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Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Disclosure of Payments by Resource Extraction Issuers, File No. S7-24-19

Dear Secretary Countryman:

The American Petroleum Institute ("API") is pleased to provide comments addressing the Commission's proposed rules implementing Section 13(q) of the Securities Exchange Act of 1934. API is a national trade organization representing over 600 companies involved in all aspects of the domestic and international oil and natural gas industry, including exploration, production, refining, marketing, distribution and marine activities. Our highly competitive industry is essential to the economic health of the United States and the prosperity of our fellow citizens, who depend on ready access to reliable and affordable energy that our members strive to provide. In addition to supporting hundreds of thousands of American jobs, millions of Americans invest in our companies through retirement and pension plans, mutual funds, and individual investments.

I. Introduction

API greatly appreciates the Commission's work on the proposed rules and agrees with the overall intent. API and its members support transparency and firmly believe that the Commission can promote transparency via Section 13(q) while remaining true to the Commission's core mission of protecting investors, competition, and the efficiency of capital markets. We thank the Commission for its diligence in considering previously submitted comments, while being mindful of Congress' intent behind the statute. In this letter, we address issues in the proposed rules that are most significant to API and its members, provide suggestions for increased efficiency and effectiveness, and note areas where additional clarity or minor revisions may ensure that the final rules meet the Commission's intent.

II. Aggregated, Anonymized Public Reporting Would Meet the Intent of Congress Efficiently.

While the proposed rules broadly balance the transparency requirement with the Commission's overall mission to foster fair markets and capital development, we continue to have concerns about the manner of reporting that the rules would mandate and reiterate our prior views that this approach is not required by the statute. The Commission has proposed "that resource extraction issuers provide the required payment disclosure publicly through the searchable, online EDGAR database."[1] API objected to that approach when it was included in prior rules.[2] Though we appreciate that the Commission included several provisions in these proposed rules that would make this type of public reporting significantly less problematic, we continue to have concerns that final rules requiring individual companies to disclose publicly their payments to governments would be inconsistent with the Commission's statutory obligations and unnecessary in light of the Commission's alternative (a public compilation).[3]

The Commission acknowledged that a better option may be for the Commission to "permit issuers to submit the required payment information non-publicly and then provide an anonymized compilation" and asked for comments on that approach in the proposed rules.[4] API strongly encourages the Commission to adopt aggregated reporting as we believe that a public compilation would better serve the purposes of Section 13(q) than the company-specific, public reporting that the Commission has proposed. As the district court held in vacating the Commission's original Section 13(q) rule, the statute does not mandate company-specific, public disclosure.[5] The district court's opinion and the plain language of the statute confirm that instead the Commission should require companies to disclose payment information to the Commission confidentially and that the Commission "shall" then make a "compilation of" that information available to the public "to the extent practicable."[6] This two-step process is wholly consistent with Congress's statutory framework and serves Congress's interest in making publicly available information about the monies received by the U.S. and foreign governments from resource-extraction issuers. Moreover, Section 13(q) provides the Commission "shall" make a compilation, which creates a mandate that should not be read out of the statute. Submissions by issuers as outlined in the proposed rules would then be sufficient to address the required creation of a compilation.

A two-step process also achieves Congress's objectives because the Commission gains no perceptible benefit from requiring issuers to disclose their payment information directly to the public rather than aggregating that information and making a compilation available to the public.

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[1] Release No. 34-87783 at 82, 85 Fed. Reg. 2,522 (Jan. 15, 2020) (Proposed Rules).
[2] *See* Letter from API (Feb. 16, 2016) at 3-10, 31-35; *see also, e.g.*, Letter from API (Mar. 8, 2016); Letter from API (Apr. 15, 2014) at 8-9; Letter from API (Nov. 7, 2013) at 2-3; Letter from API (Jan. 19, 2012); Letter from API (Aug. 11, 2011); Letter from API (Jan. 28, 2011) at 3-4, 38-41.
[3] We note that this approach should also address any concerns raised by issuers on First Amendment grounds, as discussed in detail in our comment letter regarding the earlier version of these rules as proposed. Letter from API (Feb. 16, 2016) at 10-14.
[4] Proposed Rules at 86.
[5] *See American Petroleum Institute v. SEC*, 953 F. Supp. 2d 5, 12-20 (D.D.C. 2013).
[6] Exchange Act § 13(q)(3), 15 U.S.C. § 78m(q)(3).

