IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN PETROLEUM INSTITUTE, *et al.*, Plaintiffs, v. U.S. SECURITIES AND EXCHANGE COMMISSION, Defendant, and OXFAM AMERICA, INC. Intervenor-Defendant.	Civil Action No. 12-cv-1668 (JDB)

SUPPLEMENTAL BRIEF OF OXFAM AMERICA, INC.

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Pursuant to the Court's Order of May 10, 2013, (DN 28), Intervenor Oxfam America, Inc. ("Oxfam"), submits this Supplemental Brief.

1. *Plaintiffs fail to identify any injury to their First Amendment rights.* Although Plaintiffs claim that Cardin-Lugar and the Disclosure Rule compel them to engage in "core political speech," these purely factual disclosures – discrete payment information indistinguishable from other business information reported under the Exchange Act – are a far-cry from the expressive speech to which First Amendment strict scrutiny applies. Seizing on only one of its purposes – restoring accountability to resource-rich governments – Plaintiffs complain that Cardin-Lugar conscripts them into political advocacy.[1] Plaintiffs thus analogize this case to precedents in the very different contexts of political elections, ballot initiatives, and charitable fundraising. *See* Reply Br. at 7-10 (citing cases). Plaintiffs' reliance on this precedent is misplaced.

The cases Plaintiffs cite are concerned with removing impediments to political speech. The constitutional injury in those cases is not, as Plaintiffs suggest, the compelled disclosure of facts. First Amendment injury arises *only* when disclosure restricts the efficacy or reach of the expressive speech in which the speaker wishes to engage. *See Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 199 (1999) (invalidating name badge requirement that "compel[led] personal name identification at the precise moment when the [petition] circulator's interest in anonymity is greatest"); *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) ("the disclosure will be the last words spoken as the donor closes the door or hangs up the phone.").

By contrast, Plaintiffs fail to explain how the year-end payment disclosure at issue restricts *their* speech rights. The information they are required to disclose constitutes facts, not a political viewpoint. If Plaintiffs do not want to discuss the political implications of their

[1] Plaintiffs glibly denounce another obvious purpose: investor protection; Oxfam's main brief discusses that purpose more fully and Plaintiffs' inadequate response to it. Oxfam Br. at 26-7.

payments to foreign governments, nothing commands them to do so. If they do wish to, they are free to advocate any position they choose without any government interference.[2]

Plaintiffs' challenge, therefore, conflates the content of the disclosure with all of its potential uses by others. But the possibility that others may use disclosed information to discuss "political" subjects does not convert that disclosure into a political or expressive act. Indeed, if it did, virtually any factual disclosure in any context would be suspect—after all, any fact important enough to the public to warrant mandated disclosure is bound to be relevant to some public issue, and thus an issue about which people disagree. Disclosing objective payment information – independent of any other speech in which Plaintiffs may or may not engage – simply is not political speech. Certainly, it is no more political than information they already are required to report (e.g. executive compensation). *See* 17 C.F.R. § 229.402.[3]

2. *Plaintiffs' cost estimates are illusory and misleading*. Plaintiffs baselessly characterize the Disclosure Rule as the SEC's most expensive rule ever, conjuring a $14 billion price tag, and attributing the figure to the SEC. Reply Br. at 2, 11, 25. The principal component of this illusory figure is the SEC's estimate of how much issuers "*could*" lose, "*assuming* that four countries . . . prohibit the disclosure of payment information . . . *if forced to sell their assets*." *Am. Petroleum*

[2] The Supreme Court in *Riley* stated that "as a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of solicitation." 487 U.S. at 800. SEC's publication of the required disclosures could have a similar burden-lessening effect.

[3] Recent precedent does not improve Plaintiffs' argument. *See* Oxfam Br. at 29 (discussing *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1212 (D.C. Cir. 2012), which concerned the "scope of the government's authority to force the manufacturer of a product to *go beyond* making purely factual and accurate commercial disclosures and undermine its own economic interest – in this case, by making every single pack of cigarettes in the country a mini billboard for the government's anti-smoking message") (emphasis added); *see also Nat'l Assoc. of Mfrs. v. NLRB*, _ F.3d _, 2013 WL 1876234, *5, No. 12-5068 (D.C. Cir. May 7, 2013) (rejecting NLRB regulation compelling employers to broadcast a government-scripted "pro-union" message).

Inst. v. SEC, __ F.3d __, 2013 U.S. App. LEXIS 8477 at * 5 (D.C. Cir. Apr. 26, 2013) (emphasis added). This number is doubly contingent: to have even a chance of being true, a country would 1) have to prohibit disclosures, and 2) trigger asset fire sales as a result of the prohibition. The SEC noted that the former was contested and identified reasons why the latter was unlikely. 77 Fed. Reg. 56,402-3. It also deemed "unpersuasive" industry evidence that any country prohibited disclosures. SEC Rel. No. 68197, Order Denying Stay at 7 (Nov. 8, 2012); Oxfam Br. at 5-7, 18. Thus the SEC was not required to accommodate industry's demands based on the estimate.

