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March 8, 2016

By E-Mail:
Chair Mary Jo White
Commissioner Michael Piwowar
Commissioner Kara Stein

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20459-1090

Re: File No. S7-25-15

Dear Chair and Commissioners:

We write to urge you to finalize the proposed Rule 13q-1 implementing Section 13(q) of the Securities Exchange Act of 1934 ("Section 13(q)") and to exercise your discretion to reject criticisms of the proposed rule that lack any evidentiary backing. We fully support the recommendations made in a February 16, 2016 comment submitted by Publish What You Pay – United States ("PWYP-US").[1]

About Global Witness

Global Witness is an independent non-profit organization dedicated to ending the environmental and human rights abuses that are driven by the exploitation of natural resources and corruption in the global political and economic system. We carry out hard-hitting investigations to expose these abuses, and advocate for change. We were a strong supporter of Congressional enactment of Section 13(q) and were closely involved in the subsequent rulemaking. We also are an investor holding stock in several issuers subject to Section 13(q). We have played a leading role in developing and implementing international transparency and natural resource governance mechanisms, including the Kimberley Process rough diamond certification scheme, the Extractive Industries Transparency Initiative ("EITI"), and the Publish What You Pay ("PWYP") campaign, which we conceived and co-launched in 2002, now a

[1] Letter from PWYP-US (Feb. 16, 2016).

global coalition of over 800 civil society organizations in more than 70 countries. We have played a leading role in EITI and have served on the international board since its creation in June 2003, only leaving the board in February 2016. We continue to be a member of the national multi-stakeholder groups in both the US EITI and the UK EITI.

I. Section 13(q) Is Intended to Deter and Improve Accountability for Secret and Corrupt Natural Resource Deals and Goes Far Beyond Only Providing Aggregate Payments per Country

Commenters arguing for a weak rule that would only require aggregate payment reporting have misunderstood the purpose and the policy behind this law. Their assumption is that the law's only concern is "to enable citizens to hold governments more accountable for the revenues they receive", and consequently "all that is needed is a clear picture of *total* revenues received by host governments" (emphasis added).[2] This bears no relationship to the actual needs and interests of users. To take one example given by the American Petroleum Institute ("API"), comparing onshore oil payments received by Nigeria with offshore oil payments received by Russia may be possible to do using only the limited data that API believes should be made public; however, such a comparison is not of interest to public users of these disclosures.[3] There is no need to speculate about how users will use this information, thanks to numerous letters the Commission received from users describing in detail why they are interested in payment information that is disaggregated by company and by project, and exactly how they are intending and preparing to use it.[4] The Commission has already reflected this evidence in its proposing release, and API's unfounded and incorrect assumptions about users' needs are not a sufficient reason to revisit it.

[2] Letter from Exxon (Feb. 16, 2016), at 7. *See also* letter from API (Feb. 16, 2016), at 6 ("The Commission's purpose of enabling people to hold their governments accountable for the revenues generated from resource development is achieved so long as citizens know the amount of money the government receives, not the companies that make each individual payment.") and p. 8 ("All the public actually needs to know—and all the statute requires the Commission to provide—is the total amount of money the government received from resource-extraction issuers.").

[3] Letter from API (Feb. 16, 2016), at 32.

[4] Letters from Andrés Hernández, Civil Society Roundtable for Transparency in the Extractive Sector in Colombia (Nov. 13, 2015); Rebecca Adamson, Founder and President, First Peoples Worldwide, et al. (Oct. 13, 2015); Ali Neema, Coordinator, Iraqi Transparency Alliance for Extractive Industries (Sept. 28, 2015); Anupama Jha (Jun. 15, 2015); Cameroon Coalition of Publish What You Pay (Jun. 8, 2015); Irene Ssekyana, Chairperson, Civil Society Coalition on Oil & Gas in Uganda (May 18, 2015); Maryati Abdullah, National Coordinator, Publish What You Pay, Indonesia (Mar. 11, 2015); Gilbert Makore, Coordinator, Publish What You Pay Zimbabwe (Feb. 20, 2015); Cecilia Mattia, Coordinator, National Advocacy Coalition on Extractives, Freetown, Sierra Leone (Feb. 10, 2015); Elias Isaac, Country Director, Open Society Initiative for Southern Africa-Angola (Jan. 29, 2015).

