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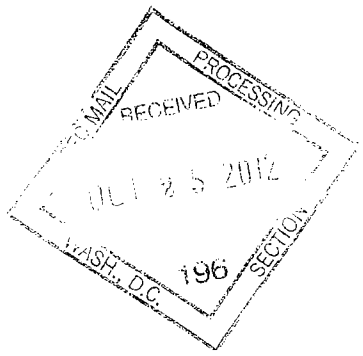
October 25, 2012



VIA HAND DELIVERY

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Room 10905
Washington, D.C. 20549
(202) 551-5400

Re: *Disclosure of Payments by Resource Extraction Issuers*, 77 Fed. Reg. 56,365 (Sept. 12, 2012)

Dear Ms. Murphy:

Enclosed for filing please find an original and three copies of the Motion for Stay of Rule 13q-1 and its Amendments to New Form SD by American Petroleum Institute, Chamber of Commerce of the United States of America, Independent Petroleum Association of America, and National Foreign Trade Council; a Notice of Appearance; and a Certificate of Compliance with the SEC's word limitations.

Very truly yours,

Eugene Scalia

Eugene Scalia

Attachments

cc: Hon. Mary L. Schapiro, Chairman, SEC (via hand delivery w/enclosures)
Hon. Elisse B. Walter, Commissioner
Hon. Luis A. Aguilar, Commissioner
Hon. Troy A. Paredes, Commissioner
Hon. Daniel M. Gallagher, Commissioner
Mr. Mark D. Cahn, General Counsel

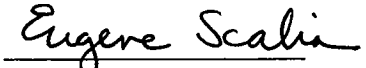
SECURITIES AND EXCHANGE COMMISSION
DISCLOSURE OF PAYMENTS BY RESOURCE EXTRACTION ISSUERS; FINAL RULE
Release Nos. 34-67717, 34-63549; File No. S7-42-10
RIN 3235-AK85
77 Fed. Reg. 56,365 (Sept. 12, 2012)

NOTICE OF APPEARANCE

Pursuant to Commission Rule of Practice 102(d)(2), the attorneys identified below represent American Petroleum Institute, Chamber of Commerce of the United States of America, Independent Petroleum Association of America, and National Foreign Trade Council in the above-referenced matter.

Dated: October 25, 2012

Respectfully submitted,



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SECURITIES AND EXCHANGE COMMISSION
DISCLOSURE OF PAYMENTS BY RESOURCE EXTRACTION ISSUERS; FINAL RULE
Release Nos. 34-67717, 34-63549; File No. S7-42-10
RIN 3235-AK85
77 Fed. Reg. 56,365 (Sept. 12, 2012)

MOTION FOR STAY OF RULE 13q-1 AND RELATED AMENDMENTS TO NEW FORM SD BY AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND NATIONAL FOREIGN TRADE COUNCIL

American Petroleum Institute, Chamber of Commerce of the United States of America, Independent Petroleum Association of America, and National Foreign Trade Council ("Petitioners") hereby request that the Securities and Exchange Commission stay newly adopted Rule 13q-1 and its related amendments to new Form SD (hereinafter, the "Rule"), including the Rule's November 13, 2012 effective date. *Disclosure of Payments by Resource Extraction Issuers*, 77 Fed. Reg. 56,365 (Sept. 12, 2012). Specifically, Petitioners request that the Commission stay the Rule pending final resolution of the petition for review filed on October 10, 2012 in *American Petroleum Institute et al. v. Securities & Exchange Commission*, in the United States Court of Appeals for the District of Columbia Circuit (Case No. 12-1398), and the complaint filed on the same date in the District Court for the District of Columbia (Case No. 12-1668). Petitioners respectfully request that the Rule's November 13, 2012 effective date be deferred by the amount of time that the case remains in litigation, and that a new compliance date be established through no-action relief at the time the litigation is concluded.

An answer to this motion is respectfully requested by Thursday, November 1, 2012, so that Petitioners may promptly proceed to Court for appropriate relief if a stay is not granted.

Dated: October 25, 2012

Respectfully submitted,

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SECURITIES AND EXCHANGE COMMISSION
DISCLOSURE OF PAYMENTS BY RESOURCE EXTRACTION ISSUERS; FINAL RULE
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INTRODUCTION

By a 2-1 vote, with two Commissioners recused and a quorum scarcely present, the Securities and Exchange Commission adopted one of the most costly rules in its history. *Disclosure of Payments by Resource Extraction Issuers*, 77 Fed. Reg. 56,365 (Sept. 12, 2012) (the "Rule"). Petitioners have challenged the Rule in a complaint filed in the U.S. District Court for the District of Columbia (Case No. 12-1668), and in a petition for review filed the same day in the U.S. Court of Appeals for the District of Columbia Circuit (Case No. 12-1398). They now ask the Commission to stay the Rule to defer the staggering costs that otherwise will begin accruing immediately, including (but not limited to) an estimated $1 billion in "initial" compliance costs that energy companies and their shareholders will bear in the next year, while litigation is pending.[1]

Petitioners appreciate that the Commissioners who voted for the Rule concluded they were in substantial part required by law to adopt the Rule they did. That is further reason this Motion should be granted. For had they *not* believed it required by law, the Commission majority never would have adopted the Rule they did (*see* 77 Fed. Reg. at 56,413/1), with its multi-billion dollar costs for U.S. companies and investors, and no clear and established benefits for peoples of foreign countries. And ultimately it is the province of the courts, not the Commission, to determine what the law requires by its plain terms, and what discretion it gives the Commission to avoid crushing regulatory burdens. In this instance there is at minimum a "serious legal question" (*Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)) whether the Commission's resolution of these issue was correct, as

[1] Petitioners have moved the D.C. Circuit to expeditiously determine whether it will exercise jurisdiction over the Rule challenge, so that Petitioners may promptly move forward with their challenge in the appropriate forum.

reflected in the dissent of Commissioner Gallagher and in the dissent of Commissioner Paredes in another rulemaking the same day, expressing the same view as Commissioner Gallagher regarding the Commission's ability to use its exemptive authority to avoid imposing multi-billion costs unaccompanied by clear countervailing benefits.

Petitioners therefore respectfully request a stay so they may seek the answers from the court that would enable the Commission to revise a rule that it recognized to be exceptionally damaging to American business. For even supposing the 2-Commissioner majority was required by law to adopt the Rule it did, it is not required now to deny a stay that would avoid placing costly burdens on American business and investors before the courts can clarify the Commission's statutory responsibilities. A rule approved by less than a majority of the Commissioners, in an area that admittedly is new to the Commission, with devastating consequences for U.S.-listed companies and their shareholders, is an unusually powerful candidate for the Commission's exercise of its discretion, and judgment, to grant a stay.

DISCUSSION

The Commission has discretion to grant a stay of its rules pending judicial review if it finds that "justice so requires." 15 U.S.C. § 78y(c)(2); *see also* 5 U.S.C. § 705; *Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 712 F.2d 669, 676 n.15 (D.C. Cir. 1983) (noting cases "in which a federal agency, *in its discretion* . . . undertakes to stay execution of . . . agency action") (emphasis added).[2]

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[2] The deadline in Section 13(q) for the Commission to "issue final rules," 15 U.S.C. § 78m(q)(2)(A), does not "limit the authority of either an agency or a court to exercise its traditional statutory authority under Section 705 of the APA to stay such rules or regulations pending judicial review." *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 19-20, 24 (D.D.C. 2012) (holding that agency had authority to stay its rules, even though the rules were issued over 10 years after a statutory deadline); *see also* 5 U.S.C. § 705. Apart from the APA, the Commission also has authority to issue a stay under the Exchange Act's general grant of

Thus, the four factors considered by the courts in determining whether to grant emergency relief need not be satisfied. *See* D.C. Cir. Rule 18(a) (court of appeals considers a stay on the basis of likelihood of success on the merits, the prospect of irreparable injury, whether a stay would harm other parties, and the public interest). Those conditions nonetheless are satisfied in this case, as shown below.

1. Petitioners recognize that the Commissioners who voted to adopt the Rule did so after deliberation and in good faith, and are unlikely to concede now that Petitioners are substantially likely to prevail on the merits of their challenge. However, such a finding is not necessary for a stay—as just noted, the agency may stay its Rule on a determination that "justice so requires"—and even under the standard applied by the courts, "[a]n order maintaining the status quo is appropriate when a *serious legal question* is presented . . . *whether or not movant has shown a mathematical probability of success*." *Wash. Metro. Area Transit*, 559 F.2d at 844 (emphases added). It presumably is in light of such considerations that the Commission agreed to stay its "proxy access" rule in 2010. *See* Order Granting Stay, *In re Motion of Business Roundtable and the Chamber of Commerce of the United States of America for Stay of Effect of Commission's Facilitating Shareholder Director Nominations Rules*, Exchange Act Release No. 63031, File No. S7-10-09 (Oct. 4, 2010).

In this instance, Petitioners respectfully submit, their challenge raises genuine questions about the Commission's authority, its reasoning, the rulemaking process, and therefore about the validity of the Rule. One of the three Commissioners to consider the Rule shared the concerns

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authority to the Commission to stay its rules pending judicial review—an authority that Section 13(q) does not circumscribe. *See* 15 U.S.C. § 78y(c)(2) ("the Commission may stay its order or rule pending judicial review if it finds that justice so requires"). The final Rule has now been "issue[d]," and the Commission may grant a stay.

that Petitioners now raise, and said in dissent that the Commission "rejected a plain language reading of section [13(q)] that would minimize the competitive risk and lower the costs of our rule, but that would fulfill in all respects the legislative intent manifest in the provision's plain language." Comm'r Daniel M. Gallagher, Statement at the SEC Open Meeting: Proposed Rules to Implement Section 1504 of the Dodd-Frank Act (Aug. 22, 2012) ("Statement of Commissioner Gallagher"), *available at* http://www.sec.gov/news/speech/2012/\spch082212dmg-extraction.htm#P28_6923. Commissioner Gallagher also faulted the Adopting Release for failing to determine whether the Rule would actually achieve the benefits intended by the statute, and for failing to "seriously consider" the Rule's "significant costs [to] issuers—and thereby shareholders." *Id.*

A second Commissioner—recused from this rulemaking—voiced some of the same concerns with regard to another rule adopted the same day. *See* Final Rule, *Conflict Minerals*, 77 Fed. Reg. 56,274 (Sept. 12, 2012); Comm'r Troy A. Paredes, Statement at the Open Meeting to Adopt a Final Rule Regarding Conflict Minerals Pursuant to Section 1502 of the Dodd-Frank Act (Aug. 22, 2012) ("Statement of Commissioner Paredes"), *available at* http://www.sec.gov/news/speech/2012/spch082212tap-minerals.htm (noting that the Commission "declined to analyze whether the choices it has made will advance the rulemaking's objective"). This close division among the Commissioners is strong evidence that a "serious legal question is presented." *Wash. Metro. Area Transit*, 559 F.2d at 844.

Petitioners have challenged the Rule on numerous grounds, as set forth in the attached Complaint that was filed in the District Court. *See* **Exhibit A**. They focus on four of those grounds in this Motion.

First, 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.

