

Publish What You Pay

United States

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

March 8, 2016

By E-Mail:

Chair Mary Jo White
Commissioner Michael Piwowar
Commissioner Kara Stein

Re: Disclosure of Payments by Resource Extraction Issuers, File No. S7-25-15, Release No. 34-76620

Dear Chair White and Commissioners:

Publish What You Pay – United States (“PWYP-US”) welcomes the opportunity to provide further commentary on proposed rule 13q-1. We submitted an extensive comment on February 16, 2016 (“February 2016 comment”) which responded to the questions posed by the Securities and Exchange Commission (“the Commission”) in the proposed rule release.¹ In this comment we seek to respond to critical issues raised during the initial comment period.

1. There is broad agreement among stakeholders in support of equivalency

As stated in our February 2016 submission, we support the Commission’s decision to allow issuers to file reports submitted in other markets, as long as the foreign requirements are deemed substantially equivalent to the Commission’s final rule.² We note that many of our industry colleagues submitted comments stating the importance of equivalency. Of particular interest, Shell stated that it would support the Commission’s rule, as proposed, with only a few changes, one of which is dependent upon the Commission’s approach to alternative reporting.³ BP noted that in June of this year it will begin to report its 2015 government payments in accordance with the EU reporting requirements and is generally supportive of the SEC’s alternative reporting proposal.⁴ Additionally, Eni

¹ Comment submitted by PWYP-US (16 Feb. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-45.pdf>.

² Ibid.p.56-59.

³ Comment submitted by Royal Dutch Shell (5 Feb. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-21.pdf>.

⁴ Comment submitted by BP (16 Feb. 2016), p.1. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-25.pdf>.

SpA,⁵ Total⁶ and BHP Billiton⁷ all submitted comments in support of the Commission's proposed rule, stating that the proposed rule is globally consistent and would therefore help to create a more level playing field. The record therefore demonstrates that many of the major international oil companies are in favor of rule 13q-1. If the Commission were to adopt the American Petroleum Institute's ("API") anonymous reporting model it would bring 13q-1 out of alignment with the global transparency standard and create an unequal playing field for companies, as well as deprive investors and communities in resource-rich countries of crucial information.

2. Case-by-case exemptions, while unnecessary, are sufficient to address industry concerns around alleged conflict of laws

PWYP-US maintains that exemptions are unnecessary and are out of alignment with the established global transparency standard. As the Commission itself has noted, no persuasive evidence has been provided to support the assertion by some industry commentators that there are legal, or contractual, prohibitions to reporting in Angola, China, Qatar, or Cameroon. In fact, PWYP-US has provided express evidence to the contrary in the cases of Cameroon⁸ and Angola;⁹ API now appears to have abandoned their demand that those two countries be exempt. In addition, we fully support the March 8, 2016 submission by Oxfam America and EarthRights International, which provides further analysis of Qatari and Chinese law and concludes that, far from prohibiting disclosures, those two countries would likely condone disclosure without penalty.

PWYP-US has documented in numerous submissions to the Commission why exemptions are unnecessary. While our position remains the same, we believe the Commission's proposal to consider requests for exemptions on a case-by-case basis is sufficient to alleviate industry concerns. In our February 2016 comment we encouraged the Commission to spell out the process by which a company may apply for exemptive relief. This process should be transparent, subject to public comment, and specify the criteria that will be applied to applications for exemptions. In particular:

- No foreign rule or law enacted after 2010 merits an exemption;
- An issuer must first try to obtain permission from the relevant foreign government to disclose any prohibited information before applying for an exemption;
- Any case-by-case exemptive relief based on a foreign law prohibition must be strictly limited in duration; and

⁵ Comment submitted by Eni SpA (31 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-12.pdf>.

⁶ Comment submitted by Total (13 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-14.pdf>.

⁷ Comment submitted by BHP Billiton (25 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-9.pdf>.

⁸ Cameroon is a 'compliant country' in the Extractive Industries Transparency Initiative. See Extractive Industries Transparency Initiative, *Cameroon*, <https://eiti.org/Cameroon/>.

⁹ In 2015, Statoil reported its 2014 payments to governments, including payments made in Angola. See Statoil, *2014 Payments to Governments (2015)*. Available at: http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf.