Certain industry commenters justify their preference for breaking down payments by political levels of government rather than by project, by arguing that the only intended goal of Section 13(q) is political accountability in a broad sense.[5] That could not be the case, given the plain text of the law and its purpose. The statutory text clearly requires companies to electronically tag disclosed payments with "the project of the resource extraction issuer to which the payments relate" (emphasis added).[6] API's proposal completely ignores the plain language of the statutory text, and offers no real definition of "project." There is certainly no confusion concerning API's proposal, contrary to what they assert. Any misunderstanding is limited to a narrow factual question of whether API's reference to "Niger River Delta" referred to a state or to the larger region of Nigeria; this misunderstanding is unrelated to the overall substantive thrust of API's proposal.[7] Clearly, API is proposing to make payments public only at the level of political subdivision, rather than what Section 13(q) and similar laws in other jurisdictions all require: project-level payment reporting. API's wishful reading of "project" as "political subdivision" is not reasonable. As API is surely aware, the term "project" is distinct from and unrelated to "political subdivision" in the context of natural resource extraction. If Congress had intended to only require reporting disaggregated by political subdivision, they would have used a term other than "project." Nor did Congress intend this detailed information to be available only to the Commission. Payments identified by project, rather than only by country or political subdivision, were meant to be available to public users, in order to satisfy a number of key government interests: first, to deter and improve accountability for secret and corrupt natural resource deals; second, to better inform interested investors; and third, to support and augment the international transparency regime.

Anti-corruption. Deterring corruption was unquestionably a central driving purpose behind both Section 13(q) and EITI.[8] Certain industry commenters exhibit a surprisingly narrow understanding of anti-corruption policies, suggesting that such policies are concerned only with government accountability.[9] But it is well-known that corruption is necessarily a two-way street, involving both demand (by governments) as well as supply (by commercial actors); indeed, from our role in the establishment of the EITI, we can attest that it was set up to address both of these aspects.[10] Accountability of commercial actors is as important as the accountability of

[5] Letter from Exxon (Feb. 16, 2016), at 9.

[6] 15 U.S.C 78m(q)(2)(D)(ii)(VI).

[7] Letter from API (Feb. 16, 2016), at 35; letter from Exxon (Feb. 16, 2016), at 10.

[8] *See* our letter dated Dec. 18, 2013, at 19-20.

[9] Letter from Exxon (Feb. 16, 2016), at 10.

[10] From its inception, EITI was "built on the notion of equal transparency from the governments and the companies." https://eiti.org/eiti/history.

government actors, as is evident from corporate accountability mechanisms such as the Foreign Corrupt Practices Act ("FCPA"), which the Commission is tasked with enforcing against issuers. In light of the Commission's longstanding leading role in fostering transparency and fighting corruption, there can be no question that the Congress appropriately delegated Section 13(q) to the Commission.[11] The Commission's own FCPA enforcement record shows that the risk of corruption is heightened in the natural resource sector, which is why Section 13(q) is appropriately focused on resource extraction issuers rather than all issuers, as certain commenters have queried.[12]

Contrary to arguments by certain commenters, the FCPA is not wholly unrelated to Section 13(q).[13] It is true that Section 13(q) applies to payments made to governments while the FCPA applies to payments made to government officials, but these categories can be closely related, as our investigations into oil corruption have uncovered. For example, in 2011, US-registered issuers Shell and Eni paid a total of $1.1 billion for a lucrative Nigerian off-shore oil block known as OPL245. Had the Section 13(q) rule requiring disclosure of project-level payments been in place, this payment would have been reportable because it was made to the Nigerian government. The government did not keep the payment but acted as a conduit for directing most of that money to the oil block's original owner, a shadowy Nigerian company owned by a former Nigerian oil minister and convicted money launderer Dan Etete.[14] Because the payment for this oil block ultimately benefited a public official, it has prompted anti-corruption investigations in several countries including the United Kingdom, Italy and Nigeria.[15] This example illustrates how payments subject to Section 13(q) could raise questions under relevant anti-corruption laws. In addition, transparency is expected to have significant deterrent benefits, discouraging companies from taking the risk of going forward with questionable deals in the future.

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[11] *See* our letter dated Dec. 18, 2013, at 2-3.

[12] A recent study found that 27% of all prosecuted FCPA cases between 1982 and 2012 involved payments by firms working in the oil and gas sectors of foreign countries. A majority of these cases have been brought since 2007. Letter from Prof. Michael L. Ross, Dep't of Political Science, UCLA (May 21, 2014). *Cf.* letters from Exxon, p. 9, n. 10 and from API (April 15, 2014), at 8.

[13] Letter from Exxon (Feb. 16, 2016) at 10, n. 15; letter from API (Feb. 16, 2016) at 7, 23.

[14] *Energy Venture Partners Ltd. v. Malabu Oil & Gas Ltd*, [2013] EWHC 2118 (Comm.). This case was brought by a middleman who alleged that Etete failed to pay him for work he had done in obtaining a buyer for OPL245; Shell and Eni were not party to these proceedings. *See also Safe sex in Nigeria*, The ECONOMIST (June 15, 2013), *available at* http://www.economist.com/news/business/21579469-court-documents-shed-light-manoeuvrings-shell-and-eni-win-huge-nigerian-oil-block.

