National Mining Association Comments on the Securities and Exchange Commission's Proposed Rule Implementing Section 1504 (Resource Extraction Issuer Disclosure of Payments to Government) of the Dodd-Frank Wall Street Reform and Consumer Protection Act

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Introduction

The National Mining Association ("NMA") is a trade association representing many of the world's largest mining companies, including more than 325 corporations involved in all aspects of the mining industry. The NMA appreciates the opportunity to offer its comments on the rule proposed by the U.S. Securities and Exchange Commission ("SEC") on Disclosure of Payments by Resource Extraction Issuers (the "Proposed Rule") to implement Section 1504 of the Dodd-Frank Act. *See* SEC Release No. 34-63549, 75 Fed. Reg. 80978 *et seq.* (Dec. 23, 2010) ("Proposing Release"). These comments elaborate on and clarify the initial thoughts the NMA offered in advance of the Proposed Rule, in its November 2010 white paper ("NMA White Paper"). For convenience, the questions posed by the SEC are summarized, and numbered according to the numbering used in the Proposing Release, with some paraphrasing or collapsing of multiple questions together. As with the NMA White Paper, the views set forth here are those of the Association as a whole, and are not necessarily the views of any individual NMA member.

Executive Summary

We believe the Proposed Rule and the Proposing Release offer a useful foundation for developing a final rule implementing Section 1504 ("Final Rule") that adheres to the text of the statute, the legislative intent, and the overall statutory purpose of supporting the Extractive Industries Transparency Initiative ("EITI"). As discussed in Part A below, we believe the Final Rule should clarify, however, that the "commercial development" of minerals, consistent with the statute read as a whole, consists of "upstream" activity that is directly related to the process of extraction and production of minerals, and does not include downstream activities, or activities that are merely ancillary or only indirectly related to the core process of moving minerals from the "ground to the smelter or refinery".

As discussed in Part B below, we believe the statutory list of payments to be disclosed is sufficient, and there is no need to identify additional payments that require disclosure. We also firmly agree with the SEC view that the term "not de minimis" is sufficiently clear and does not require definition.

Our views on how the term "project" could be defined or interpreted are set forth in Part C below. In order to reduce the burden on issuers – which we believe would be significantly greater than the Proposing Release estimates, for the reasons discussed in Part I below – it is important for the Final Rule to adopt a definition of "project", or at least permit issuers to interpret that term in most cases in a manner, that is consistent with the concept of a "reporting unit" in the relevant accounting standards. This will allow issuers to rely significantly on existing financial reporting structures in preparing their Section 1504 disclosures.

Several other steps also are critical to limiting the adverse competitive impact of this securities regulation uniquely targeting a specific set of industries, and also to align it with the statute. First, as discussed in Part D below, because Section 1504 is a reporting provision, the definition of "control" found in financial reporting standards (i.e., *consolidation*) should be used (and the Final Rule should not seek to equate "significant influence" with "control", as that would not be consistent with the statute). Second, as discussed in Part E below, we strongly believe that the statute does not seek to override or preclude SEC deference to legitimate foreign laws that may restrict the level of detail disclosed about certain payments (or in some cases, the ability to disclose the payments at all), and that widely-accepted principles of comity should be

followed. Therefore, a reasonable confidentiality exception is very important. Third, as discussed in Part F below, while we generally agree with the definition of "foreign government" reflected in the Proposed Rule, we do question the fairness of requiring more burdensome disclosure of payments to subnational units of foreign governments, when there is no similar requirement to disclose such payments to subnational units of the U.S. government. Fourth, and perhaps most importantly, as discussed in Part G below, we believe the statute clearly allows, the qualitatively unique purpose of the disclosure justifies, and due regard for the need to reduce the burden of the Final Rule compels, permitting issuers to report Section 1504 data in a disclosure, such as on Form 8-K or in the Annual Report to Securities Holders, that is separate from the annual report on Form 10-K (or its equivalent). To the extent the Final Rule does not fully address these concerns relating to burden, we also would request a delay in the effectiveness date for the Final Rule. *See* Part H.

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

There are two aspects to the phrase "commercial development of minerals" that we believe need clarification in the Final Rule or its interpretive guidance. First, there is a need to ensure alignment with the EITI by confirming the focus of the Section 1504 disclosure on "upstream" activities. Second, it is important that the Final Rule focus on those upstream activities that are directly related to, and materially further, the extraction and production process.

Focus on "upstream activities". As discussed in the NMA White Paper (including its Part I in particular), we believe the Final Rule should retain the focus of the EITI on "upstream activities", such as exploration, extraction, and production, and, to the extent associated with production, the activities of processing and export. Under this suggested approach, steps in "production" prior to the smelting or refining phase, such as crushing of raw ore, processing of the crushed ore, and export of processed ore to the smelter, would be covered, thus giving the appropriate meaning to these terms in the statute. 15 U.S.C. 78m(q)(1)(A). Steps including and beyond the "smelting" or "refining" phase, however, would not be covered, thus maximizing consistency with EITI.

While the precise definition of "downstream" and "upstream" in the mining industry is not as well developed as in the oil and gas sector, reasonable lines can be drawn. In the mining industry, the smelting process is analogous to "refining" in the oil and gas industry (in terms of the stage of processing). Indeed, in many instances, the smelting occurs in another country, and often by a third party, far removed from the mine, and is not typically considered to be part of extractive "projects" on which Section 1504 is focused. This underscores how it would not make sense to cover the downstream operations of a mining firm. If downstream operations of an integrated producer were to be covered, then it would seem that Section 1504 also would apply to independent downstream companies such as independent smelters. Yet there is no indication that Congress intended Section 1504 to apply to such firms, who are not considered "extractive firms". The type of activity covered by the statute should not depend on the form of organization (independent versus integrated) the issuer takes. The need to avoid this problem is another reason why "downstream" activities should be excluded.

This approach would be consistent with the EITI and the approach being considered by other international bodies. As the Proposing Release recognizes, "transporting, processing, and refining" are "outside the scope of most EITI programs". 75 Fed. Reg. 80982 (at n.51).

Similarly, in recognition of how such "downstream" activities are not uniquely "extractive", other similar disclosure initiatives, such as the 2010 Draft Discussion Paper issued by the International Accounting Standards Board ("IASB"), plan to exclude "downstream" activities, such as refining, sales, marketing, and distribution. *See* IASB Discussion Paper, DP/2010/1 (April 2010) § 1.12.

Accordingly, we recommend that the Final Rule exclude (or at least not explicitly include) downstream activities that are not typically conducted at the mine site – such as smelting, and the sales and marketing of product that has passed through the smelter (or similar stage of production).

Drawing the line between activities that are directly related to production, and activities that are ancillary. We also recommend that, consistent with EITI, the Final Rule adopt a consistent interpretation of the phrase "commercial development". We believe this term should be interpreted to focus on activities that directly relate to, and provide material support for, the physical process of extracting and processing ore and producing minerals from that ore, including the export of ore to the smelter. Ancillary activities that do not directly and materially further this process, such as development of infrastructure and the community, as well as security support, generally would fall outside this definition, unless they include payments to governments that are expressly required by concession, contract, law, or regulation. This overarching approach underlies our responses in Parts A and B below to the questions in the Proposing Release regarding the scope of the disclosure obligation.

6. Should the SEC define the term "commercial development of minerals" differently from the statute? If so, how?

We agree that, if the Final Rule defines the term, it should use the definition found in the statute. We do not agree, however, that the SEC should interpret this definition as extending beyond EITI, *i.e.,* to include activities beyond the "upstream" activities. In particular, we disagree with the validity of the observation in the Proposing Release that the statute "appears to include activities beyond what is currently contemplated by the EITI". 75 Fed. Reg. 80981. While that view appears to be based primarily upon a post-hoc letter submitted to the SEC by one of the sponsors of the Section 1504 provision in the Senate, such views are not binding, do not necessarily reflect the overall legislative intent because they are not contemporaneous, and by definition cannot reflect the legislative intent in the House of Representatives. Thus, a court would be very unlikely to honor such a letter in construing the statute, and the SEC should not give the letter such weight, either. Moreover, given that the United States has barely begun to participate in the EITI process, it strains credulity to suggest that with this first step the U.S. Congress intended Section 1504 not to "align with" EITI, but to "go beyond it". Policy is made incrementally, and we are not aware of any legislative history contemporaneous with passage of the Dodd-Frank Act indicating that Congress intended the United States to leapfrog the EITI with Section 1504.

7. Should activities, such as "processing" and "export", be excluded from the definition? If so, would that be consistent with the statute?

The statute includes these terms and, accordingly, the Final Rule cannot categorically exclude them. As noted above, however, the SEC should give meaning to these terms that is

consistent with the purpose of the statute – whether in the discussion in the release issuing the Final Rule, in separate interpretative guidance, or in the Final Rule itself. Absent such guidance, at a minimum the Final Rule should not extend these terms beyond "upstream" activities. As noted in the NMA White Paper (top of p. 3) and discussed above, except insofar as these terms relate to the broader concept of "production" (such as when raw ore is crushed and processed at the mine site and exported for smelting or refining), "processing" and "export" are not traditionally upstream activities. Therefore, including these terms generally, without narrowing their application to the "upstream" context, would expand the rule beyond EITI (in a manner that is not consistent with the statute), and also would hamper efforts at reconciling Section 1504 disclosures with information obtained through EITI. In summary, while the Final Rule could construe the terms "processing" and "export" broadly, so as to also cover any type of processing or export including the smelting or refining and further sale and distribution in the "downstream" operations, we believe a narrow interpretation of these terms would be more consistent with the statutory purpose of alignment with, and promotion of, the EITI. *See* NMA White Paper (Section I).

8. Should the SEC include guidance on other activities that may constitute "significant action" related to commercial development of minerals, and that therefore would be covered by the rule? For example, the non-governmental organization Publish-What-You-Pay ("PWYP") suggested including "contracting for security" that may be "necessary for the operation" of a project.

No further guidance is necessary, given that the enumerated activities fully cover the scope of "upstream" activity. With respect to the PWYP comment, as the Proposing Release notes, their suggestion was that such activity "may" be covered. 75 Fed. Reg. 80981. It is not at all clear that the statute *requires* that such activity be covered. Including security also raises the question: where does the boundary of the concept "significant action" end? If security contracts were covered, then this would undermine the rationale in the Proposing Release for not covering other activity, such as "infrastructure", which may well serve a necessary security function. *See* answer to question 22 below. Would the Final Rule also then include food and housing as "significant action" related to commercial development, merely because they are necessary for the on-site personnel? We believe the Final Rule should instead focus on those actions that are directly related to the process of extracting ore from the earth and developing it into a product that enters the "downstream" operations. Hiring or contracting security personnel generally is not a "significant action" related to the movement of ore and the production of minerals. Indeed, it is not a commercial activity, but instead is done for its own sake and for the safety of company personnel and the community (and not necessarily to enable the technical aspects of mining extraction and production). Thus, consistent with the overall approach recommended at the top of Part A above, payments related to such activities should only be included in Section 1504 disclosures to the extent they are made to the government pursuant to express requirements of concessions, contracts, laws, or regulations.

