March 23, 2020

Vanessa Countryman
Secretary, Securities and Exchange Commission
100 F Street NE,
Washington, DC 20549-1090

RE: File Number S7-24-19, Proposed Rule 13q-1 to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Secretary Countryman,

Oxfam America ("Oxfam") and EarthRights International ("EarthRights") provide the following submission to address specific aspects of the Securities and Exchange Commission's Proposed Rule implementing Section 13(q) added to the Securities Exchange Act of 1934 by Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Section 13(q)" or "Section 1504"). We focus primarily on the Commission's problematic approach to the "not substantially the same" language of the Congressional Review Act (CRA), the Commission's economic analysis, and additional specific areas where the proposed rule is legally vulnerable.

The global transparency landscape has fundamentally shifted in the last three years, as international consensus has solidified around certain key features of effective extractive transparency – most notably, disaggregated reporting at the project-level, defined to mean the contract or lease from which the payment liabilities arise. Certain minimum features are necessary to ensure the rule can meaningfully advance the anti-corruption and accountability goals of Section 13(q) and ensure sufficient basic consistency with the international transparency standard reflected in other markets and the Extractive Industries Transparency Initiative (EITI).

We address the proper interpretation of the CRA's "not substantially the same" language, demonstrating an alternative approach that will best navigate the various legal mandates facing the Commission and minimize the risk of legal challenge. While we believe there is sufficient room for the Commission to make meaningful modifications that result in a rule that is "not substantially the same" as the 2016 Rule, the Commission's proposal, and its overly broad approach to the CRA, impermissibly undermine the statutory objectives and intent of Section 13(q) and cannot be reconciled with the evidence in the record nor current market realities. We outline alternative contours of a final rule that is more squarely supported by the evidentiary record, accounts for recent market developments and changes in the competitive landscape, has a more favorable cost-benefit ratio, and fulfills Section 13(q) while also complying with the CRA.

We also analyze the Commission's economic analysis and find that it does not support the rule as proposed, and fails to meet the Commission's own standards for proposed rules. It omits analysis on requisite costs that must be assessed in order to establish an accurate economic baseline against which to measure the likely economic impacts of the proposed rule and its alternatives.

The proposal also fails to accurately assess "the existing state of efficiency, competition, and capital formation, against which to measure the likely impact of the proposed rule and the principal alternative regulatory approaches."[1] The rule should be reproposed with an adequate economic analysis that meets the clear minimum requirements of the Commission's own guidance.

The Commission deserves credit for the global progress achieved in the last few years, as its leadership has catalyzed the critical advancements leading to international consensus on the most effective, practical and least burdensome standard for extractive transparency. We are eager for the Commission to reassert the U.S. leadership role Congress intended on this issue.

As the Commission knows, we have been actively involved in the rulemaking around Section 13(q) for a decade, and we remain committed to ensuring a strong implementing rule that is sufficiently consistent with regulations in other countries and the EITI. In the context of extreme volatility in the energy markets, precisely the type situation that Congress had in mind as they drafted Section 13(q), the Commission has a unique opportunity to comprehensively and carefully respond to the needs of investors and the public. While we do not wish to see the Commission's third rule end again in litigation, we will follow where the evidence takes us and defend the statute's purpose, and its intended beneficiaries, if necessary.

We appreciate the continued work and dedication the Commission has put into implementation of Section 13(q). As always, we remain eager to be a resource and would be happy to provide more information to the Commission.

Sincerely,

Ian Gary
Director, Power and Money
Oxfam America

Michelle Harrison
Counsel to Oxfam America
EarthRights International

[1] Securities and Exchange Commission, Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012), at 7 https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

I. Significant developments in the global transparency landscape have transformed the competitive landscape and shifted industry norms.[2]

Extractive industry norms and the global transparency landscape more generally have changed dramatically since the Commission's 2016 Final Rule[3] and the February 2017 resolution of disapproval.[4] These changes are highly relevant to, and in many cases directly address, what the Commission identifies as Congress's primary concerns in voting to disapprove the 2016 Rule, and must be reflected in the Commission's assessment of current market realities.

There is now clear international consensus around the most appropriate and effective transparency standard for the extractive industries and multiple years of implementation experience pursuant to that standard. In particular, fully-public, disaggregated, project-level disclosures have become the industry norm. There have now been three or more years of project-level reporting of payments to governments by nearly 800 public, private and state-owned companies under mandatory disclosure regimes in the European Union, the United Kingdom, Norway, and Canada, all of which define "project" to mean "operational activities governed by a single contract, license, lease, concession or similar legal agreement, and form the basis for payment liabilities with a government."[5]

The International Monetary Fund (IMF), which utilizes the same definition of project,[6] in updating its Fiscal Transparency Code in 2019, recognized "project-level disclosure of resource revenues and the publication of contracts" as "key transparency practices" that "are now established as international norms."[7] The IMF emphasizes that "[o]pen and transparent reporting of resource corporations' payments to government is an important element of transparency," and recommends governments "support this process by requiring that companies report on all payments to government, including payments in-kind, on a project-by-project basis where possible."[8] It specifically notes the "important role" that "'home' countries" have to play, and

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[2] Response to questions 1, 2, 37, 71, 89, 92.

[3] SEC, *Disclosure of Payments by Resource Extraction Issuers,* 81 Fed. Reg. 49360 (July 27, 2016) [hereinafter "2016 Final Rule"].

[4]Joint resolution providing for congressional disapproval under chapter 8 of title 5, U.S.C., of a rule submitted by the Securities and Exchange Commission relating to "Disclosure of Payments by Resource Extraction Issuers," Pub. L. No. 115-4 (Feb. 14, 2017) [hereinafter "Resolution of Disapproval"].

[5] *See*, *e.g.*, Directive 2013/34/EU of the European Parliament and of the Council (June 26, 2013), Article 41(4) [EU Directives], *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0034; Extractive Sector Transparency Measures Act (ESTMA) 2014 S.C., ch. 39, s. 376 (Can.), *available at:* https://laws-lois.justice.gc.ca/PDF/E-22.7.pdf. *See also* 2016 Final Rule, 81 Fed. Reg. 49363 n. 58 (2016)(citing contract-level reporting laws adopted in Norway and the U.K.).

[6] International Monetary Fund, Fiscal Transparency Initiative: Integration of Natural Resource Management Issues, at 47-48 (Jan 2019), *available at* https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/01/29/pp122818fiscal-transparency-initiative-integration-of-natural-resource-management-issues ("Operational activities (in the natural resource sectors) governed by a single contract, license, lease, concession, or similar legal agreements that form the basis for payment liabilities with a government. Agreements with substantially similar terms that are both operationally and geographically integrated may be treated by the company as a single project.").

[7] *Id.* at 7.

[8] *Id.* at 15

refers to the disclosure provisions in the European Union, Norway and Canada as representing "an internationally accepted norm."[9]

Based on implementation experience, the EITI, which is now being implemented by 53 countries, has also evolved in the interim period in significant ways to require greater transparency and public disclosure of more information, at a more granular level. The EITI Standard and its evolution represents the express approval of major multinational oil, gas and mining companies, serving on the EITI Board,[10] representing their constituency in the EITI Association.[11] Project-level reporting was first approved by the EITI Board in 2013, and in 2016, the EITI standard was revised to require project-level reporting "consistent with the United States Securities and Exchange Commission rules and the forthcoming European Union requirements."[12] This referred to the Commission's 2016 Final Rule. The 2016 EITI standard also "encouraged" countries to "publicly disclose any contracts and licenses that provide the terms attached to the exploitation of oil, gas and minerals," and required the EITI Report to document the "the government's policy on disclosure of contracts and licenses that govern the exploration and exploitation of oil, gas and minerals," including "relevant legal provisions, actual disclosure practices and any reforms that are planned or underway."[13]

In 2019, the EITI Standard was revised again to specifically provide that data must be "disaggregated by each individual project, company, government entity and revenue stream," and defines "[a] project … as operational activities that are governed by a single contract, license, lease, concession or similar legal agreement, and form the basis for payment liabilities with a government," the same definition used in the EU, U.K., Norway, and Canada.[14] This revision represents six years of discussions and review by industry, civil society, investors and governments and solidifies international consensus as to the proper project definition.

The 2019 EITI Standard also reflects the broader industry shift towards greater transparency in recent years, mandating publication of beneficial ownership information by

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[9] *Id.*

[10] *See e.g.* Comment submitted by BP (Mar. 16, 2020), at 1, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6952845-212570.pdf ("The EITI Standard embodies a global consensus - negotiated between governments, civil society and companies - on a consistent and workable approach to the disclosure of material payments (and other relevant data) with respect to extractive activities.") The industry constituency of the current EITI Board comprises mostly US issuers as well as investors, including: Chevron, ExxonMobil, Total SA, Royal Dutch Shell, BP, Equinor ASA, Rio Tinto, BHP Billiton, AngloAmerican, Southern Peru Copper, and Norges Bank. https://eiti.org/about/board#companies-and-investors-representatives

[11] "The objective of the EITI Association is to make the EITI Principles and the EITI requirements the internationally accepted standard for transparency in the oil, gas and mining sectors, recognising that strengthened transparency of natural resource revenues can reduce corruption, and the revenue from extractive industries can transform economies, reduce poverty, and raise the living standards of entire populations in resource-rich countries." 2019 EITI Standard, II.9 Article 2.2. https://eiti.org/document/eiti-articles-of-association-2019-2021#Article2; *See also* https://eiti.org/files/documents/eiti_members_registry_2016-2019_as_at_29_feb_2016.pdf.

[12] *See* EITI Standard, 4.7 (2016), *available at* https://eiti.org/document/eiti-standard-requirements-2016. ("It is required that EITI data is presented by individual company, government entity and revenue stream. Reporting at project level is required, provided that it is consistent with the United States Securities and Exchange Commission rules and the forthcoming European Union requirements.")

[13] *Id.* 2.4.

[14] EITI Standard, 4.7 (2019) *available at* https://eiti.org/files/documents/eiti_standard_2019_en_a4_web.pdf

January 2020 and contract transparency by January 2021, among other new transparency requirements.[15] The IMF also emphasizes contract transparency as an emerging norm, and instructs that "[t]ransparency of the fiscal regime should extend to both tax legislation and project specific fiscal terms," including publication or disclosure of "project-specific contracts, licenses and agreements."[16] The IMF has noted that "contract disclosure is emerging as a norm in many resource-rich countries," and "in general, there should be no legal impediments to publication of resource contracts, which do not typically contain commercially sensitive information."[17]

The EITI Standard has encouraged countries to publicly disclose contracts and leases since 2013, and required a range of activities to promote disclosure.[18] As a result, by 2017, more than half of the EITI implementing countries had already disclosed at least some of their contracts, and others were in the process of doing so.[19] In addition, a number of globally significant oil, gas and mining companies have endorsed contract transparency, with some committing to advocate with host governments on disclosure. This includes Total, Shell, BP, Equinor, BHP Billiton, Rio Tinto, EGCs such as Kosmos Energy and Tullow Oil, as well as state-owned companies such as Petrobras.[20]

But the advances in global reporting rules, the EITI and the IMF are not alone. A host of organizations support contract transparency in oil, gas and mining including the OECD, United Nations, the World Bank Group - including the International Finance Corporation and the Multilateral Investment Guarantee Agency (MIGA) -- the European Bank of Reconstruction and Development (IBRD), and industry associations including the International Council of Mining and Metals (ICMM) and IPIECA, to name a few. Please see the Appendix for additional examples of support.

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[15] *See* 2019 EITI Standard, 2.4 (Contracts or licenses that are granted, entered into or amended from January 1, 2021 must be disclosed); *id.* at 2.5 (countries must request and companies must disclose beneficial ownership information by Jan. 2020). *See also* Comment submitted by Extractive Industries Transparency Initiative International Secretariat (Mar. 16, 2020) at 6, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6960332-212746.pdf ("The extractives transparency landscape has changed significantly in the last decade, moving beyond revenue disclosures and now covering contracts and fiscal terms, company ownership, project-level payment disclosures and payments to government for purchases of oil, gas and minerals.")

[16] International Monetary Fund, Fiscal Transparency Initiative: Integration of Natural Resource Management Issues, 11 (Jan 2019), https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/01/29/pp122818fiscal-transparency-initiative-integration-of-natural-resource-management-issues; *See also*, IMF Fiscal Transparency Code, Pillar IV: Resource Revenue Management (2019), https://www.imf.org/external/np/fad/trans/Code2019.pdf.

[17] IMF, Fiscal Transparency Initiative, at 11. *See also id*. (noting that if any "such impediments do exist (e.g., clauses requiring confidentiality of agreements themselves) an effort should be made to remove these by mutual agreement among the parties.")

[18] EITI, *Charting the next steps for transparency in extractives*, (May 10, 2013) https://eiti.org/blog/charting-next-steps-for-transparency-in-extractives ("EITI Reports must contain basic contextual information about the extractive sector" including, "a description of the fiscal regime, with disclosure of production contracts being encouraged")

[19] *See e.g.* Don Hubert and Ron Pitman, NRGI & PWYP, *Past the Tipping Point? Contract Disclosure within EITI* (March 2017), https://www.pwyp.org/wp-content/uploads/2019/05/past-the-tipping-point-contract-disclosure-within-eiti-web-1.pdf

[20] *See* Isabel Munilla and Kathleen Brophy, Oxfam America, Contract Disclosure Survey 2018: A review of the contract disclosure policies of 40 oil, gas and mining companies (May 2018), *available at* https://www.oxfam.org/en/research/contract-disclosure-survey-2018.

In addition to changes in the normative landscape, the industry practice of payment transparency at the project level is now firmly established. Since the 2016 Final Rule, there has been, in effect, a successful live test in the market of the Commission's 2016 approach. To date, nearly 800 companies have reported over $800 billion in payments under rules now in force in other markets that require fully-public contract-level payment disclosure. Notably, these sister rules in the EU, UK, Canada and Norway do not allow for exemptions of any kind, including for potential conflicts of law or contract, nor based on the size of reporting companies. Among the hundreds of companies already publishing annual payments-to-governments reports are cross-listed issuers and notable subsidiaries of U.S. issuers, state-owned companies from China and Russia, among other countries, emerging growth companies and small reporting companies. Experience to date has been positive, without overly burdensome compliance costs, nor competitive harms.[21]

Other regulators have conducted reviews of implementation experience thus far and confirmed that no material competitive or compliance impacts were documented. In fact, the European Commission noted in their review that "[t]here is no evidence that competitors from third countries benefit from substantial competitive advantages by not being required to report on payments to governments."[22] The review further found that " European companies have not reported that they suffered material damages or losses of opportunity due to the introduction of the reporting requirements. The requirements entail compliance costs, but they are not seen as highly disproportionate by the industry. Similarly, companies did not find it harder to operate in third countries. An analysis of recent contracts in the extractive sector in some countries of operation shows that EU companies have maintained or increased their presence in countries where they were operating."[23] These significant external developments, which have direct relevance to what the Commission has identified as Congressional concerns, must be reflected in the Commission's economic analysis, as they represent current market realities.

Since our first submission to the Commission in 2010, and in subsequent submissions, we (and a range of other commenters) have maintained that the assertions of alleged competitive harm resulting from transparency have no basis in fact, contradict the realities of the competitive environment and are undermined by the fact that contract-level payment information can be easily accessed through pay-to-see databases that are normally out of reach for most of the intended beneficiaries of the statute, investors and citizens of resource-rich countries. We have consistently supported our position with concrete evidence, in contrast to those commenters

[21] *See, e.g.* Comment submitted by Equinor (Mar. 13, 2020) at 3, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6952843-212532.pdf ("The costs involved … have been modest and acceptable for a business operation of our size and nature. More broadly, although inherently hard to measure, we believe our disclosures have contributed to building additional trust with external stakeholders and have allowed us to tell a more complete story about our business and local value creation in a way conducive to strengthening our 'license to operate'")

[22] European Union, Review of country-by-country reporting requirements for extractive and logging industries, at 112-13 (2018), *available at* https://ec.europa.eu/info/sites/info/files/business_economy_euro/company_reporting_and_auditing/documents/181126-country-by-country-reporting-extractive-logging-industries-study_en.pdf

[23] *Id.* The review also noted that while reporting "entail[ed] additional compliance costs… the companies did not consider that they represent a disproportionate burden."

asserting otherwise. Five years of successful reporting by a range of multinational and state-owned companies, as well as emerging growth small reporting companies, has now confirmed the fact that there is *no evidence* to support the theoretical competitive harms on which the Commission would now base the majority of its most problematic changes to the 2016 Rule.

These developments and in particular, evidence from actual implementation experience, must be comprehensively taken into account in addressing the CRA's "substantially the same language," as they make certain features of the 2016 Rule all the more important to maintain in the new rule, while significantly altering the cost-benefit ratio - in a clearly favorable way - of maintaining those features. As explained further below, while there are changes the Commission can make to the 2016 Rule to ensure a rule that is sufficiently different, yet still faithful to Section 13(q), at a minimum, that rule must reflect the basic central features of the international standard: fully public, project-level reporting, defined at the contract-level consistent with every other transparency regime, and "not de minimis" defined to be consistent with other markets.

II. The Commission's approach to the Congressional Review Act subverts the pro-disclosure intent of the statute and cannot be reconciled with the evidentiary record, nor current market realities.

In 2010, Congress enacted Section 13(q), directing the Commission to promulgate rules requiring extractive companies to disclose the payments they make to governments. The statute's objectives are twofold: First, to combat the "resource curse" by giving citizens information about the payments extractive companies make to governments to combat corruption in extractive deals and enable citizens to hold their governments accountable for the responsible management of natural resource wealth. And second, to benefit investors by better enabling them to evaluate risk.[24] Congress sought to establish the U.S. as a leader on extractive transparency, and to provide for mandatory disclosure rules that would augment, and go further than, existing EITI practice, which was recognized as a minimum standard.[25] And Congress specifically directed the Commission's rules "shall support the commitment of the Federal Government to international transparency promotion efforts."[26]

The Commission promulgated a Final Rule implementing Section 13(q) in June 2016. In February 2017, however, under the expedited CRA process, Congress passed and the President

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[24] *See infra* Section VII.

[25] *See* 2016 Final Rule, 81 Fed. Reg. at 49365 n.83 (citing 156 Cong. Rec. S3815 (May 17, 2010) (Sen. Lugar)); 163 Cong. Rec. S3815 (May 17, 2010) (Sen. Cardin) ("We currently have a voluntary international standard for promoting transparency. A number of countries and companies have joined [EITI], an excellent initiative that has made tremendous strides in changing the cultural secrecy that surrounds extractive industries. But too many countries and too many companies remain outside this voluntary system."); *id.* S3818 (May 17, 2010) (Sen. Dodd) (stating that "broad new requirements for greater disclosure by resource extractive companies operating around the world . . . would be an important step" to complement EITI's "voluntary program"). *See also e.g*. Senator Cardin letter to Commission, (Dec. 1, 2010), *available at* https://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-94.pdf; ("EITI is a minimum reporting standard, and the intent of Sec. 13(q) was to go beyond these requirements," and, "[w]here possible, the SEC rules should align with EITI disclosure practices, but Sec. 13(q) is clear that reporting should go beyond the EITI's minimum reporting standards.") Indeed, EITI is voluntary for countries to join, so important gaps in transparency remain for the citizens and investors in countries without the political will or capacity to join the initiative.

[26] 15 U.S.C. § 78m(q)(2)(E).

signed a one sentence "resolution of disapproval," vacating the 2016 Final Rule and giving the Commission one year to promulgate new regulations.[27] Beyond the deadline, the only other direction provided under the CRA is that the new rule not be "substantially the same" as the one that Congress disapproved, a phrase that is not defined.[28] The use of the CRA, however, did not repeal or amend Section 13(q).

While we are sympathetic to this difficult context, the proposed rule misses the mark. The Commission takes an overly broad view of the CRA's "not substantially the same" language and gives undue weight to inconsistent and unreliable statements by a handful of individual members of Congress who supported the resolution of disapproval. The proposed rule reverses course on nearly every aspect of the rule and the Commission's prior policy determinations, in many cases reversing the Commission's own previous view of the underlying facts and evidence, and gutting the rule's ability to advance the statute's anti-corruption and transparency goals. [29] And contrary to the statute's directive to support international transparency efforts, the proposed rule would "deviate wildly" from the clear international consensus reflected in disclosure laws in Europe and Canada and in the EITI Standard.[30] The Commission's approach is all the more untenable in light of the significant shift in industry norms since the 2017 vote that have fundamentally changed the competitive landscape for U.S. issuers, disproven what the Commission points to as the primary concerns of Congress, and made the case for certain key aspects of the 2016 Final Rule *more* compelling as a factual matter. The Commission fails to account for these current market realities in its economic analysis.

A narrower interpretation of "substantially the same" is required in this context. We outline below the contours of a rule that we are confident strikes a legally sound balance, ensuring the Commission does not run afoul of the CRA, while producing a rule supported by the evidence, reasoned decision-making, and consistent with Section 13(q) and the international transparency standard.

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[27] Pub. L. 115–4 (14 Feb. 2017); *see also* 5 U.S.C. § 803 (For rules required under a specific directive with a statutory deadline, like Section 13(q), the CRA gives a one-year deadline for re-issuance).

[28] 5 U.S.C. § 801(b).

[29] Peter Rasmussen, ANALYSIS: *SEC tries to solve CRA conundrum on Resource Payments*, Bloomberg Law (Jan. 7 2020) https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-sec-tries-to-solve-cra-conundrum-on-resource-payments. Peter Rasmussen notes the proposed rule "does little to implement the spirit of the Dodd-Frank disclosure mandate," explaining that "[t]hat the disclosures that would be generated under the proposed rules will be of little decision-making use to investors. Too many payments may be shielded under the proposed de minimis standard, and the information would not be available to investors in a timely fashion. Commissioner Lee described the challenge of crafting a delicate balance between Congress' intent under Section 1504 and the concerns expressed in the CRA disapproval resolution. The resulting rulemaking proposal, however, has largely abandoned that balance and swung dramatically away from the intent of Congress in enacting Section 1504."

[30] Statement of Commissioner Lee, *Statement on Proposed Resource Extraction Rule* (Dec. 18 2019), https://www.sec.gov/news/public-statement/statement-lee-2019-12-18-resource-extraction

A. The duty to carry out the pro-transparency intent of Section 13(q) remains unchanged.

While Congress invoked the CRA to disapprove the 2016 Rule, the Commission's duty to carry out Section 13(q), as well as its usual duty to promulgate a rule that is the product of rational decision-making, based on the facts as they currently exist, remains.