- The exemptions must be narrowly tailored to cover only the specific information that an issuer proves is expressly prohibited, and for which disclosure is clearly punishable, under the relevant foreign law.¹⁰

The process and requirements recommended by PWYP-US, and applied on a case-by-case basis, are adequate to provide industry with the opportunity to stave off any alleged harm from purported prohibitions, for which compelling evidence has yet to be presented. In their February 2016 comment, API claims that a case-by-case exemption may make it impossible for an issuer to apply for exemptive relief and for the Commission to review that application and grant such relief, before the issuer's reporting obligations become due. Companies have known about Section 13(q) reporting requirements since 2010 and, indeed, some of API's largest members have already begun reporting payments (voluntarily¹¹ or to meet a legal requirement¹²). Certain dual-listed members, such as Shell, BP and Total, will be disclosing their payments to governments via the EU Directives this year. Rule 13q-1 will be finalized no later than June 27, 2016 and reports will not be expected from companies until over a year later. If these prohibitions did indeed exist, companies would have over a year to provide the necessary documentation and to petition the Commission for an exemption.¹³

Companies have had nearly six years to analyze country laws and contracts to provide evidence that prohibitions to disclosure exist, yet they have failed to do so, including in this rulemaking period. Additionally, companies should have ensured that all of their contracts include the industry standard exceptions to confidentiality for compliance with applicable disclosure regulations.¹⁴ With the first EU reports expected in the first half of this year, responsible companies should have already been in discussions with host governments about these required disclosures if they anticipated prohibitions to be a genuine concern. In a recent submission, an Italian oil company, Eni SpA, details the outreach they have conducted to their business partners, such as "Governments, State-owned Companies and private

¹⁰ For our full list or recommendations, see Comment submitted by PWYP-US (16 Feb. 2016), p.48-56. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-45.pdf> (responding to Questions 45 through 48).

¹¹ Comment submitted by BHP Billiton (25 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-9.pdf>.

¹² Statoil is reporting its payments to governments as required under the Norwegian transparency law, see Statoil, 2014 Payments to Governments (Mar. 2015). Available at: http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf.

¹³ In setting out the process by which issuers could apply for an exemption, the Commission could address the circumstances under which a portion of the filing for which an exemption is requested could be considered timely filed even if the Commission has not yet made a final decision on the application by the time the filing is due.

¹⁴ Exceptions to confidentiality for stock exchange disclosure requirements are a standard component of oil, gas and mining contracts. For instance, the Association of International Petroleum Negotiators has included this type of exception to confidentiality in its model contract used by its members for the last two decades. See comment submitted by Oxfam America (20 Mar. 2012). Available at: <https://www.sec.gov/comments/s7-42-10/s74210-294.pdf> (Association of International Petroleum Negotiators (AIPN) Model Form Confidentiality Agreement authorizes the disclosure of otherwise confidential information that is required "under applicable law, including by stock exchange regulations or by a governmental order, decree, regulation or rule."); See also comment submitted by Open Oil (26 Oct. 2015). Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-94.pdf>. Natural Resource Governance Institute, Contracts Confidential: Ending Secret Deals in the Extractive Industries (2009). Available at: <http://www.resourcegovernance.org/sites/default/files/RWI-Contracts-Confidential.pdf>.

companies,” on transparency.¹⁵ Eni SpA notes that they have actively sought permission from their partners for disclosure, acting ahead of mandatory requirements to do so. API members could easily do the same to ensure they are able to comply with US law and to address their concerns about supposed legal or contractual prohibitions.

3. The Congressional intent behind enactment of Section 1504 is clear

In their most recent comment, API wrongly states that Congress’s “unambiguous intent” was for the Commission to provide *only* an aggregated compilation of payment information to the public. This jarring misrepresentation is plainly inaccurate, as is demonstrated by the numerous public statements and submissions to the Commission by the Congressional authors and supporters of Section 1504.

In a February 2016 letter signed by 12 Senators, they write:

“We commend the Commission for its work in preparing a strong proposed rule. Public disclosure by individual issuers of disaggregated project-level payments with no exemptions accurately captures Congressional intent.”¹⁶

A May 2014 letter signed by 13 Senators states:

“Disaggregated, project-level payment information for each company is necessary to enable investors to make decisions with a sufficient understanding of the risks and opportunities associated with investing in extractive companies.”¹⁷

And in a January 2012 letter signed by six Senators, including one of the original authors of Section 1504, Senator Cardin, and current Secretary of State, John Kerry, they note:

*“We urge the SEC to resist pressure to release a weak rule that does not follow the clear statutory language and legislative intent of Section 1504. To accurately reflect the letter and intent of the law, the final rule should apply to **all countries** and **companies** with no exemptions. The rule should also define the terms “project” and “payment” in ways that do not create reporting loopholes, particularly with regard to the threshold amount for reporting. The SEC should require the compilation of the payment data to be in addition to, and **not in lieu of**, the data produced by companies.” [emphasis added].¹⁸*

In fact, the Commission’s own review of the legislative history of this provision concluded that Congress intended for project-level disclosure, by company, to be made available to the public.¹⁹ The

¹⁵ Comment submitted by Eni SpA (31 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-12.pdf>.