9. Is the Proposing Release's suggestion that "transportation" of minerals, other than for export, is not covered appropriate?

Yes. Excluding "transportation" is consistent with a focus on "upstream" activity, and with the EITI. We note, however, that the term "transportation" does not usually include

movement of ore at the mine site from mine to crusher to processing facility. Rather, we understand "transportation" to mean the movement of processed ore (concentrate) by vehicle or vessel to the smelter or refinery (as well as onward shipment of goods from the smelter or refiners).[1]

10. Should other mining activities, beyond those described in the statute, be excluded from the Proposed Rule's definition of "commercial development" of minerals?

The NMA does not believe there is a valid purpose or basis for deviating from the scope of the term "commercial development" as defined by the statute. The activities specifically enumerated in the statute are those activities that are commonly understood to relate directly to commercial development in the mining industry.

11. Should the SEC provide any further guidance on activities that are within or outside the scope of the definition of "commercial development" of minerals?

Further guidance is not required nor is it recommended, as the statute has a meaningful list of activities that are relevant. To the extent that additional guidance is provided either within the Final Rule or as supplemental guidance, however, the regulation would be less burdensome if the guidance served to limit rather than expand upon the disclosures required. Registrants could rely on the guidance to exclude certain activities from disclosure if they are not "significant actions" related to commercial development, or do not "further" commercial development. For example, as noted above, guidance calling for including security contracts would be unwarranted.

B. Definition of "Payment"

(1) Types of Payments Covered

12. Should the rule include or exclude specific types of payments, or provide guidance on what is covered by the statutory list?

We believe the statute adequately defines what types of payments are included and excluded, though as noted below, we believe further interpretive guidance would be useful.

The definition of "payment" in the statute has two components – a purpose element, and an amount threshold. The amount threshold is discussed in Part B(2) below. Under the purpose element, the statute is clear – it applies only to payments that "further" the commercial development of minerals, oil, and gas, such as those set forth in the statutory list – taxes, royalties, fees, production entitlements, bonuses, and other material benefits that are part of the commonly-recognized revenue stream from the commercial development of minerals, oil, and

[1] Although some mining firms may treat transportation as part of their production process, others do not. For the sake of consistency, we believe all companies should be allowed to exclude transportation. If, however, a company generally treats transportation as part of their production process, they should be allowed to include such payments voluntarily and disclose their inclusion.

gas. The Proposed Rule incorporates these statutory criteria, which we believe is appropriate. The Final Rule should not include additional types of payments beyond these main types, as that would not be called for by the statute and would unnecessarily complicate the reporting process. We also would think it simplest if the body of the Final Rule provided the principles for reporting and not a list of examples (beyond those set forth in the statute).

We believe interpretive guidance in the issuing release would be useful in two areas, in order to reduce uncertainty and burden on registrants. First, we believe the issuing release should include further clarification on what types of "taxes" are covered (*see* question 13 below). Second, we believe the issuing release should clarify whether there are any payments falling into the final "type" of enumerated payments – that both "further" commercial development of minerals *and* constitute "material benefits" to the host government that are part of the commonly-recognized revenue stream from that activity. 15 U.S.C. 78m(q)(1)(C). With respect to this second area for clarification, consistent with our discussion in Part A above and our earlier comments in the NMA White Paper (at p. 3), we believe it is important that the interpretive guidance clarify that the following payments do not satisfy these tests: (a) payments that relate to "downstream" operations (*i.e.*, that do not meet the EITI definition of "upstream" discussed above) such as refining activities; (b) payments that provide only "indirect economic benefits" such as construction of local infrastructure (like schools, roads, hospitals, and the like) that are not primarily used for extractive activities, local purchasing or employment, other forms of community development, security contracts and the like; and (c) payments that are made on behalf of third parties such as vendors, consultants, or employees (withholding taxes, already mentioned above and discussed in the answer to question 13 below, are one type of example).

Accordingly, with respect to item (a), we urge the SEC to clarify that "downstream" activities fall outside the scope of the Final Rule. It is clear that revenues to the government from such activities do not qualify, under EITI, as part of the commonly-recognized revenue stream from the commercial development of minerals. Thus we do not see a valid statutory or policy basis for including them.

With respect to item (b), we encourage the SEC to confirm its apparent position with respect to "indirect economic benefits." The Proposing Release indicates that, in general, the SEC is "not proposing that social or community payments be included in the disclosure" (75 Fed. Reg. 80996) and that payments for infrastructure would not be covered (question 22). We believe that such payments (*i.e.*, social, community and infrastructure payments), as well as security payments, particularly when they are made voluntarily, do not generally further commercial development of minerals or constitute "revenue" from such activity. Accordingly, as discussed in our answers to question 8 above and questions 22 and 23 below, we believe these payments should only be included in Section 1504 disclosures to the extent they are expressly required by concessions, contracts, laws, or regulations.

13. Is the list of taxes that should be included and excluded appropriate, or should it be revised? If it should be revised, how should it be revised?

The disclosure forms in the Proposed Rule include an instruction clarifying which taxes "further" the commercial development of minerals – noting that taxes on corporate profits, corporate income, and production would need to be disclosed, while taxes on consumption such as value-added taxes, personal income taxes, and sales taxes would not need to be disclosed. 75 Fed. Reg. 80999. We agree that the instruction is useful. Because the types of taxes imposed

around the world can vary widely, however, the references to value-added, personal, and sales taxes may not be sufficient. Therefore, as suggested above, we would encourage the SEC to add an instruction that taxes paid (and any other payments made) *on behalf of third parties* are not covered. Because these are not payments by the issuer on its own behalf, it would be misleading to imply that the issuer is furthering commercial development through these payments. It also is worth noting that other types of taxes may be included in voluntary disclosures anyway.[2]

14. Although the SEC believes that the term "payment" would include "in kind" payments, the rule does not make this clear. Should the rule expressly include this?

Yes. If a payment is of the type that is otherwise covered by the statutory criteria, then it should be included, whether it is made in cash or in-kind. Including "in kind" payments would be consistent with the EITI guidance. *See* EITI Source Book (2005) at p. 28 (calling for reporting of production entitlements that are made "in kind"). In order to ensure consistency in reporting, it is recommended that the rule should be explicit and make reference to "in kind" payments, and also allow companies to report the payments at cost (or if not determinable, then at fair market value). We do not believe there is a need to require that the disclosures separately identify "in kind" payments, however. (Of course, if a company finds it useful to do so, it can always do so voluntarily.)

15-17. Should the rule specify which type of fees are covered or excluded? If so, what should be specified? The SEC believes that concession fees, entry fees, and leasing and rental fees would be covered by the term "fees", consistent with the inclusion of such items in the EITI disclosures. Is that appropriate? Should the definition also include fees paid for permits or customs duties?

We do not believe the Final Rule should list types of "fees" that are included, as the statute does not do so and it would be too difficult to capture the various fees that extractive issuers face around the world now and in the future. We therefore believe that any list of types of fees covered, if provided, should align with EITI guidance and be provided separately as interpretative guidance, and not as an extensive list in the Final Rule. This approach also will ensure that the rule can evolve, rather than being tied to a static list, as new types of relevant fees arise in the future, and the scope of EITI reporting evolves as well. It may be useful, however, to clarify that fees that are not designed with a specific focus on the extractive industries are not necessarily part of the "commonly recognized revenue stream" from extractive activities.

18-19. Although the Proposed Rule does not explicitly so state, the SEC believes that issuers generally should follow the definition of "bonus" found in the EITI (see Proposing Release at p. 20). Should the rule provide guidance regarding what is and is not a "bonus"?

[2] Most companies currently disclose, on a voluntary basis, total taxes paid to governments, which can include consumption (and other indirect) taxes (*e.g.*, value-added taxes, payroll taxes, customs and excise duties, etc.). Some companies also include taxes paid on behalf of the government (*e.g.*, employee contributions to social security).

No further guidance is required. We believe the term “bonus” is self-explanatory. If the SEC determines that guidance is required in the future, we recommend that it be provided separately from the Final Rule as interpretive guidance, and should align with the EITI guidance.

20-21. Should the rule specify what may qualify as “other material benefits”, or provide guidance on how that term should be applied? For example, should “dividends” be included here, as they are found in the EITI, even though they are not in the Dodd-Frank Act’s definition?

We do not see a need for guidance that identifies payments that do or may qualify. For example, we do not see a need to include “dividends”. The Proposing Release indicates that the term “dividends” relates to amounts received by the host country government as a shareholder in a state enterprise. 75 Fed. Reg. 80982. These payments essentially are inter-governmental transfers and therefore more appropriate for EITI to track on the government reporting side.[3]

Rather, as noted in response to questions 22 and 23 below, the issuing release should clarify that certain types of indirect economic benefits generally do not qualify.

22. Although the Proposed Rule does not explicitly so state, the SEC believes that payments for “infrastructure improvements” would <u>not</u> *be covered by the rule, as they are not part of commonly-recognized revenue stream and may distort the disclosure. Is that appropriate?*

We agree that voluntary payments for infrastructure improvements cannot be covered because they do not meet the statutory criteria. *See* NMA White Paper (at p. 3). They typically do not constitute part of the commonly-recognized revenue stream from the commercial development of minerals, and often do not further that commercial activity, either. Either way, the statutory criterion is rarely met. For example, when a mining firm voluntarily donates funds for construction of a school, hospital, or public road for use by members of a local community, those payments, even if made to a government body, do not directly relate to, or materially further, the process of moving ore from “ground to smelter”. In any event, costs incurred by companies to develop infrastructure can be included in voluntary sustainable development reports, which many mining firms provide. Accordingly, we do not believe that payments associated with infrastructure should be included, unless they are (a) expressly required by the concession contract, law, or regulation, and (b) are paid to the government,[4] or are paid to fund the development of infrastructure that will be owned by the government.

23. Should the rule provide guidance on whether and which “social or community” payments are covered, such as those that “directly fulfill a condition to engaging in resource extraction activities”?

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[3] Our membership does not include state enterprises that are SEC registrants, such that dividends paid by them is not an issue for us.

[4] To the extent that the Final Rule provides for the inclusion of these payments to governments, we recommend that the issuing release provide interpretive guidance clarifying, for example, that the Final Rule does not apply to payments to nongovernmental bodies for programs that indirectly benefit a government.

As the SEC notes (*see* Proposing Release at n. 64, 75 Fed. Reg. 80984), the NMA White Paper called for a general exclusion of these types of payments. Requiring disclosure of voluntary "social or community" payments would be just as distortive as requiring disclosure of voluntary payments for "infrastructure". Indeed, these categories may overlap in some cases. Therefore we do not believe the Final Rule or its issuing release should require disclosure of such voluntary payments. As noted in response to question 22, to the extent payments are made to governments for socio-economic development, they can be included in voluntary sustainable development disclosures. Accordingly, we believe that payments made to governments for social or community development should only be covered by Section 1504 disclosures if they are made pursuant to explicit requirements of concession contracts or host country laws or regulations.

24. Would it be appropriate for the SEC to clarify, as suggested by PWYP, that "other material benefits" include "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)"?

