UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Securities Exchange Act of 1934
Release No. 68197/November 8, 2012

In the Matter of	)	
AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND NATIONAL FOREIGN TRADE COUNCIL'S MOTION FOR STAY OF RULE 13q-1 AND RELATED AMENDMENTS TO FORM SD	)	ORDER DENYING STAY

The American Petroleum Institute, Chamber of Commerce of the United States of America, Independent Petroleum Association of America, and National Foreign Trade Council ("Movants") have submitted a motion for a stay of Exchange Act Rule 13q-1's effective date and related amendments to Form SD. *See* Mot. for Stay of Rule 13q-1 and Related Amendments to New Form SD (available at http://www.sec.gov/rules/final/2012/34-67717-motion-stay.pdf) ("Stay Motion"). For the reasons discussed below, the motion is denied.

BACKGROUND

On August 22, 2012, the Commission promulgated Rule 13q-1 and certain related amendments to new Form SD pursuant to Section 13(q) of the Exchange Act, which was added by Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Section 13(q) directs the Commission to "issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or

the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals[.]" Exchange Act § 13(q)(2)(A). The Commission adopted Rule 13q-1 and amended new Form SD to implement the Section 13(q) disclosure requirements. A resource extraction issuer must comply with the new rules and form for fiscal years ending after September 30, 2013, and each annual report will be due no later than 150 days after the end of the issuer's most recent fiscal year. Accordingly, the first reports under Rule 13q-1 would not be due *until* February 28, 2014 at the earliest.

On October 10, 2012, Movants filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit challenging Rule 13q-1 and the related amendments to Form SD. Case No. 12-1398 (D.C. Cir. filed Oct. 10, 2012). On the same day, Movants filed a complaint in the United States District Court for the District of Columbia challenging the validity of Rule 13q-1 on several grounds. Case No. 12-CV-1668 (D.D.C. filed Oct. 10, 2012).

On October 25, 2012, Movants submitted a motion requesting that the Commission stay the effective date of Rule 13q-1 and the related amendments to Form SD. Movants assert that a stay during the pendency of their challenge to Rule 13q-1 is warranted because four alleged defects in the rulemaking make it likely that they will succeed in their petition for review or, at a minimum, raise substantial questions about the rule's validity: (1) "the Commission erred in declining to exercise its exemptive authority, *see* 15 U.S.C. §§ 78mm, 78l(h), to provide an exemption to public companies in cases where disclosure is prohibited by foreign law or the terms of commercial contracts," Stay Motion at 5; (2) "the Commission improperly imposed a public, company-specific disclosure requirement that it erroneously believed was compelled by the statutory text," *id.* at 9; (3) "the Commission failed to define 'project,' an integral term of the Rule," *id.* at 12; and (4) "the Commission failed to properly consider the costs and benefits of the Rule," *id.* at 13.

Movants further assert that their "members are likely to suffer irreparable harm in the absence of a stay[.]" *Id.* at 15. They allege five such harms: (1) the "initial compliance costs [that] will begin to accrue immediately[] as companies prepare for the reporting that must begin in early 2014," *id.* at 16; (2) "immediate, serious competitive disadvantage" in bidding and negotiating new contracts in countries that "allow [the payment disclosures required by Rule 13q-1], but may disfavor it," Stay Motion at 16, 17; (3) "effects on companies' *existing* contracts

and operations" where either the relevant contract or host country law may prohibit disclosure, *id.* at 17; (4) "competitive harms that companies might suffer from disclosure of confidential or proprietary pricing information," *id.* at 18; and (5) injury to the issuers' First Amendment rights by being forced "to make involuntary representations to the public on controversial topics," *id.* at 19.

On November 1—while the stay motion was still pending—the court of appeals directed expedited briefing and argument of the Movants' petition for review. Under the court of appeals' schedule, the last brief is to be filed on January 28, 2013, with argument to occur "on the first appropriate date" thereafter.

DISCUSSION

In considering Movants' motion for a stay, we are guided by the familiar four-factor framework that both this Commission and the courts generally use to consider whether a stay during litigation is appropriate:

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 imminent, 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.

