Publish What You Pay
United States

ActionAid International USA
Amnesty International
American Jewish World Service
Bank Information Center
CARE USA
Catholic Relief Services
Columban Center for Advocacy and Outreach
CorpWatch
Crude Accountability
EarthRights International
EARTHWORKS
Environmental Defense Fund
EG Justice
Environmental Defense
Friends of the Earth
Gender Action
Global Financial Integrity
Global Rights
Global Witness
Government Accountability Project
Human Rights Watch
International Budget Project
International Labor Rights Forum
Justice in Nigeria Now
Maryknoll Office for Global Concerns
Micah Challenge USA
Natural Resource Governance Institute
Open Society Policy Center
Oxfam America
Pacific Environment
Presbyterian Church USA
Project on Government Oversight
Robert F. Kennedy Center for Human Rights
Sustainable Energy & Economy Network
The Borgen Project
The ONE Campaign
United Methodist General Board of Church and Society
United Steelworkers
United to End Genocide

March 16, 2020

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

RE: File Number S7-24-19 – Proposed Rule 13q-1 to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Secretary Countryman:

I am pleased to submit the following comment on behalf of the Publish What You Pay—United States coalition ("PWYP-US") on the proposed rule published by the Securities and Exchange Commission (the "Commission") to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

Publish What You Pay ("PWYP") is a global civil society coalition made up of over 800 member organizations operating in more than 70 countries. The US coalition was founded in 2004 and consists of 39 anti-corruption, financial transparency, anti-poverty, tax justice, environmental, faith-based and human rights organizations representing over five million constituents across the United States. PWYP-US members have been actively involved in all stages of the rulemaking process since the first rule was issued in 2012, and were integral to the inclusion of Section 1504 in the Dodd-Frank Act.

We welcome the Commission's proposed rule and commend the Commission for its efforts. The attached document contains our key comments, responses to questions, and suggested regulatory language.

We appreciate the opportunity to comment and would welcome the chance to discuss our recommendations with you in further detail. As in previous years, we look forward to a carefully considered and thorough rulemaking. Please do not hesitate to contact us with any questions.

Sincerely,

Kathleen Brophy
Director, Publish What You Pay—US

PWYP-US Comments on Proposed Rule Disclosure of Payments by Resource Extraction Issuers

Executive Summary

PWYP-US regrets that a Congressional Review Act ("CRA") resolution of disapproval was employed in February 2017 to delay final implementation of Section 13(q). Although Congress invoked the CRA to disapprove the prior rule issued by the Commission, Congress did ***not*** alter, nor purport to alter, the original statutory directive in Section 13(q) or the Commission's obligation to adopt a regulation based on a rulemaking record compiled in accordance with the Administrative Procedures Act ("APA").

While the CRA provides that an agency may not promulgate a new rule that is "substantially the same" as one that was disapproved, this language does not require and cannot justify the fundamental reversal on nearly every feature that is currently reflected in the proposed rule. Nor can it justify designing the rule in a way that would eliminate the vast majority of benefits Congress intended and undermine, rather than advance, international transparency promotion efforts required by the statute and supported by several proponents of the CRA resolution.[1] A more narrow interpretation is necessary in this context, where Congress has specifically directed the Commission to address a particular problem, and where subsequent developments have made the factual basis for certain aspects significantly more compelling in the interim.

Since the 2016 Final Rule and since the February 2017 vote of disapproval, the global transparency landscape has changed significantly in critical ways that bear directly on this rulemaking, and specifically on what the Commission identifies as the primary concerns of members of Congress that supported the resolution. In the last three years, international consensus has solidified around a clear global transparency standard for extractive industries and implementation is now well underway. Unlike in 2016, predicting the realities of publicly reporting payments to governments is no longer a theoretical exercise. A significant proportion of the world's largest oil, gas, and mining companies (including issuers cross-listed in the US, and major subsidiaries of US issuers) have now publicly reported at least three years of disaggregated, project-level payments to governments in over 150 countries, without any exemptions, pursuant to regulations in the European Union, the United Kingdom, Norway and Canada.

Substantial additional reporting is already taking place at the project level in countries implementing the Extractive Industries Transparency Initiative (EITI) as well, covering even more companies. Significantly, the EITI Standard was recently revised to more closely mirror the mandatory disclosure regimes in other jurisdictions, further solidifying consensus around the most effective and appropriate disclosure standard for the industry. Although the 2013 and 2016 EITI Standards specifically required project-level reporting, this has been further elaborated in the 2019 Standard, which now expressly adopts the definition of project-level used in Europe and Canada.

In 2019, the International Monetary Fund also updated its Fiscal Transparency Code, recognizing both "project-level disclosure of resource revenues and the publication of contracts" as "key transparency

[1] Comment submitted by Sens. Bob Corker, Susan Collins, Marco Rubio, Johnny Isakson, Lindsey Graham and Todd Young; U.S. Senate (2 February 2017). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3080156-161926.pdf.

practices" that "are now established as international norms."[2] It notably uses the same definition of project as used by the EU, Canada, UK, Norway and the 2019 EITI Standard.[3]

Other major advancements in the 2019 EITI Standard also show how far industry norms have moved beyond payment transparency. In particular, while the EITI has encouraged contract transparency since 2013, the 2019 Standard now requires the disclosure of contracts signed, entered into or amended after January 2021. A number of countries and companies are already ahead of the curve; for example, a 2018 Oxfam America paper found that more than half of EITI countries already disclosed extractive contracts in practice and/or law.[4]

These important developments show that external conditions have changed significantly in the last three years. These developments, and in particular the new data coming out of companies' reporting experience in other markets, speak directly to what the Commission identifies as Congress's "primary concerns" in voting to disapprove the 2016 Rule. They show the costs of implementation are in fact substantially lower than the Commission's predictions in its 2016 economic analysis, and it shows that the competitive landscape has shifted markedly, as fully public disaggregated project reporting according to each contract is now the international norm, and there is significant support and rapid movement toward full contract transparency, further undermining the notion that payment disclosure is competitively harmful.

A resolution of disapproval under the CRA requires an all or nothing vote on pre-determined language, meaning there is no opportunity for Congress to specify aspects of the rule it approved of or may have considered necessary, nor to specify what it identified as problematic and what should be changed. Floor debate is limited by the CRA; there are no hearings, no committee reports nor any other form of meaningful legislative history.[5] There is no guidance in the CRA, the resolution of disapproval, nor elsewhere as to what the Commission should do differently. By contrast, Section 13(q), and the facts and evidence in the record, clearly narrow the scope within which the Commission can act to chart a different path. The CRA resolution did not change the Commission's obligations under either Section 13(q) or the APA, so those must be the guideposts governing any rulemaking.

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[2] International Monetary Fund, Fiscal Transparency Initiative: Integration of Natural Resource Management Issues (Jan 2019), p.7. Available at https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/01/29/pp122818fiscal-transparency-initiative-integration-of-natural-resource-management-issues. See also id. at 15 (referring to the disclosure provisions in the European Union, Norway and Canada as representing "an internationally accepted norm.")

[3] Id. at 47-48. Glossary. "Project: Operational activities (in the natural resource sectors) governed by a single contract, license, lease, concession, or similar legal agreements that form the basis for payment liabilities with a government. Agreements with substantially similar terms that are both operationally and geographically integrated may be treated by the company as a single project."

[4] Munilla, I., Brophy, K. Contract Disclosure Survey 2018: A review of the contract disclosure policies of 40 oil, gas and mining companies (May 2018), Oxfam America. Available at: https://oxfamilibrary.openrepository.com/handle/10546/620465; Total adopted a policy in 2018 endorsing contract transparency, as well as to proactively advocate with host countries to disclose their petroleum contracts and licenses. See Total, Business Ethics. Available at: https://www.sustainable-performance.total.com/en/our-challenges/business-ethics. Kosmos Energy already makes the material terms of its Petroleum Agreements and Production Sharing Contracts publicly available. See EITI, "Contract transparency builds trust and mitigates risk says Kosmos" (11 Dec 2018). Available at: https://eiti.org/blog/contract-transparency-builds-trust-mitigates-risk-says-kosmos.

[5] The debate on this resolution was even shorter than the limited window the CRA permits. There was no consideration given to the significant number of companies that supported the rule, nor the unanimous support from investors who have participated in the rulemaking.

The current proposed rule will not satisfy Section 13(q) and lacks support in the evidentiary record. The proposed rule assumes significant cost savings based on a number of disproven assumptions, but simultaneously guts the benefits of disclosures to all intended beneficiaries. The Commission gives too much weight to select statements by individual members it selects as representing the "concerns" of Congress in making sweeping changes to its prior policy determinations, including taking a far different - and arbitrary - view of the facts in various instances than it previously did, without an evidentiary basis. These individual comments do not and cannot alter the underlying statute, nor lead the Commission to ignore available evidence.[6] And implementation experience outside the US - which represents a successful, multi-year, live test in the market of the key 2016 rule requirements, undertaken by nearly 800 companies - directly speaks to many of those expressed concerns.

A narrower interpretation of the obligations under the CRA is necessary in this context; the Commission must interpret substantially the same in light of Section 13(q),[7] as well as the changed external circumstances and new data. The CRA scholars that the Commission cites[8] endorse a narrow interpretation whereby the agency's task is simply to ensure enough changes to result in a different (more favorable) cost-benefit analysis, and further argue that changes in external conditions can be enough to justify a virtually identical rule.[9] Here, the best approach for the Commission to navigate the CRA, Section 13(q) and the record, is to adopt a rule with certain key features consistent with the international standard while making changes to other features of the rule, and based on a revised and comprehensive economic analysis that accurately describes the current reality of reporting under a standard similar to what is already in place in other markets.

At a minimum, meaningful consistency with the EITI and other markets requires the following key features: (1) fully public reporting, including the identity of the issuer and the government payee (2) disaggregated project-level reporting, defined consistently with the definitions in the EU, Canada, UK, Norway and the EITI Standard, and (3) an approach to "not de minimis" that sets an individual payment threshold similar to other markets, but *not* an artificial total payments value for a project.

While maintaining these key features and substantially updating its economic analysis, the Commission still has sufficient room to make other modifications to issue a rule that is meaningfully different, so as to comply with the CRA, while also satisfying the Congressional intent behind Section 13(q). We explain a number of shortcomings in the economic analysis, and significant changes that must be made to reflect new evidence of compliance costs and the competitive landscape and to reflect external

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[6] Nor could these statements be said to represent the consensus view of the supporters of the resolution given the inconsistencies among many statements, as well as many inaccuracies, not to mention the expedited procedures and limited debate time.

[7] A narrow interpretation is further warranted given the potential constitutional issues presented by the use of the CRA to invalidate Executive Branch actions. These issues are of particular concern in the context of Section 1504, which unequivocally imposes a mandate on the Commission to take action to address a particular problem in a particular way and where the Commission has already set forth, and supported with an extensive rulemaking record, what the agency regards as the most appropriate means of executing the legislative intent underlying Section 1504.

[8] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 85 Fed. Reg. at 2527 n.68. [Hereinafter referred to as "Proposed Rule."]

[9] Adam M. Finkel and Jason W. Sullivan, *A Cost-Benefit Interpretation* (2011), 63 Administrative Law Review 707, 762. *See also id.* at 762 (concluding that "even an identical rule can be reissued" under different external conditions). See also Michael Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same" and Decline to Defer to Agencies Under Chevron* (2018), 70 Admin. L. Rev. 53, 106 (arguing substantially the same should be "narrowly construe[d]" and changes that "alter the cost-benefit analysis of a reissued rule" is sufficient.)

developments, which show a much different cost-benefit balance than the 2016 rule. And we have indicated in our responses below where we believe there are modifications that could be made without fundamentally undermining the statutory intent, nor rendering the rule at odds with the key features of the existing global transparency standard. This includes:

- Changed approach to exemptive relief (see our responses to Questions 57-66 below);
- Changes to proportionate reporting (see our responses to Questions 31-34 below);
- Changes to allow various forms of transitional relief (see our responses to Questions 67-69 and 74-6 below);
- Changes to project tags (see our responses to Questions 39-43 below);
- Changes in approach to aggregating similar contracts (see our responses to questions 35);
- Addition of payments to governments for the purchase of oil, gas and minerals (commodity trading related payments) (see our responses to Questions 9 and 21 below);
- Addition of volume reporting for certain in-kind payments (see our response to Questions 19 and 20 below).

While there may remain uncertainty around exactly how a court might construe the CRA, there is substantially less uncertainty regarding the Commission's usual obligations under the APA for reasoned decision making supported by the record, and its obligation to faithfully implement Section 13(q). We are confident that the approach outlined here will best ensure the Commission produces a legally sound final rule, consistent with each of the legal mandates before it.

<u>Comments on Proposed Rule 13q-1</u>

1. ***Are there any data since the 2016 Rules concerning actual costs of compliance with mandatory disclosure regimes that relate to or otherwise address the Congressional concerns about the potential adverse economic effects of the rules, and specifically, that the 2016 Rules would impose undue compliance costs on companies? Should we consider, and if so how, the compliance cost data in the UK Government's Department for Business, Energy and Industrial Strategy post implementation review of the UK regulations, in determining how to address the stated Congressional concerns?***

<u>Yes, data from European mandatory disclosure regimes are directly relevant to, and substantially address, what the Commission identifies as Congressional concerns about the 2016 Rule, and weigh heavily against certain rule changes.</u>

<u>In particular, actual reporting experience has subsequently shown that publicly disclosing payments for each contract is significantly less costly and less burdensome than the estimates in the 2016 Rule that were cited by members of Congress in disapproving the rule. Substantial revisions to the Commission's economic analysis are necessary to reflect these market realities, and the resulting improvements to the cost-benefit ratio will go a long way towards producing a rule that is clearly different, and consistent with the CRA.</u> (See our discussion of the CRA immediately above and our answers to Questions 89-97 relating to economic analysis.)

Data resulting from company reporting under the EU Accounting and Transparency Directives ("EU Directives"), is directly relevant to what the Commission identifies as the primary concerns of Congress in voting to disapprove the rule. This includes company-specific data and data generated by the UK Government's review of the UK disclosure regulations.

To the extent members of Congress were concerned about the compliance costs in the Commission's 2016 Rule, reporting experience has now mooted those concerns; actual costs are *far* lower than what the Commission previously estimated. The data give strong indications that some previous cost predictions provided to, and relied upon by the Commission in its prior rulemakings, are significantly overblown and do not match the current market reality. Furthermore, compliance costs attributable to a Section 13(q) rule for large international oil companies like Exxon would also be substantially lower than earlier predictions now that many of their foreign subsidiaries have been reporting in other markets for years. Therefore, predictions that they provided previously are unrealistic, out of date and should not be relied on in the current rulemaking.

In contrast to these wild guesses, the company-specific data summarized below and data from the UK review) are based on *actual* costs as it was collected directly from companies already reporting contract-based project-level payments. This is highly relevant evidence that must be incorporated into the Commission's economic analysis in this rulemaking.

Compliance costs: company-specific data

Total S.A.

Total S.A. ("Total") has published four payments-to-governments reports, covering the fiscal years 2015 to 2018. Total currently discloses payments for the largest number of identifiable projects of any reporting company.[10] In its most recent payments-to-governments report, Total disclosed payments for 155 identifiable projects. In its comment dated February 27, 2020, Total states that the "internal cost for this reporting is low, in the region of $200,000 per year. This corresponds to 1.5 full time equivalent during one month at the central finance team level, and 1 to 2 days' work in each subsidiary to ensure the reliability of the data. Regarding our external auditors, beyond the first year when Total paid a one-off remuneration of $100,000, there is no additional cost as it is now integrated in their global remuneration with no specific cost."[11]

Total's assets at the end of fiscal year 2018 were over $256 billion, meaning its ongoing compliance costs as a percentage of assets are 0.000078 percent. This is far lower than the Commission's estimated lower bound of ongoing compliance costs of 0.0008 percent of assets, as cited in the 2016 Final Rule, which was based on a hypothetical cost figure provided by an issuer.[12] Total reports on approximately 160 extractive projects, giving an average recurring cost per project of $1,250. Total has not reported any risk of, or actual competitive harm as a result of its contract-level project payment disclosures in any annual report to the Commission since it began reporting.[13] In fact, Total adopted a policy supporting contract transparency in 2018 committing it to advocate with governments to disclose "their Petroleum contracts and licenses.)[14]

Tullow Oil

Tullow Oil ("Tullow") has published six payments-to-governments reports, covering the fiscal years 2013 to 2018. In a communication to PWYP UK, Tullow states that "[i]mplementation costs were low given that we began reporting just as our internal processes were changing. We estimate the cost to have been less than $150,000 for the initial report, and ongoing costs (including assurance work provided by [external auditor]) would be about the same. This is calculated using internal Tullow rates, so the actual opportunity cost will be lower as we have not employed any extra people or services to facilitate this reporting. Tullow's size will also have contributed to this … For the big global mining and oil companies,

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[10] Data sourced from: www.resourceprojects.org (NRGI). Accessed February 2020.

[11] Comment submitted by Total (27 Feb 2020), p.1. Available at: https://www.sec.gov/comments/s7-24-19/s72419-6879145-210715.pdf

[12] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Final Rule, 81 Fed. Reg. at 49409. [Hereinafter referred to as "2016 Final Rule."]

[13] See for example: Total SA. (2018). Form 20-F 2018. See Risk Factors at P. 74-86. Available at: https://www.total.com/sites/default/files/atoms/files/2018-form-20-f-web.pdf. Total SA. (2017). Form 20-F 2017. See Risk Factors at P. 74-86. Available at: https://www.total.com/sites/default/files/atoms/files/2017-form-20-f-web.pdf

[14] Total SA. Business Ethics. "Total supports governments efforts towards advancing transparency in accordance with the EITI framework, and advocates for the public disclosure by countries of their Petroleum contracts and licenses. To do this, Total strives to: Foster dialogue between the relevant Group officials and representatives of States, civil society and the EITI; Participate in the efforts of the EITI Board; Promote the EITI and its principles among the States in which it operates and, more generally, whenever it has the opportunity; Share resources and recommendations based on our experience." Available at: https://www.sustainable-performance.total.com/en/business-ethics-0.

the task will have been very much more complex … although you could say proportionate to the size of the company/resources available for the task."[15]

Tullow's assets at the end of fiscal year 2018 were over $10.6 billion, meaning its ongoing compliance costs as a percentage of assets are 0.0014 percent. This is much lower than the Commission's estimated average ongoing compliance costs of 0.0079 percent of assets, as cited in the 2016 Final Rule, which was based on hypothetical cost figures provided by two companies and an industry association.[16] Tullow reports on approximately 40 extractive projects, giving an average recurring cost per project of $3,750. Tullow has not reported any risk of, or actual competitive harm as a result of its contract-level project payment disclosures in any annual report to the Commission since it began reporting.[17]

Eni SpA

Eni SpA ("Eni") has published three payments-to-governments reports, covering the fiscal years 2016 to 2018. In its response to a 2018 survey conducted by the European Commission (EC) on company reporting in the EU, Eni states that its start-up costs for complying with the EU Directives were €1,000,000, and that its recurring costs are €500,000 per year.[18] Eni's assets at the end of fiscal year 2018 were over €118 billion, meaning its ongoing compliance costs as a percentage of assets are 0.00042 percent. This is almost 50 percent less than the Commission's estimated lower bound of ongoing compliance costs of 0.0008 percent of assets, as cited in the 2016 Final Rule, which was based on a hypothetical cost figure provided by an issuer.[19] Eni has not reported any risk of, or actual competitive harm as a result of its contract-level project payment disclosures in any annual report to the Commission since it began reporting.[20]

BASF

BASF has published three payments-to-governments reports, covering the fiscal years 2016 to 2018. In its response to the European Commission's 2018 survey on company reporting in the EU, BASF states that its start-up costs for complying with the EU Directives were €47,000, and that its recurring costs are €26,000 per year.[21] BASF reports on approximately 17 extractive projects, giving an average recurring cost per project of €1,530.

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[15] Tullow email communication to PWYP UK (February 2018), including permission to quote. Included in a comment submitted by PWYP UK (25 Nov 2019), p.4. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6470014-199342.pdf.
[16] 2016 Final Rule at 49409.
[17] Tullow Oil, 2018 Annual Report and Accounts (2018), p.51. Available at: https://www.tullowoil.com/Media/docs/default-source/3_investors/2018-annual-report/tullow-oil-plc-2018-annual-report-and-accounts.pdf?sfvrsn=2.
[18] European Commission, Public Consultation on the Fitness Check on the EU Framework for Public Reporting by Companies, (2018). A searchable database of the published results is available at: https://ec.europa.eu/eusurvey/publication/finance-2018-companies-public-reporting.
[19] 2016 Final Rule at 49409.
[20] Eni SpA, Eni Annual Report (2018), p. 87. Available at: https://www.eni.com/assets/documents/Annual-Report-2018.pdf.
[21] European Commission, Public Consultation on the Fitness Check on the EU Framework for Public Reporting by Companies, (2018). Extractive assets make up a small percentage of BASF's total assets, and it doesn't break down the figure for extractives in its annual report.

The experience of companies that are already reporting project-level payments publicly under mandatory disclosure regimes is obviously superior to outdated and theoretical predictions of disclosure costs by companies who are *not* (and/or were not at the time they provided predicted cost numbers on the 2010 proposed rule) undertaking any comparable disclosures.

Compliance costs: UK review data

Data from the UK Government's review of the UK disclosure regulations is highly relevant to and should be incorporated into the Commission's cost analysis, as well as to the Commission's assumptions about the drivers of costs in the proposed rule. The Commission now has the benefit of real evidence as to the realities of implementation and the costs of compliance in this rulemaking, instead of mere speculations it had in 2016. This must inform the Commission's rulemaking.

In 2017-18, the UK Government's Department for Business, Energy and Industrial Strategy ("BEIS") undertook a post-implementation review of the UK regulations ("UK review"). The UK regulations require fully public, company-specific and contract-based project-level reporting, with no country exemptions, in line with the 2016 Rule. The UK review was published in early 2018, and covered the first full year of extractive company reporting, i.e. reporting in 2016 and the first half of 2017 on payments made in fiscal years starting in 2015.[22]

The review demonstrated that compliance costs associated with the UK regulations have been substantially lower than costs previously predicted by some companies during the 2016 rulemaking process. Of the 32 extractive companies participating in the UK review, none reported "any substantial costs" associated with disclosing payments to governments.[23] These companies include approximately six in the largest category of operators with revenue of £10 billion or more.[24] 15 companies provided actual or estimated costs for one-off impacts, and 15 provided evidence for recurring costs (though these are not the same 15 companies in both cases).[25]

Estimated and actual one-off costs were in the ranges of £700 - £30,000 (small companies) to £4,000 - £5,230,000 (large companies); and annual recurring costs were put at £500 - £25,000 (small companies) to £5,000 - £1,200,000 (large companies).[26]

An additional four companies whose estimates were indicative only, and therefore omitted from the BEIS reviewers' calculations, "suggested that their annual costs were likely to be less than £100,000."[27]

[22] Department for Business, Energy and Industrial Strategy ("BEIS"), Reports on Payments to Governments Regulations: Final report, (Jan 2018), BEIS Research Paper. Available at: http://www.legislation.gov.uk/uksi/2014/3209/pdfs/uksiod_20143209_en_001.pdf; and BEIS, The Reports on Payments to Governments Regulations 2014, Post Implementation Review, PIR No. BEIS024(PIR)-18-BF, (Feb 2018). Available at: http://www.legislation.gov.uk/uksi/2014/3209/pdfs/uksiod_20143209_en.pdf, [hereinafter referred to respectively as "BEIS (Jan 2018)," and "BEIS (Feb 2018)."]
[23] BEIS (Feb 2018), p.i., and p.6.
[24] BEIS (Jan 2018), p.9., and BEIS (Feb 2018), p.8.
[25] BEIS (Feb 2018), p.9.
[26] BEIS (Jan 2018), p.4., and BEIS (Feb 2018), p.9.
[27] BEIS (Jan 2018), p.6.

The reviewers also found that “companies with lower burdens, reporting on less than five countries, tended to have one-off costs in the first year in the region of £40,000.”[28]

The UK review put the total cost of compliance for all companies reporting in the UK under the regulations in the first year (91 companies) at an estimated £52.5 million.[29] This figure can be understood as representing initial one-off costs plus recurring costs for one year of reporting.

The UK review found no evidence that small companies face (or will face) a disproportionately high financial or non-financial burden from this mandatory reporting requirement. The final report states that the “costs of compliance and external costs vary by company profile, which implies that small companies will face costs commensurate with their size and scale of operations.”[30]

The UK review found that “one of the main drivers of cost was understanding the regulatory requirements”, and thus, “in general, respondents were hopeful that the Year 2 costs will be less” than Year 1 costs, on which the review was based.[31]

The experience of companies that are already reporting project-level payments publicly under mandatory disclosure regimes in the UK and elsewhere is superior to outdated and theoretical predictions of disclosure costs by companies who are *not* (and/or were not at the time they provided predicted cost numbers) undertaking any comparable disclosures. Moreover, the UK review is based on actual experience of companies reporting and directly addresses what the Commission identifies as the key “concerns” of Congress, including “compliance costs” with the 2016 Final Rule.[32] Like the specific company compliance numbers above, the study shows that the Commission’s previous assumptions and quantitative predictions as to both costs and risk of competitive harm, which were cited by members of Congress to support the CRA resolution, were vastly overblown in numerous respects. Companies participating in the UK review, as well as the other company examples noted here, have found little to no competitive harm, and some have noted the competitive advantage of such transparency, while also finding compliance costs to be far lower. This is important evidence that must be reflected in the Commission’s economic analysis and must inform the Commission’s approach to the CRA and its assessment of its proposed choices.

As explained further below, the UK review (along with related transparency developments) makes the case for disaggregated contract-level disclosures significantly more compelling. It also undermines the asserted justification for certain dramatic changes to this and other key features of the rule, including the Modified Project Definition, on the basis of supposed cost-savings or minimizing competitive harm, as more transparent disclosure regimes have found those rationales unsupported.

Compliance costs: European Commission review data

[28] BEIS (Jan 2018), p.16.
[29] BEIS (Feb 2018), p.10.
[30] BEIS (Jan 2018), p.19.
[31] BEIS (Jan 2018), p.20.
[32] See e.g. Proposed Rule at 2525.

In 2018, the European Commission (EC) published a review of the payment disclosure requirements in the EU Directives ("EC review"). Although only two reporting companies (unidentified) provided compliance cost data for the study, both gave low figures: €12,000 and €36,000 per report. Both figures include start-up and recurring costs.[33] On competition, the EC review found: "**There is no evidence that competitors from third countries benefit from substantial competitive advantages by not being required to report on payments to governments.** In addition, so far European companies have not reported that they suffered material damages or losses of opportunity due to the introduction of the reporting requirements. The requirements entail compliance costs, but they are not seen as highly disproportionate by the industry. Similarly, companies did not find it harder to operate in third countries. An analysis of recent contracts in the extractive sector in some countries of operation shows that **EU companies have maintained or increased their presence in countries where they were operating**."[34] Notably, the EU provided for no exemptions of any kind, including those now being contemplated by the Commission.

This too is highly relevant evidence that must be reflected in the Commission's economic analysis and must inform its approach to the CRA.

All of the above squarely speak to the principal concerns identified by the Commission as having motivated Congress to disapprove the 2016 Rule and undermines key assumptions and stated justifications for changing certain key features of the rule. Further, the above information compels substantial revisions to the Commission's economic analysis, and together with more tailored changes to the rule, enable the Commission to produce a rule that is not substantially the same, yet still consistent with the record, current market realities, and faithful to Section 13(q).

2. ***Have there been any developments or changes in industry practices since the 2016 Rules related to how companies track and record payment information or how they capture the cost of compliance with mandatory disclosure regimes that could impact or otherwise address the stated Congressional concerns?***

<u>Yes. There have been significant developments in industry practice that directly address what the Commission identifies as key Congressional concerns with the 2016 Rule. The Commission's analysis must comprehensively take into account the substantial evidence as to current industry practices since 2016 related to how companies track, record and publish payment information. This will produce a far different cost-benefit analysis that will obviate the need for dramatic and unwarranted changes to certain features of the 2016 Rule under the CRA (see our discussion of the CRA above).</u>

At the time the Commission finalized the 2016 Rule, only a handful of companies were publicly reporting their disaggregated project-level payments under rules in Norway, or voluntarily, and only the

[33] European Commission, Review of Country-by-Country Reporting Requirements for Extractive and Logging Industries – Final Report, (2018), p.41. Available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/company_reporting_and_auditing/documents/181126-country-by-country-reporting-extractive-logging-industries-study_en.pdf.

[34] Ibid. (emphasis added)

first few companies under the EU and UK regimes were beginning to report. Since then, however, the transparency landscape for the extractive industries has fundamentally changed, as described below.

1) Public reporting of entity and contract-level project payments is now standard practice for nearly 800 oil, gas and mining companies.

With these companies now reporting under mandatory disclosure regimes that uniformly define project at the lease and contract level (or other legal agreement that forms the basis of payment liabilities) tracking, recording and disclosing payments at the contract level is standard practice. In addition to cross listed issuers, this includes significant foreign subsidiaries of US-listed issuers, which demonstrates, at a minimum, that those issuers have established the standard practice for tracking, recording and publishing contract-level payment reporting in at least some segments of their overall enterprise. This includes, for example:

a) ExxonMobil[35]: 11 subsidiaries have disclosed a total of $24.9 billion in entity and contract-level project payments between 2014 and 2018. This includes:
    i) Contract-level project payment reporting for Guyana (Starbroek, Kaieteur and Canje Blocks), Angola (Blocks 15 and 17), Cote D'Ivoire (Blocks C-603, C-602), Liberia (Block 13), South Africa (Exploration Rights/Blocks Transkei-Algoa and Tugela South and Technical Cooperation Deepwater Durban Permit)
    ii) ExxonMobil Norway, which disclosed $9.7 billion in payments since 2014.[36]
    iii) ExxonMobil's Canadian subsidiaries, which have been disclosing under ESTMA since 2016, including Imperial Oil[37], Canada's largest refiner and an upstream oil and gas producer and XTO Energy Canada.[38]
b) Chevron:[39] Two subsidiaries have disclosed a total of $12.5 billion in entity and license-level payments between 2015 and 2018.
c) ConocoPhillips:[40] Four subsidiaries have disclosed a total of $3 billion in entity and license-level payments between 2014 and 2018.

The UK review provides additional insight into how companies track payment information and capture compliance costs. The review found, for example, that "[l]argely, companies leveraged existing staff to capture and report the flow of payment to governments."[41] It appeared that, while adjustments were made, companies' comments indicate "companies did not introduce new systems" to comply with the

[35] Exxon subsidiary reporting available on ResourceProjects.org (accessed on March 11, 2020). Available at: https://bit.ly/2Q98ANI.
[36] https://resourceprojects.org/projects?tab=0&reportingCompanies=ExxonMobil%20Norway. All of Exxon's Norwegian licenses were sold to Var Energi in September 2019.
[37] https://www.imperialoil.ca/en-CA/Investors/Investor-relations/Annual-and-quarterly-reports-and-filings#2017
[38] https://corporate.exxonmobil.com/Locations/Canada/ExxonMobil-in-Canada
[39] Chevron subsidiary reporting available on ResourceProjects.org (accessed on 11 March 2020). Available at: https://bit.ly/3cP7C2Z.
[40] ConocoPhillips subsidiary reporting available on ResourceProjects.org (accessed on 11 March 2020). Available at: https://bit.ly/3cP8Pax. Notably, ConocoPhillips Norway has been reporting since 2015. Information available at: http://www.conocophillips.no/social-responsibility/country-by-country-report/.
[41] BEIS (Feb 2018), p.10.

regulations.[42] Although "[m]ost companies were unable to provide specific costs associated with internal reporting activities (by grade, time, and total internal salary costs)," companies that did "provide some indications of those costs noted that they were not borne as separate costs since these reporting activities were added to existing roles and hence absorbed into business-as-usual (therefore not imposing any additional burden)."[43] This finding is confirmed by Total S.A., which wrote to the Commission saying that "the internal cost for this reporting is low" and that the annual cost of $200,000 was borne internally without need for external support after initial implementation.[44]

2) Companies operating in EITI countries must now compile and produce contract-level project payment information to abide by the revised 2019 EITI Standard.

The 2019 EITI Standard requires that member countries disclose company-by-company payment information at the project level, using a contract-level project definition in line with the EU, UK and Canada. This means that any company with operations in an EITI country will need to track and collect this information for those purposes. Therefore, any estimate of comparative burden of disclosure by the Commission between the Modified Project Definition and contract-level project disclosure must take into account the previous and future investments made by issuers to adjust internal systems to respond to the EITI project reporting requirement. These investments should be estimated and reflected in the Commission's Economic Analysis.

3) Existing Country-by-Country tax reporting demonstrates that tax paid in each jurisdiction is regularly being tracked, compiled and in some cases published.

Currently, each US taxpayer with approximately $850 million in annual revenues is required to file a Country-by-Country ("CbC") report with the IRS showing profits and corporate income taxes paid in each jurisdiction that they operate. Resulting from regulations adopted by the IRS in June 2016, these reports document what is arguably the most complex aspect of payments-to-governments reporting: corporate income tax paid. The IRS regulatory requirement includes the CbC report submission to the IRS, as well as the requirement to maintain the records to produce the CbC report.[45] The cost of compliance to produce this tax information has already been internalized by the largest issuers. Notably, this includes 16 emerging growth companies covered under Section 13(q).

[42] BEIS (Jan 2018), p.17.
[43] BEIS (Feb 2018), p.10. See also BEIS (Jan 2018), p.12. (costs "tended to be absorbed as a business-as-usual cost rather than through the whole-scale creation of new roles and systems.")
[44] Comment submitted by Total S.A. (17 Feb 2020). Available at: https://www.sec.gov/comments/s7-24-19/s72419-6879145-210715.pdf.
[45] Relevant IRS CbC requirements include disclosure of "(iv) Total income tax paid on a cash basis to all tax jurisdictions, and any taxes withheld on payments received by the constituent entities; (v) Total accrued tax expense recorded on taxable profits or losses, reflecting only operations in the relevant annual period and excluding deferred taxes or provisions for uncertain tax liabilities;"; and, "(g) *Maintenance of records*. The US person filing Form 8975 as an ultimate parent entity of a US MNE group must maintain records to support the information provided on Form 8975." Department of the Treasury, International Revenue Service, Country by Country Reporting. 81 Fed. Reg. at 42490 and 42495. Available at: https://www.govinfo.gov/content/pkg/FR-2016-06-30/pdf/2016-15482.pdf.

More broadly, major oil, gas, and mining companies have been a part of the momentum toward tax transparency, with increasing numbers supporting public CbC reporting of revenues, profits, employment, and tax. Some of them have done so in line with public commitments to Responsible Tax Principles, like those articulated by the B Team and more than a dozen companies.[46] Over the last two years, extractive sector companies like ENI, Shell, Repsol, and Anglo American have all begun publishing CbC information, leading what the Wall Street Journal has suggested may be "the beginning of the end of tax secrecy."[47] With the Global Reporting Initiative (GRI) adopting a new global standard on tax transparency in December 2019, many more companies -- including International Council on Mining and Minerals (ICMM) members, who are committed to implementing the GRI Standards -- will soon publish their own country-by-country tax data, which will serve to complement payments-to-governments reporting by oil, gas, and mining companies.[48]

The Commission's cost analysis must evaluate and consider the clear evidence that many covered issuers, beyond those that are cross-listed in other markets, have already made upfront investments in the tracking, collection, and compilation of the CBCR reports required by the IRS.

All of the above shows that many of the Commission's assumptions in the 2016 Rule that drove its cost predictions, which in turn were cited by members of Congress as concerns, no longer reflect current market realities.

3. ***Should we define "resource extraction issuer" to mean an issuer that is required to file with the Commission an annual report on Form 10-K, Form 20-F, or Form 40-F pursuant to Section 13 or 15(d) of the Exchange Act and that engages in the commercial development of oil, natural gas, or minerals, as proposed? Should we alter our approach to the definition of "resource extraction issuer" based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?***

<u>We agree with the Commission's proposed definition of "resource extraction issuer" as it aligns with the definition put forward in Section 13(q). There is no reason to alter the definition.</u>

4. ***Should we exclude other categories of issuers, such as foreign private issuers, from the definition of "resource extraction issuer"?***

<u>We strongly support the Commission's proposal to include foreign private issuers in the definition of "resource extraction issuer." Exemption should not be provided based on foreign private issuer status.</u>

[46] The B Team, B Team Responsible Tax Principles (2018). Available at: https://bteam.org/our-thinking/news/responsible-tax.
[47] Rochelle Toplensky, "The Beginning of the End of Tax Secrecy," Wall Street Journal (20 Dec 2019). Available at: https://www.wsj.com/articles/the-beginning-of-the-end-of-tax-secrecy-11576837708.
[48] For information on how the GRI Standard 207 compares to mandatory payment disclosure requirements for mining, oil, and gas companies, see Publish What You Pay, Tax and Transparency – How the Global Reporting Initiative Tax Disclosure Standard compares with global extractives transparency standards (25 Feb 2020). Available at: https://www.pwyp.org/pwyp-resources/tax-transparency-gri-tax-disclosure-standard/.

Applying the disclosure requirements to the broadest possible coverage of resource extraction issuers is key to satisfying the transparency objectives of Section 13(q). Categorical exemptions based on the size, ownership, foreign private issuer status, or other broad characteristics would be inconsistent with the statute and Congressional intent as well as with transparency laws in other jurisdictions: both the EU Directives and Canada's ESTMA require reporting by all public companies, regardless of size. Neither foreign private issuers nor small reporting companies, as addressed further in response to questions 67-69, should be excluded from the definition of resource extraction issuer (or similarly through an exemption).

Such exemptions would contravene the Congressional intent to achieve the broadest possible coverage of both US and foreign issuers. Senator Cardin made clear the Congressional intent to cover foreign issuers in a statement from May 2010, "This amendment goes a long way in achieving that transparency by requiring *all foreign and domestic* companies registered with the US Securities and Exchange Commission to report, in their annual reports to the SEC, how much they pay each government for access to their oil, gas, and minerals."[49] (emphasis added). Senator Lugar also made this clear in the following statement, "This amendment requires foreign and domestic companies listed on US stock exchanges and exchanging American Depository Receipts to disclose in their regular SEC filings their extractive payments to governments for oil, gas and mining."[50]

Senator Cardin reiterated this point in his subsequent letter to the Commission: "The intent of Sec. 13(q) is to provide the broadest possible meaning to the term 'resource extraction issuer.' Specifically, the intent was to include all issuers, including foreign issuers, which have a reporting requirement to the SEC."[51]

Broad exemptions for major categories of issuers would result in significant loss of coverage and intended transparency. Moreover, foreign private issuers are exposed to significant political regulatory risks, and excluding them would undermine the value of the rules to investors.[52] Therefore, such categorical exemptions should not be provided.

5. ***Should we define "commercial development of oil, natural gas, or minerals" using the list of activities described in the statute, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?***

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49 Floor remarks by Senator Cardin, Congressional Record S3815, 17 May 2010.
50 Floor remarks by Senator Lugar, Congressional Record S3815, 17 May 2010.
51 See Senator Cardin letter to Commission, 1 December 2010. Available at: http://www.sec.gov/comments/df-title-xv/specializeddisclosures/specializeddisclosures-94.pdf. In addition, we note that "almost all of the commenters on the [2015] Proposing Release supported the proposed definition" in 2016 which covered "all companies," and the only commenter to the contrary was specifically concerned with ensuring cross listed issuers would not have to comply with two inconsistent regimes. 2016 Final Rule at 49367.
52 See comment submitted by US SIF (8 Mar 2016), p.2. Available at: https://www.sec.gov/comments/s7-25-15/s72515-54.pdf.

Yes. We support the Commission's proposal that "commercial development of oil, natural gas, or minerals" means "exploration, extraction, processing, export, and the acquisition of a license for any such activity."

This definition should not be altered since it is consistent with the statutory language of Section 13(q) and is in line with the established international transparency standard.

6. ***Should we define "extraction" as the production of oil and natural gas as well as the extraction of minerals, as proposed?***

Yes. We support the Commission's definition of "extraction." This definition is consistent with the statutory language of Section 13(q) and is in line with the established international transparency standard.

7. ***Are the types of activities covered by the term "processing" appropriate?***

Yes. We agree with the list of activities covered by the term "processing." This definition is consistent with the statutory language of Section 13(q) and is in line with the established international transparency standard.

8. ***Should we alter our approach to the definition of "extraction" or the instruction on "processing" based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?***

No. We agree with the definition of "extraction" proposed by the Commission.

9. ***Should we adopt the definition of "export," as proposed? If we should provide a different definition, what should it be? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?***

We recommend that the definition for "export" be expanded to include trading-related activities when an issuer makes a payment for the purchase of oil, natural gas, or minerals sold by a government (including a state-owned company).

For further discussion on trading-related payments and proposed amendments to the regulatory language, see our response to Questions 21 as well as the February 2016 and March 2020 submissions by the Natural Resource Governance Institute on disclosure of trading-related payments.[53]

We recommend amending proposed Item2.01(d)(4) of Form SD as follows:

[53] Comments submitted by the Natural Resource Governance Institute (16 Feb 2016). Available at: http://www.resourcegovernance.org/sites/default/files/nrgi_sec_trading.pdf; and submitted on 16 March 2020 (forthcoming).

(4) Export means the movement of a resource across an international border from the host country to another country by a company with an ownership interest in the resource. Export ~~does not include the movement of a resource across an international border by a company that (i) is not engaged in the exploration, extraction, or processing of oil, natural gas, or minerals and (ii) acquired its ownership interest in the resource directly or indirectly from a foreign government or the Federal Government~~ **includes trading activities where an issuer purchases government's (including a state-owned company's) oil, gas, or minerals**. Export also does not include cross-border transportation activities by an entity that is functioning solely as a service provider, with no ownership interest in the resource being transported.

10. ***Should we adopt the instruction on the meaning of the term "mineral," as proposed? Is the proposed instruction sufficiently clear for issuers to identify when they are engaged in the commercial development of a mineral?***

Yes, the Commission should adopt the instruction on the meaning of the term "mineral" as proposed.