As noted at the outset of this section B(1), the statute is clear. A payment is only covered by Section 1504 if it furthers the commercial activity and, if not on the enumerated list, it otherwise provides a material benefit to the host government that is part of the commonly-recognized revenue stream from that activity.

Under these criteria, it is clear that payments for liabilities (and related bond guarantees) cannot be covered. These do not further the commercial activity, but instead result from it. Moreover, restitution for damages is not "revenue" to the host government, and also is not a "material benefit" from a project, but instead compensation for an injury.

The other types of so-called "ancillary" payments listed in the question, even if made pursuant to the investment contract, are not covered by the statute if they are not made to governments. (Such payments typically will be covered by the voluntary sustainable development reports in any event.) If such payments are made to governments for activities such as supply of goods or personnel for a commercial mining project, or for training personnel to be used in the project, and are mandated by the concession contract, law, or regulation, then these payments presumably would be subject to disclosure under the "other" category if they provide material benefits. Because there often would be little doubt that such payments "further" the commercial activity, we do not see a need for specific guidance on this point.

25. Should the SEC provide additional guidance, whether as a clarification in the rules or as separate interpretative guidance?

Any additional guidance should be provided separately as interpretative guidance, and not as part of the Final Rule.

(2) The "Not De Minimis" Standard

27. Should the SEC define "not de minimis"? Why or why not? If it does not, should the issuer be required to disclose its definition or methodology?

We understand that the SEC does not intend to define the "not de minimis" threshold below which payments are excluded from the disclosure. 15 U.S.C. 78m(q)(1)(C). Just as the statute does not define the term, we agree with the preliminary SEC conclusion that "the phrase 'not de minimis' is sufficiently clear that further explanation is unnecessary …." Proposing Release, 75 Fed. Reg. 80984. As noted there, in common usage "de minimis" is defined as "lacking significance or importance" or "so minor as to merit disregard". *Id.* After extended consideration of this issue, we would therefore recommend against prescribing any specific methodology, such as requiring registrants to use a quantitative threshold (whether absolute or relative), or requiring adherence to a specific set of rules. Because multiple methodologies may be consistent with the common understanding of the term, there would be little basis for determining that there is only one reasonable methodology for determining what is "not de minimis". The Proposing Release suggests the SEC understandably was not prepared to choose one from the wide range of alternative methodologies that could be applied. Thus, we believe the Final Rule should grant issuers flexibility to apply reasonable methodologies that are consistent with the common usage of the term.

To ensure the information provided is understood and not misleading, it would make sense to require registrants to disclose their methodology. Requiring disclosure also would enable the SEC to issue guidance in case it objected to a certain methodology as unreasonable. Alternatively, in the issuing release, the SEC could set forth an illustrative, but not exhaustive, list of several reasonable alternatives that could be used.

28. If the term "not de minimis" should be defined, indicate what the definition should be and provide data to support that definition.

As noted in response to question 27, we strongly agree that the SEC should not adopt a prescriptive approach by defining the term "not de minimis". In light of the structure of the statute, it is unclear that Congress believed the term needed a definition, either. Whereas the statute provides for the SEC to clarify one part of the definition of "payment" (*i.e.,* what constitute "other material benefits"), the statute does not expressly call for the implementing regulations to define the "not de minimis" element.

If, however, the SEC nonetheless chooses to define the term, it would be useful for the Final Rule to allow issuers to use a mix of quantitative and qualitative criteria similar to those found in Staff Accounting Bulletin (SAB) 99, which is a type of analysis with which issuers are most familiar. Indeed, as noted below in response to questions 26 and 29, we believe it would not be unreasonable for issuers to elect to use the materiality thresholds to determine what is *de minimis.* Even if the Final Rule did not permit that approach, issuers still should be allowed to apply considerations similar to those found in SAB 99. Such considerations could lead issuers, for example, to apply a percentage threshold, an absolute threshold, or a threshold that combines both, as well as to consider the possibility that certain payments falling below thresholds could be qualitatively significant (and therefore not *de minimis*).

29/26. Is the SEC correct that "not de minimis" is different from "material"? If the SEC were to treat the terms as equivalent, would that be consistent with the "language and intent" of the

statute? If so, would the SEC need to provide guidance on the application of the "materiality" standard in this context? What guidance could it provide?

As noted above in response to question 27, we agree with the conclusion by the SEC that it should not define the term "not de minimis". We therefore do not believe it would be appropriate for the Final Rule (or its issuing release) to indirectly define "not de minimis" by declaring that this term is necessarily distinct in all circumstances from the term "material" or considerations that inform decisions regarding materiality. Instead, by allowing each registrant to disclose its methodology for determining what is "not de minimis", the Final Rule should permit registrants who wish to do so to incorporate the existing guidance in SAB 99 that addresses the quantitative aspects[5] and qualitative aspects of "materiality" to be considered when disclosing certain information. Allowing (but not requiring) registrants to define "not de minimis" in appropriate circumstances as "material" would enable registrants to make disclosures based on criteria that are consistent with the financial reporting thresholds applied to the financial information in the annual report and financial statements. Companies already are familiar with this concept, and allowing them to use it would therefore reduce the burden of disclosure under the rule. At the same time, by not defining the term "not de minimis", the Final Rule still would allow companies to prepare disclosures to a lower threshold, if they choose to do so, recognizing that this should be a voluntary decision.

30. Should the rule use an absolute threshold to determine what is "not de minimis", and if so, what should the amount be -- $100,000, a lesser amount as low as $1,000, a greater amount as high as $10,000,0000, or some other amount?

Consistent with our comments in the NMA White Paper and our responses above, we do not believe the Final Rule should mandate the use of an absolute threshold (*i.e.*, a dollar amount threshold). For example, a threshold such as US$100,000 or US$10,000 likely would be too low for large companies, and could be too high for some smaller companies. Setting an absolute amount, even as a component of the definition, would be unduly onerous for larger companies because the absolute amount almost invariably would supersede the quantitative guidelines they use in their financial reporting systems. It would also allow smaller companies making smaller payments to avoid disclosure more often, which might provide them with an unfair competitive advantage. Thus an absolute threshold seems likely to force some companies into unnecessarily onerous disclosures, whilst other companies are able to avoid disclosing payments that may even be material. For example, if an absolute threshold of US$1 million is set, then Company A that makes total payments to governments of $1 billion would be required to prepare the disclosures at an accuracy level of 0.1%, whereas Company B that made total payments to governments of $999,999 would be able to completely avoid making any disclosures whatsoever. This would mislead investors. Investors also are likely to be confused, if not misled, by a threshold such as US$1,000, which would be too low for any company. If a payment threshold of $1,000 were

[5] For example, as the NMA White Paper (p. 9) noted, it would be reasonable for an issuer to adopt a methodology that treated as quantitatively "not de minimis" a benefit stream (payments) in a country where total payments, in the aggregate, was 5% or more of the issuer's gross expenses. *See also* Proposing Release at n. 75, 75 Fed. Reg. 80985 (citing this suggestion).

used, this could lead investors to the incorrect belief that other financial information in the annual report is prepared to a similar level of precision.

31/34-36. Should the rule clarify that what is "not de minimis" varies by the size of the issuer and the nature of the project? Would that be consistent with the statute? For example, should an absolute or percentage threshold depend on the size of the issuer (such 1% or $1,000 for a non-accelerated filer, 2% or $10,000 for an accelerated filer, or 3% or $100,000 for a large accelerated filer)? Or would defining the threshold as the "lesser of two measures", such as a dollar amount or a percentage threshold, address variations in the size of issuers?

As discussed above, we do not believe the term "not de minimis" should be defined. We do not believe any specific methodology should be prescribed to the exclusion of others, and we particularly object to the use of absolute thresholds (whether in whole or in part). Accordingly, issuers should be free to apply any reasonable methodology that they disclose. Moreover, we believe it would be arbitrary to mandate a specific dollar or percentage threshold for certain sizes of issuers. For example, the SEC's existing guidance on materiality, Staff Accounting Bulletin (SAB) 99, accepts using a 5% threshold for the quantitative assessment, and does not prescribe using different thresholds for different types or sizes of filers.

32. Should the term "not de minimis" be defined relative to the percentage of expenses for a project, to the percentage of an issuer's total expenses for the year, to the percentage of an issuer's total expenses in a country for the year, or something else such as revenues, profits, or income? Would such an approach further the intent of the statute and help minimize costs associated with the disclosure?

As discussed above, we do not believe the term "not de minimis" should be defined. We believe issuers should be allowed to adopt a methodology that is based on a single threshold for the company/group as a whole, and should not be required to use a methodology that is based upon expenses for each project.

Requiring relative thresholds would raise the burden on issuers because the denominator (whether expenses, revenues, profits, income, or another metric) typically would not be known with sufficient certainty until a significant period of time after the close of the year, requiring the issuer to look back, thereby delaying its response. *See* NMA White Paper (at p. 5).

Requiring the use of relative thresholds – particularly by reference to a specific country or project – also could cause confusion and lead to incorrect assumptions being made by investors. Issuers generally are not required to disclose country-specific or project-specific expenses, leaving investors unable to evaluate such thresholds. In addition, applying a relative threshold to each country or project would invariably lead to different absolute thresholds for disclosure – which might lead investors to incorrectly assume that the disclosures had been prepared to the same level of precision. Take the following example (which assumes a disclosure trigger of 5% of project expenses):

Company A	**Country/Project X**	**Country/Project Y**	**Country/Project Z**
Total expenses	US$100 million	US$10 million	US$1 million
5% of total expenses	US$5 million	US$500,000	US$50,000

Total payments to governments	US$7 million	US$250,000	US$100,000
Disclosure	US$7 million	–	US$100,000

In the example above, investors would see that Company A has not disclosed any payments for Country/Project Y. By comparison, investors would see US$100,000 disclosed for Country/Project Z. This can easily lead to the incorrect assumption that payments in Country/Project Y likely did not exceed US$100,000 (since payments at that level were disclosed for Country/Project Z). In addition, year-to-year comparisons over the course of a particular project or in a particular country could fluctuate widely, because the reference expense amount would be more volatile than the use of the company expenses as a whole.

33. If a percentage threshold is used, should it be 1%, a lesser amount as low as 0.1%, or a higher amount as high as 5%?

As discussed above, we do not believe the Final Rule should prescribe a particular methodology for determining what is "not de minimis". To the extent a quantitative criterion such as a percentage is applied, issuers should be free to determine their own reasonable, disclosed methodology. The issuer is in the best position to determine what information, in light of its size, structure, and nature of its business, is meaningful and should be disclosed.

37. Should the term "not de minimis" be defined as payments that are "significant" compared to total expenses on a particular project, or with regard to a particular government, for the year?