[15] Global Witness, *Shell and Eni's Misadventures in Nigeria: Shell and Eni and Risk of Losing Enormous Oil Block Acquired in Corrupt Deal* (Nov. 2015), *available at* https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/shell-and-enis-misadventures-nigeria

Finally, we wish to take this opportunity to address concerns that contract-based payment disclosures would bury the public in an avalanche of irrelevant and useless data. Based on our twenty years of experience investigating corruption in the natural resource sector, we have no doubt that this information will be highly relevant and useful, and in fact necessary, in our work, as well as to other anti-corruption investigators and activists, investors and other public users.[16] We are already working together with groups around the world to analyze the data that will be reported pursuant to European transparency laws in the coming months. The fact that the data will be tagged in XBRL ensures that it will be useful and easily analyzable.

Informing and protecting investors. The intended public users of the information disclosed pursuant to Section 13(q) are not limited to civil society groups, but include investors as a key group.[17] Congress clearly understood that this information matters to investors. As Senator Cardin, one of the law's principal authors, noted prior to the enactment of Section 13(q), "The investor has a right to know about the payments. Secrecy of payments carries real bottom-line risks for investors."[18] Legislators have reasserted to the Commission and in court filings that they intended for Section 13(q) to inform investors about the commercial, political, and legal risks companies may face.[19] Recent letters from twelve sitting and three retired Senators remind the Commission that "one of the primary goals of Section 1504 is to support and protect investors [….] it is crucial that the Commission recognize and acknowledge their significant interests in the final rule."[20]

The importance of this rule to investors is underscored by the unprecedented number of investor letters that have been submitted in this rulemaking, representing nearly $10 trillion in assets under management, which the Commission cannot ignore.[21] The Commission should also bear in mind that the interests of investors cannot be equated with the interests of issuers, and

[16] *See* n. 4 above.

[17] *Cf.* letter from Exxon (Feb. 16, 2016) at 8.

[18] 156 Cong. Reg. S3316 (May 6, 2010).

[19] Br. for Representatives Edward J. Markey, Maxine Waters, Eliot l. Engel, Jim McDermott, Gregory W. Meeks, Betty McCollum, Jim Moran, Earl Blumenauer, André Carson, Sam Farr, Peter Welch, and Barbara J. Lee as Amici Curiae Supporting Respondent at 12, 15, 16, *API v. SEC*, No. 12-1398 (D.C. Cir. Jan 16, 2013); Br. of United States Senator Benjamin Cardin, Former Senator Richard Lugar, and United States Senator Carl Levin as Amici Curiae in Support of Respondent at 2, *API v. SEC*, No. 12-1398 (D.C. Cir. Jan. 17, 2013).

[20] Letters from Senators (Ret.) Richard G. Lugar, Carl Levin and Christopher J. Dodd (Feb. 4, 2016) and from Senators Benjamin L. Cardin, Patrick Leahy, Richard J. Durbin, Sherrod Brown, Elizabeth Warren, Tammy Baldwin, Edward J. Markey, Christopher A. Coons, Jeanne Shaheen, Sheldon Whitehouse, Robert Menendez and Jeffrey A. Merkley (Feb. 5, 2016).

[21] Letter from PWYP-US (Feb. 16, 2016), Appendix B.

therefore, issuers cannot be assumed to speak on behalf of investors, including in particular on questions of deterring corruption.[22] A strong Section 13(q) rule will help to protect investors from corruption risks, such as the OPL245 oil deal described above.

Augmenting EITI. Industry commenters opposed to the proposed rule cite EITI as a model for the Commission to follow. They ignore that one aspect of the Congressional purpose behind Section 13(q) was to complement and build on the international standard set by EITI, because Congress was "[u]nsatisfied with the EITI regime alone" as the District Court pointed out.[23] Given that the EITI has always mandated significantly more transparency than merely reporting national, or even subnational, government totals (as API is proposing here), Congress clearly intended to go beyond what was already available by mandating public project-level disclosure. For more detail on how Section 13(q) relates to EITI, see Part V below.

II. Disclosure of Uncontroversial Financial Information Is Not Inhibited by the First Amendment

Arguments that public disclosures under the proposed rule violate the First Amendment have no basis in either law or fact: they rely on a misinterpretation of Congressional purpose, a legal mischaracterization of the disclosed information as political speech, and they ignore the abundant evidence on the record that transparency brings clear anti-corruption and economic growth benefits.[24]

In enacting Section 13(q), Congress intended to deter and improve accountability for secret and corrupt natural resource deals, as discussed above. This was Congress' goal. It was not, as API suggests without basis or citation, "to further political debate."[25] Indeed, industry objections to this rule have been focused not on the political offensiveness, but rather on the alleged commercial sensitivity, of the disclosed payment information. No court would place the purely factual financial information that will be published in these disclosures in the same constitutional category as speech such as the Pledge of Allegiance, compelled statement of which

[22] *See* Letter from Susan Rose-Ackerman, Henry R. Luce Professor of Jurisprudence (Law and Political Science), Yale University (Mar. 28, 2014).

