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January 21, 2016

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Mr. Brent J. Fields

Secretary

Securities and Exchange Commission

100 F Street, NE

Washington, DC 20549-1090

**Comment on Proposed Rule Requiring  
Disclosure of Payments by Resource Extraction Issuers**

Dear Secretary Fields:

I write to provide the following comments on proposed rule 13q-1, approved by the U.S. Securities and Exchange Commission (SEC), on December 11, 2015, on behalf of myself and the American Security Project (ASP), where I serve as the Director of Studies and Senior Fellow for Energy and Climate. Based in Washington, D.C., ASP is a nonprofit, nonpartisan public-policy organization created to educate public audiences about the changing nature of America's security and global leadership in the 21st Century.

ASP's interest in this issue derives from the belief that greater transparency of resource-extraction payments to foreign nations is fundamentally a good thing; that putting in place a protocol that allows for these disclosure data to be submitted, collected, curated and made available to the public in a broadly accessible and intelligible way is essential to the program's success; and that the SEC has an historic opportunity to implement a system that, if done right, can be replicated by regulatory agencies around the world, allowing the United States to reclaim a position of leadership. I was the author of a report, "Alleviating the Resource Curse" published on November 23, 2015 that explained these principles in full, and provided a model for how to move forward. The report was provided to the SEC through your public comment protocol.

As currently constituted, I am concerned that the proposed rule falls short on a number of these core imperatives. The rule will adopt fundamental aspects of proposed payment disclosure directives from Europe and elsewhere. If these rules are implemented here, it will make it harder – not easier – to both protect the competitiveness of U.S.-listed companies operating abroad and provide the public with the information it needs to ensure that the governments receiving these payments can be held to account.

In my November report, I outlined a foreign-payments disclosure system that would deliver on the priorities of transparency for the public and competitiveness for American industry. That report focused in particular on the value of embedding a “dashboard” tool for viewing disclosed data that could be accessed and used by lay audiences. Such a tool that would allow interested parties to gather information on payments broken-out by the type of resource that had been produced, the type and nature of the extraction activity in question, and the specific state, province and/or regional jurisdiction in which those activities had taken place.

Congress’s intent in advancing this historic legislation was not merely to create new data streams for the sake of creating new data streams – as I’m afraid this rule would do. Congress meant to build on the work that has already been done, most notably through the international Extractive Industries Transparency Initiative (EITI). We can introduce greater order, consistency, accessibility and informational integrity to the existing regime. Having in place a system that allows for this level of disaggregated disclosure is critical in delivering on the broader policy imperatives envisioned by Congress when it first passed Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act back in 2010.

But as other commenters have noted in their submissions, the protocols currently being contemplated by various regulatory agencies abroad, and specifically in and by the European Union (EU), suffer from many of the same structural inconsistencies and incongruities that Congress rightly sought to correct by way of Dodd-Frank. Most troubling, the new proposed rules issued by SEC appear to accept at face-value the utility of adopting an overly expansive EU definition of what constitutes a “project,” potentially forcing regulated parties to release detailed contract-level information related to their specific operations and putting them at a significant competitive disadvantage relative to non-listed, and particularly state-sponsored, firms that are not subject to the same rules.

The report specifically addressed the issue of defining a project, specifically saying that all resource extraction projects can be defined by three key attributes: (1) What resource is being extracted, (2) How the resource is being developed, and (3) Where the development is taking place. The combination of what resource, how it is extracted, and where it is extracted from is a comprehensible, easily accepted way of reporting that will produce meaningful results.

Everyone agrees that the overriding public-interest goal of Section 1504 isn't to handicap U.S.-listed firms relative to their state-owned competitors. It's to create a system that allows disclosure data to be usable to public audiences – so that these audiences themselves can insist on accountability from their home governments.

