

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

CC: Mr. William Hinman, Director, Division of Corporate Finance

Mr. Barry Summer, Associate Director, Division of Corporation Finance

Ms. Elizabeth Murphy, Associate Director, Division of Corporate Finance

Mr. Elliot Staffin, Special Counsel, Division of Corporate Finance

Mr. Vladimir Ivanov, Assistant Director, Office of Corporate Finance

Via Email (to: rule-comments@sec.gov)

May 1st, 2020

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

**Towards Meaningful Disclosures in the Rule to Implement Section 1504 of the Dodd-Frank Act:
Evidence-Based Cost-Benefit and Competitiveness Considerations**

Dear Secretary Countryman,

I welcome the opportunity to provide a submission to the Securities and Exchange Commission (the “Commission”) on proposed Rule 13q-1 and amendment to Form SD implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Section 1504) requiring payment disclosure by resource extraction issuers.¹

At some level, I am mindful that the subject matter before us may not be the highest priority given the current global pandemic we are all confronting, humbling and diverting us all. On the other hand, this pandemic painfully reminds us of the paramount importance of effective, granular and timely transparency, and the nefarious consequences of opacity, partial disclosures, and lack of openness. Further, and concretely linked to benefits to citizens in many afflicted countries, it is of paramount importance at this juncture to ensure that every dollar going to countries is used well to support the health systems and struggling economies and citizens under the pandemic strain.

I am an economist who has worked on matters of private sector development and firm’s behavior, governance, anticorruption and regulatory economics, focusing on evidence-based research and policy analysis. Among others, during a long career at the World Bank I led the regulatory, governance and anti-corruption work. This continued thereafter, with increasing focus on extractives and resource-rich

¹ Semantically, in this submission we use the terms issuers, firms, companies, industry and corporates interchangeably.

countries, first at the Brookings Institution and subsequently at the Natural Resource Governance Institute (NRGI, where I served as President and CEO for almost eight years until February this year (and currently am its Chief Adviser).

Until this past June I was also a member for six years of the international board at the Extractive Industries Transparency Initiative (EITI). I have also been an adviser to the leadership of the OECD, the Inter-American Development Bank, and of some countries. I have also conducted evidence-based research on transparency and governance, and on the causes, consequences and costs of corruption.

This submission makes a two-fold contribution relevant to the Commission's economic cost-benefit analysis:

1. evidence and findings pointing to the need for high quality, granular, comprehensive, reliable, relevant, accessible and timely payment transparency,
2. the potential competitive and market efficiency harm caused by two major newly introduced features of the 2019 proposed rule (namely, the modified project definition and the \$750,000 project "not de minimis" threshold), relative to the contract-level project reporting requirements as laid out in the EU Accounting Directive and Canada's Extractive Sector Transparency Measures Act (ESTMA).

The evidence at hand suggests outsized benefits from implementing a rule consistent with meaningful transparency provisions, where disclosures would take place at the disaggregated contract level and with low de minimis exceptions, contrasting the limited or absent benefits from a rule which permitted aggregated disclosures and exempted a large number of projects with a high de minimis threshold.

Further, the additional costs of reporting at a disaggregated level and with limited exceptions would be rather low. In fact for many issuers it is likely to be lower than reporting in the aggregated manner indicated in the proposed rule. Hence, taking such cost and benefits considerations into account, the potential rate of return of a rule that would mandate meaningful transparency –including granular detail at the contract level and very limited exceptions-- would be extremely high.

Such oversized benefit-cost ratio is likely to be magnified even further once market efficiency, investor protection and competitiveness considerations are integrated into the analysis. I elaborate on these aspects in this submission by providing insights and evidence from the existing body of literature as well as more recent analysis of the evidence. In this context, towards the end of this submission, I include a section containing new evidence-based analysis of the anti-competitive implications of the currently proposed rule on issuers.

In concluding, based on the findings of this analysis, I would urge the Commission to ensure the final rule aligns with the contract-level project reporting requirements as laid out in the EU Accounting Directive, Canada's Extractive Sector Transparency Measures Act (ESTMA), and the Extractives Industry Transparency Initiative (EITI), and to remove the \$750,000 project "not de minimis" very high threshold proposed in the 2019 Proposed Rule.

Sincerely,

Daniel Kaufmann

**Towards Meaningful Disclosures in the Rule to Implement Section 1504 of the Dodd-Frank Act:
*Evidence-Based Cost-Benefit and Competitiveness Considerations*²**

Promoting financial transparency in an industry historically plagued by opacity and corruption lies at the core of rule 13q-1. In order to assess the net benefits of transparency it is key to place it in its proper context, understanding the channels through which it delivers benefits and the fact that its role is not in a vacuum. An important channel through which transparency can deliver results is via the prevention and mitigation of corruption. We have estimated corruption to be a multi-trillion global industry³, causing enormous socio-economic and financial harm.

Our evidence also shows that the extractives sector in particular, and resource rich countries more generally –with some notable exceptions—are particularly vulnerable and afflicted by corruption, opacity and poor governance. Based on our data⁴, we estimate that in nearly 90 percent of the emerging and developing countries where issuers operate, corruption levels are very high (such host countries placing in the bottom quartile on corruption worldwide), and similarly, with a few exceptions, the level of transparency and accountability in resource governance in those countries is rather low.

Consequently, corporate and national transparency initiatives that would help prevent and mitigate corruption could lead to very large economic, social and financial benefits, and particularly so in resource dependent economies and in the extractive sector. Furthermore, meaningful transparency at a granular and disaggregated level is associated with more efficient and competitive markets and with investor protection.

Drawing on a review of the literature and on evidence, I elaborate on these aspects below, given their importance for a rigorous cost-benefit analysis and related competitiveness and market efficiency considerations. I also provide a literature review on these relevant economic and financial considerations, adding to what has already been reviewed by the SEC in the past and by other submitters of commentary. Following the main text, a methodological annex follows, and thereafter the extensive – even if not fully exhaustive-- bibliography list referenced in the text is provided.