A resolution of disapproval under the CRA may only contain one pre-determined sentence of statutory language, the same "nonamendable template for any joint resolution."[31] Because the text is pre-determined, and because the CRA allows only the disapproval of a rule in its entirety, not specific provisions, Congress does not and cannot specify what it found objectionable about the prior rule in the resolution, nor which aspects it may view as appropriate or even necessary to include in a subsequent rule.[32] As an all-or-nothing vote, any non-problematic features are necessarily "disapproved" along with whatever might specifically be viewed as problematic. The CRA also provides expedited procedures for consideration of resolutions of disapproval such that there are no committee reports nor hearings, and time for debate is strictly limited.[33] Because there is no procedure for agreement on the problematic aspects that lead to disapproval, it is entirely possible that the disapproving members of Congress do not actually agree on what is problematic.

It is clear, however, that the CRA does not eliminate the need to issue rules under Section 13(q), or other rules with a statutory mandate. For rules required under a specific directive with a statutory deadline, like Section 13(q), the CRA specifically gives a one year deadline for re-issuance.[34] While the CRA directs that a new rule not be "substantially the same" as one that was disapproved, it does not define that phrase, nor identify what criteria should be considered, nor is there any meaningful guidance from the sparse legislative history of the CRA as to what it means.[35] The Commission cites a post-enactment statement by the CRA's main sponsors, but it

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[31] Adam Finkel and Jason Sullivan, *A Cost-Benefit Interpretation of the "Substantially the Same" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?,* 63 Admin Law. R. 707, 750. *See* 5 USC § 802 (a resolution of disapproval must read: "That Congress disapproves the rule submitted by the _____ relating to _____ , and such rule shall have no force and effect.")

[32] Since "the text can only effect a repeal of the rule and no more," a resolution of disapproval cannot speak to what "would constitute a substantially similar reissuance of the rejected rule." *Id.* at 752.

[33] For expedited procedures, *see* 5 U.S.C. § 802(c), (d) and (f). For restrictions on debate in the Senate, *see id.* § 802(d)(2) ("debate on the joint resolution, and on all debatable motions … in connection therewith, shall be limited to not more than 10 hours… divided equally between those favoring and those opposing" and "[a] motion further to limit debate is in order and not debatable.")

[34] *Id.* § 803.

[35] *Id.* § 801(b)(2). *See* Finkel and Sullivan, *A Cost-Benefit Interpretation,* 63 Admin Law. R. at 718 (noting "the congressional review provision [of the Contract with America Advancement Act] was ultimately enacted without debate"); *id.* at n.49 (quoting 142 Cong. Rec. 6922-30) (statement of Rep. Hyde)) ("no formal legislative history document was prepared to explain the CRA"). *See also* Congressional Research Service, *The Congressional Review Act (CRA): Frequently Asked Questions,* at 17 n. 96 (Updated January 14, 2020) *available at* https://fas.org/sgp/crs/misc/R43992.pdf ("Even the post-enactment legislative history, which is of limited legal value in interpreting a statute, does not shed light on the meaning of substantially the same. Nor is there a particular definition of *substantially the same* in the U.S. Code that would apply to this section.")

is of minimal value.[36] Beyond its questionable legal weight, it provides no substantive guidance as to the intended meaning other than to "prevent circumvention of a resolution of disapproval."[37]

The Commission seemingly interprets "not substantially the same" as requiring reversal on nearly every front, but no legal precedent or authority supports such a stunning about-face.[38] Without repealing or amending Section 13(q), the original statute and congressional intent remain unchanged.[39] The CRA's "substantially the same" language cannot authorize a rule that would not otherwise be defensible under Section 13(q) or on the facts before the Commission. On certain key aspects of the rule, however, the Commission now proposes adopting an approach that it has already thoroughly considered and rejected as inappropriate in light of the text, structure and purpose of Section 13(q) and the evidence in the record. The Commission purports to take a different view of the same facts while ignoring other inconvenient facts already in the records, as explained further below, but subsequent developments reinforce and confirm the validity of the Commission's prior conclusions on key aspects of the rule – in particular, with respect to the commonly understood definition of project, the granularity of disclosures, the "not de minimis" threshold and the lessening of potential competitive impacts if the rule aligned with those in other markets.

A narrower interpretation of "substantially the same" is both warranted and required in light of the clear statutory directive from Congress in Section 13(q) to address a particular problem in a particular manner.[40] The far less specific resolution of disapproval and the CRA's "substantially the same" language must be interpreted and applied with that original – and far *more* specific - statutory directive in mind.[41]

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[36] *See* Proposed Rule, 85 Fed. Reg. at 2526 n. 62 (citing the Joint Explanatory Statement of House and Senate Sponsors (Senators Nickles, Reid, and Stevens), 142 Cong. Rec. S3683 (April 18, 1996)). As "post-enactment legislative history," this statement "is of limited legal value in interpreting a statute." Congressional Research Service, *The Congressional Review Act (CRA): Frequently Asked Questions*, at 17 n. 96 (Updated January 14, 2020) available at https://fas.org/sgp/crs/misc/R43992.pdf. *See also e.g. API v. SEC*, 953 F. Supp. 2d 5, 20 (D.D.C. 2013)("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.") (quoting *Brueswitz v. Wyeth LLC*, 131 S.Ct. 1068, 1081 (2011)).

[37] 142 Cong. Rec. at S3686.

[38] As Commissioner Lee aptly pointed out, the SEC "ha[s] not identified any legal authority or precedent that would compel" it to "stray so far from the policy determination the Commission made in 2016." Statement of Commissioner Lee (Dec. 18, 2019).

[39] *See* 85 Fed. Reg. at 2526 ("the statutory mandate under Section 13(q) of the Exchange Act remains in effect")

[40] *See* Finkel and Sullivan, *A Cost-Benefit Interpretation,* 63 Admin Law. R. at 784 (the "provision should be interpreted narrowly."). The use of the CRA to invalidate executive action in situations such as this one - where Congress has specifically directed an agency to act in a particular way, and the agency has already extensively analyzed the best way to execute legislative intent under that directive - also raises the prospect of difficult constitutional questions that further caution against an overly broad interpretation of "substantially the same."

[41] *Cf.* Maeve P. Carey, CRS, W*hat Is the Effect of Enacting a Congressional Review Act Resolution of Disapproval?* at 1 (Updated Oct. 30, 2018), *available at* https://fas.org/sgp/crs/misc/IN10660.pdf (explaining "[t]he relevant factors" for evaluating "substantially the same" "likely depend on the specific rule at hand, as well as the underlying statutory authority or requirement for the rule").

B. A cost-benefit approach with more carefully tailored changes will best produce a legally sound rule that is "not substantially the same."

The only concrete conclusions that can be drawn from the use of the CRA in this case are that (1) Congress did not repeal Section 13(q) and that (2) Congress did not want exactly the same rule. Because there is no clear guidance as to what "not . . . substantially the same" means, any substantive change that is not merely a change to form intended to produce the same substantive effect, must be sufficient to satisfy the CRA's reissuance bar.[42] Some scholars have described its meaning as "something akin to 'different enough that it is clear the agency is not acting in bad faith.'"[43] Among the changes that would qualify, then, would be modifications of aspects of the rule that result in a different cost-benefit analysis, especially when it would result in a more favorable cost to benefit ratio, and any changes that address any of the concerns of members of Congress. It cannot, however, be read to require an agency to address every concern raised by any member of Congress. To require otherwise would make little sense as it cannot be assumed Congress as a whole adopted the reasoning of any individual member. Indeed, it is entirely possible that each concern raised by individual members was *rejected* by a majority of Congress, and that the resolution passed because a majority of members had *some* concern with the Final Rule – without any particular concern garnering a majority. [44] So while it can be assumed Congress did not intend the Commission to promulgate the *exact* same rule,[45] it cannot be that the Commission must attempt to divine, and address, every possible concern with the prior rule.

Likewise, the CRA cannot be read to require the Commission to disregard its prior findings of fact to address a concern that has since been mooted, or that was then or has since been proven demonstrably false. Because Congress did not amend or repeal Section 13(q) itself, any new rule is still governed by Section 13(q)'s plan text and objectives, as well as the evidentiary requirements of the Administrative Procedure Act (APA). To the extent that the proposed rule does not faithfully implement Section 13(q) or is not supported by the record and reasoned decision-making under the APA, it will be legally vulnerable.

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[42] *See e.g.* Maeve P. Carey et al, Congressional Research Service, *The Congressional Review Act: Frequently Asked Questions,* at 17 (Nov. 27 2016), available at https://www.ncsl.org/documents/health/CRS_CRA_FAQs.pdf ("sameness could be determined by scope, penalty level, textual similarity, or administrative policy, among other factors.")

[43] *See* Finkel & Sullivan, *A Cost-Benefit Interpretation,* 63 Admin Law. R. at 747 (suggesting "'substantially the same' means something akin to 'different enough that it is clear the agency is not acting in bad faith.'"). As noted above, the CRA sponsors' statement described it as intended to "prevent circumvention." 142 Cong. Rec. at S.3686.

[44] *See* Finkel and Sullivan, *A Cost-Benefit Interpretation,* 63 Admin. Law Rev. at 736 ("the fact that Congress chose not to accompany statements of disapproval with any language explaining the consensus of what the objections were may make it inadvisable to require the agency to fix problems that were never formally defined and that may not even have been seen as problems by more than a few vocal representatives.")

[45] It is difficult to see how requiring anything further could be subject to any kind of meaningful review. The question of whether compliance with the CRA can be subject to judicial review, in light of § 805, which provides that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review, has not yet been litigated. *But see Montanans for Multiple Use v. Barbouletos,* 568 F.3d 225, 229 (D.C. Cir. 2009) (the "language of § 805 is unequivocal and precludes [judicial] review" "on the basis of agency noncompliance with the Act"). But even it is subject to review, to require more from the Commission would leave courts with no meaningful standards to apply to determine whether a rule is sufficiently different.

The most appropriate approach for the Commission to take here is to pair the more tailored changes outlined below[46] – which can reduce costs and minimize competitive harm in a targeted manner, without wholesale stripping the rule of its ability to advance the statute's transparency objectives – together with substantial revisions to the Commission's prior economic analysis to properly reflect current market realities and shifted transparency norms.[47] This is more than sufficient to ensure a different rule, and specifically with respect to the metrics the Commission identifies as motivating congressional concern with the 2016 rule – costs.

We note this approach is specifically supported by the CRA scholars the Commission cites. Adam Finkel and Jason Sullivan, two scholars who have crafted the most thorough analysis of possible interpretations of "substantially the same," consider a range of possibilities and conclude that a narrow interpretation that focuses on whether the "cost-benefit balance" is improved "makes the most sense . . . and should become the commonly understood default position."[48] They explain that because the CRA is fundamentally a tool for Congress to "scrutinize the costs and benefits of individual regulations for possible veto," "a similar-looking rule" that has a "more favorable" balance between costs and benefits is "simply not the same," since "[s]uch a rule will be different along precisely the key dimension over which Congress expressed paramount concern."[49] They argue more specifically that the "currency for judging similarity should be the costs and benefits rather than the extent of narrative revision to the regulatory text per se or the extent to which a reissued rule contains wholly different provisions or takes a different approach."[50] So long as the rule "makes enough changes to alter the cost-benefit ratio . . . the purposes of the CRA will be served, and the new rule should not be barred as 'substantially the same.'"[51] Other scholars have similarly argued that "substantially the same" should be given a flexible understanding and "narrowly construe[d]" along the same lines.[52]

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[46] *See infra* Section II.D.

[47] *See also infra* Section VIII (Economic Analysis).

[48] Finkel and Sullivan, *A Cost-Benefit Interpretation,* 63 Administrative Law Review 707, 762 (2011).

[49] *Id.* at 743.

[50] *Id.* at 735

[51] *Id.* at 740. *See also id.* at 710 (concluding that "the CRA permits an agency to reissue a rule that is very similar in content to a vetoed rule, so long as it produces a rule with a significantly favorable balance of costs and benefits than the vetoed rule")

[52] *See, e.g.* Michael Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same" and Decline to Defer to Agencies Under Chevron*, 70 Admin. L. Rev. 53, 106 (2018) (arguing substantially the same should be "narrowly construe[d]" so as to "require agencies to do nothing more than alter the cost-benefit analysis of a reissued rule to avoid finding the rule to be substantially the same as a vetoed rule."); *id.* at 91 (endorsing "Finkel and Sullivan's cost-benefit ratio approach" as "proper **in** the vast majority of cases"); John C. Ruple, "*The Rise and Fall of Planning 2.0 and Other Developments in BLM Land Management Planning*," 63 Rocky Mt. Min. L. Inst. 22-1 (2017) ("[a] compelling argument can … be made that sameness can be determined based on changes in the benefit-cost ratio between the disapproved rule and any subsequent replacement."). *See also* Note*: Use of the Congressional Review Act at the Start of the Trump Administration: A Study of Two Vetoes*, 86 Geo. Wash. L. Rev. 1373, 1389-91 (noting that a "narrower interpretation" of "substantially the same" "using cost-benefit analysis as a touchstone seems well suited to explain the [SEC's] resource extraction rule's veto, given proponents' focus on the rule's projected compliance cost," but because no single definition accounts for every congressional motivation for using the CRA, advocating for "a flexible definition, using anticircumvention as a touchstone," which would "seek to answer the question of whether the new regulation evinces an intent by the agency to frustrate the will of Congress")

The Commission cites Finkel and Sullivan to suggest it thinks changing the rationale, or economic analysis, even when based on changed external circumstances, would be *insufficient* to satisfy the CRA.[53] But Finkel and Sullivan say exactly the opposite. While they explain that an interpretation allowing an agency to rely *only* on "new rhetoric" to provide "better explanations for an identical reissued rule," without *any* "different costs and benefits," would be impermissible,[54] they expressly conclude that "even an identical rule can be reissued under 'substantially different' external conditions."[55] They explain that "the effects of regulation – or the estimates of those effects – can change over time even if the rule itself does not change,"[56] observing that the signing statement by the CRA's sponsors acknowledges that with the passage of time, "the nature of the problem addressed, and its proper solution, can change."[57]

While we do not recommend the Commission *only* alter the economic analysis, flaws in the economic analysis of the 2016 Rule, based in part on a lack of adequate information, resulted in a cost analysis that has since been shown to have been highly misleading with cost predictions far higher than implementation experience has now shown to be reality.[58] The case for certain features of the rule has only grown more compelling with these changed external conditions, including by confirming the Commission's prediction that "the potential for competitive harm resulting from the final rules is significantly reduced… by the adoption of a similar definition of 'project'" in the EU and Canada.[59] And new evidence shows the cost-benefit analysis of a rule that more closely mirrors the regulations in other markets would be significantly more favorable, as the costs for industry are far lower than the Commission predicted in 2016, any basis for concern for competitive harm is substantially lessened, and the benefits would be greater to citizens and investors of alignment with other markets to ensure comparability of data and consistency in reporting.

Nothing in the CRA requires the Commission to take a hatchet to the rule, nor specifically to gut the most essential features, necessary to align with the international standard – in particular, but not limited to, project-level reporting – and in light of Section 13(q), a scalpel is far more appropriate.[60] A substantially revised and more realistic cost assessment, reflecting new evidence, changed circumstances, and current market realities, combined with more carefully

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[53] Proposed Rule, 85 Fed. Reg. At 2527 n. 68 (citing Adam M. Finkel and Jason W. Sullivan, *A Cost-Benefit Interpretation,* 63 Administrative Law Review 707, 757–58 (2011)). The language the Commission quotes is on pages 763.

[54] Finkel and Sullivan, *A Cost-Benefit Interpretation,* 63 Admin. L. Rev. at 763.

[55] *Id.* at 762.

[56] *Id.* at 734.

[57] *Id.* at 762

[58] *Compare e.g.* Comment from Exxon Mobil (Jan. 31, 2011), https://www.sec.gov/comments/s7-42-10/s74210-11.pdf (suggesting initial compliance costs for Exxon could be as high as $50 million); 2016 Final Rule, 81 Fed. Reg. 49408 n. 623 *with* Comment submitted by PWYP-UK, at 3 (Nov. 25, 2019), *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6470014-199342.pdf (explaining the UK review found that the total initial cost of compliance for *all 91 companies reporting in the UK* under the UK regulations was approximately £52.5 million).

[59] *See* 81 Fed. Reg at 49382 n.300

[60] *See* Finkel and Sullivan, *A Cost-Benefit Interpretation,* 63 Administrative Law Review at 744 (arguing that with respect to rules promulgated pursuant to statutory deadlines, Congress envisioned only "a very circumscribed set of 'fixes' to respond to the original resolution of disapproval.")

tailored changes that address legitimate, demonstrated concerns as opposed to unsupported assumptions, as outlined below, will ensure the Commission satisfies the CRA, produces a rule with a far better cost to benefit ratio, and is faithful to Section 13(q), while aligning with other markets. There is a sound legal basis for this approach. The alternative, giving maximum – and unwarranted – weight to select comments by individual members of Congress, and relying on unsupported assumptions that the Commission itself has already persuasively rejected and that new evidence has thoroughly disproven, will produce a rule that will fail to the produce the benefits Section 13(q) intended and will be vulnerable to legal challenge.

C. The Commission cannot and should not give undue weight to statements by individual members of Congress during the expedited floor debate over the resolution of disapproval in crafting a new rule.

The Commission relies heavily on "concerns" voiced by a handful of members of Congress supportive of the resolution of disapproval during the truncated debate. While we understand the difficulty created by a lack of meaningful direction, the Commission's rationale for many aspects of the proposed rule gives undue weight to these statements – and the industry comments the Commission identifies as espousing similar views – while giving insufficient weight to Section 13(q) itself. We strongly caution the Commission against an overreliance on select statements of individual members, particularly as implicitly providing support for approaches it has already thoroughly considered and rejected as unfounded and unsupported by the evidence. Statements by members cannot override the need to faithfully implement Section 13(q).

First, we note that courts generally give such statements substantially less weight than other sources of legislative history,[61] particularly where legislative consideration is limited, as was the case here. Courts have also consistently cautioned against the inherent bias invited by using such statements, which has been described as the "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."[62] The Commission frames the task before it as balancing, on the one hand, Section 13(q) and on the other "concerns expressed by members of Congress."[63] But that is not the task before the Commission; it cannot

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[61] *See e.g. Garcia v. United States*, 469 U.S. 70, 76 (1984) (noting the Supreme Court has "eschewed reliance on the passing comments of one Member," and "casual statements from the floor debates."); *NLRB v. SW Gen., Inc.*, __ U.S. __, 137 S. Ct. 929, 943 (2017). *Cf.* Finkel & Sullivan, 63 Admin. L. R. at 752-53 ("too many disparate (and perhaps disingenuous) arguments on the floor make [it] unworkable" to "look to the legislative history [of a resolution of disapproval] to determine whether Congress has 'spoken to' the issue" as a judicial doctrine without any textual hook to hang it on."); *see also id.* at 736.

[62] *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (stating that, on the whole, the use of legislative history is "more likely to confuse than to clarify," and as an interpretive technique it is the "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends").

[63] *See, e.g.* Proposed Rule, 85 Fed. Reg. at 2528 (The Commission explains its approach as "striv[ing] to achieve an appropriate balance between implementing the statute as required by Congress and addressing the concerns expressed by commenters and members of Congress.); *id.* 2528 (explaining its choices in the rule as "provid[ing] an appropriate balance between the stated concerns with the 2016 Rules and the mandate of Section 13(q) to increase transparency of payments to governments in resource-rich nations"); *id.* at 2539 ("achieve an appropriate balance between promoting transparency regarding a resource extraction issuer's payments to governments and reducing regulatory costs and burdens"); *id.* at 2529 ("we believe that this proposed change from the 2016 Rules would reduce the overall cost of the proposed rules and address the related Congressional concerns")

balance the statute against a handful of statements from a few individual members of Congress. The individually voiced concerns of select members of Congress do not demonstrate any clear consensus of the majority, and certainly cannot change the meaning of Section 13(q) seven years later.[64] Indeed, the Supreme Court has expressly ruled that statutory text is "far more probative" than floor statements and debate.[65] Thus relying on floor statements in order to override a duly enacted statute would invite judicial scrutiny.

Worse still, the Commission substitutes *industry* comments in the place of actual members of Congress – comments that are afforded no weight at all as legislative history. The Commission notes floor statements expressing concerns about compliance costs and risk of competitive harm, and ties them to prior comments from three industry commenters – specifically from the American Petroleum Institute (API), ExxonMobil and Chevron – noting they were similar, then throughout the rule uses those same industry comments as a proxy for representing Congressional concern.[66] Nowhere did any member of Congress state that those comments reflected their own identical concerns.

Ultimately, a comparison of the Commission's proposed rule with the position of the three industry commenters they most cite, in particular the API, is revealing. Every one of the Commission's changes exclusively serves to *substantially weaken* the rule in ways that severely limit transparency, undermining Section 13(q) itself. In nearly every respect, the proposed rule reverses itself to adopt the API position, and in nearly every respect directly departs from the rules in other markets. It is not that the Commission considers a range of possible changes and decides the API position (that it had previously rejected) on every issue is superior; rather, the proposing release does not even give consideration to other possible changes that could be made that would serve the statutory purpose, nor even align with the position of other industry commenters, the majority of whom supported consistency and close alignment with the regulations in other markets, not to mention investors, whose interests are completely and dismissively rejected. This is particularly troubling here, as the Commission is in the rare position of effectively having a test run of its 2016 rule completed in the market by nearly 800, under the remit of other jurisdictions. Yet it makes no effort to utilize nor even consider that real

[64] Moreover, the Commission may also be reading too much into the post-enactment explanatory statement from the CRA's sponsors in opting to rely so heavily on floor statements. *See* Proposed Rule, 85 Fed. Reg. at 2526. Although the statement indicates they expect the floor debate would illuminate whether a new rule can be issued *at all*, it does not actually state that the debate is expected to specify exactly what Congress found objectionable nor what the agency is expected to change in a new rule. *See* Joint Explanatory Statement of House and Senate Sponsors (Senators Nickles, Reid, and Stevens), 142 Cong. Rec. S.3686 (April 18, 1996). Even if that was their intent, however, that flies in the face of established law regarding the determination of legislative intent, and ultimately provides no guidance where, as here, the debate in Congress did not actually illuminate the Commission's options following the resolution, beyond the expectation that the Commission issue a new rule.

[65] *Trump v. Hawaii*, __ U.S. __, 138 S. Ct. 2392, 2413 (2018).

[66] *See e.g.* Proposed Rule, 85 Fed. Reg. at 2526 n.65 ("we note that many of the concerns raised by members of Congress were raised by commenters in the previous rulemakings") (citing comments from API, ExxonMobil Corporation and Chevron Corporation). *See also e.g. id.* at 2537 ("In light of the concerns expressed by prior commenters and members of Congress that the 2016 Rules imposed undue competitive harm..."); *id.* at 2537 & n.181 (stating that the change to "project" addresses "the primary concerns" expressed about the 2016 Rules and citing individual members of Congress and API, Exxon, and Chevron); *id.* at 2538 ("we have striven to achieve an appropriate balance between the policy goal of promoting transparency … and the concerns expressed by commenters and members of Congress"); *id.* at 2557.

experience with reporting and current market realities in determining the possibilities for addressing the "substantially the same" language. Nothing in the CRA, the resolution of disapproval nor the floor debate can justify the Commission's singular focus on the recommendations of the API, without considering other possible changes to the rule that could align with the interests of issuers more broadly, investors, and data users.