It is important to recognize the billions in dollars of relief for U.S.-listed companies and their shareholders that would have resulted from even a limited use of the Commission's exemptive authority. Commenters estimated that the Rule will affect the operations of U.S. companies in over 50 resource-rich countries. *See* Publish What You Pay Comment Letter at 1 (Feb. 25, 2010); EarthRights International Comment Letter at 2 (Feb. 3, 2012). Of the more than 50 countries that will be affected by the Rule, commenters focused on the legal prohibitions of just four: Angola, Cameroon, China, and Qatar. The Commission *agreed* with commenters that the costs to U.S. companies and shareholders of extending disclosure requirements to those countries were immense. "[C]ommentators' concerns that the impact of such host country laws *could add billions of dollars of costs* to affected issuers, and hence have a significant impact on their profitability and competitive position, *appear warranted*," the Commission concluded. 77 Fed. Reg. at 56,412/1 (emphases added). The Commission was referring to commenters' statements that they were likely to lose "tens of billions of dollars of capital investments . . . if issuers were required to disclose, pursuant to [the Commission's] rules, information prohibited by the host country's laws or regulations," *id.* at 56,402/3 (citing comment from Royal Dutch Shell), and that these losses would extend "well beyond resource extraction issuers" themselves. *Id.* (citing comment from API). At least 51 U.S.-listed companies do business in Angola, Cameroon, China, and Qatar, the Commission acknowledged. Quantifying the Rule's costs for just three of those companies, the Commission estimated a combined lost cash flow of approximately $12.5 billion. *Id.* at 56,411/3, 56,412/3. And indeed, a single commenter

represented that it had more than $20 billion in investments just in Qatar and China. *See* Royal Dutch Shell Comment Letter at 1 (Aug. 1, 2011).

An exemption for foreign law to avert such staggering costs, the Commission said, would be "inconsistent with the structure and language of Section 13(q)." 77 Fed. Reg. at 56,372/3. To be sure, the purpose of Section 13(q)—as construed by the Commission—would be implemented less fully in those four countries than elsewhere if an exemption were allowed. But what would have been the actual effects in those countries, and to Section 13(q) implementation as a whole, and to the overarching purposes of the securities laws? Section 13(q) exists alongside the Commission's other statutory responsibilities and authorities, including its obligation not to impose burdens on competition that are "not necessary or appropriate in furtherance of the purposes of [the Exchange Act]," 15 U.S.C. § 78w(a)(2); its general exemptive authority under Section 36 of the Exchange Act, and its authority under Section 78l(h), which confers exemptive authority with respect to Section 13(q) in particular; and of course the Commission's overarching responsibility to further investor protection, efficiency, and capital formation. Having determined that billions in dollars of costs for U.S. companies and investors were associated with applying the Rule to just four countries, it was incumbent on the Commission to consider whether immediate coverage of those countries was so essential to Section 13(q)—and to the furtherance of U.S. competitiveness and the purposes of the Exchange Act as a whole—that no exemption could be provided. The Commission's consideration of this question would have included, among other things, an assessment of the information on government revenues currently available in those countries; whether the people of those countries realize the benefits of extractive industries revenues to a lesser degree than the people of other countries; and the extent to which the citizens of Angola, Cameroon, China, and Qatar will be able to use the

additional information made available under the Rule to change those governmental practices. These fundamental questions were neither asked, nor answered.[3]

The Commission expressed concern that exempting disclosure for nations that prohibit it would cause other countries to adopt similar prohibitions. Elsewhere, however, the Commission identified countervailing international pressures that are causing a growing number of countries to support payment disclosure. *See* 77 Fed. Reg. at 56,413/1-2 ("the widening global influence of the EITI . . . may discourage governments in resource-rich countries from adopting new prohibitions on payment disclosure"). There was, in any event, an "obvious alternative" (*see Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986)) that the Commission was obligated to consider: Only exempting the four countries that currently prohibit disclosure, or even some subset of them. Exempting disclosure about Qatar alone would have saved investors billions of dollars.

In dismissing use of its exemptive authority as inconsistent with Section 13(q)'s "purpose," the Commission also failed to recognize that an exemption from a statutory provision will often, perhaps always, detract to some degree from that provision's *immediate* objective—that is in the nature of an exemption—yet in the past Commission has *championed* use of the exemptive authority in such circumstances. *See* Amicus Curiae SEC Post Argument Letter Brief 10, *Schiller v. Tower Semiconductor, Ltd.*, No. 04-5295 (2d Cir. Jan. 10, 2006) ("an exemption can be consistent with the protection of investors even when it deprives those investors of certain statutory or regulatory protections that would apply in the absence of the exemption."). Indeed,

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[3] The Commission may not have considered such matters to be within its expertise. Congress, however, entrusted the Commission with administering the most ambitious extractive industry transparency initiative in the world; it is the Commission's obligation to bring an expertise to bear commensurate with this responsibility.

the Commission has previously used the exemptive authority to accommodate foreign law specifically. *See* 17 C.F.R. § 229.1202(a)(2) (Instruction 4); *id.* § 240.3a12-3(b) (exempting securities of a "foreign private issuer" from certain Exchange Act requirements). In this instance, moreover, exemption would have *furthered* Section 13(q)'s express command to cover payments "*consistent with* the guidelines of the Extractive Industries Transparency Initiative." 15 U.S.C. § 78m(q)(1)(C)(ii). The EITI's foundational principles recognize that the "achievement of greater transparency must be set in the context of respect for existing contracts *and laws*." EITI Sourcebook at 34, *available at* http://eiti.org/files/document/sourcebookmarch05.pdf (emphasis added).

The Commission's decision not to use its exemptive authority was strongly criticized in dissent by Commissioner Gallagher, who faulted the Commission for what he called "[c]onclusory policy statements" and failing to meaningfully consider the prospect of "forc[ing] companies that file Form SD . . . to risk violating host country law – which may, it is important to remember, include national security laws not specific to the extractive industries." Statement of Commissioner Gallagher. This sentiment was echoed by Commissioner Paredes in his dissent from the conflict minerals rule, which cited the Commission's exemptive authority under Section 36 of the '34 Act as "a distinct source of discretion that the Commission can avail itself of to fashion what it believes is the appropriate final rule." Statement of Commissioner Paredes 1 & n.4.

These statements by two of the Commission's five members indicate that there is substantial room for a difference of opinion as to whether an exemption was appropriate to reduce the burdens of the Rule on U.S. companies. And if a court were to agree with Petitioners

that an exemption was appropriate, the benefits for U.S. competiveness and U.S. investors would be profound.

Second, the Commission improperly imposed a public, company-specific disclosure requirement that it erroneously believed was compelled by the statutory text. Section 13(q) imposes no such requirement. To the contrary, the statute contemplates a two-step process for disclosure of information. First, companies must provide the Commission with an "annual report" that includes the "the type and total amount of . . . payments [made to the U.S. and foreign governments] for each project" relating to the "commercial development of oil, natural gas, or minerals," as well as the "type and total amount of such payments made to each government." 15 U.S.C. § 78m(q)(2). Then, as described in a separate section of the statute entitled "Public availability of information," the Commission shall, "*[t]o the extent practicable*," "make available online, to the public, a *compilation* of the information required to be submitted under the rules issued under paragraph (2)(A)." *Id.* § 78m(q)(3) (emphases added).

These statutory requirements may be satisfied by U.S. companies providing an "annual report" confidentially to the Commission, and the Commission then making publicly available—"to the extent practicable"—a "compilation" or aggregation of payment information submitted by the companies. This two-step process is consistent with the practice under the EITI, which, as noted, Congress identified as a model for Section 13(q). *See id.* § 78m(q)(1)(C)(ii) (referring to EITI); *id.* § 78m(q)(2)(E) (Commission's rules should "support . . . international transparency promotion efforts"). Under the EITI, "companies and the host country's government submit payment information *confidentially* to an independent administrator selected by the country's multi-stakeholder group, which is frequently an independent auditor." 77 Fed. Reg. at 56,367/3 & n.27 (emphasis added). The independent administrator then "reconciles the information

provided to it by the government and by the companies and produces a report," whose content "varies widely among countries." *Id.* Participants in the EITI process—including private companies, national governments, and civil-society groups—jointly agree on the level of publication in the report that is appropriate for each country. In that regard, a key "principle of the EITI is the recognition that achievement of greater transparency must be set in the context of respect for existing contracts and laws. *Particular care should be taken to balance the presumption of disclosure under the EITI with the concerns of companies regarding commercial confidentiality.*" EITI Source Book at 34 (emphasis added).

The process for disclosure described above would have effectuated that EITI principle, achieved fidelity to the statutory language, and saved American companies potentially billions of dollars in competitive losses. The Commission concluded, however, that "Section 13(q) *requires* resource extraction issuers to provide the payment disclosure publicly and does not contemplate confidential submissions of the required information," and that the Commission therefore lacked the discretion to take a different approach. 77 Fed. Reg. at 56,401/2 (emphasis added); *see also id.* at 56,391/1 ("We are not persuaded . . . that the statute allows resource extraction issuers to submit . . . the payment information confidentially to us and have the Commission make public only a compilation of the information. . . . We believe that Section 13(q) contemplates that resource extraction issuers will provide the disclosure publicly.") (footnote omitted). Thus, the Commission mandated that each U.S. company file its report on the Commission's online electronic database (EDGAR) and detail payments made to each and every foreign government, for each and every "project" relating to extractive industries. *See, e.g.*, *id.* at 56,401/1.

Petitioners believe the Commission's reasoning was flawed, which was also the conclusion of one of three Commissioners to consider the issue. At minimum, it presents "a

serious legal question." *Wash. Metro. Area Transit*, 559 F.2d at 844. The Commission majority treated the question of public disclosure as one answered by the terms of the statute itself—an issue resolved at "*Chevron* Step One"—but plainly the statutory language had not "directly spoken to the precise question at issue." *Chevron Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Rather, the Commission's own reasoning was based on a series of inferences and deductions, not on a clear statutory command as the Adopting Release asserted.

Those inferences and deductions, moreover, were mistaken. The Commission noted that the statute referred to companies providing "disclosure[s]" and "reports," and concluded that those must be public, 77 Fed. Reg. at 56,391/1, yet the EITI uses those very terms to refer to information that companies provide confidentially to the "reconciler," before it is aggregated and made public. *See, e.g.*, EITI Rules, 2011 Edition at Table of Contents and 3 (separately identifying requirements for "disclosure" to the reconciler and "dissemination" to the public), *available at* http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf; *id.* at 3.2(10) (referring to information "disclosed" by the company to the reconciler); and *id.* at 3.2(12) (referring to "company reports" given confidentially to the reconciler). Meanwhile, the Commission gave no weight to the sub-title in Section 13(q) that makes the "Public availability of information" contingent on compilation and posting by the Commission.

The Commission also observed that companies were required to submit their reports in an interactive data format, "which suggests that Congress intended for the information to be available for public analysis." 77 Fed. Reg. at 56,391/1. "Suggestions" about what Congress "intended" are not a clear statutory command that speaks "directly . . . to the precise question at issue" and forecloses agency discretion, however. Indeed, the Commission elsewhere has noted that receiving information in an interactive data format facilitates its performance of its own

responsibilities. *See* Final Rule, *Interactive Data to Improve Financial Reporting*, 74 Fed. Reg. 6,776, 6,793/3 (Feb. 10, 2009) ("The availability of interactive data . . . may also enhance [the Commission's] review of company filings.").

The Commission erred, moreover, not only in concluding that companies' reports would be public, but also in evidently determining that the reports *could never* be confidential. An alternative middle ground was for the Commission to require reports to be submitted to the Commission, and then to determine on a case-by-case basis whether the reports should be made available when requested by the public. As under the Freedom of Information Act, the reports would not have been disclosed if doing so would be competitively damaging; otherwise, they would be. Instead, the Commission appears to have taken the indefensibly extreme position of requiring that competitively damaging information be publicly disclosed.

