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Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-4628

Via e-mail: www.sec.gov/rules/proposed.shtml;
rule-comments@sec.gov
www.regulations.gov

Subject: File Number S7-42-10
Release No. 34-63549

January 28, 2011

Dear Ms. Murphy,

We appreciate the opportunity to respond to the Commission's proposed amendments to its rules implementing Section 13(q) under the Securities and Exchange Act of 1934, as amended (Exchange Act). Royal Dutch Shell plc (RDS) as a founding member of the Extractive Industries Transparency Initiative (EITI) applauds the transparency goals of Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). However, as discussed below and in appendix A to this letter, we are concerned, if adopted, the proposed amendments would harm investors and adversely affect efficiency, competition and capital formation in violation of Sections 3(f) and 23(a) of the Exchange Act and fail to achieve the intended revenue transparency objectives.

RDS is a "foreign private issuer" as defined in Rule 3b-4(c) under the Exchange Act. RDS is incorporated as a public limited company in England and Wales and is the successor issuer to Royal Dutch Petroleum Company and Shell Transport and Trading Company. RDS securities are traded on the London Stock Exchange, Euronext and the New York Stock Exchange (NYSE). RDS and its predecessors have been listed on the NYSE since the 1950's. Today, RDS is one of the largest foreign private issuers registered with the Securities and Exchange Commission (the "Commission"). We have over 500 million American Depository Receipts (ADRs) outstanding and our NYSE average daily trading volume in 2009 exceeded two million ADRs.

As a company incorporated in the United Kingdom, RDS is subject to the requirements of the UK Company Act 2006. RDS has its primary listing on the London Stock Exchange and our primary securities regulator is the UK Financial Services Authority (FSA). RDS is subject to the UK Corporate Governance Code promulgated by the UK Financial Reporting Council. RDS also is subject to all European Union (EU) directives. RDS financial statements are prepared in accordance with International Financial Reporting Standards as adopted by the International Accounting Standards Board (IASB). We prepare our annual report on Form 20-F to not only meet all the requirements of the Commission but also to meet all our disclosure obligations pursuant to UK

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requirements. We believe producing one annual report that meets all the Commission's requirements and satisfies all our UK obligations provides additional benefits to our investors.

Investor Protection and Section 3(f) and 23(a) of the Exchange Act

When Congress passed the Dodd-Frank Act and thereby amended the Exchange Act to add Section 13(q), they did not change or modify the Commission's mission of protecting investors nor did they repeal Sections 3(f) or 23(a) of the Exchange Act. As the Supreme Court noted in Gustafson v Alloyd, no Act passed by Congress should be read as a series of unrelated or isolated provisions.[1] Moreover, unlike certain provisions of the Dodd-Frank Act that took effect on adoption, such as the repeal of Rule 436(g), Section 1504 requires the Commission to conduct rulemaking in order to implement Section 13(q) of the Exchange Act. This rulemaking must be conducted pursuant to all the requirements of the Exchange Act governing rulemaking including Sections 3(f) and 23(a) of the Exchange Act.

Foreign Law and Contract Prohibitions

As discussed in our letter dated October 25, 2010, to Ms. Meredith Cross, Director of the Division of Corporation Finance, Section 1504 of the Dodd-Frank Act was designed to be a disclosure provision not a business prohibition statute. Accordingly, we believe it is essential for the Commission to provide an exemption from its proposed rules for disclosure that is prohibited by foreign governments or existing contracts in order to avoid irreparable harm to investors, efficiency, competition and capital formation. In this regard, RDS has received legal advice that disclosure in the US of revenue payments made to foreign governments or companies owned by foreign governments, in relation to all or part of our activities, is prohibited by law in the following countries: Cameroon, China and Qatar. If the Commission does not provide an exemption from disclosure when prohibited by foreign law, the Commission will force RDS to either withdraw from these projects or violate foreign law. Either outcome will adversely affect investors, efficiency, competition and capital formation and is not necessary to meet the Congressional goal of promoting international transparency efforts. We also are particularly concerned with the potential negative personal consequences for US nationals working in host countries where the Commission's proposals would force us to violate local laws.

Additionally, while many of our contracts provide for a carve out for disclosure required by law or stock exchange rule, some of those contracts only provide a carve out for the contracting parties not for affiliates or parent companies such as RDS. Other RDS subsidiaries' contracts do not provide any carve outs. In this regard it is important for the Commission to recognize that it is not unusual in the oil and gas industry for contracts to run for 20 years or more. In some cases these contracts were entered into prior to the company becoming part of RDS. Thus no carve out would have been needed since the company was not listed on a stock exchange or part of a public company.

RDS can confirm to the Commission that it has existing contracts that we believe would prohibit disclosure of revenue payments made under those agreements and that no carve out exists for RDS to make disclosure pursuant to either US government or US stock exchange regulation. RDS can aim to secure such carves outs for future contracts but has little ability to change existing contracts without potentially paying compensation to the other party. Accordingly, if the Commission adopted rules without a carve out for existing contracts that prohibit such disclosure those rules would adversely affect RDS and our shareholders.

As noted above, there are three countries where RDS operates, which as a matter of law RDS is prohibited from disclosing revenue payments. More importantly, however, RDS has no ability to prevent other foreign governments from prohibiting such disclosure in the future. As discussed in our letter of October 25, 2010, we believe there are at least four strong reasons why foreign governments may prohibit such disclosure in the future:

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[1] Gustafson v Alloyd, 513 U.S. 561, 570 (1995) ("The 1933 Act, like every Act of Congress, should not be read as a series of unrelated and isolated provisions.")

1. Payment information at a project level is likely to be competitively sensitive to the foreign government. For example, it is unlikely that a foreign government would want one international oil company to know the amount of a signature bonus and other remuneration elements paid by another international oil company when negotiating a similar project;
2. A country where security is an issue may have significant safety concerns regarding such disclosure. For example, precise project level payment disclosure could have unintended consequences in revealing information that terrorists or insurgents might use to target a specific project in order to significantly affect a country's revenue and thereby destabilize that country's economy;
3. Disclosure of precise payment information concerning projects where the underlying oil or gas field crosses a country's borders could be viewed as a security risk or state secret;
4. Some countries are unlikely to appreciate the extraterritorial effects of the US legislation.

The Commission under Section II.D.5: Other Matters, states that it has not proposed any exception for disclosure prohibited by foreign governments or existing contract provisions; it is important to note, however, that such an exception already exists for domestic issuers filing Form 10-K. While we applaud the Commission's wisdom in not repealing Instruction E to Form 10-K, we are extremely concerned that a similar instruction was not included in Form 20-F. Instruction E to Form 10-K provides:

> *Disclosure With Respect to Foreign Subsidiaries.*
> *Information required by any item or other requirement of this form with respect to any foreign subsidiary may be omitted to the extent that the required disclosure would be detrimental to the registrant. However, financial statements and financial statement schedules, otherwise required, shall not be omitted pursuant to this Instruction. Where information is omitted pursuant to this Instruction, a statement shall be made that such information has been omitted and the names of the subsidiaries involved shall be separately furnished to the Commission. The Commission may, in its discretion, call for justification that the required disclosure would be detrimental.*

We believe Instruction E to Form 10-K would provide sufficient relief to companies so that they would not be forced to violate a foreign government prohibition, abandon projects, renegotiate existing contracts or pay damages under those contracts that prohibited disclosure, or disclose competitively sensitive information to their detriment. However, if Instruction E or a similar exemption is not added to Form 20-F the proposed amendments implementing Section 13(q) of the Exchange Act would be highly anticompetitive and potentially violate a number of US foreign treaties including the World Trade Organization treaty. We urge the Commission to treat foreign private issuers fairly and provide such an instruction to Form 20-F in order to avoid harm to investors and adversely affect efficiency, competition and capital formation.

Project Definition

We urge the Commission to define the term *project or* limit disclosure to material *projects*. How the Commission defines the term *project* will be a key variable in determining whether the final rules will harm investors or adversely affect efficiency, competition and capital formation. As the Commission is aware, there is no common definition for the term *project* across the oil, gas and mining industries. By failing to define the term *project,* it is likely that any disclosure provided would not be comparable from company to company, unless the Commission limits disclosure to material *projects*. If the Commission limits disclosure to projects that are material to the issuer, no further definition would be needed, as the definition of material is well understood across all industries. We believe, however, it would be unwise and extremely burdensome and costly for the Commission to define the term *project* through the Division of Corporation Finance's comment letter process or worse through the Commission's enforcement actions.

We believe any definition of *project* must include the concept of materiality. If the definition of *project* does not include the concept of materiality then we have estimated that the costs of compliance with the Commission's proposed amendments would be in the tens of millions of dollars and potentially much more, if significant

modifications to our financial systems are needed. If the Commission limits disclosure to material *projects* this would significantly reduce our costs as fewer modifications to our financial systems would be needed. Like most companies, our financial systems are designed to report at entity level or in the case of tax payments, country level. We operate in over 90 countries and could be forced to disclose thousands of projects. In Staff Accounting Bulletin 99, the Commission stated that "*a matter is "material" if there is a substantial likelihood that a reasonable person would consider it important.*" Now if a reasonable person does not consider disclosure of payments associated with a particular project important, because it is not a material project, why would the Commission want to impose costs of tens of millions of dollars and potentially much more for the disclosure of unimportant information? Moreover, the Commission, itself has recognized the harm of overloading investors with immaterial information in its December 29, 2003 guidance regarding Management's Discussion and Analysis:

> *"[C]ompanies must evaluate an increased amount of information to determine which information they must disclose. In doing so, companies should avoid the unnecessary information overload for investors that can result from disclosure of information that is not required, is immaterial and does not promote understanding. . . ."*

Additionally, as the Commission recognized in question 83 of the Proposing Release, not all payments made are associated with a specific project. Accordingly, we believe the Commission should limit disclosure to material projects and then require country level disclosure for any country where a company has a material project. This disclosure we believe would be consistent with the spirit of legislation by providing material project level information that Congress believes would be important to investors and at the same time promoting international transparency by providing disclosure of non-project related payments such as certain tax payments.

The Commission on page 76 of the Proposing Release states its belief that the costs associated with complying with the proposed amendments are a result of statutory requirements and not the proposed amendments. We disagree. The majority of the costs are directly associated with how the Commission decides to implement the requirements of Section 13(q) of the Exchange Act. As noted in our letter of October 25, 2010, and the letter from the eight law firms[2] dated November 5, 2010, the Commission has both definitional and exemptive authority under the Exchange Act necessary to implement the requirements of Section 13(q) in a cost effective manner in order to avoid harming investor or adversely affecting efficiency, competition or capital formation. Accordingly, we believe it is inappropriate to attribute the significant costs associated with the Commission's proposed amendments to the statutory requirements of Section 13(q), since Congress has provided the Commission with all the authority needed to reduce these costs and comply with its obligations under Sections 3(f) and 23(a) of the Exchange Act. If Congress did not want the Commission to use it expertise and judgment in issuing rules, it could have made that clear by making Section 13(q) self-enacting or eliminating the Commission's obligations under Sections 3(f) and 23(a) of the Exchange Act for this rulemaking. Congress did neither, nor did they instruct the Commission not to use its exemptive or definitional authority. Moreover, there is no indication from the legislative history that Congress considered the effects on investors and companies as a result of foreign law and contract prohibitions, nor is there any evidence that they considered or understood the costs associated with major modifications of companies' financial systems. Rather, the legislative history only indicates that Congress believed that this information was already being disclosed pursuant to the EITI, which as discussed in our October 25, 2010 letter is not the case.

