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February 21, 2011

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Re: Proposed Rule on "Disclosure of Payments by Resource Extraction Issuers," File No. S7-42-10

Dear Ms. Murphy:

Oxfam America is pleased to respond to the Securities and Exchange Commission's ("SEC" or the "Commission") request for comment on its proposed rule implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010); Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. 80,978 (Dec. 23, 2010) ("Proposed Rule").

Oxfam America is an international relief and development organization that creates lasting solutions to poverty, hunger, and injustice. Together with individuals and local groups in over 90 countries, Oxfam America saves lives, helps people overcome poverty, and promotes social justice. Oxfam America is one of 14 affiliates forming the international Oxfam confederation. Oxfam America is also a proud member of Publish What You Pay ("PWYP"), a coalition of civil society organizations advocating payment transparency in extractive industries as a necessary ingredient for accountability in the governance of resource-rich countries. Oxfam America fully endorses the PWYP public comment to the SEC on the above referenced proposed rule.

For more than a decade, Oxfam America has implemented a global program designed to help communities address the impact of extractive industries in developing countries around the world. We have staff based in the US, Central America, South America, West Africa and South-East Asia dedicated to policy advocacy, research and support to local organizations working to address the financial, social and environmental impact of extractive industries. Since our landmark 2001 report, *Extractive Sectors and the Poor*, written by Professor Michael Ross of

UCLA, we have issued a series of reports on the sector, many related to the challenges posed by a lack of transparency in the financial flows between companies and governments as well as a lack of financial transparency by host governments themselves.[1] We have developed significant expertise related to how the oil, gas and mining industries operate in many countries, and have been grateful for the opportunity to share that expertise with the Commission. In countries around the world, we support local PWYP coalitions and transparency campaigners who stand ready to use the information to be disclosed by this rule to hold their own governments accountable for the use of corporate payments for extractive rights.

Oxfam America believes that the new Section 13(q) added to the Securities and Exchange Act of 1934 ("Exchange Act") by Section 1504 of Dodd-Frank (to be codified at 15 U.S.C. § 78m(q)) represents an historic opportunity for the United States to demonstrate leadership in the field of resource extraction transparency and to accelerate the global trend toward holding governments accountable to their people for the stewardship of extracted wealth. In passing Section 1504, Congress recognized that payment transparency in extractive industries is key to lifting the "resource curse," by which the societies most richly endowed with natural resources all too frequently face abysmal standards of living and the repressive, unaccountable government of a wealthy and corrupt few. 156 Cong. Rec. S5872 (daily ed. July 15, 2010) (statement of Sen. Cardin). If implemented as Congress intended, Section 13(q)'s reporting requirements will also contribute significantly to the marketplace's efficient assessment and management of the risks faced by resource extraction issuers.

Oxfam America accordingly welcomes the SEC's Proposed Rule. The Commission's proposal of a project-level reporting requirement applicable to all U.S. and foreign issuers filing Forms 10-K, 20-F, and 40-F will significantly advance the objectives of Section 13(q).

That said, Oxfam America takes this opportunity in the submission below to comment on several of the most important issues raised by the Proposed Rule: (1) whether reports pursuant to Section 13(q) should be deemed "filed" with the SEC and subject to liability under Section 18 of the Exchange Act; (2) whether, and how, "project" should be defined for purposes of Section 13(q)'s project-level reporting requirement; (3) whether the SEC should authorize exemptions to Section 13(q)'s project-level reporting requirement for smaller reporting companies, foreign private issuers, or where a host country's law or confidentiality requirements would conflict with Section 13(q) obligations; (4) whether the SEC should limit public access to information submitted by regulated issuers; and (5) the potential impact of regulations implementing Section13(q)'s project-based disclosure requirement on competitiveness and the potential for regulatory flight.

[1] See, for example, the following Oxfam America reports: *Extractive Sectors and the Poor*, 2001, http://www.oxfamamerica.org/publications/extractive-sectors-and-the-poor; *Hidden Treasure?: In Search of Mali's Gold Mining Revenues,* 2007, http://www.oxfamamerica.org/files/hidden-treasure.pdf; *Ghana's Big Test: Oil's Challenge to Democratic Accountability*, 2009, http://www.oxfamamerica.org/files/ghanas-big-test.pdf; *People, Power and Pipelines: Lessons from Peru in the Governance of Gas Production Revenues,* 2010, http://www.oxfamamerica.org/files/oxfam-america-camisea-report-lowres.pdf .

Oxfam America thanks the Commission for the opportunity to comment on the Proposed Rule in the discussion below and for its thoughtful consideration of this submission. Oxfam America looks forward to continued engagement with the Commission on these issues.

Respectfully,

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Discussion

I. Disclosures Pursuant To Section 13(q) Should Be "Filed."

Disclosures pursuant to Section 13(q) should be "filed" and subject to liability under Section 18 of the Exchange Act.

A. Requiring "Filing" Will Encourage Compliance.

The effectiveness of Section 13(q) will depend on the seriousness with which issuers approach their compliance obligations. Requiring "filing" will significantly strengthen incentives for compliance.

Exchange Act Section 18(a), codified at 15 U.S.C. § 78r(a), provides an express civil remedy for false or misleading statements in Exchange Act filings. Specifically, Section 18 provides:

> Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder . . . 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 provide that he acted in good faith and had no knowledge that such statement was false or misleading.

Section 18 liability only attaches to statements made in documents "filed" with the Commission pursuant to the Exchange Act or implementing regulations. If the SEC does not require Section 13(q) reports to be "filed" with the Commission, there will be no readily available right of action for investors harmed by their reliance on false or misleading Section 13(q) disclosures. Compliance would be significantly weakened.

By contrast, the possibility of private liability under Section 18 would represent a powerful spur for compliance by regulated issuers. Private parties are, Oxfam America believes, both more likely to identify false or misleading statements and, given the Commission's uncertain budget and competing enforcement priorities, to be able to bring suits to hold regulated issuers accountable for the accuracy of their Section 13(q) filings. This point was emphasized by Senator Levin in his February 1, 2011 letter to the Commission. In his letter, Senator Levin called for the Commission to require "filing" and characterized Section 13(q)'s reporting requirement as "one of the most important issues to ensure the effectiveness of the proposed rule."[2]

[2] Letter from Sen. Carl Levin to the SEC 3 (Feb. 1, 2011) ("Senator Levin Letter"), *available at* http://www.sec.gov/comments/s7-42-10/s74210-19.pdf.

Oxfam America therefore respectfully disagrees with language in the SEC's discussion of the Proposed Rule suggesting that minimal liability should attach to Section 13(q) disclosures because "the nature and purpose of the disclosure required by Section 13(q) is qualitatively different from the nature and purpose of existing disclosure that has historically been required under Section 13 of the Exchange Act." Proposed Rule at 80,992.

Oxfam America agrees that rulemaking under Section 13(q) must "support the Federal Government's commitment to international transparency promotion efforts." *Id*. But this is not the statute's only objective. Section 13(q) is equally concerned with objectives *qualitatively identical* in nature and purpose to other disclosures required under the Exchange Act. The legislative history of Dodd-Frank Section 1504 makes clear that Congress views government payment patterns from extractive issuers as a proxy for assessing risks associated with those payments. These risks are ultimately borne by investors buying and selling regulated issuers' securities. There is accordingly no reason to treat Section 13(q) disclosures differently from other core 10-K, 20-F, and 40-F disclosures, which are ultimately mandated in order to inform and protect investors. More broadly, if Congress had not had the investor protection functions of the Exchange Act in mind when enacting Dodd-Frank Section 1504, it could have easily added a transparency-based reporting requirement to another statute, perhaps even one not administered by the SEC. Congress' choice to amend the Exchange Act, rather than another statute, is significant and should be honored.[3]

B. The Legislative History Of Dodd-Frank Section 1504 Makes Clear That Congress Intended To Protect Investors In Extractive Issuers.

The legislative history of Dodd-Frank Section 1504 makes clear that Congress was concerned with providing crucial data to investors as well as with addressing the "resource curse."

