

No. 24-1522 and all consolidated cases: Nos. 24-1623, 24-1624, 24-1626,
24-1627, 24-1628, 24-1631, 24-1633, 24-1634, and 24-1685

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATE OF IOWA; STATE OF ARKANSAS; STATE OF IDAHO; STATE OF
MISSOURI; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF
NORTH DAKOTA; STATE OF SOUTH DAKOTA; STATE OF UTAH;
AMERICAN FREE ENTERPRISE CHAMBER OF COMMERCE,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

SECURITIES AND EXCHANGE COMMISSION'S OMNIBUS
OPPOSITION TO PETITIONERS' MOTIONS FOR STAY
PENDING DISPOSITION OF PETITIONS FOR REVIEW

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INTRODUCTION

These consolidated proceedings under 28 U.S.C. § 2112 challenge rules adopted by the Securities and Exchange Commission that require registrants to, among other things, disclose certain information in their registration statements and annual reports about climate-related risks that they determine have or will likely have a material impact on their business. *See The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 89 Fed. Reg. 21,668, 21,673–76 (Mar. 28, 2024) (“Final Rules”). Five groups of petitioners sought emergency relief from this Court to stay the Final Rules without having first asked the Commission for a stay as required. *See* Fed. R. App. P. 18(a)(1); 15 U.S.C. § 78y(c)(2).¹

On April 4, 2024, pursuant to Section 25(c) of the Securities Exchange Act of 1934 and Section 705 of the Administrative Procedure Act, the Commission entered a stay of the challenged rules “pending the completion of judicial review of the consolidated Eighth Circuit petitions.” Doc. 5380534-2, at 3. It is unclear whether any of the petitioners intend to seek any further relief from this Court in light of the Commission’s stay, but the Commission files this opposition out of an abundance of caution. Because the Commission has itself stayed the challenged

¹ Doc. 5379903, No. 24-1522 (Apr. 3, 2024); Doc. 5377132, No. 24-1624 (Mar. 26, 2024); Doc. 5380129, No. 24-1626 (Apr. 3, 2024); Doc. 5377362, No. 24-1628 (Apr. 3, 2024); Doc. 5380143, No. 24-1685 (Apr. 3, 2024) (motions for stay).

rules, there is no basis for this Court to grant petitioners' requested relief, and the pending motions for relief should be denied.

BACKGROUND

The Commission adopted the Final Rules on March 6, 2024. *See* 89 Fed. Reg. at 21,920. Within ten days after the Commission's adoption of the Final Rules, nine petitions for review of the rules were filed in various courts of appeals. On March 21, 2024, the Judicial Panel on Multidistrict Litigation consolidated those petitions in this Court under 28 U.S.C. § 2112. Doc. 5376308. That same day, an additional petition for review was filed in the Fifth Circuit. That petition has now been transferred to this Court and included in the consolidated proceedings. Doc. 5379194, No. 24-1685 (Apr. 1, 2024).

On March 26, 2024, Liberty Energy, Inc. and Nomad Proppant Services, LLC filed a letter in this Court noting the pendency of their motion for an administrative stay and a stay pending judicial review, which was filed prior to consolidation. Doc. 5377132, No. 24-1624. Also on March 26, 2024, petitioners Chamber of Commerce of the United States of America, the Texas Association of Business, and the Longview Chamber of Commerce filed a separate motion seeking a stay. Doc. 5377362, No. 24-1628. Since that date, three other motions for a stay of the Final Rules have been filed in this Court. *See* Doc. 5379903, No. 24-1522 (Apr. 3, 2024); Doc. 5380129, No. 24-1626 (Apr. 3, 2024); Doc.

5380143, No. 24-1685 (Apr. 3, 2024). On March 29, the Commission filed a motion to establish a consolidated briefing schedule for the motions that had been filed and any additional motions. Doc. 5378581.

On April 4, pursuant to Section 25(c) of the Exchange Act and Section 705 of the APA, the Commission ordered “that the Final Rules are stayed pending the completion of judicial review of the consolidated Eighth Circuit petitions.” Doc. 5380534-2, at 3; *see* 15 U.S.C. § 78y(c)(2); 5 U.S.C. § 705. As the Commission explained, it did “not depart[] from its view that the Final Rules are consistent with applicable law and within the Commission’s long-standing authority to require the disclosure of information important to investors in making investment and voting decisions.” Doc. 5380534-2, at 2. However, “given the procedural complexities accompanying the consolidation and litigation of the large number of petitions for review of the Final Rules, a Commission stay will facilitate the orderly judicial resolution of those challenges and allow the court of appeals to focus on deciding the merits.” *Id.* at 2–3. And “a stay avoids potential regulatory uncertainty if registrants were to become subject to the Final Rules’ requirements during the pendency of the challenges to their validity.” *Id.* at 3.

ARGUMENT

The Court should deny petitioners’ motions for a stay in light of the Commission’s decision to stay the Final Rules pending judicial review.

Section 25(c)(2) of the Exchange Act states that “[u]ntil the court’s jurisdiction becomes exclusive, the Commission may stay its order or rule pending judicial review if it finds that justice so requires.” 15 U.S.C. § 78y(c)(2).

