Publish What You Pay
United States

ActionAid International USA
Amnesty International
Bank Information Center
CARE USA
Catholic Relief Services
Columban Center for Advocacy and Outreach
CorpWatch
Crude Accountability
EarthRights International
EARTHWORKS
Environmental Defense Fund
EG Justice
Environmental Defense
Friends of the Earth
Gender Action
Global Financial Integrity
Global Rights
Global Witness
Government Accountability Project
Human Rights Watch
International Budget Project
International Labor Rights Forum
Justice in Nigeria Now
ONE Campaign
Open Society Policy Center
Oxfam America
Pacific Environment
Presbyterian Church USA
Revenue Watch Institute
Robert F. Kennedy Center for Human Rights
Sierra Club
Sustainable Energy & Economy Network

February 25, 2010

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-5546

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

Dear Secretary Murphy:

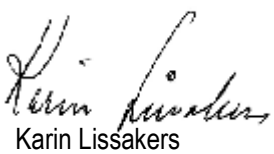
We are pleased to submit the attached comments on behalf of the Publish What You Pay coalition ("PWYP") to the Securities and Exchange Commission (the "Commission") on the proposed regulations published by the Securities and Exchange Commission (the "SEC" or the "Commission") to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

We welcome the Commission's Proposed Rule and applaud the dedication and hard work of the Commission during this process. We are grateful for the opportunity to provide our perspectives. The attached document provides a summary of key comments, and provides responses to questions that are relevant to PWYP in turn.

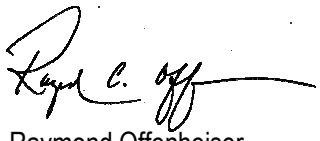
Please do not hesitate to contact us with any questions. We would welcome an opportunity to discuss these recommendations with you.

Sincerely,

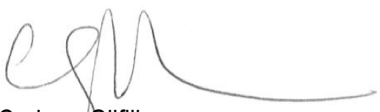
Isabel Munilla
Director, Publish What You Pay U.S.



Karin Lissakers
Director
Revenue Watch Institute



Raymond Offenheiser
President
Oxfam America



Corinna Gilfillan
Head U.S. Office
Global Witness

Raymond Baker
Director
Global Financial Integrity

Publish What You Pay United States
529 14th Street NW, Suite 1085, Washington DC 20001
Tel 202. 525. 2754 Fax 202. 450. 1347 www.pwypusa.org

Ken Hackett
President
Catholic Relief Services

Jonathan Kauffman
Staff Attorney
Earthrights International

Michelle Chan
Director, Economic Policy Programs
Friends of the Earth - US

Arvind Ganesan
Director, Business & Human Rights
Human Rights Watch

CC:
Ms. Meredith Cross, Director, Division of Corporate Finance
Ms. Paula Dubberly, Deputy Director, Division of Corporate Finance
Ms. Tamara Brightwell, Senior Special Counsel to the Director, Division of Corporate Finance
Mr. Wayne Carnall, Chief Accountant, Division of Corporate Finance
Mr. Paul Dudeck, Chief Office of International Corporate Finance, Division of Corporate Finance
Mr. Roger Schwall, Assistant Director, Division of Corporate Finance
Mr. Elliot Staffin, Special Counsel, Division of Corporate Finance

Publish What You Pay United States
529 14th Street NW, Suite 1085, Washington DC 20001
Tel 202. 525. 2754 Fax 202. 450. 1347 www.pwypusa.org

PWYP US Comments on Proposed Rules
Disclosure of Payments by Resource Extraction Issuers

EXECUTIVE SUMMARY

Introduction

Founded in 2002, Publish What You Pay ("PWYP") is a global civil society coalition of over 600 organizations working in over 55 countries. In the U.S., PWYP comprises 32 members, including development, faith-based, human rights, environmental, financial reform and anti-corruption organizations representing over 2.5 million constituents spread through every state in the nation.

If managed properly, the wealth generated by oil, gas and mining industries can be a pathway to poverty reduction, stable economic growth and development in resource-rich countries. PWYP works to help citizens in these countries hold their governments accountable for channeling these revenues through legitimate budget processes and for effectively managing these resources in the interest of national development. To do this, PWYP advocates for revenue transparency as a necessary ingredient for accountability. Specifically, PWYP advocates for mandatory disclosure of the payments made by companies to governments, and disclosure of government receipts. PWYP advocates for the inclusion of these disclosure requirements in national laws, stock market listing regulations, accounting standards, and in the lending policies of financial institutions. PWYP also advocates for individual company disclosure policies and voluntary initiatives such as the Extractive Industries Transparency Initiative ("EITI"). Finally, PWYP members have developed an extensive body of research on the extractive industries and how it operates around the world. This research has documented the challenges of managing extractive industry wealth, and the significant information gaps facing citizens in resource-rich countries, and investors seeking to assess risk in these countries.

Section 13(q) of the Exchange Act of 1934 represents a critical milestone in the development of a global standard for extractive industry transparency, and demonstrates U.S. leadership. If implemented according to the Congressional intent, this statute will help to stabilize and improve the investment climate in resource-rich countries and provide vital information to investors while also enabling citizens to hold their governments to account.

PWYP welcomes and is supportive of the Proposed Rule, which hews closely to the statute. We would like to commend the Commission and its staff for the open and transparent public comment and rule development process, as well as the thoughtfulness exhibited by the proposed rule and the questions raised in the rule. We are supportive and particularly pleased with the following elements:

- The lack of exemptions for broad categories of issuers
- The requirement that disclosures be made in Forms 10-K, 20-F, 40-F
- The requirement for disclosure of payments related to transport for export
- The disclosure of information in the interactive data standard XBRL, as well as in HTML

Immediately below is a summary of what we believe are the most important points for maintaining the benefits contained in the Proposed Rule and upholding Congressional intent. Following that, as was requested of us in meetings with the Commission, we provide detailed responses to the questions posed by the Commission.

Summary of Key Points

1. No exemptions should be provided

We welcome and strongly support the Commission's proposal that all resource extraction issuers be covered and that no exemptions be provided. This proposal is fully consistent with the statute and the Congressional intent, and it should not be changed.

The granting of broad exemptions would be inconsistent with the statute and the Congressional intent. The statutory language is clear and does not provide an exemption, stating that disclosure is required of "*each* resource extraction issuer" (emphasis added). Exemptions would also contravene the Congressional intent to achieve the broadest possible coverage of both U.S. and foreign issuers, made clear by Senator Cardin his letter to the Commission: "The intent of Sec. 13(q) is to provide the broadest possible meaning to the term 'resource extraction issuer.' Specifically, the intent was to include all issuers, including foreign issuers, which have a reporting requirement to the SEC."[1]

We, therefore, support the Commission's interpretation of the statutory language and its subsequent proposal based on this interpretation. Our position is also consistent with some industry commentators,[2] which state in their comments that the Commission should not exempt smaller companies and foreign private issuers from these disclosure requirements. More detail is provided in our responses to Questions 1-5.

1a. <u>There should be no exemption to accommodate host country laws or confidentiality agreements that prohibit disclosure</u>.

As stated by Revenue Watch Institute[3], laws that would prohibit the disclosure required in Section 13(q) are uncommon. In addition, recent research suggests that most resource-extraction contracts include exceptions for home country disclosure requirements.[4] There are numerous reasons to believe that foreign countries will allow such disclosures: investment contracts allow it, EITI nations have committed to disclosure, and many countries have unilaterally disclosed information similar to that required by Section 13(q).[5]

Some industry commentators have requested exemption from disclosure when prohibited by foreign law "…disclosure of revenue payments made to foreign governments or companies owned by foreign governments are prohibited for the following countries: Angola, Cameroon, Qatar and China."[6] However, no detailed evidence of contracts or specific laws within the few countries mentioned was provided. A review of the context within Angola, Cameroon, Qatar and China, provided in our response to Question 55,

---

[1] *See* Senator Cardin letter to Commission, December 1, 2010, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-94.pdf

[2] *See* Kyle Isakower, and Patrick T. Mulva, American Petroleum Institute, letter to the SEC, Jan. 28, 2011 available at http://www.sec.gov/comments/s7-42-10/s74210-10.pdf and Patrick T. Mulva, Exxon Mobil Corporation, letter to the SEC, Jan 31, 2011 available at http://www.sec.gov/comments/s7-42-10/s74210-11.pdf.

[3] *See* Karin Lissakers, Revenue Watch Institute, letter to the SEC, Dec. 6, 2010 available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-98.pdf

[4] *See* Ibid.

[5] *See* Bennett Freeman and Paul Bugala, Calvert Investments, and Lisa Wolf, Social Investment Forum, letter to the SEC, Nov. 15, 2010, P5-6, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-49.pdf.

[6] *See* e.g. Kyle Isakower, and Patrick T. Mulva, American Petroleum Institute, letter to the SEC, Jan. 28, 2011 available at http://www.sec.gov/comments/s7-42-10/s74210-10.pdf

suggests that the proposition that disclosure would force an issuer to withdraw from projects in these countries is overblown. Further, a global survey of over 140 resource-extraction investment contracts commissioned by Revenue Watch Institute from the Columbia University School of Law concluded that boilerplate language in most contracts includes an explicit exception for "information that must be disclosed by law," and that, in cases where such language is not explicit, it generally would be "read into" any such contract under judicial or arbitral review.[7]

We therefore believe that broad exemptions are unnecessary. Allowing such exemptions could also have the unintended and extremely detrimental consequence of leading countries to pass laws to prohibit disclosure, when it is in precisely those countries that hamper disclosure that the risk to investors is greatest. See also our responses to Questions 54 and 55.

2b. No exceptions to reporting should be provided for reasons of commercially or competitively sensitive information.

There is no reason to believe that adverse competitiveness effects from disclosure will be significant, or that disclosure will lead to the publication of commercially sensitive information to the detriment of issuers' competitive positions. On this point, two distinct claims have been made: 1) that companies subject to this disclosure regime will be at a competitive disadvantage as compared to companies not subject to it, for example by being less attractive in the eyes of foreign governments of resource exporting nations that desire to prohibit disclosure of payments they receive or, in the alternative, 2) that the release of commercially sensitive information will allow competitors to utilize this information in unfair competition with issuers subject to the Act, for example by allowing them to divine the bidding strategies of issuers subject to the Act.

Firstly, the proposed rules for Section 13(q) apply to a very high percentage of those companies listed on stock exchanges around the world, and other markets are beginning to follow Congress's lead. For instance, 90 percent of the top 30 oil and gas companies (as measured by reserves of oil and gas) would be covered by the Act.[8] In addition, recent news suggests that regulations in other markets are likely, helping to address competitiveness concerns. French President Nicholas 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."[9] UK government officials have begun "lead[ing] the government's push to secure a European agreement on the issue."[10]

---

[7] Peter Rosenblum & Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (RWI 2009), available at http://www.revenuewatch.org/news/publications/contracts-confidential-ending-secret-deals-extractive-industries. As the report notes at page 27, many "provisions do not just require compliance with the law of the host state; they also usually state that the parties may make disclosures under any law to which the party is subject."

[8] *See* Kyle Isakower, and Patrick T. Mulva, American Petroleum Institute, letter to the SEC, October 12, 2011 at Attachment B, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-27.pdf

[9] *See* "Sarkozy Tells Bono Will Seek Africa Transparency laws", January 30, 2011, http://www.eubusiness.com/news-eu/africa-france.8dn/?searchterm=sarkozy. *See* also Karin Lissakers, Revenue Watch Institute, letter to the SEC, Feb. 17, 2011 at 11 and in Attachment, available at http://www.sec.gov/comments/s7-42-10/s74210-23.pdf.

[10] *See* "Britain backs 'publish what you pay' rule for oil and mining firms in Africa", The Observer, Feb. 20, 2011.available at http://www.guardian.co.uk/business/2011/feb/20/george-osborne-oil-mining-africa. *See* also "New transparency laws could help millions, says Publish What You Pay", Publish What You Pay Press Release, February 20, 2011, available at http://publishwhatyoupay.org/en/resources/new-transparency-laws-could-help-millions-says-publish-what-you-pay

Secondly, Section 13(q) does not force companies to disclose sensitive or confidential information such as existing, pending or expected contracts with governments. It does not require issuers to reveal any contract terms aside from the payment price to a government. Section 13(q) will not require issuers to reveal contemplated transactions, business models, proprietary technology, or confidential communications. As noted by Oxfam America in their comment to the Commission dated February 21, 2011,[11] the commercial realities of deal-making in the extractive industries involve a wide array of complex factors including the fiscal terms offered, technological capacity, capital available, and others. Section 13(q) disclosures do not provide sufficient information to be determinant in creating competitive disadvantage during a bidding process.

The success of companies with robust voluntary disclosure practices suggests that disclosure practices in general are unlikely to weigh heavily among the range of factors upon which competition is based. Companies that publicly disclose their payments to host governments by country include Statoil Hydro,[12] Newmont Mining,[13] Talisman Energy,[14] and AngloGold Ashanti.[15] Most of these same companies have also disclosed project level payments, including Newmont Mining (reporting payments related to projects in Peru, Bolivia, and Ghana)[16] Statoil (reporting payments related to a project in Iran),[17] and AngloGold Ashanti (reporting payments related to projects in Argentina, Guinea, Namibia, and Tanzania).[18] A number of companies also publicly disclose their project-level payments to host governments as a condition for obtaining project financing from the International Finance Corporation, including Peru LNG and Maple Energy plc (both operating in Peru), Improved Petroleum Recovery Group of Companies (IPR) (operating in Egypt),[19] and ExxonMobil (operating in Chad).[20] Together, these suggest that it would be unlikely for disclosure of project payments to be a significant determinant of a company's success in winning a bid.

2. Require issuers to file rather than furnish the required disclosures

We believe that payment disclosures required under Section 13(q) should be filed as a part of the annual report. While we agree with the Commission that rulemaking under Section 13(q) must "support the Federal Government's commitment to international transparency promotion efforts," it is clear from the Congressional intent and the inclusion of the provision within the Exchange Act, that Section 13(q) is equally concerned with objectives that are identical in nature and purpose to other disclosures required under the Exchange Act designed to benefit investors.

---

[11] *See* Offenheiser, Raymond, Oxfam America comment letter to SEC, February 21, 2011, forthcoming at http://www.sec.gov/comments/s7-42-10/s74210.shtml

[12] *See* Statoil Hydro, Annual Report 2009, available at http://www.statoil.com/annualreport2009/en/financialperformance/positiveimpacts/pages/overviewofactivitiesbycountry.aspx.

[13] *See* Newmont Mining Corporation, Beyond the Mine Annual Sustainability Report 2009, available at http://www.beyondthemine.com/2009/?l=2&pid=4&parent=17&id=148.

[14] *See* Talisman Energy Inc., Annual Corporate Responsibility Report, 2009, available at http://cr.talisman-energy.com/2009/key-performance-indicators/economic-performance.html.

[15] *See* AngloGold Ashanti, Sustainability Review—Economic Performance, Payments to and Assistance From Government, available at http://www.anglogoldashanti.co.za/subwebs/informationforinvestors/reports09/Sustainability Review09/economic.htm

[16] See Newmont Mining Corporation, Newmont Sustainability Report 2008, Community, Performance, Taxes and Royalties, available at http://www.beyondthemine.com/2008/?l=2&pid%20=4&parent=17&id=144

[17] *See* Statoil *supra* note 12

[18] *See* AngloGold Ashanti, Sustainability Review 2009—Supplementary Information, available at http://www.anglogold.co.za/subwebs/informationforinvestors/reports09/SustainabilityReview09/f/AGA_SD09.pdf

[19] *See* International Finance Corporation, Development— Government Revenues, http://www.ifc.org/ifcext/coc.nsf/content/Disclosure#&Tab=2

[20] *See* Exxon Mobil Corporation, Chad/Cameroon Development Project, Project Update No. 28, Mid-Year Report 2010, http://www.esso.com/Chad-English/PA/Files/28_allchapters.pdf

We therefore respectfully disagree with the Commission's view and preliminary proposal, which suggests 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." This interpretation runs counter to Congressional intent. Congress chose to amend the Exchange Act, rather than another statute, which demonstrates their view that the types of information covered by Section 13(q) are qualitatively similar to other disclosures required under Section 13 of the Exchange Act. Congress specifically intended Section 13(q) disclosures to provide information of use to investors to assess risk, as with other 10-K, 20-F, and 40-F disclosures. The Proposed Rule made note of this intent, when it referenced Senator Cardin's remarks during the presentation of the legislative amendment that became Section 13(q):

> "Investors need to be able to assess the risks of their investments. Investors need to know where, in what amount, and on what terms their money is being spent in what are often very high-risk operating environments. These environments are often poor developing countries that may be politically unstable, have lots of corruption, and have a history of civil unrest. The investor has a right to know about the payments. Secrecy of payments carries real bottom-line risks for investors. Creating a reporting 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 a level playing field. Investors should be able to know how much money is being invested up front in oil, gas, and mining projects."[21]

Further, investor statements and submissions to the Commission make clear their view that these are material.[22] Lowering the status of the required information from "filed" to "furnished" would deprive these investors of certain causes of action normally available to seek redress for misstatements in filed annual reports. It would also undermine investor confidence in the reports. This would contravene the Congressional intent.

As a result, we believe that the right of private action afforded by "filing" the required disclosures would serve several important purposes: 1) it would provide remedies for investors and 2) it would incentivize better due diligence for the information disclosed. As the Commission deliberates on the type of investor protection it is willing to afford to these disclosures, we urge the Commission to consider that company misreporting is not uncommon[23] and that EITI reporting experience suggests that reporting quality is lacking.[24]

---

[21] Floor remarks by Senator Cardin, Congressional Record S3316, May 17, 2010. (Cited in Proposed Rule at 80,992 n.151)

[22] *See* e.g Ian Greenwood, Local Authority Pension Fund Forum, letter to the SEC, Jan. 31, 2011 and attachment: Investors' Statement on Transparency in the Extractives Sector, available at http://www.sec.gov/comments/s7-42-10/s74210-17.pdf The Investors' Statement was signed by 86 institutional investors, representing $12.3 trillion in assets under management. The Local Authority Pension Fund Forum represents an association of 52 UK-based pension funds with combined assets of £90 billion (roughly over $145 billion). *See* Bennett Freeman and Paul Bugala, Calvert Investments, and Lisa Wolf, Social Investment Forum, letter to the SEC, Nov. 15, 2010, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-49.pdf. Calvert has over $14.7 billion in assets under management.

[23] *See* Isabel Munilla (Publish What You Pay), Karin Lissakers (Revenue Watch Institute), Ray Offenheiser (Oxfam America), Ken Hackett (Catholic Relief Services), Corinna Gilfillan (Global Witness), Raymond Baker (Global Financial Integrity) and Arvind Ganesan (Human Rights Watch), letter to the SEC, Nov. 22, 2010, at 22 available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-82.pdf ("On June 30, 2010 the U.S. Department of the Interior ("DOI") assessed a $5.2 million penalty on

Furthermore, in contrast to the requirements of EITI[25], the Commission has proposed that issuers not be required to audit payment disclosures.[26] Removing the possibility that the required disclosures could be subject to liability under the Securities Act reduces incentives for much-needed diligence and minimizes the consequences for failing to comply with the law. In the absence of the quality and accuracy certification that would be provided by audited data, Section 13(q) disclosures should, at a minimum, be "filed" and incorporated by reference into an issuer's Securities Act filings.

3. EITI is a floor and not a ceiling

The Congressional intent was for Section 13(q) disclosures to be consistent with the EITI payment categories, but to go beyond those specifically stated in EITI. This is evidenced in Senator Cardin's comment to the Commission, which states that "EITI is a minimum reporting standard, and the intent of Sec. 13(q) was to go beyond these requirements," and, "[w]here possible, the SEC rules should align with EITI disclosure practices, but Sec. 13(q) is clear that reporting should go beyond the EITI's minimum reporting standards."[27]

4. "Project" should be defined in relation to the lease, license and/or other concession-level arrangement that assigns it with rights and fiscal obligations.

As outlined in our November 22, 2010 submission, PWYP urges the Commission to define "project" in relation to each lease, license and/or other concession-level arrangement entered into by a resource extraction issuer and to apply this definition universally for all issuers reporting under Section 13(q). Where, with respect to a particular jurisdiction, certain payments are levied at an entity level rather than at the lease/license level (e.g., corporate income tax calculated on the basis of all profits on all projects within a jurisdiction), this fact should have no bearing on the definition of project – but, rather, may give rise to a limited reporting allowance whereby issuers could report at an entity level, rather than project-level, for those specific payments only. Additionally, we believe that the Commission should offer one definition to apply universally to all resource extraction issuers.