Congress's goal of enabling people to hold their governments accountable for the revenues generated from resource development is achieved so long as citizens know the amount of money the government receives, not the companies that make each individual payment. In fact, API strongly believes that this information will be more accessible and useable by interested citizens in an aggregated compilation.

Further, when combined with the Commission's proposed definition of "Project," which API supports as noted below, this approach is more efficiently tailored to carry out the underlying intent of Congress to promote political accountability of host countries for the use of proceeds from development of their national resources. The approach will help protect resource extraction issuers and their shareholders from harm that would result from disclosure of proprietary and competitively sensitive information. Therefore, we believe aggregated, anonymized public reporting would work best with the proposed "Project" definition to limit competitive harm that would otherwise not be balanced against a benefit to the objective of transparency.

As we have stated in prior comments, company-specific public disclosure of extractive payments may result in harm by allowing competitors to "reverse engineer" the value a particular company places on a specific resource area. This could undermine a company's significant investment in developing proprietary technology and expertise by allowing competitors to benefit from that investment at no cost. The threat of reverse-engineering could occur even under the proposed definition of "Project." For example, comparing changes in reported payments for the same area year over year provides competitive insights especially where a particular country effectively possesses a single major area of resource development, and wherein company-specific reporting even under the proposed Project definition may effectively differ little from reporting on an individual contract basis.

In summary, API continues to believe that the confidential submission of information by resource extraction issuers, combined with public reporting of anonymized aggregate payment information, strikes the best balance between achieving the objectives of Section 1504 while preventing unnecessary harm to companies and their shareholders.

III. In-Kind Payments

The Commission has proposed rules that "would require disclosure of payments that fall within the specified payment types that are made in-kind rather than through a monetary payment to the host country government."[7] In reporting these in-kind payments, "the proposed rules specify that issuers must value them at historical cost, or, if historical costs are not reasonably determinable, fair market value."[8] Issuers would also be required to "provide a brief description of how the monetary value was calculated."[9]

API does not support this approach, as fair market value represents the best benchmark for valuing in-kind payments. We further believe that without modifying the rule to provide for

[7] Proposed Rules at 43.
[8] *Id.*
[9] *Id.*

aggregated anonymized reporting, publishing specific cost information could result in issuers having to share business sensitive data with third party competitors.

Fair market values for minerals in our industry are readily available relative to the date any in-kind payment would be made. Cost data, on the other hand, is not as relevant given the intent of providing transparency in payment disclosures. Cost data would inherently represent a systematic allocation of historical costs accumulated over a period of years, sometimes decades, such as lease bonuses/acquisition costs, exploration and development costs, and current production costs. Historical costs will also differ in material respects based on how an entity acquired the projects. For example, an outright purchase of a pre-existing, producing field will have a distinctly different cost basis as compared to that same field if it were instead acquired, explored and developed using organic leasing efforts. In addition, historical costs are subject to downward revisions in the event of an impairment. Reporting payments to governments based on historical costs of a previously impaired asset will cause a misalignment with the value of in-kind payments relative to the total costs incurred that form the basis of historical cost.

Finally, and most importantly from a transparency perspective, cost data does not reflect the reality of the value received by the government entity, which is what Section 13(q) was meant to capture. In fact, reporting in-kind payments at cost could result in an understatement of benefits received by the government if it were to sell in-kind payments at values higher than the proposed reported costs (which is typically the situation). Accordingly, we strongly believe the final rules should require an issuer to report in-kind payments at fair market value unless such value is not reasonably available or determinable.

