ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1398

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA; NATIONAL FOREIGN TRADE COUNCIL,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

———

OXFAM AMERICA, INC.,

Intervenor.

Petition for Review of Final Rule of the
United States Securities and Exchange Commission

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GLOSSARY

API	American Petroleum Institute
Commission, or SEC	Securities and Exchange Commission
EITI	Extractive Industries Transparency Initiative
IPAA	Independent Petroleum Association of America
NFTC	National Foreign Trade Council
PWYP	Publish What You Pay

STATUTES AND REGULATIONS

The text of relevant statutes and regulations is set forth in the Addendum to the Opening Brief of Petitioners.

SUMMARY OF ARGUMENT

The Securities and Exchange Commission, whose "primary purpose" is to protect investors, *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 849 (1975), is required to "consider" its rules' effects on efficiency, competition, and capital formation, and to avoid regulatory requirements that impair competition. Here, it determined that its Rule would impose more than $14 billion in costs on U.S. companies and investors, with no ascertainable benefit. In those circumstances, the Commission was duty-bound to exhaustively consider alternatives by which it could implement new Section 13(q) of the Exchange Act while also giving effect to its other statutory duties and its core mission of protecting investors.

In its brief as in its rulemaking, however, the Commission scoffs at the suggestion that it conduct "extensive analysis" to avoid unnecessary burdens on competition, investors, and issuers. SEC Br. 47. With pervasive reliance on legislative history of dubious provenance, the Commission constructs a flawed statutory interpretation under which it was compelled to adopt the Rule it did, despite the Rule's costs and uncertain benefits, and despite the Commission's authority to tailor exemptions from the Act to further the public interest and protect shareholders. This statutory interpretation—and the Commission's thin, often self-

contradictory explanations for its action—cannot bear the weight the Commission gives them, nor the burdens imposed by the Rule.

This Brief first addresses this Court's jurisdiction, and the unconstitutional decision by Congress and the Commission to compel speech so that its content will influence political affairs. The Brief then addresses the Commission's flawed assessment of the Rule's costs and benefits, and its failure to adjust the Rule's terms in response.

ARGUMENT

I. THIS COURT HAS JURISDICTION.

The Commission agrees with Petitioners that this Court has jurisdiction under Section 25(a) of the Exchange Act. 15 U.S.C. § 78y(a); SEC Br. 4. Oxfam's argument to the contrary rests on a misreading of Section 25 and its failure to acknowledge that, to the extent the Section is ambiguous, this Court may "not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985).

First, the Rule is an appealable "order" under Section 25(a). Oxfam erroneously states that the Court did not reach the question of jurisdiction in the decisions Petitioners cite. In *Investment Company Institute v. Board of Governors of the Federal Reserve System*, 551 F.2d 1270 (D.C. Cir. 1977), this Court squarely

held that the term "order" in the Bank Holding Company Act "mean[s] any agency action capable of review on the basis of the administrative record." *Id.* at 1277-78. A similar jurisdictional question was briefed thoroughly in *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005) ("*Chamber I*").

Oxfam emphasizes that neighboring Section 25(b) expressly authorizes direct appellate court review of certain "rules." That does not mean, however, that Section 25(b) must be the *exclusive* basis for directly reviewing rules. The bifurcated structure of Section 25 was Congress's response to the narrow interpretation of "order"—to exclude "rules"—which this Court adopted in 1950 but overturned in 1977 in *Investment Company Institute*. 551 F.2d at 1277-78; Pets. Br. 28-29. The fact that, in the interim, Congress enacted Section 25(b) to *ensure* direct review of rules adopted under new sections it was adding to the Exchange Act, is no basis to insist upon the mistaken interpretation of "order" that this Court subsequently rejected. This Court should interpret "order" in the Exchange Act in its modern sense and consistent with the judicial review provisions of other statutes administered by the Commission, including the Investment Company Act (*see Chamber I* and *Chamber of Commerce v. SEC*, 443

F.3d 890 (D.C. Cir. 2006) ("*Chamber II*")) and the Securities Act (*see Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010)).[1]

Second, Section 25(b) provides an independent basis for jurisdiction, because it provides for direct review of rules promulgated pursuant to Exchange Act Sections 15(c)(5) and (c)(6). *See* 15 U.S.C. § 78y(b). In promulgating the Rule, the Commission cited "Section 15" generally as authority for the Rule. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56,365, 56,417/3 (Sept. 12, 2012). The Commission has since said that subsection 15(d) was the specific grant of authority intended by this reference, but that does not deprive this court of jurisdiction, because when the applicability of a review provision to a rule is ambiguous on its face, the presumption for direct review prevails. *Lorion*, 470 U.S. at 745. That presumption, which avoids an "irrational bifurcated system" that causes "duplication of judicial review" and "attendant delays," should be applied here. *Id*. at 742 (internal quotation marks omitted).