Senator Cardin, presenting the legislative amendment that became Section 13(q), explained:

> [I]nvestors have a right to know. If you are going to invest in an oil company, you have a right to know where they are doing business, where they are making payments. I would think this is information that may affect your decision as to whether you want to take this risk in investing in that company. So *this amendment provides greater disclosure for investors to be able to make intelligent decisions as to whether to invest in an oil or gas or mineral company*.

156 Cong. Rec. S5870-02, S5872 (daily ed. July 15, 2010) (statement of Sen. Cardin) (emphasis added).[4]

[3] The SEC's analogy of Section 13(q) disclosures to various kinds of "furnished" documents fails to appreciate Section 13(q)'s investor-protection functions. Section 13(q) disclosures are not analogous to Section 1350 certifications under 18 U.S.C. § 1350 or to the audit and compensation committee reports required by Item 407 of Regulation S-K. *Cf.* Proposed Rule at 80,992, because the latter documents do not contain core data as to issuers' financial health and risk.

[4] *See also* Statement of Senator Cardin in support of Amendment No. 3732 to the Restoring American Financial Stability Act (S3217), 156 Cong. Rec. S3316 (daily ed. May 6, 2010) (*cited in* Proposed Rule at 80,992 n.151) ("Secrecy of payments carries real bottom-line risks for investors. Creating a reporting

C. Requiring Filing Will Lead To More Accurate Data.

Holding issuers accountable directly to the marketplace for their 13(q) disclosures will, as Senator Levin noted, discourage "recalcitrant issuers [from] ignor[ing] these obligations." Sen. Levin Letter at 3.

Prior experience with respect to disclosure of payments to governments by members of the extractive industries underscores the importance of creating meaningful incentives for compliance. The voluntary Extractive Industries Transparency Initiative ("EITI")[5] has been an important first step in promoting extractive industry payment transparency. That said, the data provided through the EITI scheme is often unreliable due to a lack of genuine oversight and the absence of any meaningful liability for furnishing misleading data. A January 2010 report issued by the World Bank Group's Oil, Gas, and Mining Policy Division,[6] casts doubt on the reliability of data produced pursuant to the EITI's voluntary reporting mechanism.[7] *See also* Letter from Syena Capital Management LLC to the SEC 1–2 (Feb. 14, 2011) ("Syena Letter") (noting that "current U.S. and international accounting standards do not provide adequate revenue and payment data in an easily comparable format" and that data furnished through EITI "has often been criticized for limitations in scope due to its voluntary nature, as well as the variable consistency in the quality of data provided").[8]

The Commission's imposition of the same Section 18 liability for misstated data will signal that these disclosures are to be taken seriously and conform to Congressional intent that § 1504 represent a step beyond EITI's mixed record.[9] This will enhance the reliability of these disclosures as risk assessment tools and will also promote Congress' stated goal of increasing international transparency.[10]

requirement with the SEC will capture a larger portion of the international extractive industries corporations than any other single mechanism, thereby setting a global standard for transparency and promoting equal opportunities for investment. Investors should be able to know how much money is being invested up front in oil, gas, and mining projects. For example, oil companies often pay very large signature payments to secure the rights for an oilfield, long before the first drop of oil is produced. Such payments are in addition to the capital investment required.").

[5] The EITI comprises a coalition of governments, companies, non-governmental groups, investors, and international organizations dedicated to increasing transparency in the extractive industries.

[6] Anwar Ravat & Andre Ufer, *Toward Strengthening EITI Reporting: Summary Report and Recommendations*, 14 WORLD BANK EXTRACTIVE INDUSTRIES FOR DEV. SERIES (Jan. 2010), *available at* http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266963339030/eifd14_strengthening_eiti.pdf.

[7] *Id.* at 4.

[8] Syena's letter articulates the views of nearly 100 "institutional investors in emerging equity and debt markets" from "a full range of members of the New York City investment community." *See* Letter from Syena Capital Management LLC to the SEC 2 (Feb. 14, 2011).

[9] *See* 156 Cong. Rec. S3315 (daily ed. May 6, 2010) (statement of Sen. Cardin) (explaining that an extractive industries transparency amendment is needed because existing disclosures are "not useful in determining the extent of a company's operations in or its ongoing financial arrangements with a country").

[10] For this reason, the Commission should not give credence to the suggestions made by many of the commenters that the rules promulgated to enact Section 13(q) should mimic the standards established by the EITI scheme. Letter from the American Petroleum Institute to the SEC 2 (Jan. 28, 2011) ("API Letter

II. Section 13(q) Unambiguously Requires Project-Level Reporting.

A. A Regulatory Definition Of "Project" Is Needed To Clarify Compliance Obligations.

The SEC has requested comment on the formulation of a regulatory definition of "project" for purposes of Section 13(q). Proposed Rule at 80,985. Oxfam America considers it essential that the SEC develop a regulatory definition of "project" precisely because of the uncertainty that it identified in its discussion of the Proposed Rule, and also to ensure that compliance obligations are clearly understood by regulated issuers. Oxfam America believes that the definition of "project" proposed by Calvert Investments would be ideal. Letter from Calvert Investments to the SEC (Nov. 15, 2010) ("Calvert Letter"). Oxfam America also believes it critical to emphasize that two interpretations *are plainly foreclosed* by Section 13(q)'s text and legislative intent: (1) permitting "project" to be defined at the country level, Proposed Rules at 80,986 n.83; or (2) qualifying "project" to mean only those projects that are "material" to a regulated issuer, *id.* at 80,985.

B. Section 13(q) Forecloses "Country-Level" Reporting And Requires Project-Level Disclosures.

The statutory text of Section 13(q) does not permit "project" to be interpreted as encompassing all of an issuer's operations in a given country. *Cf.* Letter from the American Petroleum Institute to the SEC 6 (Oct. 12, 2010) ("API Letter 1"), suggesting such an approach; *see also* Letter from the American Petroleum Institute to the SEC 17, 20–21 (Jan. 28, 2011) ("API Letter 2"); AngloGold Ashanti Letter to the SEC 13 (Jan. 31, 2011) ("AngloGold Ashanti Letter")[11] In fact, Exxon has acknowledged that the Commission is "constrained in its rulemaking discretion by the terms of the statute, which specify reporting at the project level." Letter from Exxon to the SEC 18 (Jan. 28, 2011) ("Exxon Letter").

First, Sections 13(q)(2)(A)(i) and (ii) require issuers to report *both* "the type and total amount of such payments made for each project of the resource extraction issuer" *and* "the type and total amount of such payments made to each government." If "project" and "government" were interpreted as synonymous, the second of these provisions would be rendered redundant. The Commission must interpret the statute so as to give each word meaning. *TRW Inc. v. Andrews*,

2"); Letter from Exxon to the SEC 7 (Jan. 28, 2011) ("Exxon Letter"); AngloGold Ashanti Letter to the SEC 3 (Jan. 31, 2011) ("AngloGold Ashanti Letter").

[11] Oxfam America observes that API's first submission did nothing less than ask the Commission to disregard Congress' unambiguous textual instruction that the Commission promulgate a project-level disclosure regime. API Letter 1 at 6 ("The industry believes that Congress did not fully consider all of the implications or ramifications of project level disclosure. We respectfully submit that the Commission could use its general exemptive authority under Section 36 of the Exchange Act to exempt any provision(s) of this bill as necessary to protect investors, such as to permit aggregation of payment information at the country level. Alternatively, the Commission could seek a limited technical correction from Congress to eliminate the project-level reporting requirement.") In its second letter to the Commission commenting on the proposed rules, API conceded that "the terms of the statute . . . specify reporting at the project level." API Letter 2 at 18.

534 U.S. 19, 31 (2001) (It is “a cardinal principle of statutory construction” that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (internal citations omitted). Congress’ use of the phrase “each project” shows that Congress intended for issuers not to aggregate projects for a single country.

Second, Congress’ inclusion of an interactive data reporting standard in Section 13(q) would make little sense had Congress not wanted issuers to make granular reports entailing significant disaggregation of data. The presence of both Section 13(q)(2)(D)(VI) (requiring the interactive data standard to designate the particular “project of the resource extraction issuer to which [given] payments relate”) *and* Section 13(q)(2)(D)(V) (requiring identification of “the government that received the payments, and the country in which the government is located”), makes Congress’ expectation that reports would contain disaggregated project-level data even more unambiguous. Congress clearly understood “project,” on the one hand, and “government” or “country,” on the other, to be different concepts.