11. ***Have there been developments since the 2016 Rules that should lead us to provide a defined term for "mineral" or different guidance? If so, what should be the definition or guidance?***

No. We agree with the Commission's definition of the term "mineral."

12. ***Is the proposed approach to disclosure of tax payments appropriate? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release? Would allowing disclosure of tax payments at the entity level improperly inflate reported payments?***

Yes. We agree with the proposed approach, and would emphasize that tax payments, like all non-tax payments to governments, that are ring-fenced by project be reported separately for each project rather than at entity level.

The proposed approach is consistent with EITI and related requirements in other jurisdictions, and we see no reason for the Commission to depart from this well-established global standard. However, unlike the US, there are countries where corporate tax payments are ring-fenced for each project (such as the UK). Under those circumstances, there is no reason that companies should not report their taxes at the project level. The fact that tax regimes can differ in whether or not they are ring-fenced by project is certainly not a reason to avoid tax reporting at project level, where possible. Our concern with entity-level tax reporting is not that it would improperly inflate payment amounts, but that in certain circumstances, it could allow for unnecessary and unhelpful aggregation that departs from established practice.

13. ***Should we provide additional guidance on how to isolate the corporate income tax payments made on income generated from the commercial development of oil,***

natural gas, or minerals given that income may be earned from other business activities in the same jurisdiction as well? If so, what guidance should we provide?

No. In our opinion, such guidance is not feasible, but this certainly should not justify leaving out taxes paid by integrated companies.

Under tax regimes of some countries (including the US), integrated companies pay taxes on income from all of their activities, combining commercial development of oil, gas or minerals with downstream activities such as refining, shipment petrochemicals, gas stations etc. When the USEITI grappled with this question, a representative of US Treasury explained that US income tax revenues represent taxes from all sources of income, and noted: "The information provided on a corporation's consolidated tax return is insufficient to make an allocation of tax payments by source of income (e.g., upstream and downstream operations, transportation, activities unrelated to mineral extraction and foreign source income)."[54] In other words, the task of separating taxes for extractive and non-extractive activities is not practicable (at least not in the US), so it would not be fruitful for the Commission to consider guidance. However, that this is not practicable is not to say that such taxes are not material to include, even if they necessarily include non-extractive activities.

14. ***Should we adopt an instruction providing examples of fees, bonuses, and royalties that would be considered "payments," as proposed? Is our interpretation of royalties overly broad? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?***

We support the inclusion of an instruction that provides a non-exhaustive list of fees, bonuses, and royalties.

Providing these examples would help companies more accurately interpret the rule's requirements, since each of these payment categories is comprised of numerous different types of payments. An EITI review of fees in ten EITI-implementing countries shows that a wide range of fees paid to governments are considered part of the commonly recognized revenue stream. These include application fees; seismic data fees; permit fees; acreage fees; water fees; and fees for forestry use.[55] Bonuses in the upstream segments of the oil, gas, and mining industries are often individually tailored to suit different contractual contexts and can take various different forms, including signing, discovery, and production bonuses.

Royalties similarly take various forms, including hybrid systems that mix value and profit-based royalties.[56] To ensure all royalties required to be paid pursuant to state-investor contracts, licenses, leases, concessions, or similar legal agreements are disclosed, the Commission could consider including a non-exclusive list of royalties, similar to its approach to fees and bonuses. We recommended using

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[54] https://www.doi.gov/sites/doi.gov/files/migrated/eiti/FACA/upload/USEITI_Treasury_Presentation_April-23-24_2014.pdf.
[55] EITI, Overview of EITI Reports (29 Jul 2009). Available at: https://eiti.org/files/documents/Overview%20EITI%20Reports.pdf.
[56] World Bank, Mining Royalties: Their Impact on Investors, Government and Civil Society (2006), p.55. Available at: http://siteresources.worldbank.org/INTOGMC/Resources/336099- 1156955107170/miningroyaltiespublication.pdf.

the categories cited in the World Bank's publication, *Mining Royalties: Their Impact on Investors, Government and Civil Society*.[57]

We therefore agree with the Commission that a non-exhaustive list of included fees, bonuses, and royalties should be included in the instructions.

We recommend amending proposed Instruction 10 to Item 2.01 as follows:

Royalties include **but are not limited to** unit-based, value-based, and profit-based royalties. Fees include **but are not limited to** license fees, rental fees, entry fees, and other considerations for licenses or concessions. Bonuses include **but are not limited to** signature, discovery, and production bonuses.

15. ***Should we require disclosure of dividend payments, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?***

<u>We support the inclusion of dividends in the list of payments that are required to be disclosed.</u> This would align with the text and Congressional intent of Section 13(q), as dividend payments are material benefits that are part of the commonly recognized revenue stream, and are recognized by the EITI.[58] The EU Directives,[59] ESTMA,[60] and EITI Standard[61] all require dividends to be disclosed. Exxon[62] and API[63] have also commented that the rule should include dividends.

We support the inclusion of an instruction that an issuer would not need to disclose dividends paid to a government as a common or ordinary shareholder of the issuer, as long as the dividend is paid to the government under the same terms as other shareholders. We agree that the issuer should be required to disclose any dividends paid to a government in lieu of production entitlements or royalties.

16. ***Should we require the disclosure of infrastructure payments, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?***

<u>We support the inclusion of a requirement for issuers to report payments for infrastructure</u>. The large-scale nature of many infrastructure improvements paid for by extractive companies, such as the development of roads, ports, or bridges, makes them of material benefit in resource-producing countries. This is a commonly recognized revenue stream from natural resource extraction. These

[57] These categories are cited in World Bank, Mining Royalties: Their Impact on Investors, Government and Civil Society (2006), pp.50-54.
[58] 15 USC § 78m(q)(1)(C)
[59] Directive 2013/34/EU of the European Parliament and of the Council (26 Jun 2013), Article 41(5)(d).
[60] Extractive Sector Transparency Measures Act (22 Dec 2015), p.3. Available at: http://laws-lois.justice.gc.ca/PDF/E-22.7.pdf.
[61] 2019 EITI Standard.
[62] Comment submitted by ExxonMobil (31 Jan 2011), p.10. Available at: http://www.sec.gov/comments/s7-42- 10/s74210-11.pdf.
[63] Comment submitted by API (28 Jan 2011), p.10. Available at: http://www.sec.gov/comments/s7-42-10/s74210- 10.pdf.

payments are covered by the EU Directives,[64] ESTMA,[65] and the EITI Standard.[66] Including payments for infrastructure improvements is therefore consistent with the definition of "payments" under Section 13(q) and Congressional intent to further international transparency efforts.

Natural resources are frequently located in remote or under-developed areas and many extractive companies, in particular mining companies, make infrastructure-related payments. Such payments are generally viewed as part of the cost of doing business in these regions. In many developing countries, particularly in Africa and specifically in countries emerging from civil war, transport infrastructure is frequently poor or non-existent, and financing to improve that infrastructure is often crucial for the export of natural resources.

17. ***Should we require disclosure of CSR payments, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release? For example, is there evidence to suggest that CSR payments are not part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals?***

<u>Yes, the Commission should require disclosure of CSR payments (or community and social payments) that are made to governments, required either by law or contract, and intended to further the commercial development of oil, natural gas, or minerals.</u>

This would be consistent with the EITI Standard, which requires disclosure of mandatory CSR payments:

> Where material social expenditures by companies are mandated by law or the contract with the government that governs the extractive investment, implementing countries must disclose these transactions. Where such benefits are provided in kind, it is required that implementing countries disclose the nature and the deemed value of the in-kind transaction. Where the beneficiary of the mandated social expenditure is a third party, i.e. not a government agency, it is required that the name and function of the beneficiary be disclosed. Where reconciliation is not feasible, countries should provide unilateral company and/or government disclosures of these transactions.[67]

CSR payments meet the "payment" definition in Section 13(q) because 1) including them is consistent with the EITI Standard, 2) they are made to further the commercial development of oil, natural gas, or minerals, and 3) they are material benefits that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[68]

First, CSR payments included in the terms of natural resource contracts are made for the purpose of the "acquisition of a license for" and the "exploration, extraction, processing, export, and other significant

[64] Directive 2013/34/EU of the European Parliament and of the Council (26 Jun 2013), Article 41(5)(g).
[65] Extractive Sector Transparency Measures Act (22 Dec 2015), p.3.
[66] 2019 EITI Standard, p.22.
[67] 2019 EITI Standard, Requirement 6.1 (a), p.31.
[68] 15 U.S.C. § 78m(q)(1)(C)(ii).

actions relating to oil, natural gas, or minerals." They thus qualify as payments made to further the "commercial development of oil, natural gas, or minerals" as defined in Section 13(q).[69]

Second, CSR payments are clearly of material benefit in resource-dependent countries, both to governments and to local communities. Shell is supportive of the inclusion of such payments as a type of "other material benefit" if these are found to be material to the overall payments made to a foreign government.[70] US-listed companies that already disclose CSR payments include Equinor,[71] Newmont,[72] and Kosmos Energy.[73] Including CSR payments would also be consistent with the position of AngloGold Ashanti, which states in its comment to the Commission that "such payments should be considered part of the commonly recognized revenue stream to the extent that they constitute part of the issuer's overall relationship with the government pursuant to which the issuer engages in the commercial development of oil, natural gas, or minerals."[74]

The magnitude of these payments clearly qualifies them as a material benefit. A KPMG survey of the international mining sector found ten mining, metals and engineering companies had combined social investments of $1.2 billion in 2013.[75] Chevron contributed more than $1 billion in social investments to local communities from 2013 to 2018, and currently funds community projects and partnerships in 29 countries.[76] In Kazakhstan, extractive companies' social and local infrastructure payments totaled approximately $2 billion between 1996 and 2009.[77] In Angola, a 2008 study found that foreign oil companies' contractual CSR payments amounted to approximately $200 million per year on average – more than half the total amount of official development assistance received by Angola in 2008.[78] Contractual obligations for CSR payments have reached into the hundreds of millions of dollars per oil block in Angola. The terms for the consortium that won the bidding round for blocks 15, 16, and 17 in 2006 included $200 million in CSR payments for each of the blocks.[79] In Zambia, social investments in the country's Copperbelt and North-Western Province amounted to nearly $80.6 million in 2012.[80] In Equatorial Guinea, the government encourages oil companies to spend more on social investments than the minimum required by law. In 2008, for instance, six foreign-owned oil and gas companies spent

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[69] 15 U.S.C. § 78m(q)(1)(A).
[70] Comment submitted by Royal Dutch Shell (28 Jan 2011), p.11. Available at: https://www.sec.gov/comments/s7-42-10/s74210-18.pdf.
[71] See Equinor, 2018 Payments to Governments. Available at: https://www.equinor.com/en/how-and-why/sustainability/integrity-transparency-and-tax-approach.html.
[72] See: https://www.newmont.com/sustainability/sustainability-reporting/economic-and-social-performance/value-sharing/.
[73] See: http://www.kosmosenergy.com/pdfs/CRR-2018.pdf.
[74] Comment submitted by AngloGold Ashanti (31 Jan 2011), p.9. Available at: https://www.sec.gov/comments/s7-42-10/s74210-15.pdf.
[75] KPMG Global Mining Institute, Valuing Social Investments in Mining (2014). Available at: https://assets.kpmg.com/content/dam/kpmg/pdf/2014/10/valuing-social-investment-mining-v3.pdf.
[76] See: https://www.chevron.com/-/media/shared-media/documents/2018-corporate-responsibility-report.pdf.
[77] Comment submitted by PWYP-US (25 Feb 2011), p.25, FN.104. Available at: https://www.sec.gov/comments/s7-42-10/s74210-29.pdf.
[78] Inge Amundsen and Arne Wiig, Social Payments in Angola: Channels, Amounts and Impact (2008), Chr. Michelson Institute, p.12. Available at: http://www.cmi.no/publications/file/3196-social-funds-in-angolachannels.pdf.
[79] Id., p.10.
[80] See: https://www.icmm.com/website/publications/pdfs/mining-parterships-for-development/enhancing-minings-contribution-to-the-zambian-economy-and-society.

approximately $35 million on social development and training projects, well above the combined $3.5 million they were legally required to pay.[81]

The large number of countries where CSR payments are required shows that they are part of the commonly recognized revenue stream. A paper commissioned by the World Bank revealed that as of January 2016, 40 countries had adopted provisions in their mining laws and policies that require extractive companies to make CSR payments.[82] The laws and policies identified in the study specifically target communities living in proximity to mining operations, and mandate either mining companies and/or governments to carry out socio-economic development projects in those communities. EITI-implementing countries that already disclose or reconcile mandatory and/or voluntary social expenditures in their EITI Reports include Kazakhstan, Kyrgyzstan, Liberia, Mongolia, Mozambique, Peru, Republic of Congo, Togo, Yemen and Zambia.[83]

Inclusion of mandatory CSR payments would serve the statutory purpose of Section 13(q) to deter corrupt deals and allow investors to understand the secret financial transactions that can threaten the legality and stability of their investments in the extractive industries. Of the 40 national mining laws that include CSR payment requirements analyzed by the World Bank, only three include transparency provisions relating to CSR payments.[84] Experience has shown that CSR payments are vulnerable to corruption and mismanagement.[85] For example, research by Global Witness shows that $175 million in social contributions from a single Angolan oil block may have been corruptly diverted.[86] In Kazakhstan, civil society organizations have reported social investment funds being misused.[87] In Equatorial Guinea, where mandatory CSR payments are not publicly disclosed despite being required by law, the government has used CSR payments as cover under which to approach US-listed oil and gas companies about financing projects that appear to have been motivated politically, by the whims of individual government officials and had little to do with social development. For instance, companies have been

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[81] Joseph Kraus, The "Business" of State-Building: The Impact of Corporate Social Responsibility on State Development in Equatorial Guinea (Dec 2010), p.172. Available at: http://etd.fcla.edu/UF/UFE0042514/kraus_j.pdf.

[82] Kendra Dupuy, Community Development in Mining: A Global Analysis of Legal Requirements (Jan 2016), Summary Report Written for the World Bank, Governance Global Practices Group (available on request). The 40 countries are: Afghanistan, Australia, Burkina Faso, Canada, Central African Republic, China, Colombia, Cote d'Ivoire, Democratic Republic of Congo, Ecuador, Equatorial Guinea, Ethiopia, Fiji, Ghana, Greenland, Guinea, India, Indonesia, Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Laos, Mali, Mongolia, Mozambique, Niger, Nigeria, Oman, Papua New Guinea, Peru, Philippines, Sierra Leone, South Africa, South Sudan, Tanzania, Togo, Vietnam, Yemen, and Zimbabwe.

[83] EITI Guidance Note 17 on Social Expenditures, Requirement 4.1(e). Available at: https://eiti.org/document/guidance-note-17-on-social-expenditures.

[84] Sierra Leone's community development agreement ("CDA") provision makes explicit mention of the fact that CDAs are not confidential, while Guinea's legislation states that principles of transparency will be adhered to in CDA management. Indonesia's legislation calls on mining companies to implement socio-economic activities transparently.

[85] Comment submitted by Dr. Harry G. Broadman and Bruce H. Searby (25 Jan 2016), p.4. Available at: https://www.sec.gov/comments/s7-25-15/s72515-10.pdf.

[86] Justin Scheck, "Anticorruption Group Questions BP Payments in Angola", Wall Street Journal (5 Aug 2014). Available at: http://blogs.wsj.com/corporate-intelligence/2014/08/05/anticorruption-group-questions-bppayments-in-angola/; Global Witness, "BP and Partners' $350 Million Payments in Corruption-Prone Angola Show Need for US Transparency Rules" (4 Aug 2014). Available at: https://www.globalwitness.org/en/archive/bp-and-partners-us350-million-payments-corruption-prone-angola-show-need-us-transparency/

[87] Emma Wilson and James van Alstine, *Localising Transparency: Exploring EITI's Contribution to Sustainable Development* (2014), University of Leeds and International Institute for Environment and Development, p.42. Available at: http://pubs.iied.org/16555IIED.html.

approached by government officials with requests to drill a water well for a local church attended by a high ranking government official, to donate equipment to the government for an international oil and natural gas conference, and to finance a kickboxing tournament.[88] This raises concerns that CSR payments, if allowed to remain opaque, could be misused to channel corrupt payments, special favors, and kickbacks, creating a gray zone of illicit payments that may not be easily monitored or policed by the FCPA.

We believe that including contractually and legally mandated CSR payments in the final rule would obviate the need for producing additional guidance, as well as reduce the reporting burden for companies. As all legally or contractually required CSR payments, payments for infrastructure improvements, and payments in kind would need to be disclosed, extractive issuers would not need to make decisions as to which types of payment to omit from reports.

> ***18. If we exclude CSR payments from the list of covered payment types, should we provide additional guidance concerning how an issuer would distinguish CSR payments from infrastructure payments?***

<u>No such guidance is necessary if CSR payments are covered, as we recommend.</u>

> ***19. Should we require an issuer to report in-kind payments at cost, or if cost is not reasonably available or determinable, at fair market value, and provide a brief description of how the monetary value was calculated, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules, in light of our other proposals in this release or for any other reason? Specifically, should we require an issuer to report in-kind payments at fair market value, or at cost only if fair market value is not reasonably available or determinable? Should we instead permit resource extraction issuers to choose whether to report in-kind payments at cost or fair market value?***

<u>We support the inclusion of a requirement for an issuer to report in-kind payments at cost, or if cost is not determinable, fair market value together with a brief description of how that value was calculated.</u> Where applicable, the Commission should also require issuers to report the relevant volume. This is an appropriate modification that would result in closer alignment with other international transparency regimes and taken together with other changes, will contribute to making this rule “not substantially the same” as the 2016 rule.

Requiring disclosure of the volume of in-kind payments, where applicable, would be consistent with the EU Directives.[89] We also support this requirement because it would allow us and other users of the

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[88] Joseph Kraus, The “Business” of State-Building: The Impact of Corporate Social Responsibility on State Development in Equatorial Guinea (Dec 2010), p.180.

[89] Directive 2013/34/EU of the European Parliament and of the Council (26 Jun. 2013), Article 43(3). “Where payments in kind are made to a government, they shall be reported in value and, where applicable, in volume. Supporting notes shall be provided to explain how their value has been determined.”

information to better understand the methodology used to calculate the value of in-kind payments, as well as to hold governments to account for the volumes of resources received. Our experience of using in-kind payment data shows that if the volume amount is not disclosed, it is often not possible to calculate the unit price of in-kind oil, gas or mineral payments, which in turn prevents holding governments to account when in-kind payments are not appropriately valued.[90]

This is particularly important in countries such as Nigeria where the handling of the sale of the government's production entitlement has been an area of particular concern with respect to corruption and lack of transparency.[91] In 2014, Nigeria's Central Bank Governor Lamido Sanusi raised an alarm that $20 billion in oil sale revenues had gone missing.[92]

Issuers should not be permitted to aggregate in a single figure in-kind payments for differently valued commodities, such as when in-kind payments from a project comprise both oil and gas. PWYP's experience of using in-kind payment data shows that such aggregation makes it impossible to calculate the unit price of in-kind oil, gas or mineral payments, and to hold the government to account when they are not appropriately valued.[93]

We recommend amending proposed Item 2.01(a) of Form SD by adding the following:

Where payments are made in-kind, they shall be reported in value and, where applicable, in volume. Supporting notes shall be provided to explain how their value has been determined.

20. ***Should we include an instruction regarding how to calculate the in-kind value of a production entitlement, as proposed? Is the proposed instruction sufficiently clear for resource extraction issuers to determine how to calculate the in-kind value?***

<u>We support the inclusion of an instruction for issuers to calculate the in-kind value of a production entitlement.</u> This would assist report users to analyze the data as well as benefiting issuers, and would also be consistent with the ESTMA Technical Reporting Specifications.[94]

We recommend amending proposed Instruction 12 to Item 2.01 as follows:

If a resource extraction issuer makes an in-kind payment of the types of payments required to be disclosed, the issuer must disclose the payment. When reporting an in-kind payment, an issuer must

[90] PWYP UK, Submission to UK Government Review of the Reports on Payments to Governments Regulations 2014 (17 Nov 2017), p.31. Available at: https://www.pwyp.org/wp-content/uploads/2017/11/2017-11-PWYP-submission-to-UK-review-final.pdf.
[91] Natural Resource Governance Institute, Inside NNPC Oil Sales: A Case for Reform (August 2015). Available at: http://www.resourcegovernance.org/sites/default/files/NRGI_InsideNNPCOilSales_MainReport.pdf.
[92] Ibid.
[93] PWYP UK, Submission to UK Government Review of the Reports on Payments to Governments Regulations 2014 (17 Nov 2017), p.11.
[94] Extractive Sector Transparency Measures Act – Technical Reporting Specifications (18 Jun 2018), Section 2.4.5, p.6. Available at: https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/Technical%20Reporting%20Specifications%20-%20Version%202.pdf

determine the monetary value of the in-kind payment and tag the information as ''in-kind'' for purposes of the currency. For purposes of the disclosure, an issuer may report the payment at cost, or if cost is not determinable, fair market value. **The issuer must** provide a brief description of how the monetary value was calculated **and, where applicable, report the relevant volume.**

Furthermore, proposed instruction 12 to Item 2.01 of Form SD on the repurchase of in-kind production entitlements is insufficient given that <u>all</u> payments to governments for the purchase of oil, gas and minerals extracted in that jurisdiction are now established as a commonly recognized revenue stream related to the commercial development of oil, natural gas and minerals (See our response to questions 9 and 21 for further information.)

21. ***In light of developments since the 2016 Rules or other aspects of the proposed rules, should we add other payment types or eliminate certain payment types from the proposed list of covered payment types? If so, please explain which payment types should or should not be considered part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. If you recommend adding other payment types, please also explain how they are consistent with the EITI's guidelines and how their inclusion would support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas or minerals.***

<u>We urge the Commission to include commodity trading-related payments where an issuer purchases oil, natural gas or minerals from a government (including a state-owned company).</u>

In order for Section 13(q) to be comprehensive and promote accountability and combat corruption within resource-rich countries, it is essential that payments to governments for the purchase of oil, gas and minerals (physical commodity trading-related payments) are included in the final rules.

In many countries, payments received from the sale of oil or gas represent the country's largest revenue stream. While most common in oil producing countries, a number of state-owned mining companies make similar commodity sales.

In 2019 NRGI analyzed the oil, gas and product sales by NOCs in 35 countries for which data is available. Our findings confirmed that payments to governments for the purchase of oil, gas and minerals is an important source of government revenue for many resource rich countries across the globe. The payments made to NOCs in these 35 countries to commodity traders and other buyers which include numerous US issuers generated over $1.5 trillion in 2016, equaling 22 percent of the countries' total government revenues. This 22 percent figure is remarkably high given that this data is drawn from such a wide range of countries, including new producers such as Ghana and Mozambique for which oil sales are currently equivalent to a low percentage of government revenue, at 3 percent and less than 1 percent respectively. This research highlighted some countries where payments to governments for the purchase of oil and gas equals a very high percentage of total government revenue, including Angola, where such payments are equivalent to 79 percent of government revenue, Malaysia where it equals 77 percent of government revenue and Algeria where it equals 68 percent of government revenue.[95]

Since the release of this research, the NOC database has been updated to include, where available, data on 2018 payments to NOCs for the purchase of oil and gas. Data for 2016 – 2018 is available for 28 countries. Analysis from these 28 countries indicates that payments to governments for the purchase of oil and gas has risen significantly from $1.4 trillion in 2016 to $2.1 trillion in 2018 – an increase that likely reflects a rise in oil prices of a similar scale.

Along with their large size, NOC oil and gas sales often exhibit high corruption risks. NRGI has published *Initial Evidence of Corruption Risks in Government Oil and Gas Sales*, which describes how controversies or legal actions arose around oil and gas sale transactions in Angola, Indonesia, Iraq, Nigeria, the Republic of Congo and Turkmenistan. Corruption risks can occur in relation to the allocation of buyer rights, the negotiation of purchase terms and the collection and use of payment proceeds.

Finally, significant developments in terms of company-specific disclosure purchases of oil, gas and minerals from governments both in terms of policy and practice have taken place over the decade since Section 13(q) was passed and *in particular* since the development of the 2016 rule. Trading payments are now firmly established as a commonly recognized revenue stream related to the commercial development of oil, natural gas and minerals with the EITI (Section 4.2 of the 2019 Standard), IMF (including trading payments in its Fiscal Transparency Code), OECD (disclosure framework under development and support from the Secretary General's High Level Advisory Group on Anti-Corruption and Integrity for disclosure of these payments), and other governments including Switzerland and the United Kingdom.

For further discussion on trading-related payments and proposed amendments to the regulatory language, the February 2016 and March 2020 submissions by the Natural Resource Governance Institute on disclosure of trading-related payments.[96]

We recommend amending proposed Item 2.01(d)(9)(iii) of Form SD by adding the following:

(I) ***Payments (including payments in-kind) to governments (including a company owned by a foreign government) for the purchase of oil, natural gas or minerals.***

22. Should we require issuers to disclose payment information on a cash basis rather than an accrual basis, as proposed? Should we alter our approach based on any

[95] See: https://www.nationaloilcompanydata.org/; Alexander Malden and Joseph Williams, Big Sellers: Exploring the Scale and Risk of National Oil Company Sales, NRGI (June 2019). Available at: https://resourcegovernance.org/analysis-tools/publications/big-sellers-exploring-scale-and-risk-national-oil-company-sales.

[96] Comments submitted by the Natural Resource Governance Institute (16 Feb 2016). Available at: http://www.resourcegovernance.org/sites/default/files/nrgi_sec_trading.pdf and submitted on 16 March 2020, forthcoming.

developments since the adoption of the 2016 Rules or in light of our other proposals in this release?

We agree with the Commission that payments should be disclosed on a cash basis, consistent with long-standing EITI requirements and related requirements in other jurisdictions, as well as the anti-corruption purpose.

23. ***The definition of "not de minimis" requires issuers to disclose payments for an individual project if the payments in the aggregate equal or exceed $750,000, unless no individual payments per that project equal or exceed $150,000. Is this approach appropriate in light of our proposed definition of "project," which would allow for greater aggregation of payments? Should we instead continue to use the same quantitative threshold of $100,000 that we used in the 2016 and 2012 Rules without regard to the proposed definition of project? If it is appropriate to take into account the proposed definition of project, are there any data or have there been any developments since the 2016 Rules that suggest a quantitative threshold lower or higher than $750,000 is the more appropriate project threshold, or that an individual payment threshold lower or higher than $150,000 is the more appropriate threshold?***

We disagree with the proposed definition of "not de minimis" payments and urge the Commission to revert to a threshold $100,000 for each individual payment.

The proposed definition is arbitrary, not supported by the plain language of the statute, Congressional intent, nor the Commission's own findings.

While the 2016 Rule defined "not de minimis" payments to require reporting of all payments of $100,000 or more, consistent with the international standard now in place in Canada, the UK and Europe[97], the Commission now proposes a completely new approach that will exclude substantial portions of payments that would otherwise have been disclosed. Most significantly, the Commission proposes excluding from disclosure *all* payments for a project if the total payments for any project are under $750,000. In addition, the Commission also increased the threshold for individual payments from $100,000 to $150,000. Thus, even if the $750,000 project-total threshold is exceeded, individual payments that do not equal or exceed $150,000 would not have to be disclosed. But individual payments *over* $150,000 would not be disclosed if total payments for the project were under $750,000. This approach, when combined with the proposed "project" definition, which artificially aggregates payments across multiple separate projects without naming the project that generated them, while eliminating the inclusion of disclosures from projects with payments under $750,000, would result in producing information of little use in achieving the original objectives of Section 13(q) as intended by Congress.

[97] As the Commission noted in 2016, other "countries have established payment thresholds that approximate the … $100,000 standard." 2016 Final Rule at 49375.

This approach is unworkable for the following reasons:

1) This approach would undermine Congressional intent by eliminating a significant amount of project and payment disclosures.

In cases of issuers with only one project, the threshold would serve as a de facto exemption from reporting in years where payments made were below $750,000.

The proposal states that the introduction of the new $750,000 project threshold was necessary 'in light of the larger aggregations permitted under the revised definition of project.'[98] To test the validity of this claim NRGI, in its comment to the Commission,[99] simulated the aggregation that would occur under the Modified Project Definition. Utilizing location data that was identifiable for 4,018 projects disclosed under existing payment to governments reporting, NRGI simulated the level of aggregation for 731 companies and analyzed how many of the projects disclosed by these companies would fail to meet the $750,000 project threshold. Based on the most recent year of reporting under the contract-level project definition, NRGI found that 55 percent of those projects did not exceed the $750,000 threshold and would not be reported. However, in simulating the aggregation that would occur under the Modified Project Definition, NRGI also found that 49 percent of such "projects" under the Modified Project Definition would not exceed a $750,000 project threshold and would not be reported. As NRGI's results make clear, the Commission's claim that the aggregation under the Modified Project Definition would somehow justify this project threshold is flawed, as around half of the projects would not meet the threshold and thus would be not reported on under both the contract-level project definition and Modified Project Definition definitions. The magnitude of this loss in transparency is unjustifiable and would severely undermine the utility of the rule in carrying out its statutory mandate.

2) A project total threshold, as opposed to an individual payment threshold, is unmoored from the statute.

Section 13(q) requires "any payment" that is "not de minimis" be reported for "*each* project."[100] The Commission's proposed application of a "de minimis" standard to projects instead, which results in the exclusion of *all payments* for a project, regardless of any individual payments value, is at odds with the plain language and construction of the statute and the clear Congressional intent. Congress expressly applied the concept of "de minimis" to "payments" and expressly required disclosure of payments for "*each* project." The text and structure foreclose application of a "de minimis" threshold to projects.

3) Established definitions for "de minimis" in the US Code, the international standard for payment disclosure, and the position of the US Department of Interior, provide ample guidance for the Commission's approach to "de minimis."

[98] Proposed Rule at 2534.
[99] Natural Resource Governance Institute, Comment on SEC proposed rule 13q-1 to implement Section 1504 of the Dodd-Frank Act File Number S7-24-19: Impact Analysis of Modified Project Definition (2020), Forthcoming.
[100] 15 U.S.C. 78m(q)(1)(C), 78m(q)(2)(A) (emphasis added).

As noted by Calvert Investments, "de minimis" is defined in the US Code as "property or service the value of which is...so small as to make accounting for it unreasonable or administratively impracticable."[101] The US Department of Interior, in its response to the 2016 rulemaking wrote "ONRR believes that the definition of 'not de minimis' as proposed is appropriate, and is the same standard that ONRR uses in its unilateral disclosure of revenue data."[102] Most significantly, regulators in 30 other countries considering the proper threshold for the extractives sectors all came to the same conclusion, setting a de minimis threshold for payments, not projects, and all approximating $100,000.

4) The proposed $750,000 project threshold operates as a de facto materiality threshold for projects, which has no support in the statutory language, and was rejected by the Commission, as well as Congressional, investor and industry commenters.

The concept of "de minimis" is clear, and 30 other jurisdictions provide that payments above $100,000 must be reported. As discussed below, the Commission has not provided any justification for why an additional $50,000 per payment should be added to the definition of "de minimis," or why $750,001 is the threshold at which issuers will feel the most relief from the alleged cost impacts of aggregated project payment disclosure.

Similarly, there is no justification anywhere within or outside the Commission's record for how three quarters of a million dollars can remotely be considered "de minimis." As Commissioner Lee made clear in her dissent, the *only* way that such a proposed threshold can be reasonably construed is as imposing a materiality standard for projects,[103] which is foreclosed by the statutory language, Congressional intent, and the Commission's own findings in previous rulemakings. Allowing for any project to be exempted from disclosure requirements according to a materiality standard- even if the materiality test is implicitly applied through a flawed "not de minimis" definition rather than expressly described as such- would prevent payments related to this project from being reported and would contravene the clear requirements of Section 13(q). In its legislative proceedings, Congress did not introduce a "materiality" qualifier to the phrase "projects." Rather, it utilized the phrase "each project."[104]

The Commission's record is replete with evidence of Congressional intent in this regard, as well as evidence of investors repeatedly rejecting the notion that "not de minimis" be equated with "material."[105] As the Commission has acknowledged "Section 13(q) uses a 'not de minimis' standard instead of a materiality standard, which is used elsewhere in the Federal securities laws and in the EITI.

[101] Comment by Calvert Investments (1 March 2011), p.5. Available at: https://www.sec.gov/comments/s7-42-10/s74210-40.pdf; Black's Law Dictionary similarly defines de minimis as of "negligible" or "so insignificant" as to be "overlook[ed]...in deciding an issue or case." Black's Law Dictionary (11th ed. 2019).
[102] Comment submitted by US Department of Interior (17 Feb 2015). Available at: https://www.sec.gov/comments/s7-25-15/s72515-47.pdf.
[103] Indeed, "de minimis" is clearly contrasted to the concepts of materiality outlined by the Commission's Staff Accounting Bulletin No. 99, US Supreme Court case TSC Industries v. Northway, Inc., and FASB Concepts Statement No. 2, 125 which indicate a threshold that is notably higher than a quantity that is so small as to be 'administratively impracticable.'
[104] 15 USC § 78m(q)(2)(A).
[105] Comment submitted by Calvert Investments (1 March 2011), p.5. Available at: https://www.sec.gov/comments/s7-42-10/s74210-40.pdf; Comment submitted by TIAA-CREF (2 March 2011), p.4. Available at: https://www.sec.gov/comments/s7-42-10/s74210-54.pdf.

This suggests that Congress did not intend 'not de minimis' to equate to a materiality standard. We continue to believe that this is the better approach to take when defining ''not de minimis.''"[106] As Congressman Barney Frank and his colleagues have previously emphasized, the statute does not reference "materiality" in regards to which payments or projects are to be disclosed. Congress knows how to impose a materiality requirement when it wants to: the Exchange Act contains numerous instances where Congress chose to qualify an otherwise required disclosure by the term "material," and did not do so here. We therefore believe that any inclusion of "materiality" to limit payments or projects to be disclosed would be in violation of the statute."[107]

5) The selection of the $750,000 project threshold is completely arbitrary, and is supported by no evidentiary or factual basis either within or outside the proposal.

No commenter in the last decade has asked the Commission to consider such a figure, and the Commission has provided *no* evidence in the record to support how it selected this number, nor any quantitative analysis to suggest why it is the appropriate number.

6) The $750,000 threshold would also undermine the intent of the statute, and the Commission's own findings by facilitating and failing to deter corruption.

The proposed $750,000 threshold would be a gift to corrupt officials in countries with high corruption risk, by reducing public scrutiny on what would be, in many emerging markets, a relatively large sum of money.[108] A number of factors, like low government salaries for instance, in developing countries with significant hydrocarbon and mineral reserves, create perverse incentives and documented corruption risks around the licensing and management of extractive projects.[109] As evidenced in its findings in the 2016 release, the Commission has an accurate and reasoned understanding of how corruption functions: "[w]e believe that, in contrast to the API Proposal of aggregated disclosure at the major subnational jurisdiction level, contract-level disclosure will better help deter corruption by all participants in the resource extraction sector...detailed or granular disclosure makes hidden or opaque behavior more difficult...Specifically, the granular information makes it easier for the public and others to observe potential improprieties with respect to the payment flows and such disclosure makes it more difficult for actors to hide any impropriety from scrutiny." The Commission confirms the critical

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[106] Proposed Rule at 2534.

[107] See comment submitted by Rep. Barney Frank et al. (15 Feb 2012). Available at https://www.sec.gov/comments/s7-42-10/s74210-162.pdf.

[108] Ernst and Young, Managing bribery and corruption risks in the oil and gas industry (2014), p.5. Available at: https://www.ey.com/Publication/vwLUAssets/EY-Managing-bribery-and-corruption-risk-in-the-oil-and-gas-industry/$FILE/EY-Managing-bribery-and-corruption-risk-in-the-oil-and-gas-industry.pdf. "In some markets, government officials have relatively low salaries compared with those in the private sector, raising the temptation for them to take bribes to supplement their incomes," and "taxes and other remittances on revenues and royalties for extraction and production agreements may bypass government bank accounts and be diverted to individuals working in government."

[109] See G. Schulze, et al. *Corruption in Russia.* Journal of Law and Economics, vol. 59 (February 2016), University of Chicago. Available at: https://www.journals.uchicago.edu/doi/pdfplus/10.1086/684844. "Low salary levels of public officials have long been regarded as one of the root causes of corruption among public officials (see, among others, Palmier 1985; Mauro 1997; World Bank 1997; Kaufmann 1997). Underpaid civil servants seeking to make ends meet or to achieve an income comparable to that of their peers in the private sector may be tempted to accept bribes in exchange for favors, such as government contracts, non prosecution, easier licensing, and so forth."

importance of the deterrent effect which "may discourage improper conduct in the first instance."[110] Despite its previous findings, the Commission fails to acknowledge or assess the corruption risks created by guaranteeing the secrecy of $749,000 in payments to host governments.

For similar reasons, we disagree with the Commission's assertion that "this 'not de minimis' threshold would further the statutory objectives of Section 13(q) by requiring disclosure of those payments that are of a significant enough size such that they would likely benefit the host country and its local communities."[111] Given our coalition's presence in over 60 countries, we can confidently assure the Commission that host countries and communities, especially those in emerging markets with low GDP per capita facing indebtedness, commodity volatility, stranded assets and corruption risks, are not interested in payments that are "significant enough." They are rightly interested in capturing the totality of what is legally due to the state and to local governments and communities. This is especially true since many issuers and host governments consistently advertise strong future benefits of these projects. Disclosing a partial picture of the actual benefits through a $750,000 project payment threshold undermines issuers' social license to operate, potentially creating operating risk and local instability. When this is combined with non-disclosure of relatively large payments, as well as non-disclosure of the names of projects that are nonetheless generating government revenue, it is not difficult to imagine that this reporting regime could become a tool for corrupt networks looking for opaque funds to pilfer. Surely, this is precisely the opposite of what Congress intended and host countries and local communities require.

7) The selection of the new $150,000 payment threshold is not supported by evidence in the Commission's record.

This new number creates unnecessary inconsistency with the regimes in other countries, and does so despite the lack of issue raised with this standard by any issuer in the 2016 rulemaking.[112] In contrast, the Commission's record includes an overwhelming number of commenters supporting alignment with the international standard which includes a $100,000 not de minimis threshold, which has been proven by existing reporting issuers to be a feasible and cost effective approach.[113] Indeed, by the time of the 2016 rule release, 96 companies were already disclosing according to the $100,000 standard with no reports of overburdensome costs related to the threshold.[114] With nearly 800 companies now implementing this standard, including 109 issuers covered under the proposed rules, the Commission is obligated to assess and demonstrate the existing burdens of disclosure and provide evidence that an

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[110] 2016 Final Rule at 49387 FN.280.

[111] Proposed Rule at 2534.

[112] As SEC noted in 2016, no issuers, and "only one of the many commenters that addressed the definition thought that the reporting threshold [of $100,000] was too low," suggesting it might be too low specifically for companies working on "massive scale projects," but "none of the large issuers commenting on the Proposing Release expressed similar concerns". 2016 Final Rule at 49375.

[113] In contrast to the lack of support in the record on the $150,000 and $750,000 thresholds, the Commission has received support over the years for lower de minimis thresholds for example from CalSTRS, "London Stock Exchange ("LSE")'s Alternative Investment Market ("AIM") of £ 10,000 (or about $15,000)". See comment submitted by CalSTRS (1 Mar 2011). Available at: https://www.sec.gov/comments/s7-42-10/s74210-59.pdf.

[114] See https://resourceprojects.org/projects?tab=0&years=2014%3A2015.

increase in $50,000 is warranted, and will in fact, deliver the cost-saving benefits the Commission proposes.

8) The Commission's analysis of the proposal's costs and benefits fails to provide any analysis or evidentiary support for the changes to the "not de minimis" thresholds.

Given the lack of support for changes to a threshold in the record, which so dramatically changes the 2016 rule, the loss in transparency and the clear corruption risks facilitated by the proposed changes, the Commission's own analysis must make a convincing case for the changes in the threshold. On this, the proposal fails. Specifically, the Commission fails to make any use of the data from international filings it already has access to in order to evaluate the effect of or need for such a dramatic change.

9) Congress intended for the disclosure requirements to have the broadest possible coverage of payments to satisfy the transparency objectives of Section 13(q).

For example, Senator Cardin, co-author of Section 13(q), has made his intentions clear to the Commission:

> "*To accurately reflect the letter and intent of the law, the final rule should apply to all countries and companies with no exemptions. The rule should also define the terms "project" and "payment" in ways that do not create reporting loopholes,* ***particularly with regard to the threshold amount for reporting****.*"[115] (Emphasis added)

Former Chairman of the House Financial Services Committee Barney Frank, co-author of the first version of House legislation that ultimately became Section 13(q), and member of Congress that introduced the Section 13(q) amendment into the Dodd-Frank Act during conference clarified the intent in his submission to the Commission:

> *"The rule should also define the terms "project" and "payment" in ways that* ***do not create reporting loopholes, particularly with regard to the threshold amount for reporting****. The statute is clear in requiring "any" payment to be disclosed as part of country and project-level disclosures, except if it is "de minimis...On the definition of "de minimis,"* ***if the SEC were to provide a specific monetary threshold below which payments are not required to be reported, it would be very important not to set this threshold too high****, as that would leave important payment streams undisclosed as well as encourage companies and governments to structure payments in future contracts in a way that would avoid the disclosure requirement."*[116] [emphasis added.]

We recommend amending proposed Item 2.01(d)(8) of Form SD as follows:

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[115] See comment submitted by Senator Cardin et al. (31 July 2012). Available at: https://www.sec.gov/comments/s7-42-10/s74210-122.pdf.

[116] See comment submitted by Rep. Barney Frank et al. (15 Feb 2012). Available at: https://www.sec.gov/comments/s7-42-10/s74210-162.pdf.

(8) Not de minimis means any Payment made to each Foreign Government in a host country or the Federal Government that equals or exceeds **$100,000**~~$150,000~~, or its equivalent in the issuer's reporting currency, whether made as a single payment or series of related payments~~, subject to the condition that single payment (or a series of related payments) disclosure for a Project is only required if the total Payments for a Project equal or exceed $750,000~~. In the case of any arrangement providing for periodic payments or installments, a resource extraction issuer must use the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that series of payments, and accordingly, whether disclosure is required.