² The valuable inputs of Alexander Malden are much noted and appreciated, as well as the excellent support from Thomas Morrison and Jimena Montoya, and the feedback from Amir Shafaie and Joseph Williams, all from NRG. I have also benefitted from discussions and feedback from Zorka Milin and Isabel Munilla. Errors and views here are all mine.

³ Drawing on an estimation of the extent of bribery worldwide around the world of around US\$ 1 trillion (Kaufmann, 2005), a rough estimate of about US\$ 2 trillion was arrived at in recent years (IMF, 2017), and, related to the prevalence of corruption, amounts involved, and its macro-economic consequences, the IMF now considers corruption as ‘macro-critical’. The US\$2 trillion global estimate, while subject to a margin of error, and only focused on bribery, illustrates the global scale of the challenge.

⁴ Drawing in particular from analysis using the Worldwide Governance Indicators (WGI) and Resource Governance Index (RGI).

The benefits of transparency in perspective: is it a cure for all corruption and inefficiency, or simply vastly overrated?

The review of the evidence and literature on transparency, complemented by our own research, suggests that the answer to this question is neither. The mere adoption of particular disclosures by countries or firms associated with transparency reforms, by themselves, are not necessarily associated with significant improvements in corruption or governance.

Whether at the national, corporate or sectoral level – including in the case of extractives –, such transparency needs to be meaningful, or effective⁵, which inter alia means that disclosures have to be of high quality, granular, comprehensive, reliable, relevant, accessible and timely.⁶

Further, the impact of transparency initiatives can ultimately end up being limited when these initiatives are stand-alone and not complemented by accountability (and participation), and by institutional and legal/enforcement reforms. Both of these pre-conditions –*meaningful* transparency and *complementary* measures– are intertwined. This is because granular and effective disclosures are required for governments and industry to be effectively monitored and held to account, whether by specialized agencies, shareholders, or civil society groups and policy institutes.⁷

But does this imply that the benefits of transparency may be over-rated? No, to the contrary. The review of the literature also clearly points to the significantly positive impact of transparency. While as suggested above disclosures on their own often do not appear to be a **sufficient** condition for substantial and sustained impact – since reinforcing conditions or initiatives are also needed –, the emerging consensus around the existing evidence is that effective transparency is a **necessary** condition for positive outcomes on governance, anticorruption, and economic progress.

Specifically, the body of research points to the overall economy-wide impact that enhanced transparency has on governance in general and in lowering corruption in particular, and, in turn, their significant (and causal) effects in raising income per capita of countries, in lowering infant mortality, and in raising education standards. A number of these studies are economy-wide, including in resource rich countries, while others focus on the extractives sector.

In particular, we have found that transparency is associated with better socio-economic and human development indicators, as well as with higher competitiveness and lower corruption (Kaufmann and Bellver, 2005), and that that an increase in financial data flows and macro-economic transparency decreases the likelihood that financial liberalization would result in a financial crisis (Mehrez and Kaufmann, 1999). Other studies found that more transparent governments govern better for a wide number of governance indicators such as government effectiveness, regulatory burden, corruption, voice and accountability, the rule of law, contract repudiation, and expropriation risk (Islam, 2003). More generally, a review of a global transparency initiative found that transparency improves people's lives in various dimensions, including health care (Williamson and Eisen, 2016).

⁵ Semantically, we use the notions of *meaningful and effective* transparency (or disclosures) interchangeably in this submission.

⁶ Vishwanath and Kaufmann (1999 and 2001), Bellver and Kaufmann (2005), Islam (2003), Islam (2006).

⁷ These are addressed in detail in an ongoing multi-institutional and multi-year research project on leveraging transparency to address corruption in the extractives sector where I have been a principal investigator. See both the LTRC annotated bibliography, as forthcoming report, 2020).

As mentioned, the impact of transparency on social and economic progress (as well as on financial variables) is often indirect, via improved governance and corruption control. In addition to the links between transparency on the one hand, and governance and corruption control, on the other, empirical studies have also shown the impact of improved governance and corruption control on poverty and incomes, on health and education spending and outcomes, as well as on reducing income inequality (Mauro, 1996; Tanzi and Davoodi, 1998; Gupta et al., 2002; Kaufmann and Kraay, 2003), as well as on investment (Mauro, 1995; Gelos and Wei, 2002).

To place these findings into perspective, our research with worldwide data found that a country that improves governance and corruption control (by one standard deviation, which is realistically attainable) would on average triple its income per capita in the long term (Kaufmann and Kraay, 2003). In other words, a country with an income per capita of US\$10,000 per capita per year, can reach US\$30,000 in the long term if corruption control takes place as well as complementary governance measures. Further, this major development dividend from improved governance is found to be even more pronounced in resource-rich countries.

Importantly, beyond national-level studies, there is also substantial evidence at the firm level, presented selectively here. Analyzing firm-level data, we found that where there are higher standards of accountability, transparency and press freedom, as well as rule of law, firms engage in significantly less bribery (D'Souza and Kaufmann, 2013). And, in another study with firm-level data, we find that firms that pay more bribes are likely to spend more, not less, management time with bureaucrats in negotiating regulations; and they also face a higher, not lower, cost of capital (Kaufmann and Wei, 2000).

Other research we conducted based on various multi-country survey of firms found that: i) where firms bribed frequently, the private sector grew at about one-half the rate compared with where bribery was less frequent; ii) bribery did not benefit the bottom line of the bribing firms (while causing competitive damage to the rest), and, iii) a major deterrent to bribery by firms was the extent of transparency and accountability they were subject to (Hellman et al., 2000; Batra et al., 2003).

In the extractive sector there is also a significant body of evidence regarding the substantial benefits of transparency for addressing corruption, both in terms of case studies and statistical evidence. While only about 20 percent of the world's population live in resource rich countries, comprising 25 percent of the poor in 1990, nowadays that share is inching towards one-half of the world's poor. And governance and corruption control levels are low and not improving in these countries.