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[1] Petitioners' reading does not render Section 25(b) superfluous because it would remain the sole basis for direct appellate court review when rules under the enumerated sections are not "capable of review" on the administrative record. Courts may permit fact-finding when agency action is not adequately explained in the record, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); the agency ignored relevant factors, *Citizens for Alternatives to Radioactive Dumping v. United States Department of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007); or in cases of improper behavior, *see id.*

II. THE RULE AND SECTION 13(Q) VIOLATE THE FIRST AMENDMENT.

A. The Required Disclosures Constitute Protected Speech.

The Commission's First Amendment defense founders on two irreconcilable claims: That Section 13(q) and the Rule further a compelling governmental interest by requiring speech so that its content may be used in political advocacy; and that the Rule is indistinguishable from other regulations of the SEC and other agencies.

In fact, the Rule is not a regulation of "'the exchange of information about securities,'" SEC Br. 55 n.30, quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985), and does not regulate speech "relating to the purchase and sale of securities." *SEC v. Wall Street Publ'g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988). In the Commission's words, the Rule's objectives "differ[] from the investor protection benefits that [the SEC's] rules typically strive to achieve," 77 Fed. Reg. at 56,397/3. The Commission conspicuously failed to determine that the Rule benefited shareholders and does not defend the Rule based on fraud prevention or any connection to the purchase and sale of securities. The rationale it provides would apply to all energy companies, not only those that offer securities. Constitutional protections are not suspended when speech regulation is appended to the Exchange Act.

The speech at issue is also unlike information that is reported to the government so it may discharge regulatory responsibilities, as with the government programs cited in the Commission's brief at 55-56. "The only significant responsibility that Section 13(q) assigns to the Commission," it says, "is to ensure that the issuers' payment information is provided to the public," SEC Br. 43, *i.e.*, compelling speech is the government's only role. The Court should not fear the implications of barring this innovation, it should fear the implications of allowing it.

This speech is distinct from the "purely factual" and "uncontroversial" ***commercial*** speech in cases like *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650-51 (1985), and *National Electrical Manufacturing Association v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), because—as the Commission concedes—Section 13(q) does not regulate commercial speech. SEC Br. 56 n.31, 59. Moreover, the Rule is not intended to "'dissipate . . . consumer confusion or deception.'" *Zauderer*, 471 U.S. at 651. In any event, Section 13(q) and the Rule could not survive even intermediate scrutiny. Pets. Br. 35 & n.8.

In fact, the speech compelled by the Rule is "'core political speech,'" that is, "communication[s] concerning political change," which is what the Rule intends to achieve. *Meyer v. Grant*, 486 U.S. 414, 422 (1988). That the disclosures are

factual does not divest them of their political character. Courts regularly invalidate statutes that compel "factual" information to further the government's political ends. In *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), the Court held that a Colorado statute requiring that initiative-petition circulators wear name badges, and that initiative sponsors report circulators' names, addresses, and pay, violated the First Amendment because these controls were "excessively restrictive of political speech." *Id.* at 187, 200, 204; *see also Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989) (invalidating ordinance requiring peepshow operators to submit to licensing regime and disclose names and addresses of shareholders).

This Rule is *more* offensive to First Amendment principles than the laws invalidated in those cases, because the content compelled here is intended to aid particular interests in a political dispute in other nations. The subjects of that dispute—government revenues (*e.g.*, taxes) and how they are distributed (*e.g.*, spending)—are perennial political questions.

Finally, the speech compelled by the Rule would be subject to the most stringent First Amendment scrutiny even if it were not political. "[S]trict scrutiny applies even in cases where the compelled disclosure is limited to *factually accurate* and *non-ideological* statements." *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council*, 683 F.3d 539, 552 (4th Cir. 2012)

(emphases added); *see also Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988) (cited in SEC Br. 58 n.33) (applying strict scrutiny to invalidate ordinance requiring professional fundraisers to disclose to donors the percent of charitable contributions that were provided to charitable organizations).

B. Section 13(q) And The Rule Cannot Survive Strict Scrutiny.

The Commission asserts that the Rule will "reduce global poverty, promote better governance, and advance U.S. energy and anti-terrorism interests." SEC Br. 60. Its lone supporting citation—a floor statement by a senator who voted *against* the bill (*infra* p. 16)—does not begin to satisfy a court's independent factual review under the First Amendment. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). Moreover, these uncertain, attenuated downstream effects fall outside the narrow circumstances that courts have found sufficiently compelling to survive strict scrutiny, Pets. Br. 33-34; indeed such "ineffective or remote support for the government's purpose" fails even intermediate scrutiny. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980). Reducing poverty *in the U.S.* would not justify abridging First Amendment rights—the fact that the purported beneficiaries are non-U.S. citizens does not trigger some "foreign policy" exception.