Finally, a country-level definition of “project” would contravene Congress’ intention that Section 13(q) demonstrate U.S. leadership in the field of extractive industries transparency. 56 Cong. Rec. S3801-02, S3815 (daily ed. May 17, 2010) (statement of Sen. Cardin) (explaining that extractive industries transparency provisions would create “a historic transparency standard”). Nor would country-level reporting provide investors with meaningful insight into a particular issuer’s position vis-à-vis governments to which it makes payments. Such data would not, for example, reflect whether an issuer’s payments are evenly spread across numerous projects or whether an issuer’s payments—and exposure to the foreign government—are concentrated on a particular project or projects.

Several commenters have noted that the EITI requires only country-level reporting and have suggested that the Commission’s required disclosures should be aligned with EITI’s reporting scheme. *E.g.*, AngloGold Ashanti Letter at 13. EITI reporting requirements set minimum standards and not “ceilings” for the type of disclosures possible under the initiative. (For example, as a result of the company-by-company reporting adopted by some countries under EITI, and the fact that some companies may have only one project in the country, some project-level reporting already occurs under EITI.[12]) Additionally, merely codifying EITI-style reporting would be contrary to Congressional intent. In fact, country-level reporting as currently conducted under EITI is “not very useful” for understanding an issuer’s exposure to risk vis-à-vis a given government. Calvert Letter at 3. Aggregated, country-level data is “inadequate” and “makes it difficult to determine political, regulatory or tax risk.” *Id.* For example, country-level reporting is of limited value in providing “information to investors that would enable them to better evaluate actual or potential investments in extractive industries companies.” Paul Bugala, Calvert Investments, *Materiality of Disclosure Required by the Energy Security Through Transparency Act* 8 (Apr. 2010).

[12] See for example Hart Nurse Ltd, Chartered Accountants, Nigeria Extractive Industries Transparency Initiative (NEITI) 2006–2008 EITI Reconciliation Final Report (Feb. 3, 2011), *available at* http://www.neiti.org.ng/files-pdf/NEITI2006-2008Reconciliation-FinalReport-010211.pdf. The report provides disaggregated, company-by-company reporting, including signature bonuses.

Congress agreed. Accordingly, Congress enacted Section 13(q) in part to address the inadequacies of the EITI regime. During Congressional statements in 2010, Sen. Cardin explainined that an extractive industries transparency amendment is needed because existing disclosures are "not useful in determining the extent of a company's operations in or its ongoing financial arrangements with a country." 156 Cong. Rec. S3315 (daily ed. May 6, 2010) and that) that Section 13(q) will "empower investors to have *a more complete view* of the value of their holdings" and will "*bring more information* to global commodity markets") (emphases added) 156 Cong. Rec. S3801-02, S3816) (daily ed. May 17, 2010).

For all these reasons, the SEC should not—and, *consistent with the statute*, cannot—adopt a country-level definition of "project."[13]

C. The SEC Should Define "Project" At The Lease and License Level.

Consistent with PWYP's submissions regarding Section 13(q), Oxfam America believes that the SEC should define "project" in a way that ensures that payments are reported at the lease and license level.

Specifically, Oxfam America endorses the definition of "project" proposed by Calvert Investments in its submission of November 15, 2010. Consistent with that proposal, the Commission should define "project" as "any oil, natural gas or mineral exploration, development, production, transport, refining or marketing activity from which payments above the de minimis threshold originate at the lease or license level, except where these payments originate from the entity level." Calvert Letter at 5. Such a definition would treat oil, gas, and mining issuers equally and be relatively easy to apply.[14]

Oxfam America notes that the SEC has sought comment on whether to 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. In particular, the SEC has asked whether it should 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

[13] Oxfam America does not object to allowing issuers to report at an entity level, rather than project level, when certain payments are actually assessed or calculated at an entity level rather than a project level. For example, an exception might apply to corporate income tax calculated on the basis of all profits made on all projects within a jurisdiction. Such an allowance should have no bearing on the definition of "project" or the implementation of Section 13(q)'s primary reporting obligations.

[14] Any definition of "project" will, in its implementation, require judgment calls to be made by regulated issuers and the SEC. Oxfam America accordingly suggests that a non-exhaustive list of examples be made available with any definition. Such a list might advise that a project would include: each and every instance and/or phase of exploration studies; seismic data acquisition; exploration drilling; acquisition of rights; reservoir engineering studies; facilities engineering design studies; commercial evaluation studies; development drilling; facilities construction; production operations; or abandonment by a resource issuer in connection with a specific lease, license, or concession, such as an individual oil field, mine, refinery or other processing plant, pipeline or other mode of transportation from which payments above a de minimis threshold originate.

> 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.

Proposed Rule at 80,986. Oxfam America believes that the Commission's proposed definition of "project" based on language from Regulation S-X is problematic. Notably, in its letter to the Commission, Exxon has acknowledged that using this definition would exclude payments that Section 13 (q) intended to capture and that "[r]eliance on this definition would therefore not result in appropriate payment reporting by issuers." Exxon Letter at 20. If the Commission does adopt a Regulation S-X based definition of "project," Oxfam America submits that this could be acceptable with appropriate modifications.

In particular, Oxfam America recommends that, if the Commission adopts a Regulation S-X-inspired definition of "project," it should make several important modifications to that definition to ensure proper implementation of Section 13(q).

First, the Commission should revise the definition to clarify that it applies to ongoing production activities associated with operating a producing well or mine, including maintenance, as well as the initial stages leading up to a resource becoming "economically producible" or "commercially developed." In its current formulation, the SEC's proposed definition is susceptible to the interpretation that a project can only exist before and until the point at which oil, natural gas, or mineral resource goes into commercial production; that is, when it is "brought into the status of being economically producible or commercially developed." *Id.* Such a reading would exclude important payment streams from Section 13(q) reporting and would encourage regulated issuers to shift payments from one stage in the lifecycle of a resource asset to another in order to avoid Section 13(q)'s reporting requirements.

Second, the Commission should revise the definition to clarify that a "project" need not lead to an issuer's success in making resources "economically producible." Payments to governments may easily be made in connection with, or attributed to, economically unsuccessful projects. Those payments would not be captured by the Commission's current proposed definition.

Third, the Commission should omit any limitation of "project" to an activity having a "definite cost estimate, time schedule or investment decision." Any definition that included such limitations would lead to the under-reporting of payments associated with particular activities supposedly lacking any of these factors; this would be inconsistent with the objectives underlying the adoption of Section 13(q).

Finally, consistent with the text and above-demonstrated legislative intent to require granular project-level reporting, Oxfam America also believes that any Regulation S-X derived definition should be modified to clearly preclude aggregation of distinct reservoirs, fields, or mines. *Cf.*

Proposed Rule at 80,986. Such aggregation would obscure the significance of payment streams and be correspondingly less valuable to those looking to Section 13(q) reports for investment analysis or to hold their governments accountable for use of resource revenues.[15]

D. Section 13(q)'s Disclosure Requirement Applies to All Projects, Not Just "Material" Projects.

(1) Some commenters have suggested a definition of "project" that is qualified to apply to only those projects "material to the issuer."