This proposal is consistent with the statute. Section 13(q) requires issuers to disclose an explicit list of project-level payments whose values largely derive from the unique fiscal terms assigned to a given concession or license area.[28] In particular, royalties, license fees, production entitlements and bonuses – which together represent a large share of the payments made to governments by extractives issuers – are levied according to the terms of specific leases and licenses. It follows, therefore, that for the purposes of

---

British Petroleum ("BP") for chronic false reporting of energy production on Southern Ute Indian Tribal lands in Colorado...BP was fined for incorrectly reporting royalty rates and prices to the DOI, and for attributing oil and gas production to the wrong leases.")

[24] *See* World Bank, "Toward Strengthened EITI Reporting: Summary Report and Recommendations, available at http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266963339030/eifd14_strengthening_eiti.pdf

[25] *See* EITI Rules – 2011 Edition, at 17 available at http://eiti.org/files/2011-01-05_DRAFT_EITI_Rules_2011.doc ("EITI Requirement 12: The government is required to ensure that company reports are based on audited accounts to international standards.")

[26] Securities and Exchange Commission, Proposed Rule, Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. at 80,983-84 n.63.

[27] *See* Senator Cardin letter to Commission, December 1, 2010, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-94.pdf

[28] *See* Munilla et al PWYP Submission at P14-15.

reporting under Section 13(q), an extractive "project" should be defined in relation to the lease, license or other concession-level arrangement that governs its rights and fiscal obligations.

PWYP does not believe that such a definition will be overly burdensome to issuers or will require costly revisions to existing company processes. The majority of information required to be disclosed by Section 13(q) is already collected by companies for internal record-keeping and audits – and is already reported to taxation authorities at the lease/license-level by issuers operating in the U.S. We provide additional detail in our response to Questions 40-43.

4a. "Project" should be defined to prevent aggregated reporting of project disclosures at the country level.
Section 13(q) requires the Commission to issue rules requiring each resource extraction issuer to report "information relating to any payment made by the resource extraction issuer," including information on "(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, and (ii) the type and total amount of such payments made to *each* government." Thus the intent of this language is to require project-level reporting alongside of country-by-country company disclosures. This reading is supported by the letter of Senator Cardin to the Commission, which clarified that Section 13(q) of the Dodd-Frank Act "purposefully requires reporting at the project level, disaggregated by payment stream."[29] The aggregation of project-level payments by country would therefore directly contravene the intent of Section 13(q) by eliminating one of its key requirements. In our response to Questions 44 and 48, we provide details to counter the suggestion that only aggregated payment information be provided.

4b. "Project" should not be defined to mean only a material project.
There is no support in the statutory language for the suggestion that "project" might be defined to refer only to material projects. Instead, Section 13(q) requires issuers to disclose information related to "*any payment made*… for the purpose of the commercial development of oil, natural gas or minerals" (emphasis added) and then implicitly defines at least "taxes, royalties, fees (including license fees), production entitlements, [and] bonuses" as material, by noting that these and "other material payments" must be reported. Allowing for any project to be exempted from disclosure requirements according to a materiality standard would therefore prevent payments related to this project from being reported, in direct contradiction to the requirements of Section 13(q). Additional detail is found in our response to Question 47.

5. Make public a compilation that includes the full level of detail that companies are required to report under this statute as well as the company reports.

Any aggregation in the compilation required by Section 13(q) would have little utility and would be squarely at odds with the plain language of the statute, Congressional intent underlying the statute, and the Commission's own preliminary interpretation of the statute. In addition, it would fall short of the EITI's disclosure standards. The Congressional intent behind this subsection was to ensure that the data was collected from each of the issuers' reports and compiled in one place, in order for the public to be able to find it in a workable format that facilitates comparison of company and country data. Congress intended that this rule make company reports available to investors and others who would be familiar with how to access financial information on the Commission's website and on company websites. In addition, to aid

[29] *See* Senator Benjamin Cardin, letter to the SEC, Dec. 1 2010, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-94.pdf

access by a broader public in the U.S. and in other host countries, Congress mandated the Commission to create a “compilation” to make this information more readily accessible to this broader audience.

This compilation was meant to be in addition to the required public disclosures by the companies, not in lieu of them. Section 13(q) plainly requires not only the publication of a “compilation” of the required disclosures by the Commission but also the inclusion of the required disclosures in a covered issuer’s publicly available annual report. Additional detail can be found in our response to Question 86.

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?

We welcome and strongly support the Commission's proposal cover all resource extraction issuers and that no exemptions be provided.

We agree with the Commission's proposal to require disclosure of "all U.S. companies and foreign companies that are engaged in the commercial development of oil, natural gas, or minerals, and that are required to file annual reports with the Commission, regardless of size or the extent of business operations" and "whether or not they are owned or controlled by governments." This proposal is fully consistent with the statute and the Congressional intent, and it should not be changed.

Exemptions should not be granted because these would be inconsistent with the statute and the Congressional intent. The statutory language is clear and does not provide an exemption, stating that disclosure is required of "*each* resource extraction issuer" (emphasis added). The Commission recognized the clarity of the statutory language in the Proposed Rule discussion when it stated that "[t]he provision 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."[30]

Further, exemptions would contravene the Congressional intent to achieve the broadest possible coverage of both U.S. and foreign issuers, made clear by Senator Cardin in a letter to the Commission dated December 1, 2010[31]: "The intent of Sec. 13(q) is to provide the broadest possible meaning to the term 'resource extraction issuer. Specifically, the intent was to include all issuers, including foreign issuers, which have a reporting requirement to the SEC."

We, therefore, support the Commission's interpretation of the statutory language, and its subsequent proposal based on this interpretation. Our position is also consistent with some industry commentators,[32] which state in their comments that the Commission should not exempt smaller companies or foreign private issuers from these disclosure requirements.

---

[30] Securities and Exchange Commission, Proposed Rule, Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. at 80,983-84 n.63.

[31] *See* Senator Cardin letter to Commission, December 1, 2010, [*hereinafter* "Cardin Submission"] available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-94.pdf

[32] *See* Kyle Isakower, and Patrick T. Mulva, American Petroleum Institute, letter to the SEC, Jan. 28, 2011 [*hereinafter* "API submission"] available at http://www.sec.gov/comments/s7-42-10/s74210-10.pdf and Patrick T. Mulva, Exxon Mobil Corporation, letter to the SEC, Jan 31, 2011 [*hereinafter* "Exxon submission"] available at http://www.sec.gov/comments/s7-42-10/s74210-11.pdf.

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?

Smaller reporting companies should not be exempt from Section 13(q) reporting.

As noted above, it is clear that exemptions for smaller reporting companies would be inconsistent with the statute and the Congressional intent. We support the Commission's proposal that no exemptions be provided.

Several other factors also support our view that smaller reporting companies should not receive reporting exemptions. Smaller companies are generally exposed to greater equity risk than larger issuers and often take on greater risks due to the nature of their operations. For example, according to the Metals Economics Group, junior miners (those with annual revenues of less than $50 million) led exploration spending from 2003 to 2008.[33] The exploration phase of a mining project generally carries substantial risks, including both geological risk and often high-risk engagement with host governments on financial and contract considerations. This underscores the importance of ensuring that smaller companies be required to make the Section 13(q) disclosures.

Furthermore, smaller reporting companies, by definition, will have more limited operations and projects, and therefore fewer payments to disclose as compared to larger companies. The statute requires the disclosure of payments that companies track in the normal course of doing business. This would be in addition to any other record-keeping practices expected to meet the obligations of tax authorities or to be in compliance with FCPA record-keeping requirements. It is thus reasonable to expect that such systems can be adapted to the Section 13(q) requirements.

Finally, we are in agreement with Exxon and API that smaller reporting companies should not be exempt.[34] We do not support an exemption discussed under Section VI Initial Regulatory Flexibility Analysis for "small business" or "small organization" entities having total assets of $5 million or less on the last day of the most recent fiscal year. As noted above, smaller entities play an important role in the mining sector during the exploration phase, and given the size of their operations, the reporting burden on these entities would be limited.

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?

Foreign private issuers should not be exempt from Section 13(q) reporting.

[33] *See* Metals Economics Group. "World Exploration Trends," 2010. available at http://www.metalseconomics.com/pdf/WET%202010%20(English).pdf

[34] *See* API submission

We support the Commission's proposal that no exemptions be provided. As noted above, it is clear that exemptions for foreign private issuers would be inconsistent with the statute and the Congressional intent.

Senator Cardin made clear the Congressional intent to cover foreign issuers in the Cardin Letter, as well as in a statement from May 2010, "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."[35] Senator Lugar also made this clear in the following statement, "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."[36]

The Commission requests comment on whether foreign issuers should be given an exemption and instead be allowed to report according to their home country disclosure regimes. We agree with industry commentators[37], who oppose such an exemption because this would put other issuers at a competitive disadvantage and create an un-level playing field. This should not be permitted for the following additional reasons:

1. Such an exemption would be premature.

   Section 13(q) sets a global standard for extractive industry payment disclosure, as was intended by Congress, and PWYP has not found any other national extractive disclosure regulatory regime equivalent to the project-level disclosure standard required by Section 13(q). This is corroborated in the letter to the Commission from Royal Dutch Shell dated January 28, 2011.[38]

   Relevant decision-makers in the European Union, UK and other markets are considering regulatory convergence with the statute. PWYP met senior officials in the EU and UK who have confirmed their consideration of similar regulations, but indicated that they are likely to review the final U.S. regulations before taking any action.[39] Following Sarkozy's support for the disclosure of payments by resource extraction issuers noted in the Revenue Watch letter,[40] UK government officials are "lead[ing] the government's push to secure a European agreement on the issue."[41]

   For these reasons, it would be premature to provide an exemption for home country laws or regulations at this time.

---

[35] Floor remarks by Senator Cardin, Congressional Record S3815, May 17, 2010. (emphasis added)
[36] Floor remarks by Senator Lugar, Congressional Record S3815, May 17, 2010. (emphasis added).
[37] *See* API submission
[38] *See* Martin J. ten Brink, Royal Dutch Shell plc, letter to the SEC, Jan. 28, 2011 [*hereinafter* "Shell submission"] available at http://www.sec.gov/comments/s7-42-10/s74210-18.pdf
[39] *See* Karin Lissakers, Revenue Watch Institute, letter to the SEC, Dec. 6, 2010 [*hereinafter* "RWI December submission"] available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-98.pdf
[40] *See* Karin Lissakers, Revenue Watch Institute, letter to the SEC, Feb. 17, 2011 [*hereinafter* "RWI February submission"] available at http://www.sec.gov/comments/s7-42-10/s74210-23.pdf
[41] *See* "Britain backs 'publish what you pay' rule for oil and mining firms in Africa", The Observer, Feb. 20, 2011, available at http://www.guardian.co.uk/business/2011/feb/20/george-osborne-oil-mining-africa

2. Such an exemption would lead to inconsistency in reporting

Payment transparency policies and initiatives vary widely in coverage, consistency and application.[42] Therefore, if Commission were to allow foreign private issuers to report according to their home country's reporting regime and disclose in their Form 20-F the required home country disclosures, this would be inconsistent with Section 13(q) disclosures and prevent comparisons.

The Commission designed its proposed rule to ensure that disclosures would be consistent and comparable and framed this aspect as a concrete benefit in its Initial Regulatory Flexibility Analysis when it stated that "[t]he specific disclosure requirements in the proposed amendments would promote consistent and comparable disclosure among all resource extraction issuers." This supports the needs of investors for consistent and comparable disclosures as stated by Calvert Asset Management and the Social Investment Forum in their letter to the Commission dated November 15, 2010.

We therefore support the Commission's current proposal, which does not provide exemptions, and we agree with the comments from Exxon and API, which state that the Commission should "only permit foreign private issuers to meet their Section 13(q) disclosure obligations through compliance with home country laws or rules if the Commission determines that such home country rules require disclosure of at least as much information, to at least as great a level of detail, as the rules under Section 13(q)."[43]

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?

Section 13(q) requirements should be applied to companies that are owned or controlled by governments.

The statute is clear in its intent hold all resource extraction issuers accountable for payments to governments. The proposal to require all resource extraction issuers to disclose payments to governments, "regardless of whether they are owned or controlled by governments," is consistent with the purpose of the statute and with the objective of promoting equal treatment of issuers. A government-owned company may do business with other governments, but also within its own country. Payments between a parastatal and its government could be the source of vast and highly questionable flows and diversion of monies away from the public interest. For example, in the 2007/8 fiscal year, Sonangol, the state-oil company of Angola, reported paying US $436 million to its shareholder, the government of Angola.[44] To meet the ends of the statute, it is critical that the requirements be applied to these entities.

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?

---

[42] *See* Isabel Munilla (Publish What You Pay), Karin Lissakers (Revenue Watch Institute), Ray Offenheiser (Oxfam America), Ken Hackett (Catholic Relief Services), Corinna Gilfillan (Global Witness), Raymond Baker (Global Financial Integrity) and Arvind Ganesan (Human Rights Watch), letter to the SEC, Nov. 22, 2010, p. 6-7 [*hereinafter* "PWYP November submission"] available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-82.pdf

[43] *See* API submission and Shell submission

[44] *See* Open Society Institute of South Africa and Global Witness, "Oil Revenues in Angola,"", December 2010. available at http://www.globalwitness.org/sites/default/files/library/Oil%20Revenues%20in%20Angola%20FINAL.pdf

No exemption or omission from reporting should be permitted by wholly-owned subsidiaries and asset-backed issuers wishing special provisions included in the General Instructions I and J to Form 10-K.

Such an omission should not be permitted, since these entities file annual reports, and are therefore required by the plain language of the statute to disclose payments required by Section 13(q). Exemptions or omissions of this type would contravene the Congressional intent as stated above.

We agree with the industry commentators that say that these omissions should not be applied here: "General Instructions I and J to Form 10-K recognize that, because of the special circumstances of the covered entities, investors may not require the full range of information otherwise called for in the 10-K" but that "[t]his rationale for reduced disclosure does not apply to disclosure under Section 13(q) since the purpose of that disclosure is to enhance the transparency of payments received by governments for natural resource extraction."[45] We also agree that "[e]xempting some resource extraction issuers from the disclosure requirements of Section 13(q) would also be inconsistent with EITI and could give the exempted issuers an unfair competitive advantage."[46]

Further, 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. Presumably Section 13(q) compliant resource extraction issuers could be tempted to sponsor the formation of asset-backed issuers so that payments could be made by or through such entities from their books. There is no reason for the Commission to include a potential loophole of this nature in its implementation of Section 13(q). Such an exemption would be entirely contrary to Congress' intent in enacting Dodd-Frank, which consistently requires greater transparency in the asset-backed securities marketplace.[47]

Industry commentators have proposed that wholly-owned subsidiaries should not be required to report if the payments made by the subsidiary are disclosed in the annual reports provided to the Commission by the parent company. Should the Commission choose to accommodate this proposal, the rules should ensure that in these cases, the relevant payments made by the subsidiary are tagged clearly with the "business segment" making the payment, as required by the statute[48].

C. Definition of "Commercial Development of Oil, Natural Gas, or Minerals"

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?

We support the Commission's proposal that "commercial development of oil, natural gas, or minerals" include "activities of exploration, extraction, processing and export and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity."

[45] *See* API submission and Exxon submission responses to Question 5.
[46] *See* Ibid.
[47] *See* generally Dodd-Frank Act §§ 941–46.
[48] SEC, Proposed Rule Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. at 80, 983-84

This is consistent with the plain language of the law. According to the law, the activities of "exploration, extraction, processing and export," at a minimum, should be included. Exclusions of any of these activities would be inconsistent with the plain language of the statute.

As stated clearly by Senator Cardin in the Cardin letter, the Congressional intent was that "[w]here possible, the SEC rules should align with EITI disclosure practices, but Sec. 13(q) is clear that reporting should go beyond the EITI's minimum reporting requirements." While EITI does not include as a minimum requirement disclosure of payments for processing or export, the Congressional intent was that the statute go beyond what is required by EITI.

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?

All of these activities should be included and none of these activities should be excluded. See our response to Question 6.

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?

See our response to Question 6.

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 welcome and support the Commission's proposal that transport activities related to export should be included within the required disclosures.

As mentioned in our November 2010 comment, the disclosure of such payments are required by the International Finance Corporation (IFC) for several projects.[49] These examples demonstrate the size and

[49] IFC requires disclosure of tax and royalty payments associated with the Peru LNG project as a condition of a $300 million loan authorized in 2008. The project is comprised of a liquefaction plant and a marine loading terminal on Peru's coast, as well as a new 408-kilometer pipeline connecting the coastal facilities to an existing pipeline network east of the Andes. The IFC believes the project "will generate significant tax and incremental royalty payments to the government, equivalent to over 1.5 percent of current state revenues." *See* Peru LNG Project, IFC website, available at http://www.ifc.org/ifcext/plng.nsf. The IFC requires the same disclosures in connection with its $250 million in loans for the Baku-Tbilisi-Ceyhan ("BTC") pipeline. The BTC pipeline is a dedicated crude oil pipeline system, 1760 kilometers long, with a capacity of 1 million barrels per day. The pipeline extends from the ACG field through Azerbaijan and Georgia, to a terminal at Ceyhan on the Mediterranean coast of Turkey. Turkey is expected to earn $1.5 billion from payments related to downstream activities including pipeline and terminal operations, transit fees, and upstream investments. The pipeline transit revenues to Georgia are expected to be approximately $500 million over the life of

significance of these payments and therefore support the Commission's proposal. For example, the World Bank estimated in 2000 that Cameroon would earn $500 million from transit fees and taxes as a result of allowing crude oil from Chad to pass through its territory on its way to an export facility on the Cameroonian coast.[50] Exxon discloses Cameroon's transit fees as part of its Chad-Cameroon project disclosures and disclosed in mid-2010 that Cameroon had earned US$145 million in transit fees since 2003.[51]

Further, the proposal to include transport for export is consistent with the position of certain investors,[52] which urged the Commission to interpret the statute to include "payments related to the upstream activities involved in the exploration and production of resources, midstream activities involved in the trading and transport of resources, and downstream activities involved in the refining, ore processing and marketing of resources." It was noted that the equity valuations of Calvert Asset Management "involve[s] assessment of an entire entity and not just its upstream or exploration and production operations," which therefore, supports their state that "payments related to a resource extraction company's entire operations are a necessary element of meaningful disclosure."[53]

Additionally, the disclosure of payments in the transport sub-sector is important because it can involve some of the most flagrant and destabilizing instances of theft and corruption in the extractive industries. For example, illegal bunkering or the diverting of fuel from pipelines for resale is estimated to cost the government of Nigeria $5 billion a year.[54]

Furthermore, reports from civil society groups and the United Nations have documented widespread human rights abuses – including forced labor, extrajudicial killings, and torture – associated with the issuers' security arrangements along oil and gas pipelines in countries like Burma.[55] We therefore believe, that in order to fully capture companies' exposure, transportation activities should defined to include pipelines and other forms of transport security arrangements associated with a pipeline, and also to encompass pipelines used within a host country, as both have been the catalyst for egregious conduct in the past. For example, civil society groups have reported widespread extrajudicial executions, forced labor, land confiscation, and other human rights abuses by Burmese security forces hired to patrol and protect two pipelines that form part of the Yadana gas project: the Yadana pipeline, which is operated by Total S.A. and carries natural

---

the project. See IFC News, Nov. 4, 2003, available at available at http*://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=87B904CEA7A55BF585256DD4004FFBA3*.

[50] *See* International Finance Corporation (World Bank), *Fact Sheet on Chad-Cameroon Pipeline*, 2000, available at http://www.ifc.org/ifcext/eir.nsf/AttachmentsByTitle/ChadCameroonPipeline1/$FILE/CHAD+CAMEROON+PIPELINE+FACT+SHEET.pdf

[51] *See* Exxon Mobil Corporation, Chad/Cameroon Project Update 28, 2010, Page 74, available at http://www.esso.com/Chad-English/PA/Files/28_ch13.pdf

[52] *See* Bennett Freeman and Paul Bugala, Calvert Investments, and Lisa Wolf, Social Investment Forum, letter to the SEC, Nov. 15, 2010 [*thereinafter* "Calvert and SIF Submission"] available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-49.pdf

[53] *See* Calvert and SIF submission

[54] *See* Andrew Walker, "'Blood Oil' Dripping from Nigeria," BBC News, July 27, 2008, http://news.bbc.co.uk/2/hi/africa/7519302.stm. See: http://news.bbc.co.uk/2/hi/africa/7519302.stm. Official estimates are made by subtracting the amount of oil delivered from the amount expected from a wellhead.