Second, overreliance on select individual members' floor statements for substantive guidance is all the more ill-advised here. Many of the "concerns" the Commission identifies as guideposts here appear to spring from misunderstandings of the rule. The lack of clarity, consistency, and the vast inaccuracies and contradictions of many of the members' statements, illustrate precisely why this form of legislative history is disfavored.

For example, a reason for disapproval cited by a few members was that the 2016 Rule provided no exemptions for situations where foreign laws might prohibit disclosure, with some members expressly stating that such foreign laws exist (without citing any), and asserting that companies would be forced to violate foreign law, and have to abandon business ventures and leave the country.[67] The 2016 Rule, however, expressly provided for the possibility of exemptions on the basis of a foreign law conflict, where an issuer showed such a conflict actually existed – and did so despite finding "uncertainty" as to whether any such laws exist.[68] These members of Congress thus appear to have based their vote at least partly on a misunderstanding.

The Commission's approach to this issue in its economic analysis was almost certainly a contributing factor in this confusion. The Commission found there was insufficient evidence of any such laws, noting evidence directly contradicting assertions otherwise, and despite this, opted to allow issuers to apply for exemptive relief in the (unlikely) event such laws exist. But despite finding insufficient evidence of such laws, and despite fully providing for safeguards against losses in the event they did exist, the Commission nonetheless engaged in an extended discussion of potential doomsday scenarios that could result, including billions of dollars of potential losses in its cost analysis if those scenarios played out.[69] This was unnecessary and

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[67] *See e.g.* 163 Cong. Rec. S493 (Senator Inhofe stated categorically that "the SEC's rule lacks an exemption for circumstances in which disclosure would violate the laws of a country where a U.S. company is operating."); 163 Cong. Rec. H853 (Representative Rothfus stated that "foreign countries have laws to prohibit the sort of disclosures called for in this rule" and since "the rule provides no exemptions, American firms may be forced to abandon business ventures"); Letter from Senator Corker et al. (Feb 2, 2017), *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3080156-161926.pdf ("Under the SEC's rule, as we understand it, U.S. companies would be required to make the disclosures about their payments to host governments even where another country's laws might prohibit by law those disclosures. Effectively that could require U.S. companies to stop doing business in those countries, leaving those markets to the unfettered advantage of their foreign competitors."))

[68] *See e.g.* 2016 Final Rule, 81 Fed. Reg. at 49366 ("issuers may seek exemptive relief when foreign laws may prohibit the Section 13(q) disclosures. This exemptive process should help mitigate the final rules' potential adverse effects on issuers while still preserving the transparency objectives of the statute."); *id.* at 49411 ("In the event that such foreign law prohibitions exist, or are adopted in the future, pursuant to our existing Exchange Act authority, we will consider requests for exemptive relief on a case-by-case basis and may grant such relief, if and when warranted")

[69] *See, e.g. id.* at 49413 ("Although we discuss the potential costs below for completeness, it is not clear that these costs, in fact, will be incurred by issuers in light of the present uncertainty regarding the existence and scope of such foreign laws and the fact that we intend to consider the use of our exemptive authority …. Accordingly, the

became a focal point for some members of Congress. These members likely believed, precisely because the issue was incorporated into the economic analysis, that there were no exemptions and that compliance with foreign laws would likely require companies to sell assets. This is precisely the kind of scenario that Finkel and Sullivan's described in which changing the economic analysis may be sufficient to effect a substantial change; obviously, Congress may not view a rule that will force companies to lose billions of dollars as the same as a rule that will not.

Indeed, members of Congress specifically raised concerns that the abbreviated debate was leading to serious errors in proponents' understanding of the rule. Another misconception voiced by a handful of members of Congress supportive of the resolution, for example, was that the rule applied only to American companies, not to foreign companies or state-owned companies.[70] But the 2016 Rule, and the statute itself, plainly did apply to foreign companies, as well as to state-owned companies, listed on U.S. exchanges.[71] Congressman McGovern noted at one point that the "description that somehow the U.S. oil companies are only being singled out, it makes my case why we should have had a hearing," as it "does not reflect reality. . . . I looked at section 1504 of Dodd-Frank. . . . It says that all extractive companies, U.S. and foreign, listed on the U.S. exchanges are to publicly disclose the payments they make to governments for oil, gas, and mining resources."[72] He went on to note that "other countries have followed suit," so "it is not just the United States being singled out. That is just wrong. Maybe, if we had a hearing in the committee of jurisdiction, that would have been clear, and this wouldn't be a point of contention."[73]

The Commission cites a comment by one Congressman saying that "industry is already publicly disclosing the work they do in foreign countries and will continue to do so . . . at a level that does not cause competitive harm,"[74] as showing Congress was specifically concerned with the contract-based definition of "project." [75] Beside the fact that this was the comment of only a

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magnitude of the potential costs outlined below should not be viewed as necessarily indicative of the likely or expected costs of this aspect of the final rules"); *id.* at 49417 ("…it is not clear that these costs, in fact, will be incurred by issuers in light of the present uncertainty over the existence and scope of such foreign law prohibitions and our intent to consider exemptive relief on a case-by-case basis."); *id.* at 49412 (noting that "[a]lthough we are not making any final determinations at this stage," as to whether any actually exist, "[t]o the extent that such prohibitions exist and are enforced without any type of waiver, affected issuers could suffer substantial losses" potentially "amount[ing] to billions of dollars."); *id.* at 49413 (noting the "increasing uncertainty about the existence and scope of such laws" and noting that "assuming such laws exist and that the Commission determines to grant an exemption from the final rules, this approach could potentially save affected issuers billions of dollars in compliance and economic costs")

[70] *See, e.g.* 163 Cong. Rec. H854 (Feb. 1, 2017) (Rep. Hill) ("state-owned enterprises… are not covered by this rule," which "puts our companies at a competitive disadvantage."); *id.* at H854 (Rep. Trott) (stating that "[b]oth foreign and American companies sell products and energy in our economy but only American companies are required to jump through additional hoops, regulations that cost billions of dollars and pass on hundreds of millions of dollars to consumers"); *id*. (Rep. Trott)(suggesting the government was "tip[ing] the scale in favor of foreign companies").

[71] *See e.g.* 2016 Final Rule, 81 Fed. Reg. at 49423 ("The disclosure requirements apply equally to U.S. issuers and foreign issuers").

[72] 163 Cong. Rec. H836 (Feb. 1, 2017).

[73] *Id.*

[74] *Id.* at H854 (Rep. Williams).

[75] Proposed Rule, 85 Fed. Reg. at 2537.

single member, however, it is unclear what he meant by "already publicly disclosing the work they do," and at no point does he specifically refer to the definition of project, nor even payments to governments.[76] He does, however, in the same floor statement state incorrectly – twice – that the Commission had estimated costs would be "as high as $591 *billion*."[77]

While some proponents of the resolution referenced the flawed compliance cost predictions and voiced general concerns about potential competitive harm, they largely did so without indicating any particular features of the rule that were problematic, nor specifying how the Commission should respond.[78] It is clear, however, that even the members with the strongest concerns expected a new rule to be issued; in other words, they did not view their CRA vote as in any way repealing Section 13(q). Representative Huizenga, for example, explained that the resolution "simply tells the SEC to go back to the drawing board . . . and come up with a better rule that will not put American public companies at an unfair disadvantage and cost us jobs."[79] When another Congressman specifically asked Representative Huizenga to be more specific and "propose an alternative," he refused, responding that "what my resolution does, is it directs the SEC to go back to the drawing board. It is not our job to write the rule. . . . I put it back to the SEC."[80]

Finally, but just as significantly, we note statements the Commission does *not* cite further demonstrate the inherent problem in putting undue weight on individual statements as it does here. The Commission cites statements mentioning compliance costs and risk of competitive harm, all to justify substantially weakening the rule, but not the statements indicating the need for close alignment of the rule with other markets. Representative Huizenga, the sponsor of the resolution in the House, for example, suggested the Commission's rule was too different from the rules in Europe and Canada and indicated the expectation was that in a new rulemaking, the Commission will "actually mirror what the EU and what other foreign governments are doing."[81]

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[76] Indeed no individual member of Congress during the brief debate appears to have specifically identified the definition of project as problematic, nor suggested it be defined differently, let alone argued the Commission should adopt the API model, now the Commission's proposed use the API Modified Project Definition.

[77] *See* 163 Cong. Rec. H854 (Rep. Williams) ("the SEC estimates that ongoing compliance costs for this rule to be as high as $591 billion. Let me say that again: one agency, one rule, $591 billion.")

[78] *See, e.g.*, 163 Cong. Rec. at H848 (Feb. 1 2017) (Rep. Hensarling) ("The SEC has estimated that ongoing compliance costs for his rule could reach as high as $591 million annually…. That is $591 million every year that could better be used to hire thousands more Americans."); *id.* at H851 (Rep. Wagner) ("The SEC estimated that ongoing compliance costs for this rule could reach as high as $591 million annually and fully admit that it has the potential to divert capital away from other productive opportunities, like growing a business and creating jobs"); *id.* at H852 (Rep. Barr) ("SEC estimates that the initial cost of compliance for U.S. firms could be as high as $700 million and that the ongoing costs could be as large as $591 million annually.")

[79] 163 Cong. Rec. H853.

[80] *Id.* (Rep. McGovern). Individual members also voiced seemingly conflicting rationales for their own support For example, the Commission cites Representative Hensarling's statements as showing Congress was concerned about compliance costs and competitive harm. *See* Proposed Rule, 85 Fed. Reg. at 2525 n.54-56. But at another point, he explains his support for the resolution by stating, "Let's vote down this leftist, elitist agenda," and at another point, "this has nothing to do with corruption. . . . It is about a radical, leftist, and elitist agenda that promotes narrow special interests and has declared war on carbon-based industry and energy. . . . That is what this is really about." 163 Cong. Rec. H858 (Feb 1, 2017)

[81] *Id.* at H850 (Rep. Huizenga) ("This foreign rule that has been brought up is really like comparing apples and oranges with the foreign rules versus this particular rule. And if we allow [SEC] to rewrite this particular rule, we might actually mirror what the EU and what other foreign governments are doing.")

Senator Isakson, in supporting the CRA resolution, emphasized the importance of ensuring the resolution did not "create a setback for U.S. leadership in anti-corruption efforts around the world," noting that "countries like the United Kingdom, the EU, Norway, and Canada have followed our lead, and I do not want to lose that."[82] Senator Isakson also joined together with five other senators to explain to the Commission that they support "transparency on these matters consistent with the international standards already adopted by European and other governments."[83] Thus, any new rule that is not aligned with international standards reflected in the European and other markets does not reflect the views of these members, and there is no reason to believe that their views are any less representative of Congress as a whole than those of the members that the Commission did choose to cite.

Overall, a close review of the legislative history of the resolution of disapproval shows little in the way of specific, meaningful guidance and substantial reason for caution. It certainly *does not* provide support for an approach that would change every significant feature of the rule in ways that fundamentally diverge with rules in other markets – in fact, it shows the opposite, because several members voiced concerns with departing from international standards. At most, it shows support for the resolution of disapproval was at least in part motivated for some members by the cost projections in the 2016 Rule, projections which have now been shown to be dramatically overstated.[84] Addressing such concerns through more tailored changes to the rule and updating the assumptions and data in the prior economic analysis to reflect current market realities will best ensure a different rule with a more favorable cost benefit ratio, yet still faithful to Section 13(q).

D. Appropriate contours for the Final Rule that will satisfy Section 13(q), are supported by the evidence in the record, and consistent with the CRA

The statute, the record, and developments outside the U.S. since the 2016 Rule and 2017 vote compel certain key features. At a minimum, the proposed rule must include (1) fully-public reporting, including issuer identity and government payee, (2) disaggregated at the project-level, defined to mean the contract or lease level, as is reflected in every other transparency regime, and (3) a de minimis threshold akin to that used in other markets. To fulfill the statute's directive to promote international transparency efforts, these features are necessary to ensure minimum basic consistency with other markets and the EITI. If, however, these features are in the final rule, there are other modifications that can be made that will ensure the rule is not "substantially the same," and also ensure that the Commission's rule is legally sound – supported by the record and Section 13(q). These modifications, although significant, represent a more appropriate balance that will still provide the benefits Congress intended, while also resulting in a significantly improved cost-benefit ratio as compared to the 2016 Rule and as compared to the current proposed rule.[85]

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[82] *See* 163 Cong. Rec. S635.

[83] *See* Letter from Senator Corker et al. (Feb 2, 2017) *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3080156-161926.pdf

[84] *See supra* Section I. *and infra* Section VIII (Economic Analysis)

[85] *See infra* Section VIII (Economic Analysis)

1. Revised approach to proportional reporting.[86]

While the Commission's 2016 approach to this issue would best promote the statute's transparency objectives and would be more consistent with Congress's intent for U.S. leadership on transparency (as opposed to merely meeting the current minimum international standard), we acknowledge that this would be a permissible change. While we continue to believe the cost concerns associated with this issue have been overstated,[87] we acknowledge revising the approach to proportional reporting as currently proposed would result in meaningful cost reductions to make this change. While this would result in significant loss of transparency, particularly given the prevalence of joint ventures in the extractives sector,[88] this change would enable the Commission to address what it identifies as the principal Congressional concerns without creating inconsistency,, as other markets do not currently require proportional reporting. In contrast with other far more problematic modifications proposed by the Commission, this change would generally be in line with existing reporting requirements.

However, we strongly urge the Commission to recognize proportional reporting as industry best practice in the final rule and encourage companies to adopt the practice, even if not required. We note that although not required in other markets, companies such as Total already report proportionally,[89] and U.S issuers should be encouraged to lead on this issue. Congress intended the U.S. to set the standard for corporate transparency in *all* payments, not to abide by the bare minimum industry expectation.

2. Adding an exemptive process for pre-existing foreign laws and pre-existing contracts.[90]

We continue to believe that exemptions for alleged foreign law conflicts and contractual prohibitions on disclosure are not warranted and remain deeply concerned that they could be easily manipulated to directly undermine the statute's transparency and anticorruption purposes. We acknowledge, however, that concerns about contract confidentiality and exemptions for situations where foreign laws prohibit disclosures were issues raised by multiple members of Congress supportive of the resolution of disapproval.[91]

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[86] This responds in part to question 32.

[87] *See e.g.* Comment submitted by PWYP-US (Feb. 16, 2016) at 24-25, *available at* https://www.sec.gov/comments/s7-25-15/s72515-45.pdf; Comment submitted by Global Witness (Mar 8, 2016) at 9-11, *available at* https://www.sec.gov/comments/s7-25-15/s72515-58.pdf

[88] *See*, *e.g.*, Comment submitted by PWYP-US (Mar. 16, 2020) at 35-36; Comment submitted by Global Witness (Mar 8, 2016) at 9-11, *available at* https://www.sec.gov/comments/s7-25-15/s72515-58.pdf. *See also e.g.* Ernst & Young, Joint ventures for oil and gas megaprojects," (2015) *available at* https://www.ey.com/Publication/vwLUAssets/ey-joint-ventures-for-oil-and-gas-megaprojects/$File/ey-joint-ventures-for-oil-and-gas-megaprojects.pdf

[89] *See, e.g.* Total SA. 2018 Registration Document. Reports on payments made to governments (Article L. 225- 102-3 of the French Commercial Code) https://www.total.com/sites/default/files/atoms/files/ddr2018-en.pdf#page=382 ("They are presented based on the Group share in each Project, whether the payments have been made directly by the Group Extractive Companies as operator or indirectly through third- party operating companies."); Comment submitted by Global Witness (Mar 8, 2016) at 10-11, *available at* https://www.sec.gov/comments/s7-25-15/s72515-58.pdf (noting other examples)

[90] This responds in part to Questions 57-66.

[91] *See supra* Section II.C.

As explained above, we strongly believe the Commission's approach to this issue in the 2016 economic analysis, most notably the unnecessary inclusion of billions of dollars in potential losses – despite the absence of evidence of any such laws, or reason to believe that such losses would actually take place, and despite the recognition of the Commission's case-by-case exemptive authority – appears to have contributed to confusion over this issue.[92] Since the CRA vote, the experience of companies reporting outside the U.S. has substantially clarified this issue, as the Commission predicted it would.[93] Nonetheless, we recognize this is an issue the Commission can address in a way that would clearly demonstrate attention to an issue highlighted by members of Congress and eliminate the billions of dollars of predicted potential indirect costs that were included in the 2016 rule.

While we generally agree that it would be permissible for the Commission to address the "substantially the same" language by allowing for such exemptions, the CRA plainly does not allow the Commission to ignore Section 13(q)'s purpose, the evidence from companies reporting in other markets, nor the robust evidentiary record on this issue showing clear need for caution. We have serious concerns about the Commission providing for self-executing exemptions on the basis of alleged conflicts with foreign laws or contractual disclosure prohibitions, given the misleading and even demonstrably false statements that have been advanced repeatedly over the last decade by certain industry commenters in pushing for such exemptions.[94] With three or more years of reporting disaggregated project-level payment information by nearly 800 companies, despite no exemptions in other reporting regimes, and none of the dramatic consequences previously predicted, there is significant reason to be all the more wary of any asserted need for such exemptions. The Commission must not risk making U.S. policy subordinate to non-disclosure laws enacted by secretive or corrupt regimes or create a situation that can be manipulated or abused by issuers.[95] Indeed, this would directly contravene the intent of Section 13(q), to promote transparency precisely where it is needed the most.

For contracts, we note similarly the overwhelming evidence that it has long been standard industry practice to include contract provisions that enable disclosure of information that might otherwise be deemed confidential where required by law, by regulators, or by stock exchange disclosure rules. The majority of companies abide by this standard practice in order to protect

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[92] *See supra* Section II.C.

[93] *See* 2016 Final Rule, 81 Fed. Reg. at 49390 ("as more companies begin to report under the EU Directives and ESTMA, the existence of alleged conflicts between those disclosure regimes and foreign laws may be clarified prior to any reports being due under the rules we are adopting today"). We note the Commission in 2016 stated that there was "sufficient uncertainty in the record" as to whether any such laws existed, that "counsel[ed] against adoption of any blanket exemptions for foreign law conflicts" at that time. 2016 Rule, 81 Fed. Reg. at 49390. Needless to say, there is significantly *less* uncertainty now.

[94] *See* Comment submitted by PWYP-US (Mar. 16, 2020), at 76-81, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6892310-210930.pdf; *See also* Comment submitted by Oxfam and EarthRights International (March 2016) at 9-17, *available at* https://www.sec.gov/comments/s7-25-15/s72515-59.pdf.

[95] As the Commission previously noted, "a blanket exemption" could lead a foreign government "to enact laws prohibiting the Section 13(q) disclosures." 2016 Final Rule, 81 Fed. Reg. at 49390. *See also id.* at 49391 (expressing concerns that issuers might apply exemptions in "an overly broad way" and noting generally that "effective and appropriate utilization of broad exemptions … would be dependent on the independent assessment and good faith implementation by issuers, potentially producing inconsistent application, if not overuse")

their shareholders from regulatory risk. Although it does not acknowledge this evidence in the proposed rule, we note the Commission has expressly recognized this fact in both the 2012 and 2016 Final Rules.[96] It follows that the Commission – after almost a decade of acknowledging an industry best practice - should not be in the business of accommodating irresponsible practices of a minority of issuers that put investors at risk. It is therefore just as essential to prevent abuse here.

Accordingly, self-executing exemptions along the lines proposed would only be acceptable if additional qualifying conditions and procedural safeguards are added. For foreign law, this includes restricting the exemption to only national-level laws *pre-dating* the enactment of Section 13(q). We continue to believe no such exemptions for laws after July 21, 2010 are warranted, as it would be inconsistent with the intent of the statute to effectively allow parties to contract around disclosures required by Section 13(q).[97] This has been extensively addressed in our past comments.

For contractual prohibitions, this too must be limited to contracts or contractual provisions - including amendments and extensions - that pre-date enactment of Dodd-Frank in 2010.[98] It would be unacceptable to provide, as the Commission currently proposes, a window through the effective date wherein companies and/or governments can negotiate and execute contracts (or amendments/extensions) specifically intended to circumvent compliance with the statute.[99] This window would be ripe for abuse.

We support the proposal of Publish What You Pay-U.S. with respect to procedural safeguards and necessary conditions, including the importance of maximizing transparency as to any claimed basis for any exemption.[100] In particular, any issuer seeking to utilize an exemption on the basis of alleged foreign law conflicts to withhold any information required by the rules,

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[96] *See*, *e.g.*, 2012 Final Rule, 77 Fed. Reg. at 46373 ("We understand that contracts typically allow for disclosure to be made when required by law for reporting purposes."); 2016 Final Rule, 81 Fed. Reg at 49391 (explaining "we are not persuaded that there is a need for an exemption in the final rules for contracts that may prohibit the disclosure" and noting "various commenters opposing such an exemption provided evidence indicating that many contracts allow for disclosure of payment information where it is required by law"); *see also id.* at 49391 n.411 ("persuasive evidence demonstrating that exceptions to confidentiality for laws or stock exchange requirements that require disclosure are frequently a standard component of oil, gas and mining contracts").

[97] *See, e.g.* 2016 Final Rule, 81 Fed. Reg. at 49365 n.83 ("in enacting Section 13(q)'s mandatory disclosure requirement, Congress sought to complement the EITI's existing voluntary transparency efforts that too many countries and too many companies either had not joined or would not."); *API v. SEC,* 953 F. Supp. 2d 5, 22 (D. D.C. 2013) ("[a] broadly written exemption could eviscerate section 13(q) by allowing any country to avoid disclosure by enacting a disclosure-barring law—returning, in effect to the EITI voluntary compliance regime 13(q) sought to augment.") We note further that even the most ardent proponents of exemptions did not insist on unbounded future exemptions. *See, e.g.* 2016 Final Rule, 81 Fed. Reg. at 49389 (noting that API proposed 3 approaches to exemptions, including "exempting issuers from reporting payments in any country whose laws prohibited the disclosures, so long as those laws existed before the Commission adopted its rules") (citing submissions from API, Exxon and Chevron)

[98] We strongly believe 2010 should be the cut off, but at a minimum, issuance of the 2012 Final Rules unquestionably provided sufficient notice.

[99] *See, e.g.* 2012 Final Rule, 77 Fed. Reg. at 46373 (noting "a different approach might encourage a change in practice or an increase in the use of confidentiality provisions to circumvent the disclosure required by the final rules…. [and] frustrate the purpose of Section 13(q).")