[23] *American Petroleum Institute v. SEC*, 953 F.Supp.2d 5, 9 (D.D.C. 2013). *See also* 156 Cong. Rec. S3816 (May 17, 2010) (Statement of Senator Lugar) ("This domestic action will complement multilateral transparency efforts such as the EITI […]").

[24] Letter from PWYP-US (Mar. 14, 2014) at 5-12.

[25] Letter from API (Feb. 16, 2016) at 10.

may offend the speaker's moral, political or religious values.[26] Nor is the disclosure of financial information here "inextricably intertwined with [issuers'] otherwise fully protected speech."[27] Here, no companies are disputing the factual accuracy of these disclosures, or suggesting that the disclosures are repugnant to their moral or religious values – in fact, they insist that they share and champion the values of transparency and accountability.[28] That certain members of the public might use the disclosed payment information for their speech, including their own political speech, does not make the disclosures themselves political speech, nor is it sufficient to characterize it as controversial commercial speech.[29] Were this not the case, routine disclosures required by the Commission and other agencies would be open to constitutional challenges.[30]

Nothing requires the Commission to give any weight to these misguided arguments when it exercises its discretion to construe and implement this statute.[31]

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[26] *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943). *See also Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state could not require that vehicle license plates display the state motto because the motto offended moral and religious convictions).

[27] *Riley v. North Carolina Federation of Blind*, 487 U.S. 781, 796 (1988).

[28] Letters from Exxon (Feb. 16, 2016) and Chevron (Feb. 16, 2016). *Cf. Nat'l Ass'n of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) (plaintiff successfully argued that "not found to be conflict-free" product descriptions were a "scarlet letter" that compelled issuers "to confess blood on their hands").

[29] In fact, the Supreme Court has upheld disclosure requirements precisely *because* the disclosed information might cause controversy. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 370 (2010) (upholding disclosure requirements because they would allow "citizens [to] see whether elected officials are in the pocket of so-called moneyed interests" (internal citations omitted)).

[30] Numerous securities regulations require disclosure of facts that may provoke controversy without themselves being controversial speech, for example: "the chairman of our board was convicted of fraud," *cf.* 17 C.F.R. 229.401(f)(2); "the government has opened a criminal investigation into our company," *cf.* 17 C.F.R. 229.103.

[31] In its letter, API misconstrues the doctrine of constitutional avoidance, which does not require the Commission to construe the statute against full public disclosure. This doctrine of judicial self-restraint applies only to a court's interpretation of a statute or regulations, and in no way limits the Commission's wide discretion in deciding how best to implement this statute. "Constitutionally timid administration both compromises faithful agency and potentially usurps the role of the judiciary in harmonizing congressional power and constitutional command." Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 508 (2005). *Cf.* letter from API (Feb. 16, 2016) at 2, 10, 13.

III. Concerns About Costs Are Exaggerated and Unsupported

The record before the Commission is clear about the significant benefits of this rule, even if they are difficult to quantify.[32] While costs are much easier to quantify than benefits, the record before the Commission is surprisingly sparse in quantified costs estimates. We commissioned the only evidentiary submission that provides a quantified estimate of compliance costs.[33] This estimate shows that most of the compliance cost estimates provided by certain issuers during the previous rulemaking are not reasonable.[34] None of the commenters that have continued to raise concerns about the costs of complying with this rule have submitted any concrete cost estimates in this rulemaking. When the UK implementing agency faced a similar situation, they rejected cost arguments made by the industry that were "unusable" due to lack of justification.[35] Similarly, nothing in administrative law requires the Commission to take into account claims about costs that are not backed by any evidence. We urge the Commission to use its discretion to reject such unsupported arguments and to exclude them from its cost-benefit analysis.

This applies not only to compliance costs but also to costs arising out of allegedly losing competitive advantage to unlisted companies, or due to secrecy laws or contractual prohibitions. There is no merit to the claim that US companies would lose out to unlisted state companies as a result of this rule. In fact, most of the largest state-owned companies are listed on US and/or European stock exchanges and would therefore be subject to the same rules as other US and European issuers. This includes, among many others, Russian oil giants Gazprom and Rosneft (both listed on the London Stock Exchange and therefore subject to the EU Transparency Directive); Brazilian state oil company Petrobras (listed on the New York Stock Exchange ("NYSE") and an active participant in both the current and the previous Section 13(q) rulemaking)[36]; as well as all three major Chinese state-owned oil companies, all of which have shares listed on the NYSE: the China National Offshore Oil Corporation, PetroChina (the

[32] Letter from PWYP-US (Mar. 14, 2014) at 5-12.