This case is leagues removed from *National Association of Manufacturers v. Taylor*, 582 F.3d 1 (D.C. Cir. 2009), where this Court's conclusion that Congress

had a "vital national interest" in compelling the "public disclosure of lobbying information," *id.* at 6, was supported by more than 50 years of caselaw holding that Congress may compel certain speech to protect the "effective, free functioning" of our political institutions. *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976). That is a far cry from forcing speech so its content will support political advocacy.

Finally, with respect to narrow tailoring, the Commission does not even address whether the alternatives described in Petitioners' Brief would have furthered the same interests while imposing a lesser burden on First Amendment rights.

C. Petitioners Have Not Waived Their First Amendment Challenge.

The Commission concedes that Petitioners have not waived their constitutional challenge to the statute. SEC Br. 54.[2] Because the Commission maintains that the Rule's disclosure requirement is *the same as* the statute's requirement, and is compelled by it, it follows that Petitioners' constitutional challenge to the Rule is not waived either. Put differently, the challenge to the Rule is waived only if (among other things) the statute does not contain the publication requirement the Rule adopted. But in that case the Commission's

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[2] Agencies may not pass on the constitutionality of statutes, *Nebraska v. EPA*, 331 F.3d 995 (D.C. Cir. 2003), and parties do not waive issues in rulemakings that it would have been futile to raise, *Cutler v. Hayes*, 818 F.2d 879, 891-92 (D.C. Cir. 1987).

statutory interpretation is wrong, and the Court may vacate the Rule on that ground.

In any event, waiver is a prudential concern "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The Rule's threat to First Amendment rights should be addressed now, not deferred to enforcement litigation between the Commission and individual companies that could be filed in courts across the country and take years to resolve.

III. THE COMMISSION VIOLATED ITS STATUTORY RESPONSIBILITIES TO CONSIDER ECONOMIC EFFECTS AND TO AVOID UNNECESSARY BURDENS ON COMPETITION.

A. The Commission Never Evaluated The Rule In Light Of Its Uncertain Benefits, Enormous Costs, And The Commission's Other Statutory Responsibilities.

The Commission confronted a serious dilemma: It had crafted one of the most costly rules in its history, with adverse consequences for competition, devastating losses for investors, and no ascertainable benefits. Rulemaking requires balancing—costs against benefits; one statutory goal against another. *See* Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. Chi. L. Rev. 1349, 1387 (2011) ("empirically informed" rulemaking requires agencies to consider whether "the benefits justify the costs, and if so, [whether] the agency [has] chosen the approach that maximizes net benefits"). The imperative to balance here was especially great for the SEC, an agency with a "central purpose[]" of protecting

investors, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967), a statutory duty to "consider" a proposed rule's effects on "efficiency, competition, and capital formation," 15 U.S.C. §§ 78c(f); 80a-2(c), and which may not adopt a rule that imposes "a burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act, *id.* § 78w(a)(2).

Yet, at this critical juncture in its rulemaking, the Commission appears not to have recognized that a juncture had been reached at all. At no point did it engage in a cohesive discussion of how to implement Section 13(q) while remaining true to its statutory duties to protect investors and avoid burdens on competition unnecessary to *all* the purposes of the Act. Instead, the Commission proceeded as if it were duty-bound to implement the statute in a specific way at all costs without regard to any other statutory obligations. In its brief, it advances an argument under which there is no point at which costs would have been so high, and anti-competitive effects so great, that the Commission would have taken a different approach to the Rule.

The Commission claims that it "satisf[ied] th[e] requirement" to consider the Rule's effects on efficiency, competition, and capital formation because it provided "estimates" of costs and concluded that benefits were undeterminable. SEC Br. 26-27. But economic analysis is not simply a mathematical exercise; the Commission's duty to "consider" effects on investors and on efficiency,

competition, and capital formation was an obligation to take them into account in crafting the Rule. The Ahab-like pursuit of a single objective *regardless* of economic effects is the *opposite* of "considering" economic effects. As for the Commission's responsibility not to impose a burden on competition "not necessary or appropriate in furtherance of the purposes of this chapter," 15 U.S.C. § 78w(a)(2), the Commission consigns it to a footnote (at 37 n.16).[3]

The Commission suggests that when Congress requires regulation, the agency must pursue the intended benefit no matter what the expense. But it is axiomatic that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). The Commission therefore attacks a straw man when it claims to have "faithfully" refused to "second-guess" Congress's regulatory decision. SEC Br. 29, 30. To determine *how* to implement Section 13(q) while respecting Congress's other statutory commands, the Commission needed a clear understanding of the benefits that would result from its action. Congress's "specific determination" that transparency was beneficial (*id.* at 30) did not constitute a "specific determination" of the type or extent of