[100] *See* Comment submitted by PWYP-US (Mar. 16, 2020) at 86-95.

must, at a minimum, be required to: (1) identify the jurisdiction for which payment information is being withheld, (2) provide the law prohibiting disclosure (and English translation, if necessary), (3) take steps to seek permission or consent to disclose and explain those steps taken to obtain permission or consent to disclose, (4) provide a legal opinion addressing the inability to disclose that specifically (i) identifies a conflict with disclosures under this section, (ii) addresses the scope of the prohibition and specifically which payment information is prohibited and which is not, (iii) describes the penalties or/or sanctions for violating the foreign legal provision, including information about whether the prohibition has been enforced in the past.

For contractual prohibitions, the rules must require an issuer to (1) identify the jurisdiction for which payment information is being withheld, (2) the country, title of contract, parties, and date of execution, (3) the full text of the contract terms prohibiting disclosure, as well as any other terms relevant to disclosure rights including terms providing any exceptions allowing for disclosure, and the terms providing the legal consequences of violating the provision; (4) take steps to seek permission or consent to disclose and explain those steps taken to obtain permission or consent to disclose, (5) provide a legal opinion addressing the inability to disclose that specifically (i) identifies a conflict with disclosures under this section, (ii) addresses the scope of the prohibition and specifically which payment information is prohibited and which is not, (iii) documents the existence of any carve-outs, exceptions or other processes built into the contract that allow issuers to comply with disclosure laws, regulations, or stock exchange requirements, and (iv) describes the penalties or/or sanctions for violating the provision. We also believe issuers should be expected to negotiate for consent where necessary remains intact.[101]

The Commission must ensure exemptions are narrowly applied, should strongly consider imposing limits on duration, and must prevent a situation where US issuers attempt to exercise exemptions for countries where companies listed in the UK, Canadian or European markets are already disclosing disaggregated project payment information.

3. *Providing transitional relief to various issuers.*[102]

Categorical exemptions for large numbers of issuers would be plainly at odds with the text of Section 13(q) and Congressional intent.[103] There is no basis in the statute to wholesale exclude, permanently, any such category of issuer. As the Commission has recognized, exempting small reporting companies would "create a significant gap in the intended transparency,"[104] and payments made by such entities are no less critical to the transparency

[101] *See* Comment submitted by PWYP-US (Mar. 16 2020) at 92-93.

[102] This responds to questions 67-68, 73-76.

[103] *See, e.g.* 15 U.S.C. 78m(q)(2)(A)(requiring "*each* resource issuer" to provide payment information)(emphasis added); *see also* Letter submitted to the Commission by Senators Cardin, Kerry, Leahy, Schumer, and Frank (Mar. 1, 2011), *available at* https://www.sec.gov/comments/s7-42-10/s74210-42.pdf ("Section 1504 states specifically a disclosure requirement for all issuers 'that file annual reports with the SEC'" and "the statute makes clear that the intent is to make this information available from all countries" and that "there be no exemptions from reporting, for any type of covered issuer.").

[104] 2016 Final Rule, 81 Fed. Reg. at 49426. The Commission previously found this would eliminate at least 43% of covered issuers. In the Proposed Rule, it predicts such an exemption would permanently exclude nearly half – 47 percent - of the issuers who would otherwise be required to disclose payments to foreign governments or the federal government. Proposed Rule, 85 Fed. Reg. 2552.

objectives of the statute.[105] Thanks to evidence of successful reporting in other jurisdictions, as well as compliance cost numbers provided by companies,[106] we strongly believe that compliance costs to issuers generally are not burdensome, and that small reporting companies or emerging growth companies do not face sufficiently different burdens that would justify exclusion from reporting obligations altogether.[107]

We do, however, believe that there is a more appropriate way for the Commission to make meaningful changes from the 2016 Rule that will address what it perceives as Congressional concerns about costs without undermining Section 13(q) -- by providing transitional relief to give such entities more time to prepare to comply. While we strongly oppose any categorical exemptions that would exempt any type of entity from the rules, we consider transitional relief for different entities to be an acceptable and appropriate way to address the CRA's "substantially the same" language. Accordingly, we recommend an optional two-year period of transitional relief for small reporting companies and emerging growth companies that are not already reporting under similar regimes in other markets, as well as the proposed transitional relief for new IPOs, where not previously subject to reporting requirements in other countries (in which case they would not be able to utilize the transitional period).

We believe, however, that the Commission should explicitly encourage timely reporting by such issuers, despite providing this option. The Commission should reference in its revised economic analysis examples that demonstrate the feasibility of reporting by companies that would qualify as emerging growth companies. We note a number of cross listed companies that would have qualified as EGC in FY2018 are already reporting in other jurisdictions.[108] Congress – including members who supported the CRA resolution – has emphasized the intent that the U.S. lead on extractive transparency,[109] and experience outside the U.S. shows that timely compliance is clearly feasible for all categories of issuers. Accordingly, we urge the Commission to make clear that this relief is optional, that timely disclosure is encouraged, and require that if such entities intend to utilize the transitional period, to state affirmatively in their filings that they are opting not to report payments to governments for that fiscal year on the basis of that exemption.

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[105] *See, e.g*. Comment submitted by the Carter Center (Mar. 16, 2020) at 2, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6952851-212572.pdf (opposing the exemption for small reporting companies and explaining that " junior companies are often more likely to pay governments large, up-front bonuses to gain access to resources, particularly in the DRC. By excluding them from the reporting requirement, critical information about the payments associated with the acquisition of exploration and/or extraction permits will remain undisclosed")

[106] *See, e.g.* Comment submitted by PWYP-US (Mar. 16, 2020) at 6-9.

[107] We note further that during the last rulemaking, "no commenters supported an exemption or different reporting requirements for small entities in response to the Proposing Release." 2016 Final Rule, 81 Fed. Reg. at 49426.

[108] For example, in a review of covered issuers that would have qualified as emerging growth companies in FY2018, we found that over 25 cross-listed companies are currently reporting payments to governments, with approximately $2.3 billion in total payments reported. This includes, for example, oil companies Enerplus Corporation ($497.2 million), Gran Tierra Energy ($460.8 million), Obsidian Energy ($144.7), Transglobe Energy ($351.8 million), Transatlantic Petroleum Ltd. ($74.9 million), and mining companies such as Eldorado Gold Corporation ($151.2), Kirkland Lake Gold Ltd. ($79.6 million), Alamos Gold Inc. ($39.8 million), and Caledonia Mining Corporation ($21.7 million). This data was compiled using Bloomberg data to identify companies, and using ResourceProjects.org to review payments made by cross-listed companies.

[109] *See supra* Section II.C.

4. *Changes to project-level reporting and tagging.*[110]

As explained above, "project" must be defined consistent with the international standard, as operational activities governed by a single contract, license, lease, concession, or similar legal agreement, which forms the basis for payment liabilities with a government.[111] A final rule that fails to align with this definition would be subject to legal challenge. However, there are two changes that the Commission can make to the way project-level data is publicly reported from the 2016 Rule that would substantially assist the Commission in ensuring a rule that is different, while still ensuring the necessary alignment with the international standard.

First, the Commission should change the approach to aggregating contracts from the 2016 Rule to instead adopt the approach for aggregating contracts used in the U.K., EU, Norway, Canada, and the IMF, in which "agreements with substantially similar terms that are both operationally and geographically integrated may be treated by the company as a single project." This change from the 2016 Rule will better align with international practice than the prior approach, responds to the concerns of investors, and is consistent with the views of many industry commenters. Most importantly, the ability of companies to utilize such a standard cannot be questioned, given the hundreds of companies already reporting under this approach.[112] Cost data from the EU and UK further shows that this is a cost effective way to report project level payments.[113]

Second, although the interactive data tags currently proposed would be useful to data users, with a proper project definition, the Commission could eliminate some of the additional proposed tags that are not statutorily required by Section 13(q). While this would result in a loss of helpful information, it would do so with comparatively less damage to the statutory objectives than other changes proposed by the Commission. Moreover, this change would be acceptable as it would result in changes from the 2016 Rule without undermining consistency with other markets, preserving the alignment and comparability that Congress intended and investors have requested of the Commission for almost a decade.[114]

5. *Changes to specific payment categories.*[115]

Two changes from the 2016 rule are warranted to the covered payment categories in light of experience with reporting by companies outside the U.S. and and other transparency

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[110] This responds in part to questions 35-36 and 80.

[111] *See infra* Section IV (detailed discussion of project definition)

[112] *Cf.* 2016 Final Rule, 81 Fed. Reg. at 49382 n.305 ("It is now apparent that the reporting that we are requiring is practicable—that is, it is capable of being done or accomplished—because companies are already making similar disclosures pursuant to the EU Directives.")

[113] *See, e.g.* PWYP-US (Mar. 16, 2016), at 6-9.

[114] *See, e.g*. id. at 55; Comment submitted by Amundi et al (Mar. 16, 2020) at 3, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6969413-214065.pdf; Comment submitted by ACTIAM NV et al (Mar. 8, 2016) *available at* https://www.sec.gov/comments/s7-25-15/s72515-52.pdf; Comment submitted by Calvert Investments (25 Nov. 2013), *available at* http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-17.pdf

[115] This responds in part to questions 19-21.

developments. First, commodity trading payments where an issuer purchases oil, natural gas or minerals from a government, including a state-owned company, should be included. This change would be consistent with Section 13(q)'s definition of payment, as it would be consistent with the EITI, which requires the disclosure of trading-related payments related to the sale of the state's share of production.[116] We also fully support the justification and recommendations of the Natural Resource Governance Institute ("NRGI"), which have provided concrete evidence and convincingly argued that these payments are economically significant, prone to corruption and subject to limited scrutiny, and now firmly established as a commonly recognized revenue stream in relation to the commercial development of oil, gas and minerals.[117]

Second, the Commission should revise its approach to in-kind payments to also require reporting the volume of in-kind payments where applicable, in line with the EITI Standard.[118] This is important to ensuring the ability to hold governments accountable where in kind payments are not appropriately valued,[119] and is an appropriate change to make from the 2016 Rule that is based on experience with reporting by companies in other markets, and that would ensure closer alignment with the international standard.[120] This is needed to support the accountability work Congress intended civil society to undertake.[121]

6. *Eliminate the exploratory exemption.*[122]

In light of the experience with reporting that has taken place since 2016 under other reporting regimes, it is now evident that no exemption is necessary or warranted for exploratory activities. While the Commission had previously identified this as the stage at which the risk of

[116] 15 USC § 78m(q)(1)(C) (the definition of "payment", "includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals."). *See also* 2019 EITI Standard, Requirement 4.2, p. 23; Comment submitted by PWYP-US (Mar. 16, 2020) at 24-25.

[117] *See* Comment submitted by Joseph Williams, NRGI (Mar. 16, 2020) *available at* https://www.sec.gov/comments/s7-24-19/s72419-6961595-212793.pdf

[118] *See* Comment from EITI Secretariat. (Mar. 16, 2020), at 23, 24, 26, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6960332-212746.pdf (Confirming the EITI requirements: "Where the state sells its share of production or collects other material revenues in-kind, the government, including state-owned enterprises, are required to disclose the volumes received and sold, and revenues received relating to that production and to publish data disaggregated by individual buying company (Requirement 4.2)" and citing to the Summary Data template agreed by the EITI Board in April 2019 which requires the disclosure of in-kind volumes per project.).

[119] *See, e.g.* PWYP-US (Mar. 16, 2016), at 23-24.

[120] The EU Directives require companies to report the value of in-kind payments "and, where applicable, the volume," and require a note explaining the method for determining the value of in-kind payments. Directive 2013/34/EU of the European Parliament and of the Council (26 Jun. 2013), Article 43(3). *See also* Comment submitted by PWYP-US (Mar. 16, 2020), at 24-25, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6961610-212816.pdf (noting "[t]rading payments are now firmly established as a commonly recognized revenue stream related to the commercial development of oil, natural gas and minerals with the EITI, … IMF (including trading payments in its Fiscal Transparency Code), OECD … and other governments including Switzerland and the United Kingdom)

[121] *See e.g.,* Comment submitted by PWYP Indonesia (Mar. 11 2015), 2-3, *available at,* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-64.pdf.

[122] This responds to questions 70 and 71

competitive harm was most plausible, no company appears to have raised concerns about disclosures during the exploratory phase during either the UK nor EU reviews of implementation experience.[123] This is an appropriate, evidence-based change to make to the 2016 Rule, informed by the actual experience of companies who have already reported under a very similar standard to the 2016 Rule without such an exemption for exploratory stage payments. This change would produce greater transparency benefits, further promote international alignment, consistent with clear Congressional intent, and ensure more timely access to more data of critical use to investors and citizens alike. And the reporting experience of hundreds of companies shows these additional transparency benefits would be produced without notable additional costs.

7. Improve the anti-evasion provision to align with other markets.

In addition, based on experience with reporting outside the U.S., we recommend the anti-evasion provision be revised to more closely align with the rules in other markets by adding that "activities and payments must not be artificially structured, split, or aggregated to avoid the application of the rules."[124]

* * *

These changes outlined above are significant, and more than sufficient to satisfy the CRA, and unlike the current proposed rule, will ensure the Commission is able to produce a rule that is soundly supported by the evidence in the record and current market realities, and advances the statute's objectives, thereby complying with the CRA, the APA and Section 13(q).

Summary of Proposed Changes from the 2016 Rule:

- Conditional exemptions provided for *pre-existing* foreign law conflicts and contractual prohibitions on disclosure.
- Proportional reporting is encouraged, but not required.
- Project definition changed to allow "agreements with substantially similar terms that are both operationally and geographically integrated may be treated by the company as a single project".
- Project tagging changed to no longer require tagging of "particular resource" or "major subnational jurisdiction".
- No exploratory exemption provided.
- Transitional relief provided for small reporting companies and emerging growth companies.
- Transitional relief provided for new IPOs, where not already subject to similar disclosure requirements in other jurisdictions.
- Payment categories changed to include commodity trading.

[123] *See supra* Section I (discussing the EU review); *Accord* Comment submitted by PWYP-UK (Nov. 25, 2019), *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6470014-199342.pdf (summarizing findings of the UK Review and attaching the government reports).

[124] *See* Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Article 43(4);Extractive Sector Transparency Measures Act (22 Dec 2015), at 12.

- In-kind payment reporting requirement changed to require the volume of in kind-payments where applicable.
- Anti-evasion provision revised to more closely align with Europe and Canada.

III. Fully public reporting is essential to carry out the pro-transparency intent of Section 13(q).[125]

Fully public reporting is essential to fulfilling the statute's objectives. While we support the proposal to require public reporting, we strongly object to the Commission's indication that it is still considering "an aggregated, anonymized compilation instead of making public individual Forms SD to the Commission non-publicly and the Commission using those nonpublic submissions to produce an aggregated, anonymized public compilation."[126] Such an approach would be legally untenable.

Public disclosure is strongly supported by the statute, the legislative history, the overwhelming evidence from commenters over nearly a decade – and all the more compelling in light of experience of the hundreds of companies now regularly publicly reporting payment information in other markets. For the rule to advance the statute's accountability, anti-corruption and investor protection objectives, public disclosure is vital. To allow anonymized, aggregated public disclosure, by contrast, would *negate* Section 1504's dual purpose of protecting investors and promoting accountability for communities in resource-rich countries.

A. The text, structure and legislative history strongly support public disclosure

Public disclosure is strongly supported by the text, structure and legislative history of Section 13(q). [127] This includes the fact that the provision is included in the Exchange Act, which is a public disclosure statute, and the fact that Section 13(q) uses the term "annual report," a document that is typically publicly filed. "Adding a new disclosure requirement to the Exchange Act, and doing so for the clear purpose of fostering increased transparency and public accountability, is a strong indication that Congress intended for the disclosed information to be made public."[128]

Indeed, most of the statute would make little sense if the information included in the annual report were meant to be withheld from the public. For example, the requirement that the disclosures be made in an interactive data format, with electronic tags identifying particular

[125] This responds to questions 54 and 55.

[126] Proposed Rule, 85 Fed. Reg. at 2542

[127] We continue to believe the statute is best understood to mandate public disclosures, but acknowledge the district court decision in *API v. SEC* decision, which Oxfam did not have the right to appeal. The Commission unquestionably can exercise its discretion to require public disclosure under Chevron step 2, and we do not think a decision to allow aggregated anonymized disclosures would be defensible. *Cf. API v. SEC,* 953 F. Supp. 2d at 19 n.5 (recognizing that "a rule that provides for no or extremely limited public disclosure in the compilation might be an unreasonable interpretation of Section 13(q)")

[128] 2016 Final Rule, 81 Fed. Reg. 49386 n.353.

information about each payment,[129] is meaningless unless it is meant to allow investors and other users of the data to digest it more efficiently. If the raw data were meant to be viewed only by the Commission for the purpose of developing a public compilation, there would be little reason to make it available in such a user friendly manner. In addition, and as the Commission has explained, the "data points" required -- including, for example, "the business segment" that made the payment and the "currency used" -- would not "be useful to the Commission for preparing an aggregated, anonymized compilation as the data points would not be necessary to present aggregated payment information and otherwise would not be reflected in such a compilation."[130] Furthermore, the list of enumerated categories of information for which electronic tags are statutorily required includes "such other information as the Commission may determine is necessary or appropriate *in the public interest or for the protection of investors."*[131]

The legislative history also strongly supports public reporting. For example:

- The provision "takes important steps towards reversing the resource curse by *revealing payments* made here and abroad to governments for oil, gas and minerals."[132]
- "This bill would not require the companies to collect any new information, but *to report publicly* financial figures they already maintain."[133]
- The provision "requires companies listed on U.S. stock exchanges to disclose in their regular SEC filings their extractive payments to foreign governments," which "would allow investors to better evaluate the potential country risk faced by companies" and "allow people to have information about the funds sent to their governments"[134]
- "Enhancing openness in revenue flows allows for greater public scrutiny of how revenues are used. Increased transparency can help create more stable, democratic governments, as well as more reliable energy suppliers."[135]
- "The wave of the future is transparency, and these principles of transparency have been endorsed by the G8, the International Monetary Fund (IMF), the World Bank, and a number of regional development banks."[136]
- "By giving the citizens the information about how the payments are made to their country, they have a much better chance to hold their government officials accountable."[137]

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[129] 15 U.S.C. § 78m(q)(2)(C)&(D)

[130] 2016 Final Rule, 81 Fed. Reg. at 49386. We also continue to agree that the compilation under Section 13(q)(3) is best understood as designed to supplement the required resource extraction payment disclosures.

[131] 15 U.S.C. § 78m(q)(2)(D)(ii)(VII).

[132] Floor Statement of Senator Lugar, Energy Security Through Transparency Act of 2009 (Sept 23, 2009) *available at* https://www.congress.gov/congressional-record/2009/09/23/senate-section/article/S9735-1 (emphasis added)

[133] Floor Statement of Senator Lugar, Energy Security Through Transparency Act of 2009, (Sept 23, 2009) *available at* https://www.congress.gov/congressional-record/2009/09/23/senate-section/article/S9735-1 (emphasis added)

[134] *Id.*

[135] Floor Statement of Senator Cardin, "The Dodd-Frank Wall Street Reform and Consumer Protection Act," (July 15, 2010) *available at* https://www.cardin.senate.gov/news/press-releases/the-dodd-frank-wall-street-reform-and-consumer-protection-act

[136] *Id.* These principles required - and do today as well - public reporting. *See supra* Section I.

[137] 156 Cong. Rec. 13136 (July 15, 2010) (Sen Cardin Statement)

- The amendment "would require the oil companies to disclose the payments that they make to countries for mineral rights. It is in order to give investors transparency and knowledge about the risks that may be involved in regards to oil companies."[138]
- The provision will ''require companies listed on U.S. stock exchanges to disclose in their SEC filing extractive payments made to foreign governments for oil, gas, and mining . . . This information would then be made public, empowering citizens in resource-rich countries in their efforts to combat corruption and hold their governments accountable.''[139]
- "Extractives companies, which have taken the initiative in some countries but not others, should step up their engagement to promote transparency and be more proactive in public disclosure of revenue payments to foreign governments. Oil and mining companies should voluntarily disclose their extractives payments to foreign governments. They should publicly endorse transparency in bidding and contracts."[140]
- "[P]rovisions related to transfer of funds to the federal government, payments to localities including in-kind contributions, and agreements for governments to take a specified amount of product all should be made public. An international standard for disclosing contractual information should be adopted."[141]

Section 13(q)'s architects have subsequently confirmed the importance of public disclosure to fulfilling Section 1504's objectives. For example, a letter from Senator Cardin and 11 other senators explained "Public disclosure by individual issuers of disaggregated project-level payments with no exemptions accurately captures Congressional intent."[142]

By contrast, there is no support for confidential reporting in the legislative history or the statute itself. As the Commission has previously recognized, "neither the statute's text nor legislative history includes any suggestion that the required payment disclosure should be confidential."[143]

B. Public reporting is necessary to advance the statutory objectives, which cannot be achieved without issuer-specific information.

The rule's objective is to increase revenue transparency, an objective directly and self-evidently advanced by a payment disclosure. Moreover, transparency is logically enhanced by *full* disclosure – disclosing not only the payee, but the payor. Meaningful realization of Section 13(q)'s benefits is only possible if the information in issuers' reports is made public at a company-specific and disaggregated project-level. The evidence to this end in the record is already overwhelming. To briefly summarize:

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[138] 156 Cong. Rec. S4056 (May 20, 2010) (Statement of Senator Cardin)

[139] 156 Cong. Rec. S3816, at S3976 (May 19, 2010) (Statement of Senator Feingold)

[140] Staff of S. Comm. on Foreign Relations, 110th Cong., The Petroleum And Poverty Paradox: Assessing U.S. And International Community Efforts To Fight The Resource Curse, S. Rep. No. 110--49 (Comm. Print 2008), *available at* https://www.govinfo.gov/content/pkg/CPRT-110SPRT44727/pdf/CPRT-110SPRT44727.pdf.

[141] *Id.* at 26-27

[142] Comment submitted by Sen. Benjamin L. Cardin, et al. (5 Feb. 2016), *available at* https://www.sec.gov/comments/s7-25-15/s72515-19.pdf.

[143] 2016 Final Rule, 81 Fed. Reg. at 49386.

First, removing issuer-specific information would decisively gut the feature of the rule most obviously beneficial to investors: the identity of the company making the payments.[144] That is plainly contrary to the Commission's investor protection mission.

Second, citizens, community based groups have explained in extensive detail why public disclosures are essential and why they could not usefully use information that was not company-specific.[145] To engage in meaningful oversight of government revenue collection and management and to deter and expose corruption in extractive deals, public disclosure is critical.[146]

Third, without public reporting, including of issuer identifying information, the statute cannot effectively combat and deter corruption as Congress intended. An anonymous, aggregated approach to disclosures could only be justified if the statute was exclusively concerned with the role of governments. But it is obvious from the statute that Congress was not concerned *only* with overall revenues received, without interest or attention to the payor. If it had been, Congress could have simply mandated government level disclosure. That Congress did not stop there but instead *also* mandated project-level disclosure for "each project,"[147] strongly indicates the anticorruption and accountability objectives underlying Section 13(q) are broader, as the Commission has already found.[148] Moreover, the inclusion in the statutorily required tags that an issuer "identify" "the business segment … that made the payments" in addition to the "project … to which the payments relate,"[149] further confirms the intent that the issuer-identifying information be public.