[55] For Burma, *see* reports on the website of EarthRights International (ERI) at available at https://www.earthrights.org/publications, including ERI, *Total Impact: The Human Rights, Environmental, and Financial Impacts of Total and Chevron's Yadana Gas Project in Military-Ruled Burma (Myanmar)* (Sept. 2009), available at http://www.earthrights.org/publication/total-impact-human-rights-environmental-and-financial-impacts-total-and-chevron-s-yadana; and ERI, *The Human Cost of Energy: Chevron's Continuing Role in Financing Oppression and Profiting From Human Rights Abuses in Military-Ruled Burma* (Apr. 2008), available at http://www.earthrights.org/publication/human-cost-energy-chevron-s-continuing-role-financing-oppression-and-profiting-human-rig. *See also* Letter from Jonathan Kaufman, Staff Attorney, (ERI), to Meredith Cross, Director, Division of Corporate Finance, SEC, Jan. 26, 2011, at 5, available at http://sec.gov/comments/s7-42-10/s74210-8.pdf.

gas for export to Thailand, and the Kanbauk to Myaing Kalay pipeline, which carries the Burmese government's production share from the Yadana gas field for domestic consumption.[56]

D. The 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 we support the Commission's proposal to include the payments listed in Section 13(q), this list must be expanded in order to accurately reflect the statute and the Congressional intent.

The definitions of the listed payments should include, at a minimum, the following:

- Taxes (including net consumption-based tax liability)
- Royalties (in financial form as well as in kind, the latter appropriately distinguished by quality)
- Dividends and profit shares
- Fees (including, but not limited to, license fees, transit fees, customs users fees, rental fees, land use permits, entry fees, environmental or other permits, and other considerations for licenses and/or concessions)
- Production entitlements & in-kind payment volumes, appropriately distinguished by quality (including the production share for both nationally state-owned company and for the host government)
- Bonuses (including signature bonuses, discovery bonuses, and production bonuses)
- Import and export levies and taxes
- Pipeline transit fees
- Customs duties & customs users fees
- Payments related to pipeline and terminal operations
- Payments (taxes) in lieu
- Ancillary payments made pursuant to the investment contract (including security, personnel training programs, local content, technology transfer and local supply requirements)
- Payments related to any liabilities incurred (including penalties for violations of law or regulation, environmental and remediation liabilities, and bond guaranties 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)
- Social payments made pursuant to the investment contract (in financial form as well as in kind payments)

[56] For details on abuses associated with the Kanbauk to Myaing Kalay pipeline *see* Letter from Human Rights Foundation of Monland (HURFOM) to Meredith Cross, Director, Division of Corporate Finance, SEC, Dec. 3, 2010, *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specialized-disclosures.shtml#comments; HURFOM, *Laid Waste: Human Rights along the Kanbauk to Myaing Kalay Pipeline* (May 2009), available at http://rehmonnya.org/data/Laid-Waste.pdf.

This expanded list is preferable to the list that comprises the definition of "payment" in the Proposed Rule because it (1) requires disclosure of all of the payment categories that are included in EITI guidance,[57] making it consistent with EITI; (2) expands on the definitions of several included payment categories of particular interest to investors,[58] reflecting the practice of EITI reporting at the country level as well as the commonly recognized payments that fall within each category; and (3) includes other payment categories that are part of the commonly recognized revenue stream related to the commercial development of oil, natural gas and minerals.

In order to meet the Congressional intent, we urge the following:

1. Payment categories should remain disaggregated to ensure consistency with Congressional intent.

   The plain language of the statue and the Congressional intent was clear in requiring that payments be tagged by the type of payment. Therefore, the proposal to aggregate "fees" or other payment categories into an "other payments" category would be inconsistent with both the plain language of the statute and the Congressional intent.

2. The Final Rule should not provide exclusions for certain payment categories or types of payments within categories.

   The Commission seeks comments on whether certain types of payments or payment categories should be excluded. We do not believe that the Final Rule should Exclusions would create potential for competitive disadvantage for resource extraction issuers that predominantly make payments listed in the rules. Exclusions could create an incentive for issuers to structure future agreements to avoid payments that would require disclosure.

In practice, extractive operations from which the government receives revenue as a shareholder may not differ in function from those in which it receives payments according to contract or statute.[59] In negotiations for resource extraction agreements, it is common to see a lower tax rate traded off against greater government share in the ownership of a project (and therefore greater dividends). Governments focused on a bottom line share of revenue have been willing to reclassify payments in recognition of companies' international tax considerations.[60] The potential costs associated with under-inclusion of benefit streams in the Final Rule, given these common conditions, are significant. In essence, excluding any payment category disproportionately impacts certain issuers to the benefit of others, with no clear justification based on the public interest. Certainly it was not within Congress's intent, which was to create a new international transparency standard and assist in the development of good governance worldwide.

---

[57] *See* EITI Source Book (2005), available at http://eiti.org/document/sourcebook.
[58] *See* Calvert and SIF submission
[59] *See* Daniel Johnston, International Petroleum Fiscal Systems and Production Sharing Contracts , (1994).
[60] *See*, e.g., Tax Code Mocks Federal Energy Intent, available at http://www.miller-mccune.com/business-economics/tax-code-mocks-federal-energy-intent-3463/http://www.miller-mccune.com/business-economics/tax-code-mocks-federal-energy-intent-3463/: ("To promote the development of foreign oil, the State Department encouraged state-owned oil and gas outfits overseas to reclassify royalties as income taxes, thus allowing U.S. oil and gas companies to pass on the cost to the U.S. government in the form of a tax credit. It's a minor distinction in terms but a significant one, in dollars, from a tax deduction, which logic suggests it actually is. U.S. oil and gas companies are now paying "income taxes" abroad that are dramatically higher than standard tax rates oil-rich countries set for other businesses. Saudi Arabia, for example, charges U.S. oil and gas companies an income tax of 85 percent; the non-petroleum income tax rate is 20 percent.")

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?

The Commission's proposal regarding requirements for the disclosure of taxes should be amended to include material benefit streams that are part of the commonly recognized revenue stream.

If not amended, the proposal would contravene the Congressional intent as outlined below. The rules for Section 13(q) should require disclosure of all taxes paid by a resource extraction issuer to governments, so long as they are "not *de minimis*" and so long as they are made to further the commercial development of oil, gas and mining.

1. Consumption taxes are part of the "commonly recognized" revenue stream.

Consumption taxes borne by resource extraction issuers can be a major component of the revenue a country receives from oil, gas and mining issuers operating in their jurisdictions, and therefore cannot be excluded from the 13(q) disclosure requirements. Value-added tax (VAT) payments are frequently required to be disclosed through EITI Country Reports.[61] While in most countries, VAT taxes for resource extraction issuers should be fully offset, this is not always the case. Requiring reporting on "net" VAT obligations would enable the rules to capture instances where VAT taxes form a significant part of the revenue stream, while preventing unnecessary reporting where VAT payments and credits are completely offset.

Within the EITI, all taxes borne by issuers, including consumption taxes, are recognized to be part of the "commonly recognized" revenue stream. This is evidenced by the frequency in which they are included in country reporting templates (which provide the requirements for company reporting at the national level). EITI reports include value added taxes, withholding taxes, and windfall or excess profits taxes, among many others.[62] EITI reports from Norway disclose payment data on "CO_2 Tax" and "NO_2

[61] *See* EITI Overview of Country Reports, 2010, available at http://eiti.org/node/1133. EITI Country Reports differ from EITI global guidance and rules, as they are the product of mutli-stakeholder group decisions on disclosure standards and scope applicable in a single EITI-member country. The reporting templates that cover private companies and government entities typically goes far beyond the payments covered in the EITI's global guidance. Ibid. The guidance found in EITI Source book, e.g., is a minimum disclosure standard, even within the initiative itself. EITI Source Book (2005), available at http://eiti.org/document/sourcebook.

[62] *See*, e.g., EITI reports of Azerbaijan (2008), Central African Republic (2006); Democratic Republic of Congo (2007); Guinea (2005) (including "local payments, import taxes and "other input taxes"); Kazakhstan (2008); Kyrgyzstan (2008); Liberia (2008-09); Mali (2006); Mongolia (2008); and Timor L'este, (2008). EITI reports are available at http://eiti.org/document/eitireports

Tax," among others already listed.[63]

More broadly, the total tax contribution made by a resource extraction issuer in a jurisdiction is commonly understood to include all the taxes paid by that issuer.[64] As noted by professional services and accounting firm PricewaterhouseCoopers LLP, a clear understanding of its total tax contribution can enable a business to make better informed decisions, demonstrate its wider social and economic impact and better monitor and manage tax risk.[65] In jurisdictions that currently require resource extraction issuers to disclose payments, such as British Columbia, there are no carve-outs for particular forms of taxes.[66] Excluding consumption taxes such as the VAT paid by issuers is not consistent with the principles of risk management PricewaterhouseCoopers encourages, nor is it in the best interests of investors, as noted below.

2. Industry practice demonstrates the need to include other taxes.

Current industry disclosure practice suggests a common understanding that each type of tax payment is a material benefit stream, and part of the commonly recognized revenue stream. AngloGold Ashanti regularly discloses payments relating to withholding taxes, "indirect taxes and duties," "employee taxes," property taxes, "production mine tax," "severance tax" and even taxes on vehicle ownership.[67] Newmont Mining Company regularly discloses taxes on payroll and goods and services purchased.[68] Anglo American plc discloses payment information on "Transactions," "Labour" and "environmental" taxes (among others already mentioned) paid directly to governments.[69] Rio Tinto discloses payments for property and payroll taxes.[70]

3. Investors have an interest in understanding the total tax contribution.

It is in an investor's direct interest to receive the full tax contribution picture from issuers. As Calvert Investments stated in a discussion of the materiality of payments to investor analysis and the benefits to investors that an earlier version of 13(q) would provide, investors need to have an "appreciation of the tax regime and how the company manages these obligations," without which "analysts may have difficulty judging a company's relative performance and forecasting the cost curves necessary to

---

[63] *See* Norway, 1st EITI Report, 2009 available at http://www.regjeringen.no/upload/OED/Rapporter/2010-0121%20EITI%20rapport%20engelsk.pdf

[64] *See* PricewaterhouseCoopers LLP, "Total Tax Contribution" framework, available at http://www.pwc.co.uk/eng/issues/what_is_total_tax_contribution_framework.html

[65] *See* Ibid.

[66] *See* British Columbia's Petroleum and Natural Gas Act, B.C. Reg. 495/92, December 18, 1992, Section 8(1)(d) (requiring disclosure of payments relating to "royalties and taxes"); *see* also the London Stock Exchange's Alternative Investment Market (AIM), AIM Note for Mining, Oil and Gas Companies, (June 2009), at 4, available at http://www.londonstockexchange.com/companies-and-advisors/aim/advisers/rules/guidance-note.pdf (requiring issuers to disclose "any payments" made to any government "with regard to the acquisition of, or maintenance of, its assets").

[67] *See* AngloGold Ashanti, Sustainability Review 2009, at P52-P57, available at http://www.anglogold.co.za/subwebs/informationforinvestors/reports09/SustainabilityReview09/f/AGA_SR09.pdf

[68] *See* Newmont Mining Corporation, Beyond the Mine Sustainability Report, Economic Data Tables, available at http://www.beyondthemine.com/2009/?l=2&pid=4&parent=17&id=148.

[69] *See* Anglo American plc, Report to Society, 2009, at45, available at http://www.angloamerican.com/aal/development/reports/aareports/2010gr/.

[70] *See* Rio Tinto, report on Socioeconomic Development, available at http://www.riotinto.com/ourapproach/17213_socioeconomic_development_17363.asp.

estimate when the extraction of a resource will become uneconomical and operation may close."[71] Tax information is particularly important in risk analysis, as disputes over the payment or underpayment of taxes is an indication and cause of the political risk inherent in any resource extraction activity. The Calvert note continues:

> When a company's operations are in a country where government mismanagement or corruption are prevalent or industry regulations involving taxes and licensing may otherwise be subject to unexpected, unilateral change, disclosures of taxes, royalties and other obligations are particularly important in assessing the quantitative impact of these changes to a particular company's operations.[72]

For these reasons, we believe the Commission should revise Instruction to paragraph (b)(3)(iii)(A) of Item 105, Instruction 3 to Item 161, and Note 3 to Instructions B.(17) to reflect the following principle: A resource extraction issuer must disclose all taxes, including, but not limited to, corporate profits, corporate income, production, value added taxes, sales taxes, or any other made in furtherance of the commercial development of oil, natural gas or minerals.

As noted in the response to Question 32, income tax payments levied at the entity-level, which are not associated with a particular project, can be reported at the entity level.

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 are in agreement with the Commission's interpretation that Section 13(q) would require the disclosure of payments made in cash and in kind.

The proposed rule should be revised to make it clear that both cash and in kind payments must be reported. We are in agreement with the comments of API, Exxon and AngloGold Ashanti that such a revision is consistent with EITI guidance.[73] The EITI Validation Guide is explicit about the inclusion of in kind payments by noting that the "commonly recognized revenue stream" should include items such as "production entitlements" and "profit oil," which are in kind payments.[74] Further, it is possible, in theory, for any type of payment to be made either in cash or in kind. Therefore, the Final Rule should cover both forms, in order to prevent the creation of potential reporting loopholes.

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

---

[71] *See* Paul Bugala, Calvert Investments Group, Ltd., "Materiality of disclosure required by the Energy Security through Transparency Act," April 2010, at P. 2, available at http://www.calvertgroup.com/NRC/literature/documents/10003.pdf.
[72] *See* Ibid.
[73] *See* API submission, Exxon submission and Srinivasan Venkatakrishnan, AngloGold Ashanti Limited, letter to the SEC, Jan. 31, 2011 [*hereinafter* "AngloGold Ashanti submission"] available at http://www.sec.gov/comments/s7-42-10/s74210-15.pdf
[74] *See* EITI Validation Guide, at 17, available at http://eiti.org/document/validationguide.

under our proposal. In addition to license fees, should the rules specifically list other types of fees that would be subject to disclosure?

The rules should define "fees" so as to ensure that no specific type of fee is excluded from the definition.

Fees are a material type of payment that is part of the commonly recognized revenue stream. A review of fees paid to governments in ten EITI countries demonstrates that a wide range of fees are considered part of the commonly recognized revenue stream including, for example: acreage fees and transportation tariffs;[75] flat fees;[76] rental fees and permitting fees;[77] area fees;[78] application fees, seismic data fees, development fees, and contract services fees;[79] "special payments of subsurface users;,"[80] land rents;[81] land/surface rental and administrative fees;[82] water fees, fee for forestry use and firewood, "fee for recruiting foreign experts and workers," and custom service fees;[83] and mining license fees.[84] Both AngloGold Ashanti[85] and Newmont Mining Company[86] regularly report on fees in their sustainability reports. Final Rules which are drafted too narrowly may inadvertently exclude material benefit streams that are considered part of the commonly recognized revenue stream, thereby creating uncertainty and competitive distortions amongst issuers.

Further, the omission of any form of fees serves to obscure administrative and political risks of interest to investors, particularly in the mining sector, where fees are a principal revenue stream.[87] These risks will therefore be critically important for issuers engaged in mining activities. In Sierra Leone, for example, the country's EITI report from the period 2006-2007 indicates that "mining licenses and customs duties" were the second highest and third largest revenue streams, behind "mineral royalty."[88] As a result, the payment or non-payment of such a fee payment stream that is clearly material to a host country's government, could be a source of administrative or political risk. Therefore, if Section 13(q) disclosures excluded information on certain fees, this could prevent investors from making accurate assessments of administrative and political risk. Thus, exclusion of certain fees would risk harm to investors, particularly those that invest in securities of issuers that are significantly engaged in mining.

---

[75] *See* Azerbaijan, 10th EITI Report, 2008 available at http://www.oilfund.az/pub/uploads/1jmN1pVi.pdf
[76] *See* Cameroon, 2nd EITI Report, 2005 available at http://www.eiticameroon.org/index.php?option=com_remository&Itemid=85&func=startdown&id=5&lang=fr
[77] *See* Ghana, 3rd EITI Report, 2005 available at http://eiti.org/files/ghana_third_eiti_report_Ghana.pdf
[78] *See* Norway, 1st EITI Report, 2009 available at http://www.regjeringen.no/upload/OED/Rapporter/2010-0121%20EITI%20rapport%20engelsk.pdf
[79] *See* Timor L'este, 1st EITI Report, 2008 available at http://eiti.org/files/Timor-Leste%20EITI%202008%20report.pdf
[80] *See* Kazakhstan, 4th EITI Report, 2008 available at http://eiti.org/files/EITI%20Report%202008.pdf
[81] *See* Niger, 1st EITI Report, 2005-06 available at http://eiti.org/files/EITI%20Report%202005-2006%20Niger.pdf
[82] *See* Liberia, 2nd EITI Report 2008-09 available at http://www.leiti.org.lr/doc/LEITI2ndReconciliationFinalReport.pdf
[83] *See* Mongolia, 3rd EITI Report, 2008 available at http://eiti.org/files/MEITI_3rd%20RR_ENG_20100610_FINAL%20%281%29.pdf
[84] *See* Sierra Leone, 1st EITI Report, 2006-07 available at http://eiti.org/files/FINAL%20REPORT%20March%208%202010%20Master%20Versions.doc
[85] *See* AngloGold Ashanti Sustainability Review, p.5 4at P54 (disclosing "tenement fees"), available at http://www.anglogold.co.za/subwebs/informationforinvestors/reports09/SustainabilityReview09/f/AGA_SR09.pdf
[86] *See* Newmont Mining Corporation Beyond the Mine Sustainability Report, Economic Data Tables (disclosing "Total Land Use Payments"), available at http://www.beyondthemine.com/2009/?l=2&pid=4&parent=17&id=148.
[87] *See* EITI reports of Gabon (2006), Mauritania (2006), Democratic Republic of Congo (2007); and Central African Republic (2006). EITI reports available at http://eiti.org/document/eitireports
[88] *See* EITI report for Sierra Leone (2006-07) available at http://eiti.org/files/FINAL%20REPORT%20March%208%202010%20Master%20Versions.doc

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?

All of the above fees would be relevant and should be included in issuers' reporting.

As we requested above in our response to Question 15, the rules should define "fees" so as to ensure that no specific type of fee is excluded from the definition. The type of administrative risk described in our response to Question 15 is heightened when environmental, water, air, fire and surface use permits are prevalent, as these payments are often covered by *force majeure* or termination clauses, and non-payment of such administrative prerequisites can be included as grounds for halting operations. Further, host and local governments' failure to grant such permits or demand for additional permits has sometimes been a source of dispute with companies.. The disclosure of payments related to these permits alerts investors that administrative and political risks may be present, and time-series analysis of these can assist investors in the idenfication of risk. The same applies for customs duties and trade levies, which can often be a material payment from the host government's perspective, and therefore prone to administrative and political risks.

For the reasons noted here and in the response to Question 15, we believe that the Final Rule should be written to encourage the disclosure of all forms of fees by including a non-exclusive list of fees, such as the following: "fees (including, but not limited to, license fees, transit fees, customs users fees, rental fees, land use permits, entry fees, environmental or other permits, and other considerations for licenses and/or concessions)"

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

No fees should be explicitly excluded from the definition.

See our response to Question 15.

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?

The rules should included bonuses, and guidance should provide a non-exclusive definition.

We agree with industry commentators that the rules should include "bonuses."[89] We also agree that the rules should include the examples of bonuses included in the EITI Sourcebook, however, we do not believe that issuers should be limited to disclosing only those bonuses listed by EITI. Similar to the case for "fees," "bonuses" take many forms.[90] To address the wide diversity in the forms that bonuses can take, we urge

[89] *See* API submission and Exxon submission
[90] *See* EITI, Overview of EITI Reports 2010, available at http://eiti.org/node/1133

the Commission to utilize an open, non-exclusive list in any guidance that accompanies the term "bonuses" in the final rules.

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

No types of bonuses should be excluded from the definition of "payment."

We urge the Commission to note that bonuses are often contractually created, and may be individually tailored and structured to suit nearly any contractual context. Therefore, given the ease by which bonuses can be structured, the Final Rule should not exclude any types of bonuses from the definition of "payment," as this may create a reporting loophole.

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?"

The rule should define "other material benefits" using a broad non-exclusive definition.

A broad, non-exclusive definition of "other material benefits" is important, so as to avoid giving issuers an incentive to circumvent disclosure as required by Section 13(q). We urge the Commission to define "other material benefits" as payments made to a foreign government or the U.S. Federal Government relating to the execution of any aspect of covered operations in the relevant jurisdiction that a reasonable person would find material to the project's net worth, including but not limited to:

a. activities involved in the exploration and production of resources
b. activities involved in the trading and transport of resources
c. activities involved in the refining and marketing of resources

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 rule should include "dividends" in the list of payments that are required to be disclosed.