Similarly, Section 705 of the APA provides that “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.” 5 U.S.C. § 705. These statutes, as well as Federal Rule of Appellate Procedure 18(a), contemplate that—when justice requires—agencies may exercise discretion to stay rules they have issued pending judicial review. While the petitioners did not seek a stay from the Commission prior to seeking relief from this Court as contemplated by these provisions, the Commission addressed the issue *sua sponte* and determined these statutory standards were met here. The Commission’s stay will facilitate an orderly resolution of this consolidated litigation, including by allowing the Court “to focus on deciding the merits.” Doc. 5380534-2, at 3.

The stay also “avoids potential regulatory uncertainty if registrants were to become subject to the Final Rules’ requirements during the pendency of the challenges to their validity.” *Id.* at 2–3. The Final Rules will not take effect until

after the completion of judicial review.² Put another way, the Commission’s action preserves the status quo, thereby removing any need for “the court to intervene to preserve the status quo until the merits are determined.” *Nebraska v. Biden*, 52 F.4th 1044, 1046 (8th Cir. 2022) (quotation omitted). Petitioners’ motions should therefore be denied.

Petitioners’ requests for stays were based upon the assertions that “[a]llowing the rule to take effect” will cause immediate and irreparable harm in the form of costs incurred “in the next several months” to prepare for compliance with the rule as well as purported constitutional harms in the form of compelled speech. Doc. 5377362, at 20, 24, No. 24-1628 (Mar. 26, 2024); *id.* at 25 (companies must “undertake substantial preparation *now*”); *id.* at 20 (companies will be forced to “engage in costly speech against their will”); *see also* Doc. 5379903, at 24–27, No. 24-1522 (Apr. 3, 2024); Doc. 5377132, Ex. 1, at 27–28, No. 24-1624 (Mar. 26, 2024); Doc. 5380129, at 19–20, No. 24-1626 (Apr. 3, 2024); Doc. 5380143, at 26–27, No. 24-1685 (Apr. 3, 2024). The Commission does not agree that these assertions would have justified emergency relief from the

² Because the Commission stayed the rules before their effective date, *see* 89 Fed. Reg. at 21,668 (effective date is May 28, 2024), they have not and will not become effective during the stay. The Commission will publish a document in the Federal Register at the conclusion of the stay addressing a new effective date for the Final Rules.

Court. But, regardless, the Commission's stay of the rules eliminates the possibility of these claimed harms.

In the event the petitioners still intend to seek relief from this Court, for the reasons the Commission has previously stated, the Court should order a briefing schedule that allows the Commission to file a single, consolidated response to any further motions for relief. Doc. 5378581 (Mar. 29, 2024). Indeed, many of the stay motions that have already been filed incorporate by reference arguments made by other groups of petitioners, such that a single, consolidated response to any future motions will likely be efficient for the parties and the Court. *See* Doc. 5380143, at 24, 26, No. 24-1685 (Apr. 3, 2024); Doc. 5380129, at 3, No. 24-1626 (Apr. 3, 2024). Many of the petitioners agreed that a consolidated response was appropriate. Doc. 5379427 (Apr. 1, 2024).

Finally, petitioners Chamber of Commerce of the United States of America, the Texas Association of Business, and the Longview Chamber of Commerce argued that if a stay were not granted, expedition and an accelerated briefing and argument schedule would be appropriate as an alternative. Doc. 5377362, at 28, No. 24-1628 (Mar. 26, 2024). Although the Commission's stay removes the predicate for petitioners' proposed scheduling alternative, the Commission also looks forward to expeditious resolution of the litigation, and counsel for the Commission will confer with counsel for petitioners in the consolidated cases to

determine whether the parties can jointly propose a briefing schedule that, recognizing the stay, facilitates a timely ruling on the merits by this Court.

CONCLUSION

The following motions for a stay should be denied:

1. State Petitioners' Emergency Motion for Administrative Stay and Stay Pending Disposition of Petitions for Review, Doc. 5379903, No. 24-1522, (Apr. 3, 2024).
2. Notice of Pending Emergency Motion for Administrative Stay and Stay Pending Judicial Review in *Liberty Energy v. SEC*, No. 24-60109 (5th Cir.), now *Liberty Energy v. SEC*, 24-1624 (8th Cir.), Doc. 5377132, No. 24-1624, (Mar. 26, 2024).
3. Petitioners' Motion to Stay Enforcement Pending Review, filed by Petitioners Texas Alliance of Energy Producers, et al., Doc. 5380129, No. 24-1626, (Apr. 3, 2024).
4. Emergency Motion for Stay Pending Disposition of Petitions for Review, filed by Petitioners Chamber of Commerce of the United States of America, et al., Doc. 5377362, No. 24-1628, (Mar. 26, 2024).
5. Petitioners' Emergency Motion to Stay Enforcement Pending Review, filed by Petitioners National Legal & Policy Center, et al., Doc. 5380143, No. 24-1685, (Apr. 3, 2024).

Respectfully submitted,

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April 5, 2024

CERTIFICATE OF COMPLIANCE

I certify that this opposition complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 1,581 words, excluding the parts exempted by Fed. R. App. P. 27(a)(2)(B).

I also certify that this opposition complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5) and the type-style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(6) because it has been prepared in a proportionally spaced typeface—Times New Roman, 14 point—using Microsoft Word.

/s/ John R. Rady
John R. Rady

April 5, 2024