The Commission has correctly concluded that public disclosure "is necessary to achieve the US interest in providing a level of payment transparency that will help combat corruption and promote accountability in resource-rich countries, as Section 13(q) was intended to do."[150] Accountability of commercial actors is no less important than government actors when the deals at issue necessarily involve both parties. The statute is not simply concerned with corruption by officials "after a deal is entered, but also with exposing potential corruption that may surround

[144] *See* PWYP-US (Mar. 16, 2020) at 70-72. *See also e.g.* Comment from Aviva Investors (Feb 12, 2018), *available at* https://www.sec.gov/comments/df-title-xv/resource-extractionissuers/cll6-3130136-161939.pdf ("[t]he disclosure resulting from implementation of Section 13(q) would not be useful if it provided on an anonymous basis or without clear association to the company and project to which payments may be attributed."); Comment submitted by EarthRights International (12 Dec. 2014), at 4-7, *available at:* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-58.pdf; Comment submitted by Columbia Center for Sustainable Investment (Dec. 10, 2019), *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6521646-200386.pdf.

[145] *See, e.g.* PWYP-US (Mar 16, 2020) at 68-70; Comment submitted by EarthRights International and Oxfam America (8 Mar 2016), at 6-8, *available at* https://www.sec.gov/comments/s7-25-15/s72515-59.pdf (summarizing submissions)

[146] *See, e.g*. PWYP-US (Mar. 16, 2020) at 66, 68-70; Comment submitted by EarthRights and Oxfam (Mar. 8, 2020) at 6-8.

[147] 15 U.S.C. § 78m(q)(2)(D)(ii)

[148] 2016 Final Rule, 81 Fed. Reg. at 49380 n.291

[149] 15 U.S.C. § 78m(q)(2)(D)(ii)(IV)

[150] 2016 Final Rule, 81 Fed. Reg. at 49386.

the underlying deal and the resulting payment flows,"[151] which necessarily includes the companies entering into such deals with governments. Congress intended to shine a light on payments made by extractive companies and received by governments.

Moreover, as the Commission has also explained, the government has "few other means… to directly target the myriad forms of corruption that can develop in connection with resource extraction (many of which extent well-beyond the quid pro quo payments that are the target of the Foreign Corrupt Practices Act) to promote greater accountability in the use of extractive resources and the revenues generated therefrom."[152] Removing public reporting would remove the public, one of the most important tools in combating corruption, from a meaningful role in monitoring corruption more generally.[153]

Fourth, a confidential aggregated model would plainly conflict with clear international consensus and undermine transparency promotion efforts, despite Congress's clear direction to ensure the rule supports such efforts with the directive.[154] No other transparency regime allows anonymity. As Equinor wrote in its recent comment opposing an aggregated confidential reporting model, such an approach "would further increase the differences between the US disclosure regime and other disclosure regimes without providing any corresponding meaningful reduction in the compliance burden on issuers," and "would not be conducive to building trust with external stakeholders, nor prevent possible mismanagement of funds."[155] And U.S. government agencies, including the U.S. State Department and USAID have explained that issuer-specific public disclosures are necessary to advance US foreign policy objectives,[156] while the Department of the Interior has explained that "permitting confidential disclosure would contravene the transparency objectives of the statute and the EITI Standard."[157]

IV. The Modified Project Definition is arbitrary, cannot be reconciled with Section 13(q), the record, nor current market realities and it will not achieve the transparency benefits Congress intended.[158]

The Commission correctly concluded in 2016 that a more granular definition of project was "necessary" "to achieve a level of transparency that will help advance the important anti-

[151] *Id.* at 49366 n.97

[152] *Id.* at 49381 n.293

[153] Indeed, this is why the EITI was purposefully designed and constructed to include distinct roles for three stakeholders: governments, companies and civil society. The EITI Standard specifically requires governments to enable the public to play its oversight role. *See* EITI Standard Requirement 1.3. *See also* EITI Protocol: Participation of civil society, https://eiti.org/document/eiti-protocol-participation-of-civil-society#Article1

[154] 15 U.S.C. § 78m(q)(2)(E)

[155] Comment submitted by Equinor (Mar. 13, 2020) at 2, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6952843-212532.pdf

[156] *See e.g.* Comment submitted by USAID (Feb. 16, 2016), *available at* https://www.sec.gov/comments/s7-25-15/s72515- 37.pdf; Comment submitted by US Department of State (Jan 21, 2016) *available at* https://www.sec.gov/comments/s7-25-15/s72515-13.pdf

[157] Comment from US Department of Interior (Feb . 17, 2015), at 5, *available at* https://www.sec.gov/comments/s7-25- 15/s72515-47.pdf

[158] This responds to questions 35, 36, 37, 43, 44, 92

corruption and accountability objectives underlying Section 13(q)."[159] Subsequent developments outside the U.S. have only confirmed the wisdom of that finding, and the necessity of a contract-based definition. The Modified Project Definition is unmoored from the statute, inconsistent with common industry usage, fundamentally at odds with the international transparency standard, and will not advance the objectives of the statute. Neither the CRA nor any individual member of Congress's concerns cited by the Commission can justify adopting an approach that would fundamentally gut the statute's intended effect, would conflict with current market realities, and which the Commission itself has already thoroughly rebuked.

A. The Modified Project Definition is at odds with the plain language and construction of Section 13(q).

The plain language of the statute clearly calls for reporting on "payments made for *each project* . . ." and in a separate clause, requires reporting "the type and total amount of such payments made to each government."[160] This clearly envisions separated disaggregated reporting by project. Moreover, Section 13(q) requires issuers to disclose an explicit list of project-level payments,[161] whose values largely derive from the unique fiscal terms assigned to a given concession or license area. Royalties, license fees, production entitlements and bonuses – payment types that represent a significant share of the financial benefits that accrue to governments from extractive activities – are levied according to the terms of specific contracts and licenses.[162] Even putting aside the international consensus around such a definition, defining an extractive "project" for purposes of reporting under Section 13(q) in relation to the lease, license or other concession level arrangement that governs its rights and fiscal obligations is plainly consistent with and supported by the text.

By contrast, there is *no* support for the Modified Project Definition in the statute, nor is there any evidence such a definition has ever been used before, as explained further below. We note that API devised this approach to "project" when it could not successfully argue that "project" equated to country level, as the statute's structure clearly envisions reporting for each project reporting *in addition* to reporting "the type and total amount of such payments made to each government."[163] Congress could not have meant to allow the Commission to define "project" as all activities within a given country; this would make the former sub-clause meaningless, as it would be redundant of the latter. But the Modified Project Definition is just as artificial of a construct and nothing in the statute supports contorting the meaning in such a way as to allow payments for multiple distinct and unrelated projects to be presented as if they were for a single project.

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[159] 2016 Final Rule, 81 Fed. Reg. at 49379. *See also id*. at 49380 ("We are persuaded … that a more granular approach to the definition of ''project'' like the one we are adopting today is necessary."); *id.* at 49382 (contract level definition is "necessary and appropriate")

[160] 15 U.S.C. § 78m(q)(2)(A)(i), (ii).

[161] *Id*. § 78m(q)(1)(c)(ii)

[162] *See, e.g.*, Comment submitted by PWYP-US (Feb. 23, 2012) *available at* https://www.sec.gov/comments/s7-42-10/s74210-191.pdf; Comment submitted by PWYP-US (Mar. 14, 2014), 19-21, *available at:* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf; International Monetary Fund, Fiscal Regimes for Extractive Industries: Design and Implementation (Aug. 15, 2012), at 15, *available at* http://www.imf.org/external/np/pp/eng/2012/081512.pdf.

[163] 15 U.S.C. § 78m(q)(2)(A)(i), (ii).

We note the Commission itself appears to recognize that the Modified Project Definition would limit transparency in the same way as the plainly untenable country-level approach to reading the statute. The Commission explains that although the rule with the Modified Project Definition "would no longer provide the additional transparency benefits associated with contract-level information," it would still "provide the public with information concerning the overall revenue that national governments receive from natural resources."[164] This is not the level of transparency that the statute requires. As the Commission has previously noted, the text and structure of Section 13(q) shows that intended purpose is *not* limited ''to provid[ing] the public with information about the overall revenue that national governments receive[.]"[165] If that was Congress's objective, it could have "[s]imply mandat[ed] the government level disclosure,"[166] but it did not stop there; instead, the plain text of Section 13(q) mandates project-level disclosures *in addition* to mandating national level information. Congress clearly understood "project" and "government" to be different concepts.

The Commission's proposal to allow *additional* aggregation on top of what is already baked into the Modified Project Definition is all the more troubling, and is inconsistent with the statute for the same reasons. The proposed approach would "result in broad aggregation of projects within a major subnational political jurisdiction, which could make it more difficult for end-users of the disclosure to identify the specific commercial development activities associated with the disclosed payments."[167] Aggregating across multiple projects so as to report them as if they were a single project is plainly not reporting "any payment" for "each project" as the statute requires.

B. Issuers, governments, citizens and others use a contract definition for extractive industry "projects," while the Modified Project Definition is an arbitrary creation with no precedent.

Interpreting "project" to mean multiple distinct projects, potentially geographically very far from each other and/or completely unrelated in terms of project phase, fiscal terms or other characteristic defies standard industry usage, and more generally, a common sense understanding of the term "project." As the Commission has noted, "engaging in similar extraction activities across the territory comprising the first-level subnational political jurisdictions of countries" simply does not "provide[ ] the type of defining feature to justify aggregating those various activities together as a solitary project."[168] Indeed, the Commission has thoroughly and persuasively analyzed and rejected the Modified Project Definition, explaining, for example, that:

- The Modified Project Definition (then the API model) is "inconsistent with how companies in the resource extraction sector often refer to their 'projects' with foreign countries," as it in fact "appears that companies use the term project to refer to their

[164] Proposed Rule, 85 Fed. Reg, at 2537 (internal citations omitted)
[165] 2016 Final Rule, 81 Fed. Reg. at 49380.
[166] *Id*. at 49380 n.291.
[167] Proposed Rule, 85 Fed. Reg. 2539.
[168] 2016 Final Rule, 81 Fed. Reg. at 49381.

concession-level or field-level operations,"[169] consistent with the contract-level definition in the 2016 Rule.

- By "so heavily focusing on subnational political jurisdictions as a defining consideration" the Modified Project Definition "appears to disregard the economic and operational considerations that … would more typically—and more appropriately—be relevant to determining whether an issuer's various extraction operations should be treated together as one project."[170]
- By relying on the "major subnational political jurisdiction as the defining characteristic," the Modified Project Definition would "produce vastly disparate transparency from one jurisdiction to another."[171]
- A contract-level definition makes more sense given that "[i]n commercial relations, contracts are frequently used to define the scope of a project that one party is undertaking for another."[172]

We note also that the Modified Project Definition is also at odds with how the Commission has defined projects in other regulations applicable to the oil and gas industry. For example, in the Modernized Oil and Gas Rules, the Commission defines "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."[173] While we do not believe this is the appropriate definition to use here, at a minimum, it is clearly more consistent with a contract-based understanding than the Modified Project Definition, and further shows the lack of precedent for the Modified Project Definition.

We have found no indication in the record nor anywhere else indicating anyone has ever understood the term "project" to mean anything close to what API, and now the Commission, suggests it should under the Modified Project Definition. Current market realities, as summarized above, leave no question as to the clear consensus in the extractives industry around a definition tied to the contract, lease or legal agreement that forms the basis of payment liabilities. This is further confirmed by 10 years of evidence as to how projects are understood by all relevant parties. To highlight just a few such examples:

- Existing petroleum fiscal systems are based on licenses, concessions and contracts.[174]

    - United States Government:

[169] *Id.* at 49381 n. 297.

[170] *Id.* at 49381.

[171] *Id.* at 49381-82 n. 298.

[172] *Id.* at 49380.

[173] Financial accounting and reporting for oil and gas producing activities pursuant to the Federal securities laws and the Energy Policy and Conservation Act of 1975, 17 C.F.R. § 210.4-10(a)(8) (effective Nov 5, 2018).

[174] *See*, *e.g.*, International Monetary Fund, Fiscal Regimes for Extractive Industries: Design and Implementation (Aug. 15, 2012), at 15, *available at*, https://www.imf.org/external/np/pp/eng/2012/081512.pdf; Comment submitted by PWYP-US (Feb. 23, 2012), *available at*, https://www.sec.gov/comments/s7-42-10/s74210-191.pdf (discussing publications showing existing petroleum fiscal systems are based on licenses, concessions and contracts)

- Companies operating on U.S. federal lands already must report royalty, sales and other data to the Department of the Interior (DOI) at the lease level.[175]
- Other U.S. agencies, such as the Bureau of Ocean Energy Management, the Bureau of Land Management, and the state of Alaska's Department of Natural Resources, disclose extractive payments at the lease or contract level.[176]

- Major commodity-producing countries:
  - Indonesia in particular has made project level reporting a requirement for all extractive companies for a number of years, including for subsidiaries of U.S. issuers.[177]
  - In Nigeria, EITI reporting is being used in combination with EU, ESTMA and U.K. reporting to give the public a clearer picture of state revenue from projects after years of opacity and large corruption scandals.[178]

- International Financial Institutions:
  - The IMF defines "project" as "[o]perational activities (in the natural resource sectors) governed by a single contract, license, lease, concession, or similar legal agreements that form the basis for payment liabilities with a government. Agreements with substantially similar terms that are both operationally and geographically integrated may be treated by the company as a single project."[179]
  - The World Bank and its private lending arm, the International Finance Corporation (IFC), require project-level reporting of payments to governments for any extractive projects they fund.[180] We note U.S. issuers, such as Exxon, have

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175 *See*, *e.g.* Example Report of Sales and Royalty Remittance Form MMS-2014, attached as appendix to Comment submitted by PWYP-US (Dec. 20, 2011), https://www.sec.gov/coments/s7-42-10/s74210-117.pdf; *See also*, *e.g.*, U.S. Department of the Interior, Office of Natural Resources Revenue, Solid Minerals Production and Royalty Report, https://www.onrr.gov/ReportPay/PDFDocs/4430.pdf; Department of the Interior, Office of Natural Resources Revenue, Report of Sales and Royalty Remittance Form ONRR-2014, https://www.onrr.gov/ReportPay/PDFDocs/2014.pdf; *see also,* Comment submitted by DOI (Feb. 17, 2015), *available at* https://www.sec.gov/comments/s7-25-15/s72515-47.pdf.

176 *See,* Comment submitted by PWYP-US (Dec. 20, 2011), at 2-3, *available at,* https://www.sec.gov/comments/s7-42-10/s74210-117.pdf.

177 *See* Alexander Malden and Fikri Zaki Muhammadi, Indonesia's Oil and Gas Revenues: Using Payments to Governments Data for Accountability, NRGI, (Mar. 16, 2020), at 14, *available at:* https://resourcegovernance.org/sites/default/files/documents/indonesia-oil-and-gas-revenues-using-payments-to-governments-data-for-accountability.pdf.

178 Alexander Malden, Governance Officer, Nigeria's Oil and Gas Revenues: Insights From New Company Disclosures, NRGI (Mar. 16, 2020), *available at:* https://www.sec.gov/comments/s7-24-19/s72419-6960396-212755.pdf; *see also id.* at 9 (stating that estimates about Exxon's revenue contributions can be estimated despite its lack of payment disclosures via comparisons with other issuers in the country subject to international reporting regimes).

179 IMF, Fiscal Transparency Initiative: Integration Of Natural Resource Management Issues: Glossary. (January 2019) at 47-48, *available at* https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/01/29/pp122818fiscal-transparency-initiative-integration-of-natural-resource-management-issues

180 IFC-backed oil, gas and mining projects must disclose the "principal contract with government that sets out the key terms and conditions under which a resource will be exploited.," IFC, Policy on Environmental and Social Sustainability, §§ 49-52 (Jan. 1, 2012) *available at* https://www.ifc.org/wps/wcm/connect/7141585d-c6fa-490b-a812-2ba87245115b/SP_English_2012.pdf?MOD=AJP ("IFC requires that clients publicly disclose their material

previously or are currently reporting project-level payments to governments as conditions of such project financing.[181]

- The EITI has consistently supported a contract-level definition of project over the years. While all EITI implementing countries will disclose contract-level payments under the 2019 EITI Standard,[182] a number of countries have implemented such reporting ahead of schedule, such as Indonesia, the Philippines, Trinidad and Tobago, Zambia, Mali, etc.[183]

- Such a definition is consistent with how companies, countries and industry participants communicate to the public and investors about their projects.[184]

C. The Commission's justification for abandoning the contract-definition is internally inconsistent and contradictory.

One of the key assumptions behind the Commission's decision to change the project definition appears to be the significant compliance costs from having to track, record and report payments at the contract level, possibly even requiring "build[ing] a new system to collect the payment information on a contract-by-contract basis."[185] On this basis it asserts (with no support) that the Modified Project Definition, by "requiring payment information at a higher level of aggregation may be less costly."[186] There is nothing cited to support the conclusion that higher aggregation is less costly.

Significantly, the Commission appears to directly contradict this assumption, asserting elsewhere that "[s]ince some of the payments would be required to be disclosed only *if they are required by law or contract* (e.g. CSR payments), *resource extraction issuers presumably already track such payments and hence the costs of disclosing these payments may not be large.*"[187] This contradicts the assumption that the 2016 definition requires substantial overhaul as the definition was based on the legal agreement that forms the basis of liabilities. This

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project payments to the host government (such as royalties, taxes, and profit sharing)" and requires "the principal contract with [the] government that sets out the key terms and conditions under which a resource will be exploited, and any significant amendments to that contract, be public."); *see also* IFC, Government Revenues, https://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/ogm+home/priorities/development_impact_disclosure_government_revenues).

[181] *See, e.g*. Comment submitted by PWYP-US (Feb. 25, 2010), at 4, *available at* https://www.sec.gov/comments/s7-42-10/s74210-29.pdf .

[182] *See* Comment submitted by Mark Robinson, Executive Director, EITI International Secretariat (Mar. 16, 2020) at 4, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6960332-212746.pdf

[183] *Id.* at 7.

[184] Comment submitted by Oxfam America (Dec 3, 2015), *available at,* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-103.pdf (illustrating how oil project status is commonly communicated to the public and investors via project level maps).

[185] Proposed Rule, 85 Fed Reg. 2537; *See also id.* at 2555 ("anticipated need to modify issuers' core enterprise resource planning systems and financial reporting systems to capture and report data at the project level ….developing am ecnaims to appropriately capture data by 'project,' building new collection tools within financial reporting systems").

[186] *Id.* at 2557.

[187] *Id.* at 2561.

inconsistent and opportunistic framing of cost assumptions is a serious legal vulnerability in the proposed rule.

In addition, the Commission's 2016 findings also contradict the assumption that higher aggregation is less costly and would not require comparable modifications to internal systems. Discussing the API model, the Commission explained "[i]Issuers would ... still need to modify their systems in substantially similar ways to collect data on each payment," as with a contract definition, and although they "would be able to aggregate that data in various ways before submitting it to the Commission ... the underlying collection systems … would still need to occur for each payment to ensure accurate reporting," thus "this approach would entail many of the same costs" as the contract definition.[188]

As discussed further below, this is a unique situation where the Commission has effectively had a field test of key features of its 2016 rule in the market, which has shown that actual costs of compliance are substantially lower than the Commission previously predicted. [189] The Commission now proposes a different, entirely untested model that has no basis in industry practice and no data whatsoever to evaluate compliance costs of implementation. Justifying the resultant dramatic loss of transparency benefits and alignment with other markets on this entirely unsupported assertion of cost savings is not a rational decision.[190]

D. The Modified Project Definition will not and cannot produce the accountability, anti-corruption, and investor protection benefits Congress intended.

Numerous commenters have already addressed the Modified Project Definition, as originally proposed by API, at length and explained why it would fail to produce useful information. This has been extensively documented in past submissions and we merely summarize it here.

First, the Modified Project Definition will not result in the level of granularity necessary for citizens to play the anti-corruption and accountability function that the statute intends. Citizens, civil society organizations and anti-corruption experts have repeatedly explained in detail why a contract-level definition is essential in order to monitor revenue flows, verify benefits owed to local governments, and advocate effectively with their governments,[191] among

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[188] 2016 Final Rule, 81 Fed. Reg. 49421.

[189] *See*, *e.g.*, Comment submitted by PWYP-US (Mar. 16, 2020) at 5-10; Comment submitted by BHP (Mar. 16, 2020) at 2, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6960337-212716.pdf ("Adopting the EITI Standard's definition of project currently in use globally will reduce disclosure burden and compliance cost for issuers").

[190] The Commission also does not explain how the various changes it proposes go together. For example, it is not clear why an exemption on the basis of contractual prohibitions would be needed for disclosures under the Modified Project Definition when the definition does not result in contract-level disclosures. Nor is it clear why an exploratory exemption would be warranted under the Modified Project Definition and with the delayed reporting deadline.

[191] *See e.g.* EarthRights-Oxfam Submission (March 8, 2016) at 6-9 (summarizing numerous submissions on this point); *See also*, *e.g.*, Submission from 174 Angolan civil society organizations and citizens, (March 13, 2012), at 2, *available at* https://www.sec.gov/comments/s7-42-10/s74210-264.pdf (174 Angolan civil society organizations and citizens, writing to SEC to voice their "strong support for block, or project, level reporting," explaining that "The Angolan government issues licenses on a block-by-block basis" and "reliable and detailed data" is needed "for citizens to monitor the flow of revenues and ensure the Angolan government uses these funds in the long-term

other uses, and given numerous reasons, "why the benefits to civil society of contract-based, project-level reporting would help to reduce corruption and promote accountability more effectively than more aggregated reporting."[192] This includes a number of commenters who have specifically explained why the API approach (now the Modified Project Definition) would fall short.[193] As just one example, the Iraqi Transparency Alliance for Extractive Industries explains in their recent comment that "to allow companies to compile information across many individual projects and report it as though for only one project, as the SEC would allow in the new rule, would be very confusing," "would make monitoring revenue flows substantially harder, and

interest of the Angolan people."); Submission by Global Movement for Budget Transparency, Accountability and Participation (March 30 2012) (explaining that disclosure of payments "that are generated by a particular contract or agreement on a project-by-project basis" is "very important," noting "[m]any of our global coalition members are local grassroots organisations who monitor municipal and regional budgets" and "[l]ocal information like this is vital to strengthen their work"); Cambodians for Resource Revenue Transparency (Feb. 7, 2012), *available at* https://www.sec.gov/comments/s7-42-10/s74210-135.pdf (urging the Commission to define project "in relation to each lease, license and/or other concession level arrangement entered into by a resource extraction issuer," explaining this would "ensure that the the information disclosed provides adequate detail to help us to hold our government accountable," and noting "[t]his is how extractive industries projects are developed in Cambodia, with each license providing geographical boundaries for exploration and production and specific rights and obligations including fiscal obligations."); *see also*, *id.* (noting they had directly requested this information from Chevron but Chevron refused to provide it); Libyan Transparency Association (Feb 22, 2012), *available at*: https://www.sec.gov/comments/s7-42-10/s74210-189.pdf (urging SEC to "define 'project' in relation to each lease, license and/or other concession level arrangement entered into by a resource extraction issuer," as it would provide information to enable civil society groups in Libya to "hold both our national and local governments accountable to ensure that the full local benefits of project development are delivered and equally distributed amongst communities."). Comment submitted by the Iraqi Transparency Alliance for Extractive Industries (Sept. 25, 2015), at 2-3, *available at* https://www.sec.gov/comments/df-title-xv/resource-extractionissuers/resourceextractionissuers-87.pdf (stating that project-level, company-specific disclosures are necessary to reconcile data provided by the Ministry of Oil with funds received from the Ministry of Finance, to ensure citizens located near extraction sites can determine their fair share, and to achieve greater transparency into payments received by the Kurdistan Regional Government); Comment submitted by Africa Centre for Energy Policy (ACEP) (Feb. 16, 2016) at 6, *available at* https://www.sec.gov/comments/s7-25-15/s72515-40.pdf (arguing that project-level transparency would be necessary to enable communities to advocate to their governments for a sufficient level of social benefits as a proportion of state receipts).