We agree with Exxon and API[91] that the rule should include "dividends." We believe that excluding "dividends" from the list of payments required to be disclosed under the Final Rule would contravene the Congressional intent, since dividends are part of the commonly recognized revenue stream. Dividends are

[91] *See* API submission and Exxon submission

a common component in EITI reporting and are included in EITI guidance.[92] For example, within the industry, AngloGold Ashanti annually discloses dividends it pays to governments,[93] while Newmont Mining Company considers "dividends paid to country stakeholders" (which, in countries with a national mining company, is likely to include dividends paid to governments) to be part of the "value added" it brings to a host country.[94] In addition, a number of EITI countries require reporting on dividends.[95] In Chad, the government receives dividends from an oil project as a result of being a minority shareholder in TOTCO, a company set up in Chad involving Exxon, Chevron, Petronas and the Government of Chad.[96] These examples reveal that dividends are part of the commonly recognized revenue stream, in addition to being a common component in EITI reporting.

Further, excluding "dividends" from the Final Rule could impose costs and distortions in the market as resource extraction issuers that mainly sign agreements for payments that are required to be disclosed would be disproportionately impacted when compared to issuers that pay dividends in place of a benefit stream that is required to be disclosed. For all these reasons, we believe it is crucial that the Commission determines that dividends are "other material benefits" and therefore required to be disclosed under the Final Rule.

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?

Payments made for infrastructure improvements should be included.

While this category of payments is not specifically listed in the statute, excluding it would be contrary to the spirit of the statute. Natural resources are frequently located in remote or undeveloped areas and many companies, especially mining companies,[97] make infrastructure-related payments. We understand that these payments are viewed generally as part of the cost of doing business in those areas. In many developing countries, particularly in Africa and specifically in countries emerging from civil war, transport infrastructure is frequently non-existent and financing to improve that infrastructure is often crucial for the export of natural resources once developed. In Guinea, for example, one of the world's largest Iron Ore deposits (Simandou[98]) is landlocked and unconnected to the deep-water port in the West of the country at

[92] *See* EITI, Validation Guide, Grid Indicator 9 (2009), at 17 (listing the "commonly recognized…revenue streams").
[93] *See* AngloGold Ashanti Sustainability Review 2009, at P52-P56, available at http://www.anglogold.co.za/subwebs/informationforinvestors/reports09/SustainabilityReview09/f/AGA_SR09.pdf
[94] *See* Newmont Mining Corporation, Beyond the Mine Sustainability Report 2009, Community and Economic Data Tables, available at http://www.beyondthemine.com/2009/?l=2&pid=4&parent=17&id=148.
[95] *See*, e.g., EITI reports of Cameroon (2005), Cote d'Ivoire (2006-07), Gabon (2006), Ghana (2005), Liberia (2008-09), Mali (2006), Mauritania (2006) and Mongolia (2008).
[96] *See*, e.g., World Bank, "Loan Agreement between the Republic of Chad and the International Bank for Reconstruction and Development, March 29, 2001. available at http://siteresources.worldbank.org/INTCHADCAMPIPE/Resources/td_la_en.pdf
[97] SEC, Proposed Rule Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. at 80,983-84 n.63.
[98] *See* "Simandou iron ore on new President's agenda," Wall Street Journal, January 27, 2011, available at http://www.theaustralian.com.au/business/news/simandou-iron-ore-on-new-presidents-agenda/story-e6frg90x-1225995414502

Matakan, because there is no railway.[99] This means that the commitment to reconstruct the railway, known as the Trans Guinean, has been a crucial element of all negotiations over rights to the Simandou deposits.[100] Bellzone Mining was awarded the right to develop its deposits in the west of the country based on a commitment to invest $2.7 billion dollars in improving the infrastructure, specifically the railway and a port.[101]

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?

At a minimum, social payments made to governments and required as part of investment contracts intended to further the commercial development of oil, natural gas or minerals should be included. This is supported by the plain language of the statute, which defines "commercial development of oil, natural gas, or minerals" to include "exploration, extraction, processing, export and other significant actions relating to oil, natural gas, or minerals, or *the acquisition of a license* for any such activity" (emphasis added). Therefore, social payments included within the terms of a contract for the commercial development or oil, natural gas or minerals, or the acquisition of a license for such activities, should be included within the disclosures required by Section 13(q). We believe that this would be consistent with the position of AngloGold Ashanti, which states in their comment to the Commission that "such payments should be considered part of the commonly recognized revenue stream to the extent that they constitute part of the issuer's overall relationship with the government pursuant to which the issuer engages in the commercial development of oil, natural gas, or minerals."[102] Shell is supportive of the inclusion of such payments as a type of "other material benefit" if these are found to be material to the overall payments made to a foreign government.[103]

Further support for the inclusion of social payments as a disclosure category is demonstrated by practice and law in Kazakhstan,[104] by the practice of multinational extractive industries companies[105] and by recent

---

[99] *See* "Foreign Firms Scramble for Iron, Bauxite, IPS" November 8, 2004, available at http://ipsnews.net/africa/interna.asp?idnews=26194

[100] *See* e.g. "Conakry Puts Squeeze on Rio Tinto" Africa Mining Intelligence, May 25, 2005, available at http://www.africaintelligence.com/AMA/exploration-production/2005/05/25/conakry-puts-squeeze-on-rio-tinto,13910538-ART-login or "Dadis Camara Confirms Transguinean Plan," Africa Mining Intelligence, September 16, 2009 available at http://www.africaintelligence.com/AMA/exploration-production/2009/09/16/dadis-camara-confirms-transguinean-plan,69507825-ART-login

[101] *See* Press Release, Bellzone Mining plc, Definitive agreements signed with China International Fund with the addition of a mine development financing package (Aug. 2, 2010), available at http://www.bellzone.com.au/Portals/0/docs/RNS%20-%20Finalised%20Agreement%202%20August%201010%20clean.pdf

[102] *See* AngloGold Ashanti submission

[103] *See* Shell submission

[104] In Kazakhstan, extractive companies' social and local infrastructure payments totaled approximately $2 billion between 1996 and 2009. In 2009 alone, these payments totaled $314.4 million. *See* Subsoil Users Monitoring Results as of January 1st, 2010 by Committee on Geology and Subsoil Use, Ministry of Industry and New Technologies of the Republic of Kazakhstan, available at http://geology.kz/index.php?option=com_content&view=article&id=112&Itemid=123&lang=ru). These are comparable in size to many other

EITI Board actions. The Board approved a revision to the EITI Rules (*EITI Rules – 2011 Edition*) circulated for public comment, which urged specific consideration of social in its Requirement #9:

> "Multi-stakeholder groups are encouraged to *apply a high standard of transparency to social payments and transfers*, beginning with a close understanding of the types of payments and transfers, the parties involved in the transactions, and the materiality of these payments and transfers relative to other benefit streams. If the multi-stakeholder group agrees that social payments and transfers are material, the multi stakeholder group is encouraged to develop or modify reporting templates with a view to achieving transparency commensurate with other payments and revenues. Where reconciliation of key transactions is not possible (e.g., where company payments are "in-kind" or to a third party), the multi-stakeholder group may wish to consider unilateral company and/or government disclosures to be attached to the EITI report."[106] (emphasis added)

We thus believe that the proposal to disclose social payments pursuant to investment contracts would be supportive of, and consistent with the new EITI Rules, which were approved by the EITI Board in February 2011.[107]

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)"?

---

benefit streams reported through the EITI process in Kazakhstan. *See* Kazakhstan's EITI reports for 2005-2008, at available at http://www.eiti.kz/ru/documents/reports/. In addition, Kazakhstan's Law on Subsoil and Subsoil Use explicitly states that future contract awards will take into account two main criteria: the level of signature bonus and the social spending commitments of the extractive companies.

[105] Many companies already report these payments on a consolidated and company-aggregate basis. For example, Newmont Mining reports that it spent $52 million worldwide on "community development" in 2009. (*See* Newmont Mining Corporation, Annual Report 2009, n. 6, P121: available at http://bnymellon.mobular.net/bnymellon/NEM/document_0/Corrected%20Annual%20Report%20and%20Form%2010-K.pdf). Other companies track these payments but do not report them. For example, Chevron posts on its website information on "community engagement programs" it invests in that focus on "improving access to basic human needs, enabling education and training opportunities, and promoting sustainable livelihoods," and notes that it invested $144 million worldwide in such programs in 2009. *See* http://www.chevron.com/globalissues/economiccommunitydevelopment/ The only mention of this expense made in the 2009 annual report is in the Letter to Shareholders, without mention of the amount. *See* Chevron Annual Report 2009, P3 available at http://www.chevron.com/annualreport/2009/documents/pdf/Chevron2009AnnualReport_full.pdf)

[106] *See* EITI Rules – 2011 Edition, http://eiti.org/files/2011-01-05_DRAFT_EITI_Rules_2011.doc

[107] We respectfully submit that in October 2010, the EITI Board reviewed the proposals from the Board's Working Group on Reporting, Social and Barter Payments, which recommended that the Board clarify "whether the EITI Rules should *require* MSGs to agree an approach for addressing social payments" or whether the Board should "more modestly empower the MSG to address the issue". According to the Board minutes, several industry representatives of oil companies, which are members of API, "recommended not to agree any policy changes in this area until the outcome of the SEC implementation work on the Dodd-Frank Bill was known." We note that the API submission suggested that the EITI considers social payments as "not part if the commonly recognized revenue stream". We thus respectfully submit that if the EITI Board, at the request of industry, is waiting for the Commission to act affirmatively, and the Commission allows industry objections to prevent the inclusion of social payments in rules for Section 13(q), then the Commission's action could have the unintended consequence of preventing the evolution of revenue transparency through the EITI process. *See* EITI International Secretariat, Minutes of the 13th Board Meeting (Nov. 11, 2010), at 11, available at http://eiti.org/files/121110_Minutes%20of%20the%2013th%20Board%20Meeting.pdf

The definition of certain payment categories should be expanded to be consistent with Congressional intent.

The Congressional intent was for Section 13(q) disclosures to be consistent with the EITI payment categories, but to go beyond those specifically stated in EITI. This is evidenced in the Cardin letter[108] which states that "EITI is a minimum reporting standard, and the intent of Sec. 13(q) was to go beyond these requirements," and, "[w]here possible, the SEC rules should align with EITI disclosure practices, but Sec. 13(q) is clear that reporting should go beyond the EITI's minimum reporting standards." Therefore, as noted in our responses above, PWYP believes that the definitions of "taxes, royalties, fees (including license fees), production entitlements [and] bonuses" should be expanded upon to ensure that they capture all payments that are commonly recognized to fall within each category.

In addition, there are several payment categories not specifically listed in the Proposed Rule for 13(q) for which disclosure would be useful to the users of the disclosures mandated by Section 13(q). These additional payment categories are integral to the commerciality of energy investment projects and are therefore "made to further the commercial development" of the underlying resources. They are "commonly recognized" to be part of the "revenue stream" flowing from resource extraction projects. The discussion below provides a brief overview of several of these additional categories, which have been included in the list set forth in the response to Question 12.

1. Payments related to transport should be included

   We support the Commission's proposal that the rules require the disclosure of payments related to transport operations for export. Our response to Question 9 notes that IFC requires disclosure of these payments. Country-specific EITI reporting requirements have also required such payments and have included the disclosure of exploration, production, transit, marketing, pipeline and other operations-related payments.[109] These payments are clearly part of the "commonly recognized revenue stream." Therefore, PWYP believes that the rules should also require the disclosure of payments that fall under the following categories:
   - Pipeline transit fees
   - Customs duties and customs users fees
   - Payments related to pipeline and terminal operations

2. Payment of taxes in lieu should be included

   Payments of taxes in lieu should be included such as where a national oil company joint venture partner pays taxes "for and on behalf of" the issuer and then provides the issuer a receipt that can be credited against home-country tax filing.[110]

---

[108] *See* Senator Cardin submission

[109] *See* Nigeria's Extractive Industries Transparency Initiative (NEITI) audit for 1999 to 2004, available at http://www.neiti.org.ng/files-pdf/PopularVersionof1stAudit.pdf. The NEITI 2004 includes operations data that was included to acknowledge the political and financial risks exposure of these operations relating to revenue transparency, which according to the NEITI coordinating body include "negligence – or even sabotage – of refineries, leading to higher oil product imports, product losses and potentially inflated prices."

[110] Humphreys, Macartan. Sachs, Jeffrey. Stiglitz, Joseph. Ed. "Escaping the Resource Curse." Columbia University Press. New York. 2007, page 387.

3. Ancillary payments pursuant to investment contracts should be included.

Ancillary payments to governments required under extraction contracts, such as payments made for the training of personnel or pursuant to other "local content" requirements should be included. In Ghana, for example, payments for the training of personnel and management and technical skill transfer programs are required under an agreement between Kosmos Energy and the state-owned Ghana National Petroleum Company. These types of payments accrue over time and can individually exceed over $100,000.[111] Payments for security services, such as through military or paramilitary organizations, should also be included.[112] For these reasons, PWYP urges the Commission to include as a payment category "ancillary payments made pursuant to the investment contract (including security, personnel training programs, local content, technology transfer and local supply requirements)."

4. Payments related to incurred liability should be included.

Payments related to incurred liability should be included. This should include payments made after the completion of a project, including penalties due to a failure to obtain required licenses, for violations of law or regulations, environmental and remediation liabilities, and bond guaranties entered with the central bank as well as subsequent foreclosure on the same. The recent BP spill in the Gulf of Mexico provides an example of this type of payment.

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?

We agree with the Commission's interpretation that "not *de minimis*" is not the same as "material."

An item is material if its inclusion in a financial report would elicit a reasonable investor to act differently,[113] while an item that is *de minimis* is "so insignificant" as to be overlooked in making a decision.[114] Further, the difference between *de minimis* and "material" lies in the fact that *de minimis* is typically considered a

[111] See Petroleum Agreement Among The Republic of Ghana, Ghana National Petroleum Corporation, Kosmos Energy and the E.O. Group in Respect of West Cape Three Points Block, July 22, 2004, Article 21.1 "Employment and Training," page 68.

[112] Expenditures by Freeport McMoran in projects in Indonesia illustrate payments to military and police. *See* e.g. Freeport McMoran Copper & Gold Inc. Form 10-K, 2009, available at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDI3MjR8Q2hpbGRJRD0tMXxUeXBlPTM=&t=1
("PT Freeport Indonesia's share of support costs for the government-provided security, currently involving approximately 3,000 Indonesian government security personnel located in the general area of our operations, was $10 million for 2009, $8 million for 2008 and $9 million for 2007. This supplemental support consists of various infrastructure and other costs, such as food, housing, fuel, travel, vehicle repairs, allowances to cover incidental and administrative costs, and community assistance programs conducted by the military and police. PT Freeport Indonesia's capital costs for associated infrastructure was approximately $2 million in 2009 and less than $1 million a year in 2008 and 2007.")

[113] Staff Accounting Bulletin No. 99, 17 CFR Part 211 [*hereinafter* SAB No. 99].

[114] Black's law dictionary defines a *de minimis* item as a fact or thing "so insignificant that a court may overlook it in deciding an issue."".". Black's Law Dictionary, 8th Ed., (2004), at 464. Thus, *de minimis* applies to information that can be considered not capable of making a difference to a reasonable person. As something *not capable* of inducing decisions cannot be *likely* to change a reasonable person's behavior, *de minimis* is clearly different from materiality.

quantitative threshold[115] while "quantifying…is only the beginning of an analysis of materiality."[116] Please see also responses to Question 88, 73-75 and 87, 89 and 90)

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?"

If "not *de minimis*" remains undefined, then the Final Rule should require the issuer to disclose the methodology used to determine its definition. The Final Rule should also include guidance on the provision to ensure that issuers interpret the term as distinct from "material". See also our response to Question 28.

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.

<u>If a definition is needed, the Commission should define "*de minimis*", rather than "not *de minimis*."</u>

If the Commission should choose to define "*de minimis*," we would urge that the definition of a *de minimis* payment (i) is based on the principle of equal treatment of issuers and (ii) is sufficiently narrow to protect the underlying purposes of the legislation. While we presume that the Commission would draw on the definition of *de minimis* in the U.S. Code[117] for this purpose, we would also urge consideration of the following:

If the Commission decides to define a quantitative standard for *de minimis*, either in addition to a qualitative standard or instead of one, the *de minimis* payment threshold should be set in line with existing standards that have been accepted by both governments and companies. The most relevant authorities to look to for guidance on this issue include EITI countries and the London Stock Exchange's Alternative Investment Market (AIM)'s payment disclosure requirement for Oil, Gas and Mining companies are, and they suggest that a reasonable threshold is $1,000 for individual payments and $15,000 for all payments in the aggregate.[118] As such, a reporting issuer would be required to report on any payment that exceeds the equivalent of $1,000 and on payments that, in the aggregate, exceed the equivalent of $15,000.[119] Consideration of an aggregate *de minimis* threshold rather than a solely per-payment approach would be wise, since payments that are *de minimis* when calculated on a per-payment basis may become significant as they accumulate over time. Moreover, some countries require certain payments to be made on an

---

[115] An example of a reasonable *de minimis* payment level is provided by the London Stock Exchange (LSE)'s Alternative Investment Market (AIM), which maintains an implicit *de minimis* threshold for those payments that, alone or as a whole, aggregate over £10,000 (or approximately U.S. $15,000). *See* AIM Note for Mining, Oil and Gas Companies (June 2009), at 4 [hereinafter "AIM Note"] http://www.londonstockexchange.com/companies-and-advisors/aim/publications/rules-regulations/guidance-note.pdf: *see also* Nigeria's reporting as part of its EITI implementation, which requires reporting of payments by company and by payment-category at a U.S. $1,000-level; *see also* definition of *de minimis* in Section 10A(i)(1)(B)(i) of the Exchange Act of 1934 (defining a *de minimis* exception to the requirement that all audit and non-audit services provided to an issuer must be pre-approved by that issuer's audit committee, whereby non-audit services that are less than 5% of the total amount of revenues paid by the issuer to the auditor need not be pre-approved).

[116] SAB No. 99.

[117] *See* e.g. 26 U.S.C. 132(e)1

[118] *See supra* note 15

[119] The *de minimis* payment threshold should not be set so high that the exception undermines the overall effectiveness of Section 13(q). For example, a *de minimis* threshold set at $100,000 could exceed the annual payments, such as lease rents or license fees, in some projects. This is the disclosure threshold that Newmont Mining utilizes, which PWYP believes is inappropriate as a regulatory standard. *See* Newmont Mining Corporation, Beyond the Mine (Newmont Sustainability Report 2008) available at http://www.beyondthemine.com/2008/

annual basis, while others require similar payments to be made monthly or quarterly. It is even possible that the same type of payment made by two companies in the same country would be paid on a different basis depending on negotiated contract terms. A solely per-payment approach to the *de minimis* rule would result in under-inclusion of relevant data and frustrate attempts at comparing data.

Providing a *de minimis* threshold based on the amount of overall payments, the size of assets or any other similar metric would exclude information that Congress intended be disclosed pursuant to Section 13(q). This is so because, for certain very large issuers, large payments to governments would almost certainly fall below a *de minimis* payment threshold based on such measures. In addition, if the *de minimis* exception were to be based on overall payments, asset size or a similar measure, smaller extractive industry participants would likely be treated differently—in that they would be required to disclose more information—than larger companies.[120]

In April, the International Accounting Standards Board (IASB) released a Discussion Paper[121] that summarized two types of risks against which current rules fail to protect investors against; "country specific risks"[122] and "reputational risks"[123]. The logic is that it is the relevance of a payment in relation to a country's size that makes a particular payment item a risk or not to the company. Section 13(q) requires issuers to disclose information, at a minimum, according to "such payments made for each project" and "such payments made to each government."[124] Thus, the statute's plain language mandates a concern for relevance to decision-making at the project and host nation level. Such a *de minimis* principle would be consistent with the GAAP concept of relevancy.[125]

For these reasons, if the Commission chooses to utilize a qualitative, principle-based standard in defining *de minimis*, it should follow the logic of the IASB. It should therefore define "*de minimis*" rather than "not *de minimis*," such that a payment is "*de minimis,*" and therefore can be excluded from the disclosure requirement.

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

---

[120] *See* discussion in IASB Discussion Paper, Extractive Activities, DP/2010/1 (2010), ¶6.19 at page152 *and* ¶6.24 at page 154.
[121] IASB Discussion Paper, Extractive Activities, DP/2010/1 (2010).
[122] *See* Ibid. 6.19, at 152, deals with "country-specific investment risks" and notes that consultations with investors "indicated that the disclosure of payments to governments would be useful in making investment decisions," for example for assessing "economic risks" as well as for compatibility with "socially responsible investment criteria," but that to "be useful for all these purposes, the disclosure of payments to government would need to be presented on a country-by-country basis."
[123] Ibid. 6.24, at 124 deals with "reputational risks," noting that although operations "immaterial to the entity in quantitative terms, the entity's operations in some of those countries could be material to the entity in qualitative terms (e.g. material to the entity's reputation) if, for example, the country was economically dependent on the investments made by the entity..." This lends support to the idea that "the entity should use its best efforts to disclose payments to governments whenever there is a reasonable expectation that the entity's operations would be material to the country, even though the country might not be material to the entity in quantitative terms.
[124] H.R.4173 § 13(q)(q)(2)(A)(i)&(ii).
[125] The FASB notes that to "be relevant [to decision makers], accounting information must be *capable* of making a difference in a decision by helping users to form predictions about the outcomes of past, present, and future events or to confirm or correct expectations." FASB Concept Statement No. 2, at 47. Black's law dictionary defines a *de minimis* item as a fact or thing "so insignificant that a court may overlook it in deciding an issue." Black's Law Dictionary, 8th Ed., (2004), at 464. Thus, *de minimis* applies to information that can be considered not capable of making a difference, meaning that in accounting terms, *de minimis* is concerned with whether the item is large enough to be "relevant."

information?