[3] Better Markets suggests that the Exchange Act does not obligate the Commission to conduct *any* cost-benefit analysis. BM Br. 2. But as Better Markets all but concedes, this proposition conflicts with *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209 (D.C. Cir. 2004), as well as *Business Roundtable*, *American Equity*, and the *Chamber* cases. *Id.* at 12-13. This Court is not at liberty to conclude that those unanimous decisions "lack precedential weight." *Id.* at 2.

transparency needed, or the amount of benefit it would produce. The Commission concededly had discretion to provide exemptions from foreign countries' laws; reasoned decisionmaking on that topic, for instance, required the Commission to ascertain "as best it can" (*Chamber I*, 412 F.3d at 143) the benefits the Rule would provide, particularly where costs were greatest. *Infra* pp. 17-19. This case does not present the unusual circumstance described by the Court in *FCC v. Fox TV Stations, Inc.*, where "empirical data" was "unobtainable," 556 U.S. 502, 519 (2009), rather, the Commission could review a decade's experience with EITI and had ample information on the four countries that accounted for the lion's share of costs.

In sum, the Exchange Act requires the Commission both to "determine as best it can" the costs and benefits of its proposals, *Chamber I*, 412 F.3d at 61, and to "consider" those costs and benefits when writing the rule. 15 U.S.C. §§ 78c(f); 80a-2(c). This Court did not invalidate prior Commission rules merely because the math was wrong, but because such flaws afflict the "*weighing* of costs and benefits," *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153 (D.C. Cir. 2011) (emphasis added), and the agency's ability to determine the rule's "net benefit," *id.*, and "cost[s] at the margin." *Id.* at 1151. The Commission here failed to engage in that assessment when, ignorant of its Rule's benefits, it effectively treated benefits as infinite—whereupon it was prepared to impose infinite costs.

See Dissenting Statement of Comm'r Gallagher (Aug. 22, 2012), *available at* http://www.sec.gov/news/speech/2012/spch082212dmg-extraction.htm.[4]

Legislative history is also no substitute for the fact-finding and analysis required by the APA and the Exchange Act. The reliance on legislative history in the Commission's brief is exceptional—it cites legislative history 40 times, the administrative record only ten times—yet that history is an even flimsier house of cards than usual. The Dodd-Frank Act was the largest restructuring of the U.S. financial regulatory system since the New Deal. Section 13(q) was first proposed days before the Senate vote, but was dropped before the vote and added back during conference. *See* Senators Br. 8. There were no hearings on Section 13(q) in conjunction with Dodd-Frank, and on the floor, only brief reference was made to the provision by a handful of legislators (just as only a handful of legislators appear as *amici* to defend the Rule here). The document cited most frequently in the Commission's brief, the 2008 Senate Report on the "resource curse," is not legislative history at all: It is a report that Senator Lugar had prepared by the minority staff of a committee in a prior Congress two years before Section 13(q) was enacted.

[4] Better Markets points to instances where the Commission hedged that the Rule "may" benefit foreign citizens or investors. BM Br. 9. But a rule may not be based on non-committal "prediction[s]" of what "may" happen that "ha[ve] no basis beyond mere speculation." *Bus. Roundtable*, 647 F.3d at 265.

In no circumstances are courts to "give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the . . . statutory text," even when those Senators co-sponsored the statute. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 (2002); *see also Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 819 (D.C. Cir. 2008) ("We ordinarily do not give controlling weight to such colloquies."). Nor do references in a conference report "compel" a particular interpretation "under *Chevron* step one." *Cnty. of L.A. v. Shalala*, 192 F.3d 1005, 1015 (D.C. Cir. 1999). Reliance on legislative history is particularly hazardous with complex statutes that reflect a "legislative compromise" among many interests. *Barnhart*, 534 U.S. at 461. There is no basis to believe that, in this sweeping financial reform legislation, Senators' fleeting characterization of a single provision forged their colleagues' understanding of the provision and secured their vote. Indeed, Senator Lugar voted against Dodd-Frank.[5] If Senator Lugar's characterization of Section 13(q) didn't persuade *him* to vote for the bill, we have no reason to believe that it motivated the votes of his colleagues.

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[5] Senator Lugar's vote is recorded at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00208.

The opinions that Senator Lugar and other legislators expressed in their *amicus* briefs are "[p]ost-enactment legislative history" that "is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011).

Finally, in its use of legislative history the Commission betrays the usual selection bias. On the Senate floor, Senator Cardin told his colleagues: "[W]e have made some changes [to Section 13(q)] that will give the SEC the *utmost flexibility* in defining how these reports will be made so that we [] get the transparency we need *without burdening the companies*." 156 Cong. Rec. S3814 (May 17, 2010) (emphases added). The Commission and the four briefs supporting it make no attempt to square this statement with adoption of one of the most burdensome rules in the SEC's history through a rulemaking where the Commission proceeded as if it had "minimal discretion" (House Br. 8).