Third, the Commission failed to define "project," an integral term of the Rule, despite commenters' insistence that a clear definition was needed. Specifically, commenters argued that if "project" were defined as a particular geologic basin or province, it would substantially reduce the costs and competitive injuries resulting from the Rule, because companies could aggregate payment information in a manner that was materially less likely to disclose competitively sensitive information. *See, e.g.*, API Comment Letter at 2 (Dec. 9, 2010). The Commission's reasoning for declining to define project was flawed. The Commission said at one point that "project" is a commonly used term whose meaning "is *generally understood* by resource extraction issuers and investors," 77 Fed. Reg. at 56,406/1 (emphasis added), but elsewhere said that there "does not appear to be a single agreed-upon application [of the term] in the industry," and excused its failure to define "project" on that basis, *id.* at 56,385/2. That inconsistent reasoning renders the Commission's decision legally vulnerable.

The Commission's approach to this issue failed to give companies clear direction on how to implement and comply with a rule whose initial implementation costs the Commission estimated at $1 billion. *See* 77 Fed. Reg. at 56,398/1. Companies must begin modifying their payment systems immediately to ensure compliance with the Rule by the end of next year. In doing so, they will feel pressure to develop compliance systems that take the conservative approach of disclosing the most granular level of detail possible, lest their understanding of "project"-based reporting be rejected by the Commission and additional, significant costs be incurred to retool and develop appropriate systems. This incentive is particularly keen since the Commission required that these reports be filed, not furnished confidentially, and therefore, material false statements could result in liability under Section 18 or Rule 10b-5. *See id.* at 56,395/3 & n.477. The Commission could have avoided these costs by adopting a clear definition of "project" that permits aggregated payments at the level of a geologic basin or district. Staying the Rule pending a decision by the courts will enable companies to defer developing their compliance systems until such time as this legal question is answered.

Fourth, and related to all of the points above, the Commission failed to properly consider the costs and benefits of the Rule, including whether *any* of the alternatives discussed above was appropriate in light of the Rule's staggering costs and uncertain benefits.

With regard to costs, the Commission estimated initial compliance costs of $1 billion, ongoing compliance costs of $200 to $400 million, and billions more in losses due to host country laws and private contractual provisions requiring confidentiality. *See* 77 Fed. Reg. at 56,398/1. With respect to indirect costs, the Commission "found warranted" commenters' concerns discussed above that "the impact of [ ] host country laws could add billions of dollars of costs to affected issuers, and hence have a significant impact on their profitability and

competitive position." *Id.* at 56,412/1. Specifically, commenters reported that they were likely to suffer losses of "tens of billions of dollars of capital investments . . . if issuers were required to disclose, pursuant to [the Commission's] rules, information prohibited by the host country's laws or regulations," *id.* at 56,402/3 (citing comment from Royal Dutch Shell), and that these losses would extend "well beyond resource extraction issuers" themselves. *Id.* (citing comment from API).

The Commission nonetheless vastly underestimated the adverse economic impact of the Rule. For example, the Commission declined to provide an exemption for "commercially sensitive information," *id.* at 56,368/1, 56,373/1, but provided no estimate or consideration of any kind of the magnitude or importance of the economic losses associated with the public availability of that information. And while the Commission acknowledged that at least 51 U.S.-listed companies do business in the four countries identified by commenters as prohibiting disclosure of government payments, it purported to quantify costs *for only three of those companies*. It estimated the combined lost cash flow for those three companies at approximately $12.5 billion, *see id.* at 56,411/3, 56,412/3, despite a single commenter's representation that it alone had more than $20 billion in investments in Qatar and China. *See* Royal Dutch Shell Comment Letter at 1 (Aug. 1, 2011). The Commission's failure to venture an estimate of the industry-wide impact of the Rule's effect on companies currently doing business or seeking to do business in foreign countries that prohibit disclosure—an economic impact considerably higher than $12.5 billion, given the Commission's observation that at least 51 companies do business in one or more of these countries—was error.

With regard to the Rule's benefits, the Commission offered only passing, indeterminate observations, stating, for instance, that "enhanced government accountability" under the Rule

"*may* result in social benefits that cannot be readily quantified with any precision." 77 Fed. Reg. at 56,398/2 (emphasis added). Remarkably, the Adopting Release made no determination that the Rule would produce any benefits at all.

To be sure, determining the effects of "payment transparency" on foreign peoples—and how best to administer a program that aids foreign peoples without placing inordinate costs on business—is not a matter within the Commission's historical expertise. It is a matter for which the Commission bears weighty responsibilities now, however. And the largest error of the Commission's cost-benefit analysis was its failure to consider *the terms of the Rule* in light of its staggering costs and any benefits it might yield. Simply, the Commission found no clear benefits from the rule that is among the costliest in its history. The dictates of reasoned decisionmaking, the Commission's heightened duty to consider efficiency and capital formation, and its obligation to avoid unnecessary anti-competitive effects all compelled the Commission to *re-examine what it was doing* in light of the Rule's immense costs and uncertain benefits. The Commission failed to do so.

In light of the foregoing defects, the Commission must acknowledge, at a minimum, that Petitioners' legal challenge presents serious legal questions, which in and of itself is sufficient for a stay. *See Wash. Metro. Area Transit*, 559 F.2d at 844.

2. A stay is appropriate to avoid irreparable harm. *See Comcast Corp. v. FCC*, 579 F.3d 1, 11-12 (D.C. Cir. 2009); *see also* 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948.1 (2005). In this case, Petitioners' members are likely to suffer irreparable harm in the absence of a stay because of the immediate, costly changes they must undertake to prepare to comply with the Rule, and because of the serious effect the Rule will have on their business activities and competitive position.

The Commission itself estimated the Rule's initial compliance costs at $1 billion, with ongoing compliance costs of $200 to $400 million. *See* 77 Fed. Reg. at 56,398/1, 56,412/1. The $1 billion in initial compliance costs will begin to accrue immediately, as companies prepare for the reporting that must begin in early 2014. *See id.* at 56,404/2 (noting that "resource extraction issuers will incur costs to provide the payment disclosure for the payment types identified in the statute, such as the costs associated with modifications to the issuers' core enterprise resource planning systems and financial reporting systems to capture and report the payment data at the project level, for each type of payment, government payee, and currency of payment"). Petitioners must immediately begin determining how to record, collect, and report the payment information required under the new Rule. *See* Exxon Mobil Comment Letter at 2 (Oct. 25, 2011) (explaining that the cost and extent of compliance efforts should not be underestimated). The Commission's failure to define "project" will amplify those costs, as companies modify their reporting systems without certainty regarding the level of granularity required by the Rule, and with the risk that the definition of "project" they adopt will be rejected by the Commission, requiring further system changes. These costs, which will be borne by more than 1,000 public companies (*see* 77 Fed. Reg. at 56,408/2), will be sunk costs that, once incurred, cannot be recouped even if Petitioners' suit ultimately is successful.

Although the disclosures required by the Rule will not begin until 2014, the consequences and costs of the disclosures will manifest themselves much sooner. Some countries prohibit disclosure of extractive industries payments, as discussed above. Others allow it, but may disfavor it. Some governments may conclude that they can begin reducing the harms they associate with disclosure now, by limiting the extent to which they enter new contracts with companies covered by the Rule. Petitioner API highlighted this precise concern in its

rulemaking comments: the failure to provide an exemption for foreign law and contract provisions that prohibit disclosure, it said, would result in "[h]ost governments [] select[ing] business partners or future projects that do not have similar reporting requirements." API Comment Letter at 29-30 (Jan. 28, 2011). For the 1100 companies subject to the Rule, the solicitation and execution of agreements for oil and gas exploration and development occur on a regular, on-going basis. U.S. companies therefore face an immediate, serious competitive disadvantage in these bids and negotiations in the absence of a stay.

In a similar way, the Rule's immense effects on companies' *existing* contracts and operations will not be deferred until payment information begins being disclosed and published in 2014. Concerned 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. Nor can the companies themselves wait until 2014 to confront the issue. The Commission rightly recognized that Section 13(q) threatens to function as "a 'business prohibition' statute that would force issuers to choose between leaving their operations in certain countries or breaching local law and incurring penalties in order to comply with the statute's requirements." 77 Fed. Reg. at 56,370/2; *see also* API Comment Letter at 25 (Jan. 28, 2011) (failure to provide an exemption for foreign law and contract provisions will cause "irreparable harm to investors, efficiency, competition and capital formation" because companies will be forced "to either withdraw from these projects or violate foreign law with the potential of incurring penalties and being prohibited from further activity in these countries"); PetroChina Comment Letter at 2 (Mar. 2, 2011) (without exemption, foreign private issuers will be "forced to abandon projects, renegotiate existing contracts or pay consequential damages for such violation"); Split Rock Comment Letter at 22 (Mar. 1, 2011) (observing that where companies

breach contracts, host countries could pursue a claim for breach or cancel the contract for cause and "potentially, tak[e] possession of the U.S. firm's assets, to the extent needed to complete the terms of the contract"). The Commission itself contemplated a scenario where a covered company "sells its assets" in a country that prohibits disclosure, potentially at "fire sale prices." 77 Fed. Reg. at 56,412/1-2. Transactions such as these cannot be deferred until 2014, since as the Commission recognized, mounting pressure for a company to dispose of an asset translates into downward pressure on the price the company will receive. *Id.*

Simply, the Commission predicted that companies will sell assets and abandon contracts to avoid violating foreign law through the disclosures mandated by the Rule—those prophylactic measures necessarily must occur *before* disclosure is required. They are 2013 events, not 2014.

The longer judicial proceedings take, the greater all of these costs will be. If litigation proceeds in the Court of Appeals, Petitioners are unlikely to obtain a ruling before Spring 2013. If litigation proceeds first in District Court, final relief could be two years away, and simply cannot be expected before the first disclosures occur in 2014.

The disclosures—and, particularly, their public dissemination—will cause further substantial and irreparable harm. The Commission acknowledged that the Rule "could add billions of dollars of [additional] costs" through the loss of business opportunities in countries that prohibited the disclosures. *See* Fed. Reg. at 56,398/1, 56,412/1. The Commission did not even attempt to quantify the additional competitive harms that companies might suffer from disclosure of confidential or proprietary pricing information. *See id.* at 56,410/1 & n.620 (noting that some costs, including decreased competitiveness, are "not necessarily captured" in its analysis). In the rulemaking, commenters confirmed the massive competitive injuries the Rule would impose, with API warning that "foreign companies could use the detailed disclosures

required by the [] rule to piggyback on the exploration of American companies or to negotiate more favorable terms from host governments, among other potential competitive harms." API Comment Letter at 3 (Jan. 19, 2012); *accord* Exxon Mobil Comment Letter at 29 (Jan. 31, 2011) ("Should other jurisdictions decide to implement substantially different reporting requirements, it could contribute to an unlevel playing field from a competitive perspective and contribute to shareholder harm for other U.S. registrants[.]"). The courts have long recognized that disclosure of a trade secret or other proprietary information constitutes irreparable harm, since once a trade secret becomes public it "[can]not be made secret again," and loses all value. *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983). The D.C. Circuit has previously acknowledged that in the oil business specifically, companies' "[b]id files are considered highly confidential by the producers; a competitor who had access to the bidding model developed—at high cost—by another producer could easily outbid his opponent." *FTC v. Texaco, Inc.*, 555 F.2d 862, 876 n.31 (D.C. Cir. 1977).