See Order Preliminarily Considering Whether to Issue Stay Sua Sponte, SEC Release No. 33870, File No. SR-MSRB-94-2, 1994 WL 117920 (Apr. 7, 1994). Whether a stay is appropriate turns on a balancing of the strength of the requesting party's arguments in each of the four areas. *See id.* ("The evaluation of these factors will vary with the equities and circumstances of each case."). If the

arguments for one factor are particularly strong, a stay may be appropriate even if the arguments on the other factors are less convincing. [1]

A. Movants have failed to demonstrate imminent, irreparable harm.

Notwithstanding the inherent flexibility of the four-factor framework, a party seeking a stay *must* demonstrate some imminent, irreparable harm. *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). Failure to do so alone is a sufficient basis to deny a stay.

We find that Movants have failed to carry their burden to demonstrate imminent, irreparable harm. In reaching this conclusion, we are mindful of the court of appeals' expedited briefing and argument schedule, which may yield a determination on Rule 13q-1's validity as soon as the Spring of 2013—a little less than a year before the first Form SD filings would be due.

Movants have failed to demonstrate that their first category of alleged harm—initial compliance costs to prepare to record, collect and report the payment information required under the rule—constitutes irreparable harm. "[O]rdinary compliance costs are typically insufficient to constitute irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005); *see, e.g.*, *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm."); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527-28 (3d Cir. 1976) ("Any time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction."). [2]

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[1] In their application for a stay, Movants argue that we need not apply the traditional four-factor analysis to determine whether a stay is appropriate here. *See* 5 U.S.C. § 705 (stay during litigation where "justice so requires"); 15 U.S.C. § 78y(c)(2) (same). We believe that the four-factor analysis, while not strictly required, is a useful framework to guide our consideration of whether a stay is warranted here.

[2] Movants fail to discuss the extent to which, if any, the initial compliance costs are connected to the four purported defects with the rule that they assert in

Only where compliance costs would significantly harm or impair the regulated entities' operations can these costs rise to the level of an irreparable harm. *A.O. Smith*, 530 F.2d at 527-29; *see also Eastern Bridge, LLC v. Chao*, 320 F.3d 84, 90 (1st Cir. 2003). The Rule 13q-1 adopting release described the initial compliance costs as follows:

- For an average small issuer (*i.e.*, an issuer with market capitalization under $75 million), the total initial compliance cost is likely to range from a lower bound of $10,180 to an upper bound of $106,890. Disclosure of Payments by Resource Extraction Issuers ("Adopting Release"), 77 Fed. Reg. 56365, 56409 (Sept. 12, 2012).

- For an average large issuer (*i.e.*, an issuer with market capitalization at or exceeding $75 million), the total initial compliance cost is likely to range from a lower bound of $90,080 to an upper bound of $945,840. *Id.*

Movants have not disputed these ranges in their stay application, nor have they claimed that these initial compliance costs would significantly harm or impair any of their members' operations.[3] Therefore, Movants have not shown that the initial compliance costs that Movants' members may experience prior to the adjudication of their challenge to Rule 13q-1 qualify for this limited exception.

Movants' second category of claimed harm—competitive disadvantage in bidding and negotiating new contracts in countries that allow the Rule 13q-1 disclosures but that may disfavor the disclosures—is too "speculative and unsupported by evidence" to warrant a stay. *In re Application of Whitehall*

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their stay motion. Notwithstanding this absence, based on the comments that we received during the rulemaking, we believe that a significant portion of initial compliance costs follow from the Congressional mandate in Section 13(q) and thus are not causally linked to any of the rule's alleged defects.

[3] We note that it is unlikely that most resource extraction issuers would bear the full initial compliance costs by the date the court of appeals issues a ruling on their challenge to Rule 13q-1 in light of the expedited briefing and argument schedule; this further weakens any contention that these costs constitute an irreparable injury.

Wellington Investments, Inc., Release No. 43051, 2000 WL 985754, at *2 (July 18, 2000). *See, e.g.*, *In re Bd. of Trade of the City of Chicago*, Release No. 18523, 1982 WL 523516, at *4 (Mar. 3, 1982) (same). *See also Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (injury "must be both certain and great; it must be actual and not theoretical"). Movants have not shown that any of their members are likely to suffer this harm before the court of appeals renders its determination of the rule's validity. But even supposing that a few of Movants' members might suffer this harm during the litigation, Movants have further failed to show that this harm would likely be on a scale that would significantly impact their members' operations so as to constitute an irreparable injury.