As discussed in response to question 32 above, defining "not de minimis" by reference to projects or countries would lead to confusing and potentially misleading disclosures. This type of definition also would be particularly complex, and therefore burdensome to implement. For example, under the "significant to a particular project" concept, if a company paid US$1 billion to governments during the year, and US$10,000 was paid to Country A relating to Project X, which had total expenses of US$50,000 (exploration project); and US$500,000 was paid to Country B relating to Project Y (mature operation), which had total expenses of US$100 million; then the US$10,000 would be required to be disclosed, whereas the US$500,000 would not have to be disclosed. Given that the company paid US$1 billion in total to governments, both amounts would not be significant from a quantitative perspective, as they are 0.001% and 0.050% respectively of the total payments to governments by the company (and they would have even less significance when considered in reference to the overall expenses of the company). Under the "significant to a particular government" concept, using the same information above, if Country B was a country with a large state budget, then the US$500,000 would not be significant to the country. However, if Country B was an undeveloped country with a smaller state budget, then it might be significant. It would be potentially burdensome to require issuers to judge the significance of payments to governments, many of which do not participate in EITI (and these who do typically will not release the EITI reports until long after Section 1504 disclosures are due).

38. Because the statute uses the term "not de minimis" in the definition of "payment" and not of the definition of "project", would it be consistent with the statute for the rule to exclude projects that are not material to the issuer (as suggested by the American Petroleum Institute ("API"))?

Yes. As the question suggests, the statute did not state that payments must be disclosed for "every project" or "each project" or "all projects". Because of this, the SEC has discretion on this issue. At the same time, limiting the application of Section 1504 to material projects also would be consistent with several aspects of the Exchange Act. The statutory mission of the SEC, and the general purpose of the Exchange Act into which Section 1504 of the Dodd-Frank Act is incorporated, is the protection of investors, and investors invest in the overall operations of a company worldwide, not in any specific project. If a project is immaterial to a company, then there is no reason to believe that investors would typically be concerned with payments to governments in relation to that immaterial project. While investors would receive little value, the disclosure of payments relating to immaterial activities would be particularly burdensome (because it would require detailed data collection for a host of small, discrete activities). Thus limiting Section 1504 disclosures to material projects also would serve the purposes of Sections 3(f) and 23(a)(2) of the Exchange Act, which calls for consideration of competitive burden.

C. Definition of "Project"

39-40/46. Should the term "project" be defined? Why or why not? If so, what definition should be used, what factors should be included, and what would be the basis for using that definition?

We agree with the SEC view that not adopting a specific definition of "project" would allow flexibility for different types of businesses, and sizes of issuers, to define the term in different ways. *See* Proposing Release, 75 Fed. Reg. 80985. For example, mining issuers should be allowed, if they choose to do so, to give the same meaning to the term "project" in their Section 1504 disclosure as they give to the concept "reporting unit" in their financial reporting systems (similar to the concept of operating segments under the guidance of FASB Accounting Standards Codification (ASC) 280 and IFRS 8, which is familiar to issuers). As elaborated below, the concepts of "project" and "reporting unit" overlap considerably. As a result, by allowing issuers to take this approach, the Final Rule would allow issuers to collect information on a basis with which they already are familiar, and to draw upon established internal controls over financial reporting ("ICFR"), instead of having to reallocate and assign payments arbitrarily at a lower or different level than which they manage their operations, and incurring cost and burden beyond their existing ICFR systems.

It would be relatively easy for the Final Rule to address any potential variance between the "reporting unit" concept and the scope of EITI-type disclosures, such as when a reporting unit encompasses operations in multiple countries. While the NMA believes such instances are rare, to the extent they do occur, issuers would need to develop new reporting systems at or below the country level to gather the data needed for disclosures required by Section 1504. As a result, to ensure consistency with the statute, the Final Rule also could clarify that that an issuer would be allowed to treat any reporting unit as a project, provided that the reporting unit is at or below the country level.

41. Should issuers be required to use the term "project" consistent with the way that term is used in the ordinary course of business? If so, should the issuer be required to disclose their definition or methodology?

As discussed above, the NMA encourages the SEC to allow issuers to treat a "reporting unit" as a project. Because the term "project" may be defined in a wide range of ways in the ordinary course of business of different issuers, merely relying on ordinary course definitions could lead to wide variances and inconsistent uses of the term. By contrast, Section 1504 disclosures will be more standardized and consistent if the Final Rule adopts the term "reporting unit" – whose meaning is well developed in financial reporting and accounting standards. In any event, as the question suggests, it would make sense for the definition or methodology used to be disclosed.

42. Should the term "project" be defined as "a mining property", or should the definition permit the inclusion of more than one mining property?

As discussed above (and in greater detail in our response to question 45 below), we believe issuers should be allowed treat their "reporting units" as "projects" for Section 1504 purposes. Thus, if a "reporting unit" includes multiple mining properties in the same country, then, to that extent, the issuer should be allowed to include multiple properties in its Section 1504 disclosure of data disaggregated at the project-level. As noted above, however, if a "reporting unit" encompasses multiple countries, then the issuer would need to disaggregate that data at least to the country level for consistency with EITI.

Regardless of how the term "project" is defined, we believe that limiting the term to a single mine would be unduly onerous, as there can be significant integration between multiple mines into a single reporting unit. *See* our response to question 45 below; *see also* NMA White Paper (at p. 10) (suggesting that the Final Rule allow issuers to treat exploitation of mineral deposits in an "identified geographic area" as a "project").

43. Would it be appropriate for the rule to use the definition of "development project" found in oil and gas regulations (see discussion at Proposing Release pp. 33-35)?

As indicated above, we do not believe the Final Rule should adopt a specific definition of the term "project". We also have specific reasons to believe that the term "development project" in the oil and gas regulations would not be appropriate in this context. SEC guidance under those regulations indicates that a "development project is typically a single engineering activity with a distinct beginning and end, which, when completed, results in the production, processing or transportation of crude oil or natural gas. A project typically has a definite cost estimate, time schedule and investment decision; is approved for funding by management; may include all classifications of reserves; and will be fully operational after the completion of the initial construction or development." *See* http://www.sec.gov/divisions/corpfin/guidance/oilandgas-interp.htm. This guidance is inappropriate in the mining context, in which projects can sometimes be open-ended, and may not necessarily have a definite cost estimate, time schedule, investment decision or management approval. There also can be different levels of management approval for exploration projects, greenfield developments, and brownfield developments.

Despite its not being an appropriate model for the Final Rule, we note that the approach discussed here would be compatible with Rule 4-10(a)(8) of Regulation S-X. Rule 4-10(a)(8) defines the term "development project" as the "means by which petroleum resources are brought to the status of economically producible. As examples, the development of a single reservoir or field, an incremental development in a producing field, or the integrated development of a group of several fields and associated facilities with a common ownership may constitute a development project." This definition in that context supports the position here that issuers should be allowed to treat an integrated group of several mineral deposits as one project, to the extent multiple deposits are part of the same "reporting unit" (*see* response to question 42 above).

In addition, in the context of Section 1504 disclosure, the "reporting unit" approach is superior to the "development project" approach. Whereas the term "development project" would tend to exclude certain stages of activity, such as prospecting, surveying, and exploration, disclosure on the "reporting unit" basis would cover all types of activity of the "reporting unit". Thus the "reporting unit"-based disclosure would be more comprehensive in capturing, and disaggregating, relevant payments.

44. Should the rule permit issuers to treat all operations in a country as one "project"? Would that be consistent with the statute?

Yes. While the statute uses the terms "country" and "project", this does not preclude the possibility that, in certain countries, in limited circumstances, the appropriate reporting unit may be at the country level. For example, if exploration is occurring under a country-wide concession, without any specific mine being developed, then the "reporting unit" may encompass the country-wide activity.[6] This would not be common, however. Where there are multiple mines in a country, each may be a separate "reporting unit". *See also* Proposing Release, 75 Fed. Reg. 80986 (question 45 noting that the "reporting unit" can be at the operating segment level, or also one level below).

45. Should the term "project" be equated with the term "reporting unit"? Would that ease the burden of reporting? Would that be consistent with the statute?

Yes. Defining "project" as a "reporting unit" would help to reduce the expected burden on companies, as they are already familiar with this concept, which is used for segment reporting in the financial statements. Defining "project" at what amounts to a lower level of financial reporting would involve arbitrary allocation of payments, and would be unnecessarily onerous because it would require the development of an entirely new ICFR system. This potentially could delay the publication of the annual report and financial statements.

Allowing issuers to equate "project" with "reporting unit" is not necessarily inconsistent with the statute. As noted above, the "reporting unit" can be at a level below the "operating segment" level. Therefore, disclosures disaggregated by reporting unit often will provide investors with data that is below the country level. Ensuring some information below the

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[6] In circumstances where a "reporting unit" is at the country level, treating the "project" as the country also would avoid the need arbitrarily to allocate central level payments down across multiple business units and areas of activity, which would be misleading to investors.

country level is available may have been the intent of Congress in requiring project-level disaggregation. Disaggregation by "reporting unit" would further this purpose.

47. Should the term "project" be limited to a project that is "material", and if so, what definition of "material" would be used? Would that be consistent with the statute?

Yes, if the SEC does not allow issuers to exclude payment data for immaterial projects from the disclosure entirely (*see* question 38 above), then it should at least not require that such payment data be disaggregated by project. If the project is immaterial, it presumably has a low level of importance to investors, which the Exchange Act is designed to protect. As a result, not requiring disaggregation for payments linked to immaterial projects could help reduce clutter and enhance the meaningfulness of Section 1504 disclosures.

48. Should the SEC allow issuers to aggregate by country (rather than disaggregate at the project level) certain payments (such as, per n. 84 of the Proposing Release, payments for corporate income taxes, as well as payments for prospecting, surveying, and exploration activities)? Would that be permissible under the statute?

Yes. The statute provides that payments associated with projects be broken out by project. That does not mean that payments that are not associated with projects should still be allocated, somehow, to projects. If Congress had intended that unusual type of reporting, then it presumably would have said so in the statute. Accordingly, we believe the Final Rule should permit certain payments, such as income taxes, which generally are not made on a project basis to be aggregated at the country level, which aligns with how these payments are calculated and is consistent with EITI requirements. Requiring these types of payments to be reported below the country level would result in an arbitrary allocation of these payments, which are not made at that level (for example, a "reporting unit" that is below the country level is not the level at which national income taxes are paid). Disaggregating income tax data would be especially difficult for jurisdictions where tax returns are filed on a consolidated basis. Investors would be better served by allocating these data themselves, based upon their understanding of which projects are carried out in a given country.

D. Definition of "Control"

49. Should the rule adopt a special definition of "subsidiary" and "control" that is different from the Rule 12b-2 definition? If so, why, and what definition should be used?

Yes. Section 1504 is a financial reporting provision. Therefore, the term "control" should be equated with "consolidation", which embodies the criteria for control used in the financial reporting context. *See* NMA White Paper (at p. 3). By contrast, Rule 12b-2 is a general-purpose rule that has a variety of applications, but its definition of "control" is not always suited for every context, particularly here to the extent it would include entities whose financial results are not consolidated. It would not make sense for the Final Rule to impute to the issuer the ability and the requirement to obtain and report financial data concerning a non-consolidated entity, when the accounting standards recognize that the issuer lacks the basic

control needed over the entity to consolidate its results in the first place.[7] In other words, the Final Rule should align with the overall financial reporting regime, rather than with a pre-existing rule that was not issued in this context. At the same time, issuers could be allowed to voluntarily disclose payments by non-consolidated entities, as discussed in response to question 51 below.