B. The Commission's Calculation of Costs Was Deeply Flawed And Required That The Rule Be Re-Proposed.

The Commission claims it was constrained in determining costs because it "relied almost entirely on data provided by public commentators," SEC Br. 37, but that is incorrect—the Commission admits that it looked outside the record to identify data from publicly available reports and databases, *see id.* at 33-34. It was aware, for example, that 51 companies affected by the Rule had operations in one of four countries identified as prohibiting disclosures, but it confined its estimate to the costs for *three* of those companies, even though the costs for all 51 would be far higher. 77 Fed. Reg. at 56,411-12. It made no effort to quantify the competitive harm posed by state-owned oil companies, which control over 90% of the world's oil reserves. JA 493. Countries wishing to avoid disclosure can divert

business to these foreign competitors, which also can use U.S. companies' disclosures to derive contract terms and other confidential information. *See* 77 Fed. Reg. at 56,402/1. The Commission made no effort to investigate or quantify these competitive effects. *See id.*

The Commission's calculation of the Rule's direct costs was also deeply flawed. Pets. Br. 20-22, 42-43. It reveals for the first time in its brief two "characteristics" in the Compustat® data set that it used to calculate direct costs that led to widely divergent assumptions about the assets held by covered companies in each of the two "methods" employed. SEC Br. 34 & n.15. These "characteristics," "methods," and the Commission's intent to use Compustat® were not disclosed in the Proposing Release and the public had no opportunity to comment on them, despite the "obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking." *American Radio Relay Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008). Moreover, the analysis ultimately bears no relationship to the task the Commission set out to do—identify a "range" of compliance costs. 77 Fed. Reg. at 56,408/1-2, 56,409/1.

The Commission's promulgation of the Rule without adequately calculating costs and benefits or "consider[ing]" the Rule's terms in light of them was prejudicial to Petitioners and requires that the Rule be re-proposed. Pets. Br. 45-

46. The Commission suggests there was no prejudice because a proper cost-benefit methodology would not "lead to revised cost estimates of an *order of magnitude sufficient* to change the Commission's conclusion as to petitioners' three proposals" to reduce the Rule's costs. SEC Br. 39 (emphasis added). That is not a defense of the Commission's rulemaking, however, but an indictment of its indifference to the Rule's effects.

IV. THE COMMISSION ARBITRARILY REJECTED LOWER-COST ALTERNATIVES TO THE RULE.

The Commission erroneously rejected three alternatives that would have greatly reduced the Rule's burdens. Each of these errors requires vacatur.

A. The Commission Misread The Statute To Compel Company-Specific Disclosures.

The Commission emphasizes that Section 13(q) is a "public disclosure" provision. SEC Br. 1-2, 40. That is true, but begs the question: Does the provision require companies to make company-specific disclosures? The adjacent conflict-minerals provision (Section 13(p)) imposes that requirement expressly in a subsection titled "Information Available to the Public," which requires each company to "make available to the public on the Internet website of such person the information" required by statute. 15 U.S.C. § 78m(p)(1)(E). Section 13(q) contains no such requirement. Rather, its analogous paragraph—titled "Public Availability of Information"—concerns publication by the SEC.

These differences in statutory language are sufficient by themselves to reject the Commission's conclusion that Section 13(q)'s plain language has "directly spoken to the precise question," *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984), and requires companies to publicly disclose their payments. The Commission's brief addresses this textual point only in a footnote, where it says the conflict minerals subsection requiring that "Information" be made "Available to the Public" on company web sites is merely a "*supplemental* mechanism[] for making the disclosures publicly accessible." SEC Br. 42 n.18. That retort is doubly-flawed: First, the Commission does not say what conflict-minerals provision imposes the *primary* publication requirement. To the extent it relies on the provision requiring issuers to file a "report," the same question arises as under Section 13(q)—Is that report public? Second, the Commission's retort fails to explain *why* Congress imposed a "supplemental" company-specific publication requirement for conflict minerals, but not extractive industries.

