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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,

Eugene Scalia

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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
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

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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,

[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.