24. ***The statute does not define "not de minimis" or explain how that term should be applied. Should we base the "not de minimis" threshold on an amount that is not de minimis relative to (i) a particular resource extraction issuer, (ii) a particular country, or (iii) a particular project?***

<u>No, the Commission should not set a de minimis amount relative to a particular issuer, country or project.</u>

We agree with the Commission's previous finding that "[u]sing an absolute dollar amount threshold for disclosure purposes should help reduce compliance costs and may also promote consistency and comparability."[117]

Whether a payment is financially significant to an issuer is plainly the wrong inquiry. The statute's accountability and anti-corruption objectives are broad. Corruption can happen at all stages of extractive deals and projects and is not limited to instances where a payment (whether corrupt or not) was significant to the issuer's bottom line. What is significant to an issuer says nothing about the potential for corruption or mismanagement by government officials, nor whether that payment is significant for the community or the country more broadly. It would similarly be inappropriate and burdensome to put issuers in the position of judging the significance of a particular payment for a foreign government.

25. ***Should the focal point for determining whether a payment is "not de minimis" be the relationship between individual and total company payments per payment type? If not, what should the focal point be? Should we consider the relation of the payment to the government recipient and/or the local community when adopting the "not de minimis" payment threshold?***

<u>The focal point for determining whether a payment is "not de minimis" should be each individual payment amount, without regard to total company payments, government recipients, or local communities</u>. This has the advantage of being more user-friendly, more straightforward in terms of compliance, and consistent with every other related payment transparency regime.

[117] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80073.

26. ***As an alternative to setting a bright line threshold based on dollar amount of payment, should we not define "not de minimis" and allow resource extraction issuers to make the determination of what qualifies as a payment that is not de minimis, based on the particular facts and circumstances?***

<u>No, the Commission should not permit resource extraction issuers to make their own determinations of what qualifies as a "not de minimis" payment. The commission should define "not de minimis".</u>

Allowing each issuer the discretion to define "not de minimis" on a case by case basis would lead to a lack of comparability among disclosures, and impose a compliance burden on issuers requiring them to spend time and resources on this unnecessary analysis.

27. ***If we should adopt an absolute quantitative threshold, should we include a mechanism to adjust periodically the de minimis threshold to reflect the effects of inflation? If so, what is an appropriate interval for such adjustments? What should the basis be for making any such adjustments if the appropriate focal point for determining whether a payment is "not de minimis" is in relation to the host country recipient?***

<u>No, an adjustment mechanism is not needed.</u>

No such mechanism is present in any of the related international regimes. It is easier to plan for ongoing disclosures if the de minimis amount remains the same over time, as the US Department of Interior pointed out during the 2016 rulemaking.[118]

28. ***Should we adopt a definition of "not de minimis" using a standard based on the materiality of the payment to the issuer? If so, would this be consistent with the language of the statute, which uses the term "not de minimis" rather than "material"?***

<u>No, the Commission should not adopt a definition of "not de minimis" based on materiality of the payment to the issuer. This would be inconsistent with the language and intent of the statute.</u>

Allowing for any project or payment to be exempted from disclosure requirements according to a materiality standard - even if the materiality test is implicitly applied through a flawed "not de minimis" definition rather than expressly described as such - would prevent payments related to this project from being reported and contravene the clear requirements of Section 13(q). For a more detailed explanation, please see section 4 of our response to question 23 above.

We recommend amending proposed Item 2.01(d)(8) of Form SD as follows:

Not de minimis means any payment made to each Foreign Government in a host country or the Federal Government that equals or exceeds **$100,000, or its equivalent in the resource extraction issuer's reporting currency,** whether made as a single payment or a series of related payments, **during the fiscal**

[118] Comment submitted by US Department of Interior (17 Feb 2015).

year covered by this Form SD. In the case of any arrangement providing for periodic payments or installments, a resource extraction issuer must use the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that series of payments, and accordingly, whether disclosure is required.

29. ***Should we adopt an anti-evasion provision, as proposed? Should we provide additional guidance about when the anti-evasion provision would apply?***

<u>We strongly support inclusion of an anti-evasion provision and consider it essential to the final rule.</u>

We support the Commission's inclusion of an anti-evasion provision to discourage issuers from attempting to avoid disclosure by re-characterizing covered activities or payments. This would align with Congressional intent, as well as with the EU Directives and ESTMA.

We believe the proposed anti-evasion provision should be adopted, but with the added wording below to ensure consistency with the EU Directives[119] and ESTMA.[120]

We recommend amending proposed § 240.13q–1 (b) by adding the following:

Activities and payments must not be artificially structured, split, or aggregated to avoid the application of the rules.

30. ***Have there been any developments since the 2016 Rules that suggest that a different approach to the anti-evasion provision would be appropriate?***

We are not aware of any developments that suggest a different approach to the anti-evasion provision should be taken.

31. ***Should we define the term "control" based on applicable accounting principles, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?***

Please see our response under question 34 below.

32. ***Should we exclude from the definition of control entities or operations in which an issuer has only a proportionate interest, as proposed? Should we instead require an issuer to disclose its proportionate share of the payments made by a joint venture based on its proportionate interest in the venture even when it is not the operator of the venture? Should we require such a non-operator joint venture participant to disclose its proportionate share of the joint venture payments if it knows or is able to***

[119] Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Article 43(4).
[120] Extractive Sector Transparency Measures Act (22 Dec 2015), p.12.

obtain the information necessary to comply with the proposed rules without undue difficulty or expense?

Please see our response under question 34 below.

33. ***Are there alternatives to the proposed definition of control that would better balance transparency for users of the payment information and the compliance burden on issuers? For example, should we require only the operator of a joint venture to disclose all of the payments it makes to governments, including those made on behalf of non-operator joint venture participants? Should we require the operator of a joint venture to disclose its proportionate share of the payments made? When the operator is not an Exchange Act reporting company, and therefore not subject to the Section 13(q) rules, should each non- operator participant that is subject to the Section 13(q) rules be required to disclose the payments made by itself and entities or operations that it fully or proportionately consolidates or accounts for as a joint operation? In the event that none of the joint venture participants is a consolidated entity, should we require a registrant that owns a proportionate interest in the operator of the venture to disclose the payments made either on behalf of all the participants or based on the registrant's proportionate share of the venture? In these circumstances, should we require a registrant that owns a proportionate interest in a non-operator venture participant to disclose its proportionate share of the payments if it is able to obtain the necessary payment information without undue burden or expense?***

Please see our response under question 34 below.

34. ***Alternatively, should we adopt a definition of control that includes more than just consolidated entities (e.g., entities over which an issuer has significant influence)?***

(In response to questions 31-34)

<u>While we don't favor the proposed elimination of proportionate reporting because it will result in substantial data gaps, we acknowledge that this change is one of the most suitable ways to substantially change the 2016 rule in a way that can reduce costs without undermining consistency such that it increases consistency with the transparency standard in other key markets, and reduces costs.</u>

We broadly agree that applicable accounting principles are an appropriate basis for defining control. However, we are concerned that the revised approach to proportionate reporting risks could leave out too many payments that are made through joint ventures ("JVs").[121] Joint ventures are the dominant form of organizing investment in the resource extraction sector, especially oil and gas but also mining. According to a study by Ernst & Young, as much as 71 percent of upstream investment is spent through

[121] For a more detailed discussion of control and proportionate reporting, see comment submitted by Global Witness (8 Mar 2016), pp.9-11. Available at: https://www.sec.gov/comments/s7-25-15/s72515-58.pdf

alliance or JV relationships.[122] This is consistent with an earlier analysis by Global Witness of payment reporting from certain European companies, finding that joint ventures frequently represent a majority of production or total payment value.[123]

Leaving out JVs would substantially reduce transparency, however, we also acknowledge that this is likely to significantly reduce company costs, more than any other part of this proposal. Therefore, we believe that this change, even on its own, and certainly taken together with other changes listed above could be sufficient to make this rule "not substantially the same" as the 2016 rule. This is certainly a much more appropriate change than proposed changes to project reporting, which require a tortured reading of the statute and run counter to both the original anti-corruption purpose of the statute and the clear global transparency standard, as we discuss in our responses to questions 35 to 46. Unlike project definition, the question of joint venture reporting is not squarely addressed in the statute nor is it yet settled globally, as reporting of JV payments is currently inconsistent. Canadian regulations define control as including but not limited to applicable accounting standards, and companies are given "flexibility in determining how to report these payments in a manner that achieves the purpose of the Act."[124] There is also a lack of clarity in the UK regulations (as well as French and Italian laws) on this point, which has resulted in inconsistent reporting.[125] Such inconsistencies sharply contrast with the well-established global standard for project reporting. We think this is an important question to clarify, particularly given the prevalence of JVs, but we recognize that the Commission may not be well-placed to do that.

35. ***Should we define "project" by the type of resource being commercially developed, the method of extraction, and the major subnational political jurisdiction where the commercial development of the resource is taking place, as proposed?***

<u>No. We strongly oppose the Commission's proposed definition of "project."</u> Instead the Commission should adopt a contract-level project definition consistent with payment disclosures laws in EU, UK, Norway and Canada.

This is imperative for the following reasons:

1) The Modified Project Definition is an arbitrary construction that does not reflect standard industry practice.

Nothing in the statute supports contorting the meaning of "each project" in a way that would allow multiple distinct and different projects to be presented as if they were a single project. The modified

[122] EY, "Joint ventures for oil and gas megaprojects," 2015, https://www.ey.com/Publication/vwLUAssets/ey-joint-ventures-for-oil-and-gas-megaprojects/$File/ey-joint-ventures-for-oil-and-gas-megaprojects.pdf
[123] Comment submitted by Global Witness (8 Mar 2016), pp.10-11.
[124] Government of Canada, Extractive Sector Transparency Measures Act Guidance, Version 2., (July 2018), pp.6,21. Available at: https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/estma/pdf/ESTMA%20Guidance%20-%20Version%202_1%252C%20July%202018.pdf.
[125] Publish What You Pay - UK, UK Government Review of the Reports on Payments to Governments Regulations 2014 (November 2017), pp.25-28. Available at: https://www.pwyp.org/wp-content/uploads/2017/11/2017-11-PWYP-submission-to-UK-review-final.pdf.

definition is completely at odds with a common sense understanding of the term "project." It is inconsistent with how industry, government, investors, and citizens talk about and understand extractive projects. In fact, the modified project definition has no grounding or relevancy in actual industry operations. It was formulated and derived solely from a past submission to the Commission by API. The Commission reached this conclusion in the 2016 rule and outlined several key justifications for this decision.

As the Commission has already explained, "[b]y so heavily focusing on subnational political jurisdictions as a defining consideration, the API's definition appears to disregard the economic and operational considerations that we believe would more typically—and more appropriately—be relevant to determining whether an issuer's various extraction operations should be treated together as one project."[126] It would, for example, conflict with the basic design of petroleum fiscal systems. Substantial evidence exists in the record demonstrating that supporting a definition of project linked to legal agreement that gives rise to the payments is a common sense approach that aligns with industry practice and petroleum and mineral fiscal systems.[127]

The Commission further noted the definition was "inconsistent with how companies in the resource extraction sector often refer to their 'projects' with foreign countries," and "it appears that companies use the term project to refer to their concession-level or field-level operations," consistent with the contract-level definition in the 2016 Rule.[128] There is a large body of evidence to support these conclusions. In fact, companies extracting on federal territory in the US report their royalty payments by individual lease and agreement. The Office of Natural Resources Revenue in the US Department of Interior requires companies to submit forms reporting on their production, sales, and royalties owed by "API Well Number," "ONRR Lease Number," "MMS Agreement Number," and/or "Mine Name." This shows that the US government and companies extracting on federal territory in the US, both acknowledge and operate under a contract-level project definition.[129]

In a review of their contract database, OpenOil found that the vast majority of contracts (780 out of 806 contracts) explicitly reference the location of the contract area. At least 308 of those contracts define the contract area in regards to a "block" (i.e., "block 2"), while many more reference a block name (i.e., "area 25/34"). A minority of contracts use the name of oil fields to refer to the contract area (i.e., "Amu Darya"), whereas oil blocks can be named after oil fields as well.[130] This is also made clear in the following examples:

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[126] 2016 Final Rule at 49381.
[127] See comment submitted by PWYP-US letter (23 Feb 2012), which cites to publications that make clear existing petroleum fiscal systems are based on licenses, concessions and contracts. Available at: https://www.sec.gov/comments/s7-42-10/s74210-191.pdf; See also International Monetary Fund, Fiscal Regimes for Extractive Industries: Design and Implementation (15 Aug 2012), p.15. Available at: http://www.imf.org/external/np/pp/eng/2012/081512.pdf; Comment submitted by PWYP-US (14 Mar 2014), pp.19-21. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.
[128] 2016 Final Rule at 49381 at n. 297.
[129] U.S. Department of the Interior, Office of Natural Resources Revenue, "Solid Minerals Production and Royalty Report". Available at: https://www.onrr.gov/ReportPay/PDFDocs/4430.pdf and https://www.onrr.gov/ReportPay/PDFDocs/2014.pdf
[130] OpenOil (12 Feb 2016). Available at: http://openoil.net/2016/02/10/location-references-in-contracts

- Angola: Block Map[131]
- Peru: See Oil Block Map,[132] contracts,[133] model contract[134]
- Trinidad & Tobago: Bid round documentation and model contract[135]
- Colombia: Block CPO-9[136]
- Dominican Republic: Pueblo Viejo Mine[137]

2) The Modified Project Definition does not align with, and falls well short of, the clear international consensus around the appropriate standard for the extractives industries.

Since the 2016 Rule and the 2017 vote of disapproval by Congress, significant transparency developments have firmly established contract-level project reporting as the international payment transparency norm for the extractive industries. According to NRGI's payments-to-governments data repository, since the first report was released in Norway in 2015, at least 792 companies have disclosed over $807.5 billion in payments resulting from 6,610 projects in 154 countries.[138] None have reported having experienced any issues with this disclosure. The disclosure laws in all 30 countries use the typical understanding of the term "project," defining it as "the operational activities that are governed by a single contract, license, lease, concession, or similar legal agreements and form the basis for payment liabilities with a government."[139]

Global consensus on contract-level project reporting was further underscored when the EITI Standard was revised in 2019 to specifically define a project as the "operational activities that are governed by a single contract, license, lease, concession or similar legal agreement, and form the basis for payment

[131]Sonangol Angola Concessions Map. 2020.
http://www.sonangol.co.ao/English/AreasOfActivity/Concessionary/Pages/Concessions-Map.aspx
[132] Peru Petro, Contract Block Maps,
https://perupetro.maps.arcgis.com/apps/webappviewer/index.html?id=c90a68c67d674d4cbf1d89523305328a
[133] Peru Petro, Contracts in Force, https://bit.ly/3d1jvmy
[134] Peru Petro, Modelo de Contrato de Licencia para la Exploración y Explotación de Hidrocarburos,
http://www.perupetro.com.pe/wps/wcm/connect/3e502458-feb7-435d-a9da-4db307e97412/ModeloContrato.pdf?MOD=AJPERES.
[135]Government of the Republic of Trinidad and Tobago, Ministry of Energy Guidelines,
http://www.energy.gov.tt/services/guidelines/.
[136] In Colombia, Talisman has a 45 percent working interest in the CPO-9 block with its co-participant Ecopetrol. Block CPO-9 would constitute a project based on a single agreement, as the license for each block forms the basis for separate payment liabilities with the government. See Talisman, 2013 Annual Information Form (Mar 2014). Available at: http://www.talisman-energy.com/upload/ir_briefcase/178/01/annual_information_form.pdf.
[137] In Dominican Republic, the Pueblo Viejo mine is owned 60 percent by Barrick Gold and 40 percent by Goldcorp is one single project, held through a Special Lease Agreement first negotiated by Placer Dome (which was later purchased by Barrick) in 2000. The Special Lease Agreement includes a description of payment liabilities, outlining capital investment recovery allowances, corporate income tax rates, net smelter royalties, net profits tax etc. See "Barrick Announces Agreement in Principle on Amendments to Pueblo Viejo Special Lease Agreement" (8 May 2013). Available at:
http://barrick.com/investors/news/news-details/2013/Barrick-Announces-Agreement-in-Principle-on-Amendments-to-Pueblo-Viejo-Special-Lease-Agreement/default.aspx.
[138] Data sourced from: www.resourceprojects.org (NRGI). Accessed February 2020.
[139] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.

liabilities with a government."[140] The EITI thus now requires companies operating in all 52 implementing countries to report under the same definition used in other markets. As the EITI notes in its project-level reporting guidance note, "[t]he alignment of the definition of 'project' in the 2019 EITI Standard with the existing mandatory disclosure requirements in the EU and Canada seeks to ensure that the information is consistent and comparable across jurisdictions."[141]

If the Commission adopts a modified project definition, it would force companies that operate in EITI-implementing countries to report payments under two separate definitions, unnecessarily increasing compliance costs.

Notably, several EITI-supporting companies have publicly declared their support for the adoption of a project definition in the Commission's final rule that is in alignment with the EITI Standard.[142] BP, BHP, Eni, Gold Fields, Kosmos, Newmont, Rio Tinto, and Total all stated their support for the EITI Standard's definition of project-level reporting and agree that this definition should be adopted by the Commission in the final rule. Excerpts from these responses include:

Statement by BP:

> ...We would welcome convergence on the definition of a 'project' for the purposes of disclosing project-level payments: defining extractive projects in a consistent manner across all countries would foster improved transparency and support accountability in practice...BP believes that the adoption of an implementing Rule 13q under the Dodd Frank Act should aim to maintain a level playing field among oil and gas companies and encourage convergence on a standard approach by seeking alignment with EU rules and consistency with the new EITI Standard to the greatest extent possible...**Regulatory alignment and convergence around the approach to project-level reporting already enshrined in the EITI Standard would be the most effective means of producing high-quality and comparable data…**"[143]

Statement by Kosmos:

> "[We] disclose payments to governments at the project level as defined in the European Union Accounting Directive. We believe that this type of disclosure is beneficial to investors, civil society, and local communities, and reflects evolving international expectations. We therefore support the EITI Standard's definition of project-level reporting... [I]t would be helpful and more cost-efficient if there was substantial international alignment on this definition and on payments-to-government reporting

[140] 2019 EITI Standard.
[141] EITI, January 2020, Guidance Note 29- Requirement 4.7: Project-level Reporting. Available at: https://eiti.org/files/documents/guidance_note_29_english.pdf.
[142] Business & Human Rights Resource Centre, Publish What You Pay calls on extractive companies to comment on latest SEC payment disclosure rules; including company responses (February 2020). Available at: https://www.business-humanrights.org/en/usa-publish-what-you-pay-calls-on-extractive-companies-to-comment-on-latest-sec-payment-disclosure-rules-including-company-responses/?dateorder=datedesc&page=0&componenttype=all.
[143] Ibid.

> requirements more broadly... [O]ur approach to transparency helps us to manage social and political issues... We are also encouraged that civil society is committed to using payments to governments data constructively – an essential element in ensuring that transparency policies achieve the aim of strong resource governance."[144]

Statement by Rio Tinto:

> "... Rio Tinto is a founding member of the EITI, a supporter of the EITI Principles and has played an active role in this global standard since 2003. Rio Tinto supports the EITI's position on project-by-project reporting. Further, Rio Tinto encourages the harmonization of reporting obligations aligned with global best practice. We believe that the creation of a consistent standard by which companies can report their contributions with integrity and responsibility is essential to promoting confidence in business. Accordingly, we support the harmonization of the section 1504 proposal with the requirements under the UK and Canadian mandatory disclosure regimes."[145]

Recognizing the establishment of this global norm, in 2019 the International Monetary Fund included in the natural resource revenue management pillar (Pillar IV) of its Fiscal Transparency Code ("FTC"), support for both contract disclosure and contract-level project payment transparency. [146] In the FTC, the IMF acknowledges that this form of reporting provides critical information to affected communities, governments, and investors on the economic contribution of specific extractive projects.[147]

3) The evidence in the record unquestionably demonstrates investors' interest in and need for project-level data.

Investors have shared their desire for Section 13(q) to require a project-level disclosure requirement, citing their need to have this information available in order to properly assess risk in the energy sector, which is notoriously volatile:

Statement by the Columbia Center for Sustainable Investment:

> While this line of reasoning has some validity through the lens of economic analysis, it overlooks the realities of applied securities analysis in fiercely competitive markets where consistent, reliable and detailed project-level payment data already are quite valuable to energy and materials analysts. The provision of incremental, material financial data due to security market regulatory changes or increased oversight has been a regular occurrence over time. These additional data are often valuable simply to validate the claims of company management or prompt new questions surrounding the risks and opportunities of a documented activity. From a securities analyst's perspective, the large dataset of disclosures already required by

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144 Ibid.
145 Ibid.
146 International Monetary Fund, Fiscal Transparency Initiative: Integration of Natural Resource Management Issues (Jan 2019).
147 Ibid.

complementary laws producing public, project-level disclosures in Canada and the European Union are a powerful tool for the analysis of material considerations in the oil and mining industries, including those outlined in Argument 5 (Political Risk) and Argument 6 (Fiscal Regime Change).

The value of these data to securities analysts is so clear to the market that an incomplete version is already available on Bloomberg terminals. The field ES122 - Taxes Paid to Governments (TAXES_PAID_TO_GOVERNMENTS) lists the total amount of taxes paid directly to governments by companies across all industries including the energy and materials sectors. Like the statutory requirements of Section 13(q) and its companion laws in the EU and Canada, the data provided in the Bloomberg field includes all taxes, royalties, and duties paid, not just those taxes paid on income. For companies in Bloomberg's Energy and Metals and Mining categories, these data might be disclosed as part of the Extractive Industries Transparency Initiative (EITI) and in company corporate responsibility reports. Since these data represent actual annual cash outflows, and not accrual-based estimates -- and are often significant as a percentage of total cash flow from operations -- their value in making future cash flow forecasts is clear.

The availability of this data from a Bloomberg terminal is a strong indication of its value to securities analysts alongside the many other data points that contribute to their decision-making. Further, while EITI reports and corporate responsibility disclosures have value, they are not the global, consistent and reliable source of payment data that the reports under Section 13(q) would be alongside the already successful payment reporting that has been taking place for several years pursuant to complementary EU and Canadian laws.[148]

Statement by Aviva Investors:

At Aviva Investors we believe the effective management of risks necessitates disciplined and rigorous securities analysis methods. Our approach requires the corporate disclosures necessary to identify and act on opportunities and risks in our investable universe. This is especially true of our portfolios with exposure to the extractives sectors, which have a history of volatility due to political and regulatory risk. The disclosures required by Section 13(q) help address the need of detailed information regarding the financial relationship between extractives companies and the governments where they operate. The disclosure resulting from implementation of Section 13(q) would not be useful if it provided on an anonymous basis or without clear association to the company and project to which payments may be attributed [...] We hope that in drafting a new rule for the implementation of Section 13(q) that the Commission makes definitions for project-level disclosure and other key considerations consistent with the EU and Canadian laws. Prioritizing consistency with the EU and Canadian laws would not only result in more useful disclosures to investors, but also fit the Congressional intent for the implementation of Section 13(q) and enhance the efficiency of compliance for reporting companies both in different

[148] Comment submitted by Columbia Center for Sustainable (10 Dec 2019). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6521646-200386.pdf.

> jurisdictions and through the EITI processes in which they may be engaged. [...] we believe strongly that the interests of investors should have consistent precedence over any other market actors if the Commission is to follow through on its mandate to maintain market efficiency, facilitate capital formation, and protect investors.[149]

Statement by the California State Teachers' Retirement System:

> We believe the disclosures mandated by Section 1504 are vital and material to CalSTRS' investment analysis and assessment of investment risks and opportunities in the volatile oil, gas, mining and energy equipment & services markets [...] extractive payment disclosures at the project level will provide substantive information in understanding the many risks involved in these types of projects as well as the impact on cash flows and valuations.[150]

Statement by Walden Asset Management:

> As investors wait for the SEC to issue new rules for Section 1504, oil and mining payment data is being made public through complementary laws in the EU and Canada. That data is being used by investors to gain insights and make investment decisions [...] We believe it is in the interest of investors and oil and mining companies that the rules the Commission issues are as consistent with the EU and Canadian laws as possible. As supporters of the Extractive Industries Transparency Initiative (EITI) we also note that its implementation in more than 50 countries around the world depends on consistency between key aspects of Section 1504 and the EU and Canadian laws including the details of project level disclosure.[151]

4) The Modified Project Definition would result in a significant loss of data.

While contract-level payment transparency has, as the IMF notes, become an established international norm,[152] adopting a Modified Project Definition would have a severe negative impact on the utility of project data for accountability and investor purposes. A comment submitted by NRGI to the Commission included an impact analysis of the proposed rule based on existing payments-to-governments data and found that the requirement to adopt the Modified Project Definition would result in a significant over aggregation of the data.

NRGI analyzed 4,018 projects for which contract-level payments have been disclosed under payments-to-governments laws in EU, Canada, UK and Norway and found that at least 44 percent of these projects would be aggregated under the modified definition. Of the 4,018 projects in this dataset, at least 1,776 projects are located in the same major subnational political jurisdiction[153] as another project by the

[149] Comment submitted by Aviva Investors (12 Feb 2018). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3130136-161939.pdf.
[150] Comment submitted by California State Teachers' Retirement System (1 Feb 2018). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf.
[151] Comment submitted by Walden Asset Management (16 Mar 2018). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079746-161906.pdf.
[152] International Monetary Fund, Fiscal Transparency Initiative: Integration of Natural Resource Management Issues (Jan 2019).
[153] Using the same ISO 3166-2 codes as outlined in the proposed rule.

same company. These 1,776 contract-level projects would aggregate to just 543 projects under the Modified Project Definition, meaning that in instances where project aggregation occurs, these instances on average lead to aggregation of 3.32 contract-level projects in one major subnational political jurisdiction.

The Modified Project Definition would therefore have a significant impact on the data that would severely limit the utility of these disclosures for both investors and citizens in resource-rich countries, as described in more detail in our response to Question 36. These impacts include the fact that massive numbers of payments worth many billions of dollars a year would remain hidden from public view, contrary to the original transparency purpose behind Section 13(q). This would prevent oversight actors from monitoring and analyzing these payments, which in turn will severely weaken the reporting requirements' deterrent effect and in many cases remove it altogether. Corruption, poorly-negotiated resource deals, shortfalls in payments to governments, and financial mismanagement frequently occur at the contract-level in the natural resource industries. Without transparency of contract-level payments, civil society groups and other report users will be deprived of the information they need to hold governments accountable for these practices.

We recommend amending Item 2.01(d)(1) as follows:

Project means operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government. Agreements with substantially similar terms that are both operationally and geographically interconnected may be treated by the resource extraction issuer as a single project ~~is defined by using the following three criteria: (i) The type of resource being commercially developed; (ii) The method of extraction; and (iii) The major subnational political jurisdiction where the commercial development of the resource is taking place~~.

36. ***Would the Modified Project Definition achieve an appropriate balance between promoting transparency regarding a resource extraction issuer's payments to governments and reducing regulatory costs and burdens, including the risk of harming the issuer's competitive position by requiring disclosure of proprietary commercial information? Are there any specific changes that we could make to the Modified Project Definition that would improve transparency and/or help limit compliance costs and burdens consistent with the Section 13(q) mandate and the CRA's restrictions on subsequent rulemaking?***

No, adoption of the Modified Project Definition would severely undermine the promotion of transparency. It would significantly limit the utility of the resulting data for investors, for accountability and anti-corruption purposes, and it would significantly gut these intended benefits based on unsupported assumptions about cost-savings and minimizing competitive risk.

Such a dramatic loss of transparency and anti-corruption benefits cannot be justified on the basis of asserted cost savings. This is particularly true given the evidence of company reporting experience under mandatory disclosure laws in EU, Canada, UK and Norway since the 2016 rulemaking, which shows many of the concerns regarding cost of reporting and competitive harm were and are unwarranted. See our answers to questions 1, 2 and 92 for more detail.

Unfortunately, the Modified Project Definition abandons transparency in service of concerns as to compliance costs and competitive harm, even though such concerns have been thoroughly disproven in multiple years of project-level reporting under the disclosure laws in other countries. As previously stated, according to NRGI's payments-to-government data repository resourceprojects.org, since 2015, at least 792 companies have disclosed over $807.5 billion in payments resulting from 6,610 projects in 154 countries with no major issues reported.[154] Official review of the reporting in other jurisdictions indicates that the reporting does not put companies at a competitive disadvantage. The only way to achieve the transparency gains envisaged by the original statute is through a contract-level project definition.

This is true for the following reasons:

1) The compliance cost concerns used to justify the need for a Modified Project Definition have no evidentiary basis.

One of the justifications for adopting the Modified Project Definition cited in the 2019 Proposed Rule is that the broader definition would reduce the compliance burden compared to contract-level reporting in the 2016 Rule. Following that logic, a company with a greater number of contract-level projects to report upon should presumably experience greater compliance costs. Yet in analyzing the payments-to-governments reporting of 731 companies reporting on 4,018 contract-level projects, NRGI found that Total S.A., which in a recent comment to the Commission stated that its reporting costs are "in the region of $200k per year,"[155] disclosed payments for the largest number of identifiable projects of any other reporting company. In its most recent payments-to-governments report Total S.A. disclosed payments for 155 identifiable projects, considerably more than BP, the company with the second most projects, reporting payments for 89 projects. Total S.A. would also have the most contract-level projects aggregated under the Modified Project Definition, with at least 60 of the company's projects located in the same major political subnational jurisdiction as another one of the company's projects. Given Total is, based on existing payments-to-governments data, the company that faces the greatest burden in reporting their payments at the contract-level, its $200k per year report costs figure is a positive indication that this form of reporting is not overly burdensome for companies.

2) The competitive harm concerns used to justify the need for a Modified Project Definition have no evidentiary basis.

Relying on statements by individual members of Congress, the Commission asserts that one of the "primary concerns" of Congress motivating support for the resolution of disapproval was potential competitive harm to covered issuers. The Commission states that the proposed rule is meant to address

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[154] Data sourced from: www.resourceprojects.org (NRGI). Accessed February 2020.
[155] Comment submitted by Total (27 Feb 2020), p.1.

concerns about "potential competitive harm that the 2016 Rules would have caused as a result of the public disclosure of contract-level information."[156] The competitiveness concerns raised during the 2016 rulemaking and 2017 CRA vote were **theoretical predictions, without any basis in factual evidence**. But, as noted by the Commission, much has changed in the interim and we now can look to the actual experience of companies reporting under laws in other countries. To date, 792 companies have successfully reported over $807.5 billion in payments under rules now in force in other markets,[157] that require contract-level payment disclosure with no exemptions of any kind.

Since our first submission to the Commission in 2011, and in subsequent submissions in 2014, we (and a range of other commenters) have maintained that the assertions of alleged competitive harm have no basis in fact, contradict the realities of the competitive environment, and are undermined by the fact that contract-level payment information can be easily accessed through pay-to-see databases that are normally out of reach for most of the intended beneficiaries of the statute, investors and citizens of resource-rich countries. We have repeatedly provided concrete evidence refuting each industry assertion of supposed competitive harm - even before reporting began in other markets - including that:

- Section 13(q) does not force companies to disclose sensitive, confidential, or proprietary information;
- Information to be disclosed is generally known by market participants;[158]
- Pay-to-see databases and intelligence firms provide contract-level information;[159] and,
- Neither contract-level payment disclosure nor confidentiality of payments is a decisive factor in determining an oil company's success in bargaining and winning bids with host governments.[160]

As we noted previously, the commercial realities of deal-making in the oil, gas, and mining sectors involve a wide array of complex factors including the fiscal terms offered, technological capacity, capital available, and several other components.[161] There is no way that the disclosures arising from Section 13(q) could be construed as providing sufficient information to be determinant in creating competitive disadvantage during a bidding process. Industry commenters have not refuted this evidence.

Now, with five years of successful reporting by a range of multinational and state-owned companies, as well as emerging growth companies, and smaller reporting companies, experience confirms the fact that there is **no compelling evidence** that the theoretical competitive harms on which the Commission

[156] Proposed Rule at 2528.
[157] Available at: https://resourceprojects.org/company-profiles.
[158] Indeed, the 2016 Release cites to API's 2010 letter in this regard, "In this regard, we note that one industry commenter has observed that, at least for contracts for projects that are older or well-established, ''the general terms are likely to be known even if technically not public.'' 2016 Final Rule.
[159] The Commision notes in the 2016 Release "we note that any potential competitive harm to US issuers from the final rules could be limited by the fact that, as one commenter observed, national oil companies may already have access to similar commercial information from the numerous business intelligence services that provide real time, contract-level and lease-level information." 2016 Final Rule.
[160] Comment submitted by PWYP-US (14 March 2014), Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.
[161] Comment submitted by PWYP-US (14 Mar 2014), pp. 35-37. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.

purports to base its extensive revisions to the 2016 Fule have come to pass. As the Commission correctly observed in 2016, "the potential for competitive harm resulting from the final rules is significantly reduced" by ensuring a definition of project that is consistent with Europe and Canada.[162]

3) Payment disclosures based on the Modified Project Definition would fail to fulfill the statutory imperative to enable citizens in resource-rich countries to detect corruption and demand accountability.

The Modified Project Definition would fail to produce the transparency necessary to enable citizens to detect malfeasance and demand accountability as Congress intended and would fail to effectively deter and expose corruption. By allowing issuers to report payment disclosures in aggregate, at the country and subnational level, without noting the contract or license that gave rise to the payments, the proposed rule would produce information of very limited use and directly conflict with the Commission's findings of fact on the issue.

The Commission previously found that a contract-based project definition was "necessary" "to achieve a level of transparency that will help advance the important anti-corruption and accountability objectives underlying Section 13(q)," and specifically considered and rejected what is now the Modified Project Definition outlining numerous serious flaws and shortcomings with such an approach. Citizens and community-based groups in resource-rich countries and investors have repeatedly demonstrated the added utility, importance, and necessity of disaggregated contract-level disclosures and specifically explained why the Modified Project Definition would not benefit them. Developments over the last two years, including early usage of data from the EU and Canada, have only further shown the wisdom of the Commission's conclusions that granular disclosures are necessary.

As the Commission has already explained, the Modified Project Definition, originally proposed by API,

> ...would not provide local communities with payment information at the level of granularity necessary to enable them to know what funds are being generated from the extraction activities in their particular areas. This would deprive them of the ability, for example, to assess the relative costs and benefits of the particular license or lease to help ensure that the national government or subnational government has not entered into a corrupt, suspect, or otherwise inappropriate arrangement.[163]

That clear finding is strongly supported by ample evidence already in the rulemaking record showing that the full benefits from Section 13(q) disclosures for resource-rich communities can only be realized if the information is sufficiently disaggregated at the local project level. The National Advocacy Coalition on Extractives, for example, explained that for local communities in Sierra Leone, "knowledge of the total, combined amount a company has paid the government for all extractives projects is of little value.

[162] 2016 Final Rule at 49382.
[163] 2016 Final Rule at 49381-82; Comment submitted by The Civil Society Roundtable for Transparency in the Extractive Sector in Colombia (13 Nov 2015), pp.4-5. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-99.pdf.

. . . When a single company operates multiple projects, as commonly occurs in Sierra Leone, community oversight becomes nearly impossible without data on each specific project."[164]

PWYP Indonesia told the Commission that "access to full and accurate project-level data is crucial" to effectively monitor payments, and that reporting only at the first tier below the central government would be "completely unsatisfactory in Indonesia" because it would exclude critical information about the revenue local governments are entitled to under Indonesia's production sharing agreements.[165] The submission further explained a number of ways that, thanks to the level of detail in Indonesia's EITI, civil society was already putting newly available project-level payment data to effective use monitoring in-kind payments from oil and gas companies and production sharing contracts.[166]

Deals are made at the contract level. In order to tackle corruption, citizens must be able to follow payments made at the contract level, to detect nefarious deal making. This is made easier when citizens also have access to contracts, thereby allowing them to compare payments made to contract terms. However, payment information alone can also be used to uncover wrongdoing. The Commission previously emphasized that its own experience and expertise confirmed that company-specific disclosures at the project-level "will better help deter corruption by all participants in the resource extraction sector" as compared to the Modified Project Definition's "aggregated disclosures at the major subnational jurisdiction level."[167]

This is illustrated in a recent submission by Tutu Alicante, Executive Director of EG Justice. According to Alicante, different politically-connected individuals benefit from dealmaking on the various projects throughout his country, Equatorial Guinea, by creating loopholes in revenue collection and management and by requiring kickbacks and other forms of patronage to their personal benefit.

> Our country's oil wealth has been divided up among the Obiang family and other political elites as their personal possession. Thus, the task of detecting corruption is quite difficult and involves tracking a large number of transactions within a network of government entities, shell companies and high net-worth individuals. Because different sets of political elites benefit from each individual project using some of the tactics described above, project-level information is most valuable to us because we can follow up on payments for each project to different government entities and payees and most efficiently detect corruption. If we can track each payment made at the project level to various government entities, we have the basic ingredients necessary to most effectively follow the money. Aggregation of payments would make this task significantly more

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[164] Comment submitted by National Advocacy Coalition on Extractives in Sierra Leone (20 Feb 2015), p3. Available at https://www.sec.gov/comments/df-title-xv/resource-extractionissuers/resourceextractionissuers-61.pdf.

[165] Comment submitted by PWYP Indonesia (11 Mar 2015), p.2-3. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-64.pdf.

[166] Ibid; See also SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. 80057, 80067 n.94 (citing numerous examples). Available at http://www.gpo.gov/fdsys/pkg/FR-2015-12-23/pdf/2015-31702.pdf; See also comment submitted by Oxfam and EarthRights International (8 Mar 2016), p.6-9 (citing statements from numerous commenters). Available at: https://www.sec.gov/comments/s7-25-15/s72515-59.pdf.

[167] 2016 Final Rule at 49379, n.280.

> difficult and would only aid in our government's attempts to obfuscate the receipt of individual payments.[168]

By way of example, in 2011, Shell and Eni, two US-registered issuers, paid a total of $1.1billion for a lucrative Nigerian off-shore oil block known as OPL245. Leaked internal emails published by Global Witness show that senior Shell executives knew that their payment was likely part of a vast bribery scheme.[169] Under a contract-based definition of project, this payment would have been identifiable - but under the Modified Project Definition, it would be obscured and aggregated together with payments for other offshore oil blocks in Nigeria. After receiving the payment, the Nigerian government did not keep it but acted as a conduit for directing most of that money to the oil block's original owner, a shadowy Nigerian company owned by former Nigerian oil minister and convicted money launderer Dan Etete. Because the payment for this oil block ultimately benefited a public official, it has prompted a high-profile criminal case in Italy and anti-corruption investigations in several countries including the United Kingdom, Nigeria and United States.

The Commission understands the importance of deterring corruption in light of its longstanding leading role in this area.[170] As the Commission explained, its "own experience in implementing the Foreign Corrupt Practices Act" shows that granular disclosures at the project level "will better help combat corruption than the aggregated (and anonymized) disclosures that the API Proposal" - now the Modified Project Definition - "would yield." The Commission has "found that requiring issuers to maintain detailed, disaggregated records of payments to government officials significantly decreases the potential for issuers and others to hide improper payments and as such their willingness to make such payments. This experience has led us to believe that, where corruption is involved, detailed, disaggregated disclosures of payments minimizes the potential to engage in corruption undiscovered."[171] There is no basis for the Commission to sacrifice the clear anti-corruption benefits Congress intended.

The Modified Project Definition would not only fail to provide the level of information necessary to detect corrupt deals and payments, it would also prevent communities from tracking intra-governmental corruption and revenue mismanagement. The Commission previously emphasized that "disaggregated information" under a contract definition "may help local communities and various levels of subnational government combat corruption by enabling them to verify that they are receiving the resource extraction revenue allocations from their national governments that they may be entitled to under law. In this way, project-level disclosure could help reduce instances where government officials are depriving subnational governments and local communities of revenue allocations to which they are entitled."[172]

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[168] Comment submitted by Tutu Alicante (11 Mar 2020), p.5. Available at: https://www.sec.gov/comments/s7-24-19/s72419-6939968-211853.pdf.

[169] Global Witness, "Shell Knew," 10 April 2017, https://www.globalwitness.org/shellknew.

[170] This is also why there can be no doubt that the Congress appropriately delegated Section 13(q) to the Commission.

[171] 2016 Final Rule at 49382.

[172] 2016 Final Rule at 49379.

The Modified Project Definition by contrast, would specifically prohibit citizens from holding their governments accountable in the process of subnational revenue distribution from oil, gas, and mineral payments down to the local level. This problem was raised by numerous commenters in response to the API proposal.[173] For example, the Africa Centre for Energy Policy explained that public disclosure of payments made by company and by project are critical in order to ensure that the statutory allocation of mining royalties to Ghanaian subnational governments takes place, but reporting at a higher subnational regional level "would render the oil payment disclosures useless for accountability purposes, and would prove a waste of effort for reporting companies."[174]

Many resource-rich countries establish subnational resource revenue sharing mechanisms to redistribute centrally collected oil, gas and mining revenues to the subnational and local levels. Revenue distribution schemes are commonly introduced to compensate communities in the immediate vicinity of resource extraction. This type of revenue sharing is based in part on the rationale that communities living in project-affected regions may experience negative impacts from extraction, including environmental degradation, disruption of livelihoods, and other negative consequences. Many of these sharing systems are derivation-based, meaning that revenues are distributed proportionately back to localities based on the amount of revenues derived from production in that jurisdiction.

Governments design formulas for revenue sharing based on the payments received for each project. Many revenue sharing systems distribute revenues down to the lowest level of government, including municipalities, sub-counties, kingdoms, and local councils. Some revenue sharing systems distribute revenues to non-governmental entities as well, past the lowest level of local government, like chiefdoms. In some cases, local landowners are even due to receive a portion of revenues. This is the case in Uganda, for instance, where the central government is tasked with distributing 3 percent of royalties from each mining project to the local landowners in the immediate area.