See our response to Question 27.

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, $15,000,74 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?

See our response to Question 28.

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?

Basing the definition of "not *de minimis*" on total expenses for the year, or total expenses for all projects in a particular country would not uphold legislative intent. As noted in our response to Question 28, if the definition of "*de minimis*" were to be based on overall payments or expenses, asset size or a similar measure, smaller extractive industry participants would be treated differently—in that they would be required to disclose more information—than larger companies.[126] This would create an un-level playing field.

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?

<u>If the Commission chooses to define "not *de minimis,*" the definition should be the same for all resource extraction issuers, regardless of size.</u>

If the Commission chooses to define "not *de minimis,*" it should not define it in a manner that provides exceptions or provides variations based on the size of a resource extraction issuer**.** Providing a *de minimis* threshold based on the amount of overall payments, the size of assets or any other issuer-based metric would exclude information that Congress intended be disclosed pursuant to Section 13(q). For certain very

[126] *See* discussion in IASB Discussion Paper, Extractive Activities, DP/2010/1 (2010), ¶6.19 at page152 *and* ¶6.24 at page 154.

large issuers, for example, large payments to governments would almost certainly fall below a *de minimis* payment threshold based on the amount of overall payments, the size of assets or any other issuer-based metric. See also our response to Question 28.

For this reason, we believe that a graduation would only magnify this differential treatment. Moreover, in the case of percentage thresholds, there is no cognizable reason to graduate further, as a percentage threshold would already be graduated. Increasing the minimum threshold for larger filers reduces the level of transparency provided, and consequently reduces benefits to investors, by hampering their ability to conduct comprehensive risk exposure analysis for larger issuers.

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?

If the Commission chooses to define "not *de minimis,*" it should not be defined as "significant" payments compared to total expenses or with regard to a particular government.

This would be inappropriate because "significant" and "not *de minimis*" are distinct. As noted above, an item is *de minimis* if it is "so insignificant" as to be irrelevant to an analysis.[127] The inverse formulation of this standard would refer to an item that is merely relevant to an analysis. An item that is "significant" would likely be necessary to an analysis, not merely relevant. For this reason, and as noted above, if the Commission decides to provide a qualitative standard, we believe the proper formulation would be to define "*de minimis*" rather than "not *de minimis*," such that a payment is "*de minimis,* "and therefore can be excluded from the disclosure requirement.

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?

The rule should not require disclosure of payments only if they relate to "material projects."

Requiring disclosure of payments only if they relate to "material projects" would violate the Congressional intent. Congress intended this statute to create a new transparency standard and to apply as broadly as possible across the industry. In its legislative proceedings it did not introduce a "materiality" qualifier to the phrase "projects." Rather, it utilized the phrase "each project."[128] Thus, requiring disclosure of payments only if they relate to "material projects" would be in violation of the legislative intent. See also Question 47.

D.3 The "Project" Requirement

Section 13(q) and Congressional intent is clear in requiring "project" level disclosures. Senator Cardin

[127] *See supra*, response to Request for Comment (26).
[128] 15 U.S.C. 78m(q)(2)(A).

affirmed in his letter the Commission that Section 13(q) of the Dodd-Frank Act "purposefully requires reporting at the project level, disaggregated by payment stream."[129]

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

The Commission should define "project" to ensure clarity in Section 13(q) reporting requirements.

The project-level payment disclosure requirement for resource extraction issuers is new in both scope and intent. In order that Section 13(q) (i) reflect congressional intent, (ii) produce meaningful project-level disclosures related to the site-specific financial flows affiliated with extractive industry activities, and (iii) ensure equal treatment of resource extraction issuers, the Commission should offer a clear definition of "project." A number of other commentators agree that a definition is needed, including Senator Levin,[130] and several industry commentators[131].

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

A "project" should be defined in relation to the lease, license and/or other concession-level arrangement that assigns it with rights and fiscal obligations.

Section 13(q) requires issuers to disclose an explicit list of project-level payments whose values largely derive from the unique fiscal terms assigned to a given concession or license area.[132] In particular, royalties, license fees, production entitlements and bonuses – payments which together represent a large share of the financial benefits that accrue to governments from extractive activities – are levied according to the terms of specific leases and licenses. It follows, therefore, that for the purposes of reporting under Section 13(q), an extractive "project" should be defined in relation to the lease, license or other concession-level arrangement that governs its rights and fiscal obligations.

As outlined in our November 22, 2010 submission, PWYP urges the Commission to define "project" in relation to each lease, license and/or other concession-level arrangement entered into by a resource extraction issuer and to apply this definition universally for all issuers reporting under Section 13(q). Where, with respect to a particular jurisdiction, certain payments are levied at an entity level rather than at the lease/license level (e.g., corporate income tax calculated on the basis of all profits on all projects within a jurisdiction), this fact should have no bearing on the definition of project – but, rather, may give rise to a limited reporting allowance whereby issuers could report at an entity level, rather than project-level, for those specific payments only.

We therefore support the definition provided by Calvert Asset Management Company Inc. and Social Investment Forum in their comment dated November 15, 2010, which recommended that "project" be defined under Section 13(q) as "any oil, natural gas or mineral exploration, development, production,

[129] *See* Cardin submission
[130] *See* Senator Carl Levin, letter to the SEC, Feb 4, 2011 at 4, available at http://www.sec.gov/comments/s7-42-10/s74210-19.pdf
[131] *See* e.g. API submission, Exxon submission, AngloGold Ashanti submission
[132] *See* PWYP Submission at P14-P15.

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."[133]

We do not believe that such a definition will be overly burdensome to issuers nor require costly revisions to existing company processes. The majority of information required to be disclosed by Section 13(q) is already collected by companies for internal record-keeping and audits – and is already reported to taxation authorities at the lease/license-level by issuers operating in the U.S. As Calvert Asset Management Inc. has noted, efficiently-run companies should not have to make extensive changes to their existing systems and processes in order to export practices undertaken in one operating environment to another.[134]

Additionally, we believe that the Commission should offer one definition to apply universally to all resource extraction issuers. The International Accounting Standards Board has argued that one IFRS for "minerals and oil and gas extractive activities" could be appropriate, given that "the main business activities (exploration, evaluation, development and production) and the geological and other risks and uncertainties" related to each of these industries "are very similar."[135] We agree, and we urge the Commission to offer one "project" definition applicable to all resource extraction issuers.

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?

<u>The same definition of "project" should apply to all resource extraction issuers.</u>

The manner in which a resource extraction issuer defines or refers to its own projects for internal business purposes is not relevant to the definition of a "project" under Section 13(q), nor is it relevant to the nature of the project-level payments that the statute requires. As discussed above, the project-level payment disclosures mandated by the legislation relate directly to the fiscal terms that apply to an issuer's extractive activity in a given operating environment – not to an individual issuer's understanding of what constitutes a project. This would significantly reduce comparability of data.

There is variety in how resource extraction issuers employ this term for purposes unrelated to the reporting of payments made to governments. However, the Commission has previously made significant determinations on how extractive projects should be defined in specific contexts – as it did, for instance, in establishing a definition of "development project" for the purposes of reserves reporting in the Compliance and Disclosure Interpretations to Regulation S-X. This suggests recognition on behalf of the Commission that in order for a given set of extractive disclosure requirements to apply equally to issuers and produce broadly comparable information, it may be necessary for key reporting terms such as "project" to be uniquely defined in relation to this particular set of disclosure requirements.

---

[133] *See* Calvert and SIF submission

[134] *See* Statement made by Calvert Investments at a June, 2010 IASB-sponsored roundtable, available at http://www.iasb.org/NR/rdonlyres/2A0A6F2C-E86D-4E06-9A4B-AD99B1976EDF/0/CL6.pdf

[135] See the IASB Discussion Paper on the establishment of an International Financial Report Standard (IFRS) for the extractive industries available at http://www.iasb.org/NR/rdonlyres/735F0CFC-2F50-43D3-B5A1-0D62EB5DDB99/0/DPExtractiveActivitiesApr10.pdf

We do not support a "project" definition in the rule that would "define 'project' to mean a project as that term is used by a resource extraction issuer in the ordinary course of business." However, should the Commission decide to define "project" in this fashion, each issuer should be required to disclose its basis for defining the term, so that investors are able to understand the scope and provenance of an issuer's project-level disclosures.

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?

The definition set out in Question 42 would not be appropriate.

Defining "project" under Section 13(q) as one or more properties or modes of transport would be inappropriate. Section 13(q) makes no reference to a "project" as something resembling or represented by "a field, mining property, refinery or other processing plant, or pipeline or other mode of transport." Such a "project" definition would not appropriately relate to the disclosures required by Section 13(q), nor would it reflect how extractive industry ownership and activities work in practice.

For instance, "project" cannot be defined to mean a field, as one field might easily incorporate multiple concession blocks owned by separate issuers (making separate payments to government). This was the case with Ghana's Jubilee Field in its exploration phases.[136]

Giving issuers broad permission to include payments from multiple field or properties in reported "project" disclosures would allow for an unwarranted level of aggregation, and allow issuers to obscure project-specific risks.

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)?

The definition of a "development project" under Rule 4-10(a)(8) of Regulation S-X is not relevant or suitable to Section 13(q).

The above definition has no basis in the statutory language, and would not appropriately describe or encompass the types of payment disclosures mandated by Section 13(q). Both Rule 4-10(a)(8) of Regulation S-X and Section 13(q) assess emerging risks in the extractive industries for the benefit of investors and other users of financial data. However, the payment disclosures required by Section 13(q)

[136] *See* Oxfam America, Ghana's Big Test: Oil's Challenge to Democratic Development, February 2009, at 21, available at http://www.oxfamamerica.org/files/ghanas-big-test.pdf

are substantively different from the reserves disclosures that issuers make under Rule 4-10(a)(8) in critical ways. First, as the Commission suggests, the definition of "development project" under Rule 4-10(a)(8) doesn't apply to the scope of resource extraction activities covered by Section 13(q)'s disclosure requirements. Second, the definition of "development project" offered by Rule 4-10(a)(8) was written as a component of the Commission's revisions to its oil and gas disclosure reporting requirements, which were put forth in part to align reserves reporting with accounting methods. Thus, in practice, the Commission's current definition of "development project" under Rule 4-10(a)(8) serves to guide issuers on how certain costs may be assigned to a particular amortizable set of activities. In contrast, the project disclosures required by Section 13(q) are not delineated by an issuer's internal costing methods, but by the explicit payment categories listed in Section 13(q).

Accordingly, the "project" definition offered by PWYP in this comment relates to the mechanism by which the values of the required disclosures are established – that is, it refers to the lease, license and other concession-level arrangements that govern how the benefits of a given set of extractive activities accrue to a government. We endorse this definition because it aligns unequivocally with legislative intent, and it provides issuers with a clear, straightforward understanding of how to report project-level payment disclosures.

We agree with the comments from industry commentators, which state that "using [the definition of "development project" as stated in Rule 4010(a)(8) of Regulation S-X] would exclude payments related to "projects" in the acreage acquisition, exploration, production, enhanced recovery and abandonment phases of the life cycle."[137] We agree with these industry commentators that reliance on this definition would not result in appropriate payment reporting by issuers.

- ***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?***

[137] *See* API submission and Exxon submission responses to Question 43

- ***Should any definition of project encompass only a single reservoir, field or mine? Why or why not?***

The definition of "project" should be set at the lease/license level.

As stated above, PWYP prefers a definition of "project" based on Congressional intent and set at the lease/license level. However, should the Commission choose to revise Rule 4-10(a)(8) to apply it to Section 13(q), we suggest the following considerations be taken into account:

1. Defining "project" as "the means by which oil, natural gas, or mineral resources are brought to the status of being economically producible or commercially developed" does not account for the full range of activities implied by "the commercial development of oil, natural gas, or minerals" defined by the statute to include "the activities of exploration, extraction, processing, export and other significant actions." The statutory list of activities included within "commercial development" must be accommodated by any "project" definition put forth by the Commission.

2. Defining "project" as something "involving a single engineering activity with a distinct beginning and end" might result in separate development phases of one project being reported as separate projects, which would confuse Section 13(q)'s project-level reporting standard and could result in the artificial apportionment of payments related to the same extractive activity to separate projects.

3. Defining "project" as something "having a definite cost estimate, time schedule, or investment decision, and approved for funding by management," would be an arbitrary addition to the definition of "project" under Section 13(q) and introduces an unnecessarily narrow qualification that issuers could easily exploit to avoid project-level reporting.

4. Defining "project" as "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" introduces an allowance for the aggregation of project payment data that is not supported by the statutory language of Section 13(q) and would allow for the differential treatment of issuers. In the event that the benefits accruing from a single reservoir, field or mine are established by the terms of a lease/license or other concession-level arrangement specific to that single reservoir, field or mine, we would be supportive. However, this standard would not ensure that an issuer was required to report its project-level payments at such a granular level. In many cases, the rights to multiple reservoirs might be owned by one issuer, and governed according to the terms of one lease or concession.

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

"Project" should not be defined to allow for aggregation of project disclosures at the country level.

Section 13(q) requires the Commission to issue rules requiring each resource extraction issuer to report "information relating to any payment made by the resource extraction issuer," including information on "(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, and (ii) the type and total amount of such payments made to *each* government."[138] Thus the intent of this language is to require project-level reporting alongside of country-by-country company disclosures. This reading is supported by the letter of Senator Cardin to the Commission, which clarified that Section 13(q) of the Dodd-Frank Act "purposefully requires reporting at the project level, disaggregated by payment stream."[139] The aggregation of project-level payments by country would therefore directly contravene the intent of Section 13(q) by eliminating one of its key requirements.

A concern was raised by several industry commentators[140] that project-level disclosure of bonuses paid for acreage acquisition during the exploration would reveal a company's identity, therefore attracting competitors to bid for remaining acreage, whiling driving up costs for companies whose bonus payments are disclosed. We believe this concern to be overstated. Bonuses paid for the acquisition of a license are disclosed publicly in the U.S.[141] Further, in so-called frontier countries, governments are courting companies to attract them to bid on available acreage and publicizing the development opportunities available in their jurisdictions, making it unlikely that competitors are unaware of the available resources.[142] This suggests that disclosure is unlikely to be a factor that would undermine competitive advantage during acquisition of acreage for exploration.

Industry commentators also raised the concern that "precise project 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."[143] We believe this concern is overstated. Firstly, it is unlikely that the location or fiscal importance of significant projects would otherwise be unknown to citizens within a country. Investment and energy production are typically activities publicized by governments to gain public favor and attract further investment. In addition, the physical footprint of significant extractive industry projects is highly visible. For example, their associated physical infrastructure, such as wells, mines, pipelines or refineries, can comprise large swaths of land that are likely to be protected by fencing or security forces. Further, the magnitude of local businesses that emerge to service the operation, in many cases may lead to the

[138] 15 U.S.C. 78m(q)(2)(A)
[139] Benjamin Cardin, letter to the SEC, Dec. 1 2010, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-94.pdf
[140] *See* e.g. API submission and Exxon submission
[141] Information on companies and bids is found in each state office of the U.S. Department of Interior Bureau of Land Management, in their oil and gas leasing section. Leasing results are posted on each BLM state office website within a day or two of the sale. *See* e.g. U.S. Department of Interior Bureau of Land Management Wyoming, "Competitive Lease Sale Notices & Results", available at http://www.blm.gov/wy/st/en/programs/energy/Oil_and_Gas/Leasing.html
[142] For example, the 5th East African Petroleum Conference and Exhibition, held February 2-4, 2011 in Uganda, is sponsored by the Governments of Uganda, Burundi, Kenya, Rwanda, and Tanzania, with co-sponsorship of several leading petroleum production and service companies. The conference website describes the acreage available, see Exploration Status available at http://www.eac.int/eapce/index.php?option=com_content&view=category&layout=blog&id=63&Itemid=184. Ghana is holding international Oil & Gas Exhibition and Conference in April 2011, which is endorsed by the Ghanaian Ministry of Energy and the Ghanaian National Petroleum Company to build awareness of development opportunities. See http://www.cwcghana.com/index.aspx.
[143] *See* e.g. Shell submission

establishment of small settlements around the facility. This physical footprint can easily be seen by the naked eye, and by using publicly available satellite imagery, such as that provided by Googlemaps. If it is of sizable magnitude, it is also likely to feature in local and national media. For these reasons, we find it unlikely that project payment disclosure would be determinant in aiding terrorists or insurgents to target a specific project. We believe that secrecy surrounding the flow of money paid in connection with the commercial development of natural resources contributes to the environments in which terrorists and insurgents are able to thrive.

In relation to the concern regarding the disclosure of commercially sensitive information to potential competitors during the bidding process, much of this information is already available to other industry players. As Revenue Watch Institute has noted in their comment to the Commission, "confidential industry databases, such as those maintained by Wood Mackenzie, or public databases, such as those maintained by the U.S. Department of Interior, include a wide variety of data on bids and payments made to governments."[144]

Further, allowing for the aggregation of sub-national payments would seem to conflict with the Commission's preliminary decision, published in proposed rules for Section 13(q), to "specifically include foreign sub-national governments" in its definition of "foreign government." Thus, a definition that permitted issuers to treat all in-country operations as one "project" would be inconsistent with the Commission's recognition of the need for disaggregated reporting within a country, at least in the case of payments made to foreign sub-national governments.

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)?

<u>"Project" should not be defined to mean only a material project.</u>

There is no support in the statutory language for the notion that "project" might be defined to refer only to material projects. Instead, Section 13(q) requires issuers to disclose information related to "*any payment made*… for the purpose of the commercial development of oil, natural gas or minerals" (emphasis added) and then implicitly defines at least "taxes, royalties, fees (including license fees), production entitlements, [and] bonuses" as material, by noting that these and "other material payments" must be reported. Allowing for any project to be exempted from disclosure requirements according to a materiality standard would therefore prevent payments related to this project from being reported, in direct contradiction to the requirements of Section 13(q).

1. All relevant payments by governments should be reported.

   The need to ensure that all relevant payments are captured has been emphasized by a large number of investors. The "Investors' Statement on Transparency in the Extractives Sector,"[145] states the

[144] *See* RWI February Submission at 5. Forthcoming on SEC website.
[145] *See* Investors' Statement on Transparency in the Extractives Sector, submitted as an attachment to Ian Greenwood, Local Authority Pension Fund Forum, letter to the SEC, Jan. 31, 2011, available at http://www.sec.gov/comments/s7-42-10/s74210-17.pdf

support for comprehensiveness in the development of mechanisms to promote payments transparency. Specifically, it defines the principle of comprehensiveness as "ensuring that *all* relevant payments and revenues paid to governments are captured" (emphasis added). The Investor Statement was signed by 86 institutional investors representing $16.0 trillion. The Local Authority Pension Fund Forum, which represents an association of 52 UK-based pension funds with combined assets of £90 billion (roughly over $145 billion), has also made this need clear in its letter to the Commission.[146] It is important to note that these statements did not refer to a concept of materiality related to payment disclosure.

2) If materiality is used, it should be materiality to the country, not to the issuer.

Although we strongly disagree with this approach, should the Commission decide to define "project" to mean a material project, then the Commission's standard for materiality in this case should be based on a project's materiality to a country and its citizens at the local and national level, rather than to an issuer. In addition, all payments related to these projects should be disclosed, and these should not be aggregated. The disclosure of projects that are material to the country would allow comparability across projects and meet the intent of the statute to provide information of use to hold governments accountable.

To limit disclosure to only projects that are material to the issuer would prevent comparability because of the differing sizes of covered issuers. For example, a project that is material to a smaller reporting company may not be material to a larger company. If project disclosures were limited to those that were material to the issuer, this would prevent a comprehensive view of disclosures to a country. This could contravene the intent of the law by preventing the disclosure of information that is material to a country, and therefore, payments which require government accountability. For example, Chevron and its partners paid $123 million in 2004 as signature bonus for an oil block in the Joint Development Zone between São Tomé and Príncipe and Nigeria.[147] According to the terms of the agreement, São Tomé gets 40 percent of the bonus[148], or approximately $49 million. This amount is clearly material to the government of São Tomé and Príncipe, when one considers that total government expenditure in 2009 was $57 million,[149] and the size of the bonus payment represents approximately 25% of the country's 2009 GDP ($190 million).[150] Further, when considering that São Tomé scores 0 out of 100 points on the Open Budget Survey 2010[151], it is clear that the transparency of this bonus payment would also be imminently material to citizens in São Tomé pushing for government accountability. Were the rule to only require the disclosure of projects material to that company, a payment that is clearly material to the country may be omitted. This would undermine the intent of the statute.