Some commenters have suggested that the legislative objectives underlying the adoption of Section 13(q) would be met if the Commission "limit[ed] the projects that require disclosure to projects that are *material to the issuer*." *E.g.*, Letter from Cravath, Swaine and Moore LLP et al. to the SEC 4–5 (Nov. 5, 2010) ("Cravath Letter") (emphasis added). It has been suggested that such a limitation would "make it easier for investors to access the information that is most relevant and important to their investment decisions, which is consistent with the Commission's obligation to protect investors," and to resolve a supposed "inconsistency" between the Commission's mandate to promulgate rules to implement Section 13(q) and its obligations to consider the burden on competition and the potential costs and benefits of any rulemaking initiative. *Id.* at 5 (citing Sections 3(f) and 23(a)(2) of the Exchange Act). Such a course would be thoroughly inconsistent with the text and legislative intent of Section 13(q). The Commission

[15] Some commenters have suggested that project-level reporting under 13(q) would be very burdensome. *E.g.*, Letter from Royal Dutch Shell plc to the SEC 14-15 (Jan. 28, 2011) ("RDS Letter 2"); AngloGold Ashanti Letter at 13. In fact, a significant amount of project-level reporting already occurs.
Many resource extraction companies, including Talisman Energy, *2009 Corporate Responsibility Report—Key Performance Indicators, Economic Performance*, *available at* http://cr.talisman-energy.com/2009/key-performance-indicators/economic-performance.html; Statoil, *Annual Report 2009—Financial Performance, Positive Impacts, Overview of Activities by Country*, http://www.statoil.com/AnnualReport2009/en/FinancialPerformance/PositiveImpacts/Pages/OverviewOfActivitiesByCountry.aspx; Newmont Mining, *Newmont Sustainability Report 2009—Community, Performance, Taxes and Royalties*, http://www.beyondthemine.com/2009/?l=2&pid=4&parent=17&id=144; and AngloGold Ashanti, *Sustainability Review—Economic Performance, Payments to and Assistance From Government*, *available at* http://www.anglogoldashanti.co.za/subwebs/informationforinvestors/reports09/SustainabilityReview09/economic.htm, already disclose to host governments on a voluntary basis. Their reasons for doing so are varied; they range from generating positive public relations to obtaining project financing from the World Bank. In some instances, these companies do so when they have only one project in a particular country at the time of reporting. This is the case, for example, with Newmont Mining (reporting payments related to projects in Peru, Bolivia, and Ghana), *Newmont Sustainability Report 2008—Community, Performance, Taxes and Royalties*, http://www.beyondthemine.com/2008/?l=2&pid=4&parent=17&id=144; Statoil (reporting payments related to a project in Iran), *supra*; and AngloGold Ashanti (reporting payments related to projects in Argentina, Guinea, Namibia, and Tanzania), *Sustainability Review 2009—Supplementary Information*, http://www.anglogold.co.za/subwebs/informationforinvestors/reports09/SustainabilityReview09/f/AGA_SD09.pdf. In addition, the list of resource extraction companies that publicly disclose their project-level payments to host governments as a condition for obtaining project financing from the International Finance Corporation, the private sector lending arm of the World Bank, includes Peru LNG and Maple Energy plc (both operating in Peru), Improved Petroleum Recovery Group of Companies (IPR) (operating in Egypt), *Development—Government Revenues*, http://www.ifc.org/ifcext/coc.nsf/content/Disclosure#&Tab=2; and ExxonMobil (operating in Chad), *Chad/Cameroon Development Project, Project Update No. 28, Mid-Year Report 2010*, http://www.esso.com/Chad-English/PA/Files/28_allchapters.pdf. In effect, then, a considerable amount of project-level reporting already happens by default.

should reject the invitation to interpret Section 13(q) reporting as applicable only to “material” projects.

(2) Where Congress wants to limit reporting to “material” instances, it knows how to do so; Congress did not do so here.

The text of Section 13(q) forecloses a “materiality”-based qualification of “project.” The Commission’s mandate under Section 13(q) is simple. The Commission has been instructed to issue rules that require certain statutorily defined “resource extraction issuers” to provide in an annual report “information relating to any payment made by the resource extraction issuer . . . to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including—(i) the type and total amount of such payments made for *each project* of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals.” Exchange Act § 13(q)(2)(A) (emphasis added). This means *all* projects, not just some.

Congress knows how to impose a materiality requirement when it wants to: the Exchange Act contains numerous instances where Congress chose to qualify an otherwise required disclosure by the term “material.” For instance, Section 10A of the Exchange Act, which establishes reporting requirements for auditors who detect likely illegal activity during the course of an audit and determine that management is not taking appropriate remedial action, is explicitly limited to those illegal acts that have “a material effect on the financial statements of the issuer.” That is not the case in Section 13(q).

Moreover, with respect to Section 13(q), Congress had already considered and rejected a materiality standard as to payments. Instead, Congress chose to use the qualifier “not de minimis” with respect to payments, and the Commission has properly determined that the qualifier “not de minimis” is distinct from the qualifier “material.” Proposed Rule at 80,987. Imposing a materiality qualifier on “project” would undermine this decision by the back door. Non-de minimis payments which Congress wanted reported might go unreported because of their association with a non-“material” (however defined) project, perhaps a cancelled one.[16]

(3) If the Commission limits reporting to only “material” projects, materiality must be defined in a manner reflecting the objectives of the statute.

However, if the Commission elects to restrict Section 13(q)’s reporting requirement to “material” projects only, it would be inappropriate to define materiality solely from an investment perspective. The concept of materiality is vulnerable to widely diverging interpretations, as the Commission has recognized in SEC Staff Accounting Bulletin No. 99—Materiality, 17 C.F.R. pt. 211 (“SAB 99”) (“Materiality concerns the significance of an item to users of a registrant’s financial statements. A matter is ‘material’ if there is a substantial likelihood that a reasonable person would consider it important.”) The Commission drew on previous interpretations of the

[16] As to avoiding unnecessary disclosure, the de minimis exception regarding payments already does so—insofar as Congress intended for payments to be excepted. There is simply no need, and no scope within the statute, for another such qualifier.

term “materiality” by the Financial Accounting Standards Board,[17] as well as by the United States Supreme Court,[18] and ultimately came to the conclusion that:

> [A]n assessment of materiality requires that one views the facts in the context of the “surrounding circumstances,” as the accounting literature puts it, or the “total mix” of information, in the words of the Supreme Court. In the context of a misstatement of a financial statement item, while the “total mix” includes the size in numerical or percentage terms of the misstatement, it also includes the factual context in which the user of financial statements would view the financial statement item. The shorthand in the accounting and auditing literature for this analysis is that financial management and the auditor must consider both “quantitative” and “qualitative” factors in assessing an item’s materiality.

SAB 99. In other words, the Commission recognizes that materiality is contextual.

With regard to 13(q), however, the relevant context is linked not only to the business performance of the issuer, and the unique risks facing extractive issuers,[19] but also to Section 13(q)’s goal of indirectly regulating or promoting transparency by host governments. What is “material” in one context may not be “material” in another. A small, or even “immaterial” project from the perspective of a huge oil company or its investors may be extremely significant to citizens living in resource-rich countries or organizations, such as civil society watchdog groups, trying to hold a government accountable for its management of resource wealth.[20] Any definition of materiality would have to take these factors into account in its implementation of a “total mix” approach. The difficulty of doing so suggests that Congress was wise in deciding to require reporting on all projects.

III. Section 13(q) Cannot Be Interpreted To Support Reporting Exemptions.

The Commission has requested comment on whether to allow certain exemptions from Section 13(q)’s project-based reporting requirement. Specifically, the Commission has asked whether

[17] SAB 99 (quoting Financial Accounting Standards Board, Statement of Financial Accounting Concepts No. 2) (“The omission or misstatement of an item in a financial report is material if, in the light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item.”).

[18] The Supreme Court has held that a fact is material if there is “a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.” *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

[19] The nature of the oil, gas, and mining sector means that companies often have to operate in countries that are often autocratic, unstable, or both. Investors need to know the full extent of a company’s exposure when they are operating in countries where they are subject to expropriation, political and social turmoil, and reputational risks.” 156 Cong. Rec. S5870-02 (daily ed. July 15, 2010) (statement of Sen. Cardin).

[20] BP concedes that adopting a “materiality” qualifier for projects that is based on the subjective perspective of the issuer will result in the exclusion of information relevant to that other users of Section 13(q) data. In so doing, BP acknowledges the twin purposes underlying Section 1504. Letter from BP p.l.c. to the SEC, page 6 (Feb. 11, 2011) (“We accept that other users have an interest in payment information that would e below the materiality levels ordinarily adopted by extractive industry issuers.”).

"smaller reporting companies or foreign private issuers" should be exempted from reporting pursuant to Section 13(q). Proposed Rule at 80,980. The Commission has also requested comment as to whether regulated issuers should be exempted from disclosure if prohibited by a host country's law or if an agreement between an issuer and a foreign government contains confidentiality provisions. *Id.* at 80,988.