In countries with a history of central level governmental corruption and mismanagement of funds, contract-level payment disclosures provide local governments and other local beneficiaries with the information needed to ensure that the jurisdiction is receiving the revenue it is entitled to. Without any means to verify payment figures per project, local governments have no way to detect misallocation of funds from the central government. With project-specific payment disclosures, local governments have the information necessary to independently calculate their royalties owed for instance, which can remedy misappropriation or mismanagement at the central level. Therefore, in derivation-based revenue sharing systems, project-level payment disclosures provided by companies help to ensure transparent revenue management by central governments since these disclosures allow local

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[173] See, e.g., Comment submitted by Publish What You Pay Indonesia (11 Mar 2015), p.3. Available at https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-64.pdf; Comment submitted by The Carter Center (21 Apr 2015), p.1. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-68.pdf; Comment submitted by Publish What You Pay Cameroon (8 Jun 2015), p.3. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-75.pdf; Comment submitted by the Mesa de la Sociedad Civil para la Transparencia in las Industrias Extractivas (13 Nov 2015), pp.5-6. Available at https://www.sec.gov/comments/df-title-xv/resource-extractionissuers/resourceextractionissuers-99.pdf.

[174] Comment submitted by Africa Centre for Energy Policy (16 Feb 2016), p.6. Available at: https://www.sec.gov/comments/s7-25-15/s72515-40.pdf.

governments and citizens to see the payments that have been made to central government per project and then check the local government distribution amounts accordingly.[175] The modified project definition would not be usable as a tool for accountability throughout a derivation-based revenue sharing system.

In the years since the 2016 Rule and 2017 vote of disapproval, companies have begun reporting their payments to governments under mandatory disclosure laws in EU, UK, Canada, Norway and, in some cases, EITI. Citizens, civil society, journalists, and others across the globe have begun to use the resulting contract-level project data for accountability purposes. Many of these emerging uses of payment data for accountability have depended on contract-level disclosures, specific to a single project, which would not be possible under the Modified Project Definition.

One example comes from Democratic Republic of Congo ("DRC"). Contract-level payments-to-governments data played a key role in uncovering payments of over $75 million from a mine owned by Glencore in DRC to Dan Gertler, a controversial businessman accused of bribing senior officials. The contract-level payments – made up of royalties and a signature bonus – were disclosed in a 2014 EITI report. The payments were due to Gécamines, the largest of the DRC's state-owned mining companies, under the terms of the contract. Further investigation by Global Witness showed the money was being diverted to a company registered in the Cayman Islands owned by Dan Gertler.[176] Had the company been reporting under the proposed MPD model, the payments would not have come to light and it is highly unlikely that the diverted revenues would have been uncovered. Since the payments came to light, the US Treasury has sanctioned Dan Gertler, one of his associates, and 33 companies affiliated with Gertler under the Global Magnitsky Act.[177] In 2018, Glencore received a subpoena from the US Department of Justice to produce documents relating to its extractive sector investments in DRC and other countries.[178] The ongoing investigation of Glencore illustrates that corruption risk at any level can be extremely costly to investors: news of the DOJ's subpoena in 2018 may have contributed to a 13 percent plunge in Glencore's share price, losing $8.8 billion in value.[179] Glencore has continued to be the subject of bribery investigations, not only by the Department of Justice, but also by the US Commodity

[175] See comment submitted by The Civil Society Roundtable for Transparency in the Extractive Sector in Colombia (13 Nov 2015), p.5. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-99.pdf; Comment submitted by National Advocacy Coalition on the Extractives (10 Feb 2015), pp.2-3. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-61.pdf; Comment submitted by Publish What You Pay--Indonesia (11 March 2015), p.2. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-64.pdf.

[176] Global Witness, "Glencore Redirected Over $75 Million in Mining Payments to Scandal-Hit Friend of Congolese President" (3 Mar 2017) Available at: https://www.globalwitness.org/en/press-releases/glencore-redirected-over-75-million-mining-payments-scandal-hit-friend-president-global-witness-reveals/

[177] US Department of the Treasury, "Treasury Sanctions Fourteen Entities Affiliated with Corrupt Businessman Dan Gertler Under Global Magnitsky" (15 Jun 2018). Available at: https://home.treasury.gov/news/press-releases/sm0417; US Department of the Treasury, "United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe" (21 Dec 2017). Available at: https://home.treasury.gov/news/press-releases/sm0243.

[178] Glencore, "Update on subpoena from United States Department of Justice" (11 Jul 2018). Available at: https://www.glencore.com/media-and-insights/news/Update-on-subpoena-from-United-States-Department-of-Justice

[179] Thomas Biesheuvel and Franz Wild, Glencore Drops After U.S. Orders Documents in Corruption Probe, Bloomberg (3 July 2018), Available at: https://www.bloomberg.com/news/articles/2018-07-03/glencore-gets-subpoena-from-u-s-regarding-money-laundering.

Futures Trading Commission, Canada's Ontario Securities Commission, and the UK Serious Fraud Office ("SFO"). In late 2019, news of the SFO investigation precipitated a 9 percent drop in Glencore's share price, demonstrating the material impact of corruption risks on shareholder value. Following this news, institutional investors announced a multi-billion-dollar lawsuit for share price declines related to the bribery investigations.[180] On March 5, 2020, Glencore admitted in its most recent annual report that it has uncovered "facts that may be relevant" to the ongoing corruption probes.[181]

4) Investors firmly support a contract-based project definition and identify benefits associated with disclosure on this basis throughout their comments.

Investor submissions from past Section 1504 rulemaking comment periods include many references to the benefits arising from contract-based project level disclosure.

The Columbia Center for Sustainable Investment (CCSI) comment submitted on December 10, 2019:

> From a securities analyst's perspective, the large dataset of disclosures already required by complementary laws producing public, project-level disclosures in Canada and the European Union are a powerful tool for the analysis of material considerations in the oil and mining industries, including those outlined in Argument 5 (Political Risk) and Argument 6 (Fiscal Regime Change).[182]

The Aviva Investors comment submitted on February 12, 2018:

> I would also like to emphasize the importance of the public, project- level disclosures resulting from the implementation of Section 13(q) in making investment decisions and reinforcing the objectives and standard of the Extractives Industries Transparency Initiative (EITI), of which Aviva Investors is long-time supporter.
>
> . . .
>
> The disclosures required by Section 13(q) help address the need of detailed information regarding the financial relationship between extractives companies and the governments where they operate. The disclosure resulting from implementation of Section 13(q) would not be useful if it provided on an anonymous basis or without clear association to the company and project to which payments may be attributed.[183]

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[180] Franz Wild, Glencore Investors to Sue for Billions Over Probes, Boies Says, Bloomberg (5 Dec. 2019). Available at: https://www.bloomberg.com/news/articles/2019-12-05/glencore-investors-to-sue-for-billions-over-probes-boies-says-k3tgyo42.

[181] Jack Farchy, Glencore Found 'Facts That May Be Relevant' to Corruption Probes, Bloomberg (5 Mar. 2020). Available at: https://www.bloomberg.com/news/articles/2020-03-05/glencore-found-facts-that-may-be-relevant-to-corruption-probes.

[182] Comment submitted by Columbia Center on Sustainable Investment (10 Dec 2019) p.4. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6521646-200386.pdf.

[183] Comment submitted by Aviva Investors (12 Feb 2018) p.1. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3130136-161939.pdf.

California State Teachers' Retirement System (CalSTRS) comment submitted on February 1, 2018:

> CalSTRS, believe extractive payment disclosures at the project level will provide substantive information in understanding the many risks involved in these types of projects as well as the impact on cash flows and valuations.

Letter submitted by a group of investors with $3.1 trillion in assets under management on March 8, 2016:

> As noted in the April 28, 2014 submission referenced above, we fully support the SEC's decision to define 'project' consistently with the EU Directives and the draft Canadian definitions as 'operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government'. We appreciate that this standard responds to our stated interest in uniform disaggregation of project payment information. Further, we trust the SEC will be thorough in its evaluation of whether disclosures made in compliance with other regulations include project-level disclosure that is equivalent to the rule's requirements.

Calvert Investments comment submitted on February 1, 2016:

> The usefulness of this level of disaggregation is pointed out throughout the investor comments referenced in this letter. A contract-based project definition also reflects existing reporting by companies, which Is the basis for investors' general understanding of an extractive resource project. Further, the Commission's effort to achieve consistency in this definition between the EU Directives and the draft Canadian definitions not only benefits investors seeking consistent disclosure, but also companies attempting to provide these disclosures efficiently and to achieve equivalency between disclosures required in different jurisdictions and through the EITI processes in which they may be engaged.[184]

Columbia Center for Sustainable Investment (CCSI) comment submitted on October 30, 2015:

> The comment Demonstrates that project-level disclosures provide investors with details on project costs, allowing them to better evaluate and account for risk and exposure to commodity price downturns in their investments. Investors can carry out due diligence to ensure that company behavior matches with available reporting. The project-level disclosures through Section 1504 will provide material information that will better enable investors to effectively assess company behavior and profitability

Alliance Trust PLC comment submitted on October 25, 2015:

[184] Comment submitted by Calvert Investments (16 Feb 2016) p.2. Available at: https://www.sec.gov/comments/s7-25-15/s72515-39.pdf.

> (I)nvestors can use project-level information to better understand the impact of effective tax and royalty rates on individual projects and apply this information to make stronger investment decisions.[185]

Letter submitted by a group of investors with $2.85 trillion in assets under management on April 24, 2014:

> Investors' decisions regarding the oil, gas and mining industries and the efficient functioning of markets in general rely on the public disclosure of relevant information from issuers that is comprehensive and consistent. Therefore, we agree with the Commission's August 2012 rules for Section 13(q) that require issuer-by-issuer, government-level, and project-level public disclosures and believe that these are beneficial to investors.
>
> . . .
>
> Section 13(q) and its complementing regulations also require project-level disclosure. It would be most beneficial to investors if this disclosure were consistent with best practice for disclosing disaggregated production information that references the legal relationship between individual projects and host governments. Such an approach may be modeled on the project-level disclosures made by Statoil, the large Norway-based international oil company, as well as Tullow Oil.[186]

Calvert Investment Management, Inc. comment submitted on November 25, 2013:

> The comment details how royalty and tax payment disclosure give indications of an extractives project's and company's exposure to risk relative to particular operation and within a particular country. It also indicates how this data may be used to improve important investment analysis considerations such as a project's net present value (NPV) and a resource's cut-off grade. Further, the Calvert letter points out how material considerations may also go unreported using current reporting and counting guidance.[187]

37. ***Have companies experienced compliance problems or burdens with reporting contract-based payments under the EU Directives and Canada's ESTMA? Does that experience confirm that our proposed approach to the definition of "project" is appropriate, or does it suggest that we should adopt a different approach? If the latter, describe that approach and whether it would also help limit compliance costs and burdens for resource extraction issuers.***

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[185] Comment submitted by Alliance Trust PLC (15 Oct 2015) p.1. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-90.pdf.

[186] Comment submitted by Calvert Investments et al (24 April 2014) p.1,2. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf.

[187] Comment submitted by Calvert Investments (15 Nov 2013). pp.7-8. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-17.pdf.

The experience of companies reporting contract-based payments in other jurisdictions strongly confirms that a contract-based definition is the most appropriate approach, refutes compliance cost arguments for adopting a different approach, and weighs heavily against adoption of the Modified Project Definition.

Since 2015, at least 792 companies have reported contract-based payments in 154 countries, disclosing over $807.5 billion in payments resulting from 6,610 projects.[188] No companies have reported experiencing any notable problems, despite the fact that none of the other disclosure regimes provide any exemptions for exploratory activity, for alleged foreign law conflicts, for alleged contractual prohibitions on disclosure, or any other basis.

As we discussed above in our answers to questions 1 and 2, a 2018 review of the EU Directives found that '[t]here is no evidence that competitors from third countries [based in other regions] benefit from substantial competitive advantages by not being required to report on payments to governments.[189] The review found that overall, while the reporting requirements entailed some additional compliance costs, these were not too burdensome for companies and were generally integrated in the internal work streams.[190] Moreover, according to industry respondents, a level-playing field between different jurisdictions would ensure that "all companies disclose on the same basis and reduce the reporting burden for those operating in multiple jurisdictions."[191]

The UK Government's review of the UK regulations came to the same conclusion as the EC consultants' study, finding that "this type of reporting does not disadvantage company business interests, including their relationships with governments."[192] The review also found that compliance costs were "not borne as separate costs since these reporting activities were added to existing roles and hence absorbed into business-as-usual (therefore not imposing any additional burden)", and that "[t]here is every indication that in the medium to long term, the benefits of the regulations would outweigh the costs imposed by it."[193]

This data confirms that the proposed Modified Project Definition is neither appropriate nor warranted.

38. ***Is there an alternative to using either the Modified Project Definition or the Contract-level Project Definition that would support the commitment of the Federal Government to promote international transparency promotion efforts relating to the commercial development of oil, natural gas or minerals while limiting compliance costs and mitigating competitive concerns for resource extraction issuers? To what***

[188] Data available at: https://resourceprojects.org/.
[189] European Commission, Review of country-by-country reporting requirements for extractive and logging industries: Final report (2018), op. cit., p.13.
[190] European Commission, Review of country-by-country reporting requirements for extractive and logging industries: Final report (2018), op. cit., p.43.
[191] European Commission, Review of country-by-country reporting requirements for extractive and logging industries: Final report (2018), op. cit., p.59.
[192] BEIS (Feb 2018), p.22
[193] Ibid.

extent is comparability among Section 13(q) disclosures important for transparency purposes? To the extent it is important, would requiring more or less granular project information impact comparability?

We strongly support the contract-level project definition used in the laws of 30 other countries and the EITI. Based on experience with reporting under EITI and laws in other markets, international consensus has now squarely solidified around this definition as the best and most effective approach to disclosure for the extractives industries. It unquestionably represents the established global transparency standard. To depart from that standard by adopting a conflicting approach, one that would provide less transparency than the international norm and potentially threaten to undermine consensus, is unwarranted and fundamentally at odds with the intent of Congress to play a leadership role in the global arena and the statute's clear directive to promote international transparency efforts. As we explained above in our answer to question 35, such a dramatic departure cannot be justified on the basis of cost savings or minimization of competitive harm. It is now well-established that costs of complying with the contract-level project definition and risk of competitive disadvantage are both minimal.

Such departure would also sacrifice comparability, which is essential for meaningful analysis. Comparing payment data from contract-based project-level reports is important, as the fiscal terms are often negotiated at the contract level, and payments are often levied at contract level. Comparative analysis of contract-based, project-level payment data can therefore help data users to identify poor fiscal terms, as well as potential shortfalls in payments to governments. Conversely, data produced under a Modified Project Definition system would help to conceal, rather than uncover, poor fiscal terms or shortfalls in payments.

For example, royalty payments made by joint venture partners invested in the same extractive project should reflect each company's equity share. Comparing the reported royalties helps data users verify that payments are in line with the equity shares, and identify anomalous payments if not. This type of analysis is important to carry out at contract level, as royalties are often determined and paid (or underpaid) at contract level. However, for projects in which a company or companies report under a Modified Project Definition system, while other joint venture partners report in line with the global standard, it would not be possible to use Modified Project Definition data for this comparative analysis.

This excerpt from Eni's 2018 payments-to-governments report illustrates another example of how the MPD would prevent contract-level comparative analysis.[194] Under the EU Directives, Eni reports on nine named petroleum projects in the Republic of Congo. For seven of these projects, production entitlements align approximately with the size of taxes and royalties paid. However, for two projects – Ikalou II and Marine X – production entitlements are far below the amounts one might expect to see in comparison to the rest of Eni's projects in the country. Under the MPD, it is likely that most or all of these nine projects would be aggregated for the purposes of reporting, which would have kept the

[194] Eni, Report on Payments to Governments 2018, p.13. Available at: https://www.eni.com/assets/documents/documents-en/Report-on-payments-to-governments-2018.pdf

anomalous payments concealed. While there may be a legitimate reason for the seemingly low payments – for example, they may have been to compensate for overpayment of production entitlements in the previous year – this contract-level data is nonetheless important information that civil society groups, journalists and others can use to raise questions and secure an explanation for the anomalous payments.

Congo

Payments per project

(in EUR thousand)	Production Entitlement	Taxes	Royalties
MARINE XII	25,088 [A]	38,306 [J]	86,848 [T]
MBOUNDI	19,952 [B]	29,577 [K]	26,081 [U]
LOANGO II	20,056 [C]	10,921 [L]	22,896 [V]
MWAFI II	14,297 [D]	19,538 [M]	9,824 [W]
Ikalou II	130	27,684 [N]	12,431 [Y]
MARINE X	1,752 [E]	24,431 [O]	10,516 [Z]
ZATCHI II	13,461 [F]	5,855 [P]	12,061 [AA]
FOUKANDA II	9,504 [G]	14,265 [Q]	7,116 [AB]
KITINA II	9,800 [H]	2,185 [R]	4,526 [AC]
Other projects	2,983 [I]	5,861 [S]	3,710 [AD]
Total	**117,023**	**178,623**	**196,009**

39. ***Are the proposed requirements for describing the type of resource appropriate? If not, please explain how the type of resource should be described and why.***

See our response below under question 43.

40. ***Should we require issuers to provide greater detail on the type of resource than proposed? If so, what level of detail should we require? What benefits would such additional detail provide to end-users? What costs would an issuer incur to provide such additional detail?***

See our response below under question 43.

41. ***Are the proposed requirements for describing the method of extraction appropriate? If not, please explain how the method of extraction should be described and why.***

See our response below under question 43.

42. ***Should we require issuers to provide greater detail on the method of extraction being used? If so, what level of detail should we require? What benefits would such***

additional detail provide to end-users? What costs would an issuer incur to provide such additional detail?

See our response below under question 43.

43. ***Does the proposed requirement to describe the major subnational political jurisdiction where the commercial development of the resource is taking place provide the appropriate balance between promoting payment transparency and limiting an issuer's compliance costs and burdens? If not, how should we alter the requirement and why? Does the reference to "the state, province, territory or other major subnational jurisdiction" provide adequate guidance concerning how to identify the political jurisdiction where the commercial development of the resource is taking place?***

(In response to questions 39-43)

<u>The proposed tags for "type of resource," "method of extraction" and "major subnational political jurisdiction" are not appropriate or necessary and should be eliminated from the final rule, as one of the several changes that cumulatively make this rule "not substantially the same" as the 2016 Rule.</u>

We strongly disagree with the proposed definition of project, as we discussed above in our answer to question 35. The three proposed tags that comprise that definition: "type of resource," "method of extraction" and "major subnational political jurisdiction", bear no relationship to the ordinary meaning and usage of the term "project" within the natural resource industry. None of these tags are mentioned in the original Section 13(q) statute or its legislative history. Nor are they required to be disclosed under any similar law adopted in other jurisdictions (European Union, United Kingdom, Canada, Norway).

As users of these disclosures, we would find this information somewhat helpful as a shortcut but only if it was complementary to the contract-level project designation. Without that, the information in these tags is certainly not sufficient for users to meaningfully analyze the payment data (as discussed above in our answer to question 35.) On the other hand, taken together with contract designation, the tags are somewhat superfluous, and not an essential complement because this information can be clearly identified through publicly available information.

In light of this, we believe that requiring issuers to identify and disclose this information would impose an unnecessary burden without serving the underlying statutory purpose.

For our views of the Modified Project Definition, see further our responses to questions 35, 36, and 93.

44. ***The proposed rules would permit an issuer to combine separate resources and different extraction methods into one project if they occur in the same major subnational political jurisdiction. Would this result in too much aggregation even if, as proposed, issuers would be required to describe each resource and each method of extraction?***

See our response below under question 46.

45. ***If we do not allow for multiple resource types or methods of extraction to be aggregated, would it result in confusion for issuers or end-users? Would requiring issuers to treat each resource type or method of extraction as a separate project result in more payments being considered de minimis and thus reduce the overall amount of disclosure?***

See our response below under question 46.

46. ***Is our proposed approach to disclosing activities that cross the borders of major subnational political jurisdictions appropriate? Are there specific cross-border situations that we should address? Should we instead allow issuers to include all the major subnational political jurisdictions in the description of the project in such a cross-border situation? Would such an approach make it more difficult to identify the location of the project?***

(In response to questions 44-46)

<u>Because we disagree with requiring disclosure of these three tags (see above our answer to questions 39-43), we reject the premise of these questions.</u> The information about type of resource, method of extraction and subnational political jurisdiction is not essential to the meaning of "project" so in our view, there is no need for either the Commission or issuers to grapple with resolving these questions of aggregation and geography. This can be avoided by adopting a project definition that is in line with how companies already track their payments and with the global transparency standard.

47. ***Should the definition of "foreign government" include a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as proposed?***

<u>We support the Commission's proposed definition of "foreign government" and agree with the Commission that this term should include "a foreign national government as well as a foreign subnational government such as the government of a state, province, county, district, municipality, or territory under a foreign national government."</u>

This definition is in line with the original statute and Congressional intent. As the Commission notes in the proposed rules, this definition is also consistent with the payments-to-governments laws in EU, UK, Norway and Canada.[195]

48. ***Should we 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? If we should instead require the***

[195] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80078.

disclosure of each subnational government payee, please explain why that approach would be more appropriate and address whether such a requirement could increase the potential for competitive harm.

<u>No, issuers should not be permitted to aggregate payments made to subnational governments below the major subnational level. Instead, the Commission should require the disclosure of each subnational government payee, which would not increase the potential for competitive harm.</u>

The disclosure of payee is critical to fulfill the transparency and anti-corruption objectives of the original statute. Notably, such aggregation is not permitted under the disclosure laws in other countries or the EITI Standard.

Section 4.7 of the EITI Standard requires fully disaggregated disclosure. According to the Standard, "It is required that EITI data is disaggregated by each individual project, company, *government entity* and revenue stream."[196] According to our estimates, at least 48 US-listed oil, gas, and mining companies not cross-listed in Canada, the EU, Norway, or the UK operate in one or more of the 53 countries currently implementing the EITI. As such, those companies are already subject to the EITI's requirements on government entity disaggregation and will not be allowed to aggregate payments as the Commission has proposed. That includes two of the largest US-listed oil companies, ExxonMobil and Chevron, which are each operating in at least 12 EITI countries. That reality minimizes the potential for competitive harm. Furthermore, given that nearly all of the remaining US-listed companies not already reporting in Canada, the EU, Norway, the UK, or EITI countries operate only in the US, and thus are not required to disclose payments to government levels below the national level, they would not face any risk of competitive harm caused by a requirement for companies to disclose detailed project payments to subnational government payees.

In Canada, ESTMA requires disclosure of payments to "any government in Canada or in a foreign state."[197] The guidance to the Act further specifies that "payees include governments at any level, including national, regional, state/provincial/territorial or local/municipal levels. The term 'government' is not defined in the Act and should be applied broadly to capture the various scenarios that may exist across the globe."[198]

Finally, the UK regulations define government as "any national, regional or local authority of a country, and includes a department, agency or undertaking that is a subsidiary undertaking where the authority is the parent undertaking."[199] The February 2019 Primary Market Bulletin published by the UK's

[196] 2019 EITI Standard, p.25
[197] Extractive Sector Transparency Measures Act (22 Dec 2015), p.3.
[198] Government of Canada, Extractive Sector Transparency Measures Act Guidance (July 2018), p.8. Available at: https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/estma/pdf/ESTMA%20Guidance%20-%20Version%202_1%252C%20July%202018.pdf.
[199] Government of the United Kingdom, The Reports on Payments to Governments Regulations 2014 (Nov 2014), p.2. Available at: http://www.legislation.gov.uk/uksi/2014/3209/pdfs/uksi_20143209_en.pdf.

Financial Conduct Authority made clear that the "policy intention is that *stakeholders should be able to assess to which precise government entity a payment has been made*"[200]

In order to ensure alignment with the international transparency standard as well as consistency and comparability of data across reporting regimes, the final rule must require the disclosure of project-level payments to all government recipients, regardless of the level of the government entity.

Disclosure of each individual payee below the major subnational level is critical. Communities living near the site of extraction are the first to face the negative consequences of extraction including environmental degradation, land tenure pressure, and public health risks. Payment transparency at the local level is one invaluable tool for offsetting these negative consequences and helping companies secure a social license to operate. According to Ernst & Young securing a social license to operate was the third-largest risk facing the mining industry from 2014-2015.[201] Local tensions stemming from a perceived lack of local beneficiation can lead to significant and costly operating delays.

Under the proposed rule, aggregation below the major subnational level would equate to anonymity for certain local government entities. Such anonymity would deprive citizens of the information needed to hold local government entities accountable for receipt and management of these payments and, in the absence of such information, could fuel suspicion that payments were not made in accordance with fiscal obligations. Payment disclosures are most useful when citizens and investors can compare what has been paid with what ought to have been paid and ask relevant questions; however, without clear indication of the recipient at the local level, this task becomes difficult and there is a risk that the aggregated payment could also include illicit or illegitimate payments to certain actors at the local level. Such aggregation would severely undermine the utility of the rule as a tool to increase transparency and accountability and to combat corruption, in a way that is inconsistent with the intent of the original statute.

The Commission reached a similar conclusion in the 2016 rule when discussing API's interpretation that Section 13(q) is limited to overall payment receipts at the national level. According to the Commission, "We believe that Section 13(q)'s anti-corruption and accountability goals are broader and include, among other things, providing transparency to members of local communities so that they can hold their government officials and other accountable for the underlying resource extraction agreements to help ensure that the agreements themselves are not corrupt, suspect, or otherwise inappropriate."[202]

The Commission also accurately explained that the disclosure of payments at only the national and major subnational level would lead to "disparate transparency from one jurisdiction to another."[203] The same applies in this case. In a state where only one county produces oil, the citizens of that jurisdiction

[200] UK Financial Conduct Authority ("FCA"), Primary Market Bulletin (February 2019). Available at: https://www.fca.org.uk/publication/newsletters/primary-market-bulletin-20.pdf.
[201] Ernst & Young, Business risks facing mining and metals 2014-2015 (2014). Available at: http://www.ey.com/Publication/vwLUAssets/EY-Business-risks-facing-mining-and-metals-2014%E2%80%932015/$FILE/EYBusiness-risks-facing-mining-and-metals-2014%E2%80%932015.pdf.
[202] 2016 Final Rule at 49380.
[203] 2016 Final Rule at 49381, FN. 298.

would have access to data that is inherently more localized than citizens in a state with multiple projects across multiple counties with no way to identify which payment was made to which county government. Beyond compliance cost and competitive harm concerns, there is no basis for such aggregation. There is no evidence to suggest that corruption and revenue mismanagement occur only at the national and major subnational level. Therefore, limiting transparency below this level by anonymizing local level government payees is unjustifiable. This is especially true given the experience of companies already reporting payments under the EU, Canadian, Norwegian, British and EITI requirements. Thus far, no company has indicated that publicly disclosing project-level payments to all government payees has had any negative impact on their competitiveness.[204]

49. ***Should we include an instruction in the rules clarifying that a company owned by a foreign government is a company that is at least majority-owned by a foreign government, as proposed? Should we instead provide that a company owned by a foreign government is a company in which the foreign government is the controlling shareholder?***

We disagree with the Commission's proposed approach to defining a company owned by a foreign government as a company that is at least majority-owned by a foreign government. Instead, the Commission should define and provide an instruction clarifying that a company owned by a foreign government includes both companies that are majority owned by a government, as well as companies in which the foreign government is the controlling shareholder.

We recommend a definition of "a company owned by a foreign government" that focuses on controlling shareholding by the state, and not only a pure numerical majority of shares. The companies covered under the two definitions would overlap in most cases, but it is possible for the government to retain voting control over the company (including and especially via board appointments) even where it does not own a majority of all shares. In the oil sector, state-owned enterprises are commonly required by law to be controlled by the government via majority of voting stock.

For example, the Brazilian government owns only 28.67 percent of all shares in the Brazilian oil giant Petrobras,[205] which would not qualify it as "a company owned by a foreign government" under the Commission's proposed definition. However, as explained by Petrobras, when it comes to voting shares: "The Brazilian federal government is required by law to own at least a majority of our voting stock and currently owns 50.26 percent of our common shares, which are our only voting shares. The Brazilian federal government does not have any different voting rights, but as long as it holds a majority of our voting stock, it will have the right to elect a majority of our directors, irrespective of the rights our minority shareholders may have to elect directors, set forth in our bylaws."[206]

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[204] Comment submitted by PWYP-UK (25 Nov 2019). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6470014-199342.pdf

[205] Petrobras, 2014 20-F (April 2015). Available at: https://www.sec.gov/Archives/edgar/data/1119639/000129281415001242/pbraform20f_2014.htm#_Toc418234480.

[206] Ibid.

In our view, a company should be treated as "owned by a foreign government" where the government has a controlling shareholding, enabling it to make the major decisions about the strategy and activities of the company.

We recommend amending proposed Item 2.01(c)(7) of Form SD as follows:

> <u>Foreign government</u> means a foreign government, a department, agency, or instrumentality of a foreign government, or a company at least majority owned **(including with respect to voting shares)** by a foreign government. As used in this Item 2.01, foreign government includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.

50. Should the definition of "foreign government" include federally recognized American Indian or Alaska Native tribal entities?

We have no information relevant to this question.

51. Should we alter our approach to the terms "foreign government" or "Federal Government" based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?

While we agree with the definitions of "foreign government" and "Federal government" we note with concern that, due to the proposals for aggregation based on the type of administrative or political level of government, confusion may arise around whether to disaggregate payments made specifically to a company owned by a foreign government (state owned enterprise).

State owned enterprises are in many cases the largest recipients of payments made to governments by resource extraction issuers, often in the form of production entitlements settled either in-kind or in-cash but also in the form of taxes and royalties. In 2016, 80 percent of Eni's total payments to governments were made to government-owned national oil companies (NOCs); BP paid $8 billion to NOCs representing 65 percent of its payments to all government entities. Finally, 67 percent of Shell's $15 billion total payments to governments in 2016 were paid to NOCs.

At the same time, many state-owned enterprises, including NOCs, face major corruption, governance and transparency deficiencies which have been widely documented. SOEs sit at the intersection of complex extractive activities and the decision-making powers of the state and political elites. Their missions often include a broad mix of contradictory goals. And they too frequently operate opaquely, subject to political manipulation and free from strong oversight. The 2017 *Resource Governance Index* assessed the performance of 74 SOEs across 10 governance and transparency practices. The practices assessed by the index include the companies' public reporting practices, audit provisions, and conflict of interest protections. The need for improvement in SOE governance is enormous, with only nine companies receiving a "good" score and many influential SOEs failing.

Law enforcement, whistleblowers, journalists, and activists have revealed possible instances of corruption in many SOEs. SOE officials have recently been accused of receiving bribes in Algeria, Brazil, Colombia, Iraq, and Venezuela; awarding contracts to politically favored companies in Russia, Nigeria, and the DRC; and channeling money in illicit directions, such as funding militia groups in South Sudan.[207]

We recommend that the Commission clarify in its final rules that payments made to a company owned by a foreign government should be individually disaggregated and identified, and not aggregated with other payees at any level of government, including below the major subnational jurisdiction. Furthermore, it may not always be easy to determine to which administrative or political level of government an SOE belongs. The simplest approach, given their disproportionate size as recipients of payments and the corruption and governance challenges which many display, is to have payments made to companies owned by a foreign government individually disaggregated and identified.

52. ***Should we require resource extraction issuers to provide the payment disclosure mandated under Section 13(q) on Form SD, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release? Would extending the submission deadline in this way help to mitigate potential competitive harm from the payment disclosures?***

No, Form SD is not appropriate for these disclosures – they should be reported separately.

There is no question that disclosures required under this rule must be made public (as we explain in our answer to question 54 below), but not on Form SD which is used to report on an unrelated issue pursuant to Section 13(p) of the Securities and Exchange Act. That section deals with conflict minerals reporting which is required from a different set of issuers, although there is overlap, such that some issuers are reporting under both rules.[208] Using the same form would unnecessarily confuse the users and improperly conflate these two issues, in particular given the different reporting deadlines. In addition, the fact that Section 13(q) requires an interactive data format but Section 13(p) does not, would further complicate any attempt to combine this reporting.

As we have documented previously, there is no evidence that these payment disclosures carry a risk of competitive harm – and post-2016 experience in other jurisdictions proves this beyond any doubt. Therefore, we disagree with the proposal to extend the reporting deadlines (see our answer to question 53 for more detail).

53. ***What would be a suitable submission deadline? Should we base the furnishing deadline on an issuer's calendar year-end rather than fiscal year-end?***

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[207] Alexandra Gillies, Patrick Heller, and Daniel Kaufmann, What makes an accountable state-owned enterprise? (26 March 2018). Available at: https://www.brookings.edu/blog/future-development/2018/03/26/what-makes-an-accountable-state-owned-enterprise/.

[208] The Commission estimates that 39 out of 236 issuers subject to this rule, also reported on conflict minerals for 2018.

We oppose extended reporting deadlines for Section 13(q) submission, and urge the Commission to revert to 150 days after the end of the issuer's most recent fiscal year.

The current proposal allows for **an additional delay of 275 days** for companies with financial year ending on or before June 30. However, the vast majority of oil, gas and mining companies operate using a financial year calendar ending December 31. For these companies, **there would be 456 days between the end of the financial year and the deadline for reporting payments for that financial year.** This is far too long, inconsistent with laws in Canada and the EU, and unnecessarily limits benefits to citizens and investors without doing anything to reduce compliance costs or risk of competitive harm.

There is no reason to believe that providing for these extraordinary reporting delays is likely to reduce compliance costs or staff burdens. The disclosures required under Section 13(q) involve factual and routine data that should be collectable in a timely manner without unreasonable effort or expense. For example, in the US, royalty reporting provided to the Department of the Interior is due on a monthly basis for each lease a company operates on federal land.[209]

Similarly, such a delay cannot be justified on the basis of competitive harm concerns. For a more thorough explanation on this topic, please see section 2) of our response to question 36 above.

Furthermore, the proposed deadline is out of line with reporting deadlines in other jurisdictions. Canada's ESTMA requires that extractive payment reports are filed not later than 150 days after the end of a reporting company's financial year. The UK reporting regime requires UK-listed issuers to prepare a report at the latest six months after the end of each financial year.

In contrast, EITI reports are often significantly delayed, sometimes by as much as a few years. Timelier reporting by US issuers would complement EITI reporting and provide citizens with important information to fill in the time gap. For this reason, several civil society organizations have expressly requested the Commission to adopt a 150 day reporting deadline.[210]

If the reporting deadline is implemented as proposed it would diminish the benefits users realize from timely reporting, and in particular from the consistent timing of data disclosures resulting from Section 13(q) and its companion laws in the EU, UK and Canada.

Finally, the deadline proposal is arbitrary, because during finalization of the 2016 rule no commenter raised an issue with the 150-day reporting deadline.

We recommend the following change to Form SD Instruction B.2:

> Form furnished under Rule 13q–1. ~~If your fiscal year ends on or before June 30,~~ furnish the information required by Section 2 of this form on EDGAR no later than **150 days after the end of**

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[209] U.S. Department of the Interior, Office of Natural Resources Revenue, "Solid Minerals Production and Royalty Report". Available at: https://www.onrr.gov/ReportPay/PDFDocs/4430.pdf and https://www.onrr.gov/ReportPay/PDFDocs/2014.pdf

[210] See comment submitted by Policy Alert (27 Feb 2020), p.2. Available at: https://www.sec.gov/comments/s7-24-19/s72419-6884777-210780.pdf.

~~March 31 in the calendar year following your most recent fiscal year. If your fiscal year ends after June 30, furnish this required information no later than March 31 in the second calendar year following~~ your most recent fiscal year.

54. ***Should the rules require public disclosure of payment information, as proposed? Would the proposed definition of "project" together with the proposed exemptions (discussed in Section II.J. below) and other provisions of the proposed rules sufficiently mitigate the risk of competitive harm that may arise from public disclosure?***

<u>The Final Rule must require fully public disclosure of issuers' disaggregated payment information. There is no evidence of any risk of competitive harm to justify non-public disclosure</u>.

Public reporting is essential to generate the benefits for investors, citizens, civil society, and issuers that Congress intended, to meaningfully advance Section 13(q)'s transparency, accountability and anti-corruption objectives, and to support US foreign policy interests. As the Commission has correctly observed, public disclosure is strongly supported by "the text, structure, and legislative history of Section 13(q)."[211] The public disclosure requirement will also "further the statutory directive to support international transparency promotion efforts by enhancing comparability among companies, as it would increase the total number of companies that provide public, project-level disclosure,"[212] and reinforce the clear consensus reflected in other markets and the revised EITI Standard around the importance and value of public reporting.

Significantly, the Commission has already correctly concluded that "the public release of issuers' annual reports is necessary to achieve the US interest in providing a level of payment transparency that will *help combat corruption* and *promote accountability* in resource-rich countries, as Section 13(q) was intended to do".[213] Accountability of commercial actors is as important as the accountability of government actors, because corruption is necessarily a two-way street, involving both demand (by governments) as well as supply (by commercial actors). Indeed the EITI was set up to address both of these aspects and requires public disclosure from governments and companies alike.

We are compelled to make this obvious point because of certain past comments that misunderstand anti-corruption policies, suggesting that such policies are concerned only with government accountability.[214] The Commission was right to reject this view of the anti-corruption and accountability objectives underlying Section 13(q) as "unduly narrow."[215] It should go without saying - yet apparently bears repeating - that this law is a classic sunshine policy: only public disclosure can achieve deterrent

[211] 2016 Final Rule at 49386 n.353, n.354.
[212] 2016 Final Rule at 49386.
[213] 2016 Final Rule at 49386. (emphasis added).
[214] Comment submitted by API (16 February, 2016), available at https://www.sec.gov/comments/s7-25-15/s72515-32.pdf; comment submitted by Exxon (16 February, 2016), available at https://www.sec.gov/comments/s7-25-15/s72515-33.pdf.
[215] 2016 Final Rule at 49387.

benefits, discouraging companies from taking the risk of going forward with questionable deals in the future.[216]

The evidence already in the record overwhelmingly supports fully public disclosure, and as explained further in response to question 55, demonstrates why public disclosure is necessary. In particular, we note:

- Public disclosure of detailed, company-specific information is essential to enable citizens and civil society, among others, to engage in meaningful and effective public oversight of government revenue collection and management and to deter and expose corruption in extractive deals.[217] As the Commission has found, public disclosure of detailed payment information combats the "information asymmetries" that exist between governments and companies on the one hand, and citizens on the other, that "foster corruption and a lack of governmental accountability,"[218] thereby enabling local communities and subnational governments to monitor revenue flows in numerous critical ways that fight corruption and increase accountability.[219]

- Investors have consistently called on the Commission to implement rules requiring public disclosure of issuer-specific payment information for a decade, and have repeatedly explained why this information is important to them, how they will use it, and why they will benefit from

[216] Comment submitted by Global Witness (8 March, 2016), available at https://www.sec.gov/comments/s7-25-15/s72515-58.pdf.

[217] See, e.g. Comment submitted by Africa Center for Economic Policy (16 Feb 2016), p.7. Available at: https://www.sec.gov/comments/s7-25-15/s72515-40.pdf. (Explaining that "public transparency of the payments by oil, gas and mining companies to governments for each project is absolutely critical… to deter corruption and allow public oversight of contract implementation, government budgeting and revenue management."); Comment submitted by Mesa de la Sociedad Civil para la Transparencia en las Industrias Extractivas (13 Nov 2015), p.1. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-99.pdf. (Explaining that for Colombia, "Project-level, company-specific transparency with respect to the payments our government authorities receive from extractive companies will be a key contributor to informed citizen oversight of the sector," including allowing communities to "verify" that "revenues are being redistributed to local governments according to the law"); Comment submitted by Publish What You Pay (14 Apr 2014). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-32.pdf. (Coalition of 544 civil society organizations from 40 countries calling for public disclosures and noting "we need to know the identity of individual company making the payment."); Paradigm Leadership Support Initiative (22 May 2018). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3683220-162385.pdf; Comment submitted by Civil Society Organization on Oil and Gas in Uganda (18 May 2015). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-71.pdf; See also comment submitted by EarthRights International and Oxfam America (8 Mar 2016), pp.6-8. Available at: https://www.sec.gov/comments/s7-25-15/s72515-59.pdf (summarizing submissions).

[218] 2015 Proposed Rule, 80 Fed. Reg. at 80065 (internal quotations and citations omitted). See also 2016 Final Rule at 49379 n. 277 (noting Section II.E. of the Proposing Release is incorporated by reference).

[219] 2015 Proposed Rule, 80 Fed. Reg. at 80066-67 (discussing various specific uses public, project-level disclosures provide citizens and local governments). See also comment submitted by USAID (16 Feb 2016), p.2. Available at: https://www.sec.gov/comments/s7-25-15/s72515-37.pdf ("Public disclosure of detailed payment information is needed to effectively empower citizens and civil society to demand accountability from their governments with regard to specific projects, minerals, and geographic locations."); Comment submitted by US Department of State (21 Jan 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-13.pdf ("company-specific, project-level public disclosure of payments... is key for ensuring that citizens have the necessary means to hold their governments accountable.")

it.[220] Investor support has only grown over time, with investors with well over $12 trillion in assets under management unequivocally calling for detailed, company-specific public disclosures.

- The US State Department and USAID have emphasized company-specific reporting is essential to align with and advance US foreign policy objectives.[221] For example, the State Department explained that "company-specific, project-level public disclosure of payments" would "directly advance the United States' foreign policy interests in increasing transparency and reducing corruption in the oil, gas, and minerals sectors and strengthen the United States' credibility and ability to fight corruption more broadly -- particularly as the Department of State engages diplomatically to encourage other countries to adopt strong and effective laws against corruption."[222]

- A significant number of issuers have long supported public transparency of revenues. EITI-supporting companies, which include some of the largest US-listed oil, gas, and mining companies, have endorsed public disclosure of payments since the EITI's inception, and have supported repeated efforts to strengthen the EITI standard over time. The two largest mining associations in Canada, which collectively represent more than 1,300 mining companies, publicly advocated for passage of Canada's mandatory payments disclosure law, which requires public disclosure of payments.[223] A number of issuers have directly conveyed their support to the Commission for public disclosure during this and the two previous rulemakings.[224] Those companies support public disclosure because they recognize that it helps provide them with a license to operate, promotes government accountability, and contributes to a stable operating environment.

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[220] See, e.g. comment submitted by Columbia Center on Sustainable Investment (10 Dec 2019). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6521646-200386.pdf; Comment submitted by Jeffrey Sachs et al. Chair, Advisory Board, Columbia Center on Sustainable Investment (30 Oct 2015). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-93.pdf; See also Comment from Aviva Investors (12 Feb 2018). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3130136-161939.pdf. ("Hundreds of oil and mining companies are making disclosures pursuant to the EU and Canadian laws that are providing material insights into investment decisions.")