---

[146] *See* Ibid.

[147] *See* "Sao Tome and Principe: Attorney General finds 'serious flaws' in the award of oil exploration contracts", IRIN, December, 2005 available at http://www.irinnews.org/report.aspx?reportid=57579

[148] *See* Ibid. ("Under the terms of a 2001 agreement establishing the JDZ, Nigeria is entitled to 60 percent of all oil and gas revenues from the formerly disputed waters. Sao Tome gets 40 percent.")

[149] African Economic Outlook, "São Tomé & Príncipe", available at http://www.africaneconomicoutlook.org/en/countries/west-africa/sao-tome-principe/

[150] *See* Ibid. Calculation of approximate percentage of GDP by author.

[151] *See* International Budget Project, Open Budget Survey 2010 available at http://internationalbudget.org/files/OBI2010-SaoTome.pdf (The International Budget Partnership has just released the Open Budget Survey 2010, the only independent, comparative, regular measure of budget transparency and accountability around the world.)

In addition, as Calvert Investment Asset Management Inc. has noted, in the extractive sector "a company's exposure to reputational risk is not necessary correlated to the scale of the entity's investment in a particular country."[152] The Commission came to a similar conclusion, based on previous interpretations of the term "materiality" by the International Accounting Standards Board[153] and the Supreme Court[154] when it concluded:

> [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.

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

In the case of Section 13(q), the relevant context is related not only to the business performance of the issuer, and the unique risks facing issuers[155] 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.[156] 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.

48. Should we permit issuers to aggregate payments by country rather than project? Would that

[152] Calvert Investments, Materiality of disclosure required by the Energy Security through Transparency Act, available at http://www.calvert.com/NRC/literature/documents/10003.pdf http://www.calvert.com/NRC/literature/documents/10003.pdf

[153] 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.").

[154] 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).

[155] "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).

[156] 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 13(q). *See* Grote, Byron, Letter from BP p.l.c. to the SEC dated Feb. 11, 2011 at 6 [*hereinafter* BP submission] ("We accept that other users have an interest in payment information that would be below the materiality levels ordinarily adopted by extractive industry issuers.").

be consistent with Section 13(q)?

"Project" should not be defined to allow for aggregation of project disclosures at the country level.

As discussed in our response to Question 44, allowing issuers to aggregate payments at the country-level, rather than the project-level, is wholly inconsistent with Section 13(q), and would directly contravene one of its key reporting requirements.

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 support the Commission's proposal to apply its existing definitions of "subsidiary" and "control" within rules for Section 13(q) to determine reporting obligations and request that "control" be defined.

We believe that additional guidance may be warranted with respect to the definition of "control" in the extractive industry context. For instance, as described in more detail below, we believe that where a party serves as operator of a joint venture or project, control should be presumed to exist. Such safeguards are necessary to prevent the avoidance of "control" for reporting purposes through the careful structuring of rights and responsibilities within a joint venture or project. Control must be defined such that where, for example, each party to a project is a U.S.-listed resource extractive issuer, at least one such issuer must meet the control definition. We note that disclosure of proportional payments, as discussed in the response to Question 52, would also accomplish the same objectives.

In addition, in adopting its final regulations, we respectfully urge the Commission to be mindful of the varying control relationships that exist between parent and subsidiary corporations. The statute expressly contemplates that Section 13(q) disclosures must cover payments made by a resource extraction issuer or an entity under that resource extraction issuer's control, including subsidiaries. It is unclear, however, whether the statute covers circumstances where the resource extraction issuer has a parent company (or the other related entity) that is not an issuer. We understand that such structures exist and are currently being used to make payments on behalf of the issuer.[157] In its final regulations, the Commission should make clear that when an entity that a resource extractive issuer "controls, is controlled by, or is under common control with" makes payments to governments on behalf of a resource extraction issuer or for the benefit of a resource extraction issuer, those payments must be disclosed by the subsidiary if they would be otherwise covered by the terms of the regulation. This clarification is necessary to ensure that issuers

[157] Recent research details, for example, the extensive links between China National Petroleum Corporation ("CNPC") and its partially publicly traded subsidiary, PetroChina. CNPC frequently makes payments in connection with the resource extraction contracts entered into by PetroChina. Absent clarification, these payments would not be required to be disclosed under Section 13(q). See the report *PetroChina, CNPC, and Sudan: Perpetuating Genocide*, Sudan Divestment Task Force, available at http://home.comcast.net/~berkshire_hathaway/reports/PetroChina_CNPC_Sudan.pdf, and its addendum *The Detrimental Presence of PetroChina/CNPC in Sudan: One Mind, One Will, One Corporation* available at http://investorsagainstgenocide.net/petrochina_cnpc_addendum.pdf

and governments do not circumvent the disclosure requirements mandated by Section 13(q) by funneling payments through entities in a control relationship with a resource extraction issuer.

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 appropriate to disclose payments by an entity under the control of the issuer even though the issuer does not consolidate the entity.

This approach would reflect Congressional intent to capture payments by all entities controlled by an issuer and to require reporting by the greatest number of entities with the broadest geographical and market coverage possible. Such an approach would also be consistent with Commission rules adopted in different, but related, contexts.

The statute is clear in its focus on the notion of control to determine reporting obligations. Therefore, limiting reporting to the narrower category of consolidated entities would be inconsistent with Congressional intent. The statute requires the disclosure of "any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of a resource extraction issuer." The statute distinguishes between the reporting of payments made by (i) subsidiaries, and (ii) entities under the control of the issuer, and specifically requires the disclosure of payments made by both classes of entities. Therefore, requiring the disclosure of payments only by consolidated subsidiaries would be inconsistent with the statute and the Congressional intent to achieve the broadest possible coverage of companies.

The Commission has also solicited comments concerning potential instances "other than control," where a resource extraction issuer should have to disclose payments. As discussed in further detail below, we support the Commission's initial determination that a "facts and circumstances" test is the most appropriate means of determining control for purposes of defining the class of entities subject to reporting.

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?

The rules should require reporting for unconsolidated equity investees and joint venture interests on a proportionate share basis. The rules should require reporting with respect to entities presented on both the proportionate consolidation method and the equity method where a facts and circumstances test determines that control exists.

This would reflect Congressional intent to capture payments by all entities controlled by an issuer and to

require reporting by the greatest number of entities with the broadest geographical and market coverage possible. Such an approach would also be consistent with Commission rules adopted in different, but related, contexts. As noted in our response to Question 50, the reserve reporting rules provide a useful guide for proportionate reporting with respect to unconsolidated equity investees and joint venture interests.

Further, proportionate reporting is consistent with industry practice with regard to payment disclosure.[158] While it should not be determinative of the final rule, we would also note that proportionate reporting should not adversely impact the cost of compliance with Section 13(q) in a significant way. This level of detailed information is already reported to individual members of a joint venture by the operator of the joint venture, as evidenced by existing industry accounting software in common use.[159]

Were the Commission to decide not to require proportionate reporting for unconsolidated equity investees and joint ventures, we believe that a "facts and circumstances" test examining such issues as operatorship may be used to establish a notion of control over a joint venture for the purposes of Section 13(q) implementation, with any controlling issuer responsible for reporting of all payments made by the joint venture (not only the issuer's proportionate share).

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?

<u>The rules should not permit exceptions to reporting which limit the required disclosures to those which an issuer "knows or has reason to know."</u>

Requiring disclosure only of information that the issuer knows or has reason to know would contravene the Congressional intent. Congress did not include any exceptions or qualifications to the requirement that all "resource extraction issuers" disclose all "payments" to foreign governments and to the Federal Government. The statute therefore requires that resource extraction issuers create a mechanism for internal reporting of all such payments so that they may be disclosed. Permitting the reporting entity to claim that it did not "know" about the payment creates an incentive for the resource extraction issuer to establish inadequate mechanism for the collection and reporting of Section 13(q) disclosures and would further create a reporting loophole. . Purposeful not knowing about payments would, in itself, constitute a risk to investors. This contradicts the language of the statute and undermines the spirit of the statute as well.

D.5 Other Matters

[158] BHP Billiton, for example, reports all payments to foreign governments made by entities it owns, regardless of its level of ownership interest and whether or not it was the operator of a project, on an equity share basis. These disclosures were included in BHP's 2010 Sustainability Supplementary Information to fulfill commitments under the Extractive Industries Transparency Initiative. BHP Billiton, Our Strategy Delivers: Sustainability Supplementary Information 2010, at page 26 available at http://www.bhpbilliton.com/bbContentRepository/docs/sustainabilitySupplementaryInformation2010.pdf .

[159] See, e.g., "Joint Venture Accounting with mySAP Oil & Gas" at 11; available at http://www.sap.com/industries/oil-gas/pdf/50051566s.pdf (copy provided with submission).

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.

The Commission should not allow exemptions where the laws of the host country prohibit disclosure.

We strongly support the Commission's proposal that there be no exemptions granted for broad categories of issuers, including for confidentiality agreements or host-country restrictions. As discussed in our response to Question 1, this is consistent with the statutory language. This proposal is also consistent with the Congressional intent, made clear in the Cardin Letter, which states that "[t]he language of Sec. 13(q) is very clear: there should be no exemptions for confidentiality or for host-country restrictions," and that "[t]he 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."

Exceptions for any of the reasons noted in Questions 55 to 57 in the proposed rule would contravene the intent of the statute to indirectly influence foreign governments, and promote international transparency by making available payment information to citizens whose governments may wish to withhold that information from the public.

It is precisely in countries that prevent transparency and disclosure of information where the greatest investment risk lies. Such an exemption could constitute a perverse incentive for countries to create such laws, thereby undermining the purpose and intent of the statute to provide information to investors and promote international transparency. Therefore, we do not support exceptions to the requirements for any of the reasons noted in Questions 55-57.

Finally, to address some of these concerns, we support the proposal by BP that the Commission request assistance from the U.S. agencies to reach out to governments[160] to ensure effective implementation of the statute. We believe this to be essential, particularly in the case of those that may have conflicting laws.

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?

[160] *See* BP Submission ("We also request that the SEC work closely with appropriate US departments and agencies to assist in informing and explaining to all foreign governments impacted by these regulations of the intent and wider implications of these disclosure requirements. We believe such diplomatic efforts are essential to ensure effective implementation of the regulations and will serve to greatly minimise the potential for discord when they come into effect.")

There should be no exemption to the U.S. disclosure requirement if a host country prohibits disclosure.

As stated in the RWI submission, in RWI's experience, laws that would prohibit the disclosure required in Section 13(q) are uncommon. In addition, recent research suggests that most resource-extraction contracts include exceptions for home country disclosure requirements. Further, as stated in the comment from Calvert Asset Management, there is every reason to believe that foreign countries will allow such disclosures: investment contracts allow it, EITI nations have committed to disclosure, and many countries (such as Angola and Brazil) have unilaterally disclosed information similar to that required by Section 13(q).[161]

Industry commentators have requested exemption from disclosure when prohibited by foreign law "…disclosure of revenue payments made to foreign governments or companies owned by foreign governments are prohibited for the following countries: Angola, Cameroon, Qatar and China. If the Commission does not provide an exemption from disclosure when prohibited by foreign law, the Commission will force these companies to either withdraw from these projects or violate foreign law with the potential of incurring penalties and being prohibited from further activity in these countries."[162]

As noted above, research suggests that these cases are uncommon, and therefore, we do not believe it is necessary to include a broad exemption within the rules. Consideration of the specific context in the countries for which concerns have been raised also suggests that broad exemptions are unnecessary.

> Angola - The validity of these claims with respect to Angolan law is questionable. For example, Angola has previously and unilaterally disclosed information similar to that called for by Section 13(q).[163] In addition, we understand that Angolan law implies a general principle of allowing opt-outs from confidentiality clauses for legal compliance purposes and some contracts specifically allow an opt-out for companies to comply with home-country securities regulation. Angolan Production Sharing Agreements ("PSAs") allow opt-outs from confidentiality for compliance with companies' home-country securities regulations. The latest generation of PSAs explicitly state that no information can be disclosed by the operator except "to the extent required by any applicable law, regulation or rule (including, without limitation, any regulation or rule of any regulatory agency, securities commission or securities exchange on which the securities of such Party or of any such Party's Affiliates are listed)."[164] In addition, we would like to note that companies have succeeded in operating transparently in Angola.[165] For instance, Statoil regularly reports payments made to the Angolan government.[166] It is difficult to imagine that the Angolan government would penalize a foreign company for disclosing information to meet a home-country regulatory requirement, when

[161] Bennett Freeman and Paul Bugala, Calvert Investments, and Lisa Wolf, Social Investment Forum, letter to the SEC, Nov. 15, 2010, P5-6, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-49.pdf.
[162] *See* API submission. See also Exxon submission.
[163] *See* Global Witness, *Oil Revenues in Angola: Much more information but not enough transparency* (December 2010), at available at http://www.globalwitness.org/sites/default/files/library/Oil%20Revenues%20in%20Angola_1.pdf.
[164] See latest Sonangol Production Sharing Agreement Template, P. 50 available at http://www.sonangol.co.ao/wps/wcm/connect/790e270047e2f8a19ec4dfd5ee7fe2c3/bid07_cpp_KON11_KON12_cabindaCentro_en.pdf?MOD=AJPERES&CACHEID=790e270047e2f8a19ec4dfd5ee7fe2c3
[165] Peter Rosenblum & Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (RWI 2009), at 30 available at http://www.revenuewatch.org/news/publications/contracts-confidential-ending-secret-deals-extractive-industries. Rosenblum & Maples, p. 30
[166] *See* Ibid.

some Angolan contracts allow such disclosure and when the government itself already publishes equivalent information to a high degree of detail.

Cameroon - Cameroon is a relatively small oil producer by global standards (less than 85,000 barrels per day).[167] We thus consider the suggestion that it would create potential hardship to resource extraction issuers to be overblown. Furthermore, Cameroon is an EITI candidate country, and we believe it is unlikely that it would take legal action against a company which discloses data to the Commission to comply with regulations meant to further transparency. While we are aware that Cameroon publishes its data on revenues paid by extractive companies in the aggregate, the country would face considerable reputational harm as one that aspires to be EITI compliant.[168]

Qatar – Recent action and statements by the Government of Qatar, and the importance of the investments in that country by resource extraction issuers that are EITI supporting companies, suggests that the Government of Qatar may be amenable to granting a waiver or accommodating disclosure by covered issuers.

Firstly, Qatar is supportive of the EITI and hosted the 4th EITI Global Conference in Doha in 2009. The Deputy Prime Minister, Minister of Energy and Industry, and Qatar Petroleum Chairman and Managing Director, Abdullah Bin Hamad Al-Attiyah, stated that the country's hosting of the conference "emphasizes its commitment to EITI's goal of strengthening governance by improving transparency and accountability in the extractives sector."[169] At the conference, Qatar's Minister of State for Energy and Industry Affairs, H.E. Dr Mohammed Saleh Al-Sada, reiterated Qatar's strong support for the EITI and announced that Qatar Petroleum, which controls all aspects of the country's upstream and downstream operations in both the oil and natural gas sectors, will become an EITI supporting company.[170] According to the EITI, "[t]o become an EITI supporter, a company declares their support publicly and help promote the initiative internationally and in countries where they operate."[171] International EITI supporting companies operating in Qatar include, for example, Royal Dutch Shell, ExxonMobil, ConocoPhillips, Chevron, Anadarko Petroleum, BP, and Occidental Petroleum.[172] While Qatar Petroleum dominates the country's oil and natural gas sectors, participation by international oil companies is crucial to the sector's development given their technological capacity.[173]

---

[167] Calculated by dividing 365 days to total yearly production. *See* Republic of Cameroon, Ministry of Finance, Follow-up and Implementation Committee of the Extractive Industries Transparency Initiative (EITI) in Cameroon, Final Report, July 2010 at 19 available at http://eiti.org/files/Raport_CMR_06_07_08_July_2010_EN.pdf, P. 19http://eiti.org/files/Raport_CMR_06_07_08_July_2010_EN.pdf

[168] Several important bilateral aid donors to Cameroon, such as France, Germany, UK, US, European Union, provide financial support to EITI. *See* http://eiti.org/about/mdtf. In addition, the recent backing by President Sarkozy of EU regulations for extractive industry reporting similar to the requirements of the Dodd-Frank Act (see RWI February submission fn. 47 and attachment), suggests that France, Cameroon's largest bilateral aid provider, would be unlikely to respond favorably if Cameroon were to prevent disclosure by resource extraction issuers operating within its jurisdiction.

[169] *See* Conference Programme, 4th EITI Global Conference, Ritz-Carlton, Doha, Qatar, 16-18 February 2009, p. 2 available at http://eiti.org/files/Doha%20Conference%20Programme.pdfP. 2 at http://eiti.org/files/Doha%20Conference%20Programme.pdf

[170] This was noted by EITI as a "key outcome" of the conference. *See* point #5 at http://eiti.org/node/727

[171] *See* Company Support of Implementation at available at http://eiti.org/companyimplementation

[172] *See* Qatar Country Analysis Brief, U.S. Energy Information Administration, U.S. Department of Energy available at http://www.eia.doe.gov/countries/cab.cfm?fips=QA

[173] *See* Ibid. U.S. Department of Energy states "While QP [Qatar Petroleum] owns and operates the onshore Dukhan field and the offshore Maydan Mahzam and Bul Hanine fields, the remaining offshore fields are operated by international oil companies via productions sharing agreements (PSAs)," and "Qatar's focus on natural gas development tends to be integrated large-scale projects linked to LNG exports or

The partnership with Royal Dutch Shell is especially crucial to Qatar.[174] Royal Dutch Shell is Qatar's largest foreign investor, investing over $20 billion since 2005.[175] It recently entered into a $6 billion agreement with Qatar Petroleum to develop a petrochemical plant that will use Shell's proprietary technology to establish Qatar as a globally important petrochemical product producer.[176] Royal Dutch Shell also partners on with Qatar Petroleum on the Pearl Gas to Liquids project, based on proprietary Shell technology[177], estimated at $18 billion[178], and the Qatargas 4 project, estimated at $8 billion.[179] According to Shell, these projects "cement Qatar's place as the Gas to Liquids capital of the world and the world's largest exporter of Liquefied Natural Gas."[180] Shell also provides a number of social, environmental and other programs of value to the Qatar government.[181]

This evidence demonstrates the significant economic and strategic incentives for the Qatar Government to ensure the success of its operating partnerships with the companies mentioned above, in particular, Royal Dutch Shell. Further, given the public commitment to EITI made by the Qatar Government at the EITI conference, and the operating relationship between Qatar Petroleum and several EITI supporting companies, it is reasonable to assume that the Government would be amenable to granting a waiver, or in some other fashion, accommodate disclosure by these companies. It is also reasonable to assume that these companies, in line with their commitment to EITI, would work proactively with the Qatar Government to ensure full EITI implementation. Given this context, we find the suggestion that disclosure would force an issuer to withdraw from projects in Qatar to be overblown.

China – For the last several years, the Chinese government has been signaling its support for transparency in general and EITI in particular. It signed on to 1) the 2008 UN General Assembly Resolution, which emphasized that transparency should be promoted by all Member States[182]; 2) the 2008 G20 Leader's Statement supporting participation in the EITI[183]; and, 3) the 2008 Joint

---

downstream industries that utilize natural gas as a feedstock. Therefore, foreign company involvement has favored international oil companies with the technology and expertise in integrated mega-projects, including ExxonMobil, Shell, and Total."

[174] *See* Royal Dutch Shell Press Release "Shell and Qatar Petroleum to jointly pursue international opportunities", July 6, 2007, available at http://www.shell.com.qa/home/content/qat/aboutshell/media_centre/news_and_media_releases/archive/2007/shell_qatar_petroleum_jointly.html

[175] *See* Royal Dutch Shell, Shell in Qatari Society, available at http://www.shell.com.qa/home/content/qat/environment_society/shell_qatari_society/

[176] The petrochemical plant will be based on Shell's proprietary OMEGA ("Only MEG Advantaged") technology. *See* Royal Dutch Shell, "Shell Enters Multibillion Dollar Deal With Qatar", Seeking Alpha, December 29, 2010, available at http://seekingalpha.com/article/243995-shell-enters-multibillion-dollar-deal-with-qatar

[177] According to Shell's Pearl GTL Project website, the company's proprietary Middle Distillate Synthesis (SMDS) process is "at the heart of the Pearl GTL plant." *See* Pearl GTL Overview available at http://www.shell.com/home/content/aboutshell/our_strategy/major_projects_2/pearl/overview/

[178] *See* "Pearl GTL Set for Big Payback", Upstream Online, March 11, 2008, available at http://www.upstreamonline.com/live/article150373.ece

[179] *See* "Qatargas 4 Price Tag Hits $8bn", Upstream Online, July 11, 2007, available at http://www.upstreamonline.com/live/article137007.ece

[180] Royal Dutch Shell, *See* Shell in Qatar: Shell in Qatari Society, at available at http://www.shell.com.qa/home/content/qat/environment_society/shell_qatari_society/

[181] Royal Dutch Shell, *See* Shell in Qatar: Environment and Society, available at http://www.shell.com.qa/home/content/qat/environment_society/

[182] Strengthening Transparency in Industries, United Nations Resolution 62/274, September 26, 2008 at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/480/15/PDF/N0748015.pdf?OpenElement

[183] China signed the statement along with other G20 countries. Leader's Statement The Pittsburgh Summit, February 24-25, ("We support voluntary participation in the Extractive Industries Transparency Initiative, which calls for regular public disclosure of payments by extractive industries to governments and reconciliation against recorded receipt of those funds by governments.")