50. The definition of "control" in Rule 12b-2 is potentially broader than the concept of "consolidation", and could reach entities whose results are not consolidated with the issuer. Is a requirement to disclose payments by such non-consolidated entities appropriate?

No. As the NMA White Paper indicated, such an approach would not be appropriate, as the broader standard creates greater uncertainty and companies may lack the control needed to ensure access to the necessary information, among other reasons. In particular, the level of influence over equity-accounted structures generally is not sufficient to ensure that issuers could comply with the detailed Section 1504 reporting obligations. *See also* response to question 49 above and 51 below.

51. Should investments presented on the "equity method", whose results are not viewed as "consolidated", be excluded from reporting even if they are "controlled" within the meaning of Rule 12b-2? Should ventures that are "proportionately consolidated" be treated differently?

We believe that joint ventures that are proportionately consolidated should be included in Section 1504 disclosures, but only to the extent the issuer has access to the relevant information. This proviso – conditioning disclosure on access to information – is important. Although an issuer will have access to financial statement data for a proportionally-consolidated venture, the issuer does not necessarily have access to the data needed for the Section 1504 disclosure (which is at a much more granular level). At the same time, to ensure access to information is maximized, the issuer could be required to make good-faith efforts to obtain the necessary data. Further, if the issuer has access to the data, then the payments should be disclosed on a *pro rata* basis (just as consolidation is done on a *pro rata* basis).

By contrast, we do not believe issuers should be required to include equity-accounted entities in the Section 1504 disclosures. Allowing issuers to exclude equity-accounted entities would ensure consistency with the statute, avoid confusing users of Section 1504 reports, and help to prevent Section 1504 from imposing an unreasonable burden.

By definition, equity consolidation occurs under FASB ASC 323 and IAS 28 when there is "significant influence" <u>but not "control"</u>.[8] The statute clearly limits the scope of disclosure to payments by entities that are under the "control" of the issuer. 15 U.S.C. § 78m(q)(2)(A). Accounting standards used for financial reporting provide the most relevant definition of

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[7] Similar to Rule 12b-2, though, the "consolidation" standard would treat a "subsidiary" as any entity over which the relevant company or group has control.

[8] *See* SEC Office of Chief Accountant, Study Pursuant to Section 108(b) of the Sarbanes-Oxley Act (2003) (at Section III.D, observing that "by definition, the acquisition of an equity method investee does not give rise to control."), available at http://www.sec.gov/news/studies/principlesbasedstand.htm.

"control" because Section 1504 is a financial reporting requirement. Accordingly, because the relevant accounting standards make clear that there is not "control" in an equity-accounted situation, requiring disclosure of payments by an equity-accounted entity would not be consistent with the statute. Excluding equity-accounted entities also would be logical. Just as a lack of control over the entity is a significant reason for excluding its overall results from the consolidated financial statements of the issuer, that same reason justifies excluding a part of those results – expenses in the form of payments to governments by that entity – from other financial disclosures such as the Section 1504 disclosure. *See also* responses to question 49 and 50 above.

Further, excluding equity-accounted entities from reporting is an important means of avoiding confusion and the false appearance of discrepancies between Section 1504 and EITI disclosures. If, for example, one issuer presented an entity on an equity method, but another issuer consolidated the results for that entity, then two issuers would have to make disclosures, and the total payments disclosed by both combined would actually exceed 100% of the payments actually made. The consolidating issuer presumably would disclose 100% because it has control, while the issuer who accounted for the entity using the equity method would disclose the payments at least in proportion with its own equity interest. The SEC compilation – or any compilation by users – would then overstate the amount paid to the government. Not only would this mislead investors, but this could even lead to false accusations of embezzlement or corruption by the recipient government, because the SEC or investor compilations would suggest, improperly, that the EITI country disclosures somehow understated the amounts received. That, in turn, could place companies subject to Section 1504 at a competitive disadvantage due to strained relations with host governments.

Finally, a significant burden could be avoided by not *mandating* disclosure of payment data relating to equity-accounted entities. Issuers do not generally apply the ICFR standards to equity investees that they apply to consolidated entities they control.[9] As a result, issuers would not be able to rely upon existing reporting systems to gather accurate, reliable data for Section 1504 disclosures from equity investees. Thus, requiring issuers to disclose payment data by equity investees would impose the significant burden of establishing new reporting systems.

Therefore, on balance, it would be preferable, particularly at this nascent stage of the extractive resource issuer disclosure initiative under U.S. law, to exclude equity-accounted entities from mandatory reporting. We understand the SEC may be concerned that, by not requiring that equity-accounted entities be included in a Section 1504 disclosure, some payments to governments by equity-accounted entities would go unreported. We believe this is a matter that merits further study and review, however, rather than imposing a burdensome and potentially impractical mandatory disclosure obligation before the magnitude of the concern is known. Thus it would be more prudent for the SEC to take an incremental approach, including proportionately-consolidated entities where information is available, but making disclosure on

[9] *See* SEC Division of Corporate Finance, Compliance and Disclosure Interpretations, Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports (Sept. 24, 2007) (Question 2 noting that "[t]he accounts of an equity method investee are not consolidated on a line-by-line basis in the financial statements of the investor, and as such, controls over the recording of transactions into the investee's accounts are not part of the registrant's internal control structure."), available at http://www.sec.gov/info/accountants/controlfaq.htm.

equity-accounted entities voluntary. First, issuers should be allowed, but not required, to report payments made by equity-accounted entities in proportion with their ownership. Issuers could be encouraged, for example, to make good-faith efforts to obtain the data, and to disclose the data available to them, relating to their equity-accounted entities in a separate section of the Section 1504 disclosures. Second, if the SEC prepares a compilation of Section 1504 disclosures, its compilation of Section 1504 disclosures (including mandatory disclosures for proportionately-consolidated ventures and voluntary disclosures for equity-accounted units) could be compared with country-specific EITI disclosures when they are released. Such a comparison should reveal whether, in fact, Section 1504 disclosures are omitting significant payments by entities associated with, but not necessarily under the control of, issuers that are being received by EITI member countries. That comparison then could provide a basis for revising the Final Rule, if necessary.

52. Are there other circumstances, such as the exertion of "significant influence" (suggested by PWYP), or where the issuer is the operator of a joint venture or a project, where the payments should be required to be disclosed? If so, would it be appropriate to require disclosure of amounts that correspond to the proportionate interest of the joint venture?

These situations are adequately covered by the "consolidation" test discussed above. A broader definition of control would not be consistent with the statute, as the relevant accounting standards make clear that "significant influence" is not "control". In addition, multiple issuers could exercise significant influence over an entity, which could lead to confusing Section 1504 disclosures that may even overstate the amount of payments made to the government, as discussed in our response to question 51 above.

53. Should other factors affect what payments must be disclosed? For example, should the rules only require disclosure of information that the issuer "knows or has reason to know"?

Yes, this is consistent with the preparation of the financial statements in the annual report, which are prepared on the basis of information that the company/group knows or has reason to know (with respect to its consolidated group). It would be inappropriate to assume that the company should also be able to prepare disclosure of Section 1504 data that the company does not know, or does not have reason to know. This criterion should not trump the definition of control, however.

E. Confidentiality/Host Country Law Considerations

54. Identify any specific laws that would prohibit making a Section 1504 disclosure, whether at the project or the country level.

Regardless of the extent to which current laws or regulations may prohibit or restrict such disclosures, there can be legitimate reasons for such restrictions, as discussed below in this Part E. Indeed, even the U.S. Minerals Management Service ("MMS") acknowledges that information concerning royalties at or below the "lease" level is "routinely withheld" by it from public disclosure. *See* MMS Guide to Royalty Information (Aug. 18, 2008) at 9, available at http://www.onrr.gov/FOIA/PDFFiles/GuidetoRoyaltyInfo.pdf. In any event, we do not see a

problem with placing an affirmative burden on the issuer to establish that an exception applies in any particular circumstance.

55. Should the rule include an exception from the disclosure requirement where host country laws prohibit disclosure? Would that be consistent with the statute and the protection of investors? If such an exception were used, should the issuer be required to disclose the project and the country subject to such an exception?

Yes. The Final Rule should establish this exception, at a minimum, in order to preserve the potential for some measure of comity between U.S. securities laws and the laws of foreign nations, where they are in conflict. Where Section 1504 demands disclosure, and foreign law prohibits it, then U.S. and foreign law are in true conflict, and the doctrine of comity is implicated. *See generally Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). Without some exception, the Final Rule would leave the ultimate comity determination to the courts, and invite all the potential for circuit splits and uncertainty that brings. That outcome is unnecessary because the issue can and should be addressed in the Final Rule, consistent with the statute, just as the SEC has done in other areas of Regulation S-K. *See* Proposing Release at n.93, 75 Fed. Reg. 80987 (citing similar exception).

While the text of the statute did not include an express exception, it also did not express an intent that the statute apply extraterritoriality in a manner that trumps conflicting foreign law. Therefore, it is only reasonable that the Final Rule proceed on the basis that Congress did not express an intent to interfere with foreign relations by eschewing comity and due respect for the valid laws of foreign sovereign nations. While Congress presumably was aware of the potential for conflicting foreign laws in a provision with such global reach, we are not aware of any legislative history suggesting that Congress sought to override such laws with Section 1504. The Proposed Rule also fails to recognize that foreign governments may have legitimate reason for subjecting information concerning their revenues from disclosure (similarly, the absence of a disclosure requirement for payments at the subnational level in the United States suggests that Congress saw the states may have a valid reason for not wanting such disclosure).[10]

It would be useful for the exception to operate at two levels, in any case where there is a foreign legal restriction on disclosure. First, the more limited exception would be to the requirement of disaggregation at the project-level. *See* NMA White Paper (at pp. 10-11). Where the foreign law would not necessarily be violated by inclusion of data on an aggregated basis, then only this first exception (to the disaggregation requirement) would apply. If the foreign restriction would be violated, even by the disclosure of aggregated data, then there would be a complete exception from the requirement to disclose those data. The issuer could bear the burden of proving the exception applied at each level. The SEC could also consider requiring

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[10] Although a comment letter filed by a legislator after adoption of the statute argues that there should be no exception because it would be "too easy" for a foreign country to pass a law prohibiting disclosure, Proposing Release at n. 94, 75 Fed. Reg. 80988, that letter does not amount to an expression of Congressional intent in the statute. Nor is it clear why adoption of such a law would be "easy", when countries face ever increasing pressure to improve transparency, just as the United States did leading up to the adoption of a provision such as Section 1504.

the issuer to use good-faith efforts to secure the consent of the host country to disclosure, as that may further the statutory purpose of encouraging disclosure.

As with other areas of the disclosure (such as the methodology used to determine what payments are "not de minimis" and the definition of "project"), we understand that issuers will need to be transparent about the approach they take. Thus, if a confidentiality exception applied, then it would be reasonable for the company to disclose the fact that it was prohibited from making the disclosure.