IV. API Supports the Proposed Rule to Identify Certain Payments at the Entity Level.

API supports the approach taken by the Commission in the proposed rules that issuers may provide information related to certain payments at the entity level rather than at the project level.[10] For an entity that makes payments with respect to more than one project, it is often impossible to identify, on a project basis, the relevant portion of a given payment obligation that is imposed at the entity level. Accordingly, API strongly supports the proposed rule to permit entity-level disclosure in circumstances where a government levies a payment obligation at the entity level. Similarly, API supports clarifying that entity-level disclosure is also permitted in circumstances where a given payment obligation is imposed at the level of a combined, consolidated, affiliated, or similar group of entities (e.g., where income tax payments are imposed at a level of a U.S. tax consolidated group of corporations, rather than on each corporation separately).

V. API Supports the Proposed Definition of "Subsidiary" and "Control" and Recommends Minor Revisions to Ensure the Commission's Intent is Met.

A. Support for the Proposed Definition of Control

[10] *Id.* at 37.

API supports the Commission's proposed definition of the term "control" based on applicable accounting principles as the most workable approach to defining and capturing subsidiary payments.[11] This will drive greater consistency in interpretation across companies, will align with companies' internal controls, and will reduce compliance costs for companies since the definition is consistent with the entities that are included in financial filings.

Additionally, API supports the Commission's proposed definition of the term "control" on treatment of proportionate interests. The proposed requirement that only the company actually making a payment to the host government must report that payment is a reasonable and appropriate approach to gathering payments from issuers and aligns with the industry's business model. The oil and natural gas industry utilizes a distinct operating model, whereby a single company (often referred to as the "operator") typically explores, develops and operates a field with other joint venture partners. The contractual agreements governing joint ventures often require an operator to make the necessary disbursements, including those to governments, for the entire joint venture. The operator is then typically reimbursed for the share of all venture-related costs attributable to other venture members. It is not standard industry practice for an operator to aggregate, quantify and provide its non-operating partners with a listing of payments remitted to each governmental entity, the timing of the remittance, and their corresponding share of the remittance. Further, our member companies are engaged in exploration and development involving thousands of individual joint ventures, each with its own unique combination of operating and non-operating partners.

B. Additional Clarifications

We note three areas that need to be addressed or further clarified in the proposed rules. First, we believe the proposed rules require reporting only when a resource extraction issuer makes the payment directly for an obligation either as an operator of a joint arrangement or as a non-operator of a joint arrangement. We request that the final rules clarify that non-operating partners, who may economically reimburse an operator through relevant joint cost sharing arrangements, should not be required to reflect payments made by the operator in the disclosure of payments under Section 13(q).

Second, API recommends that the Commission clarify the direction included in Form SD that a resource extraction issuer must disclose "a payment that falls within the definition of 'payment' to a government on behalf of a resource extraction issuer".[12] This requirement appears to conflict with the concepts of control and reporting of payments made by the issuer. For example, in situations of joint control or where no entity controls a business arrangement that includes two or more partners, the "on behalf of" language could be interpreted as an indirect proportional reporting mechanism.

Finally, the amendments to Form SD state that "the resource extraction issuer must disclose ***its proportionate amount of the payments*** made by such entity or operation pursuant to

[11] *Id.* at 56-59.
[12] *Id.* at 195.

this Item and must indicate the proportionate interest."[13] This provision appears to require proportionate reporting, which would conflict directly with the proposed rules and the Commission's statement that "[t]he proposed rules would not require disclosure of the proportionate amount of the payments made by a resource extraction issuer's proportionately consolidated entities or operations."[14] Again, we do not support proportionate reporting, as a significant number of issuer companies subject to these proposed rules would have to modify their internal accounting/financial reporting systems and processes. We also believe that non-issuer, operator companies would incur significant costs if such companies were required to provide their non-operating, issuer partners with their respective share of payments made to governments. We recommend that the Commission simply remove the reference to disclosure of proportionate payments to align the words with the Commission's intent.