3. *A recent agreement within the European Union to require public disclosure with no exemptions, similar to Cardin-Lugar, confirms that the SEC's refusal to credit industry's predictions was justified.* Courts reviewing rules may take into account well documented, post-promulgation information that tends to "indicate the truth or falsity of agency predictions." *See* Oxfam 28(j) Letter, (Apr. 12, 2013) (citing *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974)); *see also Animal Legal Def. Fund v. Glickman*, 943 F. Supp. 44, 58 (D.D.C. 1996); *Sea Watch Int'l v. Mosbacher*, 762 F. Supp. 370. 381 (D.D.C. 1991). The EU's exhaustively debated decision not to grant exemptions meets these criteria. Plaintiffs' only response to the fact that the European agreement suggests their cost estimates are overblown is to complain that "another regulatory authority may be poised to impose a similar economic burden, with comparable disregard for its effects," Pets.' 28(j) Response, DN 1431530 (D.C. Cir. Apr. 18. 2013), but that, of course, is no answer at all. And their assertion that the world's oil reserves are mostly owned by non-covered companies, *id.* at 2, is irrelevant. Since *all* resource extraction companies, including joint venture partners that make payments to governments, must report – and not just the national oil companies that often own the asset – the relevant number would be the number of projects that do *not* include a covered company. Plaintiffs do not give this number,

presumably because companies listed on U.S. and European exchanges make the vast majority of resource payments. And even this number is not a true measure of competitive impact, as companies have not shown that they would lose business or profit as a result of disclosure.

4. *The SEC correctly found that the statutory text, legislative history, and context of Cardin-Lugar unambiguously mandate project-level public disclosure.* The Statute provides that issuers' project-level and government-level disclosures shall be "included in an annual report." 15 U.S.C. § 78m(q)(2)(A). By placing Cardin-Lugar in the reporting regime of Section 13 of the Exchange Act and requiring the information to appear in annual reports, which – despite Plaintiffs' claims – *are* public, Congress left no room for interpretation. *See* SEC Br. at 18; Oxfam Br. at 22-23.

The legislative history and expressions of intent by the amendment's cosponsors support this result. *See* SEC Br. at 15-16 & n.12 (collecting sources). Plaintiffs misleadingly cherry-pick a quote from Senator Cardin to imply that even he meant to allow the SEC to withhold information from the public. Reply Br. at 17. But in the preceding sentence, which Plaintiffs omit, Senator Cardin notes, "this amendment is a critical part of the increased transparency and good governance we have been striving to achieve in the financial industry." 156 Cong. Record S3815 (May 17, 2010). In the same speech, he emphasizes that "[i]nvestors need to know *the full extent* of a company's exposure when they are operating in countries where they are subject to expropriation, political and social turmoil, and reputational risks." *Id.* (emphasis added).

Plaintiffs also argue that the language of a sister provision governing conflict minerals casts doubt on the unambiguous language of Cardin-Lugar. Reply Br. at 19-20. Where a statute is unambiguous, however, the agency and the court look no further. *See e.g. Pharm. Research & Mfrs. Of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001). In any event, the alternative

public disclosure mechanism for conflict minerals does not create the ambiguity Plaintiffs urge.[4] Both provisions require public filings plus an additional mechanism for convenience: disclosure on issuers' websites for conflict minerals, and an SEC compilation for Cardin-Lugar.[5] That Congress did not also require issuers to publish information on their public websites for Cardin-Lugar reflects the fact that Section 1502 was intended for consumers, who may not be familiar with EDGAR, whereas Cardin-Lugar is aimed at investors, who are. The decision to require the Cardin-Lugar compilation only "to the extent practicable" was much more plausibly to excuse the SEC from duplicating individual public corporate filings, rather than to permit the unprecedented categorical secrecy of disclosures in annual reports. This burden reduction is unnecessary in the conflict mineral provision, which allows issuers to re-publish their own filings.

5. *Even if the Court concludes the SEC had discretion on exemptions or public reporting and that it must reconsider the issue under Chevron Step 2, the appropriate remedy is remand, not vacatur*. In *Coalition for Common Sense in Gov't Procurement v. U.S.*, 671 F.Supp.2d 48, 59-60 (D.D.C. 2009), the court remanded, noting that the agency's "interpretation was erroneous only because the agency concluded that Congress mandated a particular regulatory approach that the agency might nevertheless be able to adopt in the exercise of its discretion." Since the agency "may make the same decision under *Chevron* Step 2 . . . a plausible result given . . . [SEC's] prior interpretation that the statute required the rule," remand is warranted to avoid "disruptive consequences" to the regulatory regime. *Id.* at 60; *see also* Oxfam Br. at 31.

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[4] Plaintiffs conveniently jump to conflict minerals while ignoring the mine safety disclosures provision that was included in the same section of the Dodd-Frank Act and which, like Cardin-Lugar, requires issuers to "include" the information in their annual reports under the Exchange Act. Pub. L. No. 111-203, § 1503, 124 Stat. 2218 (July 21, 2010). The implementing regulations require publication of disclosures, yet no commentator argued for non-public disclosure. *See* SEC, *Mine Safety Disclosure*, Rel. No. 33-9286, 76 Fed. Reg. 81,762 (Dec. 28, 2011).

[5] *Compare* 15 U.S.C § 78m(q)(3)(A) *with id.* § 78m(p)(1)(E).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2013, I caused the foregoing Supplemental Brief to be filed with the Clerk of Court for the United States District Court for the District of Columbia using the Court's CM/ECF system. All parties will be served via CM/ECF.

Dated: May 17, 2013

/s/ Howard M. Crystal
Howard M. Crystal