In this regard, Petitioners' First Amendment claim is germane as well. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Cal–Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 434, (9th Cir. 1993) (a mandatory assessment on almond handlers to fund almond marketing program implicated First Amendment and posed risk of irreparable harm); *United States v. Frame*, 885 F.2d 1119, 1132–33 (3d Cir. 1989) (compelled corporate speech posed irreparable harm). Petitioners do not expect the Commission to concede their First Amendment challenge, but it cannot be denied that the Rule will force companies to make involuntary representations to the public on controversial topics, costing the companies billions of dollars in competitive injuries.

3. A stay will serve the public interest, protecting investors from potentially billions in losses without any identifiable countervailing harm. The Commission itself was unable to identify with certainty any benefits to the Rule, or to predict its effectiveness in achieving its objectives. 77 Fed. Reg. at 56,403/2-3. Thus, the Commission cannot credibly claim that a temporary stay will cause injury. Many U.S. companies already comply with the EITI standards—a well-developed international transparency effort that serves the same purpose as the Rule without its onerous costs. That voluntary transparency initiative will continue to help further the purposes envisioned by Congress while the legality of the Commission's Rule is being determined.

CONCLUSION

By the vote of less than a majority of the Commissioners, the SEC adopted one of the most costly rules in its history. That action rested in substantial part on legal questions that the courts are best-suited to answer. As Petitioners seek those answers from the courts, a stay of the Rule will cause no identifiable harm, and will enable U.S. companies and their investors to avert potentially billions of dollars of unwarranted costs. With a stay in place, Petitioners will join the Commission in seeking expedited judicial review.

For the foregoing reasons, Petitioners respectfully request that the Rule's November 13, 2012 effective date be deferred by the amount of time that the case remains in litigation, and that a new compliance date be established through no-action relief at the time the litigation is concluded.

Dated: October 25, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to 17 C.F.R. § 201.154, the undersigned hereby certifies that the foregoing Motion to Stay Rule 13q-1 and its Related Amendments to New Form SD complies with the SEC's length limitations and is 6,763 words.

Dated: October 25, 2012

Eugene Scalia

Eugene Scalia

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN PETROLEUM INSTITUTE,
1220 L Street, N.W.
Washington, D.C. 20005

and

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
1615 H Street, N.W.
Washington, D.C. 20062

and

INDEPENDENT PETROLEUM
ASSOCIATION OF AMERICA,
1201 15th Street N.W.
Suite 300
Washington, D.C. 20005

and

NATIONAL FOREIGN TRADE COUNCIL,
1625 K Street, N.W.
Suite 200
Washington, D.C. 20006

Plaintiffs,

v.

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,
100 F Street, N.E.
Washington, D.C. 20549

Defendant.

Civil Action No. 12-1668

COMPLAINT

Plaintiffs AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INDEPENDENT PETROLEUM ASSOCIATION OF

AMERICA, and NATIONAL FOREIGN TRADE COUNCIL, for their Complaint against Defendant UNITED STATES SECURITIES AND EXCHANGE COMMISSION allege, by and through their attorneys, on knowledge as to Plaintiffs, and on information and belief as to all other matters, as follows:

I. INTRODUCTION

1. This is a lawsuit under the First Amendment to the United States Constitution, and under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* ("APA"), challenging a rule recently promulgated by the U.S. Securities and Exchange Commission ("SEC" or "Commission"), and the statutory provision authorizing that rule.

2. By a 2-1 vote (with two recusals), the Commission approved a rule requiring public companies to disclose certain payments of more than $100,000 when made to foreign governments for "projects" relating to the commercial development of oil, natural gas, or minerals. *See* Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365 (Sept. 12, 2012) ("Extractive Industries Rule" or "Rule"). Disclosures must also be made regarding payments to the federal government.

3. By the Commission's own reckoning, the Rule will cost U.S. public companies at least $1 billion in initial compliance costs and $200 to $400 million in ongoing compliance costs, and "could add billions of dollars of [additional] costs" through the loss of trade secrets and business opportunities. *See* 77 Fed. Reg. at 56,398, 56,412. The rulemaking record shows that the costs will actually be far greater, as U.S. oil and mining companies are forced to allow competitors access to sensitive commercial information, and to abandon projects to foreign state-owned companies in countries that forbid the disclosures or that simply refuse to do business with U.S. companies because they do not wish the disclosures to be made. Indeed, while the Commission did not quantify how many "billions of dollars" more its Rule might cost U.S.

businesses, it acknowledged that American companies may be forced to "sell their assets in the . . . host countries at fire sale prices," or else keep existing assets idle and "not use them in other projects." *Id.* at 56,412. The net result would be to compel U.S. oil, gas, and mining companies to engage in speech—in violation of their First Amendment rights—that would have disastrous effects on the companies, their employees, and their shareholders.

4. The Commission's principal defense of this onerous rule is to claim that it was required by law to issue the rule it adopted, under Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2220 (2010) (codified at 15 U.S.C. § 78m(q)). That claim is mistaken. Section 1504 provides that the Commission "shall issue final rules that require each resource extraction issuer to include in an annual report . . . information relating to any payment made by the resource extraction issuer . . . to a foreign government . . . for each project . . . relating to the commercial development of oil, natural gas, or minerals." *Id.* § 78m(q)(2)(A). Congress further provided that the Commission "shall make available online, to the public, a *compilation* of the information required to be submitted under the rules issued under paragraph (2)(A)." *Id.* § 78m(q)(3)(A) (emphasis added).

5. Thus, Section 1504 requires only that a "compilation" or aggregation of payment information made by all U.S. companies to each foreign government and the federal government be made publicly available. The Commission, however, grossly misinterpreted its statutory mandate to require that each U.S. company publicly file a report on the Commission's online electronic database (EDGAR) detailing each payment made to each and every foreign government, for each and every "project" relating to extractive industries. And the Commission adopted this approach despite the fact that publication of a "compilation" would have served the

purposes of the statute without further burdening U.S. companies or revealing trade secrets or pricing strategies to competitors.

6. This misreading of the statute by the Commission exacerbated the infringement of First Amendment interests caused by the statute itself. Section 1504 forces U.S. public companies to engage in speech that they do not wish to make, in violation of their contractual and legal commitments. The Commission has said that the purpose of this compelled speech is to give people of other nations information regarding their governments' revenues, so they may monitor the degree to which those revenues are expended for the public welfare and so that—through political action—they may change their governments' fiscal policies and practices. This compelled speech is not instrumental or essential to any government regulatory or enforcement program and does not further the investor protection purposes of the securities laws. On the contrary, the Commission has concluded that it will cost U.S. companies billions of dollars, and will advantage the owners of non-U.S. companies. In its final rule, the Commission only compounded the statute's infringement of constitutional rights by requiring U.S. companies to individually and publicly disclose the amounts and recipients of their payments.

7. In deciding to require this public, company-specific reporting, and at other key junctures in the rulemaking process, the Commission thoroughly failed to properly consider the costs and benefits associated with the Rule. Section 23(a)(2) of the Exchange Act prohibits the Commission from adopting "any . . . rule . . . which would impose a burden on competition not necessary or appropriate in furtherance of" the Act, and Section 3(f) requires the Commission "to consider or determine whether an action is necessary or appropriate in the public interest," and "whether the action will promote efficiency, competition, and capital formation." 77 Fed. Reg. at 56,373 & n.88, 56,397.

8. Yet, the Commission failed to properly consider the Rule's effects on competition, or whether the Rule was likely to achieve its desired benefits in light of its enormous costs. Indeed, the best the Commission could muster as to the Rule's purported benefits was that it "*may* result in social benefits" that "cannot be readily quantified with any precision." 77 Fed. Reg. at 56, 398 (emphasis added). As Commissioner Gallagher wrote in dissent, "we have no reason to think the SEC will succeed in achieving complex social and foreign policy objectives as to which the policymaking entities that *do* have relevant expertise have, to date, largely failed." Statement of Commissioner Gallagher (Aug. 22, 2012), *available at* http://www.sec.gov/news/speech/2012/spch082212dmg-extraction.htm#P28_6923.

9. While the Commission paid lip service to the requirement for cost-benefit analysis and tabulated (erroneously) some of the direct costs of the Rule, it repeatedly failed to resolve critical questions that directly relate to the Rule's effect on competition; made regulatory choices that exacerbated the competitive harm to U.S. companies and increased the burden on First Amendment rights; and flatly refused to allow any exemption from the Rule's requirements to protect U.S. companies from the billions of dollars in competitive harm it projected.

10. The Commission has statutory authority to provide exemptions from the requirements of its rules and from the Exchange Act when doing so is "necessary or appropriate" and consistent with the public interest (15 U.S.C. § 78l(h))—an authority the Commission has exercised under the Exchange Act and other securities laws scores of times in its history. In the final Rule, the Commission arbitrarily rejected any exemption from the Rule's disclosure requirements for projects in countries that forbid such disclosures by law. 77 Fed. Reg. at 56,368. That refusal flies in the face of principles of comity and the Restatement (Third) of

Foreign Relations Law, both of which counsel against implementing a statute in a manner that causes a direct conflict with foreign law.

11. Although such an exemption would have protected investors by preventing billions of dollars in lost business opportunities and compliance costs, the Commission reasoned, in circular fashion, that any exemption from the supposed requirements of Section 1504 would not further the purpose of the statutory provision—which would be true of *any* exemption from a statutory requirement, and which again ignores the Commission's independent obligation to consider the effect of its actions on competition, efficiency, and capital formation.

12. The Commission abdicated its statutory duties in other respects as well, including by refusing to define the critical statutory term "project," despite commenters' insistence that a clear definition was needed and that if "project" was defined as a particular geologic basin or province, it would substantially reduce the costs and competitive injury resulting from the multi-billion dollar Rule. Defining "project" by reference to a specific geographic location would have removed needless uncertainty about whether businesses needed to disclose granular (and unnecessary) information about every extractive operation, under every contract, at each particular site where oil or minerals are found. The Commission also refused the public an opportunity to comment upon its final economic analysis, which introduced information and methodologies that were not in the rulemaking record or the proposing release. Had the Rule been re-proposed, commenters would have shown that the Commission relied upon documents and suppositions outside the administrative record, and still vastly underestimated the total costs of this Rule.

13. As Commissioner Gallagher stated in his dissent from the Rule, the Commission ultimately failed to determine the benefits of the Rule and disregarded the "significant costs [to]

issuers—and thereby shareholders." Statement of Commissioner Gallagher, *available at* http://www.sec.gov/news/speech/2012/spch082212dmg-extraction.htm#P28_6923. The Commission, he said, "rejected[] a plain language reading of section 1504 that would minimize the competitive risk and lower the costs of our rule, but that would fulfill in all respects the legislative intent manifest in the provision's plain language. The cost-benefit analysis . . . did not seriously consider that."

14. In all these ways and more, the Commission acted arbitrarily and capriciously, and violated the Administrative Procedure Act, the Exchange Act, and the prohibition on compelled speech embodied in the First Amendment to the U.S. Constitution. Plaintiffs seek a declaration that Section 1504 and the Extractive Industries Rule violate the First Amendment and are null, void, and without force and effect; vacatur of the Extractive Industries Rule; and other necessary and appropriate relief, as explained in further detail in the Prayer for Relief below.

II. PARTIES

15. Plaintiff American Petroleum Institute ("API") is a national trade organization representing over 500 companies involved in all aspects of the domestic and international oil and natural gas industry, including exploration, production, refining, marketing, distribution, and marine activities. Its members include many of the leading public companies in the oil, natural gas, and mining industries.