[221] See, e.g. comment submitted by USAID (16 Feb 2016) p.8. Available at: https://www.sec.gov/comments/s7-25-15/s72515-37.pdf ("[d]etailed public disclosure" is consistent with USAID's "commitment to international transparency promotion efforts that incorporate access to disaggregated and particularized information."); Comment submitted by US Department of State (21 Jan 2016). Available at https://www.sec.gov/comments/s7-25-15/s72515-13.pdf.

[222] Comment submitted by US Department of State (21 Jan 2016). See also id. p.8 (emphasizing that a "public disclosure requirement" "directly contributes to fiscal transparency and a credible public financial management system.")

[223] Mining Association of Canada, Canada's mining industry joins forces with NGOs to improve transparency (6 Sept 2012). Available at: https://www.newswire.ca/news-releases/canadas-mining-industry-joins-forces-with-ngos-to-improve-transparency-510690711.html.

[224] See for instance: comment submitted by BP (16 Mar 2020), Available at: https://www.sec.gov/comments/s7-24-19/s72419-6952845-212570.pdf; Comment submitted by Equinor (16 Mar 2020), Available at: https://www.sec.gov/comments/s7-24-19/s72419-6952843-212532.pdf; Comment submitted by Total (10 Feb 2020), Available at: https://www.sec.gov/comments/s7-24-19/s72419-6791650-208331.pdf; Comment submitted by Eni (31 Jan 2016), Available at: https://www.sec.gov/comments/s7-25-15/s72515-12.pdf; Commented submitted by BHP Billiton (25 Jan 2016), Available at: https://www.sec.gov/comments/s7-25-15/s72515-9.pdf.

See our response to question 55 for more information.

Concerns about competitive harm do not warrant and cannot justify non-public disclosure, any more than they can justify the adoption of the proposed definition of "project" (see our responses to questions 35-37). Substantial new evidence now confirms disaggregated, public disclosure at the contract-level is not only workable, it is *currently working* for hundreds of companies already reporting their disaggregated payment information for projects in more than 150 countries, and does not present anything close to the competitive harm concerns previously predicted by certain industry commenters.

55. ***Should we instead permit issuers to submit the required payment information non-publicly and then provide an anonymized compilation? What are the incremental benefits and costs of permitting non-public submission and providing an anonymized compilation as compared to the proposed rules? Please be as specific as possible in your response.***

<u>No, the Commission should not limit public disclosure to an aggregated, anonymized compilation.</u>

As the Commission has already concluded, "neither the statute's text nor legislative history includes any suggestion that the required payment disclosure should be confidential.[225] Anonymous, aggregated compilation would fall far short of the transparency necessary to advance Section 13(q)'s objectives and would dramatically diverge from the international standard, contrary to Congress's directive to support international transparency promotion efforts.

Despite previously concluding that public disclosure "is necessary" to meaningfully advance Section 13(q)'s accountability and anti-corruption objectives,[226] the Commission now references a prior submission by API that urged confidential, anonymized and aggregated disclosures.[227] The argument that only the type and amount of payments to governments, not issuer-specific information, is necessary to achieve the statute's transparency goals fundamentally misunderstands the objectives and intended beneficiaries of the statute.[228] It is also fundamentally at odds with the evidence in the record, which clearly demonstrates that anonymous and aggregated reporting would deprive citizens, investors and issuers of the benefits Congress intended and cannot fulfill Section 13(q)'s objectives.

1) Aggregated, anonymized disclosures would fail to give citizens in resource-rich countries the information they need to carry out the accountability and anti-corruption role Congress intended.

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[225] 2016 Final Rule at 49386. See also, e.g. comment submitted by Congresswoman Maxine Waters et al. (11 Jun 2014) (explaining the Commission must produce a rule requiring "public disclosure by company and by project with no exemptions," as "[a]nything less would undermine the intended purpose and benefits of Section 1504 for investors, companies, governments and their citizens.")
[226] See 2016 Final Rule at 49386 & n.355. See also e.g. id. at 49388 ("public disclosure of each issuer's Form SD is important to further Section 13(q)'s foreign policy objectives").
[227] Proposed Rule at 2542.
[228] *See* Comment submitted by EarthRights International (12 Dec. 2014), p. 4-7. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-58.pdf

As noted above (see response to question 54), there are numerous submissions already in the record from citizens and community groups from resource-rich countries explaining why fully-public, company-specific disclosures are critical in their efforts to promote responsible natural resource governance. In addition, a number of commenters have already specifically addressed the suggestion of an anonymized, aggregated model, as previously proposed by API, and expressly refuted the utility of information that it would provide. For example:

- The Africa Center for Economic Policy ("ACEP") explained that "[t]he anonymous reporting model provides no value to ACEP or Ghana," as "this approach would render the oil payment disclosures useless for accountability purposes, and would prove a waste of effort for reporting companies."[229]

- PWYP-Zimbabwe wrote that "if payments cannot be linked to a company or project… we would not know the monetary amounts received by the government when it sells individual licenses, which is fundamental to determining corruption and incentivizing public officials to secure a fair return on the sale of natural resources."[230]

- The Iraqi Transparency Alliance for Extractive Industries has told the Commission that by failing to identify which companies made which payments, API's proposal would render the information "useless" to Iraqi civil society.[231]

- The Open Society Institute for Southern Africa-Angola wrote that "it will only be possible to carry out [its] crucial accountability functions if the Section 1504 payment data is disclosed by company and by contract."[232]

- A coalition of 544 civil society organizations from 40 countries wrote that "publishing compilation reports of data aggregated from multiple projects or keeping company names hidden from public view would deprive citizens of ... vital information" and would "allow extractive firms to hide questionable payments behind aggregated and anonymized data.[233]

- Civil Society Coalition on Oil and Gas in Uganda wrote that if "revenue data is not disaggregated by company, it will not aid our understanding", and "[o]nly payment data that is company-specific would enable us to call on both companies and the Government to explain any

[229] Comment submitted by Africa Center for Economic Policy (16 Feb 2016), p.6. Available at: https://www.sec.gov/comments/s7-25-15/s72515-40.pdf.
[230] Comment submitted by PWYP-Zimbabwe (20 Feb 2015), p.3. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-63.pdf.
[231] Comment submitted by the Iraqi Transparency Alliance for Extractive Industries (25 Sept 2015), pp.2-3. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-87.pdf
[232] Comment submitted by Open Society Institute for Southern Africa-Angola (29 Jan 2015). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-60.pdf
[233] See comment submitted by Publish What You Pay (14 Apr 2014). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-32.pdf

substantial variations."[234]

USAID has similarly explained to the Commission that "[i]nformation that is aggregated or provided at a very high level, without specificity as to the places, actors, and minerals involved simply does not serve the needed transparency function to ensure government accountability."[235] Rather, effective citizen engagement requires knowing "which company is paying what kind of payment to which government entity relating to which project in which location."[236]

The record shows issuer-specific information - in addition to disaggregated payment information at the project level - is vital. The Commission thus correctly recognized in 2016 that "the data that the API model would exclude from public disclosure is... necessary to provide the type of granular and localized transparency that will, in our view, help to combat corruption and promote accountability."[237]

Moreover, while public project-level reporting under mandatory regimes outside the US was only just beginning when the Commission finalized the 2016 Rule, and thus still largely hypothetical, the international context has dramatically changed in the intervening years. Indeed, the case for fully public, disaggregated reporting has only grown more compelling since 2016, as nearly 800 companies are now publicly reporting their disaggregated, project-level payment information in 154 countries under the laws in other countries.

These subsequent developments have substantially undermined the assumptions and assertions in the February 2016 API submission that the Commission cites, as the international consensus around the need for fully public, disaggregated data has only solidified, and, as transparency momentum has continued to expand further, now embracing fully public contract disclosure, too. A confidential, anonymous and aggregated reporting model would set back, not promote this international transparency progress as Section 13(q) intends.

2) Anonymized disclosures would render the information useless to investors.

Congress also intended Section 13(q) to provide important information to investors to use in evaluating risk and making investment decisions, things that obviously require issuer-specific information.[238] There

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[234] Comment submitted by Civil Society Coalition on Oil and Gas in Uganda, (18 May 2015), p.3. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-71.pdf

[235] Comment submitted by Eric Postel (16 Feb 2016), p.4. Available at https://www.sec.gov/comments/s7-25-15/s72515-37.pdf.

[236] Id. p.12.

[237] 2016 Final Rule at 49386 n.355. See also id. at 49387 ("disclosing an issuer's identity is important to help achieve the objectives of Section 13(q).").

[238] See, e.g. Floor Statement of Senator Cardin, "The Dodd-Frank Wall Street Reform and Consumer Protection Act" (15 July 2010). Available at: https://www.cardin.senate.gov/news/press-releases/the-dodd-frank-wall-street-reform-and-consumer-protection-act ("[i]nvestors need to know the full extent of a company's exposure when it operates in countries where it is subject to expropriation, political and social turmoil, and reputational risks."); Floor Statement of Senator Lugar, Energy Security Through Transparency Act of 2009 (23 Sept 2009). Available at: https://www.congress.gov/congressional-record/2009/09/23/senate-section/article/S9735-1 ("requir[ing] companies listed on US stock exchanges to disclose ...their extractive payments to foreign governments" will "allow investors to better evaluate the potential country risk faced by companies"); ibid. ("the payments made by companies to extractive countries are relevant to investors looking into finances of those companies,"). See also, e.g. Restoring American Financial Stability Act of 2010, 156 Cong. Rec. Vol. at S3817 (17 May 2010). Available at: https://www.congress.gov/congressional-record/2010/05/17/senate-section/article/S3801-2 (Statement by

is universal support for public disclosures by investors who have participated in the rulemaking for Section 13(q), and investor support for company-specific disclosures has only grown over time. As noted in our response to Question 54, investors have repeatedly written to the Commission to explain why this information is important to them and how they will use it, but all of these uses require, at a minimum, that disclosures be company-specific. As Aviva Investors recently explained, "[t]he disclosure resulting from implementation of Section 13(q) would not be useful if it provided on an anonymous basis or without clear association to the company and project to which payments may be attributed."[239] The California State Teachers' Retirement System ("CalSTRS") has also noted, "An anonymous compilation of the submissions required by Section 13(q) would likely not provide the information necessary to (make decisions about the securities of individual issuers)."[240]

The Proposed Rule also comes at a time when investors are seeking more information from companies about their payments to governments, not less. Investors understand that the payment of taxes in the jurisdiction where a company is operating is increasingly recognized as a key component of the company's social license to operate, and so the payments that companies make becomes critical information. In the absence of such disclosures, companies lack a defense to allegations that they are not paying their fair share, and thus may be subject to greater reputational risks or even risks of renegotiation of the project terms, which in many cases is material to investors.

As the United Nations Principles for Responsible Investment noted in its recent engagement with companies and investors on tax transparency, investors encouraged companies to publish "data on taxes along with contextual information and narrative to allow investors to make a considered assessment of how the company is positioned on tax. Investors also made companies aware of the draft Global Reporting Initiative (GRI) standard on taxes and payments to governments, which includes a comprehensive framework for country-by-country reporting."[241] The GRI Standard recognizes that detailed, country-by-country (CbC) reporting of revenues, profits, employment, and tax is critical to addressing these issues, and has also specifically recommended the inclusion of sector-specific payments as would be covered under payments-to-governments reporting.

We note that in the Proposed Rule, the Commission appears to largely disregard the investor protection purpose of the statute, and the benefits of public disclosures to investors. The Commission's rationale

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Senator Dodd) ("I thank Senators Cardin and Lugar for their important bipartisan amendment requiring additional disclosure to millions of investors who are making decisions about investing in the extractive industries--mainly oil, natural gas, and mining--around the world."). See also Comment submitted by EarthRights International (12 Dec 2014), pp.1-4. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-58.pdf.

239 Comment from Aviva Investors (12 Feb 2018). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3130136-161939.pdf. See also e.g. Comment submitted by Third Swedish National Pension Fund et al. https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-36.pdf (comment from "investors representing more than $2.85 trillion in assets under management" explaining that anonymous compilation will "not provide the information necessary"); Comment submitted by First Swedish National Pension Fund, et. al. (9 May 2014). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-42.pdf (responding to arguments made by API about investor interests")

240 Comment from CalSTRS (1 Feb 2018). Available at https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf.

241 United Nations Principles for Responsible Investment (UN-PRI), PRI Collaborative Engagements on Tax Transparency: Outcomes Report, March 9, 2020, https://www.unpri.org/download?ac=10142 .

for dismissing benefits to investors - that issuers are already required to disclose their most significant risks under other Exchange Act provisions[242] - simply cannot be squared with the number of investors who have consistently insisted that public disclosure of issuer payment information under Section 13(q) is important and valuable to them. A final rule that allowed confidential, anonymous reporting would remove the very feature that most clearly confers benefits on investors: the requirement to disclose the identity of the corporation making the payment.[243] Stripping the rule of any benefit to investors would be contrary to Congressional intent and the Commission's investor protection mission.[244]

3) Detailed public disclosures of payments to governments by (contract-level) project are also critical tools for resource-rich governments seeking to improve fiscal governance of natural resources and address corruption risks.

Public disclosure of payments, using a contract-level project definition is also useful for government actors in host countries, as they are better equipped to understand the full range of payments that are being made to various government entities across the country for a given project in a disaggregated way and can verify payments with obligations and the other entities. Given that contracts to access mining, oil, and gas resources are increasingly being disclosed (see above), a corresponding definition of projects is critical.

For instance, this data can help natural resource ministries and regulators understand the payments made by companies and their timing and allow them to coordinate better with revenue-collecting agencies. The information is also useful for revenue administrations of different types and at different levels seeking to understand who is benefiting from which revenue flows from a given project. This includes data detailing how state-owned natural resource companies – who are often the signatories to the natural resource contracts governing the projects – are benefiting from mining, oil, and gas projects. Additionally, all of that information is relevant to Supreme Audit Institutions ("SAIs") seeking to carry out government oversight of project revenues – including understanding if the right amount has been paid – and both SAIs and legislators seeking to hold other government institutions accountable for the collection and management of revenues and for rooting out corruption.

Public contract-level project payments data is particularly important in countries where: (a) that are not implementing EITI or that face challenges in EITI implementation in terms of timing or data reliability; (b) there is limited institutional coordination across government entities; (c) where there is limited transparency with respect to public financial management; or (d) fiscal governance of natural resource

[242] Proposed Rule, 85 Fed. Reg. at 2538.
[243] In addition, and as the Commission acknowledged in 2016, public disclosure "would provide investors with information that would be immediately available to all users upon filing" while the API-proposed compilation model would mean "users of the information could have to wait to access the information for months after an issuer files its Form SD (when the Commission publishes its next periodic compilation)." 2016 Final Rule at 49388 n.369.
[244] See, e.g. comment from Aviva Investors (12 Feb 2018). Available at https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3130136-161939.pdf.
("We believe strongly that the interests of investors should have consistent precedence over any other market actors if the Commission is to follow through on its mandate to maintain market efficiency, facilitate capital formation, and protect investors.")

revenues is weak. These are conditions in which corruption risks are particularly elevated. A contract-specific project definition can help to reduce these potential risks.

SAIs in particular have stressed the importance of contract-specific payment disclosures, like those required under the EITI Standard, and their value for their work in carrying out financial audits, compliance audits, and performance audits – critically including audits of state-owned natural resource companies. In recognition of the importance of this work, the International Organisation of Supreme Audit Institutions ("INTOSAI") has established a Working Group on Extractive Industries and has prioritized capacity-building and dissemination of best practices in this regard. At a recent meeting of SAIs, they particularly highlighted the utility of EITI data in three areas:[245]

I. **"Data and analysis**. EITI Reports include extensive information that can be used by SAIs. In countries like Ghana, Tanzania and Zambia that have implemented the EITI for several years, time series data can be a valuable resource in enabling SAIs to undertake financial, compliance and performance audits.
II. **Work planning and risk assessments**. SAIs typically take a risk-based approach to developing their audit programmes. EITI Reports could support this process, as they often include important observations and recommendations on areas where public financial management and other internal controls need to be improved.
III. **Raising public awareness and support**. The primary audience for SAI reports is often parliaments. However, collaboration with the EITI can help increase broader public awareness of the work undertaken by SAIs and help mobilise resources or support for their programmes."

While in some countries, it may be possible for SAIs and other government entities to access this information absent payments-to-governments reporting, that cannot be taken for granted. A 2018 Oxfam study on government efforts to control costs in petroleum projects found that governments across the world faced a number of shared challenges in fiscal management in the petroleum sector (many of which are likely applicable to the mining sector as well). In particular, it found that government entities often lack access to critical information, coordinate poorly across institutions, and have weak (and sometimes politicized) oversight mechanisms.[246] Public disclosures of contract-level payments by project help to address each of these challenges by making sure that government actors have a key, credible secondary source of information. Further, when there are concerns related to corruption that are brought to light based on public disclosures, it also provides political cover for anti-corruption champions within government to pursue the matter in a way that they may not have been able to do in its absence.

[245] Extractive Industries Transparency Initiative (EITI), Strengthening collaboration between the EITI and Supreme Audit Institutions, Oct. 17, 2019. Available at: https://eiti.org/blog/strengthening-collaboration-between-eiti-supreme-audit-institutions.
[246] Oxfam, Examining the Crude Details, Nov. 2018. Available at: https://www.oxfam.org/en/research/examining-crude-details.

4) Anonymous, aggregated payment disclosure would break with international consensus, negate the international transparency promotion efforts intended by Congress, and fail to advance US foreign policy interests.

Aggregated, anonymous reporting would represent a stark break with the international consensus that has solidified around the best way to advance transparency in the extractive industries, contrary to Congress's clear directive to support in Section 13(q) international transparency efforts. It would also represent a major step back for the US, contradicting "the objective of ensuring that the United States is a global 'leader in creating a new standard for revenue transparency in the extractive industries.'"[247]

The US Department of Interior has told the Commission that "permitting confidential disclosure would contravene the transparency objectives of the statute and the EITI Standard."[248] The State Department has emphasized that "company-specific, project-level public disclosure of payments" would "directly advance the United States' foreign policy interests in increasing transparency and reducing corruption in the oil, gas, and minerals sectors and strengthen the United States' credibility and ability to fight corruption more broadly -- particularly as the Department of State engages diplomatically to encourage other countries to adopt strong and effective laws against corruption."[249] The State Department has further emphasized that a "public disclosure requirement" "directly contributes to fiscal transparency and a credible public financial management system."[250]

5) Concerns about competitive impacts and safety from public disclosure are unfounded.

As addressed further in response to question 35, assertions of competitive harm resulting from public disclosure are substantially overblown, and at a minimum, are now obviously significantly reduced in light of the reporting already occurring around the world, as well as the revised EITI Standard, which not only requires public, project-level reporting in line with the European model, but also now goes further in mandating contract transparency.[251] Similarly, evidence in the record has already refuted the assertion that public disclosure of project-level payment information would reveal commercially sensitive information.[252] Experience with reporting in other markets, and the evolution of reporting

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[247] 2016 Final Rule at 49386 (citing Senator Cardin).
[248] Comment from US Department of Interior (17 Feb 2015), p.5. Available at: https://www.sec.gov/comments/s7-25-15/s72515-47.pdf.
[249] Comment submitted by US Department of State (21 Jan 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-13.pdf.
[250] Id. p.8.
[251] In 2016, the Commission acknowledged that "the potential for competitive harm resulting from the final rules is significantly reduced... by the adoption of a similar definition of 'project' in the European Union and Canada." 2016 Final Rule at 49382. This assessment of the facts remains accurate, and is further bolstered by the subsequent update to and expansion of the EITI Standard. See also e.g. id. at 49420 (noting that with respect to public disclosure under a contract definition of project, "[w]e do not think the same potential for competitive harm exists after a resource find occurs"); ibid. (noting "we are skeptical" that competitors would be "able to observe the total costs of a new project… based just on the required disclosures," and without total costs would "be unlikely to gain important competitive advantages").
[252] This assertion too has been refuted with respect to public reporting generally, and specifically with public reporting under a more granular contract level definition of project. See e.g. 2016 Final Rule, 81 Fed. Reg. at 49411 (noting multiple ways in which "the ability of competitors to use the publicly disclosed information to their advantage" is limited under a contract-definition of project.); id. at 49382 (noting "several commenters have questioned the API's assertion that a more granular definition of ''project' would reveal commercially sensitive information."); id. at 49389 (noting API "acknowledged that the commercial

standards like the EITI, further confirms that this is not a barrier to disaggregated, project-level public reporting. This is addressed further in response to questions 35-36.

The Commission also references past submissions by industry commenters suggesting public disclosure could endanger employees,[253] but these claims too have already been refuted. No evidence was ever put forward to substantiate these claims, and despite multiple years of fully public reporting by nearly 800 companies, there is no evidence supporting these concerns. Our previous submissions,[254] and other submissions to the Commission, including from labor unions representing employees who are allegedly being put at risk, have firmly rebutted these claims and confirmed precisely the opposite is true.[255] Further, we note the Commission rejected a blanket exemption in 2016 for safety concerns, noting it was "concerned that adopting a broad exemption with respect to … safety concerns could result in issuers applying the exemption in an overly broad way."[256] Certainly those same "concerns" that were found inadequate to justify such an exemption before cannot now, with even more evidence to refute the premise of those concerns, be used to justify making the entire disclosure regime non-public.

Confidential submissions would deprive investors, communities, and issuers alike of the vast majority of benefits Congress intended, and such a significant curtailing of the intended benefits cannot be justified on the basis of unsubstantiated assertions of cost savings and competitive harm, particularly in light of the significant recent transparency developments in other markets.

56. ***If we permit non-public submission of Form SD information and provide an anonymized compilation, what information should we include in the compilation? Should it include all information other than the identity of the issuer and identify payments by specific project, or should other information be omitted? Would the***

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terms of older projects are generally publicly known (even if the contracts are not technically publicly disclosed), thus suggesting that an exemption would generally not be necessary to protect commercially sensitive information."); id. at 49420 (explaining that for established projects, "we think it is particularly unlikely that our contract based definition of 'project' will result in the public disclosure of competitively sensitive information."). The suggestion that public reporting under the Modified Project Definition, which allows substantial aggregation across multiple contracts, could somehow result in disclosure of confidential information is wholly unpersuasive.

[253] Proposed Rule at 2542.

[254] See, e.g. comment submitted by PWYP-US (16 Feb 2016), p.45-46. Available at: https://www.sec.gov/comments/s7-25-15/s72515-45.pdf; Comment submitted by PWYP-US (14 Mar 2014), pp.25-27.

[255] See, e.g. comment submitted by United Steelworkers (29 Mar 2011), p.2-3. Available at: https://www.sec.gov/comments/s7-42-10/s74210-78.pdf ("Concern that employee safety could be threatened by project level payment disclosure… is overstated" and "project level disclosure is in fact critical for workers and their communities to achieve benefits from investment transparency."); Comment submitted by Nigeria Union of Petroleum and Natural Gas Workers (8 July 2011), p.1. Available at: https://www.sec.gov/comments/s7-42-10/s74210-97.pdf ("We understand that industry commentators have raised concerns about revenue transparency jeopardizing employee's safety. We strongly disagree but instead believe that enhanced transparency will in fact enhance employee safety, especially in volatile places like Nigeria's Niger Delta."); Comment submitted by Petroleum and Natural Gas Senior Staff Association of Nigeria ("PENGASSAN") (27 June 2011), p.1. Available at: https://www.sec.gov/comments/s7-42-10/s74210-93.pdf ("The often opaque investment environment in Nigeria leads to the conflict between communities and Oil Companies with our members caught In the middle-even being victims of kidnapping. Revenue transparency, including project-level payment disclosure will help create incentives for investment that benefits communities alleviating much of the violence in the volable Niger Delta and improving the safety of our members"). See also e.g. comment submitted by International Transport Workers' Federation (7 Mar 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-55.pdf.

[256] 2016 Final Rule at 49391.

> ***disclosure of the project raise similar competitive concerns as providing the issuer's identity? When and how often should the compilation be provided? Please be as specific as possible in your response.***

<u>There is no way to devise an anonymized compilation such that it advances the anti-corruption objectives of Section 13(q).</u> Such information is of virtually no value to any of the intended beneficiaries of the statute, including investors, citizens, local governments, and media watchdogs. For this reason we strongly oppose non-public submission and anonymized compilation (see our answer to question 55 above). We also reject the entirely unfounded premise that disclosing issuers' identities or projects could raise any competitive concerns.

> ***57. Should we provide an exemption from disclosing payments when an issuer is unable to provide such disclosure without violating the laws of the jurisdiction where the project is located, as proposed? If we should adopt such an exemption, should issuers be permitted to rely on it without first seeking relief from the Commission, as proposed?***

<u>While we maintain that a blanket, self-executing exemption for hypothetical conflicts with foreign laws is not warranted, we acknowledge that changing this feature of the rule would allow the Commission to directly address what it identifies as specific concerns voiced by certain members of Congress, and to eliminate billions of dollars of hypothetical costs previously included in its economic analysis. This would significantly contribute to the rule not being "substantially the same." The Commission cannot, however, ignore the intent of Section 13(q), its own findings in previous rulemakings, the current market realities of hundreds of companies successfully reporting without exemptions, nor the extensive record on this issue. These factors point to the need for robust and meaningful safeguards to protect against abuse and the creation of perverse, anti-transparency incentives.</u>

The history of this issue highlights the importance of ensuring that if the Commission allows for the possibility of exemptions, that there are sufficient safeguards against manipulation, including public scrutiny of, as well as Commission verification of, the asserted need and basis for any exemption. Although some industry commenters asserted in the 2012 rulemaking that some countries – citing Qatar, China, Angola, and Cameroon specifically – *might* prohibit the disclosures required by Section 13(q), no commenter has ever put forth convincing evidence demonstrating the existence of an actual legal prohibition on disclosing such information in these or any other countries. Indeed, in 2012 the Commission stated "[w]e believe that adopting such an exemption would be inconsistent with the structure and language of Section 13(q), and, as some commenters have noted, could undermine the statute by encouraging countries to adopt laws, or interpret existing laws, specifically prohibiting the disclosure required under the final rules."

1) *No additional evidence* of any foreign law prohibitions was submitted after that 2012 finding by the Commission.

Instead, during the second rulemaking, industry commenters dropped their assertion that Cameroon and Angola might prohibit disclosures, likely because those claims became too obviously untenable.[257] In the interim, Cameroon had joined the EITI and been deemed "compliant," eliminating the possibility of payment disclosure prohibitions in its domestic law,[258] and in 2015, Statoil (now Equinor) submitted statutorily required disclosures of project-level payments to the Angolan government without penalty or other consequence.[259]

API, however, continued to claim that China and Qatar prohibit disclosure, relying on the same sources in the 2011 comments submitted by Exxon (for Qatar) and Royal Dutch Shell (for China) that had already been debunked and rejected by the Commission as unpersuasive.[260] These claims were further disproven shortly thereafter when multiple companies (including API members) began public reporting, under the EU Directives, their disaggregated, project-level payments to both China and Qatar, without any apparent impact on their ability to do business in those countries.[261] Indeed, despite submitting a

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[257] See Comment Submitted by API (16 Feb 2016), p.26. Available at: https://www.sec.gov/comments/s7-25-15/s72515-32.pdf. See also 2016 Final Rule at 49391 n.408 (observing "commenters have not reiterated previous assertions that Cameroon and Angola prohibit the disclosure of resource extraction payments.").

[258] See Comment submitted by Oxfam America and EarthRights International (8 Mar 2016), p.10. Available at: https://www.sec.gov/comments/s7-25-15/s72515-59.pdf; We note, however, that there was already evidence in 2012 that Cameroon did not prohibit disclosures prior to this. See e.g. comment submitted by RELFUA (14 Mar 2011). Available at: https://www.sec.gov/comments/s7-42-10/s74210-74.pdf; Comment submitted by RELUFA (11 July 2011). Available at: https://www.sec.gov/comments/s7-42-10/s74210-96.pdf; Comment submitted by OpenOil (16 Oct 2015). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-94.pdf (noting that although certain commenters had alleged Cameroon prohibited Section 13(q) disclosures, Cameroon's petroleum law explicitly contained an exception for information that "has to be disclosed in accordance with legislative or regulatory provisions.").

[259] Comment submitted by PWYP-US (16 Feb 2016) p.54. Available at: https://www.sec.gov/comments/s7-25-15/s72515-45.pdf. (citing Statoil, 2014 Payments to Governments (2015)). For other evidence showing Angola did not prohibit disclosures prior to Statoil's disclosures, see e.g. comment submitted by PWYP-US (20 Dec 2011) pp.2-3. Available at: https://www.sec.gov/comments/s7-42-10/s74210-25.pdf; Comment submitted by OpenOil (2015). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-94.pdf (refuting arguments as to Angola).

[260] See comment submitted by API (16 Feb 2016), p.26. Available at: https://www.sec.gov/comments/s7-25-15/s72515-32.pdf (citing Letter from Royal Dutch Shell PLC at Appendix C (17 May 2011) and Letter from Exxon Mobil Corp. at Attachment II (15 March 2011)). With respect to China, API cited a legal opinion from Jun He Law Offices submitted by Royal Dutch Petroleum during the first rulemaking, but at most, it suggests that Chinese law gives the government the authority to prohibit Section 13(q) disclosures such that the government *could* act to prohibit payments in the future - not that it had done so; Comment submitted by Oxfam and ERI (8 Mar 2016), p. 11. Available at: https://www.sec.gov/comments/s7-25-15/s72515-59.pdf; See also id. pp.11-12 (explaining that API mischaracterizes the other source it cites, noting it says nothing about Section 13(q) type disclosures); Moreover, Chinese companies are regularly required to report on a wide range of extractive related payment information, including the amounts paid for extraction and exploration rights, as well as tax liabilities. Id. pp.12-14.

For Qatar, API cited only the 2009 letter from the Qatari government to Exxon, submitted by Exxon in 2011, but offered a plainly inaccurate interpretation; the letter merely informed Exxon (but apparently no other companies) that changes in the law were under consideration, and that Exxon should not disclose commercially sensitive information that could harm the interests of the Qatar government. It then lists several categories of such information, none of which overlaps with Section 13(q) disclosures. See comment submitted by Oxfam and ERI (8 Mar 2016), p.14-15. At most the letter expressed the possibility that Qatar *could* choose to prohibit disclosures in the future, but as Exxon acknowledged in 2016, law had not changed. See comment submitted by Exxon (Feb 2016), p.12 n.19. See also comment submitted by Oxfam and ERI (2 May 2016) pp.2-5. Available at: https://www.sec.gov/comments/s7-25-15/s72515-68.pdf.

[261] See comment submitted by PWYP-US (7 Apr 2016), p.2. Available at: https://www.sec.gov/comments/s7-25-15/s72515-1.pdf (attaching Total's payments-to-governments report); Submission from ERI-Oxfam (2 May 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-68.pdf (attaching report of Royal Dutch Shell); See also comment submitted by PWYP-UK (25 Nov 2019). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6470014-199342.pdf (summarizing the findings of the UK government review of disclosure laws, including that companies had "not

legal opinion in the first rulemaking that it claimed showed that China prohibited disclosures,[262] Shell subsequently became one of the first companies to begin publicly reporting its disaggregated project-level payments in both China and Qatar.[263] That this has not impacted the company's competitiveness is evident from the fact that Shell, along with other reporting companies, has subsequently announced significant new deals with both countries.[264]

In the 2016 Final Rule, the Commission concluded that "questions about the existence and scope of disclosure prohibitions" in foreign jurisdictions counseled against adopting a blanket exemption, noting that reporting under the EU Directives and ESTMA, which had just started, would clarify "the existence of alleged conflicts between those disclosure regimes and foreign laws" before reporting was due under Section 13(q).[265] Despite this, and despite providing for case-by-case exemptive relief, the Commission nonetheless included significant cost estimates that it asserted could potentially result from a conflict of law, if a company were not able to obtain an exception and was forced to sell all of its assets in a fire sale. This is a contradiction that the Commission should avoid this time.

Reporting under mandatory disclosure laws in other countries has now provided precisely the clarity the Commission predicted it would. In the UK, for example, the government's implementation review demonstrated first that compliance costs associated with the UK disclosure law – which mandates fully public, company-specific disclosure of payments on a project-by-project basis, and allows for no country exemptions – have been significantly lower than costs previously claimed by some companies in the US rulemaking process.

For example, one US company claimed in the 2011-12 Section 1504 rulemaking that its initial implementation costs could be as high as "$50 million" and that industry-wide costs "could amount to hundreds of millions of dollars."[266] However, the UK review shows those predictions were wholly unrealistic, putting the total cost of compliance for all companies reporting in the UK under the regulations in the first year (91 companies) at an estimated £52.5 million.[267]

In particular, the UK review found that:

- Of the 32 extractive companies participating in the UK review, none reported "any substantial costs" associated with disclosing payments to governments.[268] These 32 participating

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reported experiencing any problems... in countries with laws that prohibit the disclosure of payment information" and finding no "convincing evidence" that "disclosure of such information would result in any legal action or loss of business" (BEIS, Feb. 2018, para 20, page 5, emphasis added)(quoting BEIS Feb 2018 pp.11,5)

[262] See appendices to comment submitted by Royal Dutch Shell PLC (17 May 2011). Available at: https://www.sec.gov/comments/s7-42-10/s74210-90.pdf.

[263] See Shell Payments-to-Governments Report for 2015, attached as Exhibit to comment submitted by ERI & Oxfam (2 May 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-68.pdf.

[264] See comment submitted by NRGI (16 Feb 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-41.pdf

[265] 2016 Final Rule at 49390.

[266] Comment from Exxon Mobil (31 Jan 2011). Available at: https://www.sec.gov/comments/s7-42-10/s74210-11.pdf. While the Exxon figure was based off of the SEC's 2011 proposed rule, the SEC relied on the same figure in its cost analysis of its 2016 rule. See e.g. 81 Federal Register at 49424.

[267] BEIS, Feb 2018, para 32, p.10.

[268] BEIS, Feb 2018, p.i, and para 23, p.6.

companies, whose names BEIS has not published, included roughly six ("Around a fifth of participating companies") in the largest category of operators with revenue of £10 billion or more.[269]

- Estimated and actual one-off costs were in the ranges of £700 - £30,000 (small companies) to £4,000 - £5,230,000 (large companies); and annual recurring costs were put at £500 - £25,000 (small companies) to £5,000 - £1,200,000 (large companies).[270] Fifteen companies "provided actual or estimated costs for one-off impacts, and 15 provided … recurring costs."[271]
- "[T]he estimated aggregate cost of compliance for all companies in scope is £52.5 million,"[272] based on the actual and estimated costs provided by companies for the review. This estimate by the BEIS reviewers is for the 91 companies that filed reports during the first year of UK reporting[273] and can be understood as representing initial one-off costs plus recurring costs for one year of reporting.
- An additional four companies whose estimates were indicative only, and therefore omitted from the BEIS reviewers' calculations, "suggested that their annual costs were likely to be less than £100,000."[274]. The reviewers also found that "companies with lower burdens, reporting on less than five countries, tended to have one-off costs in the first year in the region of £40,000."[275]
- "Largely, companies leveraged existing staff to capture and report the flow of payment to governments."[276] It appeared that, while adjustments were made, companies' comments indicate they did not introduce new systems to comply with the regulations.[277] Although "[m]ost companies were unable to provide specific costs associated with internal reporting activities (by grade, time, and total internal salary costs)," companies that did "provide some indications of those costs noted that they were not borne as separate costs since these reporting activities were added to existing roles and hence absorbed into business-as-usual (therefore not imposing any additional burden)."[278]
- "Nine participating companies stated that they had filed a report or reports in more than one jurisdiction. Of these nine companies, four said that there had been no incremental cost associated with multiple reporting requirements" and three "said these costs were marginal."[279]
- The UK reviewers observed that "one of the main drivers of cost was understanding the regulatory requirements," and thus, "in general, respondents were hopeful that the Year 2 costs will be less" than Year 1 costs, on which the review was based.[280]

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[269] BEIS, Jan 2018, page 9, and Feb. 2018, figure 1, p.8.
[270] BEIS, Jan 2018, p.4, and Feb 2018, table 1, p.9.
[271] BEIS, Feb 2018, para 27, p.9.
[272] BEIS, Feb 2018, para 32, p10.
[273] BEIS, Jan 2018, p.4,8.
[274] BEIS, Jan 2018, p.16.
[275] BEIS, Jan 2018, p.16.
[276] BEIS, Feb 2018, para 30, p.10.
[277] BEIS, Jan 2018, p.17.
[278] BEIS, Feb 2018, para 29, p.10.
[279] BEIS, Jan 2018, p.20.
[280] BEIS, Jan 2018, p.20.

To the extent there could be any lingering doubts as to whether foreign laws might have prohibited disclosure, with more than three years of payment reporting to 154 countries now available for more than 792 companies, it is now clear that foreign laws *do not* pose an obstacle to disclosure. To illustrate, for each of the four countries previously cited by industry as problematic, reporting now shows the following:

- Since 2014, 36 companies have disclosed project-level payments totaling $64 billion in Angola, Cameroon, China, and Qatar.[281] Thirteen US-listed issuers and their subsidiaries accounted for 92.3 percent of the published payments to those four countries.[282] Furthermore, six issuers with membership of the American Petroleum Institute,[283] which has argued the existence of foreign prohibition laws in those four countries, accounted for more than two-thirds (67.5 percent) of those payment disclosures.[284]

- In Angola, twelve companies have disclosed project-level payments of $40,001,167,262 since 2014.[285] This includes the Chinese state-owned company China Petroleum & Chemical Corporation and the Russian state-owned company Gazprom. Six US-listed issuers and their subsidiaries account for $39,884,323,892, or 99.7 percent, of those payments.[286] Four API members account for $35,574,879,043, or 88.9 percent of the total project-level payments.[287] That figure includes more than $4.8 billion in payments reported by two subsidiaries[288] of ExxonMobil, which claimed during the Commission's original rulemaking that the government of Angola "broadly prohibits disclosure of any information related to petroleum activities in Angola without authorization from the Ministry of Petroleum."[289]

- In Qatar, four companies have disclosed a combined $11.6 billion in project-level payments.[290] This includes A.P. Moller-Maersk, which operates Al Shaheen, the largest oil field in Qatar.[291] Three US-listed issuers - all API members - have disclosed $7 billion in project-level payments, or 60.3 percent of the total payments disclosed to date under mandatory disclosure laws.[292] In

[281] See https://resourceprojects.org/projects?tab=0&countries=Qatar%3AAngola%3ACameroon%3AChina
[282] BHP Billiton, BP, China Petroleum & Chemical Corporation, CNOOC, Eldorado Gold Corporation, Eni, Equinor, ExxonMobil, Hoi Resources Limited (a subsidiary of Husky Energy), Husky Energy Incorporated, Royal Dutch Shell, Silvercorp Metals Incorporated, and Total.
[283] BHP Billiton, BP, Equinor, ExxonMobil, Royal Dutch Shell, Total.
[284] Natural Resource Governance Institute, Resource Projects: Open Source Data on Oil, Gas and Mining Payments, https://resourceprojects.org/. Accessed March 2, 2020.
[285] See https://resourceprojects.org/projects?tab=0&countries=Angola
[286] BP, China Petroleum & Chemical Corporation, Eni, Equinor, ExxonMobil, and Total. Exxonmobil discloses payments in Angola via two European subsidiaries, ExxonMobil Central Europe Holding GmbH and ExxonMobil Luxembourg et Cie.
[287] BP, Equinor, ExxonMobil, and Total. Natural Resource Governance Institute, Resource Projects: Open Source Data on Oil, Gas and Mining Payments, https://resourceprojects.org/. Accessed 2 March 2020.
[288] ExxonMobil Central Europe Holding GmBH, ExxonMobil Luxembourg et Cie. Data available at: https://bit.ly/2WqiGh4
[289] See comment submitted by Patrick T. Mulva (15 March 2011). Available at: https://www.sec.gov/comments/s7-42-10/s74210-73.pdf.
[290] BP, Shell, Maersk, and Total. Natural Resource Governance Institute, Resource Projects: Open Source Data on Oil, Gas and Mining Payments, https://resourceprojects.org/. Accessed March 2, 2020.
[291] Comment submitted by Publish What You Pay-US (14 Mar 2018). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3262655-162039.pdf
[292] BP, Royal Dutch Shell, and Total. See: https://resourceprojects.org/projects?tab=0&countries=Qatar

addition, the Qatari state-owned oil company, Qatar Petroleum, recently announced it was joining the EITI as a supporting company.[293] In so doing, Minister of State for Energy Affairs and President & CEO of Qatar Petroleum, Saad Sherida Al-Kaabi emphasized their commitment to "pro-actively promote transparency throughout the petroleum industry" and "pledge[d] to take a leadership role in advocating the EITI Principles internationally and throughout the MENA region."[294] News outlets further reported that Qatar Petroleum is working "to enhance its disclosure practices in alignment with international standards for corporate reporting."[295] In its company Code of Conduct, Qatar Petroleum emphasizes its efforts to fight corruption "and comply with all applicable anti-bribery and corruption laws and international conventions."[296] The company states that it is "working towards the adoption of CBCR [country-by-country reporting]."[297] According to its recent 10-K filings, ExxonMobil's operations in Qatar are via joint ventures with Qatar Petroleum.[298] In the past year alone, several US-listed oil and gas companies, including Chevron, Eni, ExxonMobil, Shell, and Total have aggressively pursued new business ventures in Qatar, suggesting that concerns over a supposed foreign prohibition law in Qatar are not driving business considerations.[299]

- In China, 22 companies, including three Chinese state-owned companies, have disclosed $12,328,193,914 in project-level payments since 2015. Eleven US-listed companies and their subsidiaries have disclosed $12,168,304,564 in project-level payments, or 98.7 percent of total payments to date, including four members of API.[300] Moreover, four Chinese state-owned

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293 See, e.g. EITI, "Qatar Petroleum joins EITI as a supporting company" (17 Oct 2019). Available at: https://eiti.org/news/qatar-petroleum-joins-eiti-as-supporting-company.