Statement of G8 Energy Ministers, which signaled support for EITI implementing countries[184]. As further evidence of Chinese support, EITI has pointed to the Chinese companies that report under the EITI framework in countries such as Gabon, Kazakhstan, Mongolia and Nigeria[185], noting that a Chinese state-owned company representative joined the EITI stakeholder group in Iraq[186]. As noted in the RWI letter, the Hong Kong Stock Exchange (HKSX) adopted far-reaching disclosure requirements for new issuers, which have not deterred companies from listing.[187] Chinese resource extraction issuers have disclosed a significant amount of information on domestic and international production and reserves to comply with U.S. disclosure requirements.[188] Finally, the recent trend towards enshrining Corporate Social Responsibility in Chinese law, regulations and voluntary business practice, with associated requirements of disclosure of corporate performance in the public interest is notable.[189] This evidence suggests that the Chinese government sees the value in increased corporate sector transparency for investors and for the public, and is, in principle, supportive of EITI. It would thus be reasonable to assume that the Chinese government may consider accommodating Section 13(q) disclosures by resource extraction issuers. Moreover, we are aware of no law in China that includes a specific prohibition of payments to the government in the resource extraction context. Therefore, in the absence of specific examples of contracts or domestic laws that would prohibit disclosure, it is difficult to argue that a specific exemption would be needed here.

Given this context described above, we find the suggestion that disclosure would force an issuer to withdraw from projects in these countries to be overblown. We believe that it is not for the Commission to promulgate rules that include exemptions for conflicts with confidentiality clauses in investment contracts or with foreign/host-country laws. We reiterate that allowing such exemptions could have the unintended and extremely detrimental consequence of leading countries to pass laws to prohibit disclosure and that it is in precisely those countries seeking to prevent disclosure that the risk to investors is greatest.

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

---

[184] Joint Statement by Energy Ministers of G8, The People's Republic of China, India and The Republic of Korea, 8 June 2008 at http://www.enecho.meti.go.jp/topics/g8/g8_3sta_eng.pdf ("We welcome the efforts of countries exporting oil and gas as well as minerals that are implementing the Extractive Industries Transparency Initiative (EITI) on a voluntary basis to strengthen governance by improving transparency and accountability in the extractives sector.")

[185] *See* "China in the EITI", February 19, 2010 at http://eiti.org/blog/china-and-eiti

[186] *See* "EITI's evolution from CSR to governance standard is the key to emerging economies", June 8, 2010 at http://eiti.org/blog/eitis-evolution-csr-governance-standard-key-emerging-economies

[187] *See* RWI February submission ("[r]ules require companies to report certain information related to their business operations, including payments made to host country governments in respect of tax, royalties and other significant payments (on a country-by-country basis), … project-specific risks… Since these requirements were passed, nine extractive companies – including Russian and Chinese entities – have listed on the HKEX, namely: United Company Rusal Plc., China Gold International Resources Corp. Ltd., the global mining giant Vale S.A., MIE, Enviro Energy International Holdings Ltd., CITIC Dameng Holdings Ltd., IRC Limited, Mongolian Mining Corporation, and SouthGobi Resources Ltd.")

[188] *See* e.g. CNOOC Limited Annual Report 2009 available at http://www.cnoocltd.com/encnoocltd/tzzgx/dqbd/f20f/images/2010423670.pdf; China Petroleum and Chemical Corporation Annual Report 2009 available at http://english.sinopec.com/download_center/reports/2009/20100514/download/20F.pdf; Petrochina Company Limited Annual Report 2009 available at http://www.petrochina.com.cn/Ptr/Investor_Relations/Periodic_Reports/#

[189] *See* Ahnert, Edward F., Sustainability and CSR Come to China, at http://www.responsiblebiz.biz/sustainability-and-csr-come-to-china

enactment of the Act?

The rules should not provide any exemptions related to host country prohibitions or other efforts to limit disclosure.

See our response to Question 54.

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?

The rules should not provide any exemptions related to existing or future confidentiality provisions.

The Commission should not promulgate rules that include specific exemptions for conflicts with confidentiality clauses in investment contracts or with confidentiality provisions in foreign/host-country laws. We recognize that the reporting requirements for Section 13(q) may create an incentive for some governments to pass laws prohibiting disclosure or for companies to lobby for their introduction in order to avoid reporting requirements. A global survey of over 140 resource-extraction investment contracts commissioned by RWI from the Columbia University School of Law concluded that boilerplate language in most contracts includes an explicit exception for "information that must be disclosed by law," and, in cases where such language is not explicit, it generally would be "read into" any such contract under judicial or arbitral review.[190] See also our responses to Questions 54 and 55.

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?

In PWYP's experience, the existence of transparency decreases unrest and conflict, and is a contributor to increased stability and safety. We urge the Commission not to consider speculative responses to this question, but rather responses that describe prior incidents of disclosure which directly jeopardized the safety and security of a resources issuer's operations or employees, as requested by the Commission. See also our response to Question 44.

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)?

Foreign private issuers should not be exempt from Section 13(q) reporting.

See our response to Question 3.

---

[190] Peter Rosenblum & Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (RWI 2009), available at http://www.revenuewatch.org/news/publications/contracts-confidential-ending-secret-deals-extractive-industries. As the report notes at page 27, many "provisions do not just require compliance with the law of the host state; they also usually state that the parties may make disclosures under any law to which the party is subject."

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?

No exceptions to reporting should be provided for reasons of commercially or competitively sensitive information.

As noted, we welcome and support the Commission's proposal that requires disclosure by all issuers, and does not grant exceptions. There is no reason to believe that adverse competitiveness effects from disclosure will be significant, or that disclosure will lead to the publication of commercially sensitive information to the detriment of issuers' competitive positions. Two distinct claims have been made: 1) that companies subject to this disclosure regime will be at a competitive disadvantage as compared to companies not subject to it, for example by being less attractive in the eyes of foreign governments of resource exporting nations that desire to prohibit disclosure of payments they receive or, in the alternative, 2) that the release of commercially sensitive information will allow competitors to utilize this information in unfair competition with issuers subject to the Act, for example by allowing them to divine the bidding strategies of issuers subject to the Act.

Firstly, the proposed rules for Section 13(q) apply to a very high percentage of those companies listed on stock exchanges around the world, and other markets are beginning to follow Congress's lead. For instance, 90 percent of the top 30 oil and gas companies (as measured by reserves of oil and gas) would be covered by the Act.[191] In addition, recent news suggests that regulations in other markets are likely, helping to address competitiveness concerns. French President Nicholas 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."[192] UK government officials have begun "lead[ing] the government's push to secure a European agreement on the issue."[193]

Secondly, Section 13(q) does not force companies to disclose sensitive or confidential information such as existing, pending or expected contracts with governments. It does not require issuers to reveal any contract terms aside from the payment price to a government. Section 13(q) will not require issuers to reveal contemplated transactions, business models, proprietary technology, or confidential communications. As noted by Oxfam America in their comment to the Commission dated February 21, 2011[194], the commercial realities of deal-making in the extractive industries involve a wide array of complex factors including the fiscal terms offered, technological capacity, capital available, and others. Section 13(q)

---

[191] *See* Kyle Isakower, and Patrick T. Mulva, American Petroleum Institute, letter to the SEC, October 12, 2011 at Attachment B, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-27.pdf

[192] *See* "Sarkozy Tells Bono Will Seek Africa Transparency laws", January 30, 2011, http://www.eubusiness.com/news-eu/africa-france.8dn/?searchterm=sarkozy. *See* also RWI February submission at 11 and in Attachment, available at http://www.sec.gov/comments/s7-42-10/s74210-23.pdf.

[193] *See* "Britain backs 'publish what you pay' rule for oil and mining firms in Africa", The Observer, Feb. 20, 2011.available at http://www.guardian.co.uk/business/2011/feb/20/george-osborne-oil-mining-africa. *See* also "New transparency laws could help millions, says Publish What You Pay", Publish What You Pay Press Release, February 20, 2011, available at http://publishwhatyoupay.org/en/resources/new-transparency-laws-could-help-millions-says-publish-what-you-pay

[194] *See* Offenheiser, Raymond, Oxfam America comment letter to SEC, February 21, 2011, forthcoming at http://www.sec.gov/comments/s7-42-10/s74210.shtml

disclosures do not provide sufficient information to be determinant in creating competitive disadvantage during a bidding process.

The success of companies with robust voluntary disclosure practices suggests that disclosure practices in general are unlikely to weigh heavily among the range of factors upon which competition is based. Companies that publicly disclose their payments to host governments by country include Statoil Hydro,[195] Newmont Mining,[196] Talisman Energy,[197] and AngloGold Ashanti.[198] Most of these same companies have also disclosed project level payments, including Newmont Mining (reporting payments related to projects in Peru, Bolivia, and Ghana)[199] Statoil (reporting payments related to a project in Iran),[200] and AngloGold Ashanti (reporting payments related to projects in Argentina, Guinea, Namibia, and Tanzania).[201] A number of companies also publicly disclose their project-level payments to host governments as a condition for obtaining project financing from the International Finance Corporation, including Peru LNG and Maple Energy plc (both operating in Peru), Improved Petroleum Recovery Group of Companies (IPR) (operating in Egypt),[202] and ExxonMobil (operating in Chad).[203] Together, these suggest that it would be unlikely for disclosure of project payments to be a significant determinant of a company's success in winning a bid.

Regarding the concern that disclosure would breach the terms of an operative contract that prohibits the parties from disclosing such information, we refer to the RWI/Columbia Law School study noted in Question 57. The authors conducted an analysis of information disclosure akin to that required under Section 13(q) (i.e., payment information) and found that most such information would likely already be in the "public domain" (i.e., known to actors within the industry) or would be of such minimal competitive value that, with the exception of references to future transactions and trade secrets (for which Section 13(q) does not require disclosure), they would not be "likely to cause substantial harm" to an issuer's competitive position.[204] As noted, the types of information that are most sensitive within the extractive industries, namely geological data, costs or profits, are not covered by Section 13(q).

Finally, we understand that some commentators have argued that Instruction E to Form 10-K would permit issuers to omit Section 13(q) information with respect to a foreign subsidiary if the disclosure of such information would be detrimental to the registrant.[205] We disagree and respectfully urge the Commission to clarify that Instruction E is not available for Section 13(q) information, just as Instruction E is not available

---

[195] *See* Statoil Hydro, Annual Report 2009, available at http://www.statoil.com/annualreport2009/en/financialperformance/positiveimpacts/pages/overviewofactivitiesbycountry.aspx.
[196] *See* Newmont Mining Corporation, Beyond the Mine Annual Sustainability Report 2009, available at http://www.beyondthemine.com/2009/?l=2&pid=4&parent=17&id=148.
[197] *See* Talisman Energy Inc., Annual Corporate Responsibility Report, 2009, available at http://cr.talisman-energy.com/2009/key-performance-indicators/economic-performance.html.
[198] *See* AngloGold Ashanti, Sustainability Review—Economic Performance, Payments to and Assistance From Government, available at http://www.anglogoldashanti.co.za/subwebs/informationforinvestors/reports09/Sustainability Review09/economic.htm
[199] See Newmont Mining Corporation, Newmont Sustainability Report 2008, Community, Performance, Taxes and Royalties, available at http://www.beyondthemine.com/2008/?l=2&pid%20=4&parent=17&id=144
[200] *See* Statoil *supra* note 12
[201] *See* AngloGold Ashanti, Sustainability Review 2009—Supplementary Information, available at http://www.anglogold.co.za/subwebs/informationforinvestors/reports09/SustainabilityReview09/f/AGA_SD09.pdf
[202] *See* International Finance Corporation, Development— Government Revenues, http://www.ifc.org/ifcext/coc.nsf/content/Disclosure#&Tab=2
[203] *See* Exxon Mobil Corporation, Chad/Cameroon Development Project, Project Update No. 28, Mid-Year Report 2010, http://www.esso.com/Chad-English/PA/Files/28_allchapters.pdf
[204] Rosenblum & Maples, p.*supra* note 100, at pages 36-40.
[205] *See*, e.g., API submission and Exxon submission

for financial statements or financial statement schedules. Permitting Instruction E to serve as a loophole here would risk becoming the exception that swallows the rule.

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 support the Commission's proposed definition of "foreign government" to include "a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government."

This is in keeping with the statute and Congressional intent.[206] It is important as payments to these entities are often significant.

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?

It is not necessary to adopt specific rules regarding payments made by state owned companies that distinguish between transactions between a company and the government and transactions between company and government as shareholder.

It would be prudent, however, to issue guidance to clarify that all payments to a foreign government, as defined (and therefore including companies owned by a foreign government) must be disclosed regardless of what form that payment may take. This is in keeping with the Congressional intent to apply the requirement as broadly as possible.

In practice, extractive operations from which the government receives revenue as a shareholder may not differ in function from those in which it receives payments according to contract or statute. For example, the Yadana gas pipeline in Burma is operated by the Moattama Gas Transportation Company (MGTC), a Bermuda corporation whose shareholders are (i) PTTEP, a Thai state-owned energy company; (ii) MOGE, a Burmese state-owned company; (iii) subsidiaries of Total S.A., and (iv) subsidiaries of Chevron Corp. (as successor to Unocal Corp.).[207] These entities hold shares in MGTC in the same proportion as the stakes they hold in a joint venture that operates the production operation supplying gas to the Yadana pipeline.[208]

[206] SEC Proposed Rule, Disclosure of Payments by Resource Extraction Issuers, Proposing Release, at 43, quoting 15 U.S.C. 78m(q)(1)(B).
[207] Moattama Gas Transportation Company Limited, Register of Members, presented as Def's. Ex. 1034 at trial in *Doe v. Unocal*, No. BC 273860 (Cal. Super. Ct.).
[208] *Compare* MGTC Register of Members, *supra* note [2]*, with* Deed of Assignment of Rights in Yadana Production Sharing Contract, Oct. 31, 1995, presented as Def's. Ex. 1007 at trial in *Doe v. Unocal*, No. BC 273860 (Cal. Super. Ct.).

Moreover, a subsidiary of Total is the sole operator of MGTC,[209] just as Total is also the sole operator of the production joint venture.[210] MGTC pays dividends to its investors, including MOGE, the Burmese state-owned oil and gas company.[211] MGTC's structure thus mirrors the production joint venture, but in the form of an incorporated entity. It may therefore be prudent to provide guidance clarifying that all payments to a foreign government, as defined, and therefore including companies owned by a foreign government, must be disclosed regardless of what form that payment may take.

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?

The Commission should include instructions in the rules clarifying that a company owned by a foreign government includes both companies that are majority owned by a government, as well as companies that are not majority owned by the government, but which the government controls.

Government control of an entity should be determined pursuant to a facts and circumstances analysis, including but not limited to (i) whether the government provides or provided working capital to the entity and (ii) whether the government has the ability to (a) direct economic or policy decisions of the company, (b) appoint or remove directors or other management personnel, (c) restrict the composition of the board of directors, or (d) veto the decisions of the company.[212]

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?

The definition of "foreign government" should be inclusive of sub-national levels of government, as proposed by the Commission.

---

[209] Shareholders Contract Agreement Dated as of January 30th, 1995 Between Total Profils Petroliers and Unocal International Pipeline Corporation and PTTEP International Limited at 9, presented as Def's Ex. 1014 at trial in *Doe v. Unocal*, No. BC 273860 (Cal. Super. Ct.).

[210] *See* Production Sharing Contract for Appraisal, Development and Production of Petroleum in the Moattama Area Between Myanma Oil and Gas Enterprise and Total Myanmar Exploration and Production, presented as Def's Ex. 1002 at trial in *Doe v. Unocal*, No. BC 273860 (Cal. Super. Ct.).

[211] *See*, *e.g.*, MGTC Monthly Financial Report, Statement of Source and Application of Funds as at 31-December-2002, presented as Def's Ex. 1268 at trial in *Doe v. Unocal*, No. BC 273860 (Cal. Super. Ct.) (dividend to MOGE of $5,484,000.00).

[212] *See generally* Accounting Principles Board (APB) Opinion No. 18, *The Equity Method of Accounting for Investments in Common Stock*, March 1971. The "equity method" of accounting for an investment should be used in instances where equity ownership is less than 50% but the investor has the ability to exercise "significant influence," as discussed therein; Exchange Act Rule 12b-2 [17 CFR 240.12b-2] and Rule 1.02 of Regulation S-X [17 CFR 210.102], "control" is defined to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise."

The statute suggests that it was the intention of Congress that the concept of foreign government be interpreted broadly and thus be inclusive of sub-national levels of government because the statute specifies that that electronic tags should include "the government that receives the payments, and the country in which the government is located."[213] This clearly indicates that the drafters anticipated that the identification of a government that receives a payment may not always be the national (i.e., entire country) level governmental unit.

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, of Form 40-F? 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)?

Resource extraction issuers should be required to provide payment information in their Exchange Act annual reports filed on Form 10-K, Form 20-F or Form 40-F.

Section 13(q) defines a resource extraction issuer as an issuer that "is required to file an annual report with the Commission." Where the scope of Section 13(q) is thereby defined by reference to a pre-existing reporting requirement, Congressional intent surely could not have been to relegate the disclosures mandated by Section 13(q) to a separate annual report. Section 13(q) requires the disclosure of information relating to "material benefits," a formulation that clearly signals that Congress viewed the disclosures required under Section 13(q) as being of a piece with information generally required to be included on Form 10-K, Form 20-F or Form 40-F.

Permitting issuers to disclose in a separate annual report would undercut one of the core objectives of the statute—the promotion of accountability—by diminishing the stature and prominence of these disclosures. There would be no benefit to investors, and indeed a separate report would only make the task of evaluating material payment information in the context of an issuer's bigger-picture financial position (as captured in the Exchange Act annual report) more difficult. We therefore support the Commission's preliminary position that reporting in annual reports that are already required to be filed will be "more useful to investors."

[213] 15 U.S.C. 78m(q)(2)(D)(ii)(V).

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)?

There is no need to provide the accommodation set out in Question 69.

Regulation S-X Rule 3-09 allows an accommodation where a registrant is subject to a shorter filing deadline than certain not-consolidated and 50 percent or less owned entities. While the rationale of Regulation S-X Rule 3-09 may apply in the case of an issuer's reporting on payments made by non-consolidated or 50 percent or less owned entities, where such entities are subject to a different filing deadline, we see no reason an issuer should enjoy such accommodations with respect to payments made by the issuer itself or by its consolidated subsidiaries.

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?

Issuers should proved the required information for the fiscal year covered by the applicable annual report.

It is reasonable to require resource extraction issuers to provide the mandated information for the fiscal year covered by the applicable annual report. Such an approach is consistent with our view that the mandated disclosures are akin to other material disclosures included in a resource extraction issuer's annual report. See also response to Question 88. It is true that other users of this information (i.e., non-investors) may have an interest in seeing such disclosures made with respect to a calendar year, so as to afford greater comparability of such disclosure with, e.g., producing country EITI reports. However, we believe that these other users will generally be able to calculate calendar year figures using the electronic data tags required by Section 13(q)(2)(D)(ii), which should indicate the quarter to which any reported payments relate. Given the ability of users to use these tags to calculate calendar year figures, we see no reason to deviate from the standard practice of reporting on a fiscal year basis in the annual report.

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?

Issuers should provide payment disclosures in a registration statement.

We believe Congressional intent underlying the provision would be best served by a requirement that resource extraction issuers provide payment disclosures in a registration statement. We recognize, however, that a requirement that registrants compile data from multiple prior years may impose

disproportionate costs on new registrants relative to current issuers (who are afforded ample time under the legislation to prepare systems for making the required disclosures). Thus, we would recommend that new registrants be required to make disclosures for their most recent fiscal year, provided such fiscal year starts after the publication final rules.

F.2 Exhibits and Interactive Data Format Requirement

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?

Issuers should file the required information in exhibits to Form 10-K, Form 20-F, or Form 40-F as proposed.