16. Plaintiff Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and organizations. Its members include many of the leading public companies in the oil, natural gas, and mining industries. An important function of the Chamber is to represent the interests of its

members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly participates in cases that raise issues of vital concern to America's business community.

17. Plaintiff Independent Petroleum Association of America ("IPAA") is a national trade association headquartered in Washington, D.C. It represents thousands of independent oil and natural gas producers and service companies across the United States, including many public extractive industry companies that are directly affected by the Commission's Rule.

18. Plaintiff National Foreign Trade Council ("NFTC") is a trade association that was founded in 1914 by a group of American companies and now serves more than 300 member companies through offices in Washington, D.C. and New York. Its members include some of the leading public companies in the oil, natural gas, and mining industries.

19. Defendant SEC is (and was at all relevant times) an agency of the U.S. government subject to the Administrative Procedure Act. *See* 5 U.S.C. § 551(1). It was created in 1934 by the Securities Exchange Act. *See* Section 4, 15 U.S.C. § 78d.

III. JURISDICTION AND VENUE

20. This action arises under the Administrative Procedure Act, 5 U.S.C. §§ 500, *et seq.*, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, and the U.S. Constitution, U.S. Const., Amend. I. Jurisdiction therefore lies in this Court under 28 U.S.C. § 1331; *see also* 5 U.S.C. § 704.

21. Each Plaintiff has standing to bring this suit on behalf of its members because at least one of its members would have standing to sue in its own right, the interests it seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires

an individual member to participate in this suit. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010).

22. Venue is proper in this Court under 28 U.S.C. § 1391(e) because this is an action against an agency of the United States that resides in this judicial district and a substantial part of the events or omissions giving rise to this action occurred in this judicial district.

IV. BACKGROUND

A. Extractive Industries

23. The extractive industry sector comprises oil, natural gas, and mining companies. The industry is highly competitive and is essential to the economic health and national security of the United States, which depends on ready access to reliable and affordable energy and mineral resources. *See* API Comment Letter at 1 (Jan. 28, 2011). Indeed, the oil and natural gas industry provides nearly two-thirds of the primary energy consumed in the United States, including more than 95% of all transportation fuel consumed. *See* Chamber of Commerce, Institute for 21st Century Energy Comment Letter at 3 (Mar. 2, 2011). Extractive industries support millions of U.S. jobs, and millions more Americans invest in these companies through retirement and pension plans, mutual funds, and individual investments. *See* API Comment Letter at 1 (Jan. 28, 2012).

24. The Rule covers more than 1,000 public companies. *See* API Comment Letter at 1 (Jan. 28, 2011); *see also* 77 Fed. Reg. at 56,408. Many of these companies invest billions of dollars in foreign countries in myriad activities related to locating and extracting natural resources, "ranging from obtaining rights to explore, to the acquisition of seismic data, to the negotiation of agreements, to exploratory drilling, to development and production plans." API Comment Letter at 1 (Dec. 9, 2010). For example, Royal Dutch Shell has investments worth

over $20 billion in Qatar and China alone. *See* Royal Dutch Shell Comment Letter at 1 (Aug. 1, 2011).

25. Despite the number and size of the companies subject to the Rule, they ultimately "represent a small percentage of the global energy market and are not afforded the market power to compel host countries to enter into agreements that are subject to disclosure and against their national interest." Chamber of Commerce, Institute for 21st Century Energy Comment Letter at 3 (Mar. 2, 2011). Rather, "[o]ver 90% of the world's oil reserves are owned or controlled by National Oil Companies (NOCs)," most of which are not subject to the Commission's jurisdiction and will not be required to comply with Section 1504. *Id.*

B. Section 13(q) of the Securities Exchange Act

26. Section 1504 of the Dodd-Frank Act amended the Securities Exchange Act of 1934 to require that the Commission promulgate rules requiring "resource extraction issuer[s]" to disclose in an annual report to the Commission certain payments (that are non-de minimis) made to the United States or a foreign government in connection with any "projects" related to "the commercial development of oil, natural gas, or minerals." 15 U.S.C. § 78m(q) (Section 13(q)).

27. In enacting Section 1504, Congress made clear that it intended the Commission's rules to track, to the extent possible, the standards of the Extractive Industries Transparency Initiative ("EITI"). *See* 15 U.S.C. § 78m(q)(1)(C)(ii) (referring to EITI); *id.* § 78m(q)(2)(E) (Commission's rules should "support . . . international transparency promotion efforts").

28. EITI is a voluntary initiative launched by Tony Blair in 2002 that is presently supported by extractive industry companies, governments, investors, and civic organizations. *See* EITI Sourcebook at 4-5 (2005). The primary objective of EITI is to provide transparency to government leaders and citizens in resource-rich countries regarding payments made by

companies in the extractive industries to those countries' governments. *See* API Comment Letter at 3 (Oct. 12, 2010). As part of this process, when a country establishes a reporting regime under EITI, the country's government works cooperatively with civil society groups and with the oil, natural gas, and mining industries to establish a protocol for the reporting of payments. EITI Sourcebook at 34. EITI thus permits the parties to extractive industry contracts to determine the appropriate level of disclosure, including whether or not to publish company-specific payment information.

29. Consistent with the EITI, Section 1504 contains no requirement that company-specific information be publicly disclosed. On the contrary, a subsection titled "Public availability of information" provides that "*[t]o the extent practicable*, the Commission shall make available online, to the public, a *compilation* of the information required to be submitted under the rules issued under paragraph (2)(A)." 15 U.S.C. § 78m(q)(3) (emphases added).

30. Section 1504 was codified as part of Section 78m of the Exchange Act, a section as to which the Commission has express, longstanding statutory authority to grant exemptions when the Commission deems it "necessary or appropriate" and "finds . . . that such action is not inconsistent with the public interest or the protection of investors." 15 U.S.C. § 78l(h). In considering whether a particular exemption is "in the public interest," the Commission is required to consider "whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f). A separate provision of the Act, Section 23(a)(2), prohibits the Commission from adopting a "rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this title." 15 U.S.C. § 78w(a)(2).

31. The Commission has exercised its exemptive authority under Section 78l(h) and similar provisions scores of times in its history to relieve public companies from responsibilities

otherwise required by statute, including from disclosure obligations that could conflict with foreign law. For example, in 1935, one year after the Exchange Act was enacted, the Commission promulgated Rule 3a12-3, which exempts foreign private issuers from certain disclosure requirements under the Act. Similarly, the Commission previously granted an exemption to public companies required to disclose proved oil reserves, where such disclosures would violate local law. *See* Regulation S-K Item 1202, Instruction 4 to Paragraph (a)(2) (17 C.F.R. § 229.1202). The 1202 exception applies to virtually the same group of companies and the same foreign laws that prohibit disclosure of payment information.

32. The Commission's use of its exemptive authority in the past to avoid conflicts with foreign law is consistent with the longstanding principle of law and comity that acts of Congress should be construed to avoid conflicts with the laws of other nations. This use of the exemptive authority has also given effect to the Restatement (Third) of Foreign Relations Law, which provides that states must not require a person to do an act in another state that is prohibited by the law of that state.

33. In the past, the Commission has successfully championed its authority to provide exemptions from statutory requirements, even when doing so would "render[] protections that would otherwise be in force inapplicable with respect to a particular class of securities or issuers." *Schiller v. Tower Semiconductor, Ltd.*, 449 F.3d 286, 296 (2d Cir. 2006). As a matter of law, Congress is presumed to have been aware of this authority when Section 1504 was enacted as an amendment to Section 78m of the Exchange Act.

C. The Commission's Proposed Rule

34. On December 15, 2010, the Commission issued its proposed extractive industries rule. That rule proposal effectively ignored the enormous costs of the rule under consideration—

the only estimate it provided related to the time it would take a public company to prepare the required annual report. The Commission projected these costs as $11,857,200 annually (an average of about $10,000 per company) for outside professional services. *See* Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. 80,978, 80,994 (Dec. 23, 2010).

35. Though the Commission acknowledged that there might be additional "costs related to tracking and collecting information about different types of payments across projects," it made no attempt to quantify those costs and concluded that in any event they were "a result of the statutory requirements that [the Commission was] required to implement." 75 Fed. Reg. at 80,996-97.

36. The Commission's two-page discussion of the proposed rule's effects on efficiency, competition, and capital formation was similarly sparse. It consisted almost entirely of the Commission's acknowledgment of one commenter's concern that if the final rule required disclosure in cases where the host country forbid it, the rule would "harm the competitive position of issuers and be contrary to the interests of their investors." 75 Fed. Reg. at 80,997. Again, the Commission made no attempt to quantify or analyze these anticompetitive effects. *See id.* No mention at all was made of the crushing competitive losses U.S. public companies would suffer under the Rule.

37. The Commission did, however, actively solicit comment on whether the Commission should exempt certain categories of public companies from the final rule. *See* 75 Fed. Reg. at 80,980. Indeed, this was the first question posed in the Commission's proposed rule release. *See id.*

D. The Public Comments

38. During the public comment period, numerous industry representatives documented the onerous costs of the proposed rule, and the need for targeted exemptions to alleviate those costs.

39. Commenters estimated that initial and ongoing compliance costs alone could reach tens of millions or even hundreds of millions of dollars. *See, e.g.*, API Comment Letter at 44 (Jan. 28, 2011) ("Total industry costs just for the initial implementation could amount to hundreds of millions of dollars even assuming a favorable final decision on audit requirements and reasonable application of accepted materiality concepts.").

40. Commenters also noted that several host countries, including Angola, Cameroon, China, and Qatar, prohibit public disclosures such as those required by the final Rule. For example, China prohibits public disclosure of confidential business information in Chinese commercial contracts. *See* Royal Dutch Shell Comment Letter at Appendix C (May 17, 2011) (explaining that Chinese law prohibits disclosure of business secrets and Shell's contracts with the Chinese government require that business secrets be kept confidential). Likewise, Cameroon prohibits disclosure of all documents, reports, surveys, plans, data, and other information in petroleum contracts, without government authorization. *See id.* at 2 & Appendix A (explaining that "data" and "other information" could be construed to cover financial information associated with the performance of petroleum contracts); *see also* Exxon Mobil Comment Letter at 1-2 (Mar. 15, 2011) (discussing Qatar, Angola, and China prohibitions). Commenters added that many foreign governments would simply refuse to do business with companies that would disclose the terms of their contractual agreements. *See, e.g.*, Chamber of Commerce, Institute for 21st Century Energy Comment Letter at 3 (Mar. 2, 2011).

41. Royal Dutch Shell estimated that its costs due to lost business with these governments could exceed $20 billion. Royal Dutch Shell Comment Letter at 1 (Aug. 1, 2011). API, too, noted the "very real potential for tens of *billions* of dollars of existing, profitable capital investments to be placed at risk." API Comment Letter at 1 (Aug. 11, 2011).

42. Commenters also explained that the disclosure requirements would cause competitive injury by providing other market participants with commercially sensitive information, to the benefit of foreign state-owned oil companies that would not be subject to the disclosure regime. *See* Chamber of Commerce, Institute for 21st Century Energy Comment Letter at 3 (Mar. 2, 2011); 77 Fed. Reg. at 56,371 & n.66 (collecting comments). As Commissioner Gallagher explained in dissent:

> [L]et's be clear; we're talking about real competition. Although it would be natural to assume that our large and familiar domestic oil and gas companies fill the list of the world's top ten, that isn't the case. State-owned oil companies, some of them truly huge even by reference to our largest domestic publicly held oil and gas companies, are major competitors. I am talking about national oil companies in Russia, China, Iran, and Venezuela among others. These companies do not operate in the highly transparent, intensely regulated world of U.S. issuers. And, they will reap competitive advantages through today's rules.