¹⁶ Comment submitted by Sen. Benjamin L. Cardin, et al. (5 Feb. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-19.pdf>.

¹⁷ Comment submitted by Sen. Benjamin L. Cardin, et al. (1 May 2014). Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-41.pdf>.

¹⁸ Comment submitted by Senator Benjamin L. Cardin, et al. (31 Jan. 2012). Available at: <https://www.sec.gov/comments/s7-42-10/s74210-122.pdf>.

¹⁹ SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80063; 80065, FN 75; 80077; 80080, “Finally, neither the statute’s text nor legislative history includes any suggestion that the required

Congressional intent of Section 13(q) has been crystal clear from members' public statements and submissions to the record, yet API seeks to mislead and distort history.²⁰

4. Reasonable investors with over \$9.8 trillion in assets under management support project-level disclosure by company

API mischaracterizes investor interest in Section 13(q) disclosures as related to “a small number of special interest investors.”²¹ This is plainly false given the 25 robust comments submitted throughout the rulemaking process from investors representing over \$9.8 trillion in assets under management. A recent submission by Calvert Investments and our February 2016 submission chronicle the many submissions investors have made to the Commission seeking granular, project-level disclosure, by company.²²

The Commission should not fall into the trap of characterizing investors such as the California Public Employees' Retirement System (CalPERS), the largest public pension fund in the US; UBS Investment Management, the investment management arm of the world's largest private wealth manager; and ING Investment Management, the investment management arm of the world's largest financial services and insurance conglomerate, as “small,” “special interest” investors. It is quite common today for money managers, mutual funds, and other institutional investors to have a focus or specialization; this does not mean they are not reasonable investors. They are still analyzing investment decisions for profit and gain. The investors that have submitted comments regarding Section 13(q) reflect the great diversity of focus and information needs of participants in public securities markets. For example, an asset manager with a focus on emerging markets equities will need to assess risks and opportunities that are different from a fixed income analyst at a large pension fund who focuses on the securities of large cap, US-based companies.

To put investor interest in perspective, the following graphic shows that the combined assets under management of supporting investors (\$9.8 trillion) is greater than the combined gross domestic product of Germany (\$3.87 trillion), the United Kingdom (\$2.99 trillion), Russia (\$1.86 trillion), Saudi Arabia (\$746 billion), and Angola (\$138 billion).²³

payment disclosure should be confidential. In fact, the legislative history supports our view that the information submitted under the statute should be publicly disclosed.”; 80085, FN 303.

²⁰ For a thorough breakdown of the legislative history of Section 1504 please refer to: PWYP-US, Legislative History, Cardin-Lugar Amendment or Section 1504 of the Dodd-Frank Financial Reform and Consumer Protection Act. Available at: http://www.publishwhatyoupay.org/wp-content/uploads/2015/12/Legislative-History-Timeline_1504.pdf.

²¹ Comment submitted by American Petroleum Institute (16 Feb. 2016), p.37. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-32.pdf>.

²² See Comment submitted by Calvert Investments (16 Feb. 2016), p.3-11. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-39.pdf>; see also Appendix B: Investor Letters of Support for Section 1504 of the Dodd-Frank Act in Comment submitted by PWYP-US (16 Feb. 2016), p.93-100. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-45.pdf>; Comment submitted by ACTIAM NV (8 March 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-52.pdf>.

²³ World Bank, Gross domestic product ranking table (2014). Available at: <http://databank.worldbank.org/data/download/GDP.pdf>.