[192] 2016 Final Rule, 81 Fed. Reg. at 49401

[193] *See e.g.* EarthRights-Oxfam Submission (March 8, 2016) at 6-9 (summarizing numerous submissions on this point); Comment submitted by EG Justice (Mar. 11, 2020), at 5, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6939968-211853.pdf (explaining that for Equatorial Guinea, "[a]ggregation of payments would make this task [of following the money] significantly more difficult and would only aid in our government's attempts to obfuscate the receipt of individual payments"); Comment submitted by the Carter Center (Mar. 16, 2020) at 1, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6952851-212572.pdf ("Without data that defines a 'project' based on the contract or concession ... it is difficult to assess whether the terms of a particular contract are being
fulfilled, whether the funds are being paid to the appropriate recipient, and whether the revenue is being properly utilized."); Comment submitted by Publish What You Pay Indonesia (Mar. 11, 2015) at 2, *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-64.pdf (stating that reporting only at the first tier below the central government would be "completely unsatisfactory in Indonesia" because it would exclude critical information about the revenue local governments are entitled to under Indonesia production sharing agreements); Comment submitted by PWYP-Indonesia (Mar. 16, 2020), at 4, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6955610-212688.pdf ("The current proposed rule... would be wholly inadequate for our purposes" as it would not enable us to "verify how much is owed through the revenue sharing system down to the local level.")

would be so different than how European and other companies report, and how the government information we have is described," that it "would make it impossible to understand together."[194]

The Commission acknowledges that the Modified Project Definition will "narrow" the benefits of transparency, but asserts that the "revised definition, because it considers the type of resource, the method of extraction, and the location, will provide substantial transparency about the overall revenue flows."[195] This conclusion is asserted without support, but it is not obviously true. Indeed, neither the method of extraction nor the type of resource tell citizens anything about the flow of money at all. Only the category of payment, the amount of the payment, the company making the money, and the specific government entity receiving it provide information about revenue flows.[196] As USAID explained - a position the Commission expressly stated it agreed with in 2016 - "effective engagement of citizens to ensure that such revenues are managed responsibly …. is only possible if the citizens know which company is paying what kind of payment to which government entity relating to which project in which location. Aggregate data about multiple resources, projects, or geographic locations does not allow citizens of a particular region to speak up and insist that the revenues associated with the project impacting them be used for their benefit, rather than to personally benefit potentially corrupt government officials."[197]

As to the third factor the Commission lists - location - that is not actually an aspect of the Modified Project Definition, rather it is "major subnational jurisdiction in which the resource extraction activities are occurring."[198] But as the Commission explains, this aspect of the definition is intentionally crafted to *avoid* giving specific location information.[199] And while in some jurisdictions it may provide some useful information as to location of a project, it will "produce vastly disparate transparency from one jurisdiction to another" overall, and in larger subnational jurisdictions, residents will receive "less localized transparency."[200]

Second, the definition will significantly reduce the rule's ability to advance the statute's anti-corruption objectives. The Commission has already recognized that "contract-based, project-level reporting would help to reduce corruption and promote accountability more effectively than

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[194] Comment submitted by Iraqi Transparency Alliance for Extractive Industries (ITAEI) (Mar. 10, 2020) at 7-8, available at https://www.sec.gov/comments/s7-24-19/s72419-6925917-211409.pdf.

[195] Proposed Rule, 85 Fed. Reg. at 2558

[196] The Commission recognized this in 2016. *See, e.g.* 2016 Final Rule, 81 Fed. Reg. at 49387 ("We thus agree with the position advanced by USAID that ''[i]t is through disaggregated data, which includes the identity of the payer and the location and type of the project, that transparency will be promoted.')

[197] *Id*. (Quoting letter from USAID)

[198] Proposed Rule, 85 Fed. Reg. at 2539.

[199] *Id.* at 2538 ("defining project with regard to the major subnational jurisdiction in which a project is located would alleviate one of the most significant concerns… about the Contract-Level Project Definition, including" that it would "[a]llow competitors to derive important information about new areas under exploration for potential resource development"). For this reason, "many" commenters during the 2016 rulemaking, "including those expressing the greatest interest in using the disclosure to further the transparency goals of the statute, disagreed with an approach that would only disclose the geographic location of a project at the highest level of political organization below the national level." 2016 Final Rule, 81 Fed. Reg. at 49397

[200] 2016 Final Rule, 81 Fed. Reg. 49381 n.298

more aggregated reporting, such as country-level reporting."[201] It noted its "own experience in implementing the Foreign Corrupt Practices Act" shows that "granular disclosures" under a contract-level definition "will better help combat corruption than the aggregated (and anonymized) disclosures that the API Proposal would yield."[202] And that "more granular disclosures…relative to the API Proposal will help provide a powerful incentive for community-based involvement in monitoring corruption and holding officials accountable by making clear to those communities in a direct and concrete fashion what revenues are being generated from their local natural resources."[203]

More granular disclosures are more effective because "[c]orruption happens within individual deals, not across them."[204] Allowing aggregation by region under the Modified Project Definition "would obscure the information that anticorruption actors need to investigate suspicious transactions, and would not effectively deter companies from manipulating individual deals for their own benefit."[205] As an anti-corruption expert explains in a recent comment, the Modified Project Definition would "creat[e] a whole new measure out of step with common practice" and "risks generating additional work while delivering less useful results."[206]

Third, investors have strongly supported the standard project definition[207] and emphasized the importance and value of consistency with other markets and comparability of data.[208]

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[201] *Id.* at 49401

[202] *Id.* at 49382.

[203] *Id*. at 49382 n. 299.

[204] Comment submitted by Alexandra Gillies (Mar. 20, 2020) at 3, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6960397-212783.pdf.

[205] *Id.* at 3. *See also e.g*. Comment submitted by USAID (Feb 16. 2016) at 7, *available at* https://www.sec.gov/comments/s7-25-15/s72515-37.pdf ("the averaging effect of aggregated data might downplay or hide those instances of corruption where they do occur. Requiring the reporting of data on a project level helps to … identify patterns or other evidence of corruption.")

[206] Comment submitted by Alexandra Gillies (Mar. 20, 2020) at 4.

[207] *See e.g.* Comment by Anne Sheehan, CalSTRs, 2018, at 2, *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf (the Commission to "make[ ] definitions for project-level disclosure and other key considerations consistent with the EU and Canadian laws,"); Comment by Erik Jan van Bergen Chief Investment Officer ACTIAM NV et al, (Mar. 8, 2016) https://www.sec.gov/comments/s7-25-15/s72515-52.pdf (noting the undersigned investors "support the SEC's decision to define 'project' consistently with the EU Directives and the draft Canadian definitions," and emphasizing the importance of "uniform disaggregation of project payment information."); Comment submitted by Amundi et al (Mar. 16, 2020) at 2, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6969413-214065.pdf (urging consistency with the global standard and explaining "[c]entral to the global standard is a contract-based definition of project, and fully public, disaggregated reporting.")

[208] *See, e.g.* Comment by Anne Sheehan, CalSTRs, 2018, at 2, *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf (emphasizing that "consistency with the EU and Canadian laws" will "result in more useful disclosures to investors."); Comment from Aviva Investors (Feb. 12, 2018) *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3130136-161939.pdf ("Prioritizing consistency with the EU and Canadian laws would not only result in more useful disclosures to investors, but also fit the Congressional intent for the implementation of Section 13(q) and enhance the efficiency of compliance for reporting companies both in different jurisdictions and through the EITI processes in which they may be engaged."); Comment by Erik Jan van Bergen Chief Investment Officer ACTIAM NV et al, (Mar. 8, 2016) https://www.sec.gov/comments/s7-25-15/s72515-52.pdf (**"**The value of a global standard for extractives payment transparency lies in its consistent application across all global markets"); Comment submitted by Amundi et al (Mar.

Finally, the definition is plainly inconsistent with international transparency promotion efforts as every other transparency regime embraces a different definition.[209]As BHP explained in its recent submission, even allowing alternative reporting for cross-listed issuers would leave a significant number of issuers who will be providing disclosure information within a framework that is not consistent with global transparency frameworks, an "outcome would not align with Section 1504's underlying requirement to 'support international transparency promotion efforts.'"[210] For the U.S. to choose to implement a standard that would diverge so significantly, and result in significantly less transparency than other regimes, would defy the statute's plain text, and Congress's intent that the U.S. be a leader on this issue.[211]

Such an outcome would also run counter to the foreign policy interests and priorities of the U.S. government. The State Department was clear that the contract-based definition "supports U.S. foreign policy interests to support global efforts to improve transparency in the extractives industries" and emphasized that "[c]ompatibility with these transparency measures further advances the United States' foreign policy interests."[212] As USAID has explained, "the API suggested definition, which allows for the combination of projects under major subnational political jurisdiction, would not produce the level of increased transparency envisioned by Congress in enacting Sec. 13(q)," as [r]olling up all projects into major subnational political jurisdictions would not serve the goal of increasing transparency at the local level, where resources are extracted. Only through more granular, project level reporting will disclosures

16, 2020) at 2, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6969413-214065.pdf ("In order for the potential of this data to be realized, it must be consistent with the global standard for extractives payment disclosure represented by ESTMA, the disclosures required by the European Accounting and Transparency Directives, the UK's Reports on Payments to Governments Regulations, and the current EITI Standard.")

[209] *See supra*, Section I.

[210] Comment submitted by BHP (Mar. 16, 2020), at 3, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6960337-212716.pdf

[211] We note the Commission states at one point that "although the statutory definition of ''payment'' explicitly refers to the EITI, the provision in Section 13(q) about supporting the Federal Government's commitment to international transparency promotion efforts does not mention the EITI." 85 Fed. Reg. 2523. As the Commission itself, however, has previously noted, "Although the provision regarding international transparency efforts does not explicitly mention the EITI, the legislative history indicates that the EITI was considered in connection with the new statutory provision." *See* 2010 Proposed Rule, 75 Fed. Reg. 80979. *See also API v. SEC*, 935 F.Supp.2d 5, 22 (D.D.C. 2013) (acknowledging that "section 13(q) sought to augment" "the EITI voluntary compliance regime"). Indeed, the EITI was repeatedly referenced as the only meaningful existing international transparency effort already in place at the time, and the intent to strengthen it was explicit. As the Commission has recognized, "in enacting Section 13(q)'s mandatory disclosures requirement, Congress sought to complement the EITI's existing voluntary transparency efforts that too many countries and too many companies either had not joined or would not." 2016 Final Rule, 81 Fed. Reg. 49365 n. 83 (citing 156 Cong. Rec. S3815 (May 17, 2010) (Sen. Lugar)). *See also* 156 Cong. Rec. S3815 (May 17, 2010) (Sen. Cardin) ("We currently have a voluntary international standard for promoting transparency. A number of countries and companies have joined [EITI], an excellent initiative that has made tremendous strides in changing the cultural secrecy that surrounds extractive industries. But too many countries and too many companies remain outside this voluntary system."); *id.* At S3818 (May 17, 2010) (Sen. Dodd) (stating that "broad new requirements for greater disclosure by resource extractive companies operating around the world . . . would be an important step" to complement EITI's "voluntary program").

[212] Comment submitted by US Department of State (Jan. 11, 2016), at 1-2, *available at* https://www.sec.gov/comments/s7-25-15/s72515-13.pdf

produce meaningful data for citizens, civil society, and local groups that seek to break cycles of corruption that involve government and corporations."[213]

The overwhelming evidence in the record and market realities weigh heavily in favor of a project definition that is consistent with other markets, and a rule that fails to adopt such a definition would be vulnerable to legal challenge.

V. Anonymity of the government payee is inconsistent with the text and congressional intent behind Section 13(q).[214]

The Commission's proposed approach to aggregation further magnifies the problems with the proposed definition of project. The proposal to allow the government payee to be effectively anonymous, identified only generically, is not consistent with the statute. Section 13(q) dictates that the "interactive data standard shall include electronic tags that *identify*, for any payments made by a resource extraction issuer" to a foreign or the federal government, "… the government that received the payment," in addition to the country in which the government is located.[215]

Commenters have emphasized that the identity of the government payee is critical to know.[216] The stated justification for this aggregation and anonymity is wholly untenable. The Commission suggests that the *identity* of the government payee may be kept secret to maintain competitive advantage.[217] The only purpose of this aggregation is to obscure dealings between companies and governments and government officials. This is precisely the type of arrangement that breeds corruption in the extractives industry that Congress sought to weed out.

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[213] Comment submitted by USAID (Feb 16. 2016) at 5 *available at* https://www.sec.gov/comments/s7-25-15/s72515-37.pdf;

[214] This responds in part to question 48.

[215] 15 U.S.C. 78m(q)(2)(D)(ii)(V)(emphasis added)

[216] *See, e.g.* Comment submitted by Mesa de la Sociedad Civil para la Transparencia en las Industrias Extractivas (Nov. 13, 2015), at 5, *available at:* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-99.pdf (emphasizing specific needs for "project-level, company-specific information that identifies the payee government entity," including, for example, to enable citizens "to know what their local governments are actually receiving for natural resource extraction, and, by corollary, what they should be able to expect in terms of social services."); Comment submitted by Eric Postel, (Mar. 19, 2020) at 4, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6974901-214270.pdf ("Without access to which company is making the payment, which government is receiving it, and which project it relates to, citizens will not be able to play the role needed to advance the statute's objectives"); Comment submitted by Project on Government Oversight (Mar. 16, 2020) at 5, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6953255-212536.pdf*; See also e.g.* 2016 Final Rule, 81 Fed. Reg. 49379, 49381 n.292, 49387.

[217] Proposed Rule, 85 Fed. Reg. 2540 ("We are proposing to permit an issuer to aggregate payments made to entities below the major subnational level without having to identify the particular subnational government payee to mitigate the risk that an issuer could be exposed to potential competitive harm from the disclosure").

VI. The Commission's approach to "not de minimis" is inconsistent with the statute, the international standard, current market realities, and the rulemaking record.[218]

We endorse the position and recommendations of PWYP-US on how to define "not de minimis." The Commission's proposed approach, particularly when combined with the Modified Project Definition, would result in producing information of little use in achieving the original objectives of Section 13(q) as intended by Congress and generate significant inconsistency with reporting in other markets that will generate significant confusion. We summarize here additional reasons this approach is unworkable.

A. A project total threshold is unmoored from the statute and at odds with Congressional intent

The statute is clear, it speaks to "*a* payment that is… not de minimis."[219] The statute directs that the rules require issuers to disclose "*any* payment made" including "the type and total amount of such payments made for each project" and "the type and total amount of such payments made to each government."[220] Section 13(q) requires "any payment" that is "not de minimis" be reported for "*each* project."[221] To apply the "de minimis" standard to *projects*, instead of payments, as currently proposed, would in many cases result in the exclusion of *every payment* for a project, regardless of any individual payment's value -- an outcome clearly in conflict with the statutory text, the structure of the statute, and clear Congressional intent. By applying the concept of "de minimis" to "payments" and expressly requiring disclosure of payments for "*each* project," the statute forecloses application of a "de minimis" threshold to a "project."

Congress intended the statute to have the broadest possible reach to maximize transparency. Yet the proposed rule would dramatically limit transparency. In cases of issuers with only one project, the threshold would serve as a de facto exemption from reporting in years where total payments for that project were below $750,000, even if multiple payments were more than $150,000, and overall would eliminate approximately half of the projects for which payments would otherwise have been disclosed.[222]

B. The $750,000 project threshold is arbitrary and lacks any evidentiary or factual support.

The $750,000 project-total threshold is arbitrary and has no basis in the record. No commenter in the last decade has asked the Commission to consider such a figure, and the Commission has provided *no* evidence in the record to support how it selected this number, nor

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[218] This responds in part to questions 23, 24, 28.

[219] 15 U.S.C. § 78m(q)(1)(C) (emphasis added).

[220] *Id*. § 78m(q)(2)(A).

[221] *Id*. § 78m(q)(1)(C), 78m(q)(2)(A) (emphasis added).

[222] *See* Comment Submitted by Suneeta Kaimal, Interim President and CEO, Natural Resource Governance Institute, Analysis of the impact of the modified project definition in the 2019 proposed rule for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Mar. 16, 2020), at 2, *available at,* https://www.sec.gov/comments/s7-24-19/s72419-6960398-212784.pdf.

any quantitative analysis to suggest why it is the appropriate number. Indeed, there is no justification provided anywhere as to why such a significant amount of money could remotely be considered "de minimis" in this context. The term is typically defined to mean "negligible" or "so insignificant" as to be "overlook[ed]...in deciding an issue or case."[223]

The *only* way that such a proposed threshold can be reasonably construed is as imposing a materiality standard for projects, which is foreclosed by the statutory language, Congressional intent, and the Commission's own findings in previous rulemakings. Congress could have selected to use the term "material" to qualify "projects" but it did not. It specified "*each* project."[224] Nor did Congress opt to use "material" as a qualifier to payments, rather, it opted for "not de minimis." As the Commission has acknowledged, "Section 13(q) uses a 'not de minimis' standard instead of a materiality standard, which is used elsewhere in the Federal securities laws and in the EITI," demonstrating that "Congress did not intend 'not de minimis' to equate to a materiality standard. We continue to believe that this is the better approach to take when defining ''not de minimis.''"[225]

The $750,000 threshold would also undermine the intent of the statute, and the Commission's own findings by facilitating and failing to deter corruption. "Small payments can signal important information" and the number proposed here "risks obscuring important data."[226] The reporting of smaller payments can also help identify which US companies are operating in certain high-risk environments."[227]

We note that the Commission purports to justify the project total threshold on the basis of the change to the Modified Project Definition. However, a study by the Natural Resources Governance Institute makes clear the result would be virtually identical under either project definition. Approximately half of the projects would not meet the threshold, and thus no payments would be reported for approximately half of projects, under both the contract-level project definition and the Project Definition definitions.[228] The Commission has not, and cannot provide a sound justification for such a dramatic loss in transparency specifically intended by Congress.

[223] Black's Law Dictionary (11th ed. 2019). *See also*, *e.g.*, Comment by Calvert Investments (March 1, 2011), p.5. Available at: https://www.sec.gov/comments/s7-42-10/s74210-40.pdf (noting "de minimis" is defined in the U.S. Code as "property or service the value of which is...so small as to make accounting for it unreasonable or administratively impracticable."); Comment submitted by TIAA-CREF (Mar. 2, 2011), p.4. Available at: https://www.sec.gov/comments/s7-42-10/s74210-54.pdf.

[224] 15 USC § 78m(q)(2)(A) (emphasis added)

[225] Proposed Rule, 85 Fed. Reg. 2534.

[226] Comment submitted by Alexandra Gillies (Mar. 16, 2020) at 3, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6960397-212783.pdf

[227] *See Id*. at 4.

[228] Comment Submitted by Suneeta Kaimal, Interim President and CEO, Natural Resource Governance Institute, Analysis of the impact of the modified project definition in the 2019 proposed rule for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Mar. 16, 2020), available at: https://www.sec.gov/comments/s7-24-19/s72419-6960398-212784.pdf.

C. The Commission provides no reasoned basis for increasing the $100,000 payment threshold to $150,000

The new $150,000 payment threshold also lacks an evidentiary basis or rationale. Regulators in 30 other countries considering the proper threshold for the extractives sectors all came to the same conclusion, setting a de minimis threshold (for payments, not projects) that approximates $100,000.[229] If the $150,000 threshold was adopted, it would create seemingly unnecessary inconsistency with the regimes in other countries, despite the fact that no issuers - and only a single commenter - in the 2016 rulemaking took issue with the $100,000 threshold.[230] In contrast, the record includes an overwhelming number of commenters supporting consistency with the $100,000 threshold in other markets. [231]

The $100,000 threshold has now been tried and tested by hundreds of companies reporting in other markets, and experience shows it is both feasible and cost-effective. The Commission offers no basis for disregarding that reporting experience nor reason to believe it has posed any problems. To the contrary, investors and citizens have emphasized the importance of consistency.[232] With nearly 800 companies now implementing a $100,000 threshold, including 109 issuers covered under the proposed rules, the Commission has an obligation to assess that experience, and provide some evidence as to why a $50,000 increase is warranted, particularly in the face of such significant support for consistency. The Commission's failure to make any use of data from outside the U.S., to attempt to evaluate the effect of the change, or to explain why it is needed, renders this rule change arbitrary.

VII. The Commission gives undue weight to the views of a few select industry commenters while wholly disregarding the interests of investors.[233]

Section 13(q) was intended in part as an investor protection provision. The Commission has investor protection at the heart of its mission and is expected to act in their interests. Yet here, the Commission sides with certain industry commenters over the express – and unanimous – position of investor commenters, over nearly a decade, who have consistently advocated for fully public project-level disclosures that are disaggregated and consistent with disclosures made under other transparency regimes in other markets. The Commission's dismissive rejection of investor interests cannot be reconciled with the weight of investor support in the record, and is

[229] In addition, we note that the U.S.Department of Interior, in its response to the 2016 rulemaking wrote "ONRR believes that the definition of 'not de minimis' as proposed is appropriate, and is the same standard that ONRR uses in its unilateral disclosure of revenue data." Comment submitted by US Department of Interior (17 Feb 2015). Available at: https://www.sec.gov/comments/s7-25-15/s72515-47.pdf.