We similarly find that Movants have not demonstrated that their members will suffer an irreparable harm with respect to the third category of claimed harm—detrimental effects on their existing contracts and operations where either the relevant contract or the host country's law may prohibit disclosure. Turning first to the claim of harm connected to contracts that may prohibit disclosure, any such harm is not imminent since the first disclosures under Rule 13q-1 would not occur until February 28, 2014 at the earliest, which will likely be well after the court of appeals has reached a decision on the rule's validity. *See also Petties ex rel. Martin v. D.C.*, 662 F.3d 564, 570 (D.C. Cir. 2011) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006)) (explaining that irreparable harm requires "injury … of such imminence that there is a clear and present need for equitable relief"). Moreover, Movants have not demonstrated that at this juncture any risk of harm is actual and not speculative. *See Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors*, 773 F. Supp. 2d 151, 181 (D.D.C. 2011) (explaining that bare allegations and speculations are insufficient). All that Movants assert to support a stay now is that "[c]oncerned foreign governments *may* be interested to know long before 2014 whether the information they consider confidential and sensitive will be disclosed by their counter-parties." Stay Motion at 17 (emphasis added). Such speculation of uncertain harm does not demonstrate irreparable harm.[4]

[4] Further, as we discussed in Rule 13q-1's adopting release, there is considerable doubt that Movants' members do in fact face an appreciable risk of breaching any non-disclosure provisions in their contracts with host countries because (1) these contracts typically allow for disclosure to be made when required by law for reporting purposes, and (2) Movants' members in any event may be able to address any disclosure issues through the contract negotiation process.

With respect to any potential costs that Movants' members might experience as a result of foreign laws that may prohibit disclosure, Movants have not demonstrated that these are either sufficiently certain or imminent to warrant a stay at this juncture. Movants have failed to establish sufficient certainty of an injury because they have not demonstrated that it is likely that any foreign government currently prohibits the Rule 13q-1 disclosures. Although Movants have alleged that four countries bar the disclosures, their submissions on this issue during the rulemaking process (as well as those of others taking the same position) were both unpersuasive and vigorously contested by other commentators. *See* Adopting Release, 77 Fed. Reg. at 56372 & n.84. Moreover, as the adopting release stated, resource extraction issuers that are subject to foreign-law disclosure prohibitions "may … be able to seek authorization from the host country in order to disclose such information." *Id.* at 56403 Movants do not contend either that this option is unavailable or that their members were denied permission from a host country after seeking authority to disclose information as required by Rule 13q-1.

Movants assert that, as a prophylactic measure to avoid violating the host country's law, some of their members may need to sell assets and abandon contracts in host countries that purportedly prohibit disclosure before the disclosure is required under Rule 13q-1. Although the Rule 13q-1 adopting release acknowledged the possibility that issuers could potentially need to sell assets in host countries, Adopting Release, 77 Fed. Reg. at 56412., the release made clear that such a scenario would be contingent on a number of presently speculative factors—*i.e.*, whether in fact (i) the host countries' laws prohibit the Rule 13q-1 disclosures, *see id.* at 56411, 56413, (ii) the host countries would be unwilling to grant authority to the resource extraction issuers to disclose the information, *see id.* at 56413, and (iii) third parties would be unwilling to acquire the assets at a fair-market value, *see id*. Moreover, Movants have not offered evidence that any of their members are in fact likely to sell assets *before* the court of appeals issues its decision on the validity of the rule. Given these uncertainties, we are not persuaded that any such potential sales are likely or imminent.

As to the last two categories of alleged injury—competitive harms resulting from competitors' use of the disclosed information and impairment of the First

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Adopting Release, 77 Fed. Reg. at 56373. These additional considerations make the potential harm from a breach of contract even more speculative.