Further, due to opacity, corruption and mis-governance, the proceeds from oil and mining are often being diverted to political or private elites, failing to benefit the country's citizens and the poor. For instance, in Brazil, cost overruns from one corrupt refinery project could have paid to educate 4 million schoolchildren for a year, while the government of Nigeria alleges that an official took a \$40,000 bribe to approve a deal that eventually saddled the government with a \$9 billion liability, which would have funded the federal health budget seven times over in a country where one in ten children dies before they turn five (Gillies, 2020). Further, as elaborated by Malden (2020), company disclosures on Nigeria and Indonesia's Oil and Gas Revenues, as well as on Ghana's Gold Mining Revenues, drawing on the payments to governments data, provide compelling illustrations of the concrete ways contract-level project payment data can be used to respond to resource governance challenges in these countries.

A plethora of research studies assessing transparency initiatives in extractives have also been conducted over the years. In large measure, they have been spearheaded by the advent of the EITI initiative (inspired by the prior inception of the PWYP initiative), and the resulting generation of significant amounts of payments data on the sector that have emerged from these disclosures.

Several EITI-related studies point to the positive benefits of transparency and financial disclosures in extractives. Papyrakis et al. (2017) find that EITI membership offers, on the whole, a shielding mechanism against the general tendency of mineral-rich countries to experience increases in corruption over time, while Londoño (2014) finds that countries can attract foreign direct investment (FDI) inflows by joining the EITI. Also, Schmaljohann (2013) shows that joining EITI increases the ratio of FDI inflows to GDP, and Malden (2017) finds that EITI implementation has a statistically significant positive impact on a country's ability to attract mining company investment.

Further, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ, Germany, 2016) carried out an online survey that found that nearly 90 percent of EITI stakeholders were of the view that the EITI had made at least some impact on democratic accountability, and Öge (2016) finds that EITI improved data disclosure in member countries.

It should also be noted that some studies over the years have presented some critical aspects or mixed findings regarding some effects of the ongoing EITI initiative. In fact some of the same studies that find positive effects also point to mixed results or to needed improvements in the initiative. For instance, Öge (2016), as well as Papyrakis et al. (2017) and others, such as Corrigan (2017), Kolstad and Wiig (2009), Ölcer (2009) and Sequeira et al. (2016), pointed to the need for further improvements in EITI disclosures to attain more impact on corruption control, while Aaronson (2011) and Smith et al. (2012) argued for enhanced participation to complement transparency in effectively addressing corruption and resource governance. And in their studies Kasekende et al. (2016) and David-Barrett and Okamura (2013) do not find significant reductions in corruption from EITI membership.

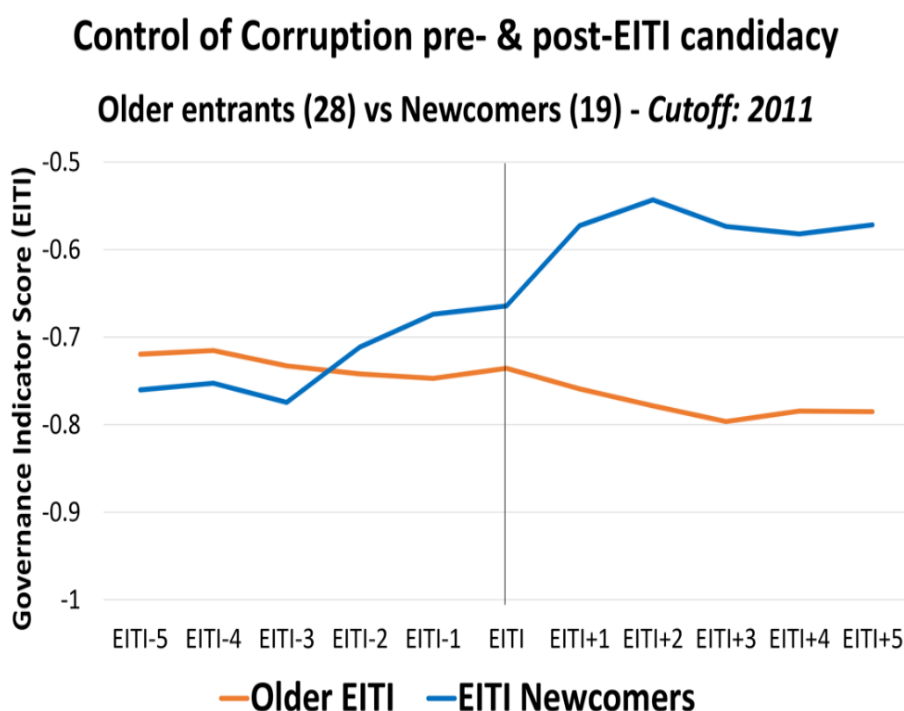
It is important to place these studies in proper perspective of the evolution of the EITI initiative. The initiative started with a rather narrow scope, comprising a few member countries and companies, and for years had modest requirements and expectations. Subsequently it evolved significantly. The initial disclosure measures in the earlier years of the initiative, even if they did not automatically or immediately generate significant positive outcomes at the country level, did promote public discussion, scrutiny and demonstration effects, in turn generating a momentum to broaden such disclosures both in thematic scope and in country coverage. These in turn led to demands to enhance accountability and participation standards within the initiative and in implementing countries. Hence the EITI Standard evolved significantly.

At any rate, most of the empirical studies on the impact of EITI do point to positive effects by the initiative. Yet, as reviewed, that is not the case with regard to all studies. A few studies suggest mixed results or weakly positive effects, some of them based on data in the earlier years of the initiative, before EITI evolved in major ways regarding the number of countries and companies in the initiative, implementing an expanding set of disclosure standards. The EITI Standard has become increasingly stringent over the years, including requiring additional granularity in the information disclosed, such as for the contract-based project level disclosure requirements adopted recently. Further, the standard also became stricter regarding accession to the initiative, with a higher bar regarding transparency and accountability commitments to be accepted as an EITI implementing country.

Many of the multi-country studies do not unbundle the overall results, providing averages across all countries assessed. This can mask the more positive trajectory of some countries, contrasting others. In a recent analysis we have conducted, with updated data about EITI countries and about governance performance, we first observed that countries joining EITI did not show a marked improvement on either voice and accountability or on corruption control (as measured by the Worldwide Governance Indicators (WGI)— *on average*, across all countries and periods, that is.