Nothing we've seen from the disclosure protocols being contemplated by the EU and other foreign regulatory agencies gives us confidence that citizens will have access to such a system if the SEC goes forward and adopts a de facto EU model. To the contrary, the regimes currently being discussed appear to suffer from many of the same problems that make our present system ineffective: companies use different definitions to describe largely similar activities; there are no standardized naming conventions for projects; and great volumes of data is generated by many of different parties, but there is no framework in place that allows everyday citizens to have even a fighting chance of understanding what's actually being reported.

The good news, as discussed in ASP's November report, is that a workable model does exist, and with a few small but important changes made to its structure, could be adopted in a way that addresses each and every one of the issues highlighted above. Specifically, the data disclosure dashboard system developed by the American Petroleum Institute (API), would seem on its face to represent a credible, significant upgrade over the protocols at the core of the proposed set of rules promulgated by SEC this past December. Attached to this letter, please find a copy of that study, which I previously submitted to the Commission soon after its new rules were announced.

I understand the Commission's previous attempts over the past several years to develop, refine and implement a 1504 rule that both aligns with Congress's goal of promoting greater foreign payment transparency in the resource-extraction sector and protects the competitiveness of U.S.-listed firms operating abroad. ASP commends the SEC for its diligence and hard work in arriving at the point where we find ourselves today.

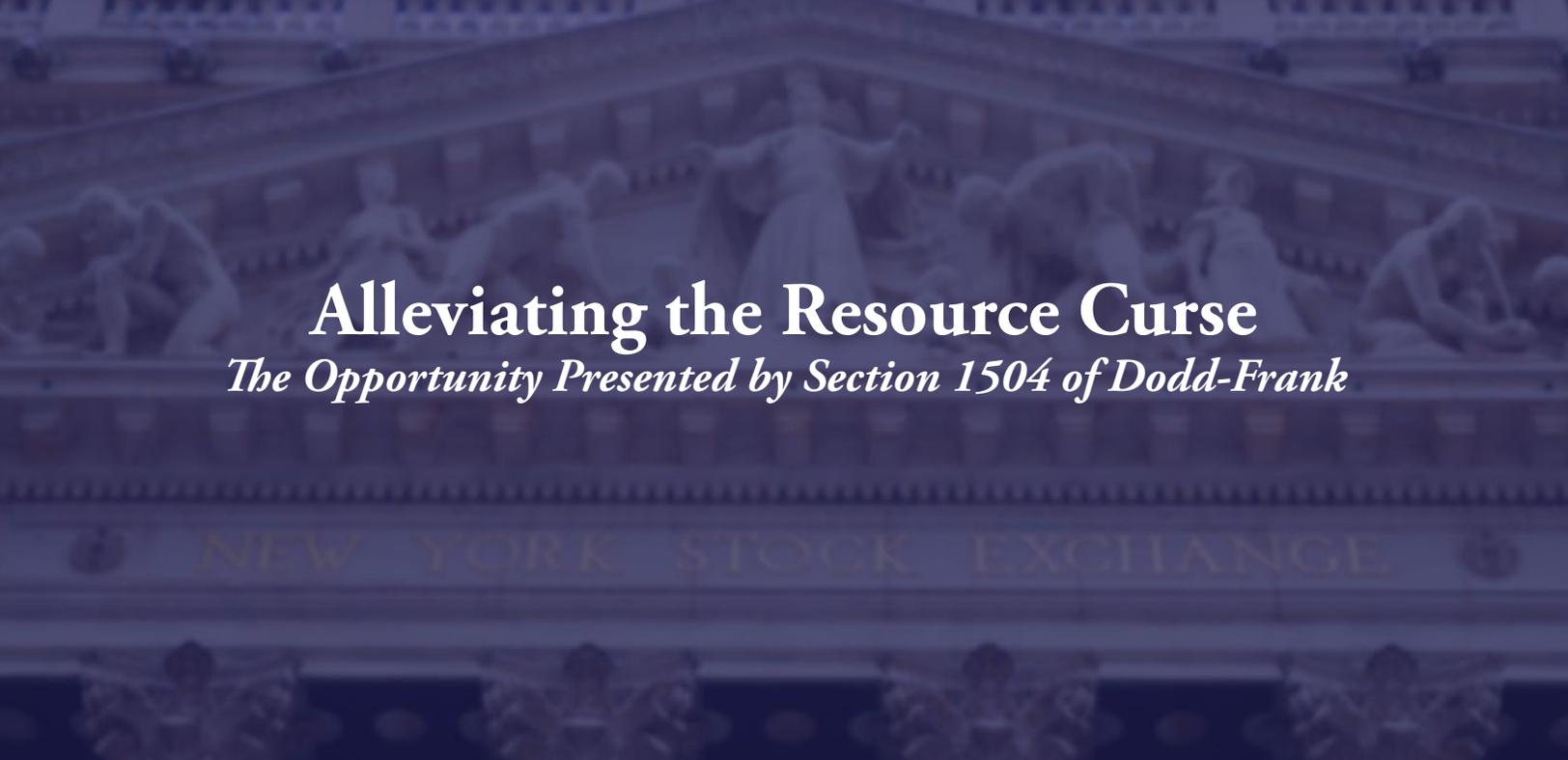
But, as discussed in the report, there will be no "do-overs" available to the Commission this time around. This final stage represents the last opportunity for SEC to put a system in place that both works here at home and can be adopted as a standard around the world. This is the final chance to deliver to citizens both here in the United States and around the world a regime that is actually useful in a real-world context.