We believe the proposed amendments would adversely affect investors, efficiency, competition and capital formation and competitively disadvantage foreign private issuers in violation the Commission's obligations under Sections 3(f) and 23(a) of the Exchange Act. We have attached as appendix A to this letter additional comments addressing the 91 questions that the Commission proposed. Also, we wish that our letter of October 25, 2010 be considered part of the Commission's rulemaking record.

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[2] Cravath, Swaine & Moore LLP, Cleary Gottlieb Steen & Hamilton LLP, Davis Polk & Wardwell LLP, Sherman & Sterling LLP, Simpson Thacher & Bartlett LLP, Skadden, Arps, Slate, Meagher & Flom LLP, Sullivan & Cromwell LLP and Wilmer Cutler Pickering Hale and Dorr LLP,

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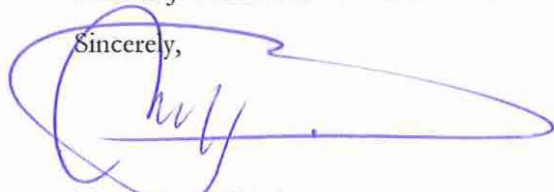
I would like to thank the Commission for giving us an opportunity to provide the Commission with our views and concerns regarding this important rulemaking. If you have any question please contact me at +31 70 377 3120 or Joe Babits at +31 70 377 4215.

Sincerely,



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Cc: Ms. Meredith Cross
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Appendix A

II. PROPOSED RULES UNDER SECTION 13(q)

B. Definition of "Resource Extraction Issuer"

1 - Should the Commission exempt certain categories of issuers, such as smaller reporting companies or foreign private issuers, from the proposed rules? If so, which ones and why? If not, why not? Would providing an exemption for certain issuers be consistent with the statute? If we do not provide such an exemption when adopting final rules, would foreign private issuers or any other issuers deregister to avoid the disclosure requirement?

The Commission should provide a limited exemption to foreign private issuers. Foreign private issuers should be allowed to rely on home country disclosure rules provided that those rules require equivalent disclosure and such disclosure is included in their Form 20-F. If the Commission adopts the rules as proposed, we would expect any company, especially foreign private issuers, with the ability, to deregister. As discussed in the main body of our letter, the Commission's current proposals unfairly target foreign private issuers and investors as a result of not amending Form 20-F to include Instruction E that is currently applicable to Form 10-K. This would not be to the benefit of investors.

2 - Would our proposed rules present undue costs to smaller reporting companies? If so, how could we mitigate those costs? Also, if our proposed rules present undue costs to smaller reporting companies, do the benefits of making their resource extraction payment information publicly available justify these costs? Should our rules provide more limited disclosure and reporting obligations for smaller reporting companies? If so, what should these limited requirements entail? Should our rules provide for a delayed implementation date for smaller reporting companies in order to provide them additional time to prepare for the requirement and the benefit of observing how larger companies comply?

The proposing release, as currently drafted, will present an undue cost to collect/report for both small and large companies. As further mentioned in our responses to the proposing release questions, we recommend that the transparency reporting be focused on material projects, which will mitigate the costs of implementation and ongoing reporting and is more beneficial to users of the reporting information.

3 - Should the Commission provide an exemption to allow foreign private issuers to follow their home country rules and disclose in their Form 20-F the required home country disclosure?

We propose that the Commission provide an exemption to allow foreign private issuers to follow their home country rules and disclose in their Form 20-F the required home country disclosures.

The disclosure of foreign government payments by extractive industry participants is being considered throughout the world. Already the Hong Kong Stock Exchange and the London Stock Exchange AIM market have adopted limited country level disclosure requirements. The EU and IASB are also considering possible disclosure requirements at the country level. Accordingly, we are concerned that as a foreign private issuer we will be required to provide multiple payment disclosures in our Form 20-F in order to satisfy the US, UK and EU requirements and thereby overwhelming our investors. Therefore, we request that the Commission consider a limited exemption similar to what it has provided with regard to executive compensation and corporate governance. In those areas, the Commission has allowed foreign private issuers to follow home country rules and disclose in their Form 20-F the required home country disclosure. We believe, given the significant cost and the questionable benefits to investors and other users of our financial reporting of such disclosure, that a limited foreign private issuer exemption would be appropriate under Section 3(f) of the Exchange Act. In order not to provide a competitive advantage to any company, this exemption should be provided only where home country rules requires equivalent information to be disclosed.

4 - Should the rules apply to issuers that are owned or controlled by governments, as proposed? If so, why? If not, why not? Should the disclosure requirements be varied for such entities?

To provide transparency, comparability and consistency, the final rules should apply to any issuers that are owned or controlled by governments. Failure to apply the Commission's proposed rules to companies controlled by governments would have drastic anticompetitive effects as many of these companies are the largest in the industry.

5 - General Instructions I and J to Form 10-K contain special provisions for the omission of certain information by wholly-owned subsidiaries and asset-backed issuers. Should either or both of these types of registrants be permitted to omit the proposed resource extraction payment disclosure in the annual reports on Form 10-K?

These registrants should be subject to the Commission's proposal as otherwise it will provide a competitive advantage to those companies.

C. Scope – Definition of "Commercial Development…"

6 - Should we, as proposed, define "commercial development of oil, natural gas, or minerals" as the term is described in the statute? Should it be defined differently (e.g. more broadly or more narrowly)? If we should define the term, what definition would be appropriate?

The definition of "commercial development of oil, natural gas, or minerals" should be consistent with the Commission's revised scope of oil and gas producing activities, *"Modernization of Oil and Gas Reporting, Securities Act Release No. 8995, Exchange Act Release No. 59,192, 74 Federal Register 2158, at 2187 (January 14, 2009)"* and SEC Industry Guide 7, Mining. This revised definition is understood in practice throughout the industry and to users of financial reporting.

7 - Should the definition of "commercial development of oil, natural gas, or minerals" include the activities of exploration, extraction, processing, and export, as proposed? Should we exclude any of these activities? If so, which activities and why? If not, why not? Would excluding certain activities be consistent with the statute? In this regard, we note that, as discussed above, disclosing payments beyond those related to exploration and production is not required by the EITI criteria, and other countries have focused on identifying, reporting and verifying revenue streams related to those activities only. Should the definition only include the activities of exploration and extraction, consistent with the EITI, and not include processing, export, and other significant actions? Should the definition include the activities of exploration, extraction, and only some processing activities, such as those related to the upgrading of bitumen and heavy oil? Should the definition explicitly include production, consistent with the use of that term by the EITI? Does "production" in the oil, natural gas, and mining industries include activities that are different than those covered by "extraction" so that if we do not include production in the definition of commercial development, some payments may go unreported?

See our response to Q 6. Additionally, the application of the Commission's scope to upstream activities as defined in its Modernization of Oil and Gas Reporting and SEC Industry Guide 7 will provide uniformity with those reserve reporting requirements and those with the EITI. With regard to the latter, the proposing release draws a number of parallels with the EITI disclosures including the qualifier "the determination should be consistent with EITI's guidelines, to the extent practicable."

The inclusion of an integrated company's downstream or midstream activities is not considered an extractive operation and such inclusion would mislead investors and users of this financial information. Further, it would appear to be inconsistent and confusing to investors and other users if the proposed rule is not applicable to registrants who have no upstream activities but which have downstream and midstream operations. This would also adversely affect competition as the cost of complying with the Commission's proposed rules is significant and if midstream and downstream activities were only included for extractive industry participants then

midstream and downstream companies would have a significant competitive advantage since they would not be required to make the proposed disclosures. Moreover, in some cases such disclosure in itself will be competitively harmful providing another advantage to non-extractive companies who engage in midstream or downstream activities.

8 - Are there other significant activities that we should include in the definition? Should we provide further guidance regarding activities that may not be covered by the list of activities, but could constitute a "significant action?" If so, what activities should be covered?

The only significant activities that should be included are those that the Commission has considered upstream activities for the last 30 years. For example, the Commission has never considered refining as processing under the reserve rules. Similarly the processing of gas-to-liquids is not considered an upstream, extractive activity since the molecules are changed.

9 - As noted, we do not believe the proposed definition of "commercial development of oil natural gas, or minerals" would include transportation to the extent that the oil, natural gas, or minerals are transported for purposes other than export, and we note that payments related to transportation activities generally are not included in EITI programs. Should the definition include transportation of oil, natural gas, or minerals? Should compression of natural gas be treated as processing, and therefore subject to the proposed rules, or transportation, and therefore not subject to the proposed rules?

We propose that all downstream activities including transportation and processing not be in scope for these disclosures as they do not pertain to extractive type activities or are considered part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. See our responses to Qs 6-8.

10 - Should the definition of "commercial development of oil, natural gas, or minerals" explicitly exclude any other oil, natural gas, or mining activities? If so, please tell us what types of activities should be excluded and why.

See our responses to Qs 6-9.

11 - Should we provide any additional guidance regarding the types of activities that may be within or outside of the scope of the definition?

See our responses to Qs 6-10.

D. Definition of "Payment"

D.1 - Types of Payments

12 - Should the definition of "payment" include the list of the types of payments from Section 13(q), as proposed? Are there additional types of payments that we should include in the definition of "payment?" Should the definition exclude certain types of payments? Are there certain payments, for example, specific types of taxes, fees, or benefits that we should include in, or exclude from, the list? Alternatively, should we provide guidance in our rules in the form of examples of payments that we believe resource extraction issuers would be required to disclose?

While an exhaustive list of the types of payments which could be made to governments is not feasible, those types of payments represented in Section 13(q) are appropriate and well understood within the industry. We feel this is sufficient and will provide the industry the framework to assess special or unique payments made to governments, which are not *de minimis*, and are of a nature to further the commercial development of oil, natural gas, or minerals.

13 - As noted above, the definition of payment includes "taxes," which is consistent with Section 13(q) and the EITI. In order to clarify the meaning of this term in a manner consistent with the EITI, we have included an instruction in our proposal noting that resource extraction issuers would be required to disclose taxes on corporate profits, corporate income, and production and would not be required to disclose taxies levied on consumption, such as value added taxes, personal income taxes, or sales taxes. Consistent with the EITI, we are not proposing to require disclosure of consumption taxes because we do not believe such taxes are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, and minerals. Is our proposal regarding disclosure of taxes appropriate? Should the types of taxes listed as requiring disclosure, or not requiring disclosure, be revised? If so, how should they be revised? Are there other taxes that we should include in or exclude from the disclosure requirements?

We agree with the Commission's current guidance regarding "taxes" such that taxes refers to taxes on corporate profits, income and production and not taxes levied on consumption, personal income or sales taxes.