No such exemptions should appear in the final rule implementing Section 13(q). Exemptions of the kinds considered by the Commission in its Notice of Proposed Rulemaking are contrary to the clear import of the statutory text—which contains no exemptions—and would directly undermine the purposes of Section 13(q).

A. Smaller Reporting Companies Should Not Be Exempted From Section 13(q) Reporting.

Section 13(q)'s project-based reporting obligations extend to "smaller reporting companies," as defined in 17 C.F.R. § 240.12b-2 (2010). Indeed, a broad cross-section of the comments submitted stress that any such an exemption "would be competitively disadvantageous to the resource extraction issuers that are required to disclose payments." *E.g.*, API Letter 2 at 2; Exxon Letter at 1.

As the SEC recognized in presenting its Proposed Rule, the statutory mandate from Congress is clear: "Section 13(q) does not contemplate separate disclosure requirements for small entities . . . or exempting them from those requirements." Proposed Rule at 80,998. Instead, the SEC must promulgate rules that "require *each* resource extraction issuer" to make project-specific disclosures. Exchange Act § 13(q)(2)(A) (emphasis added). Smaller reporting resource extraction companies unambiguously qualify as "resource extraction issuers" under the statute, which provides a simple, two-part test for applicability of its reporting obligations. Exchange Act § 13(q)(1)(D) (defining "resource extraction issuer" as "an issuer that (i) is required to file an annual report with the Commission; and (ii) engages in the commercial development of oil, natural gas, or minerals"). Smaller extractive companies—among them many qualifying as "smaller reporting companies"—meet these criteria. They should accordingly be subject to Section 13(q)'s reporting requirements.

This plain-language reading of the text of Section 13(q) reflects the legislative intent to apply Section 13(q) reporting obligations as broadly as possible. 156 Cong. Rec. S2801-02, S3815 (daily ed. May 17, 2010) (statement of Sen. Cardin) (noting that "this amendment would apply to all oil, gas, and mining companies required to file periodic reports with the SEC" and that "*too many . . . companies* remain outside" current voluntary transparency reporting standards) (emphases added); Letter from Sen. Benjamin Cardin to the SEC (Dec. 1, 2010) (stating that, with respect to the meaning of resource extraction issuer, "the intent was to include all issuers, including foreign issuers, which have a reporting requirement to the SEC").

Special treatment for smaller reporting companies would severely undermine the efficacy of any rule adopted.[21] Many companies qualifying as "smaller reporting companies" within the meaning of 17 C.F.R. § 240.12b-2 (2010) engage in the commercial development of oil, natural gas, or minerals in foreign countries with poor government transparency regimes, often at the earlier stages of resource exploitation.[22] Exempting smaller reporting companies would fail to capture the payments they make to governments in Section 13(q) reporting—an outcome inconsistent with Section 13(q)'s broad applicability and the legislative purpose to reach "all oil, gas, and mining companies." 156 Cong. Rec. S3815 (daily ed. May 17, 2010). Moreover, loopholes invite evasion of regulatory obligations. An exemption for smaller reporting companies would encourage larger resource extraction issuers to restructure their operations in order to funnel otherwise reportable activities through smaller reporting companies.

With respect to the Commission's concerns about the costs of Section 13(q) compliance, Proposed Rule at 80,980, Oxfam America respectfully submits that that fears of overburdening any issuer with an obligation to disclose non-de minimis payments to governments are overstated. As other commenters have noted, resource extraction companies routinely track payments to governments for tax and royalty purposes. *E.g.*, Letter from PWYP to the SEC 17 (Nov. 22, 2010). In addition, all registered issuers are obliged to maintain accurate books and records that "accurately and fairly reflect the transactions and dispositions of the assets of the issuer." 15 U.S.C. § 78m(b)(2)(A) (2009). It is difficult to imagine that any company complying with this requirement will be overly challenged by keeping track of its payments to governments in connection with particular projects. *See* Syena Letter at 2–3 ("We would contend that the investor can only benefit from the increased availability of information and that it would not be a difficult task to include project data . . . in a well-design interactive data format as required by Section 1504."). As a general matter, moreover, smaller reporting entities will likely have fewer operations and fewer projects to monitor. An entity that is *not already* keeping track of its payments to foreign governments is unlikely to be in a position to continue making them for very long.

B. Foreign Private Issuers Should Not Be Exempted From Section 13(q) Reporting.

Section 13(q)'s project-based reporting obligations similarly extend to foreign private issuers, as defined in 17 C.F.R. § 240.3b-4 (2010).

As already noted, Section 13(q) requires the SEC to promulgate rules binding "*each* resource extraction issuer." Exchange Act § 13(q)(2)(A) (emphasis added). Foreign private issuers

[21] Special treatment for smaller reporting companies might also unfairly prejudice larger issuers who may be less agile in their overseas operations.

[22] A review of the EDGAR database reveals numerous "smaller reporting companies" that file reports with SEC and operate in regions that are known to have poor transparency regimes. For example, Delta Mutual, Inc. has oil and gas concessions in South America; Siberian Energy Group Inc. is currently seeking opportunities for investment in and/or acquisition of companies operating in the oil and gas industry in Russia; and Premier Energy Corporation produces oil and gas in Russia's North Kopanskoye region. Oxfam America points to these companies solely by way of example of their reporting status and the geography of their operations. Oxfam America takes no position with respect to the regulatory compliance or business practices of these entities.

unambiguously fall within the two-part statutory definition of "resource extraction issuer." *Id.* § 13(q)(1)(D); *accord* Proposed Rule at 80,980 (recognizing that Section 13(q) "does not indicate that the Commission, in adopting implementing rules, should provide different standards for different issuers or should exempt any issuers from the new requirements"). Foreign private issuers are therefore subject to Section 13(q) obligations.

Beyond this clear statutory requirement, exempting foreign private issuers from Section 13(q) obligations would directly contradict Congress' unambiguous intent to subject such issuers to regulation under Section 13(q). 156 Cong. Rec. S3801-02, S3815 (daily ed. May 17, 2010) (statement of Sen. Cardin) ("This amendment goes a long way in achieving that transparency by requiring *all foreign and domestic companies registered with the U.S. Securities and Exchange Commission* to report, in their annual reports to the SEC, how much they pay each government for access to their oil, gas, and minerals.") (emphasis added); *id.* at S3816 (statement of Sen. Lugar) ("This amendment requires *foreign and domestic companies* listed on U.S. stock exchanges and exchanging American depository receipts to disclose in their regular SEC filings their extractive payments to governments for oil, gas, and mining."); *id.* at S3316 (statement of Sen. Cardin in support of Amendment No. 3732 to Restoring American Financial Stability Act (S. 3217)) (indicating the legislation was intended to cover foreign private issuers by stating that "[t]he provisions of this amendment would apply to all oil, gas, and mining companies required to file periodic reports with the SEC; namely, 90 percent of the major internationally operating oil companies and 8 out of the 10 largest mining companies in the world—only 2 of which are U.S. companies. *We are talking about foreign-owned companies, not U.S. companies*, by and large").

Several commenters have expressed concern that Section 13(q) could have a deleterious effect on the competitiveness of regulated resource extraction issuers. API Letter 1 at 5 (arguing that 15 U.S.C. § 78c(f) obliges the Commission to consider whether its rulemaking will promote competition); Cravath Letter at 5. Such concerns—to the extent the SEC shares them—weigh against exempting only foreign private issuers from a regulatory scheme under which Congress intended to treat both U.S. and foreign issuers equally, and where the statutory text supports no such distinction between the two.