Unfortunately, the current proposed rule does not, at present, meet this standard, and I hope the Commission uses this comment period and the time still available to make the changes necessary to ensure that it can, and does, meet it moving forward. I thank you for your time and for your forthright consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Holland". The signature is fluid and cursive, with a long horizontal stroke at the end.

Andrew Holland  
Director of Studies  
American Security Project



# Alleviating the Resource Curse

*The Opportunity Presented by Section 1504 of Dodd-Frank*



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Perspective

—  
Andrew Holland

November 2015

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Mr. Augustine was Chairman and Principal Officer of the American Red Cross for nine years and Chairman of the Council of the National Academy of Engineering.



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The Hon. Jeffery Bleich heads the Global Practice for Munger, Tolles & Olson. He served as the U.S. Ambassador to Australia from 2009 to 2013. He previously served in the Clinton Administration.



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Congressman Donald Beyer is the former United States Ambassador to Switzerland and Liechtenstein, as well as a former Lieutenant Governor and President of the Senate of Virginia.



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Scott Gilbert is a Partner of Gilbert LLP and Managing Director of Reneo LLC.



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Vice Admiral Gunn is the President of the Institute of Public Research at the CNA Corporation, a non-profit corporation in Virginia.



### **The Honorable Chuck Hagel**

Chuck Hagel served as the 24th U.S. Secretary of Defense and served two terms in the United States Senate (1997-2009). Hagel was a senior member of the Senate Foreign Relations; Banking, Housing and Urban Affairs; and Intelligence Committees.



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Lieutenant General Kennedy was the first woman to achieve the rank of three-star general in the United States Army.



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General Lyles retired from the United States Air Force after a distinguished 35 year career. He is presently Chairman of USAA, a member of the Defense Science Board, and a member of the President's Intelligence Advisory Board.



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Hani Masri is Chairman of Capital Investment Management Inc. based in McLean, Virginia and specializing in fund and investment real estate management in the U.S. He also serves as President of M2 Investors, Inc.



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Dennis Mehiel is the Principal Shareholder and Chairman of U.S. Corrugated, Inc.



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Edward Reilly is Global Chief Executive Officer of the Strategic Communications practice of FTI Consulting.



### **Dante Disparte, Chairman of the Business Council for American Security, Ex Officio Member**

Dante Disparte is the founder and CEO of Risk Cooperative, a strategy, risk and capital management firm focusing on mid-market opportunities.