VI. API Supports the Proposed Definition of "Project."

A. Use of the Three Criteria for Project Definition

The Commission has proposed a definition of project that uses three criteria: "(1) the type of resource being commercially developed; (2) the method of extraction; and (3) the major subnational political jurisdiction where the commercial development of the resource is taking place."[15] API strongly supports this approach and the conclusion that these factors represent "an appropriate trade-off to address commenters' and Congress's concerns about the potentially adverse impacts on resource extraction issuers arising from the 2016 Rules" while promoting transparency.[16]

Specifically, as discussed above in this letter and in API's prior comment letters,[17] we believe that this approach to defining "project" represents the best method for reducing regulatory costs and unnecessary exposures of issuers' competitively sensitive data. Further, the approach in the proposed rules would allow the information provided by issuers to be readily sorted, analyzed, and compared in a consistent manner aligned with the objectives of the statute. We believe this simple and standardized reporting approach will be much more effective for its purpose than an approach focused on company contracts. An approach based upon company contract payment disclosure can result in data that is difficult to aggregate and analyze. The logical, standardized, and well-tailored Project definition contained in the proposed rules will, we strongly believe, prove much more useful and effective for the purpose of providing meaningful information regarding the amounts received by governments for particular resource developments.

Finally, the project definition approach included in the proposed rules will reduce the potential for competitive harm to resource extraction issuers and their shareholders as well as

[13] *Id.* at 195 (emphasis added).
[14] *Id.* at 57; *see also id.* at 156-57.
[15] *Id.* at 60.
[16] *Id.* at 63.
[17] *See, e.g.*, Letter from API (Feb. 16, 2016) at 14-23; Letter from API (Mar. 8, 2016); Letter from API (Apr. 15, 2014) at 8; Letter from API (Nov. 7, 2013) at 3-7; Letter from API (Jan. 19, 2012); Letter from API (Aug. 11, 2011); Letter from API (Jan. 28, 2011) at 4, 17-22.

lower issuer compliance costs in collecting and furnishing the information required by the statute.

B. Aggregation of Payments to Subnational Governments Below Major Subnational Level

The Commission has asked whether the proposed rules should "permit an issuer to aggregate payments made to subnational governments below the major subnational level without having to identify any particular subnational government payee, as proposed."[18] API supports this approach as we believe this would reduce compliance costs while still providing overall disclosure of local payments. In the experience of our members, the vast majority of the revenue stream from the development of resources is realized at national or sub-national jurisdictional levels, where mineral interests outside the U.S. are typically owned. Payments below that level tend to be relatively minimal, and we do not believe that more granular reporting of payments below the sub-national political level will provide meaningful transparency benefits that would justify the cost and effort of reporting many separate small payments. This requirement would only serve to extend the length and complexity of payment reports.

C. Further Point of Clarification on Project Definition – Offshore Operations

In supporting the proposal's approach and definitions of the three factors, we believe that additional clarity should be developed for offshore operations that are not easily or locally tied to any subnational jurisdiction. The proposed rules would require that offshore resource extraction, even if conducted in waters where mineral interests are owned and controlled at the national level (as is typically the case in most countries), be identified according to the nearest onshore sub-national political jurisdiction.[19] We appreciate the potential benefits of distinguishing between major resource producing areas with respect to countries that have large and geographically diverse offshore regions such as the U.S. or Australia. However, we do not believe that identifying these projects by nearest sub-national political jurisdiction would be the most effective manner of addressing this issue. First, labeling projects in national waters according to the nearest sub-national political jurisdiction could create a misleading impression that the identified sub-national jurisdiction has a greater practical or legal relationship to the project than other sub-national jurisdictions in the area, which may well not be the case and could artificially create undesirable or wasteful political dynamics between states or provinces in the host country. Also, many countries may have a single major offshore development area, such that identification by nearest sub-national political jurisdiction could be both unnecessary in order to identify the project and potentially misleading. For example, in Guyana, a relatively small country in which new development of discovered offshore resources is taking place in what should appropriately be viewed as a single major project, offshore blocks may be approximately equidistant from multiple coastal provinces. For offshore resource extraction, we strongly suggest that labeling a project by the body of water in which the project is located (e.g., Gulf of Mexico, etc.) is a better approach.