Amendment right of free speech—Movants have not demonstrated that these are imminent so as to warrant a stay. Both of these claimed harms would result (if at all) only with the public disclosure of the Form SD filings. However, as discussed above, the first disclosures under Rule 13q-1 are not due until February 28, 2014 at the earliest. In light of the court of appeals' expedited briefing and argument schedule, we believe that it is likely that the court will render a decision on the rule's validity well before these alleged harms could occur, making a stay to avoid these harms unnecessary at this juncture. *See e.g.*, *Chaplaincy of Full Gospel Churches*, 454 F.3d at 301 ("[M]ovants [must] do more than merely allege a violation of freedom of expression in order to satisfy the irreparable injury prong .... [M]ovants must show that their 'First Amendment interests are either threatened or in fact being impaired at the time relief is sought.'") (quoting *Nat'l Treasury Employees Union v. United States*, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991)); *Wagner v. Taylor*, 836 F.2d 566, 576 n. 76 (D.C. Cir. 1987) (party seeking relief must show "the imminence of a First Amendment violation").

B. Movants have not demonstrated a likelihood of success on the merits.

As stated above, Movants identified four alleged defects in the Rule 13q-1 rulemaking that they claim make it likely that they will succeed in their petition for review or, at a minimum, raise substantial questions about the rule's validity: (1) the lack of an exemption for resource extraction issuers in cases where disclosure is prohibited by foreign law or the terms of commercial contracts; (2) the public, company-specific disclosure requirement; (3) the decision not to define "project;" and (4) the Commission's alleged failure to adequately consider the costs and benefits of the rule.

We have considered each of these claimed errors under the "likelihood of success on the merits" standard—rather than the less-demanding "substantial case on the merits" standard—because Movants failed to make a strong showing of imminent, irreparable harm. We do not find that the Movants have demonstrated a likelihood of success.

Our conclusion is based on our view of the strength of the explanations that were set forth in the Rule 13q-1 adopting release. With respect to the first three issues, which involve questions of statutory construction, as the adopting release explains, the text, structure, legislative history, and purpose of Section 13(q)

demonstrate that the Commission's construction of that provision is not only reasonable, but correct. With respect to Movants' challenge to the Commission's consideration of the costs and benefits, we believe that the release contains an appropriately thorough economic analysis. Among other things, the adopting release quantified the costs where possible (*see* Adopting Release, Part III.D) and otherwise provided qualitative analysis (*see* Adopting Release, Part III.C); to the limited extent that commentators provided cost projections, the release analyzed and considered those projections (*see* Adopting Release, Part III.D); and the release identified and discussed uncertainties underlying the estimates of benefits and costs.

C. Other equitable considerations counsel against the issuance of a stay.

We believe that it is appropriate to analyze the last two factors of the four-factor stay analysis together because, in the context of Rule 13q-1, any harm that third parties might suffer as a result of a stay significantly overlaps with the relevant public interest considerations.

On balance, we are not persuaded that the requested stay would serve the public interest. As we stated in the adopting release for Rule 13q-1, Congress enacted Section 13(q) to advance this country's interest in promoting accountability, stability, and good governance, among other goals. Adopting Release, 77 Fed. Reg. at 56398. Congress also determined that Section 13(q) "would help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues." 156 Cong. Rec. S3816 (May 17, 2010) (statement of Senator Richard Lugar, co-sponsor of Section 13(q)).[5] Any delay resulting from a stay would potentially frustrate Congress's desire to achieve these benefits.

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[5] We also note that investors and other commentators during the rulemaking process stated that the required disclosures will provide valuable information to investors when assessing risks and making investment decisions. Adopting Release, 77 Fed. Reg. at 56398.

CONCLUSION

Accordingly, Movants' request for a stay of Rule 13q-1's effective date and related amendments to Form SD is denied.[6]

By the Commission.

Elizabeth M. Murphy
Secretary

[6] Oxfam America filed a response to Movants' stay motion in which Oxfam argued that we lack statutory authority to grant a stay of Rule 13q-1 because our general stay authority conflicts with the mandatory effective date that Congress established in Section 13(q). *See* Response of Oxfam America to Motion for Stay of Rule 13q-1 and Related Amendments to New Form SD, at 2-4 (Nov. 1, 2012). We decline to reach this issue, however, because we find that a stay is not appropriate here under the traditional four-factor framework for assessing stay motions.