Statement of Commissioner Gallagher, *available at* http://www.sec.gov/news/speech/2012/spch082212dmg-extraction.htm#P28_6923.

E. The Commission's Final Rule

43. On August 22, 2012, the Commission issued a final Rule that was deficient in numerous, critical respects. It failed to account for comments in the record, and wrongly interpreted Section 1504 as requiring companies to publicly disclose payment information relating to each extractive industries project in each foreign country, no matter what the cost. The Commission failed to apprehend the scope of the discretion it had to minimize the Rule's

burdens, and failed to exercise its discretion in a manner that would have reduced the Rule's costs on U.S. public companies, their investors and First Amendment rights, and on the U.S. economy as a whole.

44. The Commission also failed to discharge its statutory obligation under Section 23(a)(2) of the Exchange Act, which provides that the Commission "shall not adopt any . . . rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter." 15 U.S.C. § 78w(a)(2). Under Section 23(a)(2), the Commission was also obligated to consider whether the Rule placed any burdens on competition "not necessary or appropriate" in light of the purposes of the Exchange Act *as a whole*. The Commission arbitrarily failed to consider the economic and competitive effects of the Rule on public companies and investors, and also failed to tailor the final Rule in light of the paramount objectives of the securities laws, and the fundamental First Amendment rights at stake.

The Commission Improperly Imposed a Public, Company-Specific Disclosure Requirement That Conflicts with the Statutory Text

45. The Commission acknowledged that Congress modeled Section 1504 on existing EITI standards, and that its rule should reflect those standards except where the statutory text "*clearly deviates* from the EITI." 77 Fed. Reg. at 56,367 (emphasis added). And yet, the Commission misread the statutory text and legislative history to require that it deviate from the EITI practice, which permits host countries to report payment information on an aggregated basis. Instead, the Commission requires the filing of company-specific payment information that is publicly available via EDGAR.

46. Section 1504 provides that the Commission's final rules shall "require each resource extraction issuer to include in an annual report" to the Commission the specified payment information, and then, "[t]o the extent practicable, the Commission shall make available

online, to the public, a compilation of the information required to be submitted under the rules." 15 U.S.C. §§ 78m(q)(2)(A), (3)(A). As API explained in a comment letter, "the statute does not require that the submitted reports themselves be publicly available." API Comment Letter at 39 (Jan. 28, 2011). Rather, API explained, "The reporting obligation is to the SEC, which is then required to make a 'compilation' available," and only "as practicable." *Id.* Thus, Congress provided the Commission with "the flexibility to aggregate the reported payment information on a per-country basis, taking into account the practicability provision of the statute." *Id.*

47. API further noted that limiting public disclosure to the statutorily-mandated "compilation" of payment information "would be consistent with current EITI practice, and would eliminate many of the competitive harms that issuers face under the current proposal (with public disclosure on a disaggregated basis)." API Comment Letter at 40 (Jan. 28, 2011). Specifically, Plaintiffs warned that the Rule would require disclosing commercially sensitive contract terms to competitors; force companies to choose between ceasing to list on a U.S. stock exchange or violating foreign law or contracts with foreign countries that contain non-disclosure provisions; place SEC registrants at a competitive disadvantage relative to non-registrants; and undermine transparency by encouraging foreign governments to shift business to companies that are not subject to the reporting requirements (such as state-owned oil and natural gas companies). API Comment Letter at 3 (Dec. 9, 2010); Chamber of Commerce, Institute for 21st Century Energy Comment Letter at 3 (Mar. 2, 2011). Although fully apprised of these concerns, the Commission failed to heed them, and adopted a company-specific, project-specific disclosure requirement.

48. In explaining its rejection of confidential submission of company-specific information, the Commission stated that Section 1504's "provisions, when read together and

with the statute's transparency goal, mean that the statutory intent is for the disclosure made by resource extraction issuers to be publicly available." 77 Fed. Reg. at 56,391. In particular, the Commission reasoned, the requirement that companies submit their annual report in an "interactive data format . . . suggests that Congress intended for the information to be available for public analysis," and that, in any event, confidential submission would not address commenters' concerns because "the information may well be subject to disclosure under the Freedom of Information Act." *Id.* The Commission then compounded its error by requiring public companies to file their annual report, rather than merely "furnish" it, subjecting companies to the risk of liability under Section 18 of the Exchange Act or Rule 10b-5 for false or misleading statements. *See id.* at 56,395 & n.477.

49. In basing its decision in part on the supposition that FOIA "might" require public disclosure of the information in any event, 77 Fed. Reg. at 56,401, the Commission was obligated not merely to speculate, but to determine as best it could what FOIA *actually* would require. And in fact, FOIA specifically exempts from disclosure a company's trade secrets and commercial or financial information. *See* 5 U.S.C. § 552(b)(4) (exempting "trade secrets and commercial or financial information obtained from a person and privileged or confidential"). Indeed, SEC Rule 83 provides a well-established procedure for public companies to seek confidential treatment of submitted information in accordance with FOIA's exemptions. The Commission's indeterminate invocation of FOIA was therefore arbitrary and capricious.

50. The Commission similarly erred in concluding that Section 1504's requirement that information be filed in an "interactive data format" implied a congressional intention that the individual company information be made public. *See* 77 Fed. Reg. at 56,391. In fact, as the Commission has recognized elsewhere, interactive data formats can help facilitate the

Commission's own review of data—or its preparation of an aggregated compilation. *See* Final Rule, Interactive Data to Improve Financial Reporting, 74 Fed. Reg. 6,776, 6,793 (Feb. 10, 2009) ("The availability of interactive data . . . may also enhance [the Commission's] review of company filings.").

51. The Commission took no account whatsoever of the added burden on First Amendment rights associated with requiring companies to disclose their payments publicly, rather than to the Commission alone, so it could then make the data available to the public in an aggregated—anonymous—form.

52. The Commission's requirement of company-specific public disclosure rests on an erroneous interpretation of the statute, on doubly-flawed reasoning, and exacerbates Section 1504's intrusion on First Amendment rights. The Rule must be vacated.

The Commission Failed to Define "Project"

53. The Commission declined to provide a definition in the final Rule of the critical term "project," despite requests from commenters to do so.

54. Section 1504 provides that the Commission shall require public companies to include in their annual report to the Commission information concerning "the type and total amount of . . . payments made for each *project* of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals," as well as "the type and total amount of such payments made to each government." 15 U.S.C. § 78m(q)(2)(A) (emphasis added).

55. API and other commenters proposed that the term "project" in the statute be defined as "technical and commercial activities carried out within a particular geologic basin or province to explore for, develop and produce oil, natural gas or minerals." API Comment Letter at 2 (Dec. 9, 2010); *see also* Exxon Mobil Comment Letter at 6 (Jan. 31, 2011) (same). API

explained that it made sense to define "project" with respect to a particular geologic location because "[t]he existence of a particular resource, with its own unique physical and geologic characteristics, is the common factor that links a myriad of activities—ranging from obtaining rights to explore, to the acquisition of seismic data, to the negotiation of agreements, to exploratory drilling, to development and production plans—to a single common purpose." API Comment Letter at 2 (Dec. 9, 2010). Also, API noted that this definition of "project" could be consistently applied, and would permit companies to aggregate individual payments under a single contract or under multiple contracts (as long as they pertained to the same geologic basin), which would "help reduce the potential harm to companies and their shareholders from the disclosure of commercially sensitive information, violation of local laws, or breach of contract." *Id.*; *see also* Royal Dutch Shell Comment Letter at 3-4 (Jan. 28, 2011). Finally, commenters explained, this definition of "project" would permit companies to aggregate individual contracts and extraction operations in particular locations, thereby reducing the costs of the Rule and ameliorating some of its anticompetitive effects by, for example, avoiding disclosure of information that could be used by foreign competitors in future bids.

56. The Commission refused to adopt this definition of "project." Indeed, it declined to provide any definition at all—an abdication of responsibility that will cause uncertainty among companies subject to the Rule and thereby increase implementation costs. In doing so, moreover, the Commission relied upon arbitrary, inconsistent rationales for its actions.

57. The Commission stated at one point that "project" is a commonly used term whose meaning "is *generally understood* by resource extraction issuers and investors." 77 Fed. Reg. at 56,406 (emphasis added). If that is the case, then the Commission should have articulated that "generally understood" meaning to provide clarity and consistency in application.

Indeed, the Commission's suggestion that greater clarity and fewer costs would result from its *refusal* to define a statutory term is wholly inconsistent with its claim in another context that defining statutory terms provides *greater* "clarity" to regulated businesses, thereby increasing efficiency, competition, and capital formation. *See Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177-78 (D.C. Cir. 2010).

58. Elsewhere in the release, the Commission said that there "does not appear to be a single agreed-upon application [of the term] in the industry," and attempted to excuse its failure to define "project" on that ground. 77 Fed. Reg. at 56,385. That rationale, which is diametrically opposed to the one given pages later in the release, is arbitrary, capricious, and an improper basis for abdicating an agency's responsibility to resolve difficult questions and to provide clear direction to regulated entities being subjected to a multi-billion dollar rule.

59. The Commission's reasons for refusing to define project as a "basin" or "district" in particular were similarly arbitrary and inconsistent. It reasoned that basins or districts may span more than one country, but did not explain why that should matter when defining the term "project," beyond observing that it "would be counter to the country-by-country reporting required by Section 13(q)." 77 Fed. Reg. at 56,406. In fact, that is wrong, because the statute requires reporting by project *and* country: All payments on a project could be reported on a country-by-country basis. The Commission also noted that the definition "may" not reflect public companies' contractual relationships with foreign governments—a Delphic statement whose meaning, and relevance, the Commission failed to explain. *Id.*

60. In failing to define "project" as API and others advocated, the Commission abdicated its responsibility to promulgate a rule that burdened competition no more than "necessary or appropriate." *See* Exchange Act, Section 23(a)(2), 15 U.S.C. § 78w(a)(2).

Congress gave the Commission the flexibility to significantly reduce the costs and harmful effects of the Extractive Industries Rule, but the Commission washed its hands of that discretionary authority, opting instead for increased uncertainty and crushing costs. For this reason, too, the Rule must be vacated.

The Commission Failed to Grant Any Exemption from the Rule for Foreign Laws that Prohibit Disclosure

61. The Commission refused to provide an exemption to public companies in cases where disclosure is prohibited by foreign law, despite the costs and competitive disadvantages associated with denying such an exemption, and despite having solicited comments (in its very first question in the proposed rule) on whether it should exempt certain categories of public companies. *See* 75 Fed. Reg. at 80,980.

62. The Exchange Act provides the Commission with broad discretion to grant exemptions to public companies if an exemption is consistent with the public interest and the protection of investors. *See, e.g.*, 15 U.S.C. §§ 78mm, 78l(h). In considering whether an exemption is in the public interest, the Commission must account for effects on efficiency, competition, and capital formation. *See* 15 U.S.C. § 78c(f). The competitive benefits of an exemption in this case would have been vast: U.S. companies would be spared the possibility of losing billions of dollars in business to foreign and state-owned oil companies or having to sell dramatically devalued assets in foreign countries at "fire sale" prices. 77 Fed. Reg. at 56,412.