Moreover, such an exemption could only be consistent with Congress' instructions in Section 13(q) if it accommodated compliance with an analogous project-level disclosure regime. There is not yet any project-level extractive payments disclosure regime equivalent to that established by Section 13(q) anywhere in the world. Industry members calling for such an exemption admit as much. Letter from Royal Dutch Shell to the SEC 5 (Oct. 25, 2010) (RDS Letter 1) ("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.") (emphasis added). Country-level disclosure is fundamentally different from project-level disclosure; Congress unambiguously mandated the former. Exchange Act § 13(q)(2)(A)(i) (requiring reporting of payments in relation to "each project"). Until an equivalent project-level disclosure regime is implemented in another jurisdiction, discussion of an exemption for compliance with home country disclosure requirements is simply premature.[23]

C. **An Exemption Where Confidentiality Agreements Or Host Country Laws Prohibit Disclosure Would Fundamentally Undermine The Effectiveness Of Section 13(q).**

The SEC has also sought comment on whether a reporting exemption should apply "if the laws of a host country prohibit the resource extraction issuer from disclosing the information," whether there should be an exception for payments made in connection with agreements containing confidentiality provisions. Proposed Rule at 80,988. Numerous commenters aligned with regulated issuers have called for the SEC to include these kinds of exceptions in a Final Rule. *See*, *e.g.*, API Letter 2 at 25; Cravath Letter at 2-3; Exxon Letter at 25; Letter from Royal Dutch Shell plc to the SEC 19–20 (Jan. 28, 2011) ("RDS Letter 2"). Some of these commenters have provided examples of host countries that currently have such laws in place—Angola, Cameroon, China, and Qatar – without citing specific laws. API Letter 2 at 25; Exxon Letter at 25; RDS Letter 2 at 20. Oxfam America respectfully submits that those countries which cloak their extractive industry dealings in secrecy are the very countries at which Congress' transparency efforts are directed.

Neither the text nor the unambiguous intent of Section 13(q) can be reconciled with a reporting exemption for issuers who have entered into confidentiality agreements with host countries, or where the host country's laws prohibit the publication of the information envisioned by this section. Section 13(q) includes a simple, across-the-board requirement applicable to "any payment" made to a foreign government. Exchange Act § 13(q)(2)(A).

Such an exemption would also invite evasion. Regimes fearful of transparency would very likely prohibit the publication of data regarding royalties, taxes, and other covered payments through contractual confidentiality terms or other enactments. Letter from Sen. Benjamin Cardin to the SEC 1 (Dec. 1, 2010) ("The language of Sec. 13(q) is very clear: there should be no exemptions for confidentiality or for host-country restrictions. It would be too easy for countries who want to avoid disclosures to simply pass their own law against disclosure. The purpose of Sec. 13(q) is to not allow for exemptions for confidentiality or other reasons that undermine the principle of transparency and full disclosure.").

Even more problematically, such exemptions would ignore Section 13(q)(2)(E)'s requirement that rules implementing Section 13(q) "support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals." This objective would not be served by such a reporting exemption, which would lose sight of Congress' unmistakable understanding of Section 13(q) as an instrument to influence governments and to provide information to citizens that can be used to help hold these governments accountable for spending choices from their extractive

[23] That said, Oxfam America believes that U.S. leadership through the comprehensive implementation of Section 13(q) represents the surest path to international regulatory convergence in extractive industries disclosures. The existence of numerous country-level regimes is a step toward global emergence of the more rigorous, project-based disclosure standard.

industries.[24] 156 Cong. Rec. S5870-02 (daily ed. July 15, 2010) (statement of Sen. Lugar) ("So we not only are protecting investors and helping in energy security, we are helping to alleviate poverty internationally by allowing the people of the countries that have mineral wealth to hold their officials accountable, to use those payments to help the people of that nation."); *id.* S3801-02, S3816 (daily ed.) (statement of Sen. Lugar) ("The essential issue at stake is a citizen's right to hold its government to account. Americans would not tolerate the Congress denying them access to revenues our Treasury collects. We cannot force foreign governments to treat their citizens as we would hope, but this amendment would make it much more difficult to hide the truth."); *id*. at S5872 ("By giving the citizens the information about how payments are made to their country, they have a much better chance to hold their government officials accountable.").

In this connection, Oxfam America notes that a disclosure to accommodate foreign prohibitions on compliance with Section 13(q) cannot be supported by reference to the disclosure exemption for host country restrictions found in Instruction 4 to paragraph a(2) of Item 1202 of Regulation S-K. 17 C.F.R. § 229.1202 (2009). Item 1202 of Regulation S-K is inapposite, because this regulation was not promulgated pursuant to a statute concerned with enhancing global transparency and promoting accountable governance in countries that struggle with the so-called "resource curse."

For all these reasons, an exemption to allow compliance with foreign laws prohibiting compliance with Section 13(q) must be rejected. In implementing Section 13(q), the SEC should be mindful that the statute's purpose is to *influence* non-transparent foreign regimes, not to *accommodate* them.

D. Asset-Backed Issuers Should Not Be Exempt From Section 13(q)'s Project-Level Payment Reporting Requirement.

In its Proposed Rule, the Commission noted that "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." Proposed Rule at 80,981. The Commission has sought comment as to whether "either or both of these types of registrants" should be "permitted to omit the proposed resource extraction payment disclosure in the annual reports on Form 10-K."

Oxfam America believes that it would be consistent with Section 13(q) to excuse a wholly-owned subsidiary of a resource extraction issuer from filing resource extraction payment reports

[24] As a practical matter, commenters have shown that typical extractive contracts provide for stock market disclosures notwithstanding general confidentiality obligations. *See generally* Revenue Watch Institute & Columbia Law School, Human Rights Institute, *Extractive Industries Disclosure Act Confidentiality Analysis* (June 8, 2008), *available at* https://org2.democracyinaction.org/o/5399/images/ Karin%20Lissakers_addendum_HR6066.pdf. This point was emphasized in a 2009 Revenue Watch report that characterized disclosure to stock exchanges as a "standard exception" to the otherwise binding confidentiality obligations in extractive industry contracts. PETER ROSENBLUM & SUSAN MAPLES, CONTRACTS CONFIDENTIAL: ENDING SECRET DEALS IN THE EXTRACTIVE INDUSTRIES 26 (2009), *available at* http://www.revenuewatch.org/files/RWI-Contracts-Confidential.pdf. *See also, e.g.*, Petroleum Agreement among Republic of Ghana, Kosmos Energy, and the E.O. Group, Article 16.5(b)(v). ("The [confidentiality] provisions shall not prevent disclosure . . . as may be required by applicable law or financial stock exchange.").

under Section 13(q), *provided that* these payments are actually reported at the project level by the parent issuer and that the subsidiary making the payment is identified in the parent issuer's report.

The Commission should not excuse asset-backed issuers from reporting obligations under Section 13(q). Congress' mandate to the Commission in Section 13(q) was unequivocal: *all* resource extraction issuers must make project level reports of payments to governments in connection with the commercial development of oil, natural gas, or minerals. Congress' definition of "resource extraction issuer" draws no distinction between asset-backed issuers and other issuers, but encompasses all issuers engaged in the commercial development of oil, natural gas, or minerals and that are "required to file an annual report with the Commission." Exchange Act §§ 13(q)(1)(D)(i), (ii). Although General Instruction J to Form 10-K modifies the manner in which asset-backed issuers are required to file annual reports with the Commission, asset-backed issuers are nevertheless required to file annual reports.[25] Asset-Backed Securities, 70 Fed. Reg. 1506, 1561 (Jan. 7, 2005) (promulgating Regulation AB) (explaining that for asset-backed issuers, "[a]n annual report on Form 10-K is still required, but the information required is reduced and modified"); Form 10-K, Special Instruction J(1) (specifying specific information that may be omitted by asset-backed issuers) and J(2) (prescribing substitute information to be included by asset-backed issuers). As such, and to the extent that they engage in the commercial development of oil, natural gas, or minerals, asset-backed issuers are as subject to the requirements of Section 13(q) as any other kind of issuer.

Special treatment for asset-backed issuers under Section 13(q) would create a potential loophole in the Commission's implementation of the project-level reporting requirement. Ostensibly Section 13(q) compliant resource extraction issuers could be tempted to sponsor the formation of asset-backed issuers so that payments made by or through such entities from their books. There is no reason for the SEC to include a potential loophole of this nature in its implementation of Section 13(q). Such an exemption would, moreover, be entirely contrary to Congress' intent in enacting Dodd-Frank, which consistently requires greater transparency in the asset-backed securities marketplace. *See generally* Dodd-Frank §§ 941–46.