[33] Letter from Claigan Environmental (Feb. 16, 2016).

[34] *Id.*

[35] UK Dep't for Business, Innovation and Skills, *UK implementation of the EU Accounting Directive: Chapter 10: extractive industries reporting – impact assessment* (March 2014), at 10, para. 36, *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/298603/bis-14-669-impact-assessment-consultation-on-the-uk-implementation-of-the-eu-accounting-directive.pdf.

[36] Petrobras has commented in the current rulemaking (Feb. 16, 2016), as well as in the previous one, (Feb. 21, 2011).

principal holding company of CNPC) and Sinopec. Sinopec has confirmed to us in writing that they were prepared to incorporate Section 13(q) disclosures in their 2012 annual report.[37]

Nor is there any persuasive evidence of the existence of secrecy laws that are in conflict with Section 13(q), as the Commission itself determined in 2012, and as we and others have argued.[38] Proponents of exempting whole countries from Section 13(q) have submitted no additional evidence suggesting that such laws exist (in fact they have retreated from demanding exemptions for Cameroon and Angola, two out of the four countries they previously put forward). API's latest comment suggests that Nigeria might merit an exemption because allegedly certain oil contracts in Nigeria contain clauses prohibiting disclosure in the absence of government permission.[39] This is a preposterous suggestion given Nigeria's longstanding membership in EITI and track record of revenue disclosure over many years.[40]

It is unprecedented for a company to lose assets due to legal or contractual secrecy prohibitions; on the contrary, what is material is the legal risk of losing assets as a result of engaging in corruption.[41] Mere speculation that companies could lose assets due to secrecy laws should not be taken into account in the Commission's rule and cost-benefit analysis. Any such cases would be extremely rare and appropriately addressed by the Commission's existing case-by-case authority, as proposed.

IV. Proportionate Reporting of Joint Venture Payments Is Necessary and Not Burdensome

The Commission must ensure that joint venture payments are captured in this rule. As BP has pointed out to the Commission, "[a]ctivity in the commercial development of oil and gas is predominantly carried out through unincorporated joint ventures, usually with several partners, principally 'proportionally consolidated' or accounted for as 'joint operations' under IFRS."[42]

[37] Appendix B to our letter dated Dec. 18, 2013.

[38] In the Matter of American Petroleum Institute et al., SEC Rel. No. 68197 at 7 (Nov. 8, 2012); Letter from Global Witness (Dec. 18, 2013), at 10-17; Letter from Earthrights and Oxfam America (March 8, 2016).

[39] Letter from API (Feb. 16, 2016), at 27, n. 119.

[40] http://neiti.org.ng/index.php?q=pages/about-neiti.

[41] For examples of international arbitration tribunals refusing to enforce contracts secured by bribery, *see e.g.*, *World Duty Free v. The Republic of Kenya* (ICSID Case No. ARB/00/7); *Metal-Tech Ltd v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3).

[42] Letter from BP plc (Feb. 16, 2016).

Because joint venture payments form the largest part of oil and gas payments, the Commission is right to capture them in its rule. Keeping them secret would significantly limit the scope and associated benefits of the rule.[43]

We agree with the Commission that *issuers* should be required to report payments that are made on their behalf by operators.[44] However, it would not be sufficient to require that only *operators* report payments they make on behalf of joint venture participants, as some commenters suggest, because that would leave out payments made on behalf of US-listed companies, unless one of them happens to be the operator. This could enable companies to easily evade reporting by selecting an unlisted operator. The only way to ensure that all joint venture payments are captured is by requiring proportionate reporting of payments made by entities or operations that are proportionately consolidated, as the Commission has proposed[45], as well as those over which the issuer has significant influence, as recommended by PWYP-US.[46]

Several oil industry commenters complain that complying with this aspect of the proposed rule would be too burdensome, because allegedly they would not have access to the relevant information.[47] We find this unpersuasive. In fact, two European oil companies that have already reported their payments to governments, Statoil and Tullow Oil, have been able to include these types of payments without any apparent difficulties. Tullow Oil already discloses payments made on its behalf by joint venture operators, which include payments from 13 of Tullow's 60 African oil licenses, and covering the majority (52%) of its production.[48] Statoil's report on payments to governments includes "direct payments to governments from subsidiaries, joint operations and joint ventures, *regardless of whether Statoil is the operator or not*" (emphasis added).[49] In Angola alone, the value of production entitlement payments reported by

[43] Letter from PWYP-US (Feb. 16, 2016), at 22-25.