294 See, e.g. EITI, "Qatar Petroleum joins EITI as a supporting company" (17 Oct 2019). *See also* The Peninsula, "Qatar Petroleum joins EITI as a supporting company" (21 Oct 2019). https://thepeninsulaqatar.com/article/21/10/2019/Qatar-Petroleum-joins-EITI-as-a-supporting-company (quoting Mr. Al-Kaabi as further explaining "it is important that we are known as an open and trustworthy organisation, one that is sought after as a partner of choice within the industry," and emphasizing "we know the benefits of conducting our business in a … transparent manner.")

295 The Peninsula, "Qatar Petroleum joins EITI as a supporting company" (21 Oct 2019).

296 Qatar Petroleum, Shaping Who We Are: Code of Conduct, https://qp.com.qa/en/AboutQP/SiteAssets/QP%20Code%20Of%20Conduct_EN.pdf

297 Extractive Industries Transparency Initiative, "EITI Supporting Company Form" (15 July 2019). Available at: https://eiti.org/files/stakeholder_form/qatarpetroleumstakeholderform.pdf.

298 See for instance, ExxonMobil, Form 10-K, Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2018. Available at: https://www.sec.gov/Archives/edgar/data/34088/000003408819000010/xom10k2018.htm.

299 Qatar Petroleum, "Qatar Petroleum announces a 5-year naphtha sale agreement with Shell" (2 Dec 2019). Available at: https://qp.com.qa/en/MediaCentre/Pages/ViewNews.aspx?NType=News; Shell, "Qatar Petroleum and Shell to Expand LNG Marine Fuel Availability" (18 Sept 2019). Available at: https://www.shell.com/energy-and-innovation/natural-gas/lng-for-transport/news-and-media-releases/qatar-petroleum-and-shell-to-expand-lng-marine-fuel-availability.html; Reuters, "Exclusive: Oil giants shower Qatar with crown jewels in race for LNG prize" (29 Aug 2019). Available at: https://www.reuters.com/article/us-oil-majors-qatar-exclusive/exclusive-oil-giants-shower-qatar-with-crown-jewels-in-race-for-lng-prize-idUSKCN1VJ0S4; Reuters, "Qatar teams up with Chevron Phillips for petrochemical project" (24 Jun 2019). Available at: https://www.reuters.com/article/us-qatar-petroleum-petrochemicals/qatar-teams-up-with-chevron-phillips-for-petrochemical-project-idUSKCN1TP0U7.

300 The 11 US-listed companies include: BHP Billiton, BP, China Petroleum & Chemical Corporation, CNOOC, Eldorado Gold Corporation, Eni, Hoi Resources Limited (a subsidiary of US-Listed Husky Energy), Husky Energy Incorporated, Royal Dutch Shell, Silvercorp Metals Incorporated, and Total. BHP Billiton, BP, Royal Dutch Shell, and Total are members of API. Natural Resource Governance Institute, Resource Projects: Open Source Data on Oil, Gas and Mining Payments, https://resourceprojects.org/. Accessed March 2, 2020.

extractive companies have disclosed more than $15 billion in project-level payment data in 23 countries to date, including China and the United States, providing further evidence that the Chinese government does not prohibit and is not opposed to project-level payment disclosure.[301]

- In Cameroon, five companies have disclosed over $20 million in payments under mandatory disclosure laws in Canada, France, and the UK.[302] Since 2007, Cameroon has been implementing the EITI, which requires all companies (including ExxonMobil and a subsidiary of Royal Dutch Shell) to report their payments to governments in a public report.[303] Since 2006, the government has published eleven EITI annual reports containing company payment data dating back to 2001.[304]

- We reviewed the annual reports filed with the SEC between 2015 and 2020 for all 12 US-listed oil, gas, and mining companies that disclosed payments to the governments of Angola, China, and Qatar under mandatory reporting laws in Canada, the EU, Norway, and the UK.[305] We found no specific reference to foreign prohibition laws or the risks posed by such disclosures, including to the loss of assets or license to operate attributable to those disclosures. If, as certain previous commenters have claimed, such disclosures posed an imminent risk to their assets in those countries, they would have been legally obligated to reveal that to investors. That they did not suggests that no such imminent threat existed.

None of the 30 mandatory disclosure regimes already being implemented allow for any exemptions from reporting on the basis of any foreign law or contractual prohibition on disclosure.[306] Despite the absence of exemptions, there has been no apparent impact on companies' abilities to do business in those countries. A recent review by the UK government of implementation found no evidence of any prohibitions resulting in inability to comply with disclosures and noted "concerns that reporting could lead to difficulties with the law and authorities in the countries in which [companies] operate have not been realised."[307]

[301] Natural Resource Governance Institute, Resource Projects: Open Source Data on Oil, Gas and Mining Payments, https://resourceprojects.org/. Accessed March 3, 2020.
[302] Natural Resource Governance Institute, Resource Projects: Open Source Data on Oil, Gas and Mining Payments, https://resourceprojects.org/. Accessed March 2, 2020.
[303] Extractive Industries Transparency Initiative. Rapport de Conciliation des Flux Financiers et des Volumes Relatifs a L'exploration et L'exploitation des Hydrocarbures et des Mines Solides au Titre de L'annee 2015. Available at: https://eiti.org/sites/default/files/documents/rapportitiecameroun2015-msversionfinale-signe29122017.pdf.
[304] Extractive Industries Transparency Initiative, Cameroon, https://eiti.org/cameroon#implementation-. Accessed March 3, 2020.
[305] The 12 companies include: BHP Billiton, BP, China Petroleum & Chemical Corporation, CNOOC, Eldorado Gold Corporation, Eni, Equinor, ExxonMobil, Husky Energy, Royal Dutch Shell, Silvercorp Metals, and Total. No US-listed companies disclosed payments in Cameroon.
[306] See e.g. 2016 Final Rule at 49364 (noting the EU Directives "do not provide for any exemptions" and Canada has not adopted any).
[307] See Comment submitted by PWYP-UK (25 Nov 2018), p.4. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6470014-199342.pdf (quoting findings of UK review, attached appendices thereto). At most, some companies reported "a need to assess" potential conflict of law and to "manage relationships in host countries" and in a few

In the Proposed Rule, the Commission states that it "believe[s] that the likelihood that jurisdictions will pass such laws is limited by the absence of a similar exemption under the EU Directives or Canada's ESTMA, which generally require disclosure at a more granular level, and by the growing global influence of the EITI."[308] The Commission thus appears to believe that an exemption on the basis of foreign law conflicts is even *less* necessary or warranted now - a view supported by all available evidence - yet the exemptive relief outlined in the Commission's proposed rule is far *broader* now, not narrower, than in its 2016 rule.

2) Even if the Commission allows for the possibility of exemptions for pre-existing foreign laws, it should not allow exemptions for future laws.

First, allowing overly broad exemptions - including exemptions for any future laws that might prohibit disclosure under Section 13(q) - would generate numerous negative consequences at odds with the transparency, accountability and anti-corruption objectives of the statute. As the Commission recognizes, exemptions for future laws "could create a stronger incentive for host countries that want to prevent transparency to pass laws that prohibit such disclosure."[309] Incentivizing secretive governments to pass new laws prohibiting disclosures would undermine the Federal Government's international transparency promotion efforts, and US foreign policy objectives.[310] In separate legislation, Congress has made clear that the US government's policy is to oppose any aid to the government of any country that has "in place laws, regulations, or procedures to prevent or limit the public disclosure of company payments as required by United States law."[311]

Broad exemptions would amount to a de facto dictator's veto. They would reduce transparency in the countries where it is most needed: those countries whose government officials would prefer to keep financial transactions secret in order to divert funds for corrupt purposes.[312] As the district court noted

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instances negotiate with those governments; but no problems were reported with ultimately disclosing as required under the UK law, despite the lack of any exemptions.

308 Proposed Rule at 2558.

309 Proposed Rule, at 2558.

310 See, e.g. Comment submitted by Senator Cardin et. al. (31 Jan 2012), p.2. Available at: http://www.sec.gov/comments/s7-42-10/s74210-122.pdf (warning the commission against creating "a dangerous precedent, by making the US lawmaking process subservient to governments around the world, including dictators who do not share our commitment to transparency, good governance, and the rule of law."); Comment submitted by Senator Cardin et al. (1 Mar 2011), p.2. Available at: http://www.sec.gov/comments/s7-42-10/s74210-42.pdf (Allowing exemptions "for host-country laws would be contrary to the spirit and intent," as it would incentivize countries to "exploit such an exemption and enact such prohibitions against disclosure in order to circumvent Section 1504.")

311 The US Appropriations Act signed into law on December 20, 2019 states that "The Secretary of the Treasury shall instruct the executive director of each international financial institution that it is the policy of the United States to use the voice and vote of the United States to oppose any assistance by such institutions (including any loan, credit, grant, or guarantee) to any country for the extraction and export of a natural resource if the government of such country has in place laws, regulations, or procedures to prevent or limit the public disclosure of company payments as required by United States law." Further Consolidated Appropriations Act, 2020, Sec 7031(d)(2). Available at: https://www.congress.gov/bill/116th-congress/house-bill/1865/text.

312 See e.g. Comment submitted by Senator Cardin et al. (1 Mar 2011), p.2. Available at: http://www.sec.gov/comments/s7-42-10/s74210-42.pdf ("With regard to potential host government restrictions on disclosure, the statute makes clear that the intent is to make this information available from all countries, and this is particularly relevant in countries where governments may purposefully seek to keep this information hidden."); Comment submitted by Senator Levin (1 Feb 2011), p.4. Available at: http://www.sec.gov/comments/s7-42- 10/s74210-19.pdf. ("Exemptions for companies where laws in the host-country prohibit

in *API v. SEC*, "[a] broadly written exemption could eviscerate section 13(q) by allowing any country to avoid disclosure by enacting a disclosure-barring law—returning, in effect to the EITI voluntary compliance regime 13(q) sought to augment."[313]

Permitting exemptions for future laws would also allow companies to irresponsibly – or even intentionally – enter into business arrangements despite knowing they may not be able to comply with all relevant legal disclosure requirements, in the knowledge that they will be exempt from their US compliance obligations. As we have noted in prior submissions, this would be inconsistent with the approach the Commission has taken in other contexts.[314]

Relatedly, commenters have at times argued for exemptions insisting that they are necessary to preserve their competitive edge against non-listed companies,[315] but this appeal to the Commission's statutory mandate to avoid anti-competitive regulatory action is misplaced. Such exemptions are not required, and it would not be appropriate for the Commission – which has championed the use of the FCPA to combat bribery and corruption – to promote competitiveness by providing more opportunities for corruption.

3) While we believe the Commission may appropriately address the CRA's "substantially the same" language by allowing for the possibility of exemptions, it cannot ignore Section 13(q), current market practice, nor the evidence in the record, summarized above, which demonstrate a clear need for greater safeguards than are currently proposed.

We note the concern that the rule could require companies to violate foreign law was raised by certain members of Congress during the debate on the resolution of disapproval, although no member cited any specific country as actually having such law. It appears, however, that these members of Congress did not understand that the 2016 Final Rule in fact did provide for an exemptive process that would allow companies to obtain relief on precisely this basis if they could show a true need.

This apparent confusion is likely a result of the fact that the Commission cited billions of dollars in potential losses in its 2016 cost projections, based on claims that companies would be forced to violate foreign laws. The Commission included these costs in its analysis despite not only allowing issuers to apply for exemptive relief if such laws were shown to prohibit disclosure, but also finding that: (i) such foreign prohibition laws may not exist (and noting companies were already reporting in those countries

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required reporting would contradict the purpose of the legislation and create a clear incentive for those countries, who want to prevent transparency, to pass laws against disclosure. In fact, it is precisely those jurisdictions for which investors and the public need additional transparency."); See also Letter from retired Senators Lugar, Dodd, and Levin (4 Feb 2016) (''Sen. Lugar et al.'') (exemptions based on foreign law are "unnecessary and inappropriate," and "would contradict the purpose of the legislation and risk creating an incentive" for foreign countries to pass new laws against disclosure in "precisely the jurisdictions for which investors and the public need greater transparency.")

[313] *API v. SEC*, 953 F. Supp. 2d 5, 22 (D. D.C. 2013).

[314] See *In the Matter of BDO China Dahua CPA Co. Ltd. et al.,* SEC Initial Decision Rel. No. 553 at 105 (Jan. 22, 2014). See also Comment submitted by Oxfam America and EarthRights International (8 March 2016), p.11-12. Available at: https://www.sec.gov/comments/s7-25-15/s72515-59.pdf.

[315] In any event, evidence in the record refutes the notion of competitive disadvantage. See e.g. Comment submitted by NRGI (16 Feb 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-41.pdf.

with no problem), (ii) that even if they did, it was unlikely companies would be forced to violate the law, as they may be able to obtain a waiver from foreign authorities, and (iii) that even if they could not, that it was unlikely that it would lead to the worst case scenario of a fire sale of assets at cut rates. These enormous hypothetical losses became a source of concern for certain members of Congress, despite the fact that these were virtually guaranteed to *never* come to fruition, even without the Commission's inclusion of the possibility of an exemption. Indeed, there is a strong argument that the Commission, given its findings, erred in including such hypothetical costs, since these did not reflect an accurate projection of actual risk. We hope the Commission takes greater care in producing its final economic analysis in this instance.

Regardless, and as summarized above, in the more than three years since Congress voted on the resolution of disapproval, the facts on the ground have changed significantly. There have now been three or more years of fully public reporting by nearly 800 companies in over 150 countries, without anything remotely resembling the scenarios - and billions of dollars in losses - the Commission included in the 2016 economic analysis, despite the fact that other countries' laws lack any exemptions.[316] Indeed as noted above, reporting companies continue to win contracts in the countries previously identified by industry commenters as having such conflicts.

Accordingly, while changes to the exemptive process can be an acceptable way to address the "substantially the same" language, generally speaking, we remain concerned that a self-executing process is ripe for abuse and manipulation and will result in substantial over-exempting. The Commission's approach to exemptions in the final rule must accurately reflect the facts as they currently exist, and must account for the extensive evidentiary record, which shows clear need for heightened safeguards. These are addressed further in response to questions 58-60.

Likewise, the Commission must not repeat the same confusion with the economic analysis and must adequately reflect current market realities.

58. ***Should we include qualifying conditions to the exemption, as proposed? Would these proposed conditions provide adequate protection against potentially inappropriate uses of the exemption? Are the proposed required disclosures appropriate? For example, should we require an issuer to disclose the steps taken to seek and use exemptions or other relief under foreign law as a condition to claiming the conflicts of law exemption? Would requiring such disclosure exacerbate any conflict the issuer may have with foreign law? Should we include additional or different disclosures?***

<u>While we continue to believe exemptions are not warranted, allowing for the possibility of exemptions based on foreign law conflicts could be an acceptable part of Commission's overall answer to the CRA's mandate, but only if it includes sufficiently robust safeguards and qualifying conditions.</u>

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[316] See comment submitted by PWYP-UK (25 Nov 2018), p.4. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6470014-199342.pdf ("concerns that reporting could lead to difficulties with the law and authorities in the countries in which [companies] operate have not been realised")

In particular, maximum transparency is critical. As discussed in response to question 57, certain issuers have repeatedly misled the Commission as to the existence of disclosure prohibitions in law and contract, and it is only through the efforts of other commenters that the Commission has been appraised of the truth.[317] In certain instances, issuers have identified a specific foreign law and obtained a legal opinion proclaiming the existence of a payment disclosure prohibition, only for further legal research by commenters to show that the laws had been presented inaccurately and out of context.[318] A self-executing exemption risks inviting more of the same gamesmanship, in particular, that certain issuers may continue in the same vein - finding payment disclosure prohibitions where they do not genuinely exist - and especially if applied to *future* foreign laws, will create the potential for a race to the bottom. Given this history, it is all the more important that there be robust transparency and procedural safeguards, including full transparency as to what information is being withheld and the justification for doing so.[319]

Issuers seeking to rely on such an exemption must be required to name the jurisdiction for which payment information is being withheld, provide the law prohibiting disclosure (and translation, if necessary), explain steps taken to seek permission/consent to disclose, as well as furnish a legal opinion addressing the inability to disclose that specifically identifies a conflict with disclosures under this section.[320] But additional conditions are also necessary in addition to those proposed by the Commission. See Response to Question 61. We cannot accept any exemption process or procedure that allowed companies to keep the underlying explanation and asserted basis for their claimed exemption confidential.

If the Commission allows for the possibility of exemptions, it must also make it clear that providing the required supporting documentation and explanation is not a one time exercise creating a permanent right to an exemption. Issuers must be required to start each reporting cycle with a presumption of full disclosure such that they must submit new supporting documentation and explanations, including new efforts to obtain disclosure permission, for each reporting cycle. We note the Commission previously recognized that blanket exemptions would "remove any incentive for issuers to diligently negotiate with host countries for permission to make the required disclosures" and "make it more difficult to address any material changes over time in the laws of the relevant foreign countries, thereby resulting in an outdated blanket exemption."[321] It must avoid creating these problems.

We see no reason why requiring disclosure of reasonable steps would exacerbate any conflicts. Indeed, such disclosure will have the additional benefit of enabling issuers to determine whether they are receiving fair treatment relative to other issuers and may increase their leverage. In the unlikely event

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[317] See e.g. comment submitted by ERI and Oxfam (8 Mar 2016), p.11,14,16.
[318] Id. p.16.
[319] We note it would obviously be highly concerning and legally untenable if the result of the Commission's process was that US listed issuers were claiming foreign law exemptions for the same countries companies in other markets were making public disclosures for.
[320] This would comport with the recommendations of former Staff Director and Chief Counsel of the Senate Subcommittee on Investigations, elaborated on the basis of a decade of Senate oil corruption investigations. See Comment from Elise Bean (16 Feb 2016) at P. 7. Available at: https://www.sec.gov/comments/s7-25-15/s72515-27.pdf
[321] 2016 Final Rule at 49413.

that there is a genuine disclosure prohibition that an issuer cannot obtain relief from, it may also be to the issuer's benefit to have taken the steps to try to seek governmental permission publicly available to demonstrate they have acted reasonably, which could be an important signal to investors, civil society, local communities and others who may otherwise assume ulterior motives, given what a departure withholding the information would be from industry practice and especially given full reporting in other markets.

59. ***Should we require a legal opinion to be furnished in support of the exemption, as proposed? If so, are the requirements for the legal opinion appropriate?***

<u>If the Commission allows for the possibility of exemptions on the basis of foreign law prohibitions, it must require that a legal opinion be attached as an exhibit with its public filing.</u>

While we consider the requirement that a legal opinion be provided to be a necessary check, we emphasize that a legal opinion alone would be insufficient given the history of this issue, including the mischaracterization of legal opinions to argue for sweeping exemptions that were unsupported by underlying law. See response to questions 57 and 58. This is why it is essential that there be full transparency of the as to the alleged basis for any such exemption, including of the legal opinion furnished as an exhibit to Form SD, to both deter and detect misuse of exemptions, as well as additional safeguards.

The Commission should also require the legal opinion description of the penalties or sanctions for violating the foreign legal provision, including information about whether the prohibition has been enforced in the past.

As noted in response to Question 61, the Commission should ensure that US issuers do not attempt to exercise exemptions for countries where companies listed in the UK, Canadian or European markets are already disclosing disaggregated project payment information.

See also our responses to questions 57, 58 and 61.

60. ***An issuer would be required to take reasonable steps to seek and use exemptions or other relief under the applicable law of the foreign jurisdiction in which there is a conflict in order to qualify for the proposed exemption. Should we provide guidance about what would constitute reasonable steps to satisfy this condition of the exemption? If so, what should we include in the guidance?***

<u>If the Commission allows for the possibility of exemptions on the basis of foreign law prohibitions, it must require issuers to first take reasonable steps and use exemptions or other relief under the applicable law of the foreign jurisdiction or its contracts with that government before it can qualify for an exemption.</u>

As noted in our previous responses, issuers must be required to pursue any process provided for by law or in their contracts for obtaining permission for disclosure, or to utilize any clear carve outs or protections under the terms of any relevant contract from host country laws prohibiting disclosure.[322]

More generally, where a foreign legal system allegedly may prohibit disclosure of information required in the US, it has long been standard practice to require "a good faith effort" to obtain permission from foreign authorities before considering whether the foreign law prohibition may be a defense against disclosure.[323] To the extent any negotiations might actually be required, the UK review shows companies are fully capable of successfully negotiating with host countries.[324]

See also response to Question 58.

> ***61. Are there other conditions to the proposed exemption that we should adopt instead of, or in addition to, the proposed conditions? For example, should we limit the exemption to foreign laws that pre-date the effective date of the new rules or some earlier date, such as the date of this release? Should we limit the exemption to situations involving a conflict with a foreign national law and preclude its availability when the conflict arises with the law of a foreign subnational jurisdiction, such as a province? If so, please explain why any additional limitation would be appropriate.***

<u>If the Commission provides for the possibility of exemptions, it should include the proposed conditions, but other additional conditions and safeguards are also necessary.</u>

First, exemptions are not warranted for future laws prohibiting disclosure, as such exemptions would be directly at odds with the transparency objectives of the statute (see response to question 57).

Second, as discussed in response to question 57, any process for allowing exemptions needs comprehensive safeguards to prevent abuse that undermines the statute.

Third, the Commission should limit the exemption to foreign national laws that explicitly prohibit Section 13(q) payments. As noted in our responses above to questions 57 and 58, industry commenters have mistakenly or inappropriately taken overly broad interpretations of laws or regulations that were vague or broad. Limiting the exemption would help prevent this in the future. In addition, no exemption should be allowed for laws at the subnational level. Contracting parties are seldom subnational government entities and such an exemption would be rife for abuse and exploitation.

Fourth, the Commission must ensure that US-listed issuers are not claiming exemptions for countries where companies listed in other jurisdictions are fully reporting their payments to governments. The Commission should make clear that where other companies listed in the US, or in Canada, the EU,

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[322] The Commission must ensure an issuer cannot creatively interpret a foreign law conflict in a way that allows it to consider it separately from whatever disclosure rights it may have under one or more contracts.
[323] See, e.g. Restat 3d of the Foreign Relations Law of the US, § 442(2)(b) & (c) (1987).
[324] See comment submitted by PWYP-UK (25 Nov 2019), p.4. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6470014-199342.pdf.

Norway, or the UK, have publicly disclosed payment information for that country in their last fiscal year, issuers are presumptively barred from claiming an exemption for that country.

Fifth, in addition to requiring the provision of an explanation, supporting documentation, and steps taken to seek relief each year, the Commission should also consider restricting the right to claim an exemption for a specific country to a limited number of reporting cycles. The Commission must make it clear that the expectation is that issuers will not enjoy perpetual permission to flaunt US disclosure laws and deprive investors and communities of the information that was the object of Section 13(q), and that issuers are expected to continue to work to obtain permission from host governments to make the required disclosures.

We recommend amending § 240.13q–1(d)(1) as follows:

(d) Exemptions— (1) ***Pre-existing*** *conflicts of law. A resource extraction issuer that is prohibited by a* ***country-level*** *law of the jurisdiction where the project is located,* ***enacted or adopted on or before July 21, 2010,*** *from providing the payment information required by Form SD may exclude such disclosure, subject to the following conditions:*

*(i) The issuer has taken all reasonable steps****, including but not limited to, steps*** *to seek and use any exemptions or other relief under the applicable law of the foreign jurisdiction,* ***or any relevant contract****, and has been unable to obtain or use such an exemption or other relief;*

(ii) The issuer must disclose on Form SD:

(A) The foreign jurisdiction for which it is omitting the disclosure pursuant to this paragraph (d)(1);

(B) The ***text of the*** *particular law of that jurisdiction that prevents the issuer from providing such disclosure****, including date of enactment or adoption, along with an English translation, if necessary;*** *and*

(C) The project for which payments are being withheld and whether the contract or other legal agreement that forms the basis of the payment liabilities provides the issuer any waivers or protections from laws prohibiting disclosure, and/or provisions allowing disclosures required by law, regulation or stock exchange rule;

*(D) The efforts the issuer has undertaken to seek and use exemptions or other relief under the applicable law of that jurisdiction****, or any relevant contract, during the fiscal year for which its report relates,*** *and the results of those efforts; and*

(iii) The issuer must furnish as an exhibit to Form SD a legal opinion from ***qualified*** *counsel that* ***identifies a clear conflict with the disclosure requirement of this section, addresses the specific scope of the prohibition as compared to disclosures required by this section, and provides a description of the penalties or sanctions for violating the foreign legal provision, including information about whether the prohibition has been enforced in the past.***

62. Should we provide an exemption from disclosing payments when the written terms of a pre-existing contract restrict such disclosure, as proposed?

While we maintain that a blanket, self-executing exemption for pre-existing contract terms that allegedly prohibit disclosure is not warranted, we acknowledge that changing this feature of the rule would allow the Commission to address what it identifies as concerns voiced by certain members of Congress. This would significantly contribute to the rule not being "substantially the same." The Commission cannot, however, ignore the intent of Section 13(q), its own findings in previous rulemakings, the current market realities of hundreds of companies successfully reporting without exemptions, nor the extensive record on this issue. As with alleged foreign law conflicts, these factors point to the need for robust and meaningful safeguards to protect against abuse and the creation of perverse, anti-transparency incentives.

We remain highly skeptical of the need for such exemptions and concerned about potential damage that such an exemption, which would be vulnerable to abuse and misuse, could exact on 13(q)'s transparency and anti-corruption purpose, even if the exemption is restricted to pre-existing contracts.

As noted in response to questions 57 and 58, standard provisions in oil, gas and mining contracts allow for disclosure when required by home governments or stock exchange regulators. The model contract used by the AIPN [Association of International Petroleum Negotiators] has included these standard provisions for over two decades."[325] This is confirmed by energy consultancy OpenOil in its review of its database of more than 800 contracts from 73 countries, finding that "[m]ost contracts in the database explicitly allow for disclosure when required by law. This represents standard industry practice, as evidenced by OpenOil further found that "[n]egotiations are conducted, and contracts signed, based on an understanding of the need to comply with state and market regulations, even as these change over the lifetime of a project. The regulations currently under consideration should not therefore be considered as an unusual or unreasonable burden," rather, the existence of such exceptions in "so many contracts demonstrates that developing disclosure requirements have already been anticipated during negotiation processes."[326] Substantial other evidence already in the record confirms these findings.[327]

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[325] Comment submitted by OpenOil (26 Oct 2015), pp.2-4. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-94.pdf.
See also e.g. the Association of International Petroleum Negotiators Model Form Confidentiality Agreement, attached as Exhibit A to the comment submitted by Oxfam (20 March 2012). Available at: http://www.sec.gov/comments/s7-42-10/s74210-294.pdf. 31; Comment submitted by ERI and Oxfam (2 May 2016), pp.4-6 (analysis of Qatari contracts "confirm[s] that contract provisions allowing issuers to comply with mandatory disclosure requirements are standard in Qatar," as "[n]one of the contracts or PSAs contain an express prohibition on disclosing information required under Section 13(q)," all of the contracts reviewed, and the most recent model Production Sharing Agreement "contain express carve out provisions permitting disclosure of confidential information when required by law, regulation and/or stock exchange rule.")

[326] Comment submitted by OpenOil (26 Oct 2015). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-94.pdf

[327] See, e.g. comment submitted by PWYP-US (25 Feb 2011), Available At: https://www.sec.gov/comments/s7-42-10/s74210-29.pdf; Comment submitted by Revenue Watch Institute (6 Dec 2010), Available at https://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-98.pdf; Comment submitted by Susan Maples, Vale Columbia Center for Sustainable Investment, Columbia University Law School (2 Mar 2011), Available at: https://www.sec.gov/comments/s7-42-10/s74210-52.pdf; See also Peter Rosenblum and Susan Maples, Contracts Confidential: Ending Secret Deals in the Extractive

Although this standard industry practice is not mentioned in the new proposed rule, the Commission has previously acknowledged it in 2016, noting that ”[s]everal commenters provided persuasive evidence demonstrating that exceptions to confidentiality for laws or stock exchange requirements that require disclosure are frequently a standard component of oil, gas and mining contracts.“[328] There is only *more* persuasive evidence now. As noted above, none of the other mandatory disclosure regimes allow any exemptions on the basis of contractual terms that might prohibit disclosure.

It would be exceedingly rare, if not unheard of, for the disclosures required by Section 13(q) to not be carved out of standard confidentiality provisions which allow for *all* disclosure required by stock exchange regulators. Standard confidentiality provisions have a further safeguard allowing for disclosure if agreed by both parties in the contract. It would be inappropriate for the Commission to grant an exemption to an issuer that had neglected to follow standard industry contracting practice to ensure that it could comply with regulatory requirements. If issuers defied these long-standing and clear contracting norms, then to the extent any conflicting obligations arise, they have put themselves in this position.[329] If issuers have entered into a business arrangement despite knowing they may not be able to comply with all legal disclosure requirements that might apply, simply assuming that the political, administrative, and judicial authorities will accommodate their negligence or – bad faith – they should not be rewarded for departing from industry standard.

While we continue to believe exemptions for contractual disclosure prohibitions are not warranted, the Commission may appropriately address the CRA's "substantially the same" language by allowing for the possibility of exemptions. As addressed in response to question 65, if the Commission does provide for the possibility of exemptions, the cut-off date for pre-existing contracts must be earlier than currently proposed, as issuers have been on notice of Section 13(q) disclosures since 2010 when the law was enacted.[330] The Commission cannot, however, ignore Section 13(q), current market practice, nor the evidence in the record, summarized above, which demonstrate a clear need for greater safeguards, including maximum transparency to allow public scrutiny, and additional qualifying conditions to minimize the opportunity for abuse.

63. ***Should we include qualifying conditions to the exemption, as proposed? Would these proposed conditions provide adequate protection against potentially inappropriate uses of the exemption? In particular, should we require an issuer to disclose the reasonable steps taken to seek and use any contractual exceptions or other***

Industries (14 Sept 2009), p.27. Available at: http://www.revenuewatch.org/publications/contractsconfidential-endingsecret-deals-extractive-industries; Comment submitted by PWYP-US (14 Mar. 2014), pp.14-15, 23 and FN 131, FN 133; Comment submitted by PWYP-US (8 March, 2016), p.3 n.14.

[328] 2016 Final Rule at 49391 n.411.

[329] As we have explained in prior comments, this is how the Commission has characterized the behavior of five accounting firms that were sanctioned for failing to disclose audit documents. SEC, *In the Matter of BDO China Dahua CPA Co., Ltd. et al.,* Initial Decision Release No. 553 at 105 (S.E.C. 22 January 2014). (Rejecting the firms' arguments that disclosure would subject them to potential penalties under Chinese law, the Commission sanctioned them in part because "to the extent Respondents found themselves between a rock and a hard place, it is because they wanted to be there."); See also comment submitted by PWYP-US (16 Feb 2016), pp.44, 49-50.

[330] And certainly no later than the release of the 2012 Final Rule.

contractual relief to disclose the payment information? Would requiring such disclosure exacerbate any conflict the issuer may have with a pre-existing contract term?

If the Commission allows for the possibility of exemptions for pre-existing contractual terms, it must be subject to qualifying conditions, but additional conditions and safeguards are needed beyond what the Commission has proposed.

We maintain that exemptions on the basis of contractual prohibitions are not warranted, and as with proposed exemptions for foreign law conflicts, we are concerned that a self-executing approach to exemptions will be ripe for misuse. (See responses to questions 57 and 58). These concerns are particularly serious and warranted with respect to contracts, given, as the Commission notes, the high degree of control issuers have over contractual terms.[331]

Qualifying conditions are essential. Issuers seeking to rely on such an exemption must be required, at a minimum, to explain the jurisdiction for which payment information is being withheld, the contract terms prohibiting disclosure, steps taken to seek permission/consent to disclose, as well as furnish a legal opinion addressing the inability to disclose. All of this must be subject to public scrutiny; we cannot accept any exemption process or procedure that allows issuers to keep the underlying explanation and asserted basis for their claimed exemption confidential. This is all the more important in light of the substantial evidence in the record that industry practice shows there is no need for such exemptions and the repeated mischaracterizations that have been made throughout this process by certain commenters.

As also discussed in response to questions 57-61, additional qualifying conditions and safeguards are needed to prevent gamesmanship and abuse. The Commission must include an explicit requirement that an issuer take (and explain) reasonable steps taken to seek and use any contractual exceptions or other contractual relief to disclose the payment information. The Commission should be more explicit and it should specifically foreclose exemptions in cases where the contract includes the most common exception to contractual non-disclosure and confidentiality provisions, namely disclosure, where required by law, regulation or securities registration/listing requirements, or any other authority, as discussed in response to question 62. The rule should make clear that where this type of exception is present, the exemption will not apply, as there would be no contractual prohibition on disclosure.

We do not agree with the Commission's proposal that companies would not be required "to renegotiate an existing contract or to compensate the other contractual parties in exchange for their consent to disclose the payments."[332] The Commission should not disincentivize negotiations; indeed, we note that the Commission explained its rejection of blanket exemption in 2016 by specifically noting that such an

[331] See Proposed Rule at 2545. See also our response to question 57.
[332] See Proposed Rule at 2544-45.

approach would "remove any incentive for issuers to diligently negotiate with host countries for permission to make the required disclosures."[333]

Additional disclosures are also necessary. The proposed rule states that the "terms that prohibit the issuer from providing such disclosure" must be disclosed. The Commission should clarify that this requires an issuer to identify the specific contract, by stating the country, title of contract, parties, and date, and also requires disclosure of the full text of the actual contract provision allegedly prohibiting disclosure, for example by providing the confidentiality provision, including any exceptions allowing for disclosure, and legal consequences of violating the provision.

As with foreign law conflicts, addressed in response to question 58, requiring disclosure of reasonable steps taken will not exacerbate any conflicts. Indeed, such disclosure will have the additional benefit of enabling issuers to determine whether they are receiving fair treatment relative to other issuers and may increase their leverage. In the extremely unlikely event that there is a genuine disclosure prohibition that an issuer cannot obtain relief from, it may also be to the issuer's benefit to have taken the steps to try to seek governmental permission publicly available to demonstrate they have acted reasonably, which could be an important signal to investors, civil society, local communities and others who may otherwise assume ulterior motives, given what a departure withholding the information would be from industry practice and especially given full reporting in other markets.

> ***64. Should we require a legal opinion to be furnished in support of the exemption, as proposed? If so, are the proposed requirements for the legal opinion appropriate?***

<u>If the Commission allows for the possibility of such exemptions, it must require a legal opinion to be attached as an exhibit to Form SD and it must be fully public.</u>

For the same reasons addressed in response to question 59, although insufficient alone, requiring a legal opinion that is publicly furnished with Form SD is a necessary check.

In addition to what is currently proposed, the Commission should specify that the legal opinion must explain not only the legal provision allegedly prohibiting disclosure, but must specifically address the existence of any carve-outs, exceptions or other processes built into the contract that allow issuers to comply with disclosure laws, regulations, or stock exchange listing requirements. See further our response to question 62 and 63. The Commission should also require the legal opinion to describe the penalties or sanctions applicable for violating the contractual provision.

> ***65. As proposed, the exemption would apply only to contracts that were entered into prior to the effective date of the Section 13(q) rules. Should it instead apply to contracts entered into by an earlier or later date? If so, please identify the different date and explain why it would be more appropriate.***

[333] 2016 Final Rule at 49413.

If the Commission allows for the possibility of exemptions for contract terms, the cutoff date must be substantially earlier. The most appropriate date is the enactment of Section 13(q) in July 2010.

There is no basis for allowing the exemption to apply to any contracts that post-date enactment of Section 13(q) in July, 2010. As noted above, industry practice has long been to include exceptions to any contractual confidentiality provision to ensure compliance with securities laws, regulations and stock-exchange requirements. As the Commission acknowledges, "issuers have control over the terms of their contracts," and following the enactment of Dodd-Frank would obviously have been "in a position to modify future contract terms accordingly."[334] Companies have already been on specific notice of the need to have such standard carve outs for nearly a decade. To allow contractual exceptions to Section 13(q) that extend through the effective date of the rule, as currently proposed, would mean enabling nearly 10 years of gamesmanship and sub-standard contracting practice meant to avoid transparency.[335]

Indeed, extending eligibility for the exemption to the effective date of the Final Rule could incentivize those unscrupulous issuers wishing to evade transparency to negotiate contract terms specifically with the intention of avoiding Section 13(q)'s disclosure requirements.[336] Such a result is plainly inconsistent with Section 13(q)'s transparency objectives, as it risks giving issuers and their government partners an opportunity to abuse the exemption and contract around the transparency Congress intended. Furthermore, companies have been disclosing project-level payments to governments through mandatory disclosures laws in other countries for five years with no exemptions, and have presented no evidence to indicate the need for contractually based exemptions.

66. ***Should we provide further guidance on the scope of the proposed exemption for pre-existing contracts? For example, how should we treat amendments or extensions of pre- existing contracts that occur after the effective date of the Section 13(q) rules? Should the proposed exemption apply to such amendments or extensions?***

The Commission should explicitly provide that no exemptions would be permitted for amendments or extensions, for the same reasons addressed above. (See responses to questions 62-65).

We recommend amending § 240.13q–1(d)(2) as follows:

> (2) *Conflicts with pre-existing contracts.* A resource extraction issuer that is unable to provide the payment information required by Form SD without violating one or more contract terms that were in

[334] Proposed Rule, 85 Fed. Reg. at 2545.
[335] *See* comment submitted by OpenOil (26 Oct 2015), p.5. ("The effect of weakening disclosure regulations would be to reward those few companies who have failed to make allowance for possible compliance regulations, at the expense of the majority who have taken their potential legal obligations into consideration.")
[336] An important consideration is also that the nature of extractive contracts is such that the main government payments arrive only when production begins, which is usually years after the contract is signed. For instance, the main payments for oil and gas production typically do not occur until at least 5-7 years after a contract is signed.

effect prior to **July 21, 2010,** may exclude such disclosure, subject to the following conditions:

(i) The contract does not contain terms allowing for disclosure of information where required by law, regulation, or securities registration requirements or any other authority;

(ii) the contract has not been amended or extended after July 21, 2010;

(iii) The issuer has taken all reasonable steps to obtain the consent of the relevant contractual parties, or to seek and use another contractual exception for relief, to disclose the payment information, and has been unable to obtain such consent or other contractual exception or relief;

(ii) The issuer must disclose on Form SD:

(A) The jurisdiction for which it is omitting the disclosure pursuant to this paragraph (d)(2);

(B) the title of contract, the parties to the contract, and date of the contract,

(B) The **full text of the** particular contract terms that prohibit the issuer from providing such disclosure **as well as any other terms that provide for disclosure of information or establish a process to obtaining consent to disclose information, as well as provisions providing for the legal consequences of violating the prohibition**; and

(C) The efforts the issuer has undertaken to obtain the consent of the contracting parties, or to seek and use another contractual exception or relief, to disclose the payment information**, during the fiscal year for which its report relates,** and the results of those efforts; and

(iii) The issuer must furnish as an exhibit to Form SD a legal opinion from **qualified** counsel that **identifies a clear conflict with disclosures required under this section, specifically addresses the existence of any carve-outs or other exceptions in other contractual terms, and describes the penalties or sanctions available for violating the provision.**

67. Should we exempt smaller reporting companies or emerging growth companies from the scope of Rule 13q-1, as proposed?

<u>No. Smaller reporting companies ("SRCs") and emerging growth companies ("EGCs") should not be exempt from Section 13(q) reporting</u>. Broad exemptions are inconsistent with the statute and the Congressional intent. As stated in our response to Question 4, the statutory language is clear and does not provide exemptions, stating that disclosure is required of "*each* resource extraction issuer" (emphasis added). As Senator Cardin has made clear to the Commission, the intent behind the original law is to provide the "broadest possible meaning to the term 'resource extraction issuer."[337]

[337] Comment submitted by Senator Cardin (1 Dec 2010). Available at: https://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-94.pdf

In past rules, the Commission recognized the clarity of the statutory language, stating that "the provision does not indicate that the Commission, in adopting implementing rules, should provide different standards for different issuers or should exempt any issuers from the new requirements."[338]

The proposed SRC and EGC exemption would exclude hundreds of issuers from coverage. The Commission makes the proposal despite the fact that it specifically sought comment on whether to exempt small reporting entities in 2016 and found "no commenters supported an exemption or different reporting requirements for small entities in response to the Proposing Release."[339] Moreover, in explaining why it did not include such an exemption, the Commission further explained that "exempting such issuers from the final rules could create a significant gap in the intended transparency" since "a significant number (43 percent) of affected issuers are smaller reporting companies."[340]

Despite finding such exemptions were unnecessary and would undermine the transparency objectives of the statute, the Commission now proposes excluding these entities from reporting. By the Commission's own estimates in the Proposed Rule, the effect would be even greater now: out of 677 potentially covered extractive resource issuers, a total of 318 issuers qualify as SRCs and EGCs (211 are SRCs, 191 are EGCs, and 84 issuers fall within both categories).[341] **The proposed rule would thus exclude nearly half – 47 percent - of the issuers who would otherwise be required to disclose payments to foreign governments or the federal government.**

Several other factors also support our view that smaller reporting companies should not receive reporting exemptions. Smaller companies are generally exposed to greater equity risk than larger issuers and often take on greater risks due to the nature of their operations. Smaller companies are commonly involved during the exploration phase of a project which generally carries substantial risks, including both geological risk and often high -risk engagement with host governments on financial and contract considerations. This underscores the importance of ensuring that smaller companies be required to make the Section 13(q) disclosures.

Furthermore, smaller reporting companies, by definition, will have more limited operations and projects, and therefore fewer payments to disclose as compared to larger companies. The statute requires the disclosure of payments that companies track in the normal course of doing business. This would be in addition to any other record-keeping practices expected to meet the obligations of tax authorities or to be in compliance with FCPA record-keeping requirements. It is reasonable to expect that such systems can be adapted to the Section 13(q) requirements.

We also note that the UK review has found no evidence that small companies face (or will face) a disproportionately high financial or non-financial burden from this mandatory reporting requirement.

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[338] Securities and Exchange Commission, Proposed Rule, Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. at 80983-84, n.63.
[339] 2016 Final Rule at 49426.
[340] Ibid.
[341] Proposed Rule at 2552-53; *See also*, *Id.* at 2560.