In the Commission’s adopting release, it must acknowledge the strong interest from investors for Section 13(q) disclosures. Investors with \$9.8 trillion in assets under management should not be ignored or brushed aside by the Commission. Noted economist Jeffrey Sachs, in a 2015 submission from the Columbia Center on Sustainable Investment, adds to the many investor submissions the Commission has received by detailing the specific uses of Section 13(q) disclosures to investors.²⁴ Indeed, investors are one of the main beneficiaries of Section 13(q) disclosures envisioned by its Congressional authors, as has been noted in numerous floor statements and letters to the Commission.²⁵ A February 2016 Senate letter states:

*“[O]ne of the primary goals of Section 1504 is to support and protect investors. [...]As the Commission notes in the proposed rule release, the Congressional record reflects the importance of ensuring that the disclosures required by the rule provide useful and transparent information for investors. Project-level payment disclosures for each company provides precisely the information investors want and need when they are making decisions about whether to invest in particular extractives companies and the risks involved in doing so. [Investors] cite a range of rationales for supporting the rule, including the protection to investors, as well as enabling more efficient functioning of capital markets and capital formation through the public disclosure of actual, relevant information from issuers. **These investors constitute reasonable investors and it is crucial that the Commission recognize and acknowledge their significant interests in the final rule.**”²⁶ [emphasis added].*

²⁴ Comment submitted by Columbia Center for Sustainable Investment (30 Oct. 2015) Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-93.pdf>.

²⁵ SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80065, FN 75, “We note that the legislative history also indicates that Congress intended for the Section 13(q) disclosures to serve as a potential informational tool for investors. See, e.g., id. at 3316 (Statement of Senator Cardin) (May 6, 2010) (‘The investor has a right to know about the payments. Secrecy of payments carries real bottom-line risks for investors.’).”

²⁶ Comment submitted by Sen. Benjamin L. Cardin, et al. (Feb. 5 Feb. 2016) Available at: <https://www.sec.gov/comments/s7-25-15/s72515-19.pdf>.

5. *The proposed rule reflects the disclosure regime that will be most useful to citizens in resource rich countries*

Both API and Exxon Mobil express concerns about the ability of citizens in resource rich countries to utilize information from Section 13(q) disclosures. Exxon claims the rule as proposed would “make it difficult or impossible for citizens of resource-producing countries to assess and analyze the payments their governments receive. [...] a task we believe would be laborious [...] for citizens of relatively poor countries who may not possess extensive resources for such a task.”²⁷ PWYP-US believes the civil society organizations in resource rich developing countries are better suited to speak to their own needs and abilities than US-listed oil companies. In April 2014, nearly 550 civil society organizations from 40 countries wrote to the Commission asking specifically for granular, project-level disclosure, by company.²⁸

Since the beginning of 2015, the Commission has received over a dozen highly technical letters from civil society groups in resource rich, developing countries, including the Democratic Republic of Congo, Sierra Leone, Iraq, and Ghana, all of which detail the ways civil society has utilized 13(q)-like disclosures to push for greater accountability in their countries, and how they plan to put the disclosures to work in the future.²⁹ All of these letters petition the Commission to make public *more detailed, granular information* - in particular, project and company-level payment disclosures - not *less*, as API is proposing. They also explain why API’s anonymous reporting proposal would render the disclosure information useless to the public.³⁰

API notes the Commission’s argument that, “[p]roject level payment data is also necessary to enable communities to conduct an informed cost-benefit analysis of the projects in their backyard,” and claims this is a “distortion” of Section 13(q)’s purpose.³¹ Providing citizens with the tools necessary to allow them to analyze the benefits their governments receive for their country’s natural resources is, in fact, a key purpose of Section 13(q) disclosures and one of its many benefits to both citizens and companies.³²

²⁷ Comment submitted by Exxon Mobil (16 Feb. 2016), p.7-8. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-33.pdf>.

²⁸ Comment submitted by Publish What You Pay Coalition (14 April 2014). Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-32.pdf>.

²⁹ See e.g. Comment submitted by Open Society Initiative for Southern Africa - Angola (29 Jan. 2015), p.4-5.

Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-60.pdf>;

Comment submitted by Publish What You Pay Indonesia (11 Mar. 2015), p.3-4. Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-64.pdf>;

Comment submitted by the Civil Society Coalition on Oil and Gas - Uganda (18 May 2015), p.2-5. Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-71.pdf>.

³⁰ See e.g. Comment submitted by the Iraqi Transparency Alliance for Extractive Industries (25 Sept. 2015), p. 4-5.

Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-87.pdf>;

Comment submitted by Africa Centre for Energy Policy (16 Feb. 2016), p. 6. Available at:

<https://www.sec.gov/comments/s7-25-15/s72515-40.pdf>.

