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March 8, 2016

Brent J. Fields  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Rulemaking under Section 13(q) of the Securities Exchange Act of 1934,  
File No. S7-25-15

Dear Secretary Fields:

The American Petroleum Institute (“API”) is pleased to provide supplemental comments addressing the Commission’s proposed rule to implement Section 13(q) of the Securities Exchange Act of 1934 (“Section 1504”). We write to specifically highlight for the Commission’s attention certain aspects of the policy proposals submitted by Publish What You Pay (“PWYP”) in its February 16 comment letter. Those proposals, if adopted by the Commission in its final rule, would undermine Section 1504’s central purpose of informing citizens of government revenues, unreasonably burden companies that develop natural resources, and weaken the final rule’s ability to withstand a legal challenge.

PWYP makes clear on its website that it seeks to insert itself in the contract negotiation and oversight process between natural resource development companies and sovereign nations: “Whether through amending national laws around natural resource extraction or expanding the remit of EITI, PWYP members campaign for an open and competitive bidding process and for contracts to be made accessible to the public.”<sup>1</sup> Implicitly recognizing that Section 1504 cannot possibly be interpreted to require the disclosure of actual government contracts, PWYP’s February 16 comment letter seeks to persuade the Commission to require the disclosure of key contractual terms by other means.

PWYP starts by seeking to revise the provision in the proposed rule that would allow companies to aggregate operationally and geographically interconnected contractual agreements

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<sup>1</sup> Publish What You Pay, Contract Transparency, <http://www.publishwhatyoupay.org/our-campaigns/contract-transparency/> (last visited Mar. 4, 2016).

as a single “project.” PWYP seeks to require instead that two or more agreements have “substantially similar terms” and be “integrated” in order to qualify as a single “project.”<sup>2</sup> PWYP would also require companies to identify the geographic location of the project as it was described in the contract giving rise to the project, including geographical coordinates defined by latitude, longitude, or altitude.<sup>3</sup> Together with other publicly-available information, these proposed revisions would allow activist NGOs like PWYP to determine key contractual terms and insinuate themselves into the negotiation and performance of resource development contracts.

Certain statements in the rule’s proposing release appear to indicate the Commission’s support for PWYP’s proposals. For example, the Commission approvingly cited a PWYP statement that “if revenue data is not disaggregated by company, it would not aid [PWYP’s] understanding of the deals negotiated, and variations in payments made, by different companies.”<sup>4</sup> The Commission also noted that contract-specific payment disclosures will allow citizens to conduct a cost-benefit analysis of whether the project is a worthwhile commercial endeavor.<sup>5</sup>

These proposals and considerations go far beyond Section 1504’s purpose of informing citizens of government revenues. Under the banner of transparency, groups like PWYP are seeking to increase the informational advantage and bargaining power of foreign sovereign nations at the expense of U.S. public companies and their shareholders. Such an outcome would be inconsistent not only with Section 1504, but also with the Commission’s overarching legal obligation to promote efficiency, competition, and capital formation.<sup>6</sup> By compelling broad disclosures to the public and imposing undue burdens on issuers, a final rule such as the one envisioned by PWYP would also violate the First Amendment to the U.S. Constitution because it would not be narrowly tailored to promote a compelling governmental interest.

Section 1504’s statutory objectives are best promoted by providing citizens with clear, usable, understandable, and accessible information about *government revenues*. Rather than the needlessly and unreasonably granular contract disclosures proposed by PWYP, API continues to call on the Commission to adopt API’s proposed model of payment reporting (“API Model”). As described in more detail in API’s prior comment letters, the API Model would allow companies to confidentially submit their payment reports to the Commission, which would then compile the reports and publicly report aggregate government revenues by subnational jurisdiction, government payee, payment type, resource type, and method of extraction. Under the API Model, the Commission’s compilation will provide ordinary citizens with clear, organized, and meaningful information about government revenues for natural resource

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<sup>2</sup> PWYP Comment Letter (“PWYP Letter”) at 34-35 (Feb. 16, 2016).

<sup>3</sup> *Id.* at 67-68.

<sup>4</sup> Notice of Proposed Rulemaking, Disclosure of Payments by Resource Extraction Issuers, 80 Fed. Reg. 80,058, 80,067 n.89 (Dec. 23, 2015).

<sup>5</sup> *Id.* at 80,067.

<sup>6</sup> 15 U.S.C. §§ 78c(f), 78w(a)(2); *see also* *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *Am. Equity Investment Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010).

development occurring in their home state, province, or region. We encourage the Commission and all interested commenters to view and interact with the compilation that the API Model would produce at <http://publications.api.org/API1504/>.

PWYP also seeks to expand the reach of Section 1504 in other problematic ways that are inconsistent with Section 1504:

- PWYP proposes broadening the definition of “export” to include “trading-related payments when an issuer makes a payment for the purchase of oil, natural gas, or minerals sold by a government (including a state-owned company).”<sup>7</sup> This proposal would inappropriately expand the reach of Section 1504 beyond payments associated with in-country extractive development and require the disclosure of payments made only for the purchase of a country’s crude oil or other products. Expanding the definition of export to include such trading-related payments would substantially increase the cost of reporting for no apparent benefit. PWYP’s proposed approach would also result in “double counting” of government revenues, given that the government’s share of production entitlements is already a required payment type under Section 1504.
- PWYP is incorrect in stating that “the ESTMA in Canada, and the EU Directives all require disclosure of covered payments on behalf of a resource extraction issuer.”<sup>8</sup> As will be made clearer in industry interpretive guidance to be released in the European Union (“EU”) in the coming months, the EU Directive requires only the operator of a joint venture to report the operator’s payment related to a joint venture.
- PWYP seeks to expand the definition of “control” to include entities over which an issuer has “significant influence.” PWYP attempts to justify this proposed expansion on the ground that companies “may be able to evade payment reporting by structuring the [joint venture] arrangement so that it is not controlled by any of the participants that would be required to report.”<sup>9</sup> PWYP provides no support for this prediction and fails to recognize that even under PWYP’s proposed expansion, joint venture participants who are not under the Commission’s jurisdiction will not be required to report their payments. This reporting gap is inherent in the nature of Section 1504 itself, which applies only to companies subject to the Commission’s jurisdiction.
- PWYP’s support for the Commission’s suggestion that the statutory requirement for a “compilation” of payment information can be satisfied by the availability of hundreds of separate company reports on EDGAR is without merit. The statutory

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<sup>7</sup> PWYP Letter at 7.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.* at 24.

text of Section 1504 is clear: the Commission “shall make available online, to the public, a compilation” of the payment reports “to the extent practicable.”<sup>10</sup> Hundreds of disparate individual company payment reports available on EDGAR do not constitute “a compilation.” Nor does the Commission’s passive role satisfy the statute’s command that *the Commission* make the compilation “available to the public.”

In all of these respects, PWYP’s proposals defy Section 1504 and its purpose. API encourages the Commission to reject PWYP’s proposals and to adopt API’s Model. We appreciate the Commission’s consideration of these supplemental comments. Please direct any questions to Peter Tolsdorf, Senior Counsel, at [REDACTED].

Sincerely,

A handwritten signature in black ink, appearing to read 'Stacy Linden', written in a cursive style.

Stacy Linden  
Vice President, General Counsel,  
& Corporate Secretary

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<sup>10</sup> 15 U.S.C. § 78m(q)(3)(A).