## In this Report:

Very soon, the Securities and Exchange Commission is expected to announce new proposed regulations under Section 1504 of the 2010 Dodd-Frank Financial Reform Act. The goal is to increase transparency and provide the public with greater access to information related to the payments that U.S.-listed companies make to foreign governments to extract oil, gas, and mineral resources. The rulemaking has been delayed by lawsuits and SEC inaction. But now the SEC has an opportunity to put in place a policy for disclosure that is accessible and effective.

## Interact:

Discuss section 1504 of Dodd-Frank with the author at @theAndyHolland  
Learn more about ASP at @amsecproject

## IN BRIEF

- Too often, poor and developing countries that experience a natural resource boom end up worse off than if they had never found the resource in the first place; the “resource curse.”
- The best way to prevent the resource curse is for the government, companies, and civil society to come together and agree on regulations that increase transparency, allowing the rewards of resources to be shared in a just and efficient way.
- Many governments, however, are not responsive to such initiatives– and companies that disclose payments unilaterally are placed at a competitive disadvantage in contracts. Therefore, mandatory disclosure of payments to governments is warranted.
- The EU has already proposed transparency rules for companies listed on European markets, but the implementation is inconsistent across Member States, and it is difficult to compare the data across countries
- Extractive industries, once strongly opposed to any mandatory transparency disclosures, have now put together a model providing project-based transparency that is usable and effective.
- With one final requirement added to the industry model – disclosure of company-specific payments – this could provide the SEC with a way to provide world-leading transparency, without affecting competitiveness.

## About the Author

*Andrew Holland is the Director of Studies and Senior Fellow for Energy and Climate at the American Security Project. He was a Legislative Assistant on Energy, Environment, and Infrastructure for United States Senator Chuck Hagel of Nebraska from 2006 through 2008. He has written widely about energy, the environment, and how they relate to geopolitics.*

## The Need for Transparency

Finding natural resources like oil, gas, or minerals should be a boon to the people of the country where the resources have been found. Unfortunately, too many times, countries experience a “Resource Curse” where – instead of a boom that boosts incomes, GDP, and well-being – the value of natural resources are lost and people are left worse off. Sometimes, the country is hurt by the natural boom-bust cycle of global commodity markets or the value of their currency is changed by the value of natural resource exports – harming the competitiveness of other domestic products (the so-called Dutch Disease). Also too often, many of the benefits of a natural resource boom have only accrued to a well-connected elite, or have simply been stolen.

The best way to deal with this problem is with transparency. When citizens can see how much money their government is receiving from oil, gas, and mining companies, they can make informed decisions about where that money should go, and how their governments should use it. Corruption thrives when the public cannot track what revenues governments receive and how they are spent. Transparency is important for American taxpayers and stockholders as well. If American companies know that their competitors cannot bribe officials, they will feel more comfortable bidding for projects. The American government has an interest in transparency beyond pure altruism: extractive industry revenues in developing countries provide far more money than any American aid program possibly could – but it will only help the economy if it does not end up in the pockets of corrupt officials.

In order to bring more transparency to the extractive industries, in 2010, as a part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress passed legislation that would mandate all companies engaged in the development of oil, natural gas, or minerals around the world to disclose all payments made to foreign governments. Inserted into the legislation in a bipartisan manner by Senators Lugar and Cardin, then members of the Senate Foreign Relations Committee, this legislation requires disclosure of all payments to foreign governments by companies registered with the SEC.

Unfortunately, rules implementing “Section 1504” (named for the section of the Dodd-Frank Wall Street Financial Reform Act) have been stymied for over five years. Even though the legislation says that the SEC must issue final rules on resource extraction transparency within 270 days of the passage of the Act, the rule has not been implemented. The courts rejected the SEC’s proposed rule in 2013, and there has been no re-proposal since then. In the meantime, the European Union has passed legislation requiring its Member States to enact a similar disclosure law, as have other countries, including Norway and Canada.

Now, finally, there are hopes for a breakthrough. The SEC has announced that it will propose a draft rule by the end of 2015, and meet to adopt a final rule in June 2016.<sup>1</sup> Additionally, the American Petroleum Institute (API) – long an opponent of this legislation – has proposed a model for how to comply with the disclosure requirements of Section 1504.