³¹ Comment submitted by American Petroleum Institute (16 Feb. 2016), p.22. Available at:

<https://www.sec.gov/comments/s7-25-15/s72515-32.pdf>.

³² Comment submitted by Dr. Robert F. Conrad (17 July 2015), p.3. Available at:

<https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-81.pdf>, “Mineral reserves are part of a country’s wealth, which, if extracted, is reduced in exchange for financial and other economic benefits as determined by each contract. Knowledge of the payment streams by a particular company

API asserts that citizens will try to make it more difficult for companies to develop projects if they have disclosure information available to them. On the contrary, providing citizens with a clear view of the contributions made by extractive companies has the potential to improve community-company relationships and decrease corruption.³³

The opportunity to provide project-level payment data to citizens is one of the many reasons that the Prospectors and Developers Association of Canada (“PDAC”) and the Mining Association of Canada (“MAC”) joined Publish What You Pay - Canada to petition the Canadian government to enact mandatory disclosure requirements in line with the EU Directives.³⁴ At the time, PDAC’s Executive Director noted, “[t]his information will help assure communities that they are receiving appropriate benefits from both mining operations and governments, as well as reduce instances of corruption and bribery.”³⁵ It is crucial that citizens are able to determine if the extraction of their natural resources is of actual benefit to their country and their community, rather than just a mechanism to generate wealth for well-connected political elites.

6. Section 13(q) disclosures will not cause competitive, or physical, harm to oil company operations

Here we seek to address API’s spurious argument that Section 13(q) disclosures pose a security threat to extractives projects and their employees. API posits that host governments may want to keep project-level information, such as project location, confidential because they are concerned that insurgents or terrorist groups might use the location or financial information disclosed to plan attacks on lucrative extractive project sites. This is an argument API continues to make, despite extensive evidence to the contrary, including from oil and gas associations representing employees of API member companies.³⁶ In

and by project are then necessary for resource owners to “determine whether the present value of the benefits are at least as great as the capital losses resulting from resource depletion.”

³³ See floor statement by former Senator Richard Lugar. 156 CONG. REC. S3816 (17 May 2010). Available at: <https://votesmart.org/public-statement/507898/restoring-american-finacial-stability-act-of-2010>, (“[I]t would help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas and mineral resources and revenues.”).

³⁴ PDAC and MAC represent over 1,000 mining companies, including BHP Billiton, Rio Tinto and Barrick Gold. The full membership list of PDAC is available at: <https://www.google.com/url?q=http://www.pdac.ca/members/membership&sa=D&ust=1457464462811000&usg=AFQjCNG7p5E6pvlUyacPbdAbj2YLfOStGA>; and the membership list of MAC is available at: https://www.google.com/url?q=http://mining.ca/members-partners/our-members&sa=D&ust=1457464462811000&usg=AFQjCNEmBdr5pzmyHI6_Q_-0hclSbQXXJA.

³⁵ The Mining Association of Canada, “Canada’s mining industry joins forces with NGOs to improve transparency” (6 Sept. 2012). Available at: <http://mining.ca/news-events/press-releases/canada%E2%80%99s-mining-industry-joins-forces-ngos-improve-transparency>.

³⁶ Comment submitted by PENGASSAN (27 June 2011). Available at <http://www.sec.gov/comments/s7-42-10/s74210-93.pdf>, “PENGASSAN represents about 21,000 Senior and Middle Management employees in a variety of Oil and Gas Companies throughout Nigeria, including Chevron Nigeria Limited, Phillips Oil Company (Nlg Limited and Shell Nigeria Gas Limited); Comment submitted by NUPENG (8 July 2011). Available at <http://www.sec.gov/comments/s7-42-10/s74210-97.pdf>; Comment submitted by United Steelworkers (29 Mar. 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-78.pdf>.

addition, information on extractive project sites, including their anticipated value, is typically publicly reported through numerous local, national and international media outlets.³⁷

While it is true that extractives operations may potentially be targets for terrorist or insurgent groups, API itself notes that citizens do not need project-level disclosure to “determine that someone is drilling for oil nearby.”³⁸ To further illustrate this point, please see the images below which highlight the visibility of extractive projects and their proximity to communities and populations centers.