[230] As SEC noted in 2016, no issuers, and "only one of the many commenters that addressed the definition thought that the reporting threshold [of $100,000] was too low," suggesting it might be too low specifically for companies working on "massive scale projects," but "none of the large issuers commenting on the Proposing Release expressed similar concerns". 2016 Final Rule, 81 Fed. Reg. 49375.

[231] *Id.* at 49372.

[232] *See, e.g.* Comment submitted by Amundi et al. (Mar 16, 2020), at 2, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6969413-214065.pdf ("A de minimis payment threshold that is inconsistent with the EU, UK and Canadian laws would also limit the usefulness of resulting data for users seeking to analyze securities on a global basis.")

[233] This responds in part to question 87.

inconsistent with its investor protection purpose. We strongly urge the Commission to pay heed to investors in revising the rule.[234]

A. Section 13(q) was intended to benefit investors.

That Section 13(q) was also intended to benefit investors is evident from its placement in Section 13(q) of the Securities Exchange Act, 15 U.S.C. § 78m. The first subsection of Section 13 requires all registered issuers to file annual reports in accordance with such rules or regulations that the Commission prescribes "as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security."[235] Congress's intent to benefit investors is further shown by the fact that in the "interactive tags" specified, Congress expressly included in the list "such other information as the Commission may determine is necessary or appropriate in the public interest or *for the protection of investors*."[236]

This investor protection purpose is likewise clear from the legislative history which repeatedly mentioned investors. For example:

- Senator Cardin, discussing Section 1504, explained that "[t]he geography and nature of the oil, gas, and mining industry is such that companies often have to operate in countries that are autocratic, unstable, or both. Investors need to know the full extent of a company's exposure when it operates in countries where it is subject to expropriation, political and social turmoil, and reputational risks."[237]
- Explaining the Energy Security Through Transparency Act (ESTTA), the bill that preceded the amendment that added Section 1504 to the Dodd-Frank Act, and on which it was based, Senator Lugar stated that it "requires companies listed on U.S. stock exchanges to disclose in their regular SEC filings their extractive payments to foreign

[234] *See*, *e.g.*, Comment submitted by Alexander Schay, Managing Director, W.K. Associates, Inc. (Mar. 16, 2020), *available at:* https://www.sec.gov/comments/s7-24-19/s72419-6961611-212817.pdf; Comment submitted by Amundi et al (Mar. 16, 2020) *available at* https://www.sec.gov/comments/s7-24-19/s72419-6969413-214065.pdf; Comment submitted by Columbia Center for Sustainable (Dec. 10 2019), *available at* https://www.sec.gov/comments/dftitle-xv/resource-extraction-issuers/cll6-6521646-200386.pdf; Comment submitted by Aviva Investors (Feb. 12, 2018), *available at:* https://www.sec.gov/comments/df-titlexv/resource-extraction-issuers/cll6-3130136-161939.pdf; Comment submitted by Calvert Investment Management, Inc. (April 28, 2014), *available at:* https://www.sec.gov/comments/dftitle-xv/resource-extraction-issuers/resourceextractionissuers-36.pdf 446; Comment submitted by Allianz Global Investors (28 April 2014), *available at* https://www.sec.gov/comments/df-titlexv/resource-extraction-issuers/resourceextractionissuers-35.pdf; *see also,* comment submitted by PWYP-US ( ) Appendix B, available at: https://www.sec.gov/comments/s7-25-15/s72515-45.pdf (citing past submissions to the Commission showing investor support for a strong implementation of section 1504).

[235] 15 U.S.C. § 78m(a). *See also* Comment submitted by EarthRights International (Dec. 12, 2014) *available at,* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-58.pdf

[236] 15 U.S.C. § 78m(q)(2)(D)(ii)(VII)

[237] Floor Statement of Senator Cardin, "The Dodd-Frank Wall Street Reform and Consumer Protection Act" (July 15, 2010) *available at* https://www.cardin.senate.gov/news/press-releases/the-dodd-frank-wall-street-reform-and-consumer-protection-act . *See also id.* ("In Nigeria, for example, American companies have had to take oil fields off-line because of rebel activity and instability in the Niger Delta. Last year, Nigeria was producing almost a million barrels of oil less than it was able to produce because of conflict and instability. With so much production off-line, American oil companies such as Chevron and Exxon have laid off workers and paid higher production costs because of added security.")

governments for oil, gas and mining which builds on the EITI requirement that all extractive companies operating in an EITI implementing country must report their payments to the government. This would allow investors to better evaluate the potential country risk faced by companies. It would also allow people to have information about the funds sent to their governments in non-EITI implementing countries." [238]

- Senator Lugar further explained that "the payments made by companies to extractive countries are relevant to investors looking into finances of those companies," noting experience with the financial crisis "argues strongly for more disclosure and information."[239]
- Senator Cardin explained that Section 1504 was intended to "*Strengthen[ ] Energy Markets,"* noting *"*the extractive industries are capital-intensive and dependent on long-term stability to generate favorable returns. Leading energy companies recognize that more transparent investment climates are better for their bottom lines."[240]
- Senator Cardin emphasized that ''[t]he investor has a right to know about the payments. Secrecy of payments carries real bottom-line risks for investors."[241]
- Senator Cardin again emphasized, "[I]nvestors have a right to know. If you are going to invest in an oil company, you have a right to know where they are doing business, where they are making payment."[242]
- Senator Cardin explained that "[t]his amendment provides greater disclosure for investors to be able to make intelligent decisions as to whether to invest in an oil or gas or mineral company."[243]
- Senator Cardin stated that with this bill "[w]e… are protecting investors and helping in energy security."[244]

Despite failing to do so here, the Commission has previously recognized the investor intent. For example:

- Former Commission Chairman Walter noted "the information disclosed pursuant to Section 13(q) will also benefit investors, by among other things, helping investors model project cash flows and assess political risk, acquisition costs, and management effectiveness. Moreover, investors and other market participants, as well as civil society in countries that are resource-rich, may benefit from any increased economic and political stability and improved investment climate that transparency promotes."[245]

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[238] 155 Cong. Rec. S9746, Floor Statement of Senator Lugar, Energy Security Through Transparency Act of 2009, (Sep. 23, 2009) *available at:* https://www.congress.gov/congressional-record/2009/09/23/senate-section/article/S9735-1.

[239] *Id. See also id.* ("[c]onsidering the well-established link between oil payments and the business climate, many investors might be interested in this information--particularly socially responsible investors.")

[240] 156 Cong. Rec. S5873 (July 15, 2010) (Statement of Sen.Cardin) (stating that three key results expected from section 1504 are "enhancing U.S. energy security, "strengthening energy markets," and "helping to alleviate poverty").

[241] 156 Cong. Rec. S3316 (May 6, 2010) (Senator Cardin)

[242] 156 Cong. Rec. S3136 (July 15, 2010) (Senator Cardin)

[243] *Id.*

[244] *Id.*

[245] Commissioner Elisse B. Walter, Statement at SEC Open Meeting (Aug. 22, 2012) https://www.sec.gov/news/public-statement/2012-08-22-open-meeting-statement-ebw

- Commissioner Aguilar noted Section 13(q) was intended to provide payment transparency to "empower… investors" among other stakeholders.[246] As an example "of why investors require this information," he explained "*Investors need to know the full extent of a company's exposure when it operates in countries where it is subject to expropriation, political and social turmoil, and reputational risks.*"[247]
- Commission Aguilar also explained that "enhancing transparency with respect to payments made by resource extraction issuers to governments for the commercial development of oil, natural gas, and minerals, advances our national interest, promotes our core values, and protects the interests of investors."[248]
- In defending the 2012 Rule during litigation, the Commission specifically argued that disclosure would "provide valuable information to investors when assessing risks and making investment decisions."[249] The Commission acknowledged that these benefits would accrue to investors if the information "were disclosed on an issuer-by-issuer basis."[250] By contrast, the Commission acknowledged that an aggregated, anonymous approach "would effectively eliminate one of the two legs on which this provision stands, and that's providing information to investors."[251]
- In the 2016 Rule, SEC expressly acknowledged "the legislative history also indicates that Congress intended for the Section 13(q) disclosures to serve as an informational tool for investors."[252]

We note that the failure to acknowledge the interests of investors and the benefits to investors resulting from the 2016 Rule appears to have led a number of members of Congress who supported the resolution of disapproval to be concerned that the Commission had not acted in a way that was consistent with investor interests.[253] But the lack of benefits to investors they perceived was a result of the Commission's failure to adequately acknowledge those interests in the final rule – not a lack of evidence from investors themselves reiterating their commitment to strong implementing rules, and specifically their support of key features of the 2016 rule that the Commission now proposes to change. Indeed, as noted above, there is robust, unanimous support from all investors who have commented on this rule and this cannot be ignored.

Because the Commission did not acknowledge the vast support from investors,[254] members of Congress appear to have been under the mistaken impression that the rule was not in

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246 Commissioner Luis A. Aguilar, Facilitating Transparency of Resource Revenue Payments to Protect Investors (Aug. 22, 2012) https://www.sec.gov/news/public-statement/2012-08-22-open-meeting-laa#P16_4917

247 *Id*. (quoting Senator Cardin).

248 *Id*.

249 *API v. SEC*, No. 12-1668 (JDB), Oral Argument Tr. at 51 (D.D.C. June 7, 2013).

250 *API v. SEC*, No. 12-1398, Br. of Resp. SEC, at 44 (D.C. Cir. Jan. 2, 2013)

251 *API v. SEC,* No. 12-1668 (JDB), Oral Argument Tr. at 37-38

252 2016 Final Rule, 81 Fed. Reg at 49362 n. 29.

253 *See, e.g.,* 163 Cong. Rec. H851 (Feb. 1, 2017) (Rep. Wagner) (stating SEC found rule had high compliance costs, but "with no added benefit of investor protection").

254 *See, e.g.* Comment submitted by Elise Bean, Former Staff Director and Chief Counsel U.S. Senate Permanent Subcommittee on Investigations (Feb 16. 2016) at 2, *available at* https://www.sec.gov/comments/s7-25-15/s72515-27.pdf (noting the need to "strengthen[ ] the rationale" of the 2016 Rule to address "the role it would also play in strengthening U.S. investor protections" and observing that "investor benefits have been detailed in several

the interest of and consistent with the express requests of investors. The Commission must not repeat this mistake here, nor worsen it by ignoring investor comments, and producing a rule that forecloses any investor benefits.

B. The Commission's justification for disregarding investor interests is arbitrary and internally inconsistent

The Commission vaguely refers to investor interests by noting "some prior commenters" stated a contract-level definition would enable investors to better evaluate risk.[255] But the Commission dismisses that interest out of hand, concluding its "rules requiring disclosure of the most significant risks affecting a company or the securities being offered, and disclosure of known trends or uncertainties that have had or are reasonably likely to have a material impact on the registrant's liquidity, capital resources, or results of operations, should elicit all appropriate risk-related disclosure."[256] This conclusion goes against the weight of evidence in the record, specifically the numerous voices of investors themselves, representing trillions in assets under management.[257] Surely, Congress did not intend for the Commission to ignore the interests of, for example:

- The California Public Employees' Retirement System ("CALPERS"), the largest pension fund in the United States, representing $335 billion in assets under management[258], supporting the pensions of 1.5 million people and generating $23.5 billion in economic activity in FY 2017-2018.[259] CALPERS has called for a strong rule since 2011[260] and in 2013[261].

- The California Public Employees' Retirement System ("CalSTRS"), the largest educator-only pension fund in the world, and the second largest pension fund in the U.S., with an investment portfolio valued at approximately $243.2 billion as of February 29, 2020.[262] CalSTRS holdings in Oil Gas & Consumable Fuels, Metals & Mining and Energy Equipment & Services sectors included approximately 617 companies, 606.6 million

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comment letters and Congressional statements on the law, yet receive little attention or discussion in the proposed rule"); Comment submitted by EarthRights and Oxfam (Mar. 8, 2016) at 4-5 https://www.sec.gov/comments/s7-25-15/s72515-59.pdf (urging the Commission to "reconsider its continuing refusal to adequately recognize that full public disclosure under Section 13(q) was intended to – and, in fact, does – protect the interests of investor")

[255] Proposed Rule, 85 Fed. Reg. at 2538

[256] *Id.*

[257] *See* Appendix B to Comment submitted by PWYP-US (Feb. 16, 2016) *available at* https://www.sec.gov/comments/s7-25-15/s72515-45.pdf. We also continue to believe the Commission should, consistent with the requests of investors, require the disclosures be filed, and not furnished.

[258] *See* CalPERS Investment Fund Values, https://www.calpers.ca.gov/page/investments/asset-classes/trust-level-portfolio-management/investment-fund-values

[259] CalPERS, 2018-2019 Comprehensive Annual Financial Report, https://www.calpers.ca.gov/docs/forms-publications/cafr-2019.pdf

[260] Comment submitted by CalPERS. (Feb. 28, 2011), *available at* https://www.sec.gov/comments/s7-42-10/s74210-32.pdf

[261] Comment submitted by Steve Berexa et al. (Aug. 14, 2014), *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-3.pdf

[262] CalSTRS Current Investment Portfolio. https://www.calstrs.com/current-investment-portfolio

shares with a market value of $9.2 billion as of December 2017.[263] This includes supporting the pensions of nearly 1 million people, including California's public school educators and their families. CalSTRS has consistently called for a strong rule since its first submission in 2011[264], 2014[265], 2016[266], and in 2018.[267]

The Commission's logic for disregarding investor interests here is internally inconsistent and contradictory. The Commission asserts that existing disclosure requirements in Regulations S-K already give investors all the information they need as it requires them to disclose major risks.[268] At the same time, however, the Commission bases changes to the most important elements of the rule (changes against the express position of investors) on the supposedly significant risks of competitive disadvantage resulting from Section 13(q) disclosures. The Commission does so without assessing whether any issuers that are already reporting have disclosed evidence of experiencing harm, which would presumably constitute a material risk or concrete harm warranting disclosure.[269] Indeed, some issuers have expressly voiced the opposite view.[270]

The general nature of risk factor disclosures and segment reporting guidance to which the Commission refers largely ignores the specific benefits of the information investors have identified, and specific uses to which they would put the information disclosure under Section 13(q) rules. Current risk disclosures cannot be used to conduct the detailed risk and investment analysis that is necessary in today's rapidly evolving investment environment, especially as this relates to non-technical risks.[271] As a recent investor submission explained:

> The company-by-company project-level payment information proposed Rule 13q-1 would produce, if it were consistent with the EU, UK and Canadian laws, represents a significant improvement in the potential for analysts to assess and act on a variety of considerations essential to understanding an energy or mining security's proper

[263] Comment by Anne Sheehan, Director of Corporate Governance, CalSTRS (Feb. 1, 2018), *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf

[264] Comment submitted by Anne Sheehan, Director of Corporate Governance, CalSTRS, (Mar. 1, 2011) *available at* https://www.sec.gov/comments/s7-42-10/s74210-59.pdf; *see also* Comment submitted by CalSTRS (Feb. 1, 2018) *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf

[265] Comment submitted by Peter Lundkvist et al. (Apr. 28, 2014), *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-36.pdf

[266] Comment submitted by Erik Jan van Bergen, Chief Investment Officer, ACTIAM NV, et al. (Mar. 8, 2016), *available at* https://www.sec.gov/comments/s7-25-15/s72515-52.pdf

[267] Comment submitted by Anne Sheehan, Director of Corporate Governance, CalSTRS, (Feb. 1, 2018) https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf

[268] *See* Proposed Rule, 85 Fed. Reg. at 2528 (citing Item 503(c) of Regulation S–K (17 CFR 229.503(c)) and Item 303 of Regulation S–K (17 CFR 229.303)].

[269] *See* Comment submitted by PWYP-US (Mar. 16, 2020) at 125 (explaining analysis of disclosures of financial reporting by ExxonMobil, Chevron, ConocoPhillips, BP, Royal Dutch Shell, EniSpA).

[270] *See, e.g.* comment submitted by BHP (March 16, 2020) at 1 ("Being open about the taxes and royalties we pay to governments is in the best interests of our shareholders"); Comment submitted by Kosmos (Feb 19, 2020) at 1, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6838138-208628.pdf ("We believe that this type of disclosure is beneficial to investors... and reflects evolving international expectations")

[271] Comment submitted by Columbia Center for Sustainable (Dec. 10 2019), *available at* https://www.sec.gov/comments/dftitle-xv/resource-extraction-issuers/cll6-6521646-200386.pdf;

valuation and risk profile. These analytical tasks are otherwise unachievable with the data provided in current disclosures, which are insufficiently detailed and too aggregated to accomplish these ends. We believe Section 13(q) disclosures can generate measurable, direct economic benefits to investors or issuers if they are treated like other routine financial data.[272]

Moreover, as the Commission acknowledges, the current disclosures in Regulation S-K do not apply to small reporting companies,[273] which means investors lack any such information to evaluate risks associated with investments in such entities. Yet the Commission ignores the implications and documented corruption risks of now proposing to exempt such entities from disclosure altogether.[274] For example, CalSTRS warned the Commission in its 2011 comment to "exercise caution" because smaller reporting companies "are exposed to significant political and regulatory risks and their exclusion from the Section 13(q) disclosure requirements would undermine the value of this reform to investors. While we appreciate the Commission's concerns about the regulatory burden for smaller issuers we believe that concern needs to be balanced with the Congressional intent of providing greater disclosure of this type of information to shareholders so they have the ability to assess the risks involved in investing in such companies."[275]

The Commission shows disregard for the unanimous position of investor commenters as to what is in their interest, what benefits them, what information they lack and how they will use it,[276] and instead sides with a small minority of industry commenters. This position is troubling, particularly given the series of recent Commission rulemakings that raise the same concerns.[277]

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[272] Comment submitted by Amundi et al. (Mar. 16, 2020), at 2, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6969413-214065.pdf

[273] Proposed Rule, 85 Fed. Reg. 2555.

[274] *See e.g.* Alexandra Gillies, Natural Resource Governance Institute. (Mar. 16 2020) at 4, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6960397-212783.pdf("[s]uch companies regularly crop in corruption scandals; indeed, some have bribed officials to overlook their limited resources" citing corruption case of small Candaian company that would have been exempt under the proposed rules.).

[275] Comment submitted by CalSTRS. (Mar. 1, 2011), attached as exhibit to Comment submitted by Anne Sheehan, CalSTRS (Feb. 1, 2018), *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf

[276] *See* Statement by former Commissioner Jackson on Proposed Disclosure of Issuer Payments Related To Extraction of Natural Resources (Dec. 18, 2019) ("Some might take the view that investors either do not choose investments on [the basis of payment disclosures]—or that they shouldn't. But the first argument amounts to an untested empirical assertion about investor behavior based exclusively on one's intuition. The second substitutes our view from Washington about what is important for the collective views of investors around the world.") (internal citations omitted).

[277] *See*, *e.g.*, Statement of Commissioner Allison Lee on the Rollback of Auditor Attestation Requirements (March 12, 2020) https://www.sec.gov/news/public-statement/statement-lee-accelerated-filer-2020-03-12 ("There have been a number of releases over the past several months where, as here, there was a clear division of views between investors and other commenters. … In each case, the comment file revealed a clear divide and, in each case, we disfavored or even disregarded investor views").

VIII. The Commission's Economic Analysis is incomplete, inconsistent, fails to reflect current market realities, and warrants reproposal.

The Commission's economic analysis of the proposed rule is incomplete and fails to satisfy its own internal Guidance. In particular, the proposed rule lacks an adequate baseline for measuring the likely economic impact,[278] and "a substantially complete analysis of the most likely economic consequences of the rule proposal."[279] The Commission fails to ensure its baseline reflects current market realities and fails to provide any analysis of the consequences for significant features of the rule, despite access to information from other markets that is directly relevant.

Faulty assumptions about the nature of the competitive risks, compliance costs, and investor benefits presented by payment disclosures in the current "state of the world" frustrate any attempt to effectively measure the Proposed Rule's impacts on efficiency, competition and capital formation. The Commission also gives short shrift to the "problem the rule is designed to address" through its lack of meaningful engagement with the real-world and statutorily intended benefits that 13(q) is meant to achieve.[280] In addition, the Commission opportunistically frames the costs and benefits, fails to consider alternatives to the current proposal, and is internally inconsistent or contradictory in multiple areas. In light of the significant gaps and shortcomings in the proposing release, and the insufficient notice provided to commenters, re-proposal appears necessary.

A. The baseline in the proposed rule contains significant gaps and fails to recognize current market realities.

A Proposed Rule's baseline should include "both the economic attributes of the relevant market and the existing regulatory structure," and should attempt to articulate "the state of the world in the absence of the proposed rule, including the existing state of efficiency, competition, and capital formation, against which to measure the likely impact of the proposed rule and the principal alternative regulatory approaches."[281] The proposed rule's economic analysis should compare "the *current* state of the world, including the problem that the rule is designed to address, to the expected state of the world with the proposed regulation (or regulatory alternatives) in effect."[282]

As discussed above in detail,[283] the current "state of the world" is far different than it was in 2016, yet the Commission fails to truly consider the implications of the existing international regulatory landscape, despite already having significant data at its disposal that would allow it do so. A significant percentage of extractive companies around the world are regularly reporting their contract-level payments, and many have shifted towards broader transparency, including of

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[278] SEC Staff Memorandum Re: Current Guidance on Economic Analysis in Rulemakings (Mar. 16, 2012), at 6, https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf. ["SEC, Current Guidance"]

[279] *Id.* at 16.

[280] SEC, Current Guidance, at 6

[281] *Id.* at 7.

[282] *Id*. at 6 (emphasis added). *See also id*. at 9-14.

[283] *Supra* Section I.

entire contracts. Unfortunately, the Commission's proposal omits analysis of the existing market in key respects that are necessary to establish an economic baseline against which to measure the likely economic impacts of the proposed rule and its alternatives.

1. The costs and consequences of the proposed de minimis thresholds of $750,000 (per project jurisdiction) and $150,000 (per payment) have not been thoroughly considered.

The Commission proposes two dramatic changes to the de minimis threshold that are unmoored from the statute, the factual record, and wholly at odds with other jurisdictions, as discussed further above. In doing so, the Commission relies on the single comment from the last rulemaking that took issue with the prior threshold,[284]one the Commission had already analyzed and rejected.[285] The Commission's analysis of these proposed changes is woefully incomplete and makes it virtually impossible to determine the economic consequences of the departure from the international standard reflected in other markets. In particular:

- The Commission provides no analysis or explanation as to how the $750,000 project total threshold was chosen. There is no analysis whatsoever of the relative impact of, for example, $749,000 versus $750,000, on transparency benefits and loss of payment information under different potential thresholds.
- There is no analysis or explanation of how the $150,000 payment threshold was chosen, nor of the relative impact of or $100,000 versus $150,000 in alleviating perceived compliance cost concerns for issuers of various categories, nor any assessment of existing reporting to develop a baseline of companies reporting under $100,000 thresholds.
- No meaningful explanation is given for why anything under $750,000 would be considered not de minimis in this context, when regulators in all other countries with disclosure regimes have coalesced around $100,000.
- The Commission has not explained why it makes sense to have two different thresholds, nor how they are supposed to work together. Nor is there any meaningful analysis of how utilizing a different payment threshold, in addition to a novel project total threshold, would affect overall transparency, nor how it will affect comparability of data to other jurisdictions and the corresponding impact on citizens, investors and other data users.
- No analysis of which government entities would not be listed as receiving any payment from a project in a given year as result of the new proposed thresholds, and the impact on

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[284] Proposed Rule, 85 Fed. Reg. 2534 ("In light of the previously expressed concerns that the threshold was unreasonably low and costly to calculate and the likely impact of the revised definition of project that we are proposing, we no longer believe that the $100,000 threshold is the best method for determining whether a payment is ''not de minimis'' under Section 13(q)) (internal citations omitted).