The explanation for that difference, of course, is that public disclosure of specific energy companies' payments to specific governments would have significant anti-competitive effects. That also explains another aspect of Section 13(q), namely, its omission of an earlier bill's express requirement that issuers file their reports publicly on the SEC "EDGAR" system. (*See* Pets. Br. 7 and the floor statement by Senator Cardin, *supra* p. 17: "[W]e have made some changes [to

Section 13(q) to] . . . get the transparency we need without burdening the companies.") The Commission says that under the earlier bill, companies' EDGAR filings were also a mere "supplemental mechanism" for public disclosure. SEC Br. 42 n.18. That makes no sense: If companies' filings were a "supplemental" means of disclosure but are now primary, that is a powerful reason to retain, not remove, the reference to EDGAR making clear the filings were public. Moreover, the "Public Availability of Information" paragraph of the earlier bill, in addition to referring again to EDGAR filing, required issuers' payment information to be "'accessible *by the public directly*, ***and*** in a *compiled* format, from the website of the Commission.'" SEC Br. 43 n.19 (emphases added). The final bill removed the EDGAR reference and the "direct access" requirement, and added the "to the extent practicable" limitation on the SEC's disclosure. And as the House *amici* note, an earlier House bill provided that issuers "'required [to] file an annual report'" (*i.e.*, a 10-K, which is public) must "'disclose *in such report*'" the payments made. House Br. 9 (alteration in original). The final bill omitted this language, and the Rule requires a report separate from the 10-K.

That the paragraph in Section 13(q) titled "Public Availability of Information" concerns the SEC's "'compilation,'" not issuers' filings, is further evidence that the statute does not require public filing. Pets. Br. 8. In response, the Commission invokes the absurdity canon, arguing that because the SEC

compilation must only be published "to the extent practicable," Petitioners' interpretation could mean that nothing at all becomes publicly available. The absurdity canon works against the *Commission*, however: Precisely because it would nullify the "Public Availability of Information" subsection if the Commission declined to publish anything at all, that subsection *does* require a publicly-available compilation by the Commission. The "to the extent practicable" limitation takes account of limitations on publication that may be warranted by foreign law, contractual obligations, or other competitiveness concerns.

The Commission also points to language in the same paragraph stating that "[n]othing in this paragraph shall require the Commission to make available online information other than the information required to be submitted under the rules . . . ." 15 U.S.C. § 78m(q)(3)(B). The Commission says this means that the information submitted by issuers "serves as the minimum information that the Commission *must* include in any public compilation." SEC Br. 42. The Commission has it backwards: This language describes the *most* that the Commission *must* publish, not "the minimum." The Commission need not publish *more* than what it collects from public companies, but it certainly may publish less if that is what's "practicable." Moreover, this language does not address the *form* in which the submitted information will be compiled and published. The most

reasonable interpretation is that it will be "compiled" and published on a government-specific basis, for ease of use by citizens of foreign countries.[6]

Finally, the Commission emphasizes that Section 13(q) requires companies to submit information in an "interactive data format," and notes that it previously stated in a rule release that information in this format can be useful to "investors and other members of the public." SEC Br. 14. The Commission simply ignores that in the *same* rule release, the Commission also said that it uses interactive data for its own internal purposes. Pets. Br. 14. Thus, the statute's "interactive data" requirement could have been given effect under Petitioners' approach to the Rule.

The Commission's other reasons for interpreting the statute to require public filing of company-specific information may be swiftly rejected. Company reports have *not* "always been made public" (SEC Br. 40; *see* Pets. Br. 49), and the "shareholder choice" (SEC Br. 40) rationale for other SEC filings is irrelevant to this entirely different regulatory program. And, the Commission not merely abandons but contradicts one of the Release's other principal reasons for requiring public filing when it says that "confidentiality . . . for FOIA is determined on a

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[6] The Commission suggests that "compiling" information means collecting and publishing issuers' reports in full, like a "compilation of judicial decisions" in a reporter. SEC Br. 43 n.19. Section 13(q)'s authors do not agree: to "compile," they write, means to "collect *and edit* into a volume." Senators Br. 14 (citing Merriam-Webster's Collegiate Dictionary (11th ed. 2003) (second definition; emphasis added).

case-by-case basis." SEC Br. 44 n.20. That is correct, generally[7]—and it is precisely why the Commission was wrong to interpret the Act to categorically preclude issuers from ever filing reports confidentially.

* * *

Section 13(q) is properly read to permit confidential submission of issuers' reports, with the Commission then compiling that data by country and publishing it on a non-company-specific basis. At minimum, that was one reasonable construction of the statute available to the Commission. But in a reversal of agencies' ordinary approach, the Commission resorts to a series of strained arguments to *deprive* itself of discretion. This abdication of discretion and failure to take responsibility for the Rule is replicated in the Commission's refusal to grant any exemption from the Rule's requirements, and its failure even to define one of the Rule's key terms. Perhaps the Commission felt some relief in saddling Congress with responsibility for the Rule's consequences, and not mastering an area where it "typically" does not regulate. 77 Fed. Reg. at 56,397/2-3. But it was the agency's job to make the "difficult" decisions necessary to craft the best rule possible. *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010).