Disclosure of the invocation of an exception would address the key issue from the perspective of investor protection. Investors are principally concerned with the risk of operating in specific countries, and if a company is prohibited from disclosing its payments to the government, but it had to include a statement in its annual report saying that it was prohibited from providing the disclosures, then this, in itself, could be an indicator of increased risk of operating in that country.

56. Should any exception be limited to a prohibition that was in place prior to the enactment of the Dodd-Frank Act? Should the exception be limited to host country statutes or laws, or also cover judicial or administrative orders?

No. The exception should not be so limited. Section 1504 is directed at issuers, not host governments. The SEC should not presume that any host government restriction post Dodd-Frank is illegitimate, as such an approach would effectively discredit the actions of a sovereign authority. As discussed above, an exception should be provided if there is a genuine legal prohibition to the disclosure of such information (even when required by U.S. law), regardless of whether the prohibition existed prior to or was created after the Dodd-Frank Act, and regardless of whether the prohibition is in the statute or is in some other written form, as long as the prohibition is identified and disclosed. If foreign laws tend to limit the scope of Section 1504, then that is an issue for Congress to address, if it so chooses, not the SEC.

57. Should there be an exception for existing or future agreements with confidentiality provisions? Would that be consistent with the statute and the protection of investors?

Yes, the exception should include both existing and future confidentiality provisions in legally-binding agreements. The Final Rule would tend to undercut the rule of law if it mandated breaches of agreements. As previously mentioned, as long as the prohibition is disclosed, this provides investors with necessary information to assess the risk of operating in that country.

58. Are there circumstances where a Section 1504 disclosure would jeopardize the safety and security of the operations or employees of the company? If so, should there be an exception in those circumstances?

Given the difficult environments in which extractive issuers operate, it is conceivable disclosures could jeopardize safety and security of personnel. Where companies determine there is a legitimate threat to safety or security (including by memorializing a threat conveyed verbally), an exception should be available.

59. Should a foreign issuer that is subject to similar disclosure obligations under foreign law or foreign exchange rules be exempted from compliance with the Section 1504 disclosure?

Yes. This is especially relevant, given that the IASB is considering similar disclosures in its Discussion Paper on a new accounting standard for extractive activities, and the European Union is considering similar disclosures for companies in the European Union. Section 1504 is designed to promote EITI, consistent with the goal of promoting a single international standard for disclosures of extractive payments to governments, which will allow comparability across companies and governments (and thereby increase the accuracy of the disclosures). Requiring that foreign issuers comply with multiple, potentially discrepant, disclosure standards would only unfairly increase the burden on these issuers, and would create confusion for investors faced with multiple reports.

Even if an exemption were not granted, foreign private issuers should be allowed to make Section 1504 disclosures consistent with IFRS, to avoid investor confusion and increased burden of converting accounting systems and reporting. This would be consistent with the SEC's exception allowing foreign private issuers to file their financial statements under IFRS instead of U.S. GAAP. (Note that this answer also is relevant to questions 1 and 3, concerning the possibility of an exemption for foreign private issuers, which were not included above to avoid redundancy.)

60. Are there other circumstances where an exception would be appropriate, such as for "commercially or competitively sensitive information" or to prevent breach of a contractual obligation?

Yes. An exception would be appropriate in both circumstances.

A legitimate need to protect "commercially or competitively sensitive information" is a proper basis for an exception, just as there is such an exception in other U.S. disclosure laws, such as the Freedom of Information Act. 5 U.S.C. § 552b(c)(4).[11] This would prevent competitors who are not subject to Section 1504 from gaining an unfair advantage by learning issuers' confidential concession terms. The exception is particularly important from perspective of the project-level disaggregation requirement. Such an exception would be consistent with the need to avoid an undue burden on competition. *See* NMA White Paper (at p. 11) ("To avoid such undue burdens, the SEC rule should allow issuers to aggregate payments at the country level, if disaggregating at the project level would … tend to reveal confidential concession terms or other commercially sensitive information, and thereby provide an unfair advantage to competitors (who could negotiate better terms)"). There also may be rare cases where inclusion of the data at all, even in aggregated form, could compromise commercially or competitively sensitive information. This would be the case, for example, where a company had only one significant project in a country, or data concerning its other projects was publicly-known (such that project-level data could be reverse engineered). These cases likely would be rare, however,

[11] *See also* DoJ FOIA Guide, Exemption 4 (May 2004), available at http://www.justice.gov/oip/exemption4.htm#N_55_ (discussing decisions of U.S. courts exempting federal agency royalty rates from disclosure where such disclosure would interfere with the ability of the agency to enter into royalty agreements).

as illustrated by how many companies already provide voluntary disclosures of common benefit streams, such as royalties and taxes.

As stated in response to question 57 above, we believe that a contractual prohibition on disclosure also should be recognized as having the force of law, just as a law or regulation would, and therefore should be the basis for an exception as well.

F. Definition of "Foreign Government"

61. Should the SEC use the statutory definition?

Yes, we agree that the statutory definition provides the relevant criteria. We have noted comments filed by one legislator after the law was enacted suggesting that regulators should go beyond that criteria, and broaden the definition of "government" to include not only governmental bodies, but also individual government officials, family members, and associates.[12] We strongly disagree with that approach, which is not consistent with the definition in the statute and which is directly contrary to the Congressional intent as reflected in the legislative history.[13] We are not aware of any legislation which defines the term "government" to include its officers, employees, and agents. Payments to officers, employees, and agents of foreign governments already are regulated by the federal securities laws, including the accounting requirements and anti-bribery prohibitions of the U.S. Foreign Corrupt Practices Act. 15 U.S.C. §§ 78m, 78dd-1 *et seq.* Payments to agents of foreign governments for certain purposes are subject to disclosure under the U.S .Foreign Agents Registration Act. 22 U.S.C. § 611 *et seq.* Before adding yet another layer of regulation to these types of payments, the statutory and policy basis for such a dramatic change would need to be developed by Congress, as it does not come from EITI or from Section 1504.

62. Should the SEC provide special guidance on payments that are made by state owned companies to governments?

As noted above, NMA members (including their consolidated entities) generally are not state enterprises. Therefore, this is not a critical issue to our membership.

63. Is the proposed definition of state-owned enterprise as one that is "at least majority owned" appropriate?

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[12] *See, e.g.,* Comments of Sen. Carl Levin (Feb. 1, 2011), at p.4, available at http://www.sec.gov/comments/s7-42-10/s74210-19.pdf.

[13] Although S.A. 3980 to S. 3217 (May 12, 2010) had proposed to define a "foreign government" as "a foreign government, a department, agency, or instrumentality of a foreign government, an officer or employee of a foreign government, *an agent of a foreign government, or a company owned by a foreign government*, as determined by the Commission", the Congress did not adopt the italicized language, and instead adopted the definition at Section 13(q)(1)(B), which excludes that language.

The typical understanding of "majority-owned" is "more than 50%". Subject to this caveat, we agree that the definition is appropriate.

64-65. Should "subnational" government units be included in the definition of "foreign government", as proposed in the rule? Are there some levels of subnational government that should be excluded?

We do not object in principle to including subnational units in the definition. There is an issue of consistency and fairness, however, if payments to subnational units in the United States are not required to be disclosed, while payments to subnational units in foreign countries are required to be disclosed. This would place companies operating internationally at a disadvantage, as they would face more burdensome disclosure obligations (and potentially greater exposure of commercially sensitive data) than companies operating only in the United States. There also is an issue with the increased burden inclusion of foreign subnational units would impose, particularly in relation to the time frame for reporting. If sub-national governmental units are included in the definition of a government, it will take more time and effort to collate, verify, analyze and prepare the information for disclosure. Thus, the disclosure obligation should be limited to payments to the central government as a matter of competitive fairness and consistency, and also because the Proposed Rule would require the Section 1504 disclosure to be included in the annual report to be filed on Form 10-K (or its equivalent for non-U.S. issuers), which must be prepared in short time frame. If the information is to be included on a separate filing at a later date – which the NMA supports, as discussed in Part G(1) below – then it may be feasible to provide more detailed information. In any event, certain payments to subnational governments also often are disclosed separately in voluntary sustainable development disclosures, at a later date, because it takes longer to prepare information at that level.

66. Should payments to subnational governments in the United States be required to be disclosed?

We agree with the clarification in the Proposing Release with respect to the fact that the term "Federal Government" refers to the U.S. national government and not the states or other subnational governments in the United States.

67. Should the SEC provide additional guidance on the definition of "foreign government"?

We agree with the definition of "foreign government" in the proposed rules, and do not think additional guidance is needed (except with respect to the coverage of "subnational" foreign government entities, discussed in response to question 65 above).

G. Disclosure Required and Form of Disclosure

(1) Annual Report Requirement

68. Should the SEC, instead, allow disclosure in a different kind of annual report, such as one that is provided on a new form? What should the time frame for such a filing be (e.g., 30, 60, 90, 120, or 150 days after the end of the fiscal year)?

Yes, we believe that the required disclosure not only should be allowed to be made in a different form of annual report, but that the statute requires that the SEC permit this. Of all the issues that raise questions of interpretation and legislative intent under Section 1504, this is one of the easiest to resolve. As discussed in detail in the NMA White Paper (at p. 5), the text and the legislative intent clearly show that Congress sought to allow issuers flexibility in the form of annual report used. Mandating disclosure in Form 10-K (or its equivalent for non-U.S. issuers), as the Proposed Rule would do, would run directly against the clearly-established legislative purpose. Even comments filed before the Proposing Release, by Senator Cardin (at p. 1), as well as by PWYP (at p. 3), recognize that the statute would permit disclosure in a separate report, such as the Annual Report to Security Holders.

We therefore urge the SEC to carry out the statute's intent to provide issuers with greater flexibility, and thereby reduce the burden of its regulation, by allowing issuers to include the disclosures in a new form to be filed on EDGAR, other than the annual report on Form 10-K (or its equivalent for non-U.S. issuers). This new form could be a furnished 8-K, for example. If the report is provided separately from the Form 10-K (or its equivalent), then the due date should be after the due date for the annual report, to allow sufficient time for the data to be collated, verified, analyzed and prepared. Given that it is typically the same financial reporting team who will have to prepare the annual report and financial statements, as well as the Section 1504 disclosures, we would suggest allowing the Section 1504 disclosure to be furnished up to 150 days after the deadline for filing Form 10-K (or its equivalent).

We do not believe, however, that allowing for routine post-filing amendments is useful, or that such amendments are the appropriate way to address the underlying problem – that the deadline for Form 10-K (or its equivalent) is unrealistic for Section 1504 disclosures in the first place. Such amendments can undermine the perceived credibility of the annual report. Forcing extractive firms into the position of needing to make regular amendments could put them at a competitive disadvantage. By contrast, permitting disclosure outside the Form 10-K (or its equivalent) would give issuers the choice of meeting the deadline for Form 10-K (or its equivalent), or meeting a later deadline for a separate report focused exclusively on Section 1504.