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[18] Proposed Rules at 77.
[19] *Id.* at 194.

VII. API Supports the Proposed Approach on Conflicts with Local Laws or Contracts.

API supports the direction the Commission has taken to allow an exemption for when there is a conflict with local laws or contracts. [20] This exemption acts to minimize harm to investors and supports the general goal that statutes should be construed to avoid unreasonable interference with the sovereign authority of other nations. We have identified only two countries – Qatar and China – with local laws that may conflict with transparency reporting and aware of no additional countries' adopting such laws in the nearly 10 years since Section 1504 was adopted. To the contrary, transparency continues to grow as an international practice and new countries continue to join the Extractive Industries Transparency Initiative ("EITI"). Thus, we do not believe providing an exemption for the very limited circumstances in which a conflict of laws issue may exist would in any meaningful way impede the global objectives of transparency. Also, incorporating the exemption into the proposed rules themselves as the Commission has proposed, instead of requiring companies to rely on an annual process of requesting exemptions, will significantly reduce compliance costs.

VIII. API Supports the Proposed Approach to Alternative Reporting.

The Commission has proposed a "provision that would allow issuers to meet the requirements of the proposed rules, in certain circumstances, by providing disclosures that comply with a foreign jurisdiction's reporting regime . . . if the Commission has determined that the alternate reporting regime requires disclosure that satisfies the transparency objections of Section 13(q)."[21] API supports this approach and believes that it will reduce the compliance burden on issuers that are subject to the reporting requirements in the EU or Canada, as well as issuers that report payments under EITI. We also encourage the Commissioner to quickly and explicitly move to accept reporting by issuers under the UK, EU (as implemented in an EU or European Economic Area member country) and Canadian rules as satisfying the reporting needs once a rule is finalized.

IX. API Supports the Proposed Approach that Submissions are Furnished.

API supports the approach taken in the proposed rule that submissions made by issuers be furnished rather than filed.[22] The purpose of Section 13(q) clearly differs from the type of information normally filed with the Commission by issuers. The ability to furnish this information rather than file it strikes an appropriate balance of addressing the need for transparency with the costs and liabilities associated with filing it with the Commission.

X. API Supports the Proposed Approach for Extended Reporting Deadline for Exploration Payments.

API appreciates and supports the Commission's targeted exemption for payments related to exploratory activities.[23] We agree that exploration activity represents some of the most

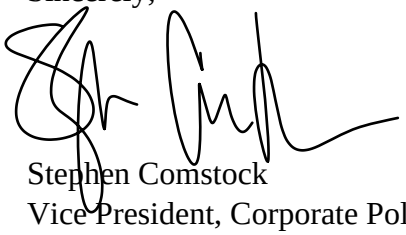
[20] *Id.* at 89-91.
[21] *Id.* at 112.
[22] *Id.* at 118.
[23] *Id.* at 97-99.

commercially sensitive investments by issuers and that reporting needs should be balanced to protect such information. We note that this provision may be unnecessary if our comments on aggregated, anonymized reporting are incorporated into a final rule. Further, we also agree that the proposed "Project" definition will limit some of the potential harm while still providing sufficient information to local populations on extraction payments in their jurisdictions.

XI. Conclusion

API appreciates the opportunity to provide comments on the Commission's proposed rules implementing Section 13(q). Should you have any questions about these comments, please contact me at 202-682-8455.

Sincerely,



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