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[7] Agencies are permitted to recognize "categorical" exemptions from FOIA for certain classes of information, and the Commission could have done so here. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 776 (1989).

B. The Commission Improperly Declined To Exercise Its Exemptive Authority.

The Commission may provide exemptions from the Exchange Act's requirements when consistent "with the public interest or the protection of investors." 15 U.S.C. § 78l(h); *see also id.* § 78mm(a)(1). It has used this authority many times in the past, including to make accommodations for foreign law. *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286 (2d Cir. 2006); Pets. Br. 15, 55-56.[8]

By the Commission's own reckoning (Pets. Br. 16, 54), a tailored exemption for four of the affected countries would have saved investors more than $12.5 billion, advancing the Commission's mandate "to protect investors and the general public," *Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 468 U.S. 137, 175 (1984), and its obligation to promote efficiency, competition, and capital formation, 15 U.S.C. § 78c(f). But despite its "'considerable regulatory discretion'" to grant exemptions, SEC Br. 46, the Commission refused to allow one.[9]

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[8] Petitioners have not waived their claim that the Commission acted arbitrarily in refusing to grant an exemption for contracts with confidentiality provisions. That challenge was advanced repeatedly in Petitioners' brief. *See* Pets. Br. 14-15, 53-54.

[9] The Commission does not and cannot argue that because it had discretion to grant an exemption, its decision is unreviewable. Assessing agencies' discretionary decisionmaking is the heart of APA review. *See Local 1219, Am.*

The Commission asserts that any exemption "would be inconsistent with the Congressionally identified public interest in promoting transparency in all countries." SEC Br. 46. The problem with this reasoning is that an exemption by definition reduces the extent to which a particular statutory purpose is achieved; on this reasoning, exemptions would never be granted. Pets. Br. 53. Moreover, Section 13(q) must be read *in harmony* with the Commission's exemptive authority and its other statutory responsibilities. The Commission's description of Section 13(q) itself is strained; that section does not say the Rule must reach "all" countries to be effective.

The Commission relies principally, however, on a new rationale: Section 13(q)'s purpose is to "circumvent an intransigent foreign government's desire to avoid . . . disclosure," SEC Br. 48, and an exemption related to "the most intransigent countries" would defeat this. *Id.* at 46. That argument fails on multiple grounds.

First, the Commission cannot defend the Rule on grounds not given in the Adopting Release. *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). (The

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Fed'n of Gov't Emps. v. Donovan, 683 F.2d 511, 515 (D.C. Cir. 1982). Particularly because it invited comment on whether to provide exemptions based on foreign law, the Commission was—as it tacitly concedes—obligated to proceed in a manner that was not arbitrary and capricious.

Commission's brief refers to "intransigent" countries nine times; the term does not appear in the Adopting Release.)

Second, this rationale—like the Commission's original one—ignores that exemptions by definition depart to some degree from the requirements of the statutory provision in issue. Moreover, the Commission's insistence that it could take no steps that reduced transparency conflicts with its refusal to define "project," which it admitted sacrificed transparency. *See* 77 Fed. Reg. at 56,406/1.

Third, the Commission is wrong that the over-riding purpose of Section 13(q) was to capture "intransigent" nations that refused to participate in EITI. It didn't identify that purpose in the Adopting Release, and elsewhere its brief emphasizes other objectives, such as "establish[ing] 'a new international transparency standard,'" and addressing the "corruption and instability" associated with "poor countries" whose revenues depend heavily on extractive industries. SEC Br. 1, 6-8, 15.

Fourth, for all the times it refers to "intransigent" countries, the Commission never says what that means. Plainly, the four countries of particular concern (Angola, Cameroon, China, and Qatar) can't be the heart of what Congress intended to address—they are just four of the dozens of countries affected by the Rule. JA 580. Moreover, EITI's website proclaims that China's "active support for the EITI will contribute towards good governance of extractive resources and a

level-playing field." China and the EITI, *available at* http://eiti.org/blog/china-and-eiti#. There is no record evidence that China is among the "*most* intransigent countries" (SEC Br. 46; emphasis added), or that, like the "resource curse[d]" nations, it is a "'poor countr[y]'" disproportionately reliant on oil revenue that has "'fueled corruption and conflict rather than growth and development.'" SEC Br. 6, 10. As for Cameroon, commenters *supportive* of the Rule identified it as "'close to compliant'" with EITI. SA 643. The State Department describes Qatar as a "dynamic, rapidly developing country that is among the wealthiest in the world by per capita income." http://travel.state.gov/travel/cis_pa_tw/cis/cis_1003.html#country). Nor does a nation's concern with disclosing sensitive contract terms make it "intransigent." One of EITI's governing principles is "respect for existing contracts and laws." The U.S. itself keeps certain contract information confidential. *See Canadian Commercial Corp. v. Dep't of Air Force*, 514 F.3d 37, 40 (D.C. Cir. 2008).[10]