14 - While the definition of "payment" in Section 13(q) does not address the means by which a payment may be made, we believe it would cover payments made in cash or in kind. Should a resource extraction issuer be required to disclose payments regardless of how the payment is made (e.g. in cash or in kind)? Should the rule be revised to make clear that "payment" would include payments made in cash or in kind?

We agree with the concept that both cash and in-kind payments related to host government or national oil company (NOC) production entitlements or profit barrels should be reported by issuers. Such payments are a common aspect of production sharing contracts. As the Commission has noted, including in-kind payments is consistent with the guidance on pages 27-28 in the *EITI Source Book*.

As noted in the EITI guidance, valuing and reporting in-kind production entitlement payments pursuant to the regulations will require special attention. In-kind payments are not currently recorded in the issuer's financial systems and methods would need to be developed for the valuing and recording of these payments to facilitate reporting. We believe in kind payments should be disclosed in barrels of oil equivalent. Disclosing a value for these payments could be very misleading, as no matter what method we use we could not provide an accurate amount the host country received for those in kind payments. For example, some countries will use natural gas for domestic use which usually is less valuable than if converted to liquid natural gas and sold in the open market. As a point of important consideration, we also note that total payments to governments reported by the industry will be over-stated if downstream activities such as refineries or chemical plants are included in the scope of reporting. In situations where the operators of such facilities purchase these "in kind" oil or gas volumes from the government, both the "upstream" registrant and the "downstream" registrant would report payments to the government. We believe that in-kind payments provide a good illustration of problems that will arise should reporting of payments associated with downstream operations be included in the final rules.

It is also important to note that issuers' financial systems are currently designed to provide correct accounting of the issuer's net share of the various benefit streams on an accrual basis. While the net share of accrual basis amounts are recorded in the general ledger modules of financial systems, detailed payment information is recorded separately in the accounts payable modules. Payments are recorded in the accounts payable modules on either a "net" share basis or on a "gross" basis, depending on the type of the payment and the specific terms of the venture arrangements. Reconfiguring business systems to accommodate this mix of situations will take considerable resources. Accordingly, we recommend that the Commission require issuers to report payments based upon the amount actually paid by the issuer to the government entity (as opposed to the issuer's net share of the payment), consistent with EITI practices. It is also worthy of note that under the EITI there is an independent body that reconciles payments across the industry to avoid double counting. This "amount actually paid" approach will considerably ease the implementation burden of the disclosure rules for issuers, and eliminate the need for operators to develop systems to calculate and transmit detailed net payments information to their partners, who each would then be required to disclose their respective net share of an operator's payments. Please also see our responses to Qs 52 and 53.

15 - The definition includes "fees (including license fees)," which is consistent with Section 13(q) and the EITI. As noted above, the EITI gives examples of the fees that should be disclosed, including concession fees, entry fees, and leasing and rental fees, which would likewise be covered under our proposal. In addition to license fees, should the rules specifically list other types of fees that would be subject to disclosure?

We believe that the term "license fees" is sufficiently understood within the industry and that an exhaustive list of fees is not appropriate. See our response to Q 12.

16 - Are there other fees that we should identify in the rules or in guidance? For example, should we specify that disclosure would be required for fees paid for environmental permits, water and surface use permits, and other land use permits; fees for construction and infrastructure planning permits, air quality and fire permits, additional environmental permits, customs duties, and trade levies? Would these types of fees be considered to fall within the categories of fees that we have identified as being subject to disclosure?

Disclosure for fees paid for environmental permits, water and surface use permits, other land use permits, fees for construction and infrastructure planning permits, air quality and fire permits, additional environmental permits, customs duties, and trade levies should not be required. These ancillary types of costs are generally *de minimis* in nature.

17 - Are there some types of fees that we should explicitly exclude from the definition?

See our response to Q 16. We believe that the term "fees" and "license fees" are sufficiently understood within the industry and that an exhaustive list of fees to include or exclude is not appropriate. See our response to Q 12.

18 - The definition includes "bonuses," which is consistent with Section 13(q) and the EITI. "Bonuses" would include the examples of bonuses identified by the EITI as noted in the table above. Should we provide further guidance about the meaning of the term "bonus" for purposes of this disclosure?

We believe that the use of the term "bonuses" (signature, discovery, production, etc.) is sufficiently understood within the industry and that no further guidance is needed.

19 - Are there types of bonuses that we should exclude from the definition of "payment?"

We believe that the term "bonus" is sufficiently understood within the industry and that an exhaustive list of bonuses to include/exclude is not appropriate. See our response to Q 18.

20 - Are there "other material benefits" that we should specify as being included within the definition of "payment?" In that regard, how should we determine what benefits "are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals?" Should we include a broad, non-exclusive definition of "other material benefits," such as benefits that are material to and directly result from or directly relate to the exploration, extraction, processing, or export of oil, natural gas, or minerals? Or would including a broad definition be inconsistent with the statutory language directing us to identify other material benefits that "are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals?"

A broad definition would be inconsistent with the statutory language as payments "commonly recognized with the revenue stream for the commercial development of oil, natural gas, or minerals" are sufficiently understood within the industry. Moreover, we are unaware of any other material benefits that are part of the commonly recognized revenue stream. If the Commission becomes aware of other material benefits that are part of the commonly recognized revenue stream, it should at that time propose those material benefits for comment.

We propose that all downstream activities including transportation and processing not be in scope for these disclosures as they do not pertain to extractive type activities or are considered part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. See our responses to Qs 6-9.

21 - As noted, dividends are not included in the list of payments required to be disclosed under the proposed rules. Should we determine that dividends are "other material benefits" and require disclosure of dividends? Are dividends part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals?

The payment of dividends (and taxes) is generally not associated with a particular project in isolation but is part of the joint arrangement which could encompass multiple fields or areas, or higher levels of aggregation. Since dividends were not included in Section 13(q), most likely because it is not normally associated with a project, we do not believe the Commission should include it under "other material benefits".

22 - We do not believe the proposed definition of payment should include payments resource extraction issuers make for infrastructure improvements, even if they are a direct cost of engaging in the commercial development of oil, natural gas, or minerals because it is not clear that such payments would be covered by the specific list of items in the statute or otherwise would be a part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. Should our definition cover such payments? Would such payments be considered part of the commonly recognized revenue stream? Would these types of payments distort the disclosure of payments for extractive activities?

We believe that infrastructure improvements (right of way access, roads, etc.) are similar in nature to permitting costs, etc. and should not be included as a part of the disclosures for payments. These improvements are generally of a *de minimis* nature when compared to the overall costs associated with the commercial development of oil, natural gas, or minerals in an area and, in many cases, are paid to private parties and not government agencies.

23 - "Social or community" payments generally include payments that relate to improvements of a host country's schools or hospitals, or to contributions to a host country's universities or funds to further resource research and development. As proposed, our rules would not expressly include social or community payments within the definition of "payment." Some EITI programs include social or community payments while others do not. Are such payments part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals? Should we require disclosure of only certain "social or community" payments under the "other material benefits" provision, such as if those payments directly fulfill a condition to engaging in resource extraction activities in the host country? Would such payments be considered part of the commonly recognized revenue stream?

Social or community payments are not typically part of the commonly recognized revenue stream. We concur with the Commission's proposal that these social costs should not be expressly included in the disclosure for payments associated with the revenue stream for the commercial development of oil, natural gas, or minerals. In the event that social or community payments are material to the overall payments made to a foreign government we would support such payments being disclosed under "other material benefits."

24 - Are there other types of payments that we should include as "other material benefits?" For example, should we, as requested by one commentator, require disclosure of "ancillary payments made pursuant to the investment contract (including personnel training programs, local content, technology transfer and local supply requirements)" and payments "related to any liabilities incurred (including penalties for violations of law or regulation, environmental and remediation liabilities, and bond guarantees entered into with the central banks or similar national or multi-national entities, as well as costs arising in connection with any such bond guarantees)"?

We do not believe that the ancillary costs of activities such as personnel training programs, local content, technology transfer and local supply requirements, penalties, bond guarantees, etc. should be required disclosures. These expenditures are more aligned with incidental taxes and levies, fees and licenses, and social and community payments.

However, any payments made to governments to settle current and future environmental and remediation costs should be in scope as payments to be included in the disclosures.

25 - Should we provide additional guidance regarding the types of payments that resource extraction issuers should disclose? If additional guidance is appropriate, should we provide clarification in the rules or as interpretive guidance?

While an exhaustive list of the types of payments which could be made to governments is not feasible, those types of payments represented in Section 13(q) are appropriate and well understood within the industry. We feel this is sufficient and will provide the industry the framework to assess special or unique payments made to governments, which are not *de minimis*, and are of a nature to further the commercial development of oil, natural gas, or minerals.

If the Commission provides any type of additional guidance regarding the types of payments that issuers should disclose, the clarification should be reflected in the final rules.

D.2 - The "Not De Minimis" Requirement

26 - Section 13(q) establishes the threshold for payment disclosure as "not de minimis," which we preliminarily believe is a standard different from a materiality standard. Is our interpretation that "not de minimis" is not the same as "material" correct?

The Commission cites the definition of "de minimis" from the Merriam-Webster Dictionary as something that is "lacking significance or importance" or "so minor as to merit disregard." As noted in the body of our letter the Commission in SAB 99 defined "a matter as material if there is substantial likelihood that a reasonable person would consider it important." Accordingly "lacking significance or importance" would be consistent with something not being material. However, perhaps more informative is that Congress used the word "material" when directing the Commission to consider "other *material* benefits." Congress did not direct the Commission to consider "other benefits." This we believe is highly informative and suggests that Congress was only concerned with material payments not immaterial payments consistent with the Merriam Webster Dictionary "lacking significance or importance."

27 - Should we define "not de minimis" for purposes of the proposed rules? Why or why not? What would be the advantages or disadvantages of not defining that term? If the final rules do not provide a definition, should an issuer be required to disclose the basis and methodology it used in assessing whether a payment amount was "not de minimis?"

Consistent with our response in Q 26 "de minimis" can and should be defined as not material. Each Statement of Financial Accounting Standards issued by the Financial Accounting Standards Board (FASB) concludes by stating "The provisions of this Statement need not be applied to immaterial items." A similar concept is found in International Accounting Standard (IAS) 1, *Presentation of Financial Statements*. Paragraph 31 of IAS 1 states "an entity need not provide a specific disclosure required by an IFRS if the information is not material.".

The FASB Concepts Statement No 2, *Qualitative Characteristics of Accounting Information*, defines "materiality" as the magnitude of an omission or misstatement of accounting information that, in light of surrounding circumstances, makes it probable that the judgment of a reasonable person relying on the information would have been changed or influenced by the omission or misstatement."