In fact, we found that the evidence was mixed, and in a particular way. The group of countries that entered the initiative during the earlier years of EITI, when disclosure and accountability requirements at entry and during implementation were thinner, did not exhibit positive results. By contrast, there is a clear positive trend on both governance dimensions we studied, namely voice and accountability and corruption control, for those countries that entered the initiative in more recent years, when application, entry and implementation standards became increasingly more stringent and detailed (Kaufmann, 2019). The evolution for corruption control for both groups of EITI countries is shown in Figure 1 below.

Figure 1:



Older EITI sample covers the 28 emerging EITI countries that were members as of 2011. EITI Newcomers sample covers the 19 emerging EITI countries who joined between 2009 and 2017. A conservative assumption is used for countries missing data in EITI+2 (11 countries) by using the data from the last year with available data. Number of countries with actual data per period are as follows: EITI (47 countries), EITI+1 (47 countries), EITI+2 (43 countries), EITI+3 (42 countries), EITI+4 (41 countries), EITI+5 (36 countries).

Source: Worldwide Governance Indicators (www.govindicators.org). Kaufmann, D., A. Kraay, & M. Mastruzzi (2010), [The Worldwide Governance Indicators: Methodology and Analytical Issues](#), World Bank Policy Research Working Paper No. 5430. EITI: Countries and joining date on EITI.

Case studies associated with EITI's work in implementing countries provide insights as well, including on the evolution of the initiative over time. Pointing to the enormous cost for Nigeria of not having detailed payment disclosures in the past, Robinson (2020, EITI submission) also discusses the positive impact that the transparency initiative would have had in the country if the data provided in the past contained project-level disclosures. Related, there is the well-known counterfactual case study pointing to the past opacity associated with the corrupt deal crafted in the case of OPL245 in Nigeria by Shell and Eni, estimated to have deprived Nigerian citizens of up to \$6 billion in future revenues (Global Witness, 2018; and Global Witness, 2013). Other such case studies, such as in the DRC and in Equatorial Guinea, also illustrate the importance of detailed disclosures and the costly consequences of their absence.⁸

Further recent research by others on the extractives sector, beyond the realm of EITI, shows that disclosures (including the detailed EU directives) have been beneficial, including in terms of additional officially reported revenues, suggesting that less diversion of proceeds for private purposes is taking place (Poncian and Kigodi, 2018, for Tanzania).

In sum, the evidence from a vast body of empirical research overall does point to rather large benefits of effective transparency, for national economies, for firms in general, and for the extractives industry in particular.

By contrast with the outsized benefits from transparency, mounting evidence suggests that the costs of detailed disclosure at the contract level for issuers is relatively small, as per various submissions to the SEC by companies already reporting under the EU directive⁹.

As one example, Total S.A., which disclosed payments for 155 identifiable projects in its 2018 payments to governments report, the largest number of any reporting company, stated in a recent comment to the Commission that for 2018 its reporting costs are 'in the region of \$200,000 per year' (Total S.A., 2020). Further, there is evidence on the relatively modest compliance company costs in the implementation of disaggregated project reporting in the U.K. and the EU (Brophy/PWYP, 2020; Munilla/Oxfam and Earth Rights, 2020), as well as the evidence provided in submissions to the SEC by companies other than Total S.A. attesting to low costs of compliance (BASF, Tullow Oil, 2020).

⁸ Robinson (2020) also discusses EITI's role in providing the data that permitted civil society to uncover that \$75 million worth of dubious payments from Glencore's Katanga mining projects in the Democratic Republic of Congo, or DRC (Global Witness, 2017). Also in the DRC, given the lack of disaggregated data by province or local entity, the Carter Center cross-checked EITI payments data with public disclosures by companies in order to calculate what the DRC's largest state-owned mining company, Gécamines, should have received from its joint venture partnerships (The Carter Center, 2019; Organisations de la Société Civile du Lualaba, 2019). They find that Gécamines reported no payment received, while their joint venture partner, Kamoto Copper Company, reported paying Gécamines US\$15 million in contractual royalties. Peters (2020) indicates "Had Glencore been subject to disaggregated disclosure requirements at that time, including a strong enforcement mechanism to ensure compliance, the situation would likely have been made public much earlier." Other related studies by these and other organizations, drawing on this country and company case study, further the tenet that with more information the monitoring and analyses by civil society actors would have been even more effective. In this context, see also the case study evidence provided by Alicante (2020) from EG Justice emphasizes that "the publicly-available payment data generated by a Dodd-Frank 1504 rule would be of great value to the DOJ and other international law enforcement agencies in ... corruption investigations".

⁹ See among others Detheridge (2020).

Market Efficiency and Competitiveness Considerations

To fully assess the cost and benefits of the rule, with its implications not only at the country level, but also for firms, industry and markets, it is also important to consider the implications for market efficiency, investment protection, and competitiveness. I discuss some salient aspects of these, *inter alia* based on recent evidence and a new analysis.

Market Efficiency and Investor Protection. There is an increasing recognition of the importance of transparency, good governance and corruption control for *market efficiency*. Until about fifteen years ago, risk rating agencies relied largely on official economic statistics to assess sovereign risk and likelihood of investment success. With the advent of publically available data on various governance dimensions, such as the WGI we have produced, such risk rating agencies found that the predictive power of their models improved significantly through integration of these governance variables. Hence, nowadays they are an integral component in their risk rating assessments¹⁰. Not surprisingly, countries afflicted by opacity and corruption need to pay a very large premium to access financial markets as compared with countries with lower corruption levels, facing lower spreads (Panizza, 2017; Depken et al., 2011).

The evidence mentioned in the previous section drawing on the research on the costs of opacity and corruption on firms is also of relevance here, since lack of transparency is associated with higher levels of corruption and bribery at the firm level. And bribing firms, whether based in the U.S. or abroad, distort markets and negatively affect the performance of the non-bribing firms.

Further evidence comes from long standing studies using cross-country data that show the negative effects of corruption on the market value of firms and point to the extent to which high levels of corruption in the public sector have significant influence on the share price of publicly traded companies (Porta, et al. 1998, and Lee and Ng 2006).