IV. **Disclosures Made Pursuant to Section 13(q) Must be Made Available to the Public.**

The Commission has received several comments in recent weeks encouraging it to collect information from resource extraction issuers, as required by Section 13(q), but then to make

[25] Oxfam America notes that the SEC is currently considering rules which might in certain circumstances excuse asset-backed issuers from reporting under Section 15(d) of the Exchange Act when there are no longer any asset-backed securities held by non-affiliates of the depositor. Suspension Of the Duty to File Reports For Classes of Asset-Backed Securities Under Section 15(d) of the Securities Exchange Act of 1934, 76 Fed. Reg. 2049 (proposed Jan. 12, 2011). The potential exemption of asset-backed issuers from annual reporting under any final version of proposed rule should not allow them to conceal payments otherwise reportable under Section 13(q). Accordingly, to the extent that an asset-backed issuer may ultimately be excused from reporting under Section 15(d) because its securities are all held by a depositor's affiliates, Oxfam America believes that Section 13(q) reporting obligations should still apply and that such a "dormant" asset-backed issuer should be treated as a subsidiary of a depositing or affiliated resource extraction issuer for the limited purpose of Section 13(q) compliance.

only limited portions of such information available to the public. Exxon Letter 40; *see also* Royal Dutch Shell Letter 2 at 28; API Letter 2 at 39-41. Public access should, commenters suggest, be limited to country-level data aggregated for *all* issuers. API Letter 2 at 41. These comments are, for the most part, identical. The rationale offered in support of this position varies. Some commenters have taken the position that Section 13(q) requires the Commission to make available only a compilation of the company disclosures, American Exploration and Production Council Letter to the SEC 4 (Jan. 31, 2011), while others believe that the Commission has discretion to do so, U.S. Council for International Business Letter to the SEC (Feb. 4, 2011). Irrespective of their stated rationale, these commenters misunderstand—or misstate—the nature of the required disclosures mandated by Section 13(q).

Section 13(q)(2) requires each resource extraction issuer to provide detailed information regarding payments it makes to governments for the purpose of commercial development of oil, gas, or minerals. As discussed above in Section I, this requirement reflects two distinct, but complementary Congressional goals. The first is to promote the accountability of governments of resource-rich countries to their citizenry. The second is to facilitate risk assessment by investors in the securities issued by resource extraction issuers. *See* 156 Cong. Rec. S3316 (daily ed. May 6, 2010) (Statement of Senator Cardin in support of Amendment No. 3732 to the Restoring American Financial Stability Act (S3217)) (*cited in* Proposed Rule at 80,992 n.151); 156 Cong. Rec. S5870-02, S5872 (daily ed. July 15, 2010) (statement of Sen. Cardin); 156 Cong. Rec. S5902-01, S5913 (daily ed. July 15, 2010) (statement of Sen. Leahy).

The Commission has consequently rightly recognized the importance of public disclosure of the information it receives pursuant to Section 13(q). In a December 15, 2010 release announcing the Proposed Rule, the Commission stated its intent to have resource extraction issuers provide the required information annually in their Exchange Act annual reports. SEC Proposes Rules for Resource Extraction Issuers Under Dodd-Frank, Release 2010-247 (Dec.15, 2010), *available at* http://www.sec.gov/news/press/2010/2010-247.htm. According to the Commission, "[t]he information would be included in two exhibits—one exhibit that would be filed in text format, *which would enable investors to easily read the disclosure about payment information without additional computer programs or software*, and another exhibit filed in eXtensible Business Reporting Language (XBRL) format that would be readable through a viewer." *Id.* (emphasis added). Likewise, in its Proposed Rule, the Commission expressed sensitivity to investors' ability to locate the required disclosures in the annual report "without over-burdening them with extensive information about resource extraction payments in the body of the report." SEC Release No. 34-63549, 17 C.F.R. pts. 229, 249. To that end, the Commission expressed its intention to require issuers to include a brief statement under a separate heading entitled "Payments Made by Resource Extraction Issuers," directing investors to the more detailed payment information in the exhibits.

Oxfam America respectfully submits that the Commission should not alter its understanding of Section 13(q) nor its stated objectives with respect to public reporting on the basis of the recently-received comments. Oxfam America does not dispute that Section 13(q)(3) requires the Commission, "[t]o the extent practicable . . . to make available online, to the public, a compilation" of the resource extraction payment information provided pursuant to Section 13(q)(2). However, the only interpretation of this language consistent with Congressional intent is that any compilation under Section 13(q)(3) is designed to *supplement* the required resource extraction payment disclosures. *See, e.g.*, SEC Release No. 34-63549 (considering a suggestion that the compilation take the form of an online database and summary report that would enable users to search by country and company, as well as by multiple years of reporting). Oxfam America agrees with the Commission that its mandate under Section 13(q)(3) is to enhance investors' ability to use the information made available pursuant to Section 13(q)(2) and to enable them to appropriately assess the risks of investing in the securities of a resource extraction issuer.

Indeed, any other reading of Section 13(q)(3) would have the opposite effect. Rather than promoting the statutory objectives, interpreting Section 13(q)(3) as a limitation would nullify the investor protection aspects of the statute.[26] In order to appropriately assess the risks inherent in investing with a particular resource extraction issuer, an investor must have access to the payment information for that issuer. Providing the investor with a compilation of payments received by governments without the corresponding information about who made the payment, and for what purpose, would entirely vitiate the utility of the information reported. Likewise, risk assessment is inherently a comparative exercise. Investors must be able to compare the payment patterns of different issuers if Section 13(q) reporting is to be of any value to them.

For all these reasons, the Commission should reject proposals to keep Section 13(q) information secret from the public.

V. Section 13(q) Will Not Significantly Burden Competitiveness.

Commenters opposed to robust implementation of Section 13(q) argue that the required disclosures will create competitive asymmetry by forcing regulated issuers to reveal sensitive information to their competitors and by making companies not subject to its reporting requirements more attractive to resource-rich countries who do not want their payments disclosed. These concerns are overstated for several reasons.

First, most leading internationally-operating oil companies will be subject to Section 13(q)'s reporting obligations. Second, concerns that companies will be forced to disclose highly sensitive information are exaggerated. Third, it is unlikely that Section 13(q) will result in significant deregistration.

In any case, to the extent that Section 13(q)'s reporting obligations result in some competitive disadvantage to regulated issuers, Congress already accepted this risk when it determined that pursuing the goals of promoting transparency and good governance was of paramount importance—even at the cost of an incidental burden on issuers. "Transparency will create more stable governments, which in turn allows U.S. companies to operate more freely, and on a level playing field, in markets that are otherwise too risky or unstable." 156 Cong. Rec. S5870-02 (daily ed. July 15, 2010) (statement of Sen. Cardin). Moreover, in enacting Section 13(q), Congress made a

[26] Data aggregated by country and not distinguishing between specific issuers would lead to a result even worse from the investor's perspective than a rule requiring public country-level, rather than project-level, reporting by a particular issuer.

decision to exhibit leadership in the global effort toward greater transparency in extractive industries and to surpass existing global initiatives with the hope and expectation that other countries will soon do the same. As with the Foreign Corrupt Practices Act, Congress made the affirmative choice to set a higher standard for global corporate practice. Other countries have already started to follow Congress' lead in this area.[27]

A. Most Leading International Oil Companies Will Be Subject to Reporting Obligations.

Commenters who argue that Section 13(q) will unfairly disadvantage regulated issuers seem to ignore that most of the leading international oil companies will be subject to reporting obligations. It is estimated that 90 percent of major internationally-operating oil companies (as measured by oil and gas reserves) will be subject to Section 13(q)'s reporting requirements. 156 Cong. Rec. S3316 (daily ed. May 6, 2010) (statement of Sen. Cardin in support of Amendment No. 3732 to Restoring American Financial Stability Act (S. 3217)). As the Commission has noted, Proposed Rule at 80,979 n.19, the London and Hong Kong stock exchange rules are also evolving to require disclosures of payments to governments by extractive industry issuers.