The final report states that the "costs of compliance and external costs vary by company profile, which implies that small companies will face costs commensurate with their size and scale of operations."[342]

Finally, we are in agreement with Exxon and API that smaller reporting companies should not be exempt.[343] As noted above, smaller entities play an important role during the exploration phase, and given the size of their operations, the reporting burden on these entities would be limited.

> ***68. Should we instead provide a longer transition period for smaller reporting companies or emerging growth companies to comply with Rule 13q-1? If so, what should be the compliance date for those companies?***

Yes. While we continue to believe that compliance costs are overstated, we agree that a longer transition period would be an appropriately measured and balanced modification for the Commission to make that would meaningfully respond to compliance concerns without wholescale gutting the transparency intended by Section 13(q), and is an appropriate change to make to ensure the rule is "not substantially the same" as the prior rule.

We recommend deleting proposed § 240.13q–1(d)(3) in its entirety:

> ~~(3) Exemption for emerging growth companies and smaller reporting companies. An issuer that is an emerging growth company or a smaller reporting company, each as defined under § 240.12b–2, is exempt from, and need not comply with, the requirements of this section~~

We recommend adding the following to proposed Item 2.01(b) as follows:

> *(b) Delayed Reporting* -- **(4) An issuer that is a smaller reporting company, or an emerging growth company, each as defined under § 240.12b–2, that has not been obligated to provide disclosure pursuant to another alternative reporting regime deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q) (15 U.S.C. 78m(q)), in such entity's last full fiscal year is not required to commence reporting payment information until the Form SD submitted for the second fiscal year immediately following the fiscal year in which the payments were made. A resource extraction issuer must disclose that it is relying on this accommodation in the body of its Form SD submission.**

[342] BEIS (Jan 2018), p.19.
[343] API submission (28 Jan 2011).

69. Should we instead adopt scaled disclosure requirements for smaller reporting companies or emerging growth companies under Rule 13q-1? If so, what should those scaled disclosure requirements entail?

No. The Commission should not adopt scaled disclosure requirements for smaller reporting companies. Reporting in other markets demonstrates that smaller reporting companies can successfully integrate all of the reporting requirements. There have been no reports of material impacts on cash flow, nor have there been any impacts on competitiveness reported. Transitional relief, as addressed in response to question 68, is the more appropriate approach.

70. Should we provide a targeted exemption for payments related to exploratory activities, as proposed? If so, should it be for longer or shorter than the proposed one-year delay in reporting? For example, should an issuer be permitted to wait until the second fiscal year following the fiscal year in which the exploratory activities occurred before having to provide the Section 13(q) disclosure?

No. The Commission should not exempt or delay reporting of payments related to exploratory activities.

Such an exemption would gut the intended anti-corruption benefits because in some contexts, exploratory activities can pose a high risk of corruption. In a recent study, the Natural Resource Governance Institute identified twelve red flags for corruption risks which fully apply to the award of exploration rights.[344] These include:

- If exploration licenses are considered very promising, they will generate high levels of competition in which companies may resort to bribery and other forms of corruption in order to increase their chances (Red Flags 5 and 6). As we discuss elsewhere, to the extent that this could be a competitive advantage for US issuers, it is precisely one that Congress meant to eliminate through laws like Section 13(q) and FCPA.
- Signature bonuses will result from these awards, and they can be very economically significant. Bonus payments can also signal problematic deals, such as if one company pays dramatically more or less than is expected (Red Flag 11).
- In other cases, including if there is not yet a lot of interest in the acreage, exploration licenses are awarded to unqualified but well-connected companies. Then, if commercial interest in these licenses increases, they flip these licenses to larger companies and collect a cut (Red Flag 12). This often involves political elites collecting rents that could have gone to the state. For example, see our discussion of OPL 245 exploration license in Nigeria in our answer to question 36.

[344] NRGI, Twelve Red Flags: Corruption Risks in the Award of Extractive Sector Licenses and Contracts (6 Apr. 2017). Available at: https://resourcegovernance.org/analysis-tools/publications/twelve-red-flags-corruption-risks-award-extractive-sector-licenses-and

Furthermore, we are not convinced that payment information relating to exploratory activities is commercially sensitive or necessary to alleviate any alleged competitive harm.

In the event that the Commission disagrees with our recommendation and exploratory stage payments are exempted, we urge that the Modified Project Definition be rejected as even more clearly unnecessary. As the Commission found in 2016, "we view the disclosure of payment information from the exploratory period as perhaps the most likely to reveal competitively sensitive information regarding a company's activities and expectations about the location of resources… We do not think the same potential for competitive harm exists after a resource find occurs."[345]

We recommend that Item 2.01(b)(1) be deleted in its entirety.

~~A resource extraction issuer may delay disclosing payment information related to exploratory activities until the Form SD submitted for the fiscal year immediately following the fiscal year in which the payment was made. For purposes of this paragraph, payment information related to exploratory activities includes all payments made as part of the process of (i) identifying areas that may warrant examination, (ii) examining specific areas that are considered to have prospects of containing oil and gas reserves, or (iii) as part of a mineral exploration program, in each case limited to exploratory activities that were commenced prior to the commercial development (other than exploration) of the oil, natural gas, or minerals on the property, any adjacent property, or any property that is part of the same project.~~

71. ***Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release? For example, does the proposed definition of project, which is non-contract based, mitigate the need for, or support a remodification to, the targeted exemption regarding exploratory activities?***

Developments since 2016 confirm that there is no need to either exempt payments related to exploratory activities, or to modify the project definition. None of the laws in other jurisdictions allow a comparable exemption for exploratory activities. There has been no evidence reported or included in the record, that in the past five years of disclosure in other markets by nearly 800 companies there have been any competitive harms related to the disclosure of payment related to exploratory activities.

72. ***Should we provide transitional relief for an issuer that has acquired or obtained control over a company whose resource extraction payments are required to be disclosed and was not previously obligated to provide such disclosure, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?***

See our response below under question 73.

73. ***Should the transitional relief be for a longer or shorter period than as proposed? For example, should an issuer that has acquired a recently acquired company, which is***

345 81 Fed. Reg. at 49419-20.

eligible for the proposed transitional relief, be permitted to wait until its second fiscal year following the fiscal year in which the acquisition occurred before having to comply with the Section 13(q) rules?

(In response to questions 72-73)

This exemption should be reconsidered because there is no evidence that it is necessary. To the extent it is shown to result in cost savings, and provided it is of short duration, it can be acceptable.

We are not convinced that this phase-in period is necessary. No companies raised this during the previous rulemaking. Under the EITI Standard, as well as the related regulations in Europe and Canada, private companies are subject to the same requirements as public companies, and report on a similar schedule; the question of delaying reporting by private companies never came up. Significantly, this suggestion came not from a resource extraction issuer but from two law firms that actively advise issuers on their compliance with the conflict minerals regulation, which includes a phase-in period for newly acquired companies. But the conflict minerals rule is not an appropriate model here because it differs from payment transparency, where there is a well-established global standard. No such global standard exists for conflict minerals, which is why previously private companies might need more time to familiarize themselves with the relevant requirements. But many private companies, particularly those with global operations, are already familiar with and follow the EITI Standard in those countries of operation that are EITI members.

Unless there is evidence that this exemption yields cost savings, we would encourage the Commission to reconsider it, as part of crafting a rule that is “not substantially the same” and is better-aligned with the international transparency standard. In any event, the temporary nature of this exemption means that any loss of transparency benefits is also temporary. On that basis, we would find it acceptable should the Commission find that this exemption provides necessary compliance cost reductions.

74. Should we provide transitional relief for an issuer that has completed its US initial public offering in its last full fiscal year, as proposed?

We agree that transitional relief with respect to IPOs is an appropriately measured, yet significant, modification that, combined with the other changes we note throughout, will result in a rule that is still consistent with Section 13(q), but “not substantially the same” as the 2016 Rule. This will result in some loss of transparency - and such loss could be significant, depending on the issuer’s size (e.g., Saudi Aramco was considering listing its IPO in New York last year).[346] But because this relief is temporary, it is an appropriate and acceptable way to address what the Commission perceives to be Congressional concerns as the loss of transparency would not be indefinite.

[346] Dinesh Nair, Battle for Aramco IPO Heats Up as Exchanges Vie for Supremacy, Bloomberg (22 Aug. 2019). Available at: https://www.bloomberg.com/news/articles/2019-08-22/battle-for-aramco-ipo-heats-up-as-exchanges-vie-for-supremacy

75. ***Should we limit the transitional relief only to those issuers that, prior to completion of their initial public offering, have not been subject to an alternative reporting regime deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q)?***

Yes, to the extent there is any relief for IPOs (as addressed in question 74), issuers that are already reporting according to alternative reporting regimes should be expected to continue to do so. There is no reason for them to stop reporting simply as a result of their IPO. They have already accrued initial compliance costs so leaving them out would not meaningfully reduce total compliance costs, but would reduce overall transparency and associated benefits.

76. ***Should the transitional relief be for a longer or shorter period than as proposed? For example, should an issuer that has recently completed its US initial public offering be permitted to wait until its second fiscal year following the fiscal year in which the initial public offering occurred before having to comply with the Section 13(q) rules?***

We agree with the transition period as proposed.

77. ***In light of the other proposed exemptions and transitional relief, should the Section 13(q) rules provide that issuers may apply for exemptions on a case-by-case basis using the procedures set forth in Rule 0-12 of the Exchange Act, as proposed?***

No, as no other exemptions are warranted.

There is no evidence any such other exemptions are warranted, and we note no such exemptions exist in other markets where companies are already regularly reporting. In light of the history of misleading (or even false) statements made by some commenters in the past to justify sweeping exemptions (see questions 57 and 58), if the Commission does allow for issuers to apply for exemptions on a case-by-case basis, the process must be transparent, open to public comment, and require adequate supporting documentation.

78. ***Should we require the resource extraction payment disclosure to be electronically formatted in XBRL and provided in a new exhibit, as proposed? We are mindful of concerns about mandating technology that may one day become outdated. Is there anything we can do to address this problem in these rules?***

No. The Commission should require that resource extraction payment disclosure be electronically formatted in Inline XBRL ("iXBRL") rather than only in XBRL as proposed. Our insights from reporting by companies reporting in Canada and Europe shows that:

- Many companies helpfully include further narrative, context, clarificatory footnotes and a basis of preparation in addition to the statutorily required data which tends to be submitted in tabular format. iXBRL would allow companies to do this.

- iXBRL would present as a human-readable report, which has XBRL tags embedded in it. The human readable text is effectively HTML - the basic language of the web. The web file contains the XBRL tags, but they are usually hidden and are only displayed to human eyes when required by software.

> 79. ***Should we alter our approach to the exhibit and interactive data format requirements described above based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?***

<u>We strongly support the submission of resource extraction payment disclosure reports to be submitted in iXBRL as all data required by the Commission can be electronically tagged but also be made available in a human readable format for all users together with any further narrative, context, clarificatory footnotes or basis of preparation deemed helpful by the issuer.</u>

> 80. ***In addition to the statutorily required tags, should we require electronic tagging to identify the type of resource, the method of extraction and the country and major subnational jurisdiction in which the project is located, as proposed? Would separate tags for these items be useful even if the information is required to be disclosed in the project description tag?***

While potentially helpful, these tags cannot replace the contract-based definition of project. We can therefore accept removing these tags as a way to make this rule more aligned with the international standard and “not substantially the same” as the 2016 Rule.

> 81. ***Should we include a provision in the rules that would allow for issuers subject to reporting requirements in certain foreign jurisdictions to submit those reports in satisfaction of our requirements, as proposed? Are the conditions we have proposed for the use of the alternative reports, such as providing a fair and accurate English translation and requiring the information to be tagged using XBRL, appropriate? For example, should a resource extraction issuer be precluded from relying on the alternative reporting accommodation for the following fiscal year if it fails to submit notice on a timely basis that it intends to submit an alternative report using the alternative jurisdiction’s deadline, as proposed? Should it be precluded from relying on the alternative reporting accommodation for the following fiscal year if it submits such notice but fails to submit the alternative report within four business days of the alternative jurisdiction’s deadline, as proposed? Should we provide more than four days after the submission deadline of the approved alternative jurisdiction for a resource extraction issuer to submit the alternative report? If so, what should that time period be? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?***

We support the inclusion of a provision allowing for substitute reporting in appropriate cases. Such a provision would be helpful both to ease the reporting burden on companies subject to reporting requirements in multiple jurisdictions, and to ensure consistent reporting that meets the global standard.

The Commission should adopt a rule that is aligned with the global standard, and only consider other jurisdictions that also align with the global standard, as adopted by the EU, UK, Norway and Canada, for approval as alternative reporting regimes. This could also include reporting in EITI-implementing countries whose reporting rules align with the global standard. But if the Commission finalizes a rule that is much weaker than the global standard, we do not believe it would be accepted as equivalent in the EU, UK, Norway and Canada. However, we would support issuers in those jurisdictions being able to submit their payment reports in the US.

We believe a resource extraction issuer should not be precluded from relying on the alternative reporting accommodation for the following fiscal year if it fails to submit notice on a timely basis that it intends to submit an alternative report using the alternative jurisdiction's deadline. We suggest the Commission allows a resource extraction issuer to submit the alternative report up to 10 business days after the deadline of the approved alternative jurisdiction.

82. ***Are the criteria that we have proposed to determine whether another foreign jurisdiction's reporting regime requires disclosure that satisfies the transparency objectives of Section 13(q) appropriate? Are there certain criteria that we should eliminate or substitute for any of the criteria discussed in this proposing release? If so, which criteria and why?***

The Commission should clearly indicate the criteria that it will use to determine whether a foreign jurisdiction's reporting regime is an appropriate substitute for Rule 13q-1 disclosures, and we broadly agree with the proposed criteria.

We support the Commission's proposal that issuers must provide a fair and accurate English translation of the entire report if prepared in a foreign language. If an issuer is permitted to submit an alternative report, pursuant to a substitute compliance order, they must disclose this.

We agree that Rule 0-13 provides a suitable framework to consider requests for substitute compliance. It is critical that there is a sufficient opportunity for public comment on any proposal to accept payment disclosure reports from alternative reporting regimes.[347] The Commission should require applications to be accompanied with sufficient supporting documentation. This should include the text of the foreign legal provision, a legal opinion establishing substantial equivalence with respect to at least all the elements listed above, and the most recent report of the issuer in the foreign jurisdiction, or, if the applicant is not an issuer, a copy of the reporting template required by that jurisdiction. We would

[347] In the European Union, any such decision regarding equivalency made by the European Commission is subject to a two-month notification period, in which either the European Parliament or the Council can express an objection. See Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Article 49 (5).

propose that only issuers or foreign jurisdictions should be permitted to submit applications for substitute compliance.

In assessing an application for a substitute compliance order, the Commission must consider the methods and ability of foreign regulators to monitor and enforce compliance with the alternative regime. If the Commission grants a substitute compliance order pursuant to Rule 0-13, it should specify whether that decision will apply to all entities subject to reporting requirements in the foreign jurisdiction. This will significantly cut compliance costs for these issuers.

Once an alternative reporting regime is established as satisfying the transparency objectives of Section 13(q), the Commission should accept reports submitted in accordance with those requirements. The fact that companies will be able to rely on previous orders establishing substantial equivalence rather than submitting a new application for each annual report will reduce the burden on companies.

If it comes to the attention of the Commission that a previously approved alternative reporting regime has changed substantially, the Commission should reconsider the substituted compliance order and give members of the public an opportunity to comment before withdrawing the order.

83. ***Given the development of resource extraction payment disclosure rules in various jurisdictions, is there any reason why, when a final rule is adopted, we should not make a determination regarding whether certain foreign reporting regimes satisfy Section 13(q)'s transparency objectives? If we should decide to make such a determination, which jurisdictions should we consider? Would the proposed, broader definition of "project" allow for jurisdictions other than the European Union and Canada to be deemed alternative reporting regimes that satisfy the transparency objectives of Section 13(q)?***

We believe that the reporting regimes adopted in EU member states, the UK, Canada and Norway should be eligible for substituted compliance orders. Once the rule is finalized, the Commission should provide for a separate public process with a dedicated comment period, pursuant to the criteria listed in response to question 82, in order to determine whether there are elements of Rule 13q-1 that are not met in each of the external jurisdictions' rules, and if so, require all issuers benefiting from the substituted compliance order for that jurisdiction to provide the missing information in an exhibit to Form SD. This is the approach taken by the Government of Canada in its substitution determination for the EU Directives, in which it requires reporting entities to include an attestation statement with their report in order to meet the requirements set out in ESTMA.[348]

84. ***Should we deem the resource extraction payment disclosure as furnished to, but not filed with, the Commission, as proposed?***

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[348] Natural Resources Canada, Assessment of the European Union Accounting and Transparency Directives, Extractive Sector Transparency Measures Act - Substitution Determination (31 July 2015). Available at: http://www.nrcan.gc.ca/acts-regulations/17754.

No, the Commission should defer to the clear position of investors in the record and require that the disclosures be filed.

It is not clear that this question is in any way responsive to what the Commission identifies as the concerns raised by members of Congress regarding the burdens and costs of the required disclosure.

It is clear from the Congressional intent and the inclusion of Section 13(q) within the Exchange Act, that it is concerned with objectives that are identical in nature and purpose to other disclosures required under the Exchange Act designed to benefit investors.

Further, as this summary[349] of investor comments to the Commission during the previous Section 13(q) rulemakings indicates, asset managers and owners with more than $10 trillion have told the Commission that the disclosures resulting from this statute would be material to securities analysis. This assertion is substantiated by the research of WK Associates, which has demonstrated the usefulness of extractives payment data gathered from company disclosure mandated by Section 13(q)'s companion laws in the UK and Canada. Specifically, a presentation by researcher Alexander Schay of the Emerging Markets Investor Alliance demonstrates how extractives payment data may be used to predict and assess changes in the fiscal regimes of natural resource producing countries in a manner that yields material insight into securities valuations.[350]

> ***85. Is the proposed transition period and compliance date appropriate? Should we instead adopt a shorter or longer transition period? If so, what should that transition period be and why?***

Yes, the proposed transition period and compliance date are appropriate. The transition period should not be longer than what the Commission has recommended.

> ***86. Should the rules provide for a longer transition period for certain categories of resource extraction issuers, such as foreign private issuers, so as to provide them additional time to prepare for the disclosure requirements and the benefit of observing how other companies comply?***

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[349] Comment submitted by Calvert Investments (16 Feb 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-39.pdf; Comment submitted by ACTIAM NV (8 Mar 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-52.pdf. Comment submitted by Aviva Investors (12 February 2018). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3130136-161939.pdf; Comment submitted by California State Teachers' Retirement System (1 Feb 2018). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf.
[350] Available at: https://zoom.us/rec/play/7px4frj5qzo3TobE4gSDBacsW468Kf-sgSIYr6EMyU_mUCMCM1KhN-ERYLY_r2bUdd2yVndxP9-9TsFj?startTime=1583426652000.

The Commission should allow for a 2-year transition period for small reporting companies and emerging growth companies, and 1-year transition period for IPOs. Please see our response to Questions 68, and 74-76. A longer transition period is not warranted for any other categories of issuers.

87. ***Are there any additional benefits from the proposed rules than the ones mentioned above? Is there information that could help us quantify any benefits of the proposed rules?***

The Commission must take into account benefits to investors and to issuers. It should also more heavily weigh the anti-corruption benefits of project-level payment transparency, even if they are necessarily more challenging to quantify than costs.

The Commission fails to recognize the interest investors have in this rule. Congress specifically intended investors to benefit from the transparency provided by Section 13(q) rules, and for a decade investors have submitted dozens of letters to the Commission referencing many benefits of the implementation of Section 13(q) in a way that is consistent with conventional financial reporting and the EITI Standard as well as the complementary EU, UK, Norwegian, and Canadian laws.[351] See our response to question 55 for a more thorough explanation.

The ongoing corruption investigations outlined in our response to question 36 illustrates the potential benefits to investors of increased transparency. In 2018, news of the DOJ's subpoena in a corruption investigation likely contributed to a 13 percent plunge in Glencore's share price, wiping out $8.8 billion in shareholder value.[352] In late 2019, news of the SFO's corruption investigation precipitated a 9 percent drop in Glencore's share price, demonstrating the material impact of corruption risks on shareholder value.[353] Following this news, institutional investors announced a multi-billion-dollar lawsuit for share price declines related to the bribery investigations. As investors have repeatedly pointed out to the Commission across three rulemakings on this issue, they see material value in detailed Section 13(q) disclosures that might provide them with information to better assess risk or contribute to the establishment of less corrupt, more stable investment environments.

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[351] Comment submitted by Calvert Investments (16 Feb 2016) p.7. Available at: https://www.sec.gov/comments/s7-25-15/s72515-39.pdf; Comment submitted by Columbia Center on Sustainable Investment (10 Dec 2016). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6521646-200386.pdf; Comment submitted by Columbia Center of Sustainable Investment (30 Oct 2015). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-93.pdf; Comment submitted by ACTIAM NV (8 March 2016), p.2,3. Available at: https://www.sec.gov/comments/s7-25-15/s72515-52.pdf; Comment submitted by Anthony Cannizzaro and Robert Weiner (16 Feb 2016). Available at: https://www.sec.gov/comments/s7-25- 15/s72515-22.pdf.

[352] Thomas Biesheuvel and Franz Wild, Glencore Drops After U.S. Orders Documents in Corruption Probe, Bloomberg (3 July 2018), Available at: https://www.bloomberg.com/news/articles/2018-07-03/glencore-gets-subpoena-from-u-s-regarding-money-laundering.

[353] Franz Wild, Glencore Investors to Sue for Billions Over Probes, Boies Says, Bloomberg (5 Dec 2019). Available at: https://www.bloomberg.com/news/articles/2019-12-05/glencore-investors-to-sue-for-billions-over-probes-boies-says-k3tgyo42

Disclosures required by Section 13(q) are strongly supported by many major oil, gas and mining companies, as well.[354] Companies recognize the business benefits of transparency, which allows them to demonstrate the economic contributions they make to communities where they operate.[355] Section 13(q) also plays a critical anti-corruption function by deterring and exposing corrupt conduct and protecting companies, and their investors, from bribe-seeking government officials.

Increasing public access to information about natural resource revenues is critical for overcoming the lack of transparency, poor governance, and mismanagement of financial flows that fuel corruption in resource-rich countries and undermine state institutions and sustainable development.[356] Increased access to information in resource-rich countries may help to constrain the ability of elites to appropriate natural resource rents and to establish corrupt patronage networks.[357] Increased transparency can lead to increased levels of trust and the mitigation of conflict,[358] including at subnational levels.[359] According to the IMF, "the best way to fight corruption is to put in place robust, accountable, and transparent institutions."[360] Increased transparency of natural resource revenues has been found to enable civil society activists to more effectively engage with companies, debate social and environmental problems associated with resource extraction, and, as a result, demand accountability. Furthermore, access to information helps to increase citizen participation, creating a self-reinforcing cycle in which citizen participation leads to enhanced transparency, which in turn increases participation.[361]

According to recent studies by the EITI and Joseph Mawejje, efforts to increase transparency in resource-rich countries have been found to increase domestic resource mobilization in poor countries by enabling citizens and governments to assess whether they receive the correct amount of taxes from extractive activities. This information can also lead to improved tax administration by enabling the identification of practices that undermine taxation and creating space for dialogue about reforms. This can have notable impacts on revenue and development. For instance, tax revenues in sub-Saharan

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[354] Publish What You Pay US, Oil, Gas, and Mining Company Support for Transparency (September 2017). Available at: http://www.pwypusa.org/wp-content/uploads/2017/10/2017-Company-Statements-on-Transparency.pdf.

[355] See Kosmos Energy, https://www.kosmosenergy.com/. ("We believe that this type of disclosure is beneficial to investors, civil society and local communities, and reflects evolving international expectations.")

[356] World Bank, Economic contributions from industrial mining in Madagascar: research summary (2015), World Bank Group. Available at: http://documents.worldbank.org/curated/en/263731468179369566/pdf/100345-WP-P131522-mining-research-summary-Box393222B-PUBLIC-ENG.pdf.

[357] Corrigan, Caitlin C., *Breaking the resource curse: transparency in the natural resource sector and the Extractive Industries Transparency Initiative* (2014), Resources Policy 40, 17–30; Kolstad, Ivar, Wiig, Arne, *Is transparency the key to reducing corruption in resource-rich countries?* (2009), World Dev. 37(3), pp.521–532; Williams, Andrew, *Shining a light on the resource curse: an empirical analysis of the relationship between natural resources, transparency, and economic growth* (2009), World Dev. 39(4), pp.490–505.

[358] Collier, Paul, *The institutional and psychological foundations of natural resource policies* (2017), J. Dev. Stud. 53(2), 217–228; Haufler, Virginia, *Disclosure as governance: the Extractive Industries Transparency Initiative and resource management in the developing world* (2011), Glob. Environ. Polit. 10(3), pp.53–73; Comment submitted by Joseph Kraus (16 Mar 2016), Available at: https://www.sec.gov/comments/s7-25-15/s72515-64.pdf.

[359] Javier Aguilar, Georg Caspary, Verena Seiler, Implementing EITI at the subnational level: emerging experience and operational framework (2011), Extractive Industries for Development Series, The World Bank.

[360] Christine Lagarde, "There's a reason for the lack of trust in government and business: corruption" (4 May 2018). Available at: https://www.imf.org/en/News/Articles/2018/05/07/theres-a-reason-for-the-lack-of-trust-in-government-and-business-corruption.

[361] Marjanneke J. Vijge; Robin Metcalfe; Linda Wallbott; and Christoph Oberlack, *Transforming institutional quality in resource curse contexts: The Extractive Industries Transparency Initiative in Myanmar* (March 2019), Resources Policy.

Africa correspond to less than 20 percent of GDP, compared to roughly one-third of GDP in OECD countries.[362] This is not, primarily, because their tax rates are lower, but because of the ability of companies to use various mechanisms to avoid paying their full share of taxes. EITI has had a positive effect on non-oil revenue mobilization and been found to partially offset the negative impact of the resource curse on tax revenues.[363]

Literature about the resource curse has shown that the theory does not apply equally to all countries. Countries that are wealthy and where democracy has consolidated before the onset of resource extraction are not likely to fall prey to the resource curse.[364] They have tax structures and expectations of provision of social welfare, precedent for handling corruption, and strong state institutions, among other democratic attributes. However, countries that are poor and do not yet have consolidated democracies are likely to see increased corruption, militarization, and instability. Of course, the key difference is that older democracies have had time to develop institutions and democratic norms, which can take years to build. Introducing project-level disclosure through EITI and payments-to-governments requirements helps countries begin to create transparency norms and build the necessary institutions that will ultimately be helpful in creating accountability not just in the energy sector, but throughout government.

It is worth noting that while wealthy democracies are less likely to fall prey to the resource curse, they are still susceptible to corruption, fraud, and mismanagement of natural resources payments and contracts.

88. ***What are the lessons about the benefits from the resource extraction payment disclosure regimes that already exist in other jurisdictions? Is there empirical evidence on benefits from the disclosure regimes that are already in place?***

<u>Lessons from other disclosure regimes strongly suggest that strong disclosure regimes help lead to the tangible benefits envisaged by the original statute. However, those benefits may not be applicable to the proposed rule, given its significant limitations. They are more likely to be realized if the Commission adopts a strong rule in alignment with the international standard.</u>

Companies listed in Europe and Canada as well as operating in EITI implementing countries have now disclosed payments for multiple years. These disclosures have tangible benefit, particularly in the following areas:

1) Contributing to governance and macroeconomic improvements in resource-rich countries.

Industry groups and numerous issuers expressly recognize that public disclosure of detailed project-level payments can effectively produce the very benefits Congress intended, especially for resource-rich

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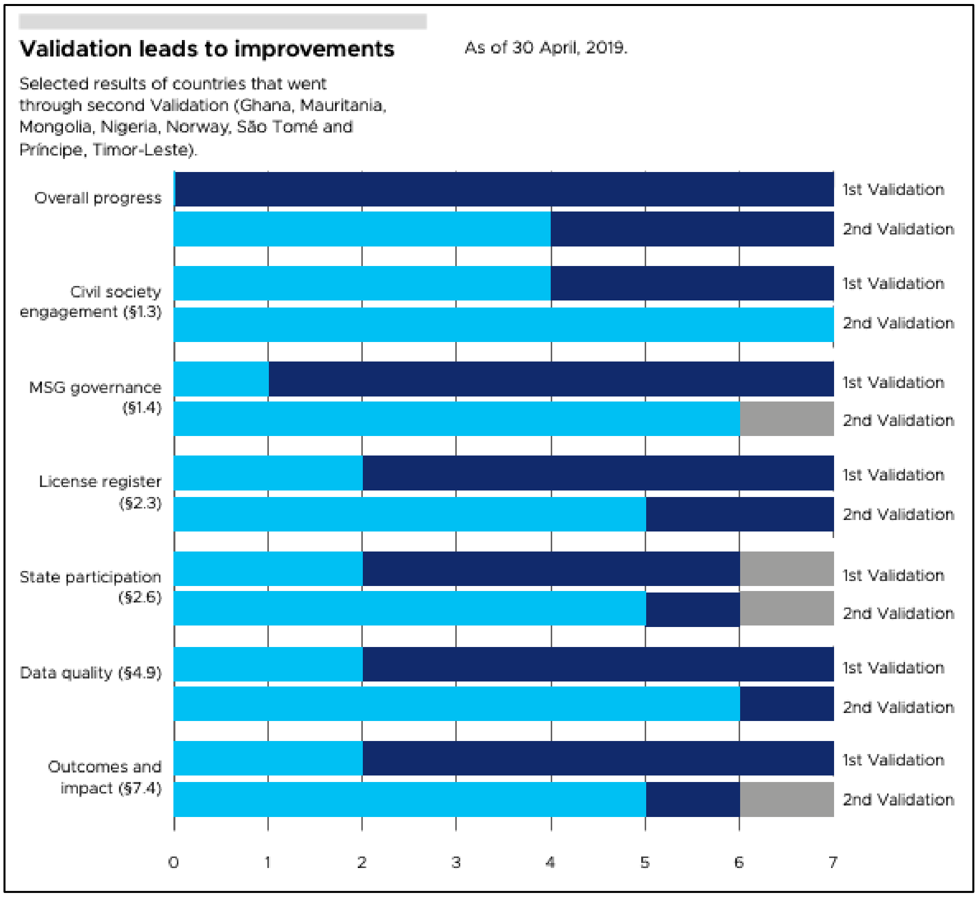
[362] EITI, EITI in Africa (2018). Available at: https://eiti.org/files/documents/eiti_africa_brief_en.pdf.
[363] Mawejje, Joseph, *Natural resources governance and tax revenue mobilization in sub saharan Africa: The role of EITI* (2019), Resources Policy, Elsevier, vol. 62(C), pp.176-183.
[364] Michael Ross, *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations* (2012), Princeton University Press.

countries.[365] As the Commission has previously observed, industry participants in EITI have expressly adopted the position that EITI disclosures produce ''[b]enefits for implementing countries'' by ''strengthening accountability and good governance, as well as promoting greater economic and political stability.'' And, further, ''[b]enefits to civil society come from increasing the amount of information in the public domain about those revenues that governments manage on behalf of citizens, thereby making governments more accountable."[366]

Several recent studies have found a link between increased transparency and reduced corruption in resource-rich countries. Papyrakis et al find evidence that the EITI mitigates the increase in corruption typically associated with mineral wealth, with the impact increasing over time such that the corruption-inducing effects of natural resources are fully reversed within 10.5 years and five years for mineral-rich and oil-rich countries, respectively.[367] In Zambia, the implementation of EITI contributed to a significant decrease in corruption.[368] EITI itself finds that providing transparent data and then reconciling it leads to improvements in extractive sector governance. (See figure below.) Specifically, they found that for countries that underwent a second validation process by 2019 (Ghana, Mauritania, Mongolia, Nigeria, Norway, São Tomé and Príncipe, and Timor-Leste), each experienced significant improvements in the core measurements (civil society engagement, multi-stakeholder group governance, license register, state participation, data quality, and outcomes and impact) between the first and second validation periods.[369]

Eighty-one percent of EITI-compliant countries have made progress towards better oversight, disclosure of pertinent information and contribution to public debate.[370] EITI's experiences with both countries that have and do not have project-level disclosure encouraged the organization to mandate project-level disclosure in reporting covering 2018 onwards. While the historical standard has led to some governance improvements, they expect that implementing project-level disclosure will lead to further positive results in subsequent validations.

[365] *See* 2016 Final rule at 49401 & n.536 (discussing industry support for EITI and citing specific issuer statements).
[366] *Ibid*.
[367] Elissaios Papyrakis, Matthias Rieger & Emma Gilberthorpe, *Corruption and the Extractive Industries Transparency Initiative* (2016), The Journal of Development Studies. Available at: https://www.researchgate.net/profile/Emma_Gilberthorpe/publication/301569929_Corruption_and_the_Extractive_Industries_Transparency_Initiative/links/5a8c4bd4458515a4068ad480/Corruption-and-the-Extractive-Industries-Transparency-Initiative.pdf.
[368] Paul Fenton Villar and Elissaios Papyrakis, *Evaluating the impact of the Extractive Industries Transparency Initiative (EITI) on corruption in Zambia* (Nov 2017), The Extractive Industries and Society, Vol.4, Issue 4, pp.795-805. Available at: https://ueaeprints.uea.ac.uk/id/eprint/63119/1/Accepted_manuscript.pdf.
[369] *See* EITI, Progress Report (2019), p. 26. Available at: https://eiti.org/files/documents/eiti_progress_report_2019_en.pdf.
[370] *Ibid*., p. 25.



Moreover, the EITI has contributed to increased economic growth.[371] There is compelling evidence that revenue transparency efforts can lead to increased foreign direct investment, a positive development for both recipient countries and the multinational corporations involved.[372] For instance, joining the EITI can increase the ratio of net foreign direct investment inflows to GDP by 2 percentage points.[373]

Unfortunately, we have seen not only how joining EITI can help countries, but also how leaving EITI can be part of a larger erosion of democratic institutions and norms. For example, in June 2003, Azerbaijan became one of the pilot countries to join the newly-created EITI. However, in 2017, following the EITI Board's decision to suspend Azerbaijan due to its failure to meet the prescribed corrective actions related to civil society space, Azerbaijan withdrew from the EITI. In 2018, Azerbaijan dropped 30 places in a single year on Transparency International's Perceptions of Corruption Index. It also scored only 34 out 100 points (down from its previous score of 51) on the Open Budget Index, dropping into the group

[371] Caitlin C. Corrigan, *The effects of increased revenue transparency in the extractives sector: The case of the Extractive Industries Transparency Initiative* (2017), The Extractive Industries and Society Vol. 4, Issue 4.
[372] Kerem Öge, *To disclose or not to disclose: How global competition for foreign direct investment influences transparency reforms in extractive industries,* (Oct 2016), Energy Policy 98: pp.133-141; Fernando Londoño, *Does Joining the Extractive Industries Transparency Initiative Have an Impact on Extractive and Non-Extractive FDI Inflows?* (2013), Georgetown University.
[373] Maya Schmaljohann, *Enhancing Foreign Direct Investment via Transparency? Evaluating the Effects of the EITI on FDI* (2013), University of Heidelberg Discussion Paper Series No. 538. Available at: https://eiti.org/files/documents/Schmaljohann_2013_dp538.pdf.

of countries with a minimum degree of budget openness.[374] Azerbaijan's withdrawal from EITI has also corresponded with decreasing freedom in civic space[375] and a crackdown on protests.[376]

2) Strengthening issuers' competitive position through increased investor confidence and improved relations between companies and communities thereby securing social license to operate.

As described in more detail in our response to question 93, several studies have pointed to the positive association between transparency and lower cost of capital for firms embracing higher levels of disclosure. Specifically, Cannizzaro and Weiner estimate that the increased transparency resulting from disclosures required under Section 13(q) may lower the cost of capital for covered US-listed firms by $6.3 billion to $12.6 billion.[377]

Investors have consistently expressed their interest in payment disclosures in the rulemaking record. Research done by WK Associates in coordination with the Columbia Center on Sustainable Investment, demonstrates the value of payment data disclosed as a result of the UK and Canadian laws to valuation of a security using conventional discounted cash flow analysis techniques. The research, which was summarized in the March 5, 2020 webinar hosted by the Emerging Markets Investor Alliance and Bloomberg Intelligence,[378] uses an aggregate of ESTMA and UK payment data to create a metric called the sovereign take rate. In a valuation model for Tullow Energy, the sovereign take rate is shown to have a material impact on the valuation estimate of the target security. Such research proves the utility of this information to investors. Accordingly, companies that provide this information and thereby equip their investors with the information that they desire may experience a positive impact on their ability to raise capital.

In addition to improving issuers' relationship with prospective investors, this information is also critical in helping companies establish positive relations with communities surrounding their operations. This was recently noted by Kosmos Energy and BP in their statements of support for a strong implementing rule for Section 13(q). In both statements, the companies tie disclosure to increased credibility for their company that is critical to the sustainability of their operations.

[374] Gubad Ibadoghlu, "Azerbaijan scores the worst in the corruption perception index during peak oil years" (24 Jun 2019), *Crude Accountability,* 24 June 2019. Available at: https://crudeaccountability.org/azerbaijan-scores-the-worst-in-the-corruption-perception-index-during-peak-oil-years/.

[375] Freedom House, "Freedom in the World Index: Azerbaijan," (2020). Available at: https://freedomhouse.org/country/azerbaijan/freedom-world/2020.

[376] Joshua Kucera, "Police bus protesters to remote interior of Azerbaijan and leave them" (17 Feb 2020), *EurasiaNet*. Available at: https://eurasianet.org/police-bus-protesters-to-remote-interior-of-azerbaijan-and-leave-them.

[377] Comment submitted by Anthony Cannizzaro and Robert Weiner (16 Feb 2016). Available at: https://www.sec.gov/comments/s7-25- 15/s72515-22.pdf.

[378] Emerging Markets Investors Alliance and Bloomberg Intelligence, Webinar (5 March 2020). Accessible at: https://zoom.us/rec/play/7px4frj5qzo3TobE4gSDBacsW468Kf-sgSIYr6EMyU_mUCMCM1KhN-ERYLY_r2bUdd2yVndxP9-9TsFj?startTime=1583426652000.

As Kosmos explains, "We believe our approach to transparency helps us to manage social and political issues, establishing Kosmos as a partner of choice and mitigating barriers to growth."[379]

According to BP:

> As a global energy business with wide reach across the world's energy system, we have worked with governments and civil society to help develop disclosure standards that are workable, proportionate and effective in improving accountability, transparency and credibility for our company and industry. BP supports transparency in revenue flows from oil and gas activities to governments. Good governance, the rule of law and positive relationships with local stakeholders help build trust and credibility in the regions where we operate. BP believes that the adoption of 13q-1 should go as far as possible to seek alignment with E. U. and Canadian rules, and consistency with the EITI Standard to the greatest extent possible by law.[380]

This is also evident from the experiences of civil society and community-based organizations working with communities surrounding oil, gas and mining projects. In Zimbabwe, the Zimbabwe Environmental Law Association ("ZELA") and the Gwanda Residents Association ("GRA") recently conducted a field study about residents' attitudes towards and understanding of Caledonia Mining Corporations ESTMA reports. Most citizens that they interviewed said that the Gwandan community is not benefiting from mining activities in their area. However, most interviewed also said that they noticed the considerable activities undertaken by the Gwanda Community Share Ownership Trust ("GCSOT") to improve local services, such as health, education, and water infrastructure in their community. What the residents didn't realize is that the interventions funded by GCSOT were actually funded through dividends paid by the mining companies.

In using the available ESTMA data to survey the community, ZELA and GRA have identified a root cause of tension between the Gwandan community and the Caledonia Mining Corporation, namely, that residents don't realize where community benefits are coming from. The researchers found that, "The main challenge though is, the company is failing to make use of transparency as a currency to engage with communities, build public trust and confidence."[381] Now that Caledonia knows this, they can begin to bridge this gap. And, now that citizens are aware that this data exists, they are beginning to ask for

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[379] Kosmos Energy, Response to Business & Human Rights Resource Centre (28 Feb 2020, Available at: https://www.business-humanrights.org/en/usa-publish-what-you-pay-calls-on-extractive-companies-to-comment-on-latest-sec-payment-disclosure-rules-including-company-responses/?page=1#c204194.

[380] Comment submitted by BP (16 March 2020). Available at: https://www.sec.gov/comments/s7-24-19/s72419-6952845-212570.pdf

[381]Mukasiri Sibanda, Emily Nickerson, and Bekezela Maduma, *Transparency and the challenging path to accountability, lessons from Gwanda mining community* (30 Jan. 2020). Available at: https://mukasirisibanda.wordpress.com/2020/01/30/transparency-and-the-challenging-path-to-accountability-lessons-from-gwanda-mining-community/.

more data, specifically on local labor use and environmental and safety protocols for the mines in their area.

In Mongolia, mining giant Rio Tinto publishes annual reports detailing its corporate social responsibility payments made through the Gobi Oyu Development Support Fund.[382] Using data from the reports, Naranbaatar Nanzad, the governor Umnugobi province, is working with mining giant Rio Tinto on increasing local procurement from the region of the company's Oyu Tolgoi mine. Rio Tinto has disclosed $472 million in local procurement payments from Umnugobi province between 2010 and 2019. Together, the governor and the mine are implementing a "Made in Mongolia" program to increase local procurement in the province. They recently signed an agreement for $10 million in new local procurement contracts with nine small-and medium-sized enterprises from Umnugobi province.[383]

3) Providing essential information to enable citizens to more effectively hold companies and governments accountable.

Although disclosure is still in the early stages, civil society organizations around the world have already started reviewing, monitoring, and using the data made available by mandatory disclosure laws in Canada and Europe to ensure accountability over resource revenues in resource-rich countries. This pro-active use of payment data serves to strengthen its deterrent effect, as it makes governments and companies aware that the reports are being closely scrutinized by civil society organizations and other accountability actors.