Put together, this means that the United States and American energy companies are poised to take a leadership position on global transparency.

## Background: The Resource Curse

Many of world's most corrupt nations are both rich in natural resources and home to some of the world's poorest. The numbers can speak for themselves: in 2010 Equatorial Guinea, 75% of the population lived on less than \$2 per day, but the per capita annual income was \$35,000 per person – meaning that the rich and connected have collected returns from the country's oil windfall for themselves, while the vast majority of the country have seen little benefit.

Even worse, the act of securing and exporting resources themselves seem to breed corruption, authoritarianism, and even conflict. In Transparency International's 2014 ranking of the most corrupt nations in the world, the twelve member countries of OPEC had an average ranking of 109, and that does not even include such corrupt oil producing countries as Russia (ranked 136), the Democratic Republic of the Congo (ranked 154), or Sudan (ranked 173).<sup>2</sup>

A United Nations Environment Program (UNEP) study found that over the last 60 years, at least 40 percent of all civil conflicts around the world have been over natural resources (including high-value resources like timber, diamonds, gold and oil and scarce resources like arable land or water) – and these conflicts over natural resources are twice as likely to relapse.<sup>3</sup>



**An oil installation in Sudan.**  
Image credit: Shannon Orcutt/SaveDarfur/Flickr

Recent research has renewed the robust academic debate about whether oil and other resources constitute a “curse” across all countries –some countries have benefitted from finding oil, while others have found ways to fail without having any resources. However, the factor that successful countries share with each other is transparency: citizens should know that their government officials are not stealing, and shareholders should know that their company isn't fostering corruption.

## International Efforts to Bring Transparency to Resources

The United States and developed countries around the world have responded to the threats posed by the “resource curse” – in 1977, the Foreign Corrupt Practices Act (FCPA) went into effect. It prohibits companies from bribing foreign officials in order to secure government contracts and other business. The Securities and Exchange Commission (SEC) is responsible for enforcing the FCPA and it prosecutes companies and individuals for bribery around the world. More than 100 other developed-country governments have enacted similar laws.

Even with an explicit legal prohibition on bribery, however, it is not always clear what constitutes corruption, as contracts can be written that favor individuals or companies, and government resources can be allocated to preferred industries. For that reason, the “Publish What You Pay” initiative, started in the United Kingdom in the 1990s, called on companies to voluntarily disclose their payments to governments of resource rich countries.

The problem is that this created a competitiveness challenge: if only one company disclosed its payments, then host government could discriminate against that firm, give the contract to a less scrupulous firm, and continue its corrupt practices without much changing from a structural standpoint. The result in this case would be to penalize companies for implementing transparency. In fact, when BP announced its plan to disclose its payments to the government of Angola in 2001, Angola's state oil company threatened to unilaterally revoke BP's operating license.<sup>4</sup>

In order to deal with this competitiveness challenge, the Extractive Industries Transparency Initiative (EITI) was launched in 2003 at the urging of UK Prime Minister Tony Blair. This is a voluntary group by which governments, in collaboration with companies and civil society, disclose information on tax payments, licenses, contracts, production and other key elements around resource extraction. As of 2015, 49 countries are an active part of EITI.<sup>5</sup>

As important as the EITI has been, it remains a voluntary organization without the authority to compel countries or companies to comply with its standards. It relies on countries to join the initiative and implement rules that meet its standards. It relies on a vibrant collection of NGOs to participate alongside government and industry in order to monitor and report on violations. That means it has been unable to operate in some large energy-producing nations, like Russia, Iran, Sudan, and most Middle Eastern countries.

For that reason, government action to compel transparency is an important way forward.