Allowing for disclosure outside the filed annual report also would avoid the potential linkage of Section 1504 disclosures to Sarbanes-Oxley Act certifications and the ICFR framework. *See* NMA White Paper (at p.7). Without a clear statement otherwise in the Final Rule, issuers and investors may well be perplexed as to whether the issuers' executives' periodic certifications under Sections 302, 404, and 906 of the Sarbanes-Oxley Act are intended to cover Section 1504 data furnished in an exhibit. Such a linkage is wholly unnecessary and inappropriate, given that Section 1504 was adopted in connection with the EITI, and not for the purpose of clarifying existing financial reporting obligations. As the Proposing Release notes, Section 1504 disclosures are "qualitatively different from the nature and purpose of existing disclosure that has historically been required under Section 13 of the Exchange Act." This strongly militates against requiring Section 1504 reporting in disclosures that are subject to the Sarbanes-

Oxley Act certification regime.[14] Imposing these costs also would be unfair for a SEC rule focusing on participants in only one industry (extractive), and then only on those participants who are issuers. *See* Section 23(a)(2) of the Exchange Act (prohibiting SEC rules that impose an unnecessary burden on competition of companies that must file Exchange Act reports); *see also id.* at Section 3(f). To the extent any similar securities disclosure provisions have been adopted in other countries (such as on the LSE AIM in the United Kingdom and the Hong Kong Securities Exchange), those are incorporated into listing requirements rather than periodic disclosure requirements, and thus periodic certification burdens are not applied there. The Section 1504 requirement of periodic disclosure therefore already exceeds the level of disclosure required in any other market. Requiring inclusion of the Section 1504 disclosure in the filed annual report would only further exacerbate this imbalance across securities markets.

Finally, allowing for disclosure outside the filed annual report would be consistent with the purpose of Section 1504, and its international counterpart, the EITI. The EITI, which Section 1504 is designed to foster, is not an initiative designed to protect investors; rather, it is designed to promote revenue accountability in host countries. As a result, Section 1504 is not focused on providing information that is material to the investment decision of the average investor, but primarily to allow the public at large to track certain receipts by governments. Comments on similar disclosure requirements considered by the IASB do not show a consensus among investors that such disclosures are material. This fact further supports allowing disclosure outside of filed annual reports. In addition, the SEC rule should take care to avoid any implication that inclusion of a payment stream in the Section 1504 disclosure makes that stream "material" (the mere fact that a payment stream is treated as "not de minimis" should not mean the payment stream is automatically deemed material from a financial reporting perspective).

69. Should issuers be permitted to provide the payment information after the filing of Form 10-K (or its equivalent for foreign issuers), by making an amendment (e.g., 30, 60, or 90 days after the due date of the annual report)?

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[14] If the disclosures are required as an exhibit to Form 10-K (or its equivalent), then we would request that the issuing release with the Final Rule include interpretive guidance confirming that the Sarbanes-Oxley Act certifications do not apply to Section 1504 disclosures, along the following lines: (a) tracking and reporting systems for Section 1504 disclosures do not, by themselves, constitute "disclosure controls" or "internal controls over financial reporting" for purposes of Sections 302 and 404 of the Sarbanes-Oxley Act and rules and certifications implemented thereunder; (b) information that is "furnished" on the Section 1504 exhibit does not fall within the scope of "other financial information in the" 10-K (or its equivalent) for purposes of the certification under Section 302 of the Sarbanes-Oxley Act; and (c) the mere furnishing of Section 1504 data in an exhibit, as opposed to independent management verification of accuracy, satisfies the certification under Section 906 of the Sarbanes-Oxley Act that the annual report fully complies with Section 13(a) or 15(d) of the Exchange Act. There is precedent for this. In 2006, for example, the Director of the Division of Corporate Finance indicated that certain furnished information in the Form 10-K is not covered by a Sarbanes-Oxley Act certification. *See* 2006 WL 3389552 (Oct. 3, 2006) at *6 (noting that, for a compensation report that is "furnished", "even though it will be incorporated into your company's 10-K, your certification will not cover this report").

As discussed above, we believe that allowing for separate reports at a later date would be a far more appropriate approach to addressing the timing issue, and would be consistent with the statute. As noted above, amendments tend to confuse investors, and may undermine the perceived credibility of the annual report; which could put SEC-regulated extractive industry participants at a competitive disadvantage. If the Final Rule nonetheless continues to require disclosure only in Form 10-K (or its equivalent), however, then we agree that allowing for amendments would be necessary to ensure sufficient time for accurate and complete disclosures. The amendment should be allowed to be made up to 150 days after the annual report on Form 10-K (or its equivalent).

70. Is the time frame for filing the annual report on Form 10-K (or its equivalent for foreign issuers) reasonable for providing the Section 1504 disclosure?

Consistent with the discussion contained in the NMA White Paper (at p.5), and as discussed further above, we do not believe the time frame for filing Form 10-K (or its equivalent) is reasonable for the Section 1504 disclosures. It may be more reasonable if the concept of "reporting unit" is used for the term "project", there is sufficient flexibility in applying the term "not de minimis", the term "control" is limited to entities that are "consolidated", and there is an adequate "confidentiality" exception for disclosure prohibited by or pursuant to local law. (If any of these approaches are not adopted, then the burden imposed by the Final Rule will be considerably increased. Normal financial reporting channels will be insufficient to address the Section 1504 burden, payments at a very low level of importance will need to be gathered, and issuers will struggle to obtain information they do not control, all of which will take considerable time.) But even if the Final Rule adopts all of the approaches we urge, it is likely that preparation of the Section 1504 report will require additional time. Mid-size and larger companies also may be at a greater disadvantage, because they will have far more detailed disclosures, but face an even earlier deadline for filing Form 10-K (or its equivalent).

71. Should the Section 1504 disclosure also be required in a registration statement under the Securities Act or the Exchange Act?

The statute, which amends the Exchange Act, clearly requires that the disclosure be made in "an annual report", and does not mandate disclosure in any other place. It therefore would be inconsistent for the Final Rule to bootstrap the statutory criteria into a new disclosure requirement for the registration statement filed under the Securities Act. If Congress had intended this, it would have amended the Securities Act, as well as the Exchange Act. This is not to say, of course, that issuers could not incorporate by reference their Section 1504 disclosure into their registration statement. But that decision should be left to each issuer, in determining what information to provide to investors.

In addition, because Rule 411 under the Securities Act requires that an exhibit be filed before it can be incorporated by reference into a registration statement, requiring disclosure in the registration statement could raise the very liability concerns that the Proposed Rule seeks to mitigate by allowing that Section 1504 disclosures be "furnished". Moreover, mandating disclosure in the registration statement would subject the disclosure to heightened due diligence, increased audit and underwriting costs, and expanded liability standards under Sections 11 and 12 of the Securities Act, none of which are called for with this type of data. As noted in the

response to question 68 above, Section 1504 reports are not so clearly relevant to investors that they merit the same treatment as other types of information covered in the registration statement and periodic Exchange Act reports. If the Final Rule were to take the contrary view, that would place the industry as a whole at a greater competitive disadvantage, and thereby run the risk of violating Sections 23(a)(2) and 3(f) of the Exchange Act.

72. Should the rule require a foreign issuer of over-the-counter American Depositary Receipts ("ADRs") to include the Section 1504 disclosure in their home country annual report, given that such issuers do not file periodic Exchange Act reports?

No. Any requirement to make extractive issuers' disclosure of data on payments to governments a condition to reliance on the 12g3-2(b) exemption would be a significant departure from existing practice, and would be inconsistent with the general principles underlying the exemption. In enacting, amending and maintaining the 12g3-2(b) exemption, the SEC has long recognized that it would be inefficient to impose periodic reporting obligations under the Exchange Act on foreign private issuers that have not sought a public trading market in the United States for their securities. The SEC also has recognized that, as long as those issuers were subject to a disclosure regime in their home market, had a primary trading market outside the United States, and provided U.S. investors with access to public disclosures, U.S. periodic reporting obligations were not necessary for the protection of U.S. investors. The imposition of specific substantive disclosure obligations on issuers relying on Rule 12g3-2(b) would run counter to the premise of the rule, and would raise the obvious question as to why the rule would require affirmative disclosure of resource extraction payment information, but not require the disclosure of other, potentially more material, information about the issuer, its business and financial performance. Mandating any specific disclosure as a condition to the exemption would also undo many of the significant benefits of the SEC's modernization of the Rule 12g3-2(b) exemption in 2008.

(2) Exhibits and Interactive Data Format

73-74/77-78. Is the proposal to require the disclosures in two new exhibits to the annual report, in the formats identified, and to include in the report a heading referring to the exhibit, appropriate?

As discussed in Section G(1) above, disclosure outside the annual report entirely would be more appropriate, and consistent with the statute. The apparent assumption driving the Proposed Rule – that inclusion of this information in exhibits to the annual report on Form 10-K (or its equivalent) is "less burdensome" to filers in that it eliminates the requirement for the filing of a separate annual report – is inconsistent with the potentially new disclosure thresholds being proposed under the "not de minimis" standard, the potential for a definition of project that goes beyond "reporting unit", and the potential for the rule to extend beyond consolidated entities (all of which would require a new financial reporting framework and systems, albeit for these exhibits only) and the Proposed Rule would require such information to be provided in an unduly short time period, consistent with the deadline for filing of a Form 10-K (or its equivalent for foreign issuers). Absent full alignment of the scope of the Final Rule with the SAB 99

thresholds, and the concepts of reporting unit and consolidation, it would be more appropriate to allow a separate report to be filed at a later date.

75. Should additional information, such as a summary of payments, also be required in the body of the annual report?

No, the disclosure should be in the separate document only, and not included in the body of the annual report on Form 10-K (or its equivalent). As the SEC has noted, it would be too cumbersome to include these data in the body of the report, and would distract investors from information that is more commonly used as a basis for investment decisions.

76. Because the statute does not require disclosure on an audited or accrual basis, the Proposed Rule does not contain such a requirement. Is that appropriate? Would including such requirements be beneficial, burdensome, or consistent with the statute?

Such requirements would not be beneficial or consistent with the statute

Requiring issuers to make disclosure on an accrual basis does not seek to promote EITI, whose reporting is generally on a cash basis. *See* EITI Source Book (2005) at 30. Requiring accrual reporting also would suggest that the Section 1504 disclosure is on the same footing, and has the same purpose, as data in the financial statements. That would be inconsistent with the approach in the Proposed Rule that provides for disclosure outside the financial statements and not in the body of the annual report. Finally, requiring accrual-based disclosures also would increase the potential audit burden, as financial statement auditors still could find Section 1504 disclosures relevant to their work.

With respect to auditing, the SEC rule should recognize that payments a company makes to a given government will rarely be "material" from the perspective of most investors who are analyzing the financial information of the issuer as a whole. *See* answer to question 68 above. Substantial recurring costs are associated with auditing the financial data in the exhibits filed on Form 10-K (or its equivalent for non-U.S. issuers), which companies would incur on top of the cost of establishing new tracking and reporting systems to prepare Section 1504 disclosures. Irrespective of audit costs, compliance costs to establish tracking and reporting systems would include (i) the updating of local accounting ledgers to capture the appropriate levels of information by country at the local, regional and international levels on a cash vs. accrual basis, (ii) the training of local accountants to record data consistent with reporting requirements and company policy, (iii) the establishment of policies to more clearly define and describe the required components, (iv) the conducting of internal audits to ensure that policies are being applied appropriately and consistently, (v) the establishment and testing of controls on a periodic basis to ensure compliance, and (vi) the negotiation of agreements with joint venture partners and majority stakeholders to permit such information to be collected, analyzed and disclosed. The auditors then would be required either to audit this information and review the disclosures made, or, at a minimum, to review the process and information to ensure completeness, existence and reasonableness of the information reported. Audit costs would apply not only to the periodic reports, but also for filings in connection with public offerings that incorporate such reports by reference. Therefore, we strongly urge the SEC to leave issuers free to determine the level of auditing or verification for Section 1504 disclosures rather than mandating auditing by requiring Section 1504 disclosures to be integrated into financial statements filed with annual reports.