Revealing payments-to-governments data can help draw attention to country-specific natural resource management practices that are vulnerable to abuse.[384] While it may take a significant amount of time for payments-to-governments data to have a quantitatively measurable impact on corruption, we can already see how this data is exposing the country-specific ways in which corruption may take place. For example, payments-to-governments reports in Indonesia revealed that Eni was requested to make its signature bonus payments for the East Ganal production sharing contract into a Director General bank account, rather than through the Online Non-Tax State Revenue Information System mechanism, the stated procedure in the Ministry of Energy and Natural Resources regulations.[385] While this does not necessarily indicate corruption, and state treasury can delegate the right to collect non-tax revenue to Directorate Generals, doing so inhibits citizens' abilities to follow the money and hold government entities accountable for how substantial non-tax bonus payments are managed and used. Similarly, in

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[382] *See, e.g.,* Gobi Oyu Development Support Fund, Annual Reports (2015-2018). Available at: http://www.goviinoyu.mn/eng/page/57

[383] *See* (Press Release) Oyu Tologoi, *Two new factories opened their doors in Manlai soum*, (2019). Available at: https://www.ot.mn/two-new-factories-opened-their-doors-in-manlai-soum/

[384] Alexandra Gillies, EITI (Discussion Paper), *The EITI's Role in Addressing Corruption* (Oct 2019). Available at: https://eiti.org/files/documents/eitis_role_in_addressing_corruption_en.pdf

[385] Alexander Malden and Fikri Zaki Muhammadi, Indonesia's Oil and Gas Revenues: Using Payments to Governments Data for Accountability (19 Dec 2019), NRGI. Available at: https://resourcegovernance.org/sites/default/files/documents/indonesia-oil-and-gas-revenues-using-payments-to-governments-data-for-accountability.pdf.

DRC, EITI data revealed that a government agency received mining payments, but did not transfer them to the Central Bank, which increased risk of misappropriation.[386]

While payment disclosures play an important role in helping citizens spot potential corruption and mismanagement, the information also allows citizens to advocate for more sound oil, gas and mining tax and revenue management policies. For instance, contract-based project-level reporting is crucial for analyzing capital gains tax (CGT) payments, which are an important source of revenue for resource-rich countries. Asset sales occur almost daily in the global extractives sector, and subsequent CGT payments often reach into the hundreds of millions or billions of dollars. The tax is generally levied at the contract level, meaning the Modified Project Definition would make it difficult if not impossible to track and analyze these payments. For example, in its 2015 voluntary payments-to-governments report, Eni disclosed a $400 million CGT payment to the Government of Mozambique. The payment was based on Eni's $4.16 billion sale of a 20 percent stake in the Area 4 gas block in 2013. The $400 million payment equaled 9.5 percent of the asset's value. This was far lower than the CGT rate of 32 percent that was included in a law passed by parliament in 2012, which could have produced a payment of $1.3 billion. The 2012 legislation, however, had not been signed into law by the president, who cited concerns about its constitutionality.[387] The Center for Public Integrity, a Mozambican civil society group, questioned the government about how the 9.5 percent rate was determined, and about a lack of transparency over the process for assessing CGT.[388]

In several countries, civil society and community-based organizations are undertaking public awareness campaigns to help communities better understand oil, gas and mining project payments so they can better engage relevant duty bearers at the national and local level. In Ghana, for instance, the majority of international mining companies, have disclosed payments under ESTMA. In addition, Gold Fields, AngloGold Ashanti and Newmont Mining have made voluntary disclosures regarding the payments they make to the Ghanaian government. African Centre for Energy Policy ("ACEP") has created OilMoneyTV, a 26-video series that investigates what oil money has been spent on, and then goes on location to see the results and interview citizens.[389] For example, after learning that offshore oil revenues paid for a dam in Zuedem community in northeastern Ghana, the host of the show travels there to see the dam and learn how it is working.[390] In this case, they learn that the irrigation system is working well and that farmers are able to grow vegetables and rice year-round. Their questioning focuses on whether the project is helping to alleviate poverty in the area, and they investigate whether it is improving the lives of women, in particular. This type of data can improve citizens' opinions of extraction projects in their

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[386] EITI, 2010 Report, DRC (Dec 2012), Available at: https://eiti.org/files/documents/2010_drc_eiti_report_en.pdf.
[387] Global Witness and Resources for Development Consulting, Finding the Missing Millions: A Handbook for Using Extractive Companies' Revenue Disclosures to Hold Governments and Industry to Account (2018), p.26. Available at: https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/handbook-using-extractives-data/
[388] Mozambique Morning Post, 'Mozambique Oil & Gas: Costs of ENI, for calculation of Capital Gains, "are acceptable" – Tax Authority said' (4 Apr 2017). Available at: https://mozambiqueminingpost.com/2017/04/04/mozambique-oil-gas-costs-of-eni-for-calculation-of-capital-gains-are-acceptable-tax-authority-said/.
[389] Available at: http://www.oilmoneytv.org/.
[390] Available at: https://www.youtube.com/watch?v=8tKeMhad3sU&feature=emb_logo.

areas, and can also uncover misuse of payments to governments if listed social projects do not exist or were not properly implemented.

In Nigeria, NGO BudgIT takes the complex data generated by payments-to-governments reports and EITI and turns it into easy-to-understand graphics. They then share the graphics on social media to their own 187.1k Twitter followers and through a broader network of social media influencers who have been training on mining governance. The hashtag #FixOurOil has become prevalent in online debates around government policy and extractive sector governance, with much of the discussion initiated and informed by BudgIT and Nigeria EITI content. Hot topics in the last two years include the country's embattled Petroleum Industry Bill, petroleum product subsidies and controversial oil licensing deals. BudgIT estimates that they have been able to reach more than 5 million Nigerians via digital and physical channels to raise awareness of transparency and accountability issues in their country's oil and gas sector.[391]

Payment data made available through the EITI and mandatory disclosures have been useful for enabling local communities in Madagascar, Senegal, and the Republic of Congo to demand, monitor, and receive the sub-national allocations to which they were legally entitled.[392]

This is also the case in Peru, where a significant portion of mining revenues are transferred from the central government to local and regional governments where mining takes place. For communities to benefit from these revenues, citizen participation and oversight is necessary to make sure government expenditures address local needs and development gaps. To that end, Mejorando la Inversión Municipal Perú ("MIM" – Improving Municipal Investment) has engaged 33,783 people (56 percent of whom are women) in dialogue sessions about how to use data to understand the payments their regions are receiving and their use of natural resource revenues. MIM has also trained 1,033 local community leaders from 376 organizations on how to monitor municipal investment. Following these trainings, citizen participation in budgeting, monitoring, and accountability meetings increased substantially. In the region of Apurimac, for example, the general population's participation in municipality-related activities increased from 9 percent to 30 percent in the subsequent three years. This participation had tangible impacts: 46 investment projects (with a value of $43.8 million) in water, sanitation, education, and road infrastructure were prioritized and closely monitored. They are expected to benefit 46,000 people.[393]

In Kenya's Karamoja Cluster, the Turkana, Pokot, Karamojong, Toposa, Nyangatom and Didinga tribes have historically been in regular conflict over water, pasture and livestock. When oil was discovered in this impoverished area, debate over subnational revenue sharing arrangements drastically increased the potential for increased conflict. However, Oxfam in Kenya was able to use payment and contract data to show the localities what they would receive under the proposed revenue sharing schemes, under

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391 More information available at: https://resourcegovernance.org/sites/default/files/documents/supporting-social-media-debates-about-nigeria-oil-sector.pdf

392 EITI, EITI in Africa (2018). Available at: https://eiti.org/files/documents/eiti_africa_brief_en.pdf

393 IFC, Transparency for Impact: Lessons from IFC Projects in Peru's Natural Resources Sector (Jan. 2020). Available at: https://www.commdev.org/pdf/publications/Transparency%20for%20Action-ENG-FIN-web.pdf

different price assumptions, and in comparison to the local operating budget of each locality. This led to the adoption of a sophisticated, evidence-based revenue sharing mechanism, which helped to neutralize the politics of the issue.[394]

The utility of the information produced thus far in ensuring citizens are getting a good deal on their natural resources has not been limited only to resource-rich developing countries. Independent industry analysts OpenOil have used mandatory disclosures from BP, Shell, and Statoil to develop a public analysis of oil pricing at a granular level—information not otherwise available to the public without paying pricey fees for market data through subscription services. Their work, using production entitlement payment information disclosed in the EU, displays the price of oil across the companies' different projects in different countries in a particular year, and finds that prices spread across a wide range, including wide variation in the concurrent price of oil for different projects in the same country. This kind of data and analysis will increasingly enable citizens and civil society to identify patterns and outliers in company payment reports and government oil sale prices, enabling improved public oversight, more informed debate and ultimately better public policymaking.[395]

Other organizations are working to ensure that citizens anywhere in the world can easily access and use payment data now being disclosed. For example, the Natural Resources Governance Institute ("NRGI"), a leading global think tank on oil, gas and mining governance, has launched an online repository of open-source data on oil, gas, and mining projects to support citizens in monitoring project and national level revenue flows in their countries.[396] NRGI has produced several briefings about how countries can and are using payments-to-governments data. In another recent report, NRGI analysts explore how data can be used by government, civil society, media and other oversight actors to better understand the revenues generated from the sector and how to use this new data source as an accountability tool. A recent report analyzes the $15 billion in payments that seventeen international oil and gas companies have reported making to Indonesian government entities since 2014 and describes how they can be used as an accountability tool.[397]

PWYP International runs the Data Extractors Program to build the capacity of civil society to access, analyze, and present the data.[398] To date, the program has helped train analysts from around the world in advanced data analysis and data training skills. These "Data Extractors" have conducted joint projects and published a number of case studies.

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[394] Oxfam Kenya, Sub-National payments in Kenya's oil industry (20 April 2018). Available at: https://kenya.oxfam.org/latest/policy-paper/sub-national-payments-kenya%E2%80%99s-oil-industry.

[395] OpenOil, "With mandatory disclosures, more open, granular oil price data" (August 2016). Available at: http://openoil.net/2016/08/15/with-mandatory-disclosures-more-open-granular-oil-price-data/

[396] NRGI, "Resource Projects." Available at: http://resourceprojects.org/

[397] Alexander Malden and Edna Osei, Ghana's Gold Mining Revenues: An Analysis of Company Disclosures (11 Sept 2018), NRGI. Available at: https://resourcegovernance.org/analysis-tools/publications/ghanas-gold-mining-revenues-analysis-company-disclosures.

[398] Publish What You Pay, Data Extractors Programme (26 Mar 2019), Available at: https://www.pwyp.org/data-extractors-programme/.

PWYP-US runs Extract-A-Fact, a website that documents case studies of how citizens are putting payment data to use. The site also provides free video and written training to enable citizens, activists, journalists and academics to find, sort, analyze and visualize oil, gas and mining payment data to hold governments to account. Extract-A-Fact has been accessed by people in over 100 countries, and features case studies from over 15 countries.[399]

In 2018, Global Witness and Resources for Development Consulting published 'Finding the Missing Millions', a handbook for using extractive companies' payment data to hold governments accountable for natural resource revenues.[400] The handbook is designed to encourage civil society actors, journalists and other stakeholders to use payment data, and to produce analyses that are reliable and influential. The handbook includes ten different methodologies for using payment data from oil, gas and mining projects. Each methodology features several 'real life' case examples to illustrate how this can be done. As corruption, poorly-negotiated deals, shortfalls in payments to governments and financial mismanagement occur frequently at the contract level, the handbook focuses on the use of contract-based project-level payment data. Since publication, Global Witness has carried out data training events based on the handbook methodologies with civil society activists and/or journalists in Nigeria, Indonesia, Senegal, Myanmar, South Africa, the UK, US and France.

89. ***We seek information that would help us quantify compliance costs (both initial and ongoing) more precisely. In particular, we invite issuers and other commenters that have experience with the costs associated with reporting under the EU Directives or ESTMA to provide us with information about those costs. What are the actual compliance costs for issuers that have started to comply with the disclosure requirements imposed under the EU Directives or ESTMA?***

See our answers to questions 1 and 2 above for detail on compliance costs in EU and Canada, and specific costs information from individual issuers.

90. ***What is the breakdown of various compliance costs, such as legal fees, direct administrative costs, information technology/consulting costs, training costs, and travel costs? What are the main drivers of compliance costs?***

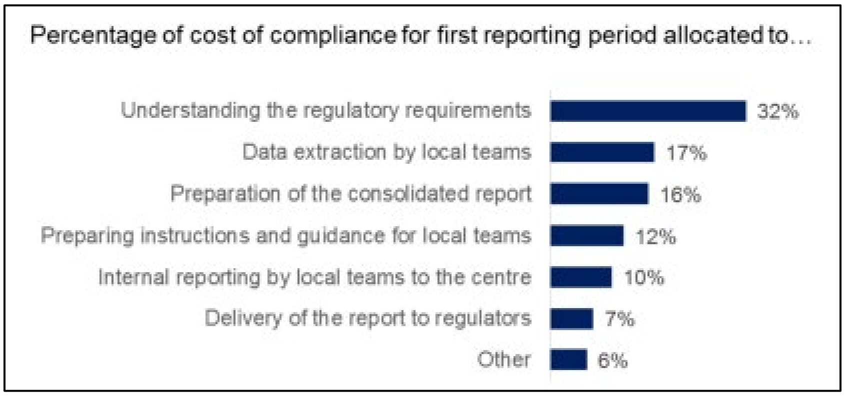
Industry respondents to the UK review provided evidence on the breakdown of various compliance costs for the first year of reporting, as presented in the chart below. "Understanding the regulatory requirements" was the most time-consuming element of the initial implementation, which was also reflected in some of the more qualitative responses.[401] However, as shown in our answer to Question 1,

[399] See www.ExtractAFact.org

[400] Global Witness, Finding the Missing Millions: a handbook for using extractive companies' payment data to hold governments accountable for natural resource revenues (2018), Available at: https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/finding-missing-millions/#chapter-0/section-0.

[401] BEIS (Jan 2018), p.18.

of the 32 companies that participated in the UK review, none reported any substantial costs associated with disclosing payments to governments.



> ***91. What is the proportion of fixed costs in the direct compliance costs structure of potentially affected resource extraction issuers? Would smaller resource extraction issuers incur proportionally lower compliance costs than larger resource extraction issuers? Would affiliated issuers be able to save on fixed costs of developing compliance systems through sharing such costs? If so, what is the estimate of such savings?***

We know of no relevant evidence on these points.

> ***92. Are there additional costs and benefits from the proposed definition of "project"? How do issuers typically define "project" in their reporting systems? How costly would it be for issuers to switch from the definition of "project" that they currently use to the one being proposed in these rules? Would our proposed definition of project reduce compliance costs for issuers compared to a contract-based definition of project?***

<u>There would be no additional benefits deriving from adoption of the modified project definition, yet an unquestionably significant loss of benefits when compared to disclosures under the industry standard contract-level project definition. There is also no evidence that adoption of the modified project definition would lower compliance cost for issuers; indeed, it appears more likely to *increase* the costs of compliance. It would severely limit the benefits for, and in fact result in additional costs for, the intended beneficiaries under the statute as compared to using the internationally accepted contract-level project definition. Adoption of the modified project definition would lead to decreased aggregate benefits and increased aggregate cost.</u>

1) There would be substantial loss in the benefits intended to flow from the statute if the Commission were to adopt the Modified Project Definition.

The evidence in the record is clear. Adoption of the modified project definition would lead to substantial loss in the benefits that Congress intended to result from disclosures, especially for the two major beneficiary groups as envisaged in the law -- investors and citizens in resource-rich countries. For a more detailed explanation on this topic, please see our response to Question 36.

2) There is no evidence that adoption of the modified project definition would lower compliance costs for issuers; in fact, it is more likely that it would increase them.

The Commission is wrong to assume that the modified project definition would help reduce compliance costs by allowing an issuer to "modify its existing internal accounting systems to collect the required payment information rather than having to build a new system to collect the payment information on a contract-by-contract basis."[402]

In fact, it is more likely that the modified project definition would result in higher compliance costs for issuers. To the extent that US issuers already collect payment information on a contract-by-contract basis, the Commission fails to consider how the modified project definition's departures from the international standard could create additional compliance costs. Where issuers currently track payment data at the contract level, complying with the modified project definition will require adapting reporting systems to track criteria for major subnational jurisdiction, extraction method and resource type, aggregating and scrubbing data of identifying payee information.

In this context, it is instructive to also consider the Treasury Department and the IRS's consideration of participating in the OECD country-by-country ("CbC") reporting of third-party and related-party revenues, profits, taxes, and employment, as reflected in the final regulations announced in 2016. One comment "recommended that the Treasury Department and the IRS decline to implement CbC reporting because, according to the comment, U.S. multinational enterprise (MNE) groups' direct costs of compliance will exceed the United States Treasury's revenue gains, and there will be high, unanticipated costs from inadvertent disclosures of sensitive information."[403] However, the Treasury Department and IRS rejected that recommendation, explaining that compliance costs were likely to increase if the US did not adopt the same requirement to other jurisdictions:[404]

> "U.S. MNE groups will be subject to CbC filing obligations in other countries in which they do business if the United States does not implement CbC reporting. Thus, a decision by the Treasury Department and the IRS not to implement CbC reporting will result in no compliance cost savings to U.S. MNE groups. In fact, failure to adopt CbC reporting requirements in the United States **may increase compliance costs** because U.S. MNE groups may be subject to CbC filing obligations in multiple foreign tax jurisdictions. U.S. MNE groups might also be subject to varying CbC filing rules and requirements in different foreign tax jurisdictions, such as requirements to prepare the CbC report using the local currency or language."

[402] Proposed Rule, 85 Fed. Reg. 2557

[403] Department of the Treasury, Internal Revenue Service, Country-by-Country Reporting, Final Rule, 81 Fed. Reg. at 42482. Available at: https://www.govinfo.gov/content/pkg/FR-2016-06-30/pdf/2016-15482.pdf.

[404] Department of the Treasury, Internal Revenue Service, Country-by-Country Reporting, Final Rule, 81 Fed. Reg. at 42482. Available at: https://www.govinfo.gov/content/pkg/FR-2016-06-30/pdf/2016-15482.pdf. (Emphasis added.)

While the global standard for payments-to-governments disclosures is distinct from CbC reporting, the CbC reporting example is analogous in that increased costs are likely in the absence of a rule that aligns well with other jurisdictions' payments-to-governments reporting.

There is every reason to believe that issuers' current systems are already capable of tracking and reporting payment by contract. As discussed further in our response to Question 36 above, a contract-level definition of project aligns with standard industry practice and petroleum and mineral fiscal systems. This is clear from evidence already in the record, and has long been true, even before mandatory reporting began in other jurisdictions.[405] As another example, evidence from the Office of Natural Resources Revenue in the US Department of Interior shows that companies extracting oil, gas and minerals on US federal territory must report royalties owed to the US government for each individual lease.[406]

Furthermore, these assumptions are based on industry predictions from 2011, at which time there were no mandatory payment disclosure regimes in existence.[407] Since then, however, the landscape has changed significantly and we now have actual cost numbers for companies reporting at contract level. This includes one of the largest oil companies in the world, Total, whose total annual costs are a mere $200,000. As contract-level reporting has become an international norm for the extractive industries, even if there were issuers that were not already tracking their payments by contract, they would have changed their core enterprise and financial reporting systems to keep up with these advancements. For example, ExxonMobil - whose 2011 submission is among those the Commission cites - has subsidiaries that are already reporting under contract-level payment disclosure regimes in other jurisdictions, so there is no question that it has adapted at least parts of its systems accordingly. Other US-listed issuers, such as ConocoPhillips and Chevron, also have business segments already reporting under a project definition based on contracts.

The baseline assumptions about the capabilities of issuers' payment tracking and reporting infrastructures do not reflect market realities and must be updated. Additionally, global cost estimates should be updated with more current numbers that reflect how relative costs for database implementation, IT services, and technologically competent staffing expenses have decreased since 2011.

3) Adoption of the modified project definition rather than a contract-level project definition would lead to increased costs for interested parties.

Citizen and investor interest in project-level data is irrefutable and has been repeatedly proven throughout the rulemaking record. By choosing not to provide publicly available access to this project-

[405] See, e.g. comment submitted by PWYP-US (23 Feb 2012). Available at: https://www.sec.gov/comments/s7-42-10/s74210-191.pdf; 2016 Final Rule at 29381 n.297 (recognizing that "companies use the term project to refer to their concession-level or field level operations" and citing numerous examples).

[406] U.S. Department of the Interior, Office of Natural Resources Revenue, "Solid Minerals Production and Royalty Report". Available at: https://www.onrr.gov/ReportPay/PDFDocs/4430.pdf and https://www.onrr.gov/ReportPay/PDFDocs/2014.pdf

[407] Proposed Rule at 2557 n.341 (citing 2016 Final Rule; Letters from API (28 Jan, 2011); ExxonMobil (31 Jan 2011); and RDS (28 Jan 2011)).

level information in a misguided effort to reduce issuers' compliance costs, the Commission is choosing instead to transfer this cost onto interested parties. Accordingly, the cost to interested parties must be included in the Commission's economic analysis.

Interested parties who seek this information lose out, unless they are willing to pay. Without access to publicly available project-level payment information, investors, citizens and other interested parties could consider paying for the information at a cost. For instance, Wood Mackenzie produces "asset reports" including project-level information about costs, fiscal and regulatory terms, and an overall economic analysis. As an example, the asset report for the OML 100 Block in Nigeria's southeastern delta costs $3,100 while an asset report for an individual exploration basin in Southwest Greenland costs $2,800.[408] Data provider IHS Markit sells access to a contracts and blocks database that provides access to more than 25,000 active contracts for over 143,000 blocks.[409] Detailed information includes "financial, seismic or drilling commitments organised by exploration phases...payment details including signature & production bonuses and royalty rates," and "terms of previous bid rounds."[410]

> ***93. Are there any additional effects on efficiency, competition, and capital formation that we have not considered? Are there any additional indirect costs or competitive harm that we have not considered?***

As the Commission is undoubtedly aware, a significant body of literature concludes that increases in transparency yield lower cost of capital for firms.[411] DeBoskey and Gillett find that increased corporate transparency is linked to credit rating and cost of debt.[412] Madhani shows that increased corporate transparency eventually results in higher management credibility, a higher Price/Earning (P/E) multiple, increased liquidity and a lower cost of capital.[413] Lang et al find a link between transparency and lower transaction costs and greater liquidity.[414]

The positive association between transparency and lower cost of capital holds true for the disclosure of information about firms' impacts on public goods. For instance, Matsumura et al find compelling evidence that firms' disclosures of climate change risk significantly lowers their cost of equity, particularly when users of that information deem it material.[415] These findings are bolstered by a robust

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[408] For an overview of the OML 100 asset report see: https://www.woodmac.com/reports/upstream-oil-and-gas-oml-100-11356999/. For an overview of the Greenland exploration basin asset report see: https://www.woodmac.com/reports/oil-and-gas-exploration-greenland-southwest-greenland-exploration-basin-16520235/.

[409] IHS Markit, International Upstream Database brochure. p.12. Available at: https://cdn.ihs.com/www/pdf/0219/ihs_markit_international_upstream_database.pdf.

[410] Ibid.

[411] See for instance: Wang Wei and Jiang Gaofeng, *Information Disclosure,Transparency and the Cost of Capital* (2004), Economic Research Journal.

[412] David Gregory DeBoskey and Peter R. Gillett, *The impact of multi-dimensional corporate transparency on us firms' credit ratings and cost of capital*, Review of Quantitative Finance and Accounting, vol.40 (2013), pp.101–134.

[413] Pankaj Madhani, *Role of Voluntary Disclosure and Transparency in Financial Reporting*, The Accounting World, Vol.7, No.6 (2007), pp.63-66.

[414] Mark Lang, Karl V. Lins, and Mark Maffett, *Transparency, Liquidity, and Valuation: International Evidence on When Transparency Matters Most,* Journal of Accounting Research, Vol. 50, Issue 3.

[415] Matsumura, Ella Mae and Prakash, Rachna and Vera-Munoz, Sandra C., "To Disclose or Not to Disclose Climate-Change Risk in Form 10-K: Does Materiality Lie in the Eyes of the Beholder?" (2007). Available at: https://ssrn.com/abstract=2986290.

literature on the effects of Corporate Social Responsibility (CSR) and CSR reporting, which finds that firms that report on socially responsible practices have higher valuation and lower risk.[416]

Separate research that specifically analyzes the impact of Section 1504 on firms and their shareholders finds that they may benefit from lower cost of capital. Cannizzaro and Weiner estimate that the increased transparency resulting from disclosures required under Section 1504 may lower the cost of capital for covered US-listed firms by $6.3 billion to $12.6 billion.[417]

For evidence that payment reporting at contract level in Europe has no negative impact on competition, see our answers to questions 88 and 97.

94. ***Is our approach to identify small issuers that likely do not make any payments above the proposed de minimis amount reasonable? Are annual revenues and net cash flows from investing activities taken together an appropriate measure for such purpose?***

<u>We agree with the general approach to identifying such issuers, with respect to their annual revenues and net cash flows, subject to using the $100,000 de minimis threshold instead of the Commission's current proposal.</u> We disagree with the proposed approach to de minimis (see our answers to questions 23-28 above).

95. ***What are the costs of converting a resource extraction payment report in the format required by the EU Directives or ESTMA (e.g., XLS or PDF) to the report format required by the proposed rules (i.e., XBRL)?***

Whatever these costs may be, they should not be taken into account so long as the EU Directives and ESTMA qualify as alternative reporting regimes for purposes of Item 2.01(c).

96. ***What are the costs and benefits arising from confidential submission of the payment information? What are the costs and benefits arising from public disclosure of the payment information? How do the potential costs of public disclosure to issuers compare to its potential benefits of the information?***

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[416] See for instance, El Ghoul, S., O. Guedhami, C. C. Y. Kwok, and D. R. Mishra, *Does corporate social responsibility affect the cost of capital?,* Journal of Banking and Finance 35 (9) (2011), p.2388-2406; Steven F. Cahan, Charl De Villiers, Debra C. Jeter, Vic Naiker and Chris J. Van Staden, *Are CSR Disclosures Value Relevant? Cross-Country Evidence*, European Accounting Review, Volume 25 Issue 3 (2003). (finding that CSR disclosures increase firm value, particularly in settings where nation-level institutions are weak); Hans B. Christensen, Luzi Hail, and Christian Leuz, "Economic Analysis of Widespread Adoption of CSR and Sustainability Reporting Standards: Structured Overview of CSR Literature" (2019). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3313793 (concluding that CSR disclosures have materiality beyond a narrow investor focus, not least of all because the use of those disclosures by non-investors can lead to financial consequences for firms that impact investors).

[417] Comment submitted by Anthony Cannizzaro and Robert Weiner (Feb 11, 2016) https://www.sec.gov/comments/s7-25-15/s72515-22.pdf.

As discussed in detail in response to question 55, confidential disclosure of payment information would result in a substantial loss of benefits. The public and civil society,[418] citizens of resource-rich countries,[419] investors,[420] and local governments would all lose out on the intended transparency benefits of 13(q) if payment disclosures were made on a confidential basis.[421] Likewise, some issuers might lose their social license to operate, and the United States may sacrifice its reputation as a world-leader on transparency and anti-corruption initiatives.

In contrast to this substantial reduction in benefits, confidential disclosure would not reduce the compliance costs. To the extent that costs relate to the internal tracking, filing and reporting systems necessary to report covered payments, the distinction between public and confidential filings for issuers is irrelevant; issuers still have to do the same work to report confidentially to the commission.

The Commission continues to countenance, and attempt to alleviate, concerns raised repeatedly by industry commenters over the years which involve baseless claims that public reporting would reveal trade secrets, proprietary information, or other commercially sensitive materials.[422] Those concerns continue to ring hollow. In the 2016 rulemaking, a leading expert in natural resource economics showed that public, contract-level payment information would not reveal sensitive information or put issuers at a disadvantage.[423] Further, the limited and delayed nature of payment disclosures is not likely to reveal more information than already available on the private market through extractive intelligence firms.[424] Since the last rulemaking, concerns about costs and potential risk of competitive harms associated with public disclosure have been shown to be unwarranted, as they have not materialized during multiple years of project-level payment reporting by many of the world's largest oil, gas and mining companies.[425] Indeed, the UK Review found virtually no negative competitive impacts, explaining that "[t]he only concerns about competitive disadvantage were voiced within the context of the timing of implementation", due to the fact that the UK and France implemented mandatory reporting one year

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[418] Comment submitted by PWYP-US (14 March 2018), p.12-14. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3262655-162039.pdf.
[419] Comment submitted by PWYP-US (14 March 2018), p.10-12. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3262655-162039.pdf.
[420] See e.g., comment submitted by Steve Waygood, Chief Responsible Investment Officer, Aviva Investors (12 Feb 2018). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3130136-161939.pdf; Comment submitted by Calvert Investments (25 Nov 2013), p.9. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-17.pdf; Comment submitted by PWYP-US (14 March 2018), p.16-19. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3262655-162039.pdf.
[421] See 2016 Rule at 49401.
[422] *See*, *e.g.*, Proposed Rule, 85 Fed. Reg. 2538 (Stating that a motivation for the modified project definition are potential competitive harms presented by the 2016 rule, noting in particulara 2016 finding by the Commission which held that "a contract-level definition of 'project' . . . increases the potential that resource extraction issuers might be required to disclose sensitive competitive information about the underlying contracts, licenses, or concessions") (citing 2016 Final Rule, Sec. II.E.3).
[423] Comment submitted by Dr. Robert Conrad (17 Jul 2015).Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-81.pdf
[424] Comment submitted by Oxfam and EarthRights International (8 March 2016), p.24-30. Available at: https://www.sec.gov/comments/s7-25-15/s72515-59.pdf
[425] Comment submitted by PWYP-US (14 March 2018), p.3. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3262655-162039.pdf

ahead of the rest of the EU, "and not the existence of the Regulations itself."[426] "Beyond early implementation concerns, no further issues regarding competitive disadvantage were flagged."[427]

In sum, the substantial benefits of public disclosure are clear and undisputed, and central to fulfilling the legislative purpose, as we discussed in our response to Question 55 above. If these benefits are by their nature more challenging to quantify than costs, that does not change the fact that issuers who have been reporting publicly have experienced no disadvantage. Notwithstanding persistent and speculative grumbling from a small number of US oil companies, the experience of European and Canadian issuers already reporting definitively proves that public disclosure does not carry any competitive cost (and there are no compliance costs above what would be incurred for a non-public report). Therefore, the correct additional costs figure for public disclosure is zero.

> ***97. Are there studies on the potential effects of the proposed rules, the disclosure rules under the EU Directives or ESTMA, or EITI compliance on efficiency, competition, and capital formation? What are the potential competitive effects of the proposed rules and how might they be impacted by regulations promulgated pursuant to the EU Directives and ESTMA? What fraction of international extractive companies would be affected by at least one of the US, EU, or Canadian rules?***

<u>We know of no evidence concerning competitive impacts of the rules as currently proposed, but all available evidence confirms that contract-level payment reporting has no negative competitive effects. Most major international extractive companies are affected by at least one transparency regime.</u>

To assess these potential effects, the Commission should, at minimum, be guided by 1) its own findings of fact from previous rulemakings; 2) the successful annual disclosure by issuers reporting under rules in other markets, where there is no evidence in financial risk reporting to the Commission or other regulators of any material impacts on competitive position or cash flow; 3) the findings from reviews by other markets; and, 4) the submissions by investors in oil, gas and mineral assets.

1) The Commission asked the same question in 2015 when it proposed a different, contract-based definition of project. Based on its analysis of responses from issuers and other commenters, it concluded in the 2016 Release, "we continue to believe that the resulting from the final rules is significantly reduced, although not eliminated, by the adoption of a similar definition of ''project'' in the European Union and Canada."[428]

Furthermore, the Commission specifically "disagree[d] with the API's assertion that the implementation of the EU Directives and ESTMA does not mitigate competitive harm because "[f]orty-six of the top 100 oil and gas companies are listed only in the United States.'' The Commission continued, stating that "[a]lthough these companies may lose the competitive advantage they previously had in the absence of

[426] Comment submitted by PWYP-UK (25 Nov 2019), pp.2-3. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6470014-199342.pdf (quoting (BEIS, Feb. 2018, para 40,)
[427] Ibid. (quoting (BEIS, Feb 2018, para 41, page 11).
[428] 2016 Final Rule at 49382

rules implementing Section 13(q), an argument disputed by other commenters, we believe that any competitive harm caused by the final rules will be significantly less than what would occur in the absence of the EU Directives and ESTMA."[429]

PWYP-US has calculated that as of 2016, 84 of the world's 100 largest oil and gas companies and 58 of the world's 100 largest mining companies (by market capitalization) were required to disclose their payments to governments as the result of listings in the US, EU, Canada, and Norway. Canada ranks first globally in the number of listed extractives companies, with more than 55 percent (1,492) of the world's publicly listed mining companies, and 30 percent (337) of publicly listed oil and gas companies.[430] In addition, currently 55 state-owned oil and mining companies participate in the implementation of the EITI in 35 countries, and at least 25 are represented in EITI multi-stakeholder groups.[431]

The Commission's analysis of costs and competition must begin from its previous finding which confidently anticipated that disclosure by other markets would mitigate any competitive concerns by covered issuers.

2) The Commission's cost analysis must consider the successful annual disclosure by cross-listed issuers disclosing under rules in other markets, in addition to the lack of financial risk or harm reported to the Commission or other regulators of any material impacts on competitive position or cash flow. The Commission should consider, for example, the lack of any reporting harms around contract-level project reporting documented by, for example:
    - Cross-listed issuers, such as BP[432], Royal Dutch Shell[433], and Eni SpA[434];
    - US-listed issuers whose subsidiaries have disclosed in other markets, such as ExxonMobil[435], Chevron[436], ConocoPhillips[437].

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[429] SEC 2016 rule at 49382, FN.300.
[430] Comment submitted by PWYP-US (16 Feb 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-45.pdf.
[431] EITI, "Qatar Petroleum joins EITI as a supporting company." Available at: https://eiti.org/news/qatar-petroleum-joins-eiti-as-supporting-company.
[432] See, for example, Risk Factors. BP. 2018 BP Annual Report and Form 20-f. P. 51. Available at: https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/investors/bp-annual-report-and-form-20f-2018.pdf
[433] See, for example, Risk Factors. Shell. 2018 Shell Annual Report. P. 8-12. Available at: https://reports.shell.com/annual-report/2016/servicepages/downloads/files/entire_shell_ar16.p
[434] See, for example, Risk Factors and Uncertainties. 2019 Eni Annual Report. P. 87. Available at: https://www.eni.com/assets/documents/Annual-Report-2018.pdf
[435] In 2016, Exxon notably mentioned in its report that "adoption of government payment transparency regulations that could require us to disclose competitively sensitive commercial information, or that could cause us to violate the non-disclosure laws of other countries", but did not disclose, any harm faced by reporting in Angola by subsidiaries, for example. ExxonMobil, Form 10-K, Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 2016, https://www.sec.gov/Archives/edgar/data/34088/000003408817000017/xom10k2016.htm.
[436] See, for example, Risk Factors (2019). Chevron Form 10-K. P. 18https://www.sec.gov/ix?doc=/Archives/edgar/data/93410/000009341020000010/cvx12312019-10kdoc.htm#sDCB7258703ED573182CB9CFD544C107C, p. 19-20.
[437] See, for example, Risk Factors. ConocoPhillips. 2019 ConocoPhillips Annual Report. P. 21. Available at: https://static.conocophillips.com/files/resources/2019-conocophillips-annual-report-19-0895.pdf

3) The findings from reviews by other markets provide conclusive information regarding competitive issues arising out of disclosure.

The EC consultants' final report, commissioned to inform the EC review of the EU Directives, states that "[a]ccording to the views of the extractive industry, both in mining and in oil and gas, there is no evidence that competitors not subject to the EU reporting requirements benefit from substantial competitive advantages from not being required to report on payments to governments."[438] None of the nine companies or three extractive industry associations interviewed for the report, or the six companies that responded to the consultants' survey,[439] knew of instances where companies suffered material damage, losses of opportunity, or were refused licenses as a consequence of the EU reporting requirements.[440] Similarly, all of the company respondents stated they did not find it harder to operate in third countries following the introduction of the EU requirements, nor have evidence that third countries restrict the operations of companies that are subject to the reporting requirements.[441]

The UK review final report concluded that "the research indicated this type of reporting does not disadvantage company business interests," and that "[t]here is every indication that in the medium to long term, the benefits of the regulations would outweigh the costs imposed by it."[442] More than two-thirds of the 32 companies that responded to the UK review "indicated that they expect the disclosure of the payments to governments to have no impact on their competitive position over the next 3 to 5 years," while only 1 company indicated that they did.[443]

Not only did the UK review dispel claims that implementation of the mandatory disclosure law would have negative impacts on extractive companies, the UK Government review also brought to light early benefits and signs of positive impacts already showing, including on companies' competitive position, even though the scope of the review was limited to only the first year of reporting. The UK review noted that one of the 32 participating companies indicated they had already "experienced positive impacts on their investment opportunities, and one company had experienced a positive impact on their competitive position relative to their peer-companies that are not required to report." Eight of the responding companies thought that there would be "a positive impact on the business environment and the associated 'license to operate' and nine thought there would be a positive impact on good governance and reduced corruption." Five of the companies estimated a marginal future financial benefit." Respondents were more optimistic about the 3-5 year outlook," with 12 percent of the responding companies expecting "decreased corruption." While still early in the regulations' implementation, and thus companies still had some uncertainty about who was using the information,

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[438] European Commission, Review of Country-by-Country Reporting Requirements for Extractive and Logging Industries – Final Report (2018), p.55. Available at: https://ec.europa.eu/info/sites/info/files/business_economy_euro/company_reporting_and_auditing/documents/181126-country-by-country-reporting-extractive-logging-industries-study_en.pdf.
[439] The consultants' final report does not indicate whether any of the companies interviewed also responded to the survey.
[440] European Commission, Review of Country-by-Country Reporting Requirements for Extractive and Logging Industries – Final Report (2018), p.56.
[441] Ibid, p.56.
[442] BEIS (Feb 2018), p.22.
[443] BEIS (Feb 2018), p.11.

four companies already “felt that the reporting of payments to government made the extractive industry more attractive to investors.”

Similarly, most stakeholders interviewed for the EC consultants’ study confirmed that the EU reporting requirements have positive impacts on companies. The report states that stakeholders are “not only skeptical that EU requirements present substantial competitive disadvantage, they believe reporting can have competitive advantages.” This includes an international mining industry association, which stated that “to a certain extent, EU requirements create competitive advantages in the form of enhanced reputation in the eyes of investors,” and “some companies in the UK [which] viewed the reporting requirements as a competitive advantage and beneficial for their reputation.”

4) In their comments to the SEC through the Section 1504 rulemaking process, investors have made it clear that implementation of this law in a manner consistent with the EU Directives, ESTMA, and the EITI Standard would promote efficiency, competition, and capital formation. Illustrative excerpts from these comments follow.

Letter submitted by Allianz Global Investors on August 24, 2013 and signed by investors with $5.6 trillion in assets under management.

> Investors depend on the SEC’s leadership and deliberate consideration of disclosure requirements that protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. We commend the Commission on issuing rules for the implementation of Section 1504 that reflect thorough contemplation of these factors and are confident the SEC will continue to act in the interest of investors as it responds to the U.S. District Court’s July 2 ruling in API vs. SEC.[444]

Letter submitted by Calvert Investment Management, Inc. on April 28, 2014 and signed by investors with $2.85 trillion in assets under management.

> The rules the SEC adopted for the implementation of Section 13(q) on August 22, 2012 would protect investors and promote efficient capital markets by providing investors with valuable factual information on risk profiles and company performance.
>
> . . .
>
> Investors’ decisions regarding the oil, gas and mining industries and the efficient functioning of markets in general rely on the public disclosure of relevant information from issuers that is comprehensive and consistent. Therefore, we agree with the Commission’s August 2012 rules

[444] Comment submitted by Allianz Global Investors (24 Aug 2013). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-3.pdf.

for Section 13(q) that require issuer-by-issuer, government-level, and project-level public disclosures and believe that these are beneficial to investors.[445]

Letter submitted by Allianz Global Investors on April 28, 2014 and signed by investors with $6.4 trillion in assets under management.

> Chair White, your fellow SEC Commissioner Michael Piwowar has recently been reported to have voiced the concern that Section 1504 may have involved a degree of legislative overreach, by allowing "special interests, from all parts of the political spectrum that are trying to co-opt the SEC's corporate disclosure regime to achieve their own objectives." Commissioner Piwowar raises a valid point that merits discussion: as investors whose interests are inextricably bound with the commercial interests of the oil and mining companies in which we invest, we wish to clarify that we fully agree that the remit of the SEC is, and should remain, that of safeguarding the efficient functioning of financial markets. We also agree that legislative and regulatory tools aimed at achieving purely social aims properly belong within instruments other than SEC regulation.
>
> However, it is our contention that Section 1504, in line with the broader purpose of the Dodd Frank Act, i.e. mitigating systemic financial market risk, plays an essential role in containing behaviors related to extractive sector activity that contribute to damaging levels of financial and economic instability.[446]

98. ***What are the benefits and costs of an alternative reporting option for issuers that are subject to a foreign jurisdiction's resource extraction payment disclosure requirements that are determined to satisfy the transparency objectives of Section 13(q)? How much would such issuers save in compliance costs if they have the option to satisfy their filing obligations by filing the report required by that foreign jurisdiction with the Commission?***

<u>The alternative reporting option has substantial costs savings for issuers that are already reporting under another transparency regime.</u> <u>We see no benefit in requiring duplicative reporting, particularly under the current proposal which is substantially less useful to intended users than contract-level reporting in other jurisdictions.</u>

The alternative reporting regime helps to streamline compliance for issuers that are subject to multiple reporting regimes and saves them the unnecessary costs of preparing multiple reports. Experience in other jurisdictions shows that compliance costs have not been significant (see our answers to Questions 1 and 2) but it is possible that compliance costs with this rule, as currently proposed, could be higher because of certain complicating factors that are meant to reduce costs but are more likely to have the

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[445] Letter submitted by Calvert Investment Management, Inc. (28 April 2014). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-36.pdf
[446] Letter submitted by Allianz Global Investors (28 April 2014). Available at https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-35.pdf.

opposite effect. This includes the need to perform complex de minimis analysis for each project and to determine projects under a new definition that bears no relationship to normal business operations. We are not aware of quantitative estimates, but whatever those costs would be, there is no reason to impose these burdens on issuers already reporting under other regimes (or any issuers, for that matter).