For the case of Brazil, in particular, Grossi et al. (2018) find that the corruption scandal involving the company JBS abnormally and negatively affected the stock pricing of Brazilian companies that operate in the American stock market by issuing ADRs). Further, Taniel (2017) show that news involving corrupt practices affected the volatility of the Brazilian stock exchange.

Indeed, a number of cross-country studies point to the negative relationship between corruption and stock market volatility, such as Spyromitros (2020) who analyzed 16 countries, and Jha et al (2019), who find, by using a sample of over 3,000 firms from 31 countries, a positive association between corruption and stock price volatility, and that the effect of country-level corruption is found to be worse for firms with larger asset size. And Zhang (2012) finds a strong correlation between corruption and financial market stability.

On a different dimension of market efficiency, namely stock market pricing efficiency, Chung et al. (2019) analyzed how the quantity of information in corporate disclosures affects the efficiency with which investors incorporate newly acquired information into stock prices. They find empirical support for the benefits of expanded and detailed numerical and textual corporate disclosure, particularly on pricing efficiency. Further, Schay (2020) notes that efficient pricing of risk is predicated on transparency: understanding the complete cash flow history and performance of companies under various oil and gas

¹⁰ See Kaufmann and Kraay (2017).

fiscal systems will allow analysts to benchmark project, country and regional performance, as well as better understand the risk of changes to these regimes.

Further, for the extractives sector, applied specifically to U.S. listed firms, Moses et al. (2018) empirically analyze the United States EITI unilateral release of information on non-tax payments by extractive companies to the US Government to test for market reaction and assess the economic value of such EITI information over the 2013-2016 period. They find that the initial release resulted in a significant trading volume increase and produced highly positive returns in the period immediately surrounding the release date. The authors suggest that the information released had value both at first release and in subsequent releases.

An important additional consideration that particularly nowadays needs to be integrated into the analysis of the benefits of transparency and of market efficiency refers to the reputational risks faced by issuers due to corruption. As mentioned in the outset, issuers in extractives tend to operate in many environments which are opaque and subject to corruption risks. Meaningful disclosures by issuers regarding the payments they make to governments help mitigate such risks via corruption prevention and providing incentives for accountability and transparency by the recipient government. Conversely, maintaining opacity increases the risk of a corruption scandal plaguing an issuer, with the concomitant price pressure resulting from reputational damage, costly and lengthy litigation, and loss of business.¹¹

Worldwide evidence does suggest that excessive regulatory burden is associated with negative outcomes in terms of market efficiency, private sector development. And such excessive regulatory burden can also result in increasing corruption, via the perverse incentives of control over red tape. These were in fact a reason for including the quality of the regulatory framework as one of the six indicators in the Worldwide Governance Indicators project we initiated in the mid-nineties.

Relevant to disclosures in this realm, in our long-standing work on this area long ago we posited a basic tenet regarding the link between transparency requirements and regulatory burden¹²: transparency initiatives can be viewed as a (net) regulatory-*saving* measure. This is because by enabling much broader monitoring, accountability and deterrence -- rather than imposing additional regulatory burden or red tape, it can relieve regulatory burden (Bellver and Kaufmann, 2005). Transparency enables the public at large to monitor and 'audit' government and industry behavior (including on tax payments and receipts, subsidies, etc.), saving on the need for excessive red tape and regulation by government fiat.

Consequently, it is not compelling to argue that transparency provisions increase the actual regulatory burden on an issuer. This approach is lent support by the low compliance estimates provided by companies noted above.

¹¹ The billion dollar bribery scandal that has embroiled Shell and Eni in Nigeria OPL 245 oil fields is one illustrative case study among many.

¹² In addition to the evidence already provided in other submissions regarding the low direct financial cost of disclosure compliance by issuers. In fact for many issuers the cost of compliance may increase with the proposed rule as compared with a rule akin to that in the EU, for instance, since they already report following such directives and would have to report differently.

Undermining Competitiveness among US issuers. Last --but not least, given the importance of this distortion and its relevance for SEC analysis--, we address in this submission, in an evidence-based manner, a specific dimension of *competitiveness* which is highly relevant for industry in the US. Highly relevant is the fact that in previous submissions made during this comment period on the proposed rule, such as by PWYP US (2020), as well as the vast majority of industry comments, among others, point to the absence of evidence of any competitive harm by global and overseas issuers already subject to detailed contract-level disclosures resulting from the EU directives and Canadian legislation.

In this section the focus is on a particular domestic aspect, which can have a distortive effect on competitiveness *among* US issuers if the proposed rule were to stand.

Specifically, two distinctive features of the proposed rule, deviating from norms adopted in other jurisdictions and by EITI, entail the following: first, the ability of companies, under the modified project definition (MPD), to aggregate the payments from multiple contract-level projects in the same major subnational political jurisdiction in their disclosures, rather than disclosing at a contract level, and, second, the imposition of a very high project “not de minimis” threshold which would mean no requirement to report payments for projects with less than US\$750K of payments in a given year.

In addition to the significantly detrimental impact that these twin features of the draft rule would have on effective transparency for real accountability and corruption control purposes, which is the subject of other submissions (Kaimal, 2020), such features in the rule would be anti-competitive across US issuers.

This is because the effect of such an approach would be to create an un-level playing field across different companies, depending on their size (and particularly depending on their size of payments to governments, which is the proxy for size used in the analysis).

De facto three distinct (and differentially treated) group of companies would result from the proposed treatment of disclosures. This emerges clearly from an analysis of a large resource project payment dataset we have conducted for this submission, which I detail below.

At one extreme, small sized/lower paying companies would be exempt from disclosing, due to the high “not de minimis” project threshold (and the proposed exemption for smaller reporting companies). On the other extreme, the very large issuers would be able to avoid effective disclosures to a very large extent: first, due to their ability to aggregate projects, hence avoiding contract-level reporting, and second, thanks to the very large number of projects they are implementing, implying that the number of projects under the high “not de minimis” project threshold is also large.