63. In refusing to allow any exemption from the Rule, the Commission explained that an exemption would detract from the transparency objectives of the statute. *See* 77 Fed. Reg. at 56,372. The Commission ignored, however, that *every* exemption to some extent reduces the efficacy of the statutory provision at issue; that is in the nature of an exemption. Indeed, the Commission's position is inconsistent with its prior acknowledgments that the Commission and

"Congress have long understood [that], in order to obtain certain protection for investors[,] it is sometimes necessary and appropriate to forego others through exemptive relief." *Schiller v. Tower Semiconductor, Ltd.*, No. 04-5295, SEC Letter Brief 10 (Jan. 10, 2006); *see also id.* ("an exemption can be consistent with the protection of investors even when it deprives those investors of certain statutory or regulatory protections that would apply in the absence of the exemption.").

64. The Commission's refusal to grant an exemption is also inconsistent with the agency's practice with regard to foreign law in particular. In the past, the Commission repeatedly has granted exemptions when public disclosure could conflict with foreign laws. Those exemptions include the 1935 exemption for foreign private issuers (Rule 3a12-3), and the more recent exemption for companies required to disclose proven reserves in countries where disclosure is prohibited. *See* Regulation S-K Item 1202, Instruction 4 to Paragraph(a)(2). Because Congress presumes that its statutes will be construed to avoid conflicts with foreign law, under the Restatement (Third) of Foreign Relations Law and principles of comity, and because avoiding such conflicts would reduce the costs of the Rule on public companies, the Commission was obligated to provide U.S. companies a limited exemption to Section 13(q).

65. In failing to grant the exemption, the Commission also failed to comply with its statutory duty under Section 23(a)(2) of the Exchange Act to issue a rule that burdens competition no more than "necessary or appropriate," and again deployed reasoning that it contradicted elsewhere in the Rule release. An exemption, it speculated at one point, "could undermine the statute by encouraging countries to adopt laws, or interpret existing laws, specifically prohibiting the disclosure required under the final rules." 77 Fed. Reg. at 56,372-73. Elsewhere in the release, however, when attempting to minimize the Rule's adverse competitive

effects, the Commission suggested the opposite, speculating that increasing global support for EITI will pressure countries to *adopt* disclosure obligations. *See id.* at 56,413.

The Commission's Cost-Benefit Analysis Was Flawed And Deprived Commenters of Proper Notice of the Commission's Methodologies by Failing to Disclose Them Before the Final Rule

66. The Commission introduced an entirely new cost-benefit analysis in adopting the final Rule, without providing the public further opportunity to comment.

67. In the final Rule release, the Commission made no determination whether the Rule would result in any benefits, nor any determination regarding the amount or extent of any such benefits. Rather, the Commission speculated that the Rule "*may* result in social benefits that cannot be readily quantified with any precision," and further stated that these benefits "do not appear to be ones that will necessarily generate measurable, direct economic benefits to investors or issuers." 77 Fed. Reg. at 56,398 (emphasis added). With respect to costs, however, the Commission calculated that the initial and ongoing compliance costs associated with the Rule would collectively total as much as $1.4 billion. *See id.*

68. The Commission reached this cost estimate by extrapolating industry-wide numbers from cost estimates provided by only four commenters, using formulae that the Commission did not previously rely upon or disclose in the proposed rule release. Using these formulae, the SEC estimated that the total initial cost of compliance for all public companies is "approximately $1 billion and the ongoing cost of compliance is between $200 million and $400 million." 77 Fed. Reg. at 56,398.

69. The Commission did not share its methodologies with commenters prior to the final Rule release. Moreover, as the Commission conceded, its methodologies had "limitations" that almost certainly underestimated the true costs of the Rule. 77 Fed. Reg. at 56,410. Indeed, these "limitations" were fatal flaws. For example, the Commission relied exclusively on data

provided by two large issuers (Barrick Gold and Exxon Mobil) to derive industry-wide estimates for initial compliance costs. The Commission calculated the ratio of these companies' costs to their total assets, and then assumed that all companies would incur costs at the same variable rate as these two large entities. *See id.* Besides relying on an unrepresentative sample of two companies for a group that totals over 1,000, the Commission's analysis discounted the real possibility that smaller companies will incur costs representing a higher percentage of total assets than their larger counterparts. *See id.*

70. With respect to indirect costs, the Commission grossly underestimated the adverse economic effects of the Rule. The Commission acknowledged that at least 51 public companies did business in the four host countries identified by commenters as prohibiting such disclosure (Angola, Cameroon, China, and Qatar), yet the Commission purported to quantify the costs for only three of those companies, estimating that the combined lost cash flow for the three companies would be approximately $12.5 billion. *See* 77 Fed. Reg. at 56,411. The Commission utterly failed, however, to venture an estimate on the industry-wide impact of the Rule's effect on companies currently doing business or seeking to do business in foreign countries that prohibit disclosure. That number is considerably higher than $12.5 billion: as noted, at least 51 companies do business in one or more of these four countries, and Royal Dutch Shell alone has more than $20 billion in investments in Qatar and China. *See* Royal Dutch Shell Comment Letter at 1 (Aug. 1, 2011).

71. In calculating the competitive costs associated with the potential for lost business in countries that prohibit the required disclosures, the Commission did not even bother to determine how many countries had laws on the books prohibiting disclosure. Rather, it merely

stated that commenters' concerns regarding lost business "appear warranted," and that host country laws "could add billions of dollars of costs to affected issuers." 77 Fed. Reg. at 56,412.

72. The Commission acknowledged that "losses could be larger" than its multi-billion dollar estimate if "firms are forced to sell their assets" in Angola, Cameroon, Qatar, and China at "fire sale" prices. 77 Fed. Reg. at 56,412. The Commission also admitted that it "[did] not have data on fire sale prices for the industries of the affected issuers," so—without seeking additional information or providing opportunity for comment—it relied upon a study of prices in the airline industry, finding a 10 to 20 percent decrease in sale prices. *Id.* The Commission did not explain why the distressed sale price for airplanes—mobile assets, by definition—would be comparable to the distressed sale price of multi-million dollar fixed assets in the oil industry.

73. Similarly, the Commission absurdly suggested that the losses from being forced to exit a country could be minimized by re-deploying assets in another location, a hypothesis that conflicts with the elementary facts of extractive industries: In extractive industries, the value lies in the right to access the resource, and above-ground development assets will often have little value if severed from the natural resources to which they relate.

74. Plaintiffs and other commenters were prejudiced by the Commission's failure to provide notice of its new cost-benefit methodologies and the analyses upon which it intended to rely in extrapolating costs of the Rule.

Commissioner Gallagher's Dissent

75. Commissioner Gallagher dissented from adoption of the Rule, criticizing the Commission for failing to adequately tailor the Rule to avoid significant adverse effects on competition and capital formation. "[W]e are *not* at liberty," he explained, "to ignore selectively the longstanding congressional mandate to consider the impact our rulemaking is likely to have

on competition." Statement of Commissioner Gallagher, *available at* http://www.sec.gov/news/speech/2012/spch082212dmg-extraction.htm#P28_6923 (citing Section 23(a)(2) of the Exchange Act). He continued:

> We are *not* entitled merely to *assume* that the rules we adopt will 'promote efficiency, competition, and capital formation.' Nor, for some rulemaking efforts, are we free to assume, first, the benefits themselves, then that they outweigh any costs entailed by the actions we may take. There is no legal basis for doing that. Congress has never said we should. The courts have been emphatic that we should *not*.

Id.

76. In particular, Commissioner Gallagher faulted the Commission for requiring disclosure even where it would "risk violating host country law," and potentially "offend local sensibilities to such a degree as to put . . . employees and operations at risk, or . . . cause companies to pull out of certain countries altogether." Statement of Commissioner Gallagher, available at http://www.sec.gov/news/speech/2012/spch082212dmg-extraction.htm#P28_6923. The Commission, he concluded, "did not need to do that." *Id.*; *see also* Statement of Commissioner Paredes at Open Meeting to Adopt a Final Rule Regarding Conflict Minerals Pursuant to Section 1502 of the Dodd-Frank Act (Aug. 22, 2012), *available at* http://www.sec.gov/news/speech/2012/spch082212tap-minerals.htm#P22_6540 (noting, in connection with a rule released the same day as the Extractive Industries Rule, that the Commission's exemptive authority "is a distinct source of discretion that the Commission can avail itself of to fashion what it believes is the appropriate final rule").

77. Commissioner Gallagher also observed that the Commission had done an even worse job assessing benefits than assessing costs, stating: "[W]e cannot accept, untested, the benefits Congress seeks as justifying whatever decisions we make or burdens we impose," but rather "are obligated to evaluate the various ways we could try to achieve any intended benefit."

Statement of Commissioner Gallagher, *available at* http://www.sec.gov/news/speech/2012/spch082212dmg-extraction.htm#P28_6923. The Rule, he said, does not have "any realistic prospect of achieving the desired result," yet "will impose significant costs on issuers—and thereby shareholders—in the process." *Id.*

COUNT ONE

SECTION 1504 AND THE EXTRACTIVE INDUSTRIES RULE VIOLATE THE FIRST AMENDMENT

78. The First Amendment to the United States Constitution protects persons' right to speak, and to refrain from speaking. This protection, which extends to statements that the speaker does not wish to make, covers corporations and individuals alike.

79. Section 1504 of the Dodd-Frank Act and the Commission's Extractive Industries Rule force U.S. companies to engage in speech that discloses sensitive, confidential information that the Commission concedes will cause them substantial economic harm. The disclosure requirement is content-based and extremely burdensome.

80. This compelled, non-commercial speech is not necessary or essential to administering any governmental program. The foreign-policy objectives espoused by the Commission make clear that the speech is not for purposes of regulating the securities market or protecting investors, indeed, it would be farcical to contend that a program found by the Commission to impose billions of dollars in costs on U.S. companies, with no discernible compensating benefit for shareholders, furthers the investor protection purposes of the securities laws.

81. Section 1504 and the Extractive Industries Rule force speech to be made for public consumption, not merely to the Commission for internal use. Indeed, rather than construing the statute so as to reduce the burden on First Amendment rights, the Commission

compounded the constitutional flaws of Section 1504 by requiring companies to publicly reveal confidential and potentially harmful information on a company-specific and project-specific basis.

82. The intent of these publication requirements is to influence controversial political matters in other nations and advance the U.S. government's foreign policy objectives, despite the knowledge that U.S. companies wish to avoid the speech because it is controversial with certain foreign governments and/or is barred by contracts with those governments or legal restrictions imposed by those governments. The practical effect of this requirement is to force private companies to engage in costly, burdensome speech in order to further the policy goals of the U.S. government.

83. Neither Section 1504 nor the final Rule satisfies the strict scrutiny required by the First Amendment because neither is the least restrictive means of serving a compelling government interest. Likewise, neither Section 1504 nor the final Rule can satisfy intermediate scrutiny because neither is narrowly tailored to serve a substantial government interest. In particular, the compelled speech does not relate to any illegal activity, nor is it necessary to dispel or counteract other deceptive speech. Moreover, the federal agency charged with designing, implementing, and administering the statute concededly is uncertain whether the speech in issue will be effective in achieving any benefit. Commenters identified numerous more narrowly-tailored means of furthering the statutory purpose, but those less restrictive alternatives were rejected for the arbitrary and capricious reasons set forth above.

84. Section 1504 and the Extractive Industries Rule violate the First Amendment rights of Plaintiffs' members and should be vacated and declared null and void.

