economic impact justifying a stay. *Cf. Sacks*, Rel. No. 34-57028 at 3 (rejecting claim of significant harm where petitioner would have to close his business pending court review, noting that petitioner could reopen if he won the challenge on appeal).

Competitive harms are also unlikely to be substantial. While non-covered companies will not have to make Section 13(q) disclosures, the likelihood of severe economic impact is demonstrably low. *See Chicago Mercantile Exchange*, Rel. No. 26709 ("the mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact."). For example, in Angola – a country that industry commenters claimed to prohibit disclosures – Statoil was awarded competitive contracts after the enactment of the Dodd-Frank Act, even though Statoil is covered by Section 13(q). *See* ERI Comment at 13-14 (Sept. 20, 2011), *available at* http://www.sec.gov/comments/s7-42-10/s74210-111.pdf.

The harms issuers may suffer from being forced to violate host country disclosure prohibitions are likewise unlikely and insubstantial. Industry commenters identified four countries in which they claimed disclosure prohibitions were operative, but other commenters analyzed these legal regimes and concluded that none of them actually prohibits disclosures. *See* 77 Fed. Reg. 56,372 n.84 (describing conclusions of commenters on foreign legal prohibitions). Thus the likelihood of incurring costs due to foreign disclosure prohibitions is low. Moreover, even if disclosure does violate some countries' laws, the likelihood of serious harm is low. Some industry participants have regularly disclosed payments made in at least two of the jurisdictions 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 (companies disclose payment information regularly in Angola and China). Thus even if disclosure does violate those countries' laws, issuers do not suffer serious consequences. *Accord Wisconsin Gas*, 758 F.2d at 675 (petitioner's claim of irreparable harm rejected in part because it 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, there would be no grounds for a stay because they are not imminent. Issuers have between 1.5 and 2.5 years – depending on their fiscal cycles – to begin disclosing the information required in Section 13(q), 77 Fed. Reg. 56,396, 56,368, and will incur no immediate costs that would justify a stay. Issuers cannot leverage any

lawsuit they file – which stands little chance of altering the disclosure regime and no chance of doing away entirely with the disclosures mandated by Congress – into an excuse for failing to put themselves in a position to comply with the Disclosure Rule a year from now.

3. A Stay Would Cause Substantial Harm to Other Parties and the Public Interest

A stay is far more likely to harm other parties and the public interest than it is to prevent irreparable harm to any issuer. A stay would disrupt parallel rules in the European Union, which is likely to use the U.S. disclosure rules as a benchmark. A committee of the European Parliament voted on September 18, 2012, for rules that clearly show the influence of the Commission's actions. *See* Barbara Lewis, "EU politicians vote for tough oil, gas anti-corruption law," *Reuters*, Sept. 18, 2012, *at* http://www.reuters.com/article/2012/09/18/us-eu-transparency-idUSBRE88H12220120918. If a stay delays the European process, it will frustrate Congress's goals of supporting "the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals," Section 13(q)(2)(E), and fostering a "global standard" for extractive industries payment disclosures. *See* 156 Cong. Rec. S3316 (daily ed. May 6, 2010) (statement of Sen. Cardin). The danger that a stay could blunt momentum in Europe is especially acute since, as explained *supra*, judicial review is likely to be lengthy. Such a delay would prejudice Oxfam America, which expects to rely on disclosures mandated both by the U.S. and European rules.

Due to the likely length of litigation over the rules, if the Commission were to grant a stay pending judicial review, it would jeopardize Congress's express command that disclosures be filed with the Commission for the fiscal year that ends "not less than one year" after the issuance of final rules. Section 13(q)(2)(F). In weighing the public interest, 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 (D.C. Cir. 1985). In this case, Congress's determination of the timeframe for initial disclosures expresses its judgment that investors and communities should have the benefit of the disclosures mandated by Section 13(q) sooner rather than later.

C. <u>Denial of a Stay Request Would Be Consistent with the Commission's Previously Expressed Positions.</u>

Although the Commission has previously granted stays of orders or rules pending judicial review, such a stay would not be appropriate in this case. The Commission granted a petition relating to shareholder director nomination rules because it found that a stay would avoid "potentially unnecessary costs, regulatory uncertainty, and disruption that could occur if the rules were to become effective during the pendency of a challenge to their validity." *Business Roundtable*, Rel. No. 63031 at 2. The Commission noted that the courts would resolve questions about the rules' validity quickly because petitioners and the Commission would seek "expedited review of petitioners' challenge." *Id.* Such considerations are not applicable in the instant case.

As noted *supra*, unlike in *Business Roundtable*, direct appellate review is not available in this case, and any costs to issuers are not imminent. Rather, stay could put the Commission in

violation of a Congressional deadline, as Section 13(q)(2)(F) requires that companies will provide disclosures for the fiscal year ending in the year following one year after the issuance of the rules. If the judicial challenge remains unresolved, issuers will not submit their disclosures within Congress's timeframe, and the Commission will be in a similar position to that in which it found itself prior to August 22, when it had missed the deadline for issuing rules by over a year.

CONCLUSION

Based on the above, Oxfam America respectfully requests that the Commission confirm by October 4, 2012 the following: (1) that the Commission does not have the authority to issue a stay of the Disclosure Rule under Section 25(c)(2) of the Exchange Act or otherwise, (2) that if the Commission receives a request to stay the Disclosure Rule that it will provide either direct notice to Oxfam America or public notice of any such stay request, and (3) that the Commission does not take the position that Oxfam America lacks the right to participate in any stay proceeding involving the Disclosure Rule initiated before the Commission.

Respectfully submitted,

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