[285] *Id*. n. 148 (citing comment submitted by Nouveau (Feb. 16, 2016) as evidence of past concerns). Nouveau argued in 2016 that the threshold would be "unreasonably low for companies working on massive scale projects and would require parties to engage in the costly collection, compilation, and standardization of potentially thousands of different data points." The Commission rejected those arguments, noting it was the only submission to argue that the de minimis threshold was too low, while other commenters praised the rule's uniformity with other US agencies (DOI) and the EITI standard. *See* 2016 Final Rule, 81 Fed. Reg. 49375 n. 227. Even in the current rule, as it relies on the Nouveau comment for justification of the current de minimis threshold, the Commission acknowledges that Nouveau "did not suggest an alternative amount or provide data to support why the [2016] threshold was too low." Proposed Rule, 85 Fed. Reg. 2562.

transparency and corruption risk from excluding payments between $150,000 and $750,000.

2. The estimates of costs to issuers due to competitive harm did not seek nor consider the best available evidence.

The Commission has been aware of issuers implementing similar rules in other markets for several years and has access to substantial data regarding their reporting experience. The Commission previously predicted that the theoretical competitive cost concerns asserted by some commenters in 2016 would be alleviated by the implementation of the rules in other markets.[286] Despite now having multiple years of reporting by nearly 800 companies, however, the Commission cites risks of competitive harm associated with the 2016 Rule to justify sweeping changes, without actually addressing the reality of the *current* competitive landscape. It is plainly reasonable to expect that, at a minimum, the Commission would have included at the proposal stage at least some cursory evaluation of reporting practice, looking at existing disclosures and annual reports to attempt to 1) identify the extent of reported competitive harm by category of issuer disclosing in other markets; and, 2) identify any unique risks now faced by covered issuers that are distinct from their competitors and peers which have successfully disclosed in other markets.

This could have included, for example, consideration of whether any issuers reported material harm resulting from disclosures that would be required under Section 13(q), for example by reviewing annual filings for actual evidence of competitive harm, or instances where companies already reporting had to violate foreign laws.[287] Having expressly noted in numerous areas of the 2016 Rule that there would be additional clarity on key issues of possible competitive harm and costs coming out of reporting experience outside the United States,[288] the Commission's decision to ignore that information is a significant omission that renders the analysis incomplete.

[286] 2016 Final Rule, 81 Fed. Reg. 49382, n. 300 ("We continue to believe that the potential for competitive harm resulting from the final rules is significantly reduced, although not eliminated, by the adoption of a similar definition of ''project'' in the European Union and Canada").

[287] Here, the Commission accessed 10-K filings of 109 cross listed issuers reporting under disclosure regimes in other jurisdictions to determine the total number of issuers already experiencing reporting costs as a result of other regimes, but did not consider any other evidence from that reporting experience. We note the Commission has a history of reviewing annual filings to support the development of its baseline and economic analysis for proposed and final rules. *See* Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, 84 Fed. Reg. 66518, nn. 218-19, 280 (proposed Dec. 4, 2019) (citing staff efforts to manually review 10-K filings to conduct detailed review). *See also* 2016 Final Rule, 81 Fed. Reg. 49414 (utilizing Form 10-Ks and 20-Fs to analyze countries operating in China and Qatar in order to project potential competitive harms).

[288] *See, e.g*. 2016 Rule, 81 Fed. Reg. at 49390 ("As more companies begin to report under the EU Directives and ESTMA, the existence of alleged conflicts between those disclosure regimes and foreign laws may be clarified prior to any reports being due under the rules we are adopting today.").

3. The extent of cost savings for US issuers with major subsidiaries already complying with contract-level disclosure requirements in other jurisdictions or the EITI.

Although the Commission properly discounted compliance costs experienced by cross-listed issuers already reporting in other jurisdictions, the Commission failed to consider the many US issuers who have significant subsidiaries already required to make contract-level payment disclosures. This includes companies with subsidiaries listed in Canada and Europe, such as Exxon and Chevron, for which their existing reporting already demonstrates significant tracking and reporting at the contract level for some countries of operations.[289] An assessment of such reports should be a minimum input for any analysis of the extent of existing compliance with the proposed rule and its alternatives.

In addition, some U.S. issuers and/or their subsidiaries have been tracking and reporting payments at the contract-level for operations in EITI implementing countries for multiple years.[290] Project level reporting is moving ahead of schedule in some places, and according to the EITI, by 2017 "three countries fully disaggregated [payment] data by project: Indonesia, Philippines and Trinidad and Tobago," consistent with the EU approach to project-level reporting, and 25 other countries had partial project reporting, where data was disaggregated for at least some projects and/or revenue streams.[291] The 2019 EITI Standard now explicitly requires reporting using a contract-level project definition in line with the EU, UK and Canada.[292] This means that any company with operations in any of the 53 EITI countries is already set up to, or will shortly need to set up (before Section 13(q) reporting would be due to begin), to track and collect this information for at least some segment of the company's operations at the contract level.[293]

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[289] *See*, *e.g.*, ExxonMobil-UK, Payments to Governments (2016) (Report), *available at* https://corporate.exxonmobil.com/-/media/UnitedKingdom/Files/2016-Transparency-Payment-Report--UK.pdf; Chevron Canada, ESTMA-Annual Report (2018), *available at* https://canada.chevron.com/-/media/canada/community/documents/2018-ESTMA-Reporting-Template.pdf; Comment submitted by PWYP-US (Mar. 16, 2020), at 11.

[290] *See* Alexander Malden and Fikri Zaki Muhammadi, Indonesia's Oil and Gas Revenues: Using Payments to Governments Data for Accountability, NRGI, at 14, *available at:* https://resourcegovernance.org/sites/default/files/documents/indonesia-oil-and-gas-revenues-using-payments-to-governments-data-for-accountability.pdf ("The largest international oil producer in Indonesia, Chevron Canada, and largest international gas producer, BP, disclose their payments to Indonesian government entities. However, the second largest producers in the country for both commodities, ExxonMobil and ConocoPhillips, do not.").

[291] EITI, Project-level reporting in the extractive industries (Nov. 2018), *available at:* https://www.sec.gov/comments/s7-24-19/s72419-6960332-212746.pdfhttps://eiti.org/document/projectlevel-reporting-in-extractive-industries.

[292] *See supra* Section I.

[293] In its comment to the Commission, the EITI International Secretariat has confirmed that for any EITI Supporting Company - which includes most companies commenting on the rules - "project-level reporting does not impose a substantial administrative burden on reporting companies" since "[m]ost EITI supporting companies are already doing so by default (as they have only one project in a country) or can do so quickly with minimal adjustments to existing reporting procedures." *See* Comment submitted by Mark Robinson, Executive Director, EITI International Secretariat (Mar. 16, 2020) at 5, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6960332-212746.pdf.

Any estimate of comparative burden of disclosure by the Commission between the Modified Project Definition and contract-level project disclosure must take into account the extent to which investments have already been made by issuers to adjust internal systems to comply with requirements applicable to its subsidiaries, including the EITI project reporting requirement for existing and anticipated projects. Any such costs are separate from and cannot be attributed to Section 13(q) and should be deducted from the estimate of compliance costs associated with a contract definition. This may also be a factor showing there are increased costs associated with the Modified Project Definition.

4. The extent of data collection, compilation and review of cost savings for covered issuers complying with disclosure requirements that include the same or similar payment disclosure categories under the U.S. Code.

Currently, each US taxpayer with approximately $850 million in annual revenues is required to file a Country-by-Country ("CbC") report with the IRS showing profits and corporate income taxes paid in each jurisdiction that they operate. Resulting from regulations adopted by the IRS in June 2016, these reports document what is arguably the most complex aspect of payments-to-governments reporting: corporate income tax paid. The IRS regulatory requirement includes the CbC report submission to the IRS, as well as the requirement to maintain the records to produce the CbC report. The cost of compliance to produce this tax information has already been internalized by the largest issuers. The Commission's cost analysis must evaluate and consider the clear evidence that many covered issuers, beyond those that are cross-listed in other markets, have already made upfront investments in the tracking, collection, and compilation of the reports required by the IRS.[294] These are costs that should not be attributed to Section 13(q).

B. The Economic Analysis fails to consider significant aspects of the rule's consequences and gives no meaningful consideration to alternatives.

1. The Commission has failed to consider the importance of granular, contract-level transparency to protecting investors and the public from market volatility and uncertainty.

Missing from the Commission's analysis is the requisite analysis of the state of efficiency, competition, and capital formation, taking into account the current state of the oil market and the uncertainty around its future trajectory and the opportunities for the proposal as well as its alternatives to improve efficiency, competition and capital formation. As noted above, the Commission largely disregards investor interests, assuming any risks are already disclosed under existing regulations.[295] This assumption, however, artificially narrows the universe of investor benefits that the Commission should consider in its analysis.

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[294] *See* Comment submitted by Financial Accountability and Corporate Transparency. (Mar. 18 2020), *available at* https://www.sec.gov/comments/s7-24-19/s72419-6969417-214090.pdf (providing an overview of global trends in tax transparency, including that"As of March 2020, the tax authorities of the United States and 90 countries collect and privately exchange disaggregated country-by-country tax and financial reports for all large multinational enterprises, according to a standard set by the Organization for Economic Cooperation and Development (OECD) in 2015.")

[295] Proposed Rule, 85 Fed. Reg. 2555. *See supra* Section VII.

Commenters have explained in detail how granular payment disclosure data would help investors understand portfolio risk. As Former Commission Chairman Walter has explained, these disclosures would help investors "model project cash flows and assess political risk, acquisition costs, and management effectiveness," in addition to benefiting from the "increased economic and political stability and improved investment climate that transparency promotes."[296] As one of the largest public pension funds in the world stated, "our portfolios have substantial exposure to the global extractives sector, through both equity and fixed income instruments, and that many of the undersigned also invest actively in the sovereign debt of resource-dependent emerging nations whose fiscal governance has a direct bearing on the quality of the credits they hold."[297] Similarly, the Commission received letters detailing an investor valuation model that successfully used payment disclosures to assess equity exposure to fiscal regime change.[298]

Current market dynamics are precisely the type of risk that the drafters of Section 13(q) had in mind and show why granular project-level reporting is critical. The Commission appears to accept, without apparent analysis, the validity of certain industry commenters' (largely unsupported) assertions about competitive disadvantage resulting from transparency, while completely dismissing the numerous and extensive investor comments that emphasize why contract-level payment information is so important. Further analysis is needed.

2. The Commission has not considered the costs of shifting the burden of granular payment data research and compilation onto data users.

Investor and civil society commenters have universally stated their support of granular payment information, explaining in detail how they would use the information to advance the statutory goals. Under the proposed rule, however, these data users, the intended beneficiaries of Section 13(q), would be responsible for conducting their own independent investigations to attempt to glean the information that Congress intended them to have. In particular, by eliminating contract-level reporting and allowing the aggregation in the Modified Project Definition, the Commission is effectively proposing to shift the burden of identifying which payments relate to which project, and tracking financial flows from a company to a particular government, to the public and investors.[299] The difficulty here is worsened by the lack of

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296 Commissioner Elisse B. Walter, Statement at SEC Open Meeting (Aug. 22, 2012) https://www.sec.gov/news/public-statement/2012-08-22-open-meeting-statement-ebw

297 *See* Comment submitted by CalSTRS (Feb. 1, 2018), *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3079757-161907.pdf

298 *See* Comment submitted by Columbia Center for Sustainable Investment (Dec. 10, 2019) *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-6521646-200386.pdf; *see also* comment submitted by Alexander Shay, W&K Associates, (March 16, 2020), *available at* https://www.sec.gov/comments/s7-24-19/s72419-6961611-212817.pdf

299 *See, e.g.* 2016 Final Rule, 81 Fed. Reg. at 49379 n.280 (explaining that "granular information makes it easier for the public and others to observe potential improprieties with respect to the payment flows and such disclosure makes it more difficult for actors to hide any impropriety from scrutiny."); *see also id*. ("reporting at the contract level" could enable "cross-project revenue comparisons [that] may allow citizens, civil society groups, and others to identify payment discrepancies that reflect potential corruption and other inappropriate financial discounts"); *id*. at 49419 (contract-level definition of project has "the benefit of providing a granular transparency that citizens, civil society groups, and others can use to assess revenue flows from projects in their local communities" which " should have a number of potential

comparability the current regime will produce. By using a different project definition, a completely different approach to "de minimis," and allowing additional aggregation on top of that, the data produced will be virtually impossible to compare with and understand alongside data from EITI and from other regimes. This loss of comparability is significant and will increase the burden on data users.[300]

In its analysis, the Commission fails to acknowledge the asymmetry of information between the statute's beneficiaries and issuers' competitors. A vast need for this data remains, and the costs for those beneficiaries to independently access replacement data should be taken into account. As noted below, a host of energy intelligence firms and services provide contract-level payment information, as well as project economic modeling and fiscal analysis services on a contract basis.[301] But it is issuers' competitors that currently have access to this information, not the citizens in resource rich countries, not civil society, not the public more broadly, and not Main Street investors.[302] These costs will create unfair advantages across investors—large, well-resourced investors may be willing and able to incur the costs of contracting intelligence firms to inform their investments. On the other hand, boutique and main-street investors will be at an informational disadvantage as they are less likely to have access to these intelligence services to inform their investment decisions.

3. The Commission has failed to consider alternatives to the current proposal.

The Commission's Guidance includes "the identification of alternative regulatory approaches" and "evaluation of the benefits and costs… of the proposed action and the main

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benefits for information users seeking to prevent corruption and promote accountability.")

[300] *See e.g.* Comment submitted by Columbia Center for Sustainable (Dec. 10 2019), *available at* https://www.sec.gov/comments/dftitle-xv/resource-extraction-issuers/cll6-6521646-200386.pdf; Comment submitted by Alexander Shay, W&K Associates, (March 16, 2020), *available at* https://www.sec.gov/comments/s7-24-19/s72419-6961611-212817.pdf; Comment submitted by Extractive Industries Transparency Initiative International Secretariat (Mar. 16, 2020) at 6, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6960332-212746.pdf; Comment submitted by BHP (Mar. 16, 2020), at 3, *available at:* https://www.sec.gov/comments/s7-24-19/s72419-6960337-212716.pdf; Comment submitted by Iraqi Transparency Alliance for Extractive Industries (ITAEI) (Mar. 10, 2020) at 7-8, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6925917-211409.pdf.

[301] *See*, *e.g.*, Comment submitted by PWYP-US (Mar. 16, 2020), at 121 ("For instance, Wood Mackenzie produces "asset reports" including project-level information about costs, fiscal and regulatory terms, and an overall economic analysis. As an example, the asset report for the OML 100 Block in Nigeria's southeastern delta costs $3,100 while an asset report for an individual exploration basin in Southwest Greenland costs $2,800.Data provider IHS Markit sells access to a contracts and blocks database that provides access to more than 25,000 active contracts for over 143,000 blocks. Detailed information includes "financial, seismic or drilling commitments organised by exploration phases...payment details including signature & production bonuses and royalty rates," and "terms of previous bid rounds.") (internal citations omitted).

[302] As cited by CCSI, the Bloomberg terminal provides at least partial access to tax payment data, *see* Comment submitted by Columbia Center for Sustainable (Dec. 10 2019), *available at* https://www.sec.gov/comments/dftitle-xv/resource-extraction-issuers/cll6-6521646-200386.pdf, however the average cost for a Bloomberg terminal is $24,000, out of the reach of many of Congress's intended beneficiaries. *See* WallStreetPrep, *Bloomberg vs. Capital IQ vs. FactSet vs. Thomson Reuters Eikon* https://www.wallstreetprep.com/knowledge/bloomberg-vs-capital-iq-vs-factset-vs-thomson-reuters-eikon/

alternatives identified" as "basic elements of a good regulatory economic analysis."[303] Yet the economic analysis here largely fails to identify, let alone meaningfully evaluate, any alternatives to the positions advanced by the API that it adopts in most respects.

As discussed above,[304] the CRA resolution of disapproval did not explain what "substantially the same" means. Even if members of Congress had voiced consistent views on what should change, which they did not, no member of Congress ever suggested the Commission should adopt the API model it had so thoroughly considered and rejected in 2016. Indeed, multiple members of Congress supportive of the disapproval indicated support for a new rule that closely aligned with other markets.[305] Yet the Commission at no point gives any consideration to alternative modifications of the rule that could more closely align with the regulations already in place in other jurisdictions, nor does it seek to examine existing practices for possible alternatives. This is a particularly glaring gap in the economic analysis considering the wealth of real reporting experience the Commission had available to identify alternatives, not to mention two full prior rounds of rulemaking.

C. The Commission's cost analysis is based on unfounded assumptions that have been disproven.

The Commission bases its reversal on key features of the rule on assumptions of cost savings in the form of compliance costs and indirect costs associated with alleged risk of competitive harms resulting from disclosure. But many of these assumptions have already been persuasively disputed, and/or have since been mooted and thoroughly refuted based on developments subsequent to the 2016 Rule and 2017 vote.

This is most important with respect to project reporting. Previous rulemakings and the Commission's findings of fact have clearly confirmed that only granular, project-level reporting at the contract level would meet the intent of the statute.[306] Now, experience with reporting since the 2016 Rule has confirmed the wisdom of those findings. In light of current market realities and reporting experience, neither alleged compliance costs nor competitive harm concerns can plausibly justify the choice of the Modified Project Definition over the contract-level project definition. The Commission cannot make sweeping changes that are inconsistent with the statute and undermine Congress's objectives based on assumptions that have no support in the record or market realities. We summarize some of these problematic assumptions below.

1. The assumptions underlying the assessment of compliance costs do not reflect the evidence in the record, nor current market realities.

While we do not exhaustively assess the compliance costs herein, we note a number of critical shortcomings in the Commission's assumption that the Modified Project Definition will result in less costs. As documented extensively in the record, and highlighted above, companies

[303] SEC, Current Guidance at 4.

[304] *See supra* Section II.

[305] *See supra* Section II.C.

[306] *See supra* Section IV.

already track payments at the project level for a variety of reasons independent of 13(q) payment disclosures.[307]

With respect to direct costs, the Commission assumes that issuers will be required to modify existing "core enterprise resource planning" and "financial reporting" systems.[308] The projected compliance savings attributable to the modified project definition are made on the basis that issuers' current systems are not already capable of "captur[ing] and report[ing] payment data for each type of payment, government payee, and currency of payment."[309] The Commission adopts the 2016 compliance estimates, and adjusts them downwards by 25% for savings attributed to the newly proposed project definition alone.[310] The entirety of the analysis relies on industry submissions from 2011, at which time there were no similar disclosure regimes in other markets,[311]and where estimates by industry included initial compliance costs in the "tens of millions of dollars for large issuers and millions of dollars for many small issuers."[312] These numbers were incorporated in the 2016 economic analysis and continue to serve as the quantitative baseline for determining the range of direct compliance costs nearly a decade later, even though they are clearly obsolete.[313] The baseline is not made using the best available data.

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[307] *See id*. The Commission also does not consider, for example, the extent to which financial and compliance systems necessary to comply with the Foreign Corrupt Practices Act (FCPA) books and records requirements, already would track at a disaggregated level, particularly given the high degree of risk in the extractive industries that would warrant more robust systems. Recent industry comments confirm that issuers' routine business practices require systems capable of granular payment tracking for a variety of practical reasons.*See* Comment submitted by Alan Detheridge, Former VP Shell (Mar. 16, 2016), *available at* https://www.sec.gov/comments/s7-24-19/s72419-6955597-212686.pdf ("Defining a project according to legal agreements does not impose an undue burden" since "[c]ompany systems necessarily require accounting by project on an ongoing basis because: 1. Contractual terms and conditions will vary from contract to contract, and companies must be able to demonstrate to government (and to any industry partners) that these are being met; 2. Contractual partners (e.g. joint venture partners) may also be different from contract to contract, and each partner will want to see periodic sets of accounts for the venture in which it is invested."); *see also*, *id.* at 2 ("The modified project definition is atypical and …. such a system would have to be developed.").

[308]Proposed Rule, 85 Fed. Reg. 2555 ("Examples of modifications that may be necessary include establishing additional granularity in existing coding structures (e.g., splitting accounts that contain both government and non-government payment amounts), developing a mechanism to appropriately capture data by ''project,'' building new collection tools within financial reporting systems, establishing a trading partner structure to identify and provide granularity around government entities, establishing transaction types to accommodate different types of payment (e.g., royalties, taxes, or bonuses), and developing a systematic approach to handle ''in-kind'' payments.").

[309] Id. at 2557; *see also id.* at 2555 ("Examples of modifications that may be necessary include establishing additional granularity in existing coding structures (e.g., splitting accounts that contain both government and non-government payment amounts), developing a mechanism to appropriately capture data by ''project,'' building new collection tools within financial reporting systems, establishing a trading partner structure to identify and provide granularity around government entities, establishing transaction types to accommodate different types of payment (e.g., royalties, taxes, or bonuses), and developing a systematic approach to handle 'in-kind' payments.").

[310] *Id.* at 2565 (stating that expected savings should also be attributed to exemption for conflicts with foreign laws and pre-existing contracts, though due to difficulties estimating those numbers, the Commissions "[has] not factored them into the current PRA estimates").

[311] 85 Fed. Reg. 2557 n. 344 (citing 2016 Final Rule Section III.B.2.; Letters from API (Jan. 28, 2011); ExxonMobil (Jan. 31, 2011); and Royal Dutch Shell (Jan. 28, 2011)).

[312] 2016 Final Rule, 81 Fed. Reg. 49405.

[313] *See id. at* 49406-49410 (citing Barrick and Exxon submissions from 2011 as the basis for cost estimates). *See also*, Proposed Rule, 85 Fed. Reg. 2555, 2565.

Moreover, the Commission's past findings directly undermine this assumption. In 2016, it noted that, even under the API Proposal, "issuers would still be required to track each payment that they make" to governments, and the process of aggregating payments at the final step of reporting would not prevent issuers from being required to collect accurate information about payments to governments, thus, "the underlying collection systems and tagging would still need to occur" and "issuers would still need to track every resource extraction payment … including the type of payment it is and which business