[44] Proposed Instruction (6) to Item 2.01 of Form SD, 80 C.F.R. 80058, 80111, and related recommendations in letter from PWYP-US (Feb. 16, 2016), at 8-10.

[45] We note here that Exxon has misread the Commission's definition of control, which unambiguously states that "control" *for purposes of Rule 13q-1* (specifically Item 2.01(a) of the Instructions) includes not only "control" in the accounting sense, understood as full consolidation (as Exxon insists), but also proportionate consolidation. Letter from Exxon (Feb. 16, 2016), at 12.

[46] Letter from PWYP-US (Feb. 16, 2016), at 22-25.

[47] Letters from Shell (Feb. 5, 2016), Chevron (Feb. 16, 2016), BP (Feb. 16, 2016), Exxon (Feb. 16, 2016), API (Feb. 16, 2016).

[48] Tullow Oil Plc, *Current Exploration, Development and Production Licence Interests* (July 31, 2015), *available at* http://www.tullowoil.com/Media/docs/default-source/operations/tullow-group-licence-list-31july-2015.pdf?sfvrsn=12.

[49] Statoil, *2014 Payments to Governments* (Mar. 2015), at 5, *available at*: http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentr

Statoil for projects where Statoil was not the operator was over $2 billion and constituted over 77% of Statoil's total reported payments to the government of Angola.[50] If the SEC were to eliminate this aspect of the proposed rule, that would result in such payments going unreported.

In order to proportionately consolidate an entity, an issuer's portion of the payment needs to be in the financial statements with appropriate internal documentation and support. If an issuer lacked support for the amounts included in its financial statements, this would constitute a deficiency in their internal control over financial reporting, and possibly a material weakness.[51] In addition, an issuer's disclosure controls and procedures could also be deficient in this situation.[52]

We therefore believe that such situations are generally rare, and we expect that the required payment information will generally be available to issuers. Consequently, it would be unnecessary and inappropriate to omit this entire major category of payments due to these concerns, which can and should be adequately addressed by Exchange Act Rule 12b-21.[53] The Commission may wish to remind issuers in its final rule that a payment can be omitted pursuant to Rule 12b-21 only if an issuer satisfies the two conditions stated in that rule: it must disclose information that is available and back it with sources, and it must explain why it was unable to obtain the remaining information.[54]

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eFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf. *See also* Global Witness, *Statoil's Historic Disclosures Blow Holes in Exxon and Shell's Campaign for Secrecy* (March 19, 2015), *available at* https://www.globalwitness.org/en/archive/statoils-historic-disclosures-blow-holes-exxon-and-shells-campaign-secrecy.

[50] *Id.*

[51] A material weakness is defined as: "a deficiency, or a combination of deficiencies, in internal control over financial reporting such that there is a reasonable possibility that a material misstatement of the registrant's annual or interim financial statements will not be prevented or detected on a timely basis." Public Company Accounting Oversight Board, Release No. 2007-005A, *Auditing Standard No. 5: An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements* (June 12, 2007), para. A7 at A1-43.

[52] Disclosure controls and procedures is defined as "controls and other procedures of an issuer that are designed to ensure that information required to be disclosed by the issuer in the reports that it files or submits under the Act (15 U.S.C. 78a et seq.) is recorded, processed, summarized and reported, within the time periods specified in the Commission's rules and forms." 17 CFR 240.13a-15.

[53] 17 CFR 240.12b-21.

[54] *Id.*

V. Fully Public Project Reporting Is the Most Effective Way to Satisfy the Statutory Mandate to Support International Transparency Efforts

In the four years since the Commission's 2012 rule, resource payment transparency has been steadily advancing around the world, as we have previously brought to the Commission's attention, and as reflected in the proposing release.[55] The Commission is right to recognize in its proposing release that this changed global transparency landscape has significantly changed considerations relevant to the Commission's decisions and cost-benefit analysis. Even if certain commenters have largely ignored or dismissed these developments, there can be no question that a final rule consistent with the laws already in place in other jurisdictions is the most practicable way for the Commission to satisfy its statutory obligation to "support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals."[56] Several government agencies – the Department of State, the US Department of Interior (the agency tasked with implementing EITI in the US) and the United States Agency for International Development – have made this clear in their comments to the Commission.[57] This remains the case notwithstanding that an ever-shrinking subset of the oil industry continue to insist that an anonymized, aggregated reporting model is preferable both to the proposed rule and the laws already in place in EU, Canada and elsewhere.