Consequently, the data analysis clearly suggests that de facto it would then be the middle group, of mid-sized issuers and payers, which would have to disclose the most by far. This is due to their significantly lesser ability to aggregate projects, on the one hand, and the much lower number of projects under the not de minimis threshold – as compared with either the very small or the very large payers/companies.

Based on NRGi’s database of project payments around the world, we simulated the impact of the proposed draft rule, relying on a reasonable assumption on the representativeness of the large sample¹³. Using this project payments database, we were able to simulate the impact of the MPD and

¹³ For details on the large dataset and the methodology used for this analysis see annex Annex 1 below in this submission, as well as the NRGi submission (NRGI (2020) Analysis of the impact of the modified project definition in the 2019 proposed rule for

\$750,000 project “not de minimis” on the most recent payments-to-governments disclosures of 727 companies, reporting on 4,013 projects.¹⁴ The result of these simulations point first to the extent to which de facto opacity, rather than meaningful disclosure, would still result overall. This is because the vast majority of companies would either be able to be exempt from reporting on some or many projects altogether, or at the very least would be permitted to aggregate, thus reporting only partially. Only a minority of firms would have to report at the contract level on most or all of their projects.¹⁵

Specifically, based on this large dataset on companies and projects, we find that out of the 727 companies in the sample, only 171 companies would neither be able to claim a project exemption due to the not de minimis nor be able to aggregate project according to the MPD proposed aggregation rule. In other words, less than 24 percent of the companies would end up being fully transparent and aligned with other jurisdictions. Under the proposed rule, over three-quarter of the firms would not.

A similar pattern to that of the results at the company level emerges from the analysis at the project level. The results with this dataset, which comprises 4013 projects, indicate that in fact 74 percent of the projects at the contract level would either be exempted due to the not de minimis proposed provision, or reporting only on aggregating projects. This means that only about one-quarter of all projects, or 26 percent, would be subject to reporting at the contract level.

Second, the data results suggest the extent to which there would be a differential impact in terms of the requirements to disclose regarding aggregated or contract-level reporting. This is depicted in Figure 2, which points to the differential ability to aggregate or not by the size of the firm (overall payments). The vast majority of large-sized companies would be able to aggregate in at least one instance, and on average all these large ‘aggregating’ firms would be aggregating close to 10 projects, in sharp contrast with medium-sized and smaller firms, where only a fraction would be able to aggregate at all, and even then, for much fewer projects.

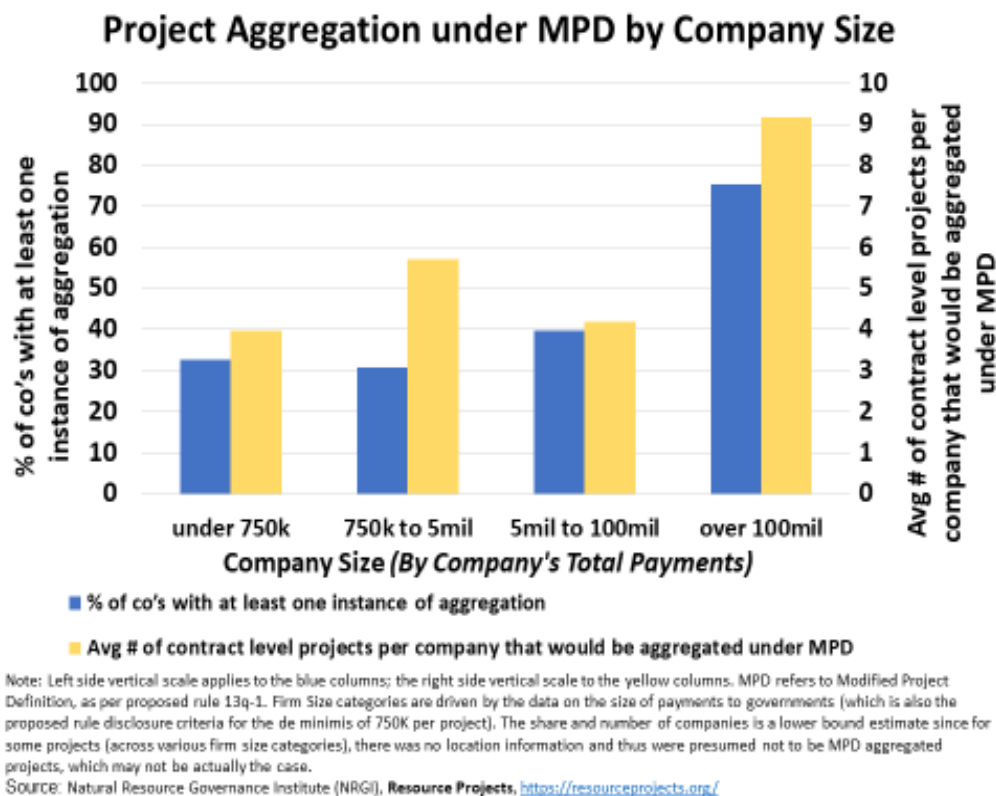
Furthermore, there would also be a highly differential impact on different-sized firms due to the proposed exemption from reporting on projects resulting from the \$750,000 project “not de minimis” threshold. Firms that do not aggregate projects can be exempted from reporting such projects at the contract level if their project payments is less than US\$750,000; as we see in Figure 3a, for that (non-aggregating) sample the overwhelming use of exemptions would be for very small and very large firms, with sharply less ability of medium-sized firms to be exempted.

Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act) where related analysis with this dataset was also carried out.

¹⁴ See Annex 1 for more information on the rationale for the assumption that the levels of aggregation that would occur and number of projects that would meet the \$750,000 “not de minimis” threshold in existing payments-to-governments reports would be similarly reflected in the disclosures under Dodd-Frank Section 1504.

¹⁵ See also the related analysis of NRGi (2020) on this aspect.