85. Plaintiffs are therefore entitled to relief under 5 U.S.C. §§ 702, 706(2)(B).

COUNT TWO

ARBITRARY AND CAPRICIOUS AGENCY ACTION IN DECLINING TO ALLOW PUBLIC COMPANIES TO SUBMIT PAYMENT INFORMATION CONFIDENTIALLY TO THE COMMISSION

86. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

87. Plaintiffs and their members have been, and will continue to be, adversely affected and aggrieved by the Commission's promulgation of the Extractive Industries Rule.

88. The Commission acted arbitrarily and capriciously under the Administrative Procedure Act by misreading the statute to require public disclosure of a company's reports.

89. The Commission's interpretation of the statute conflicted with its own announced standard—that any interpretation should be consistent with EITI unless the text of the statute "clearly deviate[d]" from those standards. 77 Fed. Reg. at 56,367.

90. Confidential submission of data and publication in aggregate form would have saved American businesses and their investors billions of dollars. The Commission therefore bore a heavy burden under the Exchange Act to justify its adoption of a much costlier alternative when publication of aggregate data would have furthered the purposes of the statute without nearly the same adverse effect on competition. *See* 15 U.S.C. § 78w(a)(2). Because the Commission erroneously concluded that its hands were tied, there is nothing approaching a reasoned explanation for the Commission's choice in the final Rule.

91. The Commission also arbitrarily justified its decision to require public reporting in part on the ground that the reports "might" be available in any event under FOIA. 77 Fed. Reg. at 56,401. It was the Commission's responsibility to determine—not merely speculate—whether reports would be available under FOIA. And in fact, the reports would be exempt from disclosure because, as the Commission acknowledged, they contain confidential commercial and

financial information that will cost U.S. companies billions of dollars in competitive injury if made public. *See* 5 U.S.C. § 552(b)(4).

92. Had the Commission exercised its discretion to require confidential individualized disclosures, the Commission could have mitigated the Rule's constitutional infirmity under the First Amendment. Likewise, the Rule would have been more narrowly tailored, thereby mitigating the constitutional infirmity of Section 1504.

93. Plaintiffs are therefore entitled to relief under 5 U.S.C. §§ 702, 706(2)(A), (B), (C).

COUNT THREE

ARBITRARY AND CAPRICIOUS AGENCY ACTION IN FAILING TO DEFINE "PROJECT" AS A GEOLOGIC BASIN OR PROVINCE

94. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

95. Plaintiffs and their members have been, and will continue to be, adversely affected and aggrieved by the Commission's promulgation of the Extractive Industries Rule.

96. The Commission's failure to define "project" is arbitrary and capricious under the Administrative Procedure Act.

97. It lay within the Commission's discretion to define the statutory term "project" as a geologic basin or province. This definition would have protected U.S.-listed companies from potentially billions of dollars in compliance costs, by providing certainty in application and by permitting companies to aggregate innumerable individual payments made under various contracts as long as they all related to extraction of a particular resource in a particular geologic area. This definition—which also would have yielded a more narrowly-tailored rule that impinged less upon First Amendment rights—was arbitrarily rejected by the Commission, which

advanced inconsistent rationales and improperly abdicated its responsibilities when it refused to provide a definition at all.

98. It was arbitrary and capricious for the Commission to fail to define a critical term in the statute when commenters sought guidance and proposed a workable option. This failure to provide a definition will vastly increase implementation costs and impose unnecessary and adverse effects on efficiency, competition, and capital formation.

99. Plaintiffs are therefore entitled to relief under 5 U.S.C. §§ 702, 706(2)(A), (B), (C).

COUNT FOUR

ARBITRARY AND CAPRICIOUS AGENCY ACTION IN DENYING EXEMPTION TO PUBLIC COMPANIES IN CASES WHERE FOREIGN LAW PROHIBITS DISCLOSURE

100. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

101. Plaintiffs and their members have been, and will continue to be, adversely affected and aggrieved by the Commission's promulgation of the Extractive Industries Rule.

102. The Commission has express statutory authority to grant exemptions "upon such terms and conditions and for such period as it deems necessary or appropriate, if the Commission finds . . . that such action is not inconsistent with the public interest or the protection of investors." 15 U.S.C. § 78l(h).

103. The Commission, which solicited comments on possible exemptions, was bound under the Administrative Procedure Act to provide a reasoned explanation for why particular exemptions were or were not in the public interest. With respect to the proposed exemption for payments whose disclosure would violate the law of a foreign state, the Commission's circular reasoning that an exemption would not further the transparency goals of the statute was arbitrary and capricious.

104. The Commission also improperly relied on inconsistent assumptions about the incentives facing foreign countries. When seeking to minimize the Rule's adverse effects on competition, the Commission mused that public companies' loss of business to competitors would be reduced by the fact that foreign states are under pressure to accept the EITI standards. Yet, it refused to allow any exemption on the ground, in part, that an exemption would incentivize countries to *adopt* laws that would *prohibit* disclosures. That reasoning was arbitrary and capricious.

105. The Commission also misinterpreted the statute when it concluded that an exemption based on conflict with foreign law would be inconsistent with the structure and language of Section 1504. To the contrary, the statute is silent as to exemptions, and the Restatement (Third) of Foreign Relations Law and principles of comity accordingly required the Commission to interpret the statute to avoid conflict with foreign law. The Commission's disregard of these canons of construction was arbitrary and capricious, and resulted, yet again, in a greater intrusion on First Amendment-protected rights than would have resulted from a more reasonable and narrowly-tailored rule.

106. Plaintiffs are therefore entitled to relief under 5 U.S.C. §§ 702, 706(2)(A), (B), (C).

COUNT FIVE

ARBITRARY AND CAPRICIOUS AGENCY ACTION IN DISREGARDING EXCHANGE ACT SECTION 23(a)(2), WHICH PROHIBITS THE COMMISSION FROM "IMPOS[ING] A BURDEN ON COMPETITION NOT NECESSARY OR APPROPRIATE IN FURTHERANCE OF THE PURPOSES OF THIS TITLE"

107. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

108. Plaintiffs and their members have been, and will continue to be, adversely affected and aggrieved by the Commission's promulgation of the Extractive Industries Rule.

109. Section 23(a)(2) provides that the Commission "shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this title." 15 U.S.C. § 78w(a)(2).

110. The Commission's singular focus on Section 13(q)'s purpose of promoting transparency and the accountability of foreign governments was incomplete in light of the statutory command prohibiting the Commission from enacting rules that place burdens on competition "not necessary or appropriate in furtherance of the purposes *of this title*." Under Section 23(a)(2), the Commission was required to take into consideration the potential economic effects of the Rule on public companies and investors, consistent with the investor-protection goals of the Exchange Act as a whole.

111. The Commission acted arbitrarily and capriciously by failing to adequately consider whether its discretionary decisions in the rulemaking—including the decisions to refuse to allow confidential reporting, to define "project," and to grant an exemption for conflicts with foreign law—resulted in burdens on competition that were "necessary or appropriate" to further Congress's goals under the Exchange Act.

112. The Commission's analysis is also arbitrary and capricious because it simply asserted that its discretionary choices promoted Congressional intent, without providing supporting analysis or evidence.

113. Plaintiffs are therefore entitled to relief under 5 U.S.C. §§ 702, 706(2)(A), (C).

COUNT SIX

ARBITRARY AND CAPRICIOUS AGENGY ACTION BY INSUFFICIENT EVALUATION OF COSTS AND BENEFITS

114. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

115. Plaintiffs and their members have been, and will continue to be, adversely affected and aggrieved by the Commission's promulgation of the Extractive Industries Rule.

116. Section 3(f) of the Exchange Act requires the Commission "to consider or determine whether an action is necessary or appropriate in the public interest," and "whether the action will promote efficiency, competition, and capital formation." Under the Exchange Act and the Administrative Procedure Act, the Commission was required to set forth substantial evidence evaluating the costs and benefits of the Rule. It failed to do so.

117. The Commission's evaluation of the direct costs of the rule was flawed because the Commission extrapolated an industry-wide standard from data provided by two large companies, and likely underestimated the Rule's costs by assuming that smaller companies adapting the rule would incur costs amounting to the same percentage of total assets.

118. The Commission was also required, but failed, to make a definitive assessment of the indirect competitive costs of the proposed rule. Instead, the Commission made assumptions about whether particular countries' laws prohibit disclosure, but did not calculate proposed industry-wide competitive costs. It merely opined that commenters' concerns about the costs of the rule "appear warranted," 77 Fed. Reg. at 56,412, without considering the possibility that, if

the Rule were twice as costly as the Commission estimated, that might finally cause the Commission to reconsider its refusal to use its exemptive authority or reduce the Rule's burdens in other ways.

119. Plaintiffs are therefore entitled to relief under 5 U.S.C. §§ 702, 706(2)(A), (C).

COUNT SEVEN

ARBITRARY AND CAPRICIOUS AGENCY ACTION IN FAILING TO SOLICIT ADDITIONAL COMMENTS AFTER RELEASING FLAWED COST-BENEFIT ANALYSIS FOR FIRST TIME IN FINAL RULE

120. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

121. Plaintiffs and their members have been, and will continue to be, adversely affected and aggrieved by the Commission's promulgation of the Extractive Industries Rule.

122. In adopting the final Rule, the Commission relied on methodologies for calculating the costs and benefits that had not been disclosed or submitted for public comment previously in the rulemaking. Those methodologies involved attempts at ball-parking industry-wide costs by pointing to raw data submitted by two companies (in the case of initial compliance costs) or three companies (in the case of ongoing costs and indirect costs). These formulae were flawed and were not made public until the day the Commission released its final Rule, whereas in fact the Commission was required under the Administrative Procedure Act to provide public notice and an opportunity for comment on its new methodology and cost assessment. It was also arbitrary and capricious for the Commission to rely on extra-record material (i.e., a survey of the airline industry) to calculate expected costs.

123. Plaintiffs suffered prejudice because a proper cost-benefit analysis would have shown that the costs of the Rule are significantly higher than those estimated by the Commission, making it even more imperative that the Commission make discretionary decisions that would

reduce costs and diminish the adverse effects on competition—including granting appropriate exemptions and permitting confidential submission of data.

124. Plaintiffs are therefore entitled to relief under 5 U.S.C. §§ 702, 706(2)(A), (C), (D).

PRAYER FOR RELIEF

125. WHEREFORE, Plaintiffs pray for an order and judgment:

a. Declaring that Section 1504 violates the U.S. Constitution and is null, void, and with no force or effect;

b. Declaring that the Extractive Industries Rule violates the First Amendment of the U.S. Constitution and is null, void, and with no force or effect;

c. Declaring that the Extractive Industries Rule was promulgated by the Commission without statutory authority within the meaning of 5 U.S.C. § 706(2)(C); was not promulgated in accordance with procedures required by law within the meaning of 5 U.S.C. § 706(2)(D); and is arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A);

d. Vacating and setting aside the Extractive Industries Rule in its entirety;

e. Enjoining the Commission and its officers, employees, and agents from implementing, applying, or taking any action whatsoever under the Extractive Industries Rule;

f. Issuing all process necessary and appropriate to postpone the effective date of the Extractive Industries Rule in its entirety and to maintain the status quo pending the conclusion of this case;

g. Awarding Plaintiffs their reasonable costs, including attorneys' fees,

incurred in bringing this action; and

h. Granting such other and further relief as this Court deems just and proper.

Respectfully submitted,

Dated: October 10, 2012

/s/ Eugene Scalia

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