Some of the oil companies that are the most vocal opponents of the proposed rule are touting their commitment to EITI and transparency in their comments to the Commission.[58] The Commission should be aware that this commitment has come into question, as those companies have been undermining the US government's commitment to implementing EITI domestically. In particular, Exxon and Chevron are "endanger[ing] US compliance" with the EITI by withholding their US tax payment information from US EITI disclosures, according to Clare Short, the then-Chair of the Board of the international EITI process.[59] Significantly, Exxon's main excuse was that "it was deemed premature to report U.S. income taxes" to US EITI ahead of the Commission's rule.[60] Such statements, and the fact that Exxon and Chevron are willing to

[55] Letter from Global Witness (Dec. 18, 2013).

[56] 15 U.S.C. 78m(q)(2)(E).

[57] Letters from U.S. Dep't of Interior (Nov. 6, 2015) and (Feb. 17, 2016); U.S. Dep't of State (Nov. 13, 2015) and (Jan. 21, 2016); U.S. Agency for Int'l Development (Feb. 16, 2016).

[58] Letters from Exxon (Feb. 16, 2016) and Chevron (Feb. 16, 2016).

[59] Patrick Rucker, *Exxon withholds tax data from global transparency group*, Reuters (Dec. 2, 2015), *available at* http://www.reuters.com/article/us-usa-tax-exxon-mobil-idUSKBN0TL2O220151202; Patrick Rucker, *Exxon blocking U.S. progress on energy transparency: watchdog chief*, Reuters (Dec. 7, 2015), *available at* http://www.reuters.com/article/us-exxon-mobil-taxes-idUSKBN0TQ2PM20151207.

[60] *Id.*

put at risk US compliance with the EITI standard raises serious questions about the companies' stated commitments to EITI and to transparency more generally. This underscores that it is critical to successful US EITI implementation that the Commission finalize a strong and detailed rule, as the US Department of Interior has pointed out.[61]

It is unfortunate that certain commenters are misrepresenting the role of the Department of Interior with respect to the US EITI. In particular, API's description of the US EITI online portal as a "compilation" is completely inaccurate.[62] This portal is not meant to be a compilation of project-level revenues in any sense[63], and is in no way comparable to the Commission's role with respect to Section 13(q). The core mission of the Department of Interior's Office of Natural Resource Revenues (ONRR) is "to collect, disburse, and verify Federal and Indian energy and other natural resource revenues on behalf of all Americans."[64] ONRR's disclosure of revenue and other relevant information predates US EITI, and the disclosed data "represent key components used in ONRR's mission."[65] In contrast, the Commission has no use for the detailed information that Congress required companies to disclose pursuant to Section 13(q), which is intended for the benefit of investors, civil society and other users. The Commission's only responsibility here is as an intermediary, to "*make available* online, to the public, a compilation" of this information (emphasis added).[66] Significantly, and contrary to interpretations advanced by API, the statutory text does not place a senseless demand on the Commission to spend its resources to "create", "make" or "assemble" a compilation out of disclosed information that is of no use to the agency itself. Rather, it requires the Commission to "evaluate [the information] to determine the extent to which disclosing it (in a compilation) would be 'practicable,'"[67] and then make this option *available* to the interested members of the public. Given that no evidence of any impracticality has been advanced, the Commission is right to exercise its judgment in deciding that the best way to "make available online, to the public, a compilation"[68] is through

[61] Letters from U.S. Dep't of Interior (Nov. 6, 2015) and (Feb. 17, 2016).

[62] Letter from API (Feb. 16, 2016) at n. 19-20.

[63] According to Gregory J. Gould, Director of the Office of Natural Resource Revenue in the Department of the Interior, "the unilateral reporting via the Data Portal would be at the company [rather than project] level for the first year", p. 17, *available at* https://www.doi.gov/sites/doi.gov/files/migrated/eiti/FACA/upload/USEITI-MSG-Sept-2014-Mtg-Summary-Approved-by-MSG-141213.pdf.

[64] http://www.onrr.gov/About/default.htm.

[65] http://statistics.onrr.gov/Default.aspx.

[66] 15 U.S.C. 78m(q)(3).

[67] *API v. SEC*, 953 F.Supp.2d at 19 (2013).

[68] 15 U.S.C. 78m(q)(3).

the use of interactive electronic data tags rather than by unnecessarily withholding certain information from the public.