Similarly, the IASB's *Framework* speaks to "materiality": "The relevance of information is affected by its nature and materiality….Information is material if its omission or misstatement could influence the economic decisions of users taken on the basis of the financial statements. Materiality depends on the size of the item or error

judged in the particular circumstances of its omission or misstatement. Thus, materiality provides a threshold or cut-off point rather than being a primary qualitative characteristic which information must have if it is to be useful." [IFRS *Framework*, paragraphs 29-30]

FASB Concept Statement No. 2 further states: "Rule 3-02 of Securities and Exchange Commission's Regulation S-X, "Form and Content of Financial Statements," states that if an "amount which would otherwise be required to be shown with respect to any item is not material, it need not be separately set forth. Those who turn to SEC Regulation S-X for help in understanding the concept of materiality learn that a material matter is one "about which an average prudent investor ought reasonably to be informed" (Rule 1-02) and that material information is 'such…information as is necessary to make the required statements, in the light of the circumstances under which they are made not misleading' (Rule 3-06)" [FASB Concept Statement No. 2, paragraphs 161-162]

SEC Staff Accounting Bulletins 99 and 108 speak to materiality issues as well.

28 - If we should define "not de minimis," what should that definition be? Provide data to support your definition if you are able to do so.

See our response to Qs 26 and 27.

29 - What would be the advantages or disadvantages of defining "not de minimis" as "material?" Would such a reading be consistent with the language and intent of the statute? Would such a standard be a reasonable means of encouraging consistent disclosure? Would it be necessary for the Commission to provide additional guidance on how to determine materiality if a materiality standard governed this disclosure? If so, what guidance would be appropriate in the context of this information?

See our responses to Qs 26-28.

Adding the qualifier "material" to the types of payments listed in Section 13(q) would provide the needed clarity to ensure comparability and consistency for all issuers. Please see the body of our letter.

30 - Should we adopt a definition of "not de minimis" that uses an absolute dollar amount as the threshold? If so, what would be the appropriate dollar amount? Should the "not de minimis" payment threshold be $100,000, an amount less than $100,000, such as $1,000, $10,000, $15,000, or $50,000, or an amount greater than $100,000, such as $200,000, $500,000, $1,000,000, or $10,000,000? Should some other dollar amount be used?

No. Please see our responses to Qs 26-29.

31 - The type and amount of payments made by resource extraction issuers may vary greatly, depending on the size of the issuer and the nature and size of a particular project. Should the rules account for variations in size of issuers and projects? Would doing so be consistent with Section 13(q)?

Yes. However, the use of material would address this issue, as what is material to a small company would not be the same as a large company. See our responses to Qs 27-30.

32 - Should a payment be considered "not de minimis" if it meets or exceeds a percentage of expenses incurred per project for the year that is the subject of the annual report? Is a per project basis appropriate because Section 13(q) requires an issuer to disclose payment information for each project as well as for each government? Instead of a per project basis, should we base a definition of "not de minimis" on a threshold that uses a percentage of an issuer's total expenses for the year or its total expenses incurred for all projects undertaken in a particular country for the year? Should the percentage threshold be based on something else, such as revenues, profits or income? Would using a percentage threshold further the intent of the statute and help minimize the costs associated with providing the disclosure?

The Commission should define de minimis as not material to the issuer. However, if the Commission decides not to define de minimis as not material, then we think it is appropriate that de minimis be defined as a percentage of an issuer's annual upstream expenses or revenue. Please see our responses to Qs 26 and33.

33 - If a percentage threshold should be used to define "not de minimis," should the percentage be 1%, 2%, 3%, 4%, 5%, or a higher percentage? Should the definition use a percentage lower than 1%, such as 0.1%, 0.2%, 0.3%, 0.4%, or 0.5%?

5% . Please see our responses to Qs 26-32.

34 - Should we adopt a definition of "not de minimis" that uses the same dollar amount or the same percentage threshold for all resource extraction issuers, regardless of size?

The same percentage would be acceptable the same dollar amount would not. Using the same dollar amount would likely result in some issuers disclosing highly immaterial payments and other smaller issuers not disclosing material payments. See our responses to Qs 26-33.

35 - Should we adopt a definition of "not de minimis" that depends on the size of a resource extraction issuer so that the dollar amount or percentage threshold would vary depending on the size of the issuer? For example, should the threshold be $1,000 for non-accelerated filers, $10,000 for accelerated filers, and $100,000 for large accelerated filers? Should some other dollar amount be used for each filer category? If so, what amount? If we use a percentage threshold, should the threshold be 1% for non-accelerated filers, 2% for accelerated filers, and 3% for large accelerated filers? Should some other percentage be used for each filer category? If so, what percentage?

See our responses to Qs 26-34.

36 - Should we define "not de minimis" to be an amount that meets or exceeds the lesser of two measures, for example, a dollar amount, such as $100,000, or a percentage, such as 1%, of an issuer's expenses, revenues or some other amount for the year? Would such an approach be appropriate to address variations in the size of resource extraction issuers?

See our responses to Qs 26-35.

37 - Should we define payments that are "not de minimis" to mean payments that are significant compared to the total expenses incurred by an issuer for a particular project, or with regard to a particular government for the year?

See our responses to Qs 26-36.

38 – We note that the phrase "not de minimis" is used only in the definition of the term "payment." Would it be consistent with the statute to require disclosure of payments that are "not de minimis" only if they are related to material projects of a resource extraction issuer?

Yes. Please see the body of our letter. It would be completely consistent to limit disclosure to material projects and then include all payments associated with the material projects that are not de minimis.

D.3 - The "Project" Requirement

39 - Should we define "project" for purposes of this new disclosure requirement? If so, why? If not, why not?

We urge the Commission to define the term *project or* limit disclosure to material *projects*. How the Commission defines the term *project* will be a key variable in determining whether the final rules will harm investors or adversely affect efficiency, competition and capital formation. As the Commission is aware, there is no common definition for the term *project* across the oil, gas and mining industries. By failing to define the term *project,* it is likely that any disclosure provided would not be comparable from company to company, unless the Commission limits disclosure to material *projects*. If the Commission limits disclosure to projects that are material to the issuer, no further definition would be needed, as the definition of material is well understood across all industries. We believe, however, it would be unwise and extremely burdensome and costly for the Commission to define the

term *project* through the Division of Corporation Finance's comment letter process or worse through the Commission's enforcement actions.

We believe any definition of *project* must include the concept of materiality. If the definition of *project* does not include the concept of materiality then we have estimated that the costs of compliance with the Commission's proposed amendments would be in the tens of millions of dollars and potentially much more, if significant modifications to our financial systems are needed. If the Commission limits disclosure to material *projects* this would significantly reduce our costs as fewer modifications to our financial systems would be needed. Like most companies, our financial systems are designed to report at entity level or in the case of tax payments, country level. We operate in over 90 countries and could be forced to disclose thousands of projects. In Staff Accounting Bulletin 99, the Commission stated that "*a matter is "material" if there is a substantial likelihood that a reasonable person would consider it important.*" Now if a reasonable person does not consider disclosure of payments associated with a particular project important, because it is not a material project, why would the Commission want to impose costs of tens of millions of dollars and potentially much more for the disclosure of unimportant information? Moreover, the Commission, itself has recognized the harm of overloading investors with immaterial information in its December 29, 2003 guidance regarding Management's Discussion and Analysis:

> *"[C]ompanies must evaluate an increased amount of information to determine which information they must disclose. In doing so, companies should avoid the unnecessary information overload for investors that can result from disclosure of information that is not required, is immaterial and does not promote understanding. . . ."*

Additionally, as the Commission recognized in question 83 of the Proposing Release, not all payments made are associated with a specific project. Accordingly, we believe the Commission should limit disclosure to material projects and then require country level disclosure for any country where a company has a material project. This disclosure we believe would be consistent with the spirit of legislation by providing material project level information that Congress believes would be important to investors and at the same time promoting international transparency by providing disclosure of non-project related payments such as certain tax payments.

40 - If we should define "project," what definition would be appropriate? Please be as specific as possible and discuss the basis for your recommendation.

Provided that the Commission requires only material projects to be disclosed, then the definition could be broadened to capture entire countries, consistent with what the American Petroleum Institute proposed in their letter of October 12, 2010.

41 - Should we define "project" to mean a project as that term is used by a resource extraction issuer in the ordinary course of business? What are the advantages and disadvantages of such an approach? If the final rules were to use such an approach, should an issuer be required to disclose the basis and methodology it used in defining what constitutes a project?

This would only be appropriate if disclosure is required only for material projects. See our letter to Meredith Cross dated October 25, 2010.

42 - Should we define "project" to mean a field, mining property, refinery or other processing plant, or pipeline or other mode of transport? Should we define "project" to permit the inclusion of more than one field, mining property, refinery or other processing plant, or pipeline or other mode of transport?

See our responses to Qs 39-41.

We propose that all downstream activities including transportation and processing not be in scope for these disclosures as they do not pertain to extractive type activities or are considered part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. See our responses to Qs 6-9.

43 - Should we adopt a definition of "project" that is substantially similar to the definition of "development project" under Rule 4-10(a)(8) of Regulation S-X? Would reliance on that existing

definition, with which oil and natural gas companies are already familiar, help to elicit appropriate payment disclosure under Section 13(q) without over-burdening issuers? Or is that definition unsuitable for purposes of Section 13(q) because it does not explicitly encompass other types of projects, such as exploration projects, and does not relate to mining activities? What modifications to the Regulation S-X definition of "development project," if any, would be appropriate to provide a definition for "project" for it to be suitable for purposes of the disclosure required by Section 13(q)?

- ☒ **In particular, similar to Rule 4-10(a)(8) and staff guidance regarding the rule, should we define project as:**
  - **the means by which oil, natural gas, or mineral resources are brought to the status of being economically producible or commercially developed;**
  - **typically involving a single engineering activity with a distinct beginning and end;**
  - **having a definite cost estimate, time schedule, or investment decision, and approved for funding by management;**
  - **one that, when completed, results in the exploration, extraction or production, processing, transportation or export of oil, natural gas, or minerals; and**
  - **one that may involve a single reservoir, field or mine, the incremental development of a producing field or mine, or the integrated development of a group of several fields or mines and associated facilities with a common ownership?**
- ☒ **Would it be appropriate to include or exclude any of the aspects listed above? Why or why not?**
- ☒ **Should the definition of project include one that involves more than one engineering activity or an engineering activity that is open-ended? Would a definition that focuses on the level of engineering activity fail to elicit the disclosure of payments in connection with some projects, for example, an exploration project?**
- ☒ **Would a project always have a definite cost estimate, time schedule, or investment decision, or be approved by management? Should any of these characteristics be excluded from any definition of project? Are there any additional characteristics that we should include in any definition of project?**
- ☒ **Should any definition of project encompass only a single reservoir, field or mine? Why or why not?**

See our responses to Qs 39-42.

We propose that all downstream activities including transportation and processing not be in scope for these disclosures as they do not pertain to extractive type activities or are considered part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. See our responses to Qs 6- 9.

44 - Should we permit issuers to treat operations in a country as a "project?" Would doing so be consistent with the statute?

See our responses to Qs 39-43.

We propose that all downstream activities including transportation and processing not be in scope for these disclosures as they do not pertain to extractive type activities or are considered part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. See our responses to Qs 6-9.

45 - We note that issuers currently use the concept of "reporting unit" for financial reporting purposes (e.g. an operating segment or one level below an operating segment). Should the definition of "project" be consistent with the "reporting unit" concept? Is that definition consistent with the statute? Would using such a definition ease implementation of the disclosure requirements for resource extraction issuers given that payments currently may be tracked on that basis? What concerns, if any, are raised by using such a concept as the basis for defining "project?" Are there other concepts, such as

an "asset group" or "cash generating unit," that would provide a more appropriate basis for the definition of "project?"