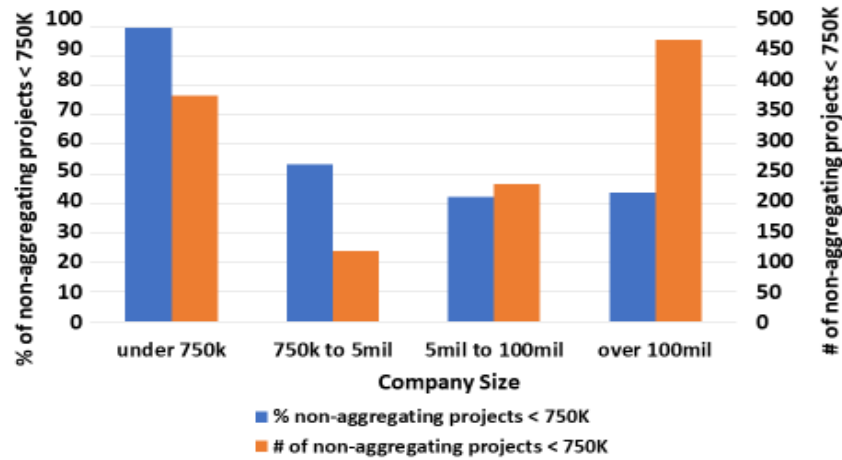
Figure 2:



Additionally, those firms that aggregate can also be exempted insofar as the sum of payments from their aggregated project bundle doesn't exceed US\$ 750,000. The very small firms would benefit the most in this 'aggregating' subset of not de minimis exemptions, due to the small size of their projects. Yet the very large firms (by size of payment) would still be able to benefit from it as well, and more so than the medium-sized firms, as depicted in Figure 3b.

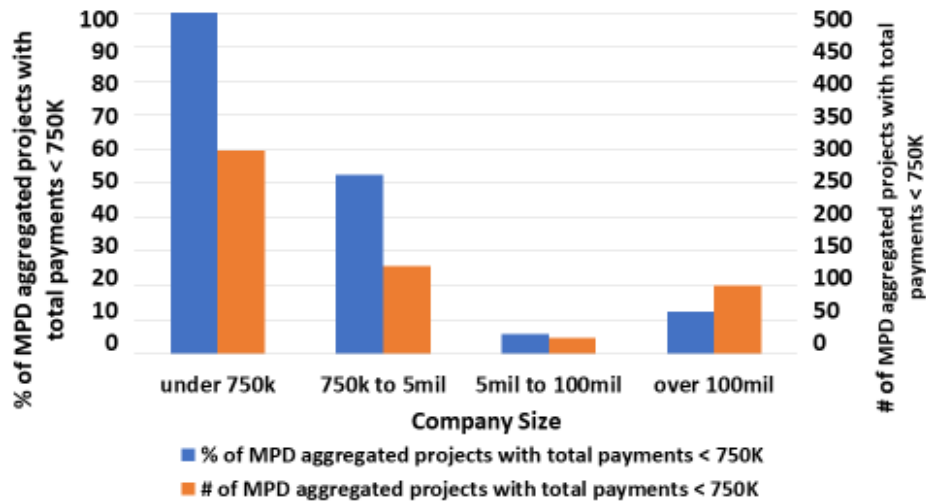
Overall, integrating the data results on the de 'not de minimis' exemption proposal, as per both figures 3a and 3b, it does emerge that the exemption would disproportionately apply not just to very small firms but also to very large ones, in contrast with medium-sized firms, where the application of such exemption would be far more limited.

Figure 3a: Share and Number of non-aggregating projects with total payments of Less than US\$750,000 by Company Size



Note: Left side vertical scale applies to the blue columns, referring to the *share* of projects of less than US\$750,000 in each firm size category; the right side vertical scale applies to the orange columns, referring to the *overall number* of projects of less than US\$750K in each firm size category. The total amount of payments made the firm is the proxy used for allocating firms to each size category (aligned with the proposed rule disclosure criteria for the de minimis of 750K per project).
Source: Natural Resource Governance Institute (NRGI), Resource Projects, <https://resourceprojects.org/>

Figure 3b: Share and Number of projects that would aggregate under MPD with total payments of less than US\$750,000 by Company Size



Note: Left side vertical scale applies to the blue columns, referring to the *share* of projects of less than US\$750,000 in each firm size category; the right side vertical scale applies to the orange columns, referring to the *overall number* of projects of less than US\$750K in each firm size category. MPD refers to Modified Project Definition, as per proposed rule 13q-1. The total amount of payments made the firm is the proxy used for allocating firms to each size category (aligned with the proposed rule disclosure criteria for the de minimis of 750K per project).
Source: Natural Resource Governance Institute (NRGI), Resource Projects, <https://resourceprojects.org/>

As mentioned at the outset, the combined effect of the aggregation and “not de minimis” exemptions in the proposed rule is noteworthy, since it would result in either no reporting at all or aggregated reporting for the vast majority of their projects – three-quarters of them in fact--, effectively undermining transparency regarding such majority of firms. Only 24 percent of projects would be subject to contract level reporting.

Importantly, this would not be applied evenly across different firm size. In fact, very large firms would report at the contract project level for only a tiny fraction of their projects. Thanks to the possible application of the proposed rule, where many firms can either aggregate projects or have them exempted from reporting, about 90 percent of these very large companies (payment size exceeding US\$100m.) would not be subject to disclosure at the contract level in at least some of their projects. This contrasts mid-sized firms, where less than 60 percent would not be subject to disclosure at the contract level for some of their projects.

In sum, in addition to general finding that the vast majority of companies and projects would not be subject to full disclosure at the contract level of their projects, there would be an insidious discriminatory effect of the proposed rules, working against levelling the playing field on transparency requirements. This is the case due to the disproportional effect in enabling lack of transparency to large firms (as well as the very small), contrasting the impact of the rule on more mid-sized firms.

Conclusion

The evidence at hand points to potentially large benefits from implementing a rule consistent with meaningful transparency provisions. Specifically, a rule where project level reporting would take place at the disaggregated contract level and with a low “not de minimis” threshold, contrasting the very limited benefits and potential distortionary costs in terms of competitiveness from a rule which may allow aggregated disclosures and exempt a large number of projects with high de minimis.

While the benefits from meaningful disclosures would be very high, the additional costs of reporting at a disaggregated contract level and with limited exceptions would be rather low. In fact, such costs in many instances are likely to be lower than reporting in a unique SEC-specific aggregated manner not recognized in any other reporting framework, as per the recently proposed rule. Hence, taking such cost and benefits considerations into account, the potential rate of return of a rule that mandated meaningful transparency is extremely high.