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[10] Oxfam disputes whether these countries' laws prohibit the required disclosures. Oxfam Br. 5-7. But, as Oxfam itself concedes, the Commission concluded that commenters' concerns about the billion-dollar effects of these laws on companies "appear warranted." 77 Fed. Reg. at 56,412/1. The Commission does not and could not adopt a contrary position on appeal. In any event, even Oxfam admits that there is evidence in the record supporting the Commission's assessment. *See* Oxfam Br. 6 (noting Chinese prohibition on disclosing "'business secrets'"); *id.* at 7 (noting Qatar letter prohibiting "'commercially sensitive information . . . without limitation'").

Unlike EITI's nuanced, country-specific approach, the Commission made no effort to determine whether these countries were the "most intransigent" or would especially benefit from the Rule, such that incurring great costs was warranted and exempting them would substantially diminish Section 13(q)'s impact. The Commission bristles at the suggestion that it conduct "an extensive analysis" of exempting particular countries. SEC Br. 47. But "extensive analysis" is precisely what is called for before the SEC adopts a Rule so costly to shareholders and competition—especially when those costs are heavily localized in a relatively small part of the problem to be addressed. The Rule embodies what Justice Breyer has called the "classic administrative disease" of "carr[ying] the single-minded pursuit of a single goal too far" by investing immensely to address "the last ten percent" of a problem, thereby "impos[ing] high costs without achieving significant additional . . . benefits." Stephen Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 11 (1993).

Finally, the Commission's refusal of any exemption requires vacating the Rule because the agency depended on inconsistent rationales and ignored alternatives. To commenters' concerns over losses in countries that bar disclosure, the Commission responded (in part) that those countries' practices might soon change due to international pressure—but it ignored that pressure when it said that if nations that prohibited disclosure were exempted, more nations would adopt

prohibitions. The attempt to reconcile these statements in the Commission's brief (at 49) does not appear in the Adopting Release; under *Chenery*, it comes too late. Similarly, when commenters said that exemption could be limited to countries that *currently* bar disclosure, the Commission ignored that alternative. It claims now to have addressed it in three words in the Adopting Release—saying that nations might "'interpret[] existing laws'" to bar disclosure—but that rings hollow. SEC Br. 49. If dubious "interpretations" cropped up, the Commission could disregard them. Or, it could simply have exempted the four countries by name.[11]

C. The Commission Arbitrarily Refused To Define "Project."

Commenters asked that the key statutory term "project" be defined as a geologic basin or province, which indisputably would have reduced the Rule's costs by revealing less commercially-sensitive information. The Commission says this definition is "contrary to Section 13(q)'s emphasis on country-specific reporting because geological basins frequently run through multiple countries." SEC Br. 53. It also cites the statute's requirement to report payments by government, not merely by country. *Id.* at n.28.

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[11] The fact that Petitioner API questioned a "grandfather" exemption is irrelevant. Other commenters made the suggestion and the alternative was obvious; the Commission had a duty to address it. The other three Petitioners expressed no objection.

That retort makes no sense. It would have been simple to have companies report payments by country, government, and geologic province, even where the province spans multiple countries, as this chart demonstrates:

Country	**Government Unit**	**Geologic Province**	**Payment**
Brazil	Ministry of Mines and Energy	Paraná Basin	$10,000,000
Argentina	Ministry of Federal Planning	Paraná Basin	$20,000,000

This obvious error with regard to this key component of the Rule requires vacatur.

The Commission also provides no reasoned explanation for why it chose to leave "project" undefined. Its brief repeats the Delphic utterance from the Adopting Release that companies can glean the meaning of "project" from their contracts with foreign governments, which "define[] the relationship and payment flows between the resource extraction issuer and the government," and therefore supposedly "provide[] a basis for determining the payments, and required payment disclosure, that would be associated with a particular 'project.'" SEC Br. 51. The Commission nowhere explains, however, how the "payment flows" in a contract shed light on the meaning of "project." A single contract could cover multiple "projects," or several contracts might pertain to one "project." Companies' agreements with foreign countries take the form, *inter alia*, of capital investments, production-sharing contracts, exploration licenses, and land leases. JA 90. Which, if any, of these is the project? The Rule provides no guidance. Characteristically,

the Commission issued its confident pronouncements about companies' contracts without citing a single contract or any other record evidence in support.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,942 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2013, I electronically filed the foregoing Reply Brief of Petitioners American Petroleum Institute, Chamber of Commerce of the United States of America, Independent Petroleum Association of America, and National Foreign Trade Council with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, which served the brief on counsel for all parties. I also hereby certify that I caused 8 copies to be hand delivered to the Clerk's Office.

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