## **SEC Inaction Cedes American Leadership to a Flawed EU Process**

Since 2010, there has been a continuation of a push for disclosure from companies in the extractive industry sector. In Europe, the European Parliament passed a directive requiring all 29 member-states to enact legislation by the end of 2015 to require companies listed in those countries to disclose all payments to governments in and outside of Europe. The action is laudable, but the follow-through is lacking, partially due to the separate nature of European Union legislation, where each member state will enact the law in its own way. While the directive issued the requirement for disclosure, Brussels does not have the authority to aggregate these reports in a coherent fashion. This means that total revenue to governments cannot be calculated and disclosed, and there is the potential for inconsistent individual company reports and data. The end result will be an avalanche of data, but no central source that can provide actual value in fighting the resource curse.

Reporting according to the EU directive began this year, with Norway adopting an EU-based program and some oil and gas and mining companies electing to proceed with their own disclosures in advance of the rest of the EU mandates being announced. As expected, what we are seeing as part of these early returns is a hodgepodge of unusable data. Different assumptions and definitions are being used by different companies, with no consistency in identifying who among the various agencies of foreign governments is receiving what.

The SEC now has the opportunity to assert U.S. leadership and rectify this situation. If, as recent SEC announcements indicate, the Commission intends to move forward with a rule in 2016, this presents an opportunity to build effective transparency. The Commission should require reporting in a way that forces companies to account for payments in a consistent manner – one that will allow the public to create usable databases. These will show not just where the money comes from, but where it actually goes. This can be done in a way that allows any interested party to access, sort and use.

## The Way Forward

The SEC now has the opportunity to write a rule that can set the world standard. Because the rule will apply to every energy and mining company that lists on US markets (a list that includes many foreign government controlled companies like China's CNOOC and Russia's Lukoil), this rule will be effective, unambiguous, and comprehensive. It will encourage the world's compliance with this standard.

If the SEC rules are better able to meet the standards of transparency needed, then they could end up earning primacy status – and companies around the world will advocate for their country to come up to American standards - “equivalency” with American rules. This means taking the best parts and the best intentions laid down in the EU rules while also establishing a system that is workable, transparent, and effective. The challenge is to do this in a way that avoids creating an undue reporting burden on companies.

### Defining a “Project”

One of the key contentions throughout this long-running debate is whether payments should be disclosed at a “project” level, and – if so – what defines a “project.” Across the 29 countries of the EU and the many companies that will be affected, there is no standard definition. This will make it very difficult to see effective cross-country and cross-company comparisons across the thousands of data points.

An important part of the SEC decision will be to define “project.” This is important because civil society has made project-based reporting a key part of their calls for transparency – but with no legal definition, companies will be incented to report in ways that fit best with their respective accounting and contracting systems, but that will differ widely between companies. Today, there is no standard definition accepted across industry. In order to draft an effective rule, the SEC will have to first determine what a “project” is.

All resource extraction projects can be defined by three key attributes, the combination of which should define a project:

1. What resource is being extracted? There are substantial differences in the regulation and oversight between oil and gas, coal, copper, rare earths, and many other minerals.
2. How is the resource being developed? Whether it's surface mining, underground mining, onshore development, offshore, hydrofracking, or other methods.
3. Where is the development taking place? Transparency is not only important at the national level, but also in the sub-national political subdivision, like a state or province. The International Organization for Standardization has a global system of standardized codes called ISO 3166 that gives a global standard for geographic areas.<sup>6</sup>