We urge the Commission to define the term *project or* limit disclosure to material *projects*. How the Commission defines the term *project* will be a key variable in determining whether the final rules will harm investors or adversely affect efficiency, competition and capital formation. As the Commission is aware, there is no common definition for the term *project* across the oil, gas and mining industries. By failing to define the term *project,* it is likely that any disclosure provided would not be comparable from company to company, unless the Commission limits disclosure to material *projects*. If the Commission limits disclosure to projects that are material to the issuer, no further definition would be needed, as the definition of material is well understood across all industries. We believe, however, it would be unwise and extremely burdensome and costly for the Commission to define the term *project* through the Division of Corporation Finance's comment letter process or worse through the Commission's enforcement actions.

We believe any definition of *project* must include the concept of materiality. If the definition of *project* does not include the concept of materiality then we have estimated that the costs of compliance with the Commission's proposed amendments would be in the tens of millions of dollars and potentially much more, if significant modifications to our financial systems are needed. If the Commission limits disclosure to material *projects* this would significantly reduce our costs as fewer modifications to our financial systems would be needed. Like most companies, our financial systems are designed to report at entity level or in the case of tax payments, country level. We operate in over 90 countries and could be forced to disclose thousands of projects. In Staff Accounting Bulletin 99, the Commission stated that "*a matter is "material" if there is a substantial likelihood that a reasonable person would consider it important."* Now if a reasonable person does not consider disclosure of payments associated with a particular project important, because it is not a material project, why would the Commission want to impose costs of tens of millions of dollars and potentially much more for the disclosure of unimportant information? Moreover, the Commission, itself has recognized the harm of overloading investors with immaterial information in its December 29, 2003 guidance regarding Management's Discussion and Analysis:

> *"[C]ompanies must evaluate an increased amount of information to determine which information they must disclose. In doing so, companies should avoid the unnecessary information overload for investors that can result from disclosure of information that is not required, is immaterial and does not promote understanding. . . ."*

Additionally, as the Commission recognized in question 83 of the Proposing Release, not all payments made are associated with a specific project. Accordingly, we believe the Commission should limit disclosure to material projects and then require country level disclosure for any country where a company has a material project. This disclosure we believe would be consistent with the spirit of legislation by providing material project level information that Congress believes would be important to investors and at the same time promoting international transparency by providing disclosure of non-project related payments such as certain tax payments.

See also our responses to Qs 40-44.

Additionally, we propose that all downstream activities including transportation and processing not be in scope for these disclosures as they do not pertain to extractive type activities or are considered part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. See our responses to Qs 6-9.

46 - Are there any other factors that we should include in the definition of "project?"

See our responses to Qs 39-45.

We propose that all downstream activities including transportation and processing not be in scope for these disclosures as they do not pertain to extractive type activities or are considered part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. See our responses to Qs 6-9.

47 - Should we define "project" to mean a material project? If so, what should be the basis for determining whether a project is material for purposes of the resource extraction payment disclosure rules? Would defining project to mean a material project be consistent with Section 13(q)?

See our responses to Qs 39-46. See our responses to Qs 27-37 regarding materiality. Materiality is well understood. The Commission should not try to redefine what is material. As discussed in the body of this letter defining project to mean material project is consistent with Section 13(q).

48 - Should we permit issuers to aggregate payments by country rather than project? Would that be consistent with Section 13(q)?

See our responses to Qs 39-47. See our responses to Qs 27-37 regarding materiality.

D.4 - Payments by "a Subsidiary…or an Entity under the control of…"

49 - As noted above, our rules currently include definitions of "subsidiary" and "control," which would apply in this context as well. Should we include a different definition for "subsidiary" or "entity under the control of" a resource extraction issuer? If so, why? How should the definitions vary?

We believe that the definitions with the proposed rules are sufficient and well understood by preparers as consistently applied with respect to the accounting standards and reporting frameworks. Payments made by a "subsidiary…or an entity under the control of…" adequately refer to parent/subsidiary activities which are fully or proportionally consolidated into the parent's consolidated accounts based on control or joint control of assets or operations. Arrangements whereby the issuer does not exercise control (joint or otherwise) are accounted for as equity investments as the issuer is an equity investee. Equity investments generally do not provide the equity investee the right to the level of details for fully consolidated activities and in some countries, detailed disclosure of payments to the company, as a shareholder and in some cases as a potential competitor, could violate market abuse and antitrust regulations and accordingly, would be out of scope of these disclosures.

50 - Under the definition of control, a resource extraction issuer may be determined to control entities that are not consolidated subsidiaries. Is the requirement to disclose payments by an entity under the control of the issuer even though the issuer does not consolidate the entity appropriate?

It is not clear when entities under control would not be consolidated. International Accounting Standard No. 27 requires, when assessing control, that all facts and circumstances be considered.

See our response to Q 49.

51 - Under the proposed rules, a resource extraction issuer would be required to provide disclosure for an entity if it is consolidated in the financial statements of the resource extraction issuer presented under U.S. GAAP (or other jurisdictional GAAP that requires a U.S. GAAP reconciliation) and IFRS as issued by the IASB because entities meeting the consolidation requirement generally also meet the definition of control. Are there circumstances under U.S. GAAP and IFRS that would render different consolidation results, such as proportionate consolidation, that we should consider? If so, please describe the circumstances and indicate how the different circumstances should be addressed in the new rules. We understand that entities and operations that are proportionately consolidated are viewed as consolidated entities or operations of an extractive issuer, while investments presented on the equity method are not viewed as consolidated entities or operations. Should our rules specifically include these concepts? For instance, should our rules treat equity investees differently even if they are controlled by

the resource extraction issuer? Should our rules, as proposed, include equity investees that the issuer controls but does not consolidate?

See our response to Q 49.

52 - Are there instances, other than control in which a resource extraction issuer should have to disclose payments made by a subsidiary or other entity? If so, should we revise our proposal to mandate disclosure in those circumstances? Would resource extraction issuers have access to payment information in those circumstances? Should our rules specify that an issuer would have to disclose payments made by a non-controlled entity only if the issuer is the operator of the joint venture or other project? Would it be appropriate to require an issuer to disclose payments that correspond to its proportional interest in the joint venture rather than all of the payments made by or for the joint venture?

As noted in our responses to Questions 49, 50, and 51, we believe requiring disclosure for a resource extraction issuer's consolidated subsidiaries clearly meets the intent of the Section 13(q) statute. Accordingly, we do not support revision of the Commission's preliminary proposal in a way that deviates from the concept of "control" as defined in existing Rule 12b-2, or that otherwise mandates disclosure for non-consolidated subsidiaries. Resource extraction issuers generally do not have access to detailed payment information in situations where they are non-operators or in situations where their interests in the underlying operations are held by an entity accounted for as an equity investment. We do not support requiring issuers to disclose payments in such circumstances, nor do we support requiring issuers to disclose payments that correspond to their proportional interest in equity investments or joint ventures unless such payments are made directly to the government by the issuer. Such information is not readily available to non-operators, and will result in under-reporting of payments to governments when a non-operating partner is not an SEC registrant. Instead, as we further explain in our response to Question 14 and consistent with EITI practices, resource extraction issuers should be required to report the cash or in-kind payments made directly to governments by the registrant or entities under its control, including the amounts that may represent the interest of other partners or interest owners. Accordingly, such other partners or interest owners should be required to report only cash or in-kind payments made to governments directly, but not any payments made to an operator. It is important to note that there is a body in EITI which reconciles payments across activities in order to avoid double counting.

53 - Are there factors or concepts different than the ones discussed above that should determine whether a resource extraction issuer must disclose payments made for a subsidiary or other entity under the issuer's control for the purpose of commercial development of oil, natural gas, or minerals? For example, should the rules require disclosure only of information that the issuer knows or has reason to know?

See our responses to Qs 49-52.

D.5 - Other Matters

54 - Would the disclosure requirement in Section 13(q) and the proposed rules potentially cause a resource extraction issuer to violate any host country's laws? Are there laws that currently prohibit such disclosure? Would the answer depend on the type of payment or the level of aggregation of the payment information required to be disclosed? If there are laws that currently prohibit the type of disclosure required by Section 13(q) and the proposed rules, please identify the specific law and the corresponding country.

As discussed in our letter dated October 25, 2010, to Ms. Meredith Cross, Director of the Division of Corporation Finance, Section 1504 of the Dodd-Frank Act was designed to be a disclosure provision not a business prohibition statute. Accordingly, we believe it is essential for the Commission to provide an exemption from its proposed rules for disclosure that is prohibited by foreign governments or existing contracts in order to avoid irreparable harm to investors, efficiency, competition and capital formation. In this regard, RDS has received legal advice that disclosure in the US of revenue payments made to foreign governments or companies

owned by foreign governments, in relation to all or part of our activities, is prohibited by law in the following countries: Cameroon, China and Qatar. If the Commission does not provide an exemption from disclosure when prohibited by foreign law, the Commission will force RDS to either withdraw from these projects or violate foreign law. Either outcome will adversely affect investors, efficiency, competition and capital formation and is not necessary to meet the Congressional goal of promoting international transparency efforts. We also are particularly concerned with the potential negative personal consequences for US nationals working in host countries where the Commission's proposals would force us to violate local laws.

Additionally, while many of our contracts provide for a carve out for disclosure required by law or stock exchange rule, some of those contracts only provide a carve out for the contracting parties not for affiliates or parent companies such as RDS. Other RDS subsidiaries' contracts do not provide any carve outs. In this regard it is important for the Commission to recognize that it is not unusual in the oil and gas industry for contracts to run for 20 years or more. In some cases these contracts were entered into prior to the company becoming part of RDS. Thus no carve out would have been needed since the company was not listed on a stock exchange or part of a public company.

RDS can confirm to the Commission that it has existing contracts that we believe would prohibit disclosure of revenue payments made under those agreements and that no carve out exists for RDS to make disclosure pursuant to either US government or US stock exchange regulation. RDS can aim to secure such carves outs for future contracts but has little ability to change existing contracts without potentially paying compensation to the other party. Accordingly, if the Commission adopted rules without a carve out for existing contracts that prohibit such disclosure those rules would adversely affect RDS and our shareholders.

As noted above, there are three countries where RDS operates, which as a matter of law RDS is prohibited from disclosing revenue payments. More importantly, however, RDS has no ability to prevent other foreign governments from prohibiting such disclosure in the future. As discussed in our letter of October 25, 2010, we believe there are at least four strong reasons why foreign governments may prohibit such disclosure in the future:

1. Payment information at a project level is likely to be competitively sensitive to the foreign government. For example, it is unlikely that a foreign government would want one international oil company to know the amount of a signature bonus and other remuneration elements paid by another international oil company when negotiating a similar project;
2. A country where security is an issue may have significant safety concerns regarding such disclosure. For example, precise project level payment disclosure could have unintended consequences in revealing information that terrorists or insurgents might use to target a specific project in order to significantly affect a country's revenue and thereby destabilize that country's economy;
3. Disclosure of precise payment information concerning projects where the underlying oil or gas field crosses a country's borders could be viewed as a security risk or state secret;
4. Some countries are unlikely to appreciate the extraterritorial effects of the US legislation.