Strong U.S. leadership with respect to transparency in the extractive industries will make it easier for foreign governments to adopt similar reporting requirements, which in turn will serve to level the playing field. Accordingly, the Commission may expect both regulated issuers and unregulated issuers to operate in a global marketplace where reporting of resource extraction payments is increasingly common. Robust application of Section 13(q) to regulated issuers will help effectuate Congress' intent to show leadership and set a "global standard." 156 Cong. Rec. S3316 (daily ed. May 6, 2010).[28]

[27] In the last month, both France and the UK have publicly supported an EU transparency requirement similar to the proposed rule. French President Nicolas Sarkozy recently wrote that he "ha[s] decided to ask the European Union to adopt as quickly as possible legislation forcing companies in the extractive sector to publish what they pay to host countries." "Sarkozy Tells Bono Will Seek Africa Transparency Law", Agence France Presse (Jan. 30, 2011), available at http://www.eubusiness.com/news-eu/africa-france.8dn. See also, "Britain backs 'publish what you pay' rule for oil and mining firms in Africa", The Observer (Sunday 20 February 2011) available at http://www.guardian.co.uk/business/2011/feb/20/george-osborne-oil-mining-africa "Britain is throwing its weight behind European efforts to force oil and mining companies to publish details of every penny they pay to governments in poor countries where they operate. George Osborne told his fellow G20 finance ministers in Paris on Saturday that the coalition was keen to support an effort by the French president, Nicolas Sarkozy, to throw open the operations of the extractive industries in the developing world to public scrutiny."

[28] This has been the experience with other U.S. statutes and regulations. Similarly dire predictions of harm to U.S. businesses were made with respect to the Foreign Corrupt Practices Act and the Sarbanes-Oxley Act, but subsequent experience proved otherwise. U.S. legislation has catalyzed foreign legislation and served as a model for Europe and the rest of the world with respect to corruption and efficient markets. With respect to the Sarbanes-Oxley Act, major provisions of the Act have already been widely adopted on a global scale. Ethiopis Tafara, *A Race to the Top*, 25 INT'L FIN. L. REV. 12 (Sept. 2006). The Foreign Corrupt Practices Act (FCPA), which prohibits bribery of foreign public officials, provides another forceful analogy in this context. Congress adopted the Foreign Corrupt Practices Act in 1977 after unsuccessful attempts to negotiate a multilateral anti-bribery instrument at the United Nations. In so doing, Congress understood and accepted the risk that U.S. businesses would be at a competitive disadvantage vis-à-vis their foreign competitors who did not have similar restrictions placed upon their

If anything, concerns about Section 13(q)'s effect on competition serve to underscore the need for broad applicability of Section 13(q). *See supra* Section III(A) (regarding exemptions for small or foreign issuers). The Commission should therefore apply the requirements of Section 13(q) to all regulated issuers—including small and foreign private issuers—and deny any exceptions based on host country law. Its failure to do so will, in effect, provide any exempted issuer with a competitive advantage vis-à-vis its non-exempted counterparts.

B. Concerns That Companies Will Be Forced To Disclose Highly Sensitive Information Are Exaggerated.

Many of the industry commenters refer to the "competitive harm" that would arise if companies are required to disclose "sensitive commercial information." *See, e.g.*, API Letter 2 at 2; Exxon Letter at 4. They do not, however, clearly articulate either the harms that they envision or how the required disclosures under Section 13(q) involve "sensitive" information. These commenters contend that "commercially sensitive contract terms" will be disclosed, Exxon Letter at 4, but neither Section 13(q) nor the Proposed Rule require the disclosure of specific contract "terms" between a resource extraction issuer and a host government. They require no more than the disclosure of payments made to governments in connection with projects.

Section 13(q) does not force companies to disclose sensitive or confidential information such as existing, pending, or expected contracts with governments. Nor does Section 13(q) require issuers to reveal any contract terms. Disclosures will occur at least a full 60 days after payment has been made. SEC Release No. 33-8644, 17 C.F.R. pts. 210, 229, 240, 249 (Dec. 27, 2005). Disclosures mandated by Section 13(q) will often include public information known to other actors in the industry, or information that will not give a competitive advantage to another actor in the field. An entire industry exists to provide intelligence on natural resources transactions. It is hard to believe that the best data available to competitors usually take the form of an annual Section 13(q) filing. As noted above, Section 13(q) will not require issuers to reveal contemplated transactions, business models, proprietary technology, or confidential communications.

Nor would Section 13(q) disclosures yield information that would allow companies to reverse engineer an issuers rates of return on investment. In order to accurately ascertain a company's rate of return on its investments, far more information would be needed, including production levels, capital investments, tax holidays, customs exemptions, and prices for production sold. Second, even if a company's rate of return were to become public information, this would not

ability to conclude international contracts. When the FCPA was adopted, most major exporting countries not only permitted bribery in international business—they actively encouraged it by allowing companies to take a tax deduction for any bribes paid. Kathryn Nickerson, *International Enforcement of the OECD Bribery Convention*, 12 FED. ETHICS REP. 1 (Mar. 2005). Strong U.S. leadership in the effort to combat bribery bore fruit with the adoption of the multilateral OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Today, 38 countries are party to this Convention. http://www.oecd.org/document/21/0,3746,en_2649_37447_2017813_1_1_1_37447,00.html. In addition, other countries have adopted stringent legislation criminalizing corrupt payments to government officials. For example, the U.K. Parliament passed legislation in April 2010 that is even more stringent than the FCPA. Nickerson, *supra*.

necessarily lead to competitive advantage, as the negotiations for each deal involve highly complex factors, including geology, quality of the oil, above-ground political risks, and economic characteristics of the project. Oxfam America therefore respectfully submits that Section 13(q) will not create any undue competitive disadvantage, but will rather produce information central to efficient capital formation, government accountability and stable investment climates for foreign investors.

C. Implementing Section 13(q) In Accordance With Congressional Intent Is Unlikely To Result In Significant Deregistration By Issuers.

Proper implementation of Section 13(q) is unlikely to result in significant deregistration by regulated issuers. The United States remains one of the world's most attractive markets for capital formation. From this vantage point, Section 13(q)'s reporting obligations will have a minimal effect on the registration/deregistration decisions of major resource extraction issuers. A recent study[29] found that firms generally do not deregister because of an unwillingness to comply with new regulations, but because they "are poor performers, have lower growth opportunities, and have a financing surplus, all characteristics that reduce the value of a cross-listing."[30] As the Commission is well aware, companies needing to raise capital regularly find that the U.S. market is the most attractive notwithstanding—and often because of—its careful regulation.[31]

Conclusion

In enacting Section 13(q), Congress decided that the United States would set the global standard for payment transparency in extractive industries. The Commission should issue a Final Rule that achieves Congress's twin goals of increasing transparency and accountability in resource-rich countries and facilitating more efficient evaluation by capital markets of the risks facing extractive industry issuers.

[29] Craig Doidge et al., *Why Do Foreign Firms Leave U.S. Equity Markets?* (Fisher Coll. of Bus., Working Paper No. 2009-03-003, Mar. 2009), *available at* http://ssrn.com/abstract=1376450.

[30] *Id.* at 37.

[31] That Section 13(q) has not scared away issuers may be inferred from the recent announcement of an IPO by Kosmos Energy, an oil company operating in Africa. This announcement, made on January 14, 2010, indicates that notwithstanding recent regulatory changes brought about by the Dodd-Frank Act, Kosmos Energy desires to raise capital in the U.S. securities market. Kosmos Energy Ltd., Registration Statement (Form S-1) (Jan. 13, 2011), *available at* http://sec.gov/Archives/edgar/data/1509991/000104746911000139/a2200598zs-1.htm. By contrast Repsol YPF's recent announcement that it will terminate its SEC registration cannot be attributed to the Commission's imminent promulgation of regulations implementing Section 13(q). Repsol's decision should be understood to reflect low trading volumes in its securities, difficulty complying with U.S. reserve reporting requirements, and compliance challenges related to Repsol's operations in Cuba and Iran. Press Release, Repsol, Repsol YDF's ADSs to be delisted from the New York Stock Exchange (Feb. 9, 2011), *available at* http://www.repsol.com/es_en/corporacion/prensa/notas-de-prensa/ultimas-notas/090211-ads-repsol-bolsa-nueva-york.aspx; Miguel Jimenez, *Repsol abandona la Bolsa de Nueva York*, EL PAIS (Feb. 9, 2011), *available at* http://www.elpais.com/articulo/economia/Repsol/abandona/Bolsa/Nueva/York/elpepueco/20110209elpepueco_11/Tes.