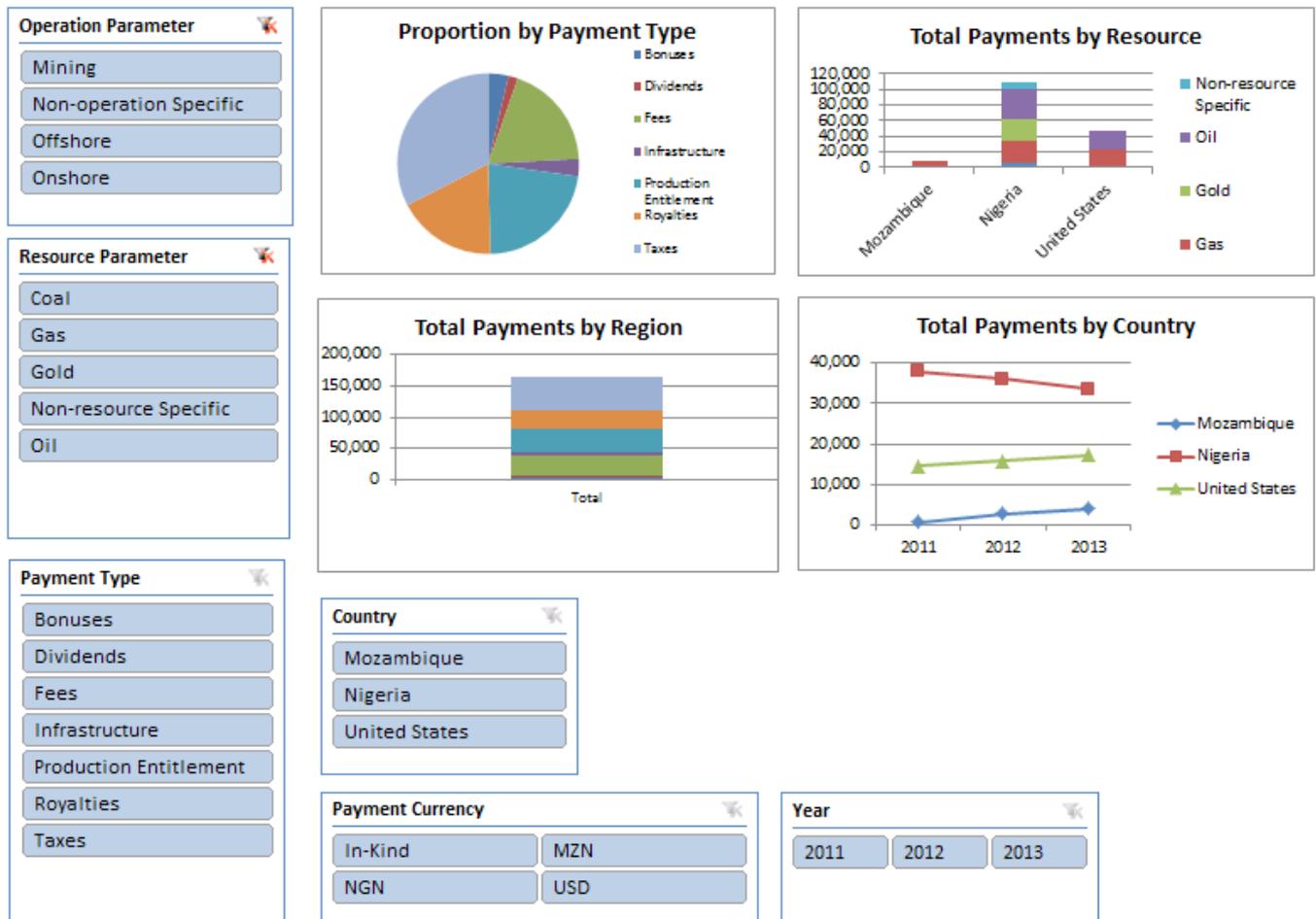
The combination of what resource, how it is extracted, and where it is extracted from is a comprehensible, easily accepted way of reporting that will produce meaningful results.

## The API Model for 1504

In 2012, when the American Petroleum Institute (API) filed suit against the SEC rule, it was clear it was implacably opposed to any transparency rules – even going so far as invoking their First Amendment rights to freedom of speech - in that it forced them to provide information they did not wish to provide.<sup>7</sup> The trade association succeeded in its lawsuit because the judge ruled that the SEC had overstepped Congress’s expressed intent. Since that 2013 decision, however, regulatory decisions around the world and increasing support by companies for the importance of transparency have fragmented that opposition. API’s position, in turn, appears to have evolved on this issue over the years as well.

Recently, API quietly posted on its website a database model for government reporting that could be done consistently by companies and would be in alignment with existing accounting standards. A model of how it would work is available at: <http://publications.api.org/API1504/>.