The Commission under Section II.D.5: Other Matters, states that it has not proposed any exception for disclosure prohibited by foreign governments or existing contract provisions; it is important to note, however, that such an exception already exists for domestic issuers filing Form 10-K. While we applaud the Commission's wisdom in not repealing Instruction E to Form 10-K, we are extremely concerned that a similar instruction was not included in Form 20-F. Instruction E to Form 10-K provides:

> *Disclosure With Respect to Foreign Subsidiaries.*
> *Information required by any item or other requirement of this form with respect to any foreign subsidiary may be omitted to the extent that the required disclosure would be detrimental to the registrant. However, financial statements and financial statement schedules, otherwise required, shall not be omitted pursuant to this Instruction. Where information is omitted pursuant to this Instruction, a statement shall be made that such information has been omitted*

> *and the names of the subsidiaries involved shall be separately furnished to the Commission. The Commission may, in its discretion, call for justification that the required disclosure would be detrimental.*

We believe Instruction E to Form 10-K would provide sufficient relief to companies so that they would not be forced to violate a foreign government prohibition, abandon projects, renegotiate existing contracts or pay damages under those contracts that prohibited disclosure, or disclose competitively sensitive information to their detriment. However, if Instruction E or a similar exemption is not added to Form 20-F the proposed amendments implementing Section 13(q) of the Exchange Act would be highly anticompetitive and potentially violate a number of US foreign treaties including the World Trade Organization treaty. We urge the Commission to treat foreign private issuers fairly and provide such an instruction to Form 20-F in order to avoid harm to investors and adversely affect efficiency, competition and capital formation.

55 - Should the Commission include an exception to the requirement to disclose the payment information if the laws of a host country prohibit the resource extraction issuer from disclosing the information? Would such an exception be consistent with the statutory provision and the protection of investors? If we provide such an exception, should it be similar to the exception provided in Instruction 4 to Item 1202 of Regulation S-K? Should we require the registrant to disclose the project and the country and to state why the payment information is not disclosed? If so, should we revise Item 1202 to require the same disclosure of the country and reason for non-disclosure?

See our response to Q 54.

As noted in our letter of October 25, 2010, and the letter from the eight law firms[3] dated November 5, 2010, the Commission has both definitional and exemptive authority under the Exchange Act necessary to implement the requirements of Section 13(q) in a cost effective manner in order to avoid harming investor or adversely affecting efficiency, competition or capital formation. If Congress did not want the Commission to use it expertise and judgment in issuing rules it could have made that clear by making Section 13(q) self enacting or eliminating the Commission obligations under 3(f) and 23(a) of the Exchange Act for this rulemaking. Congress did neither, nor did they instruct the Commission not to use its exemptive or definitional authority. Moreover, there is no indication from the legislative history that Congress considered the effects on investors and companies as a result of foreign law and contract prohibitions.

A reference to the project, country, and reason for non-disclosure for those areas/projects with a host government prohibition, violates confidentiality and highlights the activity for which the host government has prohibited disclosure due to commercial sensitivities, etc. No revision is needed to Item 1202 of Regulation S-K as companies are still required to provide material reserves information by continent. Moreover, some foreign governments would prohibit a company from disclosing whether it has triggered 15% test, as this information would provide significant information regarding that foreign country's reserves, since one could calculate the minimum amount of proved reserves associated with that country.

56 - Should the rules provide an exception only if a host country's statutes or administrative code prohibits disclosure of the required payment information? Should we provide an exception if a judicial or administrative order or executive decree prohibits disclosing the required payment information as long as the order or decree is in written form? Should we limit any exception provided to circumstances in which such a prohibition on disclosure was in place prior to the enactment of the Act?

See our responses to Qs 54-55.

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[3] Cravath, Swaine & Moore LLP, Cleary Gottlieb Steen & Hamilton LLP, Davis Polk & Wardwell LLP, Sherman & Sterling LLP, Simpson Thacher & Bartlett LLP, Skadden, Arps, Slate, Meagher & Flom LLP, Sullivan & Cromwell LLP and Wilmer Cutler Pickering Hale and Dorr LLP,

We would propose that an exception (from disclosures) be provided if a judicial or administrative order or executive decree prohibits disclosing the required payment information as long as the order or decree is in written form. Limitation of exceptions should not be limited to those in place prior to the enactment of the Act. Sovereign laws are dynamic and not static thus the Act should provide for an exception based on foreign laws and decrees in place at the time of the issuer's filing with the Commission. Moreover, companies do not have any ability to prevent countries from prohibiting such disclosure in the future, especially if they find it to be harmful.

57 - Should the rules provide an exception for existing or future agreements that contain confidentiality provisions? Would an exception be consistent with the statute and the protection of investors?

See our responses to Qs 54-56 and the body of this letter as well as our letter of October 25, 2010.

58 - Are there circumstances in which the disclosure of the required payment information would jeopardize the safety and security of a resource extraction issuer's operations or employees? If so, should the rules provide an exception for those circumstances?

There are times when the payment of information would jeopardize the safety and security of a resource extraction issuer's operations or employees and the rules should provide an exception in those circumstances. Precise project level payment disclosures could allow terrorists or insurgents to target a specific project in order to significantly affect a country's revenues and thereby destabilizing that country's economy. Please see the body of this letter and our letter of October 25, 2010.

59 - Should we permit a foreign private issuer that is already subject to resource payment disclosure obligations under its home country laws or the rules of its home country stock exchange to follow those home country laws or rules instead of the resource extraction disclosure rules mandated under Section 13(q)?

As the Commission is aware, disclosure of foreign government payments by extractive industry participants is being considered throughout the world. Already the Hong Kong Stock Exchange and the London Stock Exchange AIM market have adopted limited country level disclosure requirements. The EU and IASB are also considering possible disclosure requirements at the country level. Accordingly, we are concerned that as a foreign private issuer we will be required to provide multiple payment disclosures in our Form 20-F in order to satisfy the US, UK and EU requirements and thereby overwhelming our investors. Therefore, we request that the Commission consider a limited exemption similar to what it has provided with regard to executive compensation and corporate governance. In those areas, the Commission has allowed foreign private issuers to follow home country rules and disclose in their Form 20-F the required home country disclosure. We believe given the significant cost and the questionable benefits to investors of such disclosure that a limited foreign private issuer exemption would be appropriate under Section 3(f) of the Exchange Act. In order not to provide a competitive advantage to any company, this exemption should be provided only where home country rules require equivalent information to be disclosed.

60 - Are there any other circumstances in which an exception to the disclosure requirement would be appropriate? For instance, would it be appropriate to provide an exception for commercially or competitively sensitive information, or when disclosure would cause a resource extraction issuer to breach a contractual obligation?

We believe there are other circumstances in which an exception to the disclosure requirements would be appropriate. This would include those situations where commercially or competitively sensitive information would be jeopardized and/or a breach in a contractual obligation would arise.

Examples might include the following scenarios:

1. Country A invites investors to develop its natural resources. Officials from Country A use Section 13(q) disclosures for projects in Country B to determine the rates of return that SEC filers are willing to accept. Country A uses this information to negotiate more favorable terms. The shareholders of SEC filers participating in Country A's projects receive a lower investment return than would otherwise be the case.

2. AmeriCo, a U.S. company and SEC filer, wishes to pursue Project X in Country B. In order to be economically viable, Project X requires favorable tax and royalty terms. Country B is willing to grant appropriate fiscal relief for Project X, but does not wish the terms to be publicly disclosed because the disclosure would create pressure for Country B to grant comparable terms on other projects. Country B awards Project X to a foreign oil company that is not subject to Section 13(q) disclosure.

3. AmeriCo, a U.S. company and SEC filer, begins acquiring high-potential exploratory acreage on a confidential basis through agents in Country B. The acreage acquisition requires AmeriCo to pay bonuses to the local governments. Because AmeriCo must disclose these bonuses, its identity is revealed. A foreign competitor of AmeriCo not subject to Section 13(q) steps into the market and begins bidding for remaining available acreage, driving up AmeriCo's costs significantly. At the same time, the foreign competitor is able to continue acquiring acreage in another part of Country B on a confidential basis.

4. Country A participates in the EITI and supports country-level disclosure of aggregate payment data. For economic, competitive, and foreign policy reasons, Country A considers the specific commercial terms of its agreements to develop natural resources to be state secrets and has accordingly has passed laws prohibiting public disclosure of such terms. If the rules implementing Section 13(q) require disaggregated public disclosure of commercially sensitive terms, AmeriCo, a U.S. company and SEC filer, will be unable to bid on projects in Country A. As a result, Country A's resources are developed by foreign companies that are not subject to Section 13(q).

We believe Instruction E to Form 10-K would provide sufficient protection against disclosure of competitively sensitive information. If the Commission allows disclosure under Section 13(q) to be furnished on Form 8-K (or Form 6-K for foreign private issuers), or on a new annual reporting form developed for the purpose, as discussed in our response to Question 68, an instruction corresponding to existing Instruction E to Form 10-K (which, as noted, the Commission has not proposed to amend) should be added to Forms 8-K and 6-K or to such new form.

E. Definition of "Foreign Government"

61 - Should the definition of foreign government include a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as proposed?

We believe that foreign government, as currently defined in the proposed rule, is sufficient.

62 - We note that the definition of foreign government would include a company owned by a foreign government. We understand that in the case of certain state owned companies, the government would be a shareholder. Thus, certain transactions may occur as transactions between the company and the government and as transactions between company and shareholder. Should we adopt specific rules or provide guidance regarding payments made by state owned companies that distinguish between such types of transactions?

See our response to Q 61.

63 - Under Section 13(q) and the proposal, the definition of "foreign government" includes "a company owned by a foreign government." We are proposing to include an instruction in the rules clarifying that a company owned by a foreign government is a company that is at least majority-owned by a foreign government. Is this clarification appropriate? Should a company be considered to be owned by a foreign government if government ownership is lower than majority-ownership? Should the rules provide that a company is owned by a foreign government if government ownership is at a level higher than majority-ownership? If so, what level of ownership would be appropriate? Are there some levels of ownership of companies by a foreign government that should be included in or excluded from the proposed definition of foreign government?

See our responses to Qs 61-62.

64 - Should the definition of foreign government include a foreign subnational government, such as a state, province, county, district, municipality or territory of a non-U.S. government, in addition to a non-U.S. national government, as proposed?

See our responses to Qs 61-63.

65 - Are there some levels of subnational government that should be excluded from the proposed definition of foreign government? If so, please provide specific examples of those levels of subnational government that should be excluded.

See our responses to Qs 61-64.

66 - Should we also require a resource extraction issuer to disclose amounts paid to the states and other subnational governments in the United States in addition to payments to the Federal Government?

We propose that disclosures for amounts paid to the Federal Government is sufficient.

67 - Is there additional guidance that we should provide regarding the definition of foreign government?