Another misrepresentation advanced by certain commenters concerns the EITI requirement for project-level reporting. As longtime board members of EITI and multi-stakeholder group members of US EITI and UK EITI, we feel compelled to correct the record on this question. It is not the case that EITI's "voluntary" nature leaves it up to member countries to choose how to define project.[69] Once a country signs up to be a member of EITI, it is mandatory for extractive companies operating inside that country to declare what they pay to the government. Otherwise the country may risk not being validated as compliant with the internationally agreed EITI standard, which includes a project requirement. The text of this requirement does not leave latitude for member countries to choose between following either the EU or the US project requirements, as suggested by certain commenters.[70] The text clearly states that project-level reporting must be consistent with *both* the Commission rule *and* the EU requirements.[71] Further, this international requirement has been publicly and repeatedly endorsed by the US EITI multi-stakeholder group and a working group on project-level disclosure with participation by representatives of civil society, government and industry (including API and ExxonMobil).[72] As we have pointed out previously, API's proposal "would be drastically out of alignment with the EU definition, and thus sow confusion among EITI countries on how to report consistently with both the EU and US requirements."[73]

This confusion can be avoided if the Commission finalizes its proposal to define project consistent with the EU law. As required by Section 13(q), this will support the US government's international transparency promotion efforts, as well as its efforts to implement EITI domestically. As noted, US EITI has been grappling with how to capture payments at the project

[69] Letter from API (Feb. 16, 2016), at n 68.

[70] *Cf.* letter from Exxon (Feb. 16, 2016), at 1 and 3; letter from API (Feb. 16, 2016), at n. 68.

[71] "Reporting at project level is required, provided that it is consistent with the United States Securities and Exchange Commission rules and the forthcoming (sic) European Union requirements." (emphasis added). EITI Standard 5.2(e).

[72] *USEITI Company and Project Level Reporting Working Group Recommendation to Implementation Subcommittee* (Nov. 24, 2014), *available at* https://www.doi.gov/sites/doi.gov/files/migrated/eiti/FACA/upload/USEITI-Company-and-Project-Level-Recommendation.pdf; *Project & Company Level Reporting Working Group Report to the MSG Implementation Subcommittee September 2014* (Sept. 9, 2014), slides 2, 8 to 11, *available at* https://www.doi.gov/sites/doi.gov/files/migrated/eiti/FACA/upload/P-C-WG-Process-and-Recommendation-Presentation-090414-Final.pdf; *2015 USEITI Executive Summary* (Dec. 22, 2015), p. 33 (reference to Section 5.2e of the EITI Standard in "The Dodd-Frank Act of 2010" sidebar), *available at* https://useiti.doi.gov/downloads/USEITI_executive-summary_2015-12-22.pdf.

[73] Letter from PWYP-US (Mar. 14, 2014), at n 14.

level, as required by the EITI standard, and we hope that a project definition in the Commission's final rule can greatly help with these efforts. Neither the US EITI portal nor the US EITI candidacy application are representative of the US EITI efforts to address project reporting, which were conducted through the aforementioned project reporting working group.[74] This group was tasked with, among other things, reviewing competitive harm issues under the Trade Secrets Act that were first flagged in the US candidacy application for EITI.[75] They found that "*competitive harm is not seen as a significant impediment to disclosure of lease-level, year old data, by company and by commodity*" (emphasis added).[76] Companies were invited to present evidence of competitive harm, but as in this rulemaking, they were unable to come forward with any concrete evidence. A representative of ExxonMobil noted on the record that "the industry sector continues to have concerns about competitive harm caused to firms due to project-level reporting, but that, upon examination, these concerns were not as significant as initially anticipated."[77]

[74] *Cf.* Letter from API (Feb. 16, 2016), at n. 19-20.

[75] Slide 7: https://www.doi.gov/sites/doi.gov/files/migrated/eiti/FACA/upload/P-C-WG-Process-and-Recommendation-Presentation-090414-Final.pdf

[76] *Id. See also* statement by Paul Bugala, chair of US EITI project reporting group (Sept. 2014), *available at* p. 16: https://www.doi.gov/sites/doi.gov/files/migrated/eiti/FACA/upload/USEITI-MSG-Sept-2014-Mtg-Summary-Approved-by-MSG-141213.pdf

[77] Statement by John Harrington of ExxonMobil (Sept. 2014), *available at* p. 17: https://www.doi.gov/sites/doi.gov/files/migrated/eiti/FACA/upload/USEITI-MSG-Sept-2014-Mtg-Summary-Approved-by-MSG-141213.pdf

Conclusion

We applaud the Commission for its efforts to restore the US as a global leader in promoting extractive industries transparency, and urge the Commission to finalize its proposed rule by June 2016. Opponents of the proposed rule have advanced no credible evidence in support of their demands to weaken the rule. Their arguments are based on a misunderstanding of the Congressional purpose, a mischaracterization of these purely factual financial disclosures as political speech, unsupported exaggerations of the rule's costs and fail to account for the changed global transparency landscape. They do not merit serious consideration by the Commission.

We appreciate this opportunity to provide written comments and would welcome the opportunity to meet with you to clarify any of our comments.

Sincerely,

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Co-Founder, Publish What You Pay

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