We support the Commission's proposal requirement 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 as the exhibits to Form 10-K, Form 20-F, or Form 40-F. This is consistent with the Congressional intent, as made clear by Senator Cardin in his comment of December 1, 2010 "we would expect to see payment information included in reports such as Forms 10-K, 20-F, 40-F or an Annual Report to Security Holders (ARS)." However, to fulfill Congressional intent, these disclosures should be filed rather than furnished. See our response to Questions 87-90.

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?

We support the Commission's proposal that the issuer provide a statement in the annual report, referring to the payment information provided as exhibits, but only if these exhibits are filed.

See our responses to Questions 87-90.

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 support the inclusion of the information as exhibits to the annual report, but only if it is filed.

See our responses to Questions 87-90.

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 prefer that the resource extraction payment information be audited and presented on a cash basis.

To address the Congressional intent of improving accountability by governments for revenues received from the oil, gas and mining sectors, issuers should be required to disclose payment data in a manner that allows it to be reconciled with government receipts as recorded in the government's public finance systems. The experience of EITI indicates that many governments account for payments on a cash basis, and therefore, we recommend that the Commission require issuers to report payments on a cash basis.

EITI criteria require that disclosed "payments and revenues are the subject of a credible, independent audit, applying international auditing standards."[214] However, a recent report by the World Bank[215] indicated that comparability and timeliness of EITI data needs improvement to ensure the initiative can make its necessary reconciliations of domiciled extractive resource company payments and host government receipts. These same challenges of comparability and timeliness are among the reasons why the data produced by EITI processes are of limited use in equity analysis. In PWYP's view, it is critical that the information be used to support the auditing and comparisons needed for effective implementation of EITI national processes.

The disclosure standardization imposed through the implementation of Section 13(q) provides an opportunity for constructive influence on similar efforts to improve comparability within EITI related data. Since EITI data is subject to audit and is reported on a cash basis,[216] it would follow that the disclosures required by Section 13(q) should be included among the content of Forms 10-K, 20-F, 40-F, and other Exchange Act reports reported in a separate section of the relevant report on both a cash and accruals basis. This would accommodate the needs of all of the potential users of the disclosed data.

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

We support the proposal that two new exhibits be created if the information is filed.

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?

We support the Commission's proposal to require disclosure in a new exhibit in HTML or ASCII.

We agree with the Commission's justification that this would facilitate the reading of the information disclosed without additional software.

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

[214] *See* The EITI Principles and Criteria, available at http://eiti.org/eiti/principles

[215] *See* World Bank, "Toward Strengthened EITI Reporting: Summary Report and Recommendations, available at http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266963339030/eifd14_strengthening_eiti.pdf

[216] To ensure that company data can be reconciled with government receipts, EITI requires participating companies to report their payments on a cash basis. *See* EITI Sourcebook. March 2005. Page 30. at http://eiti.org/files/document/sourcebookmarch05.pdf

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?

We support the proposal that the disclosures be provided in XBRL formatting.

Use of XBRL formatting will allow for seamlessly integration with existing company filings formatted in XBRL, as well as the Commission's existing XBRL reporting platform, and with external XBRL-based databases managed by private sector companies. XBRL separately identifies each element of a company's financial statements so that the data can automatically flow into analysts' databases, instead of needing to be manually copied from a text-based filing. The advantages of using XBRL as the required "interactive data standard" for payment disclosure are that (a) the technology and the platform already exist at the SEC and would not need to be custom-built; and, (b) financial-market analysts who are already using XBRL-formatted financial statements will be more likely to start incorporating these disclosures into their analyses and recommendations to investors if those disclosures become part of the existing data stream they employ for analysis. For these reasons, we believe that XBRL would be preferable over XML.

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?

We support the proposal of industry commentators that cash and in-kind payments be reported in the currency in which the payment was made.[217]

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 support a requirement that the issuer identify the fiscal year and quarter in which the payment was made.

[217] *See* API submission and Exxon submission

We support the proposed requirement that issuers include an electronic tag identifying the financial period in which the payment was made. Tagging that includes information on both fiscal year and quarter will allow comparison with government receipts at the national level.

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?

In cases where both a parent company and subsidiary are resource extraction issuers, and the parent is making the disclosures on behalf of the subsidiary, those payments should be tagged with the name of the subsidiary, as the "business segment" making those particular payments.

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?

Where, with respect to a particular jurisdiction, certain payments are levied at the entity level rather than at the lease/license level (e.g., corporate income tax calculated on the basis of all profits within a jurisdiction), this fact should have no bearing on the definition of "project" but, rather, may give rise to a limited reporting allowance whereby issuers could report these payments at an entity level, rather than project-level, for that specific payment only. In these cases, issuers should be required to tag the payment with the other related tags, including payment category, currency, financial period, business segment, government receiving the payment and country in which the government is located.

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)?

Issuers should not be permitted to aggregate payments across payments types and categories.

See our response to Question 44. Payments should be reported by type and category as set out in the statute. Further, we set out a suggested set of types of payments in our response to Question 12. Aggregation of payments would go against the statute, and contravene the Congressional intent.

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 should provide a compilation that includes the full level of detail that companies are required to report under this statute.

The Congressional intent behind this subsection was to ensure that the data was collected from each of the issuers' reports and compiled in one place, in order for the public to be able to find it in a workable format that facilitates comparison of company and country data. Congress foresaw that this rule would provide company reports to investors and others who would be familiar with how to access financial information on the Commission's website and on company websites. In addition, to aid access by a broader public in the U.S. and in other host countries, Congress mandated the Commission to create a "compilation" to make this information more readily accessible to this broader audience. This compilation was meant to be in addition to the required public disclosures by the companies, not in lieu of them.

Some industry commentators have argued that the statute does not call for public disclosure of the payment information and that the only public disclosure required is the "compilation" described in Section (3) of the statute.[218] These commentators further argue that this compilation should contain only the payment information at the country-level, aggregated across issuers. This interpretation of Section 13(q) is squarely at odds with the plain language of the statute, Congressional intent underlying the statute, and the Commission's own preliminary interpretation of the statute. Achieving meaningful disclosure, and thereby increasing accountability, lies at the heart of Section 13(q), and this unsubstantiated "compilation" interpretation would eviscerate any hope of achieving either objective.

As noted, Section 13(q) plainly requires not only the publication of a "compilation" of the required disclosures by the Commission but also the inclusion of the required disclosures in a covered issuer's publicly available annual report. Section 13(q)(2) is captioned "DISCLOSURE" and directs the Commission to promulgate rules requiring resource extraction issuers to "include in an annual report" of the resource extraction issuer information relating to payments made to governments in connection with resource extractive activities. As used throughout the statute, "annual report" consistently refers to annual disclosures made by issuers to the public. Any assertion that, for this narrow point, Congress intended the term "annual report" to mean some type of annual submission for viewing only by the Commission is implausible.

Further, the legislative history of Section 13(q) is replete with references to the investor protection and transparency goals of Section 13(q).[219] The formulation proposed by certain industry commentators would frustrate these goals. Indeed, it is difficult to see what useful information investors or anyone else, could glean from a mere compilation of all payments made by all resource extraction issuers to governments. Contrary to the assertions of these industry commentators, such a disclosure regime would not compliment the EITI, but would fall far short of the EITI's disclosure standards, which require, at a minimum, reporting by both the issuer making the payments and the country to whom the payments are made.

We urge that the Commission's "compilation" of reported payment information take the form of a summary report provided annually and an online database. In order to ensure timely delivery of the information, we urge the Commission to automate the publishing of disclosure data in both the database and summary report formats so that these are made public as soon as reports are submitted by the issuers. We believe

[218] *See*, e.g., API submission
[219] *See* e.g. Floor remarks of Senator Cardin and Senator Lugar, Congressional Record

this is possible given the requirement for issuers to report their payments in an interactive data format.

Drawing from the data reported in interactive format by the issuers, the online database should allow users to download data in bulk, in addition to allowing users to search by country and company, as well as by year or multiple years of reporting. Users should be able to view payment data drawn from multiple years of reporting in order to analyze trends. To allow users to download and manipulate the data, search results should provide the data in HTML format, XBRL, as well as an open format that is usable by a wide variety of spreadsheet programs. Data could be in a CSV or XLS format.

The summary report should list, for each government to which payments are reported to have been made, the total payments by each issuer to that government and total payments within each payment category. Similarly, the report should list for each issuer, the total payments per project, and project payments within each category (where applicable). In addition, each company's disclosures should be included in full in the summary report as annexes.

This compilation has the potential to greatly enhance the benefit of this reporting to both investors and other stakeholders. For instance, a comprehensive listing of all reported payment information relating to a particular country would enable investors to have a better picture of total revenues[220] flowing to a particular government, enabling a more robust assessment of political risk than an analysis of a single company's disclosures. The ease of access to this data will provide an even greater benefit to other users of data, particularly citizens of resource-rich countries who often have little to no information about revenues arising from the extraction and exportation of state-owned resources. Many of these users lack the technical and technological capacity to search through company reports to extract the data relevant to extractive industries in their countries. The Commission's compilation will contribute greatly to the achievement of the goals of the legislation.

EITI reports provide a precedent for compiling the required disclosures. They organize already available information in a manner designed to facilitate an evaluation of company- and project-specific disclosures of material information to provide useful information to the governments, companies and civil society representatives engaged in the initiative. As the needs of investors are different than those engaged in the EITI process, the necessary emphasis must be made on the disclosure of comprehensive, comparable and accurate information.

The recommended compilation forms would enable a number of uses intended by Congress, and have beneficial related impact on the enhancement of EITI. For example, this would address several current challenges facing EITI implementation. As a relatively new initiative, the EITI faces important challenges to meeting the goal of producing reliable, consistent data that improve accountability for extractive industries revenue management. The recommendations would address several key challenges to EITI implementation by providing a model for data disclosure that can be emulated by participating governments and promoted by EITI proponents and members of Multi-Stakeholder Groups and by providing organized, downloadable data for administrators responsible for comparing government and company data submitted for EITI reports. It could also support efforts of EITI proponents in non-candidate countries by

[220] Payments from companies not listed in the U.S. would not be covered. However, where complete coverage is not possible, the EITI may capture additional companies. In addition, disclosing the greatest amount of information possible may allow citizens in resource-rich countries to push for coverage of additional companies through other mechanisms such as EITI and stock exchange disclosure requirements in other markets.

demonstrating the feasibility of corporate payment reporting, as well as providing an example of distribution mechanisms for EITI reports.

F.3 Treatment for Purposes of the Securities Act and the 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?

Resource extraction payment disclosures should be filed rather than furnished.

If such information is filed, we do not object to the use of exhibits. See our response to Question 88.

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)?

We believe that payment disclosures required under Section 13(q) should be filed as a part of the annual report.

This is supported by the plain language of the statute, which defines a resource extraction issuer that is subject to disclosure as one that "is required to *file* an annual report with the Commission." In the absence of specific language in the statute requiring disclosures to be made in some other form, it is reasonable to assume that the disclosures were intended to be made in an issuer's "filed" annual report. The interpretation that the disclosures required do not have to be "filed" in the annual report but can be "furnished" – a term that does not appear in the statute – is inconsistent with the plain language of the statute.

While we agree with the Commission that rulemaking under Section 13(q) must "support the Federal Government's commitment to international transparency promotion efforts," it is clear from the Congressional intent and the inclusion of the provision within the Exchange Act, that Section 13(q) is equally concerned with objectives that are identical in nature and purpose to other disclosures required under the Exchange Act.

We therefore respectfully disagree with the Commission's view and preliminary proposal, which suggests 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."

The record is clear that Congress intended Section 13(q) disclosures to provide information of use to investors to assess risk, as with other 10-K, 20-F, and 40-F disclosures. For example, as noted in Footnote 151 of the Commission's Proposed Rule, Senator Cardin made this intent clear when presenting the legislative amendments that became Section 13(q):

> "Investors need to be able to assess the risks of their investments. Investors need to know where, in what amount, and on what terms their money is being spent in what are often very high-risk

> operating environments. These environments are often poor developing countries that may be politically unstable, have lots of corruption, and have a history of civil unrest. The investor has a right to know about the payments. Secrecy of payments carries real bottom-line risks for investors. Creating a reporting 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 a level playing field. 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."[221]

Congress intended for these disclosures to provide investors with information on risks facing resource extraction operations, particularly political instability impairing current assets and future revenues. Congress chose to amend the Exchange Act, rather than another statute. This demonstrates their view that the types of information covered by Section 13(q) are qualitatively similar to other disclosures required under Section 13 of the Exchange Act.

Further, investor statements and submissions to the Commission make clear the materiality of these disclosures for investors. For example, the "Investors' Statement on Transparency in the Extractives Sector"[222] demonstrates support for the development of mechanisms to promote extractives payment transparency. The Statement was signed by 86 institutional investors, representing $12.3 trillion in assets under management. The Statement was submitted to the Commission by one of its signatories, the Local Authority Pension Fund Forum (LAPFF), which represents an association of 52 UK-based pension funds with combined assets of £90 billion (roughly over $145 billion). The LAPFF reiterated its support for the Investor Statement, which underpins its support of extractives payment transparency by stating:

> "We are concerned that extractive companies are particularly exposed to the risks posed by operating in these environments. Companies that make legitimate, but undisclosed, payments to governments may be accused of contributing to the conditions under which corruption can thrive. This is a significant business risk, making companies vulnerable to accusations of complicity in corrupt behaviour, impairing their local and global "licence to operate", rendering them vulnerable to local conflict and insecurity, and possibly compromising their long-term commercial prospects in these markets."

In addition, Calvert Asset Management explains in its letter to the Commission that Section 13(q) disclosures would be of use to their risk assessment process: "The calculations and assumptions made in this process, especially those regarding a particular project's exposure to political and other transparency-related risks, would be enhanced greatly with the specific data provided by Section 1504 as it is written," and "the specific data provided by Section 1504 also would be very useful in accurate calculation of cost curves that determine whether and for how long a project may remain economic."[223]

---

[221] Floor remarks by Senator Cardin, Congressional Record S3316, May 17, 2010.

[222] *See* Ian Greenwood, Local Authority Pension Fund Forum, letter to the SEC, Jan. 31, 2011, attachment: Investors' Statement on Transparency in the Extractives Sector, available at http://www.sec.gov/comments/s7-42-10/s74210-17.pdf

[223] *See* Bennett Freeman and Paul Bugala, Calvert Investments, and Lisa Wolf, Social Investment Forum, letter to the SEC, Nov. 15, 2010, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-49.pdf

It is thus clear that Congress intended Section 13(q) disclosures to serve to protect investors from the concrete risks presented by the extractives sector and that investors recognize the risks inherent in the sector and would benefit from accurate and reliable information to assess risks. Lowering the status of the required information from "filed" to "furnished" would deprive these investors of certain causes of action normally available to seek redress for misstatements in filed annual reports. It would also undermine investor confidence in the reports. This would contravene the Congressional intent. As a result, we believe that the right of private action afforded by "filing" the required disclosures would serve several important purposes; 1) it would provide remedies for investors and 2) it would incentivize better due diligence for the information disclosed. As the Commission deliberates on the type of investor protection it is willing to afford to these disclosures, we urge the Commission to consider that company misreporting is not uncommon[224] and that EITI reporting experience suggests that reporting quality is lacking.[225]

Furthermore, the Commission has proposed that issuers not be required to audit payment disclosures.[226] This is in contrast to the requirements of EITI, which recognize the critical importance of reliable and accurate payment information and require implementing country governments to "ensure that company reports are based on audited accounts to international standards."[227] In the absence of the quality and accuracy certification that would be provided by audited data, we believe that Section 13(q) disclosures should, at a minimum, be "filed" and incorporated by reference into an issuer's Securities Act filings. Removing the possibility that the required disclosures could be subject to liability under the Securities Act would disincentivize much-needed diligence and reduce the consequences for failing to comply with the law. Moreover, removing the potential for Section 18 liability would even further restrict the avenues of redress available to investors when issuers fail to comply with the disclosure requirements Section 13(q).

Section 13(q) disclosures, in addition to being qualitatively similar to other disclosures required under Section 13 of the Exchange Act, do not share the characteristics of disclosures that issuers have generally been permitted to "furnish." Regulation FD introduced the "furnish" concept in order to allow issuers to "err on the side of filing information that may or may not be material, without precluding a later conclusion that the information was not material."[228] Section 13(q) disclosures relate to "taxes, royalties, fees … and other *material* benefits" (emphasis added), and Congress's recognition of such information as material, as well as the periodic and predictable nature of such payments, precludes any need to balance the need for timely disclosure with the desire to avoid erroneous determinations of materiality, as reflected in Regulation FD.

We would also argue that the language of 13(q) relating to the form of disclosure does not support the weaker "furnish" approach. Section 13(q) calls for the Commission to draft rules requiring resource extraction issuers to "include in" an annual report the relevant information. In its proposed rule release

---

[224] *See* PWYP submission at 22 available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-82.pdf ("On June 30, 2010 the U.S. Department of the Interior ("DOI") assessed a $5.2 million penalty on British Petroleum ("BP") for chronic false reporting of energy production on Southern Ute Indian Tribal lands in Colorado...BP was fined for incorrectly reporting royalty rates and prices to the DOI, and for attributing oil and gas production to the wrong leases.")

[225] *See* World Bank, "Toward Strengthened EITI Reporting: Summary Report and Recommendations, available at http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266963339030/eifd14_strengthening_eiti.pdf

[226] Securities and Exchange Commission, Proposed Rule, Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. at 80,983-84 n.63.

[227] *See* EITI Rules – 2011 Edition, at 17 available at http://eiti.org/files/2011-01-05_DRAFT_EITI_Rules_2011.doc ("EITI Requirement 12: The government is required to ensure that company reports are based on audited accounts to international standards.")

[228] Securities and Exchange Commission, Final Rule, Selective Disclosure and Insider Trading, 17 CFR Parts 240, 243, and 249, available at http://www.sec.gov/rules/final/33-7881.htm

covering certifications required by Sections 302 and 906 of the Sarbanes-Oxley Act of 2002, the Commission justified its position that Section 906 certifications need only be furnished by noting that Section 906 "merely requires that the certifications 'accompany' a periodic report … in contrast to Section 302, which requires the certifications to be included 'in' the periodic report."[229]

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?

<u>The required disclosures should be subject to Section 18 liability.</u>

If the elements of Section 18 can be established—namely that a resource extraction issuer has made false or misleading statements, the reliance on which has caused a seller or a purchaser of shares to suffer damages—then not subjecting these disclosures to Section 18 liability would merely serve to bar an investor from a remedy to which he or she should and would otherwise be entitled.

We would argue that the assumptions underlying Question 89—namely that false or misleading statements relating to resource extraction payment information might impact the price of securities—underscores the notion that Section 13(q) disclosures are <u>not</u> "qualitatively different" from other disclosures required under Section 13 of the Exchange Act. Senator Cardin's strong statements reinforcing the investor protection purposes of Section 13(q), and the language of Section 13(q) itself (deeming covered payments to be "material"), support our argument that putting resource extraction issuers outside the reach of Section 18 would be inconsistent with the purposes of the legislation. See also our response to Question 88.

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?

For reasons set forth above, we strongly believe that Section 13(q) disclosures should be filed and not furnished in an annual report, and use of Form 8-K would be inconsistent with this treatment. However, even if the Commission maintains its preliminary position and requires Section 13(q) disclosures to be furnished rather than filed, Form 8-K would be a less appropriate vehicle for such disclosures than Forms

[229] Securities and Exchange Commission, Proposed Rule, Certification of Disclosure in Certain Exchange Act Reports, 17 CFR PARTS 228, 229, 240, 249, 270 and 274, http://www.sec.gov/rules/proposed/33-8212.htm

10-K, 20-F or 40-F.

Form 8-K is not suitable for annual disclosures under Section 13(q). Payment information covered by Section 13(q) is fundamentally dissimilar from the types of information generally reported on Form 8-K, which generally relates to unanticipated material triggering events. Section 13(q) disclosures, in stark contrast, relate to payments that will be, with very limited exceptions, made periodically according to predictable schedules. Accordingly, Form 8-K seems not only to be an inappropriate vehicle for Section 13(q) annual disclosures, but the use of Form 8-K would likely reduce the usefulness of such disclosures to investors.

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 (e.g. smaller reporting companies or foreign private issuers)? Would 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?

The rules should follow the effective date stated clearly in the law, which requires disclosure in an issuer's annual report related to the fiscal year ending on or after April 15, 2012.

As mentioned previously, we support the Commission's proposal not to allow exemptions, and thus do not support exceptions to this requirement. Exceptions would go against the principle of equal treatment of issuers, and create a competitive disadvantage for those required to report. In this regard, we agree with agree with some industry commentators that state "for consistency and comparability all issuers would be subject to the same effective date."[230]

[230] *See* API submission and Exxon submission