See our responses to Qs 61-65. An exhaustive list of subnational foreign governments is not practical; the industry has sufficient knowledge of the types of payments made to sovereign governments outside the United States so we propose no additional guidance is warranted.

F. Disclosure Required and Form of Disclosure

F.1 – Annual Report Requirement

68 - Section 13(q) requires disclosure of the payment information in an annual report but does not specify the type of annual report. Should we require resource extraction issuers to provide the payment disclosure mandated under Section 13(q) in its Exchange Act annual report, as proposed? Should we require, or permit, resource extraction issuers to provide the payment information in an annual report other than an annual report on Form 10-K, Form 20-F, or Form 40F? For example, should we require the disclosure in a new form filed annually on the Commission's Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR")? Would requiring resource extraction issuers to disclose the information in a separate annual report be consistent with Section 13(q)? Should we require an oil, natural gas, or mining company to file a separate annual report containing all of the specialized disclosures mandated by the Dodd-Frank Act? What would be the benefits or burdens of such a form for investors or resource extraction issuers? If we should require, or permit, a separate annual report, what should be the due date of the report (e.g. 30, 60, 90, 120, or 150 days after the end of the fiscal year covered by the report)?

We propose that issuers disclose the information under Section 13(q) in a new form on the Commission's Electronic Data Gathering, Analysis, and Retrieval system or on Form 6-K or Form 8-K for domestic issuers.

Due to the volume of information required, the new form should be a separate annual report permitting issuers to file such a report 150 days after the end of the fiscal year.

However, as recommended in our responses to Qs 39-48, if the disclosures are limited to material projects, the reporting could be contained as an Exhibit in Form 10-K, Form 20-F, or Form 40F. See also our responses to Qs 69-77.

69 - If we require resource extraction issuers to provide the disclosure of payment information in their Exchange Act annual reports, should we permit resource extraction issuers to file an amendment to the annual report within a specified period of time subsequent to the due date of the report, similar to Article 12 schedules or financial statements provided in accordance with Regulation S-X Rule 3-09, to provide the payment information? If so, what would be the appropriate time period (e.g. 30, 60 or 90 days after the due date of the report)?

See our response to Q 68. An amendment to any Exchange Act report would be confusing and misleading to investors and users of a Company's Exchange Act reports since any amendment may be viewed as a correction of an error, omission, restatement, etc.

70 - As noted above, Section 13(q) mandates that a resource extraction issuer provide the payment disclosure required by that section in an annual report, but it does not specifically mandate the time period for which a resource extraction issuer must provide the disclosure. Is it reasonable to require resource extraction issuers to provide the mandated payment information for the fiscal year covered by the applicable annual report, as proposed? Why or why not? Should the rules instead require disclosure of payments made by resource extraction issuers during the most recent calendar year?

See our response to Qs 68-69.

71 - Should we also require an issuer to provide the resource extraction payment disclosure in a registration statement under the Securities Act of 1933 or under the Exchange Act? If so, what time period should the disclosure cover?

No. The disclosure is not material to investors in light of the information already required to be disclosed. If the Commission does conclude that this information is material to investors and should be included in registration statements under the Securities Act of 1933, then we encourage the Commission to require such disclosure from all industries and all filers.

72 - Should we require an issuer that has a class of securities exempt from Exchange Act registration pursuant to Exchange Act Rule 12g3-2(b) to provide the resource extraction payment disclosure in its home country annual report or in a report on EDGAR? Would such an approach be consistent with the Exchange Act?

We propose that an issuer that has a class of securities exempt from Exchange Act registration pursuant to Exchange Act Rule 12g3-2(b) provide the resource extraction payment disclosure in its home country annual report.

F.2 – Exhibits and Interactive Data Format Requirements

73 - Should we require that information concerning the type and total amount of payments made for each project and to each government relating to the commercial development of oil, natural gas, or minerals be provided in the exhibits to Form 10-K, Form 20-F, or Form 40-F, as proposed?

We recommend that these disclosures be kept separate from the indicated annual report forms, and be furnished on a new annual report form or on a Form 6-K, or Form 8-K for domestic filers and be required to be submitted no later than 150 days following the end of the most recent calendar year.

74 - Should we require, as proposed, a resource extraction issuer to provide a statement, under an appropriate heading in the issuer's annual report, referring to the payment information provided in the exhibits to the report, as proposed?

No, all annual reports are required to have an exhibit list which is sufficient notice for investors who wish to review this information.

75 - Should we require a resource extraction issuer to present some or all of the required payment information in the body of the annual report instead of, or in addition to, presenting the information in the exhibits? If you believe we should require disclosure of some or all the payment information in the body of the annual report, please explain what information should be required and why. For example, should we require a resource extraction issuer to provide a summary of the payment information in the body of the annual report? If so, what items of information should be disclosed in the summary?

We do not propose that the required payment information be included in a summary in the body of a company's annual report. This will only result in addition immaterial information being contained in the body of a very large document. It is likely this will only confuse investors.

76 - Section 13(q) does not require the resource extraction payment information to be audited or provided on an accrual basis. Accordingly, the proposed rules do not include such requirements. Should we require resource extraction issuers to have the payment information audited or provide the payment information on an accrual basis? Why or why not? What would be the likely benefits and burdens? Would including such requirements be consistent with the statute?

We propose that payment information not be subject to audit or provided on an accrual basis. A requirement to subject this information to audit would increase a company's cost. If this information was included as an Exhibit in a company's annual report on Form 10-K, 20-F, or 40-F, an audit for submission for the required timeframes would not be practical. Additionally, we do not believe that providing accrual based information would further the goal of payment transparency since there may be no payment made at the time of disclosure.

77 - Should we require two new exhibits for the resource extraction disclosure, as proposed?

See our response to Qs 68-74.

78 - Should we require that the resource extraction payment disclosure be provided in a new exhibit in HTML or ASCII, as proposed? Why or why not?

See our response to Qs 68-74 and Q 77.

79 - Should we require the resource extraction payment disclosure to be electronically formatted in XBRL and provided in a new exhibit, as proposed? Is XBRL the most suitable interactive data standard for purposes of this rule? If not, why not? Should the information be provided in XML format? If so, why? Are there characteristics of XML, such as ease of entering information into a form, which makes it a better interactive data standard for the payment information than XBRL? Would the use of the XBRL taxonomy based on U.S. GAAP cause confusion in light of the fact that the information required under Section 13(q) is information about cash or in kind payments (that are not computed in accordance with GAAP) made by resource extraction issuers? Should we require an interactive data standard for the payment information other than XML or XBRL?

See our response to Qs 68-74. The XBRL taxonomy should be consistent with other filings with the Commission.

80 - Section 13(q) and our proposed rules require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. If the currency in which the payment was made differs from the issuer's reporting currency, should the rules require issuers to convert the payments to the issuer's reporting currency at the applicable rate? If the rules should, as proposed, require disclosure of in kind payments, should the rules require in kind payments to be converted to the

host country currency? Should the rules require in kind payments to be converted to the issuer's reporting currency at the applicable rate? Should the rules require disclosure of the in kind payments in the form in which the payments were made and also require the payments to be converted to the issuer's reporting currency? Should we require issuers to provide a conversion to U.S. dollars for payments made in cash and in kind, and to electronically tag that information?

See our response to Q 79 and Q 14 (in kind payments).

We propose that all disclosures be made in US dollars which is consistent with other annual reporting information filed with the Commission. Reporting currencies other than US dollars would be misleading and confusing to investors and users of this information.

81 - Section 13(q) and our proposed rules require an issuer to include an electronic tag that identifies the financial period in which the payments were made. Should we require an issuer to identify in the tag the particular fiscal year, quarter, or other period, such as a particular half-year, in which the payments were made?

We propose that identification be made to the particular fiscal year.

82 - Section 13(q) and our proposed rules require an issuer to include an electronic tag that identifies the issuer's business segment that made the payments. Should we define "business segment" for purpose of disclosing and tagging the payment information required by Section 13(q)? If so, what definition should we use? Should we instead allow resource extraction issuers to disclose and identify the business segment in accordance with how it operates its business? What are the advantages and disadvantages of allowing an issuer to rely on its definition of business segment?

As noted in our responses to Qs 6-10, we propose that applicability for these extractive payment disclosures be consistent with the Commission's reserve disclosures, which are associated with upstream operations.

83 - Section 13(q) and our proposed rules require an issuer to include an electronic tag that identifies the project to which the payments relate. Are there some payments that would not relate to a particular project? If so, should we nevertheless require that each payment be allocated to a particular project? Should we instead permit an issuer to use only the electronic tag that identifies the government receiving the payments if those payments do not relate to, or cannot be allocated to, a particular project?

Dividends and taxes are not associated with projects in isolation, nor would it be appropriate or meaningful to investors to allocate. For example, taxes, including production taxes, are paid at an entity level and are often offset by other upstream and downstream projects. Similarly, dividend payments are made at an entity level and not at a project level. Signature bonuses also are unlikely to relate to any specific project, as they are often paid before any exploration has taken place. The Commission's suggestion that it require that payments be incorrectly and misleadingly allocated to a specific project is not something we can support nor should the Commission. Rather, we believe the Commission should limit disclosure to material projects and payments associated with those projects and then require country level disclosure for any country where a company has a material project. This disclosure we believe would be consistent with the spirit of legislation by providing material project level information that Congress believes would be important to investors and at the same time promoting international transparency by providing disclosure of non-project related payments such as dividends and certain tax payments. We believe this is a much better choice than to "nevertheless require that each payment be allocated to a particular project."

84 - Section 13(q) requires an issuer to electronically tag "such other information as the Commission may determine is necessary or appropriate in the public interest or for the protection of investors." Would it be useful to have additional information about the payments electronically tagged? If so, what additional tags should we require? Are there any other items of information that should be electronically tagged?

We propose that the current language is sufficient.

85 - Should we permit issuers to aggregate their payments into three categories: "taxes and royalties," "production entitlements," and "other payments"? Would that approach be consistent with Section 13(q)?

Yes. We propose that aggregation of payments into the three categories of "taxes and royalties, "production entitlements," and "other payments" is consistent with Section 13(q).

86 - Section 13(q)(3) requires the Commission to provide a compilation of the disclosure made by resource extraction issuers. Should the Commission provide the compilation on an annual basis? Should the compilation be provided on a calendar year basis, or would some other time period be more appropriate? Should the compilation provide information as to the type and total amount of payments made on a country basis? What other information should be provided in the compilation?

The Commission is required by Section 1504 to decide how it will make information that is submitted to it under the statute available to the public. In order to best serve the objectives of the legislation, while also safeguarding its mission of protecting investors, the Commission should fashion a rule that allows for transparency while balancing the concerns of American businesses, foreign governments, and U.S. investors.

Section 1504 consists primarily of two operative provisions. First, Section 13(q)(2) requires that "resource extraction issuers" report certain payments made to foreign governments "in an annual report" to the Commission. 15 U.S.C. § 78m(q)(2). Second, "*to the extent practicable*," Section 13(q)(3) requires the Commission to make "*a compilation*"[4] of that information available to the public. *Id.* § 78m(q)(3)(A) (emphases added). The plain statutory text thus requires the Commission to determine what information provided to it will be made publicly available in the compilation, and in what form.