This model would tag every reported payment with information on who is being paid, and from where the payment originates – identifying the specific government agency that received the payment and in what state, province or offshore lease area it came from. This would generate a database that citizens of countries could use to press for government accountability, and fight the Resource Curse.



Source: API

Unlike other models around the world, the database this model will create would provide easily accessible, quantifiable data that users could then compare across countries and by the type of payment.

The database would be able to provide a detailed breakdown of how governments are paid for resources. They could be sorted by project, by payee, and by the level of government that received the payments. All of this will allow for an unprecedented level of transparency in government revenues, going a long way to alleviate the resource curse. This is more effective and easier to understand than the randomly generated, one-off company reports that are and will continue to be generated under the EU rules.

## **One Final Addition Needed – Company Based Disclosure**

The SEC should take a hard look at the API model: it provides a reporting regime that will produce actual, usable data to fight corruption and hold foreign governments to account. It is a systematic approach that will allow the US to take the lead in transparency on the basis of producing a policy that actually works in the real world.

However, there is one step further that API has not taken in its model: it asserts the SEC should only allow sorting by payee, not the payer. The association says that the names of the companies making the payment should remain protected. In today's world, and in the context of how the EU rules and EITI currently exist, that is no longer acceptable. For the API model to work, and to receive support from civil society and policymakers, disclosure of company payments must also be required.

## **Conclusion**

Less than two decades after it started, the campaign for extractive industries transparency has come a long way from the non-governmental “Publish What You Pay” push to becoming a mandatory part of every company's accounting to the government. When the SEC publishes and implements its new regulations on Section 1504, it will be a great victory for those who advocate for more transparency and want to end the “resource curse” once and for all. Once the public is able to understand how much money they are rightfully due for their nation's resource blessing, they will demand accountability from their government. But without a workable system and platform in place for accessing that information, understanding it, and making it actionable as a means of direct advocacy, these objectives will not be met.

The SEC now has a chance to act – but it only has one chance to get it right, and the time available for the agency to do that is quickly running out. If the SEC fails to put forward a rule that improves on the directive already issued by the EU, it will be the flawed EU rules that will in effect become the new rules that U.S. companies will be forced to follow – pushing the new SEC rules into obsolescence before the ink even dries. While the EU rules still represent a significant improvement over the status quo, and would encourage far more transparency in this space than is currently present, they could leave disclosure too vague and ambiguous, and cede American leadership on the issue.

To some, mining and drilling regulations may seem far from the core business of the SEC, but there really is no better place to put it. Capital markets in the United States are already the most transparent and lucrative in the world – and serious global companies need to list on American markets. These regulations will only increase that transparency, while also helping to lift some of the world's poorest out of poverty. This is a prize that the SEC cannot overlook.

## Endnotes

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The American Security Project (ASP) is a nonpartisan organization created to educate the American public and the world about the changing nature of national security in the 21st Century.

Gone are the days when a nation's security could be measured by bombers and battleships. Security in this new era requires harnessing all of America's strengths: the force of our diplomacy; the might of our military; the vigor and competitiveness of our economy; and the power of our ideals.

We believe that America must lead in the pursuit of our common goals and shared security. We must confront international challenges with our partners and with all the tools at our disposal and address emerging problems before they become security crises. And to do this we must forge a bipartisan consensus here at home.

ASP brings together prominent American business leaders, former members of Congress, retired military flag officers, and prominent former government officials. ASP conducts research on a broad range of issues and engages and empowers the American public by taking its findings directly to them via events, traditional & new media, meetings, and publications.

We live in a time when the threats to our security are as complex and diverse as terrorism, nuclear proliferation, climate change, energy challenges, and our economic wellbeing. Partisan bickering and age old solutions simply won't solve our problems. America – and the world - needs an honest dialogue about security that is as robust as it is realistic.

ASP exists to promote that dialogue, to forge that consensus, and to spur constructive action so that America meets the challenges to its security while seizing the opportunities that abound.



American Security Project

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