Such oversized benefit-cost ratio favoring a rule with meaningful disclosures is likely to be magnified even further when market efficiency and competitiveness considerations are also integrated into the analysis. On the latter, we provided a data analysis suggesting the extent to which the proposed rule would undermine a level playing field among US-listed issuers, and thus be anti-competitive in a particular manner – one which would unduly benefit the large issuers/payers, to the detriment of mid-sized payers.

In conclusion, based on the evidence in the literature, previous research, as well as further research carried out for this submission, I would urge the Commission to ensure the final rule aligns with the contract-level project reporting requirements as laid out in the EU Accounting Directive, Canada's Extractive Sector Transparency Measures Act (ESTMA) and EITI and to remove the \$750,000 project “not de minimis” threshold proposed in the 2019 Proposed Rule.

Annex 1: Methodology and Project Dataset used in the analysis

Project payments dataset

The data used in this analysis comes primarily from the NRGi's open data portal for payments-to-governments data, resourceprojects.org. This portal, which began in 2017, seeks to identify, collect and standardize data from all payments-to-governments reports from companies disclosing such payments under laws in the European Union, the United Kingdom, Canada and Norway. The data, freely available on the site, is collected directly from corporate reporting, and then cleaned and standardized before publication. Cleaning and standardization on resourceprojects.org allows the data to be maximally comparable between companies and years.

In addition to what is available for direct download on resourceprojects.org, NRGi has categorized projects according to their extractive type and collected location data based on open source research.

If a public reference to a project can be found, open source research was used to identify an exact or approximate location for it, recording latitude and longitude coordinates. In most cases, the locations are approximated from public documents from a mining or petroleum company that include a map, or from company websites. Less often, exact coordinates can be found in a company document. Other times, industry-specific publications will have stories or public databases, including location references. For a limited number of countries, such as the UK and Norway, detailed public cadasters for extractive projects are available and align with project names reported, allowing for the collection of highly accurate locations. No private databases were used to collect location data on projects.

NRGI was able to collect location data for 68 percent of disclosed projects. For projects without accurate location data it was not possible to place them in the correct subnational jurisdiction. For this analysis, these un-locatable projects are all considered to be located in their own subnational jurisdiction, distinct from all other locatable and un-locatable projects. This means a country or company with a high number of un-located projects will not show significant amounts of regional project aggregation. These projects are not removed from this analysis; they are present in both original and aggregated figures, always representing a single company-region project. In reality, a project must have a location. Therefore, it is likely that some of these projects do in fact fall in the same subnational jurisdiction as another reported by the same company and that the estimates for project aggregation under the modified project definition in this analysis represent a floor, rather than a ceiling.

Examination of the companies for which project locations could not be identified indicate no disproportionate grouping by company size. As a result, it is reasonable to assume that the findings in this analysis based on company size are not strongly impacted by these missing project locations. These un-locatable projects were kept in the analysis presented so as to not overstate the effects of the subnational aggregation.

Simulating project reporting under the modified project definition

The analysis presented depends on identifying in which major subnational political jurisdiction a disclosed project is physically located. In particular, we looked to identify regions referenced by subnational ISO 3166-2 codes, which are specified in the proposed rule as an acceptable level of project aggregation.

As elaborated above, we have latitude and longitude coordinates available for the majority of projects disclosed by companies already reporting payments. In order to identify in which major subnational political jurisdiction these coordinates are located, we used the full-world geospatial shapefile dataset available from GADM.org, the Database of Global Administrative Areas. This dataset is freely available for academic and non-commercial use. Using this method, we are able to identify the subnational region or nearest region for every project location we have in our dataset.

The 2019 proposed rule states that if a project is offshore, “the proposed rules would require an issuer to disclose that it is offshore and the nearest major subnational political jurisdiction.” To determine which major subnational political jurisdiction is nearest an offshore project, we first calculate the great circle distance between the coordinate and each subnational geometry in the country dataset.

We then proceed to test how many projects reported by the same company fall within a major subnational political jurisdiction with one or more other projects reported by the same company. For this analysis, we selected the data from only the most recent payments-to governments report from each company available on resourceprojects.org as of March, 2020. We made this decision in order not to inflate the number of project aggregations, since companies may sell or end a project from one fiscal year to the next; we are only showing what is disclosed in a single company report. This also means that our dataset covers projects reported in different years, as companies disclose reports according to their fiscal years, which vary. As of March, 2020, most companies’ latest disclosure covers the 2018 fiscal year.

Assumptions

The analysis presented in this study draws on existing payments to government’s disclosures resulting from mandatory disclosure regulations in EU, UK, Canada and Norway. As a result this study rests on the assumption that the levels of aggregation that would occur and number of projects that would meet the \$750,000 “not de minimis” threshold in existing payments-to-governments reports would be similarly reflected in the disclosures under Dodd-Frank Section 1504. We believe that this assumption is reasonable for three reasons.

The first is that with 727 companies in the dataset used for this analysis, it represents a large and diverse sample set. The companies disclosing payments-to-governments reports in the EU, UK, Canada and Norway include many of the world’s largest international oil companies and mining companies, national oil companies as well as medium sized and smaller extractive companies. The second reason we believe this assumption is reasonable is that, as a result of dual-listing, many of the companies that would be required to disclose under the Dodd-Frank Section 1504 are already reporting under existing payments-to-governments regulations and thus are included in the dataset used for this analysis.

Third, major subsidiaries of US issuers such as Chevron Corp, ConocoPhillips and ExxonMobil currently report under payments to governments laws in Europe and Canada and associated payment and project data is included in our analysis. Similarly, many of this exclusively US listed issuers will soon be required to disclose contract-level project payments on their operations in EITI implementing countries following the adoption of the EITI 2019 Standard. (EITI, 2019) A comment to the SEC by ONE found that ‘at least 45 US-only issuers operate in one or more of the 53 EITI implementing countries, or have published payments under mandatory payment disclosure laws’ (Kraus, 2020).

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