*Image A: Life carries on outside of a major gold mine in Ghana.
Photo: © Olivier Blaise*



Image B: Gas flare burns at an Agip oil site in the Akaraolu community in the Niger Delta area of Southern Nigeria. Photo: © George Osodi



Image C: “I spent years of my life hearing about the great oil wealth in Iraq, but the trend is going from poor to poorer; my wish is that my children live in better conditions.” Photo: © Akad Cultural Institute



*Image D: Godfried Ofori, chairman of the Concerned Citizens Association stands before the Prestea Bogoso Mine in Southern Ghana.
Photo: ©Jane Hahn*

³⁷ Comment submitted by PWYP-US (16 Feb. 2016), p.45. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-45.pdf>.

³⁸ Comment submitted by American Petroleum Institute (16 Feb. 2016), p.21. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-32.pdf>.

In fact, increased transparency has the potential to decrease public suspicion around the economic contributions of specific extractive projects. In a February 2016 comment to the Commission, Sarah Chayes and Sarah Peck note, “[a]ttacks on oil production facilities and pipelines may occur when the population blames the companies for the perceived failure to deliver prosperity.”³⁹ As discussed in Section 5 above, Section 13(q) disclosures will give companies the opportunity to provide citizens with a complete picture of the economic contributions made to communities, thus potentially decreasing conflict around extractive sites.

We have submitted a number of comments responding to industry allegations that Section 13(q) disclosures will hurt competition.⁴⁰ In addition, many other commentators, including noted economist Dr. Robert Conrad of Duke University, have summarily refuted claims that these disclosures will lead to a release of commercially sensitive information.⁴¹ The March 8, 2016 comment by Oxfam America and EarthRights International goes into further detail on this issue.

7. Social payments should be included as part of the “commonly recognized revenue stream”

We reiterate our position that social payments should be included as part of the “commonly recognized revenue stream.”⁴² We note that Exxon Mobil emphasized the importance of these payments to their operations in their submission.⁴³

³⁹ For further discussion on how 13(q) disclosures can mitigate the costs of corruption for both citizens and companies, see comment submitted by Sarah Peck and Sarah Chayes (16 Feb. 2016), p.5. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-31.pdf>.

⁴⁰ Comment submitted by PWYP-US (14 Mar. 2014), p.34-37. Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf>; Comment submitted by PWYP-US (16 Feb. 2016), p.30,46-47 Available at: <https://www.sec.gov/comments/s7-25-15/s72515-45.pdf>; Comment submitted by Anthony Cannizzaro and Robert Weiner (11 Feb. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-22.pdf>; Comment submitted by Caitlin C. Corrigan (16 Feb. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-28.pdf>.

⁴¹ Comment submitted by Dr. Robert F. Conrad (17 July 2015), p.4-9. Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-81.pdf>, “The resource owners’ need for information at the project level does not require disclosure of what I understand to be commercially sensitive data or data that would place a resource producer subject to Section 1504 at a competitive disadvantage...I am not aware of any requirement for disclosure of such information under Section 1504 of Dodd-Frank.” and “...no commercially sensitive information or other confidential information can be inferred [through Section 1504 disclosures].” Dr. Conrad’s comment also provides extensive evidence refuting API claims that Section 1504 disclosures could lead to competitive harm for extractive companies, including the claims that US companies would be disadvantaged when competing with state-owned extractive companies; See also Department of Interior, USEITI, Project & Company Level Reporting Working Group, Report to the Multi-stakeholder Group Implementation Subcommittee (Sept. 2015), p.7. Available at: <https://www.doi.gov/sites/doi.gov/files/migrated/eiti/FACA/upload/P-C-WG-Process-and-Recommendation-Presentation-090414-Final.pdf> (“In most cases, competitive harm not seen as a significant impediment to disclosure of lease-level, year old data, by company and by commodity in the U.S.”).

⁴² Comment submitted by PWYP-US (16 Feb. 2016), p.14. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-45.pdf>; See also comment submitted by Dr. Harry G. Broadman and Bruce H. Searby (25 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-10.pdf>.

⁴³ Comment submitted by Exxon Mobil (16 Feb. 2016), p.14-15. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-33.pdf>.

8. Anonymous reporting will prevent investors and civil society from accessing crucial payment information

There is no question that API's anonymous reporting model would provide citizens with far less information than the Commission's proposed rule.

The API model of anonymous reporting would impair, rather than enhance, the usability by the public of disclosed payment information. Anonymous reporting of company data would not fulfill the transparency objectives of Section 13(q). Withholding key information from the public, such as company names, would effectively nullify the transparency objectives Congress set out in Section 13(q). As the Natural Resource Governance Institute ("NRGI") explains in their September 2015 submission, concealing the names of companies alongside other disclosed data will prevent investors and civil society actors from carrying out risk analyses and holding governments accountable for the management of their country's natural resources.⁴⁴ NRGI also notes that API's anonymous reporting model does not align with the EU definition of project nor with the way in which companies describe their own projects.⁴⁵ In addition, there is strong agreement among major extractives companies in support of equivalency of disclosure standards. API's proposed model would run contrary to the objectives and practices of many of the oil industry constituents it purports to speak on behalf of.⁴⁶ API's approach would also conflict with the Extractive Industries Transparency Initiative ("EITI") Standard, which requires all countries to publicly disclose company payments by project.⁴⁷

API's approach to project-level disclosure ("what", "how", and "where")⁴⁸ does not provide sufficient information to differentiate between similar projects in a given area. The Commission recognized in the proposed rule release that API's proposal would in fact deprive communities of the information "necessary to enable them to know what funds are being generated from the extraction activities in their particular areas."⁴⁹ NRGI cites the example of the East Kalimantan province of Indonesia in which there are multiple oil and gas developments in the same area that can be attributed to several US-listed issuers. NRGI determined 11 different production sharing contracts which would fall under the same project if the API approach to defining projects was used.⁵⁰ Without a contract-specific project definition, this approach creates a high likelihood of aggregation of projects. Such agreements can have

⁴⁴ Comment submitted by Natural Resource Governance Institute (23 Sept. 2015), p.14. Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-84.pdf>; Comment submitted by PWYP-US (14 Mar. 2014), p.22-23. Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf>

⁴⁵ Ibid., p.12-14.

⁴⁶ For example, API members BHP Billiton and Statoil have each already reported at the project level. In addition, API members BP and Shell will be reporting in 2016 in accordance with the EU Directives.

⁴⁷ See EITI Standard 2016. Available at: https://eiti.org/files/english_eiti_standard_0.pdf

⁴⁸ Comment submitted by American Petroleum Institute (7 Nov. 2013), p.4. Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf>, "**what** resource is being extracted; **how** that resource is being extracted; and **where** the extractive activity takes place."

⁴⁹ 80 Fed. Reg. at 80,077.

⁵⁰ Comment submitted by Natural Resource Governance Institute (23 Sept. 2015), p.12. Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-84.pdf>.

varying fiscal terms so aggregation will prevent citizens from understanding the specific economic contribution made by each project.⁵¹

API's model is useless to investors. Investors cannot undertake the detailed investment and risk analysis that they have repeatedly informed the Commission they wish to conduct if they do not know the identity of the issuer making the payments. Investors may spend time and resources trying to determine which payments relate to which company and risk making the wrong determination. Investors have provided specific examples of how these disclosures are useful in making and improving investment decisions and made clear that API's project-level disclosure approach and anonymized payment information would not provide those benefits.⁵²

API implies that requiring the public "to aggregate company-specific information themselves from each company's annual report to determine the revenue their government is receiving from resource extraction," would be a burden.⁵³ In fact, determining a given country's revenues from resource extraction would be a matter of simple arithmetic when using the the Commission's model. Since the information will be tagged in XBRL, it will be easy for users to search for payments made to a particular government, or a particular type of payment made to a particular government, including local governments. This is not an onerous burden. The public could make its own compilation in addition to the public disclosure of company-specific, disaggregated project-level payment information that companies provide on the basis of the Commission's proposed rule.⁵⁴ In fact, PWYP coalitions that operate in over 60 countries comprise a ready set of users already accustomed to gathering data on company operations in their country. Likewise, the EITI Multi-Stakeholder Groups ("MSGs"), established in each of the more than 40 EITI implementing countries serve as a structured user group for the data that will be produced by individual issuers. These MSGs are already well versed in collecting company data for use in reconciliation processes and for publication in the EITI report for each country.

⁵¹ Civil society actors in Peru were able to use project-level data to develop an accurate regional revenue forecasting model, see comment submitted by the ONE Campaign (6 Nov. 2015), p.1, 13-15. Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-98.pdf>; Maps submitted to the record clearly illustrate how API's approach to defining projects would not align with how projects are currently structured, for further detail see comment submitted by Oxfam America (3 Dec. 2015). Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-103.pdf>.

⁵² See e.g. Comment submitted by PWYP-US (16 Feb. 2016), p. 77-80. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-45.pdf> (summarizing record evidence on investor benefits); Comment submitted by Calvert Investments (16 Feb. 2016), p.3-11. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-39.pdf> (summarizing submissions by investors).

⁵³ Comment submitted by American Petroleum Institute (16 Feb. 2016), p.5. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-32.pdf>.

⁵⁴ For further discussion on compilation, please refer to the March 8, 2016 comment submitted by Oxfam America and EarthRights International.

To illustrate the difference between the information available using API’s anonymous disclosure model and the Commission’s proposed rule, please see the chart below:

Reporting Proposal Comparison		
Disclosure Information	Commission Proposal	API model of anonymous disclosure
Company payor	Yes	No
Project name	Yes	No
Project level disclosure consistent with EU and Canada	Yes	No
Commodity type	Yes	Yes <i>but unclear how detailed</i>
Disclosure at local government level	Yes	No <i>only at major subnational political jurisdiction level (e.g. province or state)</i>
Operation type	No <i>but verifiable in annual reports and visually determinable</i>	Yes <i>such as onshore/offshore/mining</i>

Crucially, API’s proposal would allow for secretive and suspect deals to continue to be concealed through aggregation and anonymization. For example, when US-listed oil companies Shell and Eni SpA acquired one of West Africa’s most lucrative offshore oil blocks, their \$1.1 billion payment benefited the former Nigerian oil minister who awarded the block to a company that he secretly owned.⁵⁵ Several countries are now conducting corruption investigations into this deal. These facts came to light only by accident, because a middleman brought legal proceedings in the UK. A strong rule 13q-1 rule would ensure that such payments are routinely revealed. Because this payment was made to the Nigerian government, it would be reportable pursuant to the Commission’s proposed rule, but would remain concealed under API’s aggregated reporting model which would make it impossible to trace where the payment ended up or even find out that it had been made.

⁵⁵ Global Witness, Shell and Eni’s Misadventures in Nigeria: Shell and Eni and Risk of Losing Enormous Oil Block Acquired in Corrupt Deal (17 Nov. 2015). Available at: <https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/shell-and-enis-misadventures-nigeria>.

9. The first reports on payments to governments by EU companies are expected by mid-2016

In its recent comment, Exxon Mobil claims that the EU reporting requirements have not yet become an established norm due to the fact that companies have yet to report.⁵⁶ This position contradicts the positions of other industry commenters, which have acknowledged and accepted EU reporting requirements. BHP Billiton, which has already voluntarily reported, cited in their comment the importance of alignment between the Commission's rule and the EU reporting requirements.⁵⁷ Total, BP, and Eni SpA made similar statements in support of equivalency and international consistency in reporting requirements as noted above. It is clear that key companies already subject to payment disclosure requirements recognize the EU standard as established, and are anticipating reporting this year, as implementation of the Directives is already well underway. As noted above, BP will report its 2015 payments under the UK implementation of the EU Directives in June of this year.⁵⁸

Furthermore, Exxon Mobil mischaracterizes the status of member state transposition of the EU Directives. As of March 7, all EU member states have transposed the EU Accounting Directive with the exception of Ireland and Cyprus. Thirteen member states have transposed the EU Transparency Directive, including France and the UK, which are home to the largest extractive companies in Europe. Transposition by the UK and France alone means that 21 of the top 100 mining companies, and 17 of the top 100 oil & gas companies will publish their payment reports in 2016.⁵⁹ Extractive companies listed in other EU member states are expected to begin publishing their reports in 2017 at the latest.

PWYP-US thanks the Commission for the opportunity to respond during this rebuttal period and commends the Commission for its open and transparent rulemaking process. We would also like to endorse the March 8, 2016 submissions by our member organizations Oxfam America, Earthrights International, and Global Witness.

Please do not hesitate to contact us to discuss these matters further.

Warm regards,



Jana L. Morgan
Director
Publish What You Pay - US

⁵⁶ Comment submitted by Exxon Mobil (16 Feb. 2016), p.2. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-33.pdf>.

⁵⁷ Comment submitted by BHP Billiton (25 Jan. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-9.pdf>.

⁵⁸ Comment submitted by BP (16 Feb. 2016). Available at: <https://www.sec.gov/comments/s7-25-15/s72515-25.pdf>.

⁵⁹ These assessments are made on the basis of market capitalization. For more information see our November 2015 submission available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-100.pdf>; and for a spreadsheet of issuers and applicability of reporting requirements see: www.publishwhatyoupay.org/wp-content/uploads/2015/11/1504_Companies_MASTER.xlsx.

CC:

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