Importantly, the statute does not require that the filed reports themselves be publicly available. *See* 15 U.S.C. § 78m(q)(2). The reporting obligation is to the SEC, which is then required to make a "compilation" available. The overall organization of the statute reflects this understanding of the statutory obligations. While Section (2) deals with "Disclosure" and specifies the information that must be reported by issuers to the Commission, Section (3) of the statute separately addresses "Public Availability of Information." Thus, Congress did not contemplate that the information reported to the Commission would be directly disclosed to the public. The statute instead requires the Commission to make available an appropriately edited and arranged compilation.[5]

Congress is entirely capable of requiring issuers to make thorough disclosures directly to the public, when it intends to do so. Throughout the federal securities laws, statutes require issuers to post information directly on the Internet, or they require the Commission to make such direct disclosures. The fact that Congress chose to require "a compilation," "as practicable," should not be taken lightly. "Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another." *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[A] legislature says in a statute what it means and means in a statute what it says there."). The specific choice of words in Section 1504 should guide the Commission in fashioning a rule. Thus, a rule is necessary that allows the Commission to aggregate the reported payment information on a per-country basis, or as is otherwise required

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[4] A "compilation" is defined as "the act or action of gathering together . . . materials esp[ecially] from various sources," or alternatively, "something that is the product of the putting together of two or more items." WEBSTER'S THIRD INT'L DICTIONARY 464 (1976). The ordinary meaning of "compilation" also includes a collection of materials "arranged in an original way," such that "the resulting product constitutes an original work of authorship." BLACK'S LAW DICTIONARY 323 (9th ed. 2009).

[5] Following the statutory provision on public availability (15 U.S.C. § 78m(q)(3)(A)), clause (B) addresses "Other Information" and makes clear that the Commission cannot disclose information from outside of the issuers' reports to the general public. *Id.* § 78m(q)(3)(B) (specifying that the Commission need not "make available online information other than the information required to be submitted"). Thus, clause (B) limits the pool of information from which the Commission can draw when putting together its compilation for the public.

by the mandate of practicability and the Commission's duty to protect investors (and implicitly the companies that they invest in).[6]

By way of contrast, Section 1502 of Dodd-Frank (the "conflict minerals" provision) requires certain reporting and disclosure by companies that make products that require "conflict minerals" for production. 15 U.S.C. § 78m(p). This provision, which neighbors Section 1504 in the United States Code and bears similar transparency objectives, specifies a clearly distinct method for public disclosure. Under the conflict minerals provision, affected issuers must make an annual report to the Commission, but such persons must also "make available to the public on the Internet website of [the issuer]" the information required under the statute. *Id.* § 78m(p)(1)(E). By contrast, in Section 1504, Congress has given the Commission the responsibility of weighing the concerns of issuers and other stakeholders when fashioning an appropriate procedure for publicly disclosing *compiled* information.

Within the same section of the U.S. Code, Section 78m(l) requires certain issuers to directly "disclose to the public on a rapid and current basis" information concerning material changes in the finances of certain covered issuers. 15 U.S.C. § 78m(l). The statutory language specifies that the disclosure must be "in plain English" and "may include trend and qualitative information and graphic presentations." *Id.* Another provision in the same chapter of the Code requires the Commission to "tabulate" information and make it available to the public so as to "maximize the usefulness of the information." *Id.* § 78m(g)(5). These variations in disclosure mechanisms should not be ignored. Congress clearly is capable of specifying different forms of public disclosure for different situations, and in the case of Section 1504, it has not specified that filers' reports be public, or that they be disclosed in full by the Commission.

We believe the Commission could enact a rule that only discloses aggregated, per-country payments to the general public.[7] Such a compilation would be consistent with current EITI practice, and would eliminate many of the competitive harms that issuers face under the current proposal (with public disclosure on a per-payment basis). In fact, the statute itself requires that any rules issued under it support "international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals," namely, EITI. 15 U.S.C. § 78m(q)(2)(E); *see also id.* § 78m(q)(1)(C)(ii) (requiring a definition of "payment" "consistent with the guidelines of the Extractive Industries Transparency Initiative"). The legislative history of Section 1504 also makes clear that the statute was intended to "complement multilateral transparency efforts such as [EITI]." 74 CONG. REC. S3815-16 (daily ed. May 17, 2010) (statement of Sen. Richard Lugar). Although specific EITI standards are developed by the participating countries and companies, EITI principles strongly urge "respect for existing contracts and laws," and require weighing "the concerns of companies regarding commercial confidentiality." EITI SOURCE BOOK 34 (2005). The publication of an aggregated, per-country compilation

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[6] Exemption 4 of the Freedom of Information Act, along with the criminal penalties imposed by the Trade Secrets Act, reinforces the notion that an agency must consider competitive harms when making disclosures. Both of these statutes limit the ability of government agencies to make commercial information publicly available. For example, Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a person," so long as that information is considered confidential and disclosure is not expressly authorized by statute. 5 U.S.C. § 552(b)(4). Further, the Trade Secrets Act imposes criminal penalties on employees or officers of agencies that disclose "to any extent not authorized by law" any information received in the course of business (including information received in reports filed with the agency) that "relates to [] trade secrets" or other commercially sensitive information. 18 U.S.C. § 1905. Section 1504 should thus be interpreted in conformance with the specific requirements and underlying concerns of the Trade Secrets Act and Exemption 4 of the Freedom of Information Act.

[7] Although the Release only addresses this critical issue in two footnotes, the widespread public disclosure of payments on a per-project basis poses a significant competitive threat to issuers. The Release makes the unfounded assumption that the "compilation of information" that must be made available online "includes the type and total amount of payments made . . . on a per project and per government basis." Release, at 54 & n.133; *see also id.* at 58 n.141. Yet such disclosure would impose a costly, detrimental, and potentially dangerous requirement on issuers with no basis in the statutory text.

would not only satisfy the specific text of the statute, it would fulfill the underlying goal of promoting the international transparency regime of EITI.

In sum, the text of Section 1504, the overall statutory scheme, and the congressional objectives which drove the passage of the statute, all suggest that the Commission should enact a rule which only makes public disclosure of reported issuer information through an appropriately edited compilation. In developing a process for such a compilation, the competitive concerns of affected companies and the principles behind the EITI strongly counsel in favor of public disclosure of payments on an aggregated, per-country basis.[8]

F.3 – Treatment for Purposes of Securities Act and Exchange Act

87 - Should we, as proposed, require the resource extraction payment disclosure to be furnished as exhibits to the annual report? If not, why not? How should it be provided?

Yes. This information is unlikely to be material to investors. Therefore, it should not need to be filed and thereby incorporated into shelf registration statements.

88 - Should we require the resource extraction payment disclosure to be filed as exhibits, rather than furnished, which would affect issuers' liability under the Exchange Act or under the Securities Act (if any such issuer incorporates by reference its annual report into a Securities Act registration statement)?

No. See our response to Q 87.

89 - Under Exchange Act section 18, "Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to [the Exchange Act] or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading." Is it appropriate not to have the disclosures subject to Section 18 liability even if the elements of Section 18 could otherwise be established? Should we require the resource extraction payment disclosure to be filed for purposes of Section 18 of the Exchange Act, but permit an issuer to elect not to incorporate the disclosure into Securities Act filings?

It is appropriate and consistent with existing Commission rules not to have the disclosures subject to Section 18 liability.

90 - Should the resource extraction payment disclosure be furnished annually on Form 8-K? Would that approach be consistent with the statute? If so, should foreign private issuers, which do not file Forms 8-K, be permitted to submit the resource extraction payment disclosure either in their Form 20-F or Form 40-F, as applicable, or annually on Form 6-K, at their election?

As discussed in our response to question 68, we believe it would be appropriate for Foreign Private Issuers to furnish the information on Form 6-K as opposed to an exhibit in our Form 20-F, provided a similar instruction to Instruction E of Form 10-K is available.

G. Effective Date

91 - Should we provide a delayed effective date for the final rules, either for all issuers subject to the rules or for certain types of issuers (<u>e.g.</u> smaller reporting companies or foreign private issuers)? Would

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[8] The Commission may also consider enacting exceptions, based on its statutory mandate to make disclosure "practicable," for situations in which even a per-country disclosure would reveal information of a sensitive nature.

doing so be consistent with the statute? Why or why not? If we should provide for a delayed effective date, should issuers be required to provide disclosure in an annual report for the fiscal year ending on or after June 30, 2012, September 30, 2012, December 31, 2012, or some other date?

We propose that for consistency and comparability all issuers would be subject to the same effective date.

The level of disclosures proposed in the rule release will necessitate significant enterprise reporting system (ERP) changes. Most companies' resources for ERP changes (internal and external personnel) are committed to other projects for the next 18-24 months. In addition, the FASB and IASB have a number of significant joint Memorandum of Understanding projects underway which may also necessitate ERP system changes for implementation. To allow for programming and testing for the collection of the Commission's proposed rules, we propose that these disclosures be effective for the fiscal year beginning on or after January 1, 2014.

III. PAPERWORK REDUCTION ACT

We request comment on the accuracy of our estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (iv) evaluate whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and (v) evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

In particular, we request comment and supporting empirical data for purposes of the PRA on whether the proposed rule and form amendments:

- **will affect the burden hours and costs required to produce the annual reports on Forms 10-K, 20-F and 40-F; and**
- **if so, whether the resulting change in the burden hours and costs required to produce those Exchange Act annual reports is the same as or different than the estimated incremental burden hours and costs proposed by the Commission.**

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090, with reference to File No. S7-42-10.

We have noted that the proposing release cites a compliance estimate for collection, for the entire industries of oil and gas and mining as $12 million for outside professionals plus 52,932 hours for internal personnel time. Utilizing an internal rate of $125/hr, the SEC's proposed industry wide cost estimate on issuers is less than $20 million. The Commission has estimated that this potentially impacts 1100 forms or a cost of collection per form of $18,000.

For Shell, a good faith cost estimate to modify our financial systems in order to collect and report under the Commission's proposed rules is in the tens of millions of dollars.

V. CONSIDERATION OF BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

We request comment on whether the proposals, if adopted, would promote efficiency, competition and capital formation or have an impact or burden on competition. In particular, we request comment on the potential effect on efficiency, competition and capital formation should the Commission not adopt certain exceptions or accommodations. Commentators are requested to provide empirical data and other factual support for their views, if possible.

Please see the body of our letter. We believe if adopted as proposed the Commission's amendments and rules would harm investors and adversely affect efficiency, competition and capital formation.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- **how the proposed amendments can achieve their objective while lowering the burden on small entities;**
- **the number of small entity companies that may be affected by the proposed amendments;**
- **the existence or nature of the potential impact of the proposed amendments on small entity companies discussed in the analysis; and**
- **how to quantify the impact of the proposed amendments.**

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments

Shell is not a small entity company so we are not in a position to comment. However, we feel that all of the aspects noted in our responses are germane to smaller entities as well and may, in many cases, the compliance aspects for the disclosures by smaller entities may be esacerbated by limited resources and costs to implement.