79. Would the XML format be more appropriate than the XBRL format, for example because XBRL is based on GAPP whereas data on payments in-kind or in cash is not computed in accordance with GAAP? If so, why?

It would be less burdensome if the Final Rule were more flexible, so that issuers would at least have the choice of using XML format that is more consistent with a cash-based report such as the Section 1504 disclosure. At the same time, because XBRL is already being implemented, some issuers may want to choose that format. Investors will not be harmed by either format, so issuers should have the option of using one or the other.

80. Should payment data, including for in-kind payments, be required to be converted and reported in the issuer's reporting currency? Should in-kind payments be required to be converted to the host country currency?

We agree with the requirement of disclosure in the currency in which the payment is made, as this enhances compatibility with EITI. *See* Proposing Release, 75 Fed. Reg. 80991. Similarly, it would make sense for in-kind payments to be reported in the currency of the country where they are made. Conversion of all payments to the reporting currency, while useful for some purposes, should not be required. For one thing, EITI reports are not required to be converted to the issuer's reporting currency. Thus, for the sake of reconciliation with EITI, conversion to the reporting currency is not needed. *See id.* In addition, issuers should not be required to disclose both the home country and reporting country currency, as that could unduly complicate the disclosure.[15]

81. Should the tag for identifying the financial period in which the payment is made also identify the quarter, half-year, or other sub-period of the payment?

No. The statute is clear in its focus on an "annual report". Had Congress intended for quarterly disclosures (or disclosures broken out quarterly), it could have said so or used the more general term of art "periodic report". In addition, foreign private issuers only file their financial information on an annual basis on Form 20-F. Therefore, such information would only be available for the fiscal year. Requiring the information to be tagged for a particular quarter, when certain international filers do not report on a quarterly basis, would be unduly onerous. Domestic issuers should not be required to disclose more data than foreign issuers, as well.

82. Should issuers be allowed to use and disclose their own definition of the term "business segment" for tagging purposes? Or should the SEC define the term" business segment"?

Yes, issuers should be allowed to identify the business segment in accordance with how they operate their businesses, just as they should be allowed to use their reporting unit

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[15] To the extent currency conversion into the reporting currency is required, then the payment amounts should be converted from the local currency into the reporting currency based on the same assumptions applied by the company for financial reporting, *i.e.*, average exchange rate for transactions during the reporting period.

disclosures under existing financial reporting standards as a guide for project-level disaggregation.

83. Are there some payments that would not relate to a particular "project"? For those payments, should the rule require they be allocated to a "project"?

If payments cannot be allocated to a particular project, they should be allocated to the government receiving the payments and tagged accordingly. As noted above, the NMA White Paper suggested that country-wide payments, such as corporate income taxes, should not be required to be allocated or disaggregated on the project level. Alternatively, for such payments, the "project" level should be defined as the country level.

84. Should the rule require tagging of any additional information?

No.

85. Should issuers be allowed to aggregate their payments into three categories of "taxes and royalties", "production entitlements", and "other payments", as requested by API? Would that be consistent with the statute?

We are not certain we fully understand this proposal. As a general matter, however, the greater the aggregation allowed, the lower the burden of tracking, reporting, and disclosing. Such aggregation also could decrease the risk of violating local confidentiality restrictions.

86. Should the "compilation" of Section 1504 disclosures required under the statute be provided by the SEC on an annual basis? On a country basis? What other information should be provided in the compilation?

It would seem reasonable for the compilation to be provided on a calendar-year basis with country level data, as this would best align with EITI..

(3) Applicable Liability Standards Under the Securities Laws

87. Should the disclosure be furnished as an exhibit to the annual report, as proposed?

We agree that the disclosures should be furnished (instead of filed). Allowing disclosures that are furnished, instead of filed, accords them the appropriate level of liability treatment, in light of their relatively lower level of importance to the investment decision. That said, we disagree with commenters who have suggested that allowing disclosure to be "furnished" would deprive investors of a remedy if they are harmed by a materially misleading statement in the Section 1504 disclosure.[16] As noted in the NMA White Paper (at p.8), Section 1504 disclosures are not exempt from the anti-fraud provision of the securities laws found in Section 10(b) of the Exchange Act. Accordingly, Rule 10b-5 would continue to apply to any disclosure made under Section 1504, and to the extent the elements of a private right of action under Rule 10b-5 were

[16] *See, e.g.,* Comments of Sen. Carl Levin at p.3.

met, such an action could be maintained. Allowing disclosures to be furnished does not deprive investors of those pre-existing rights.

As to whether the disclosures should be required to be in exhibits to the annual report on Form 10-K (or its equivalent), as discussed in our answer to question 68 above, we do not believe such a mandate is appropriate or consistent with the statute.

88. Should the disclosure be required to be "filed" instead?

No, the disclosures should not be required to be filed, as the data are not so important to investors to justify imposing additional liability burdens on the issuers providing these data. Requiring a "filing" also would be inconsistent with the statute, which was not prescriptive, but instead intended to allow issuers flexibility as to the form of disclosure made (in "an annual report"). Moreover, requiring a filing could indirectly increase the costs of Securities Act disclosures that incorporate the filing by reference (raising underwriting, auditing, and perhaps even credit rating costs).

89. Should the SEC require the disclosure to be "filed" for purposes of Section 18, but allow the issuer not to incorporate the disclosure into its filings under the Securities Act (for issuance of new securities)?

No. As noted above, there is no basis for requiring the disclosure to be filed. If a filing were required, then the burden and liability risks would increase significantly, regardless of whether the disclosure is incorporated into the Securities Act registration statement. Allowing issuers not to incorporate the filing in Securities Act disclosures would not adequately ameliorate such a burden.

90. Should the disclosure be required to be furnished on Form 8-K (or Form 6-K for foreign issuers) instead? Would that be consistent with the statute?

Yes, for the reasons discussed in Part G(1) above, we strongly believe that the Final Rule should allow the disclosures to be filed outside of Form 10-K (or its equivalent). For those reasons, allowing for a disclosure on Form 8-K (or its equivalent) would be appropriate. This would be consistent with the statute because the instruction to Form 8-K could provide for its being furnished annually – which would satisfy the statutory requirement of disclosure in "an annual report".

H. Effective Date

91. Should the rule provide for a delayed effective date? Would that be consistent with the statute?

The statute says merely that the disclosure must be provided "not earlier than" for the fiscal year ending one year after issuance of the final rule. 15 U.S.C. § 78m(q)(2)(F). Thus the statute grants the SEC wide latitude to set an effective date that is later. We believe that issuers will have to institute significant new reporting systems to comply with Section 1504, which will be even more burdensome if the definition of "project" differs from "reporting unit", the "not de minimis" threshold is set at a low level, or the "control" definition is not fully consistent with

consolidation standards. If any one of these features is included in the Final Rule, then it would be useful to have an extension of the effective date to allow more time to implement new systems to capture, review and report the data. *See* NMA White Paper (at p. 8).

I. Burden Analysis

The burden estimates provided in the Proposing Release are directly relevant to the issue of burden on competition of those subject to the rule under Sections 3(f) and 23(a)(2) of the Exchange Act. In this regard, we do not believe the estimates in the Proposing Release are reasonable. They are substantially too low, particularly for multinationals, which has the unfair effect of underestimating the competitive impact of the rule. While the short time frame for filing these comments has limited our ability to canvas members and develop detailed burden estimates, we are in a position to provide some preliminary observations below.

The Proposing Release estimates that each year, the average resource extraction issuer will not need to spend more than 75 internal personnel hours and US$11,000 on outside auditors and other professionals in "collecting the information, preparing and reviewing disclosure, filing documents, and retaining records" under the Proposed Rule. *See* Proposing Release, 75 Fed. Reg. 80994. The Proposing Release also notes that there may be an additional time and cost burden in the first year in the development of "disclosure controls and procedures to record, process, summarize and report the required payment information." *Id.* at 80997. It is unclear what the Proposing Release estimates the start-up cost to be. It appears that the SEC developed its estimate of the annual hours needed by internal personnel based solely on the rationale that it will take issuers less time to comply with Section 1504 than the 100 or 150 hours the SEC estimates are needed to comply with certain oil and gas rules adopted in 2008. *See id.* at 80994 (n. 166).

We believe the Final Rule should consider the start-up cost in greater depth, including the burden of establishing new reporting and accounting systems, training local personnel on tracking and reporting, and developing guidance to ensure consistency across reporting units. We would estimate the start-up costs, even before producing the first annual report, to be at least 500 hours for a mid-to-large sized multinational under the Proposed Rule.

In addition, we believe that the estimates of annual burden are too low, and perhaps even grossly so. As we represent the mining industry, it is difficult for us to speak to the burden of complying with the 2008 oil and gas rules. But our impression of the 100-150 hour burden described is that it is much lighter than the expected burden of Section 1504 compliance, in light of the complex task of collecting, cross-checking, and analyzing extensive and detailed data from multiple jurisdictions around the world, as well as the potential for protracted time investments (a) seeking information from certain non-consolidated entities that the Proposed Rule apparently views as "controlled" by the issuer, (b) attempting to secure exceptions from foreign confidentiality restrictions, from which the Proposed Rule does not offer relief, (c) obtaining compliance advice on the application of undefined terms, such as "not de minimis" and "project" and implementing new systems based upon those definitions, (d) responding to auditor comments or queries concerning the disclosure, which, although not in the financial statements, still, at least under the Proposed Rule, would be a furnished exhibit to Form 10-K (or the

equivalent for foreign issuers)[17], and (e) any necessary review of Section 1504 disclosures in connection with periodic certifications under the Sarbanes-Oxley Act. In particular, the estimate does not appear to adequately capture the burden to an international company with multiple operations where a wide range/number of personnel will need to be involved in capturing and reviewing the data for the required disclosures as well as for electronically tagging the information in XBRL format. For a company with a hundred projects or reporting units, the burden could easily reach nearly 10 times the estimate set out in the Proposing Release.

Please note that we would expect the time and costs to at least double, if the disclosures were required to be audited (or to be filed or included in a registration statement). This is because we would have to perform additional procedures to verify the submissions from business units, before the disclosures are provided to the external auditors or filed or included in a registration statement.

[17] This tends to contradict the conclusion in the Proposing Release, 75 Fed. Reg. 80997, that providing for disclosure as part of the annual report on Form 10-K (or its equivalent) would reduce the burden, as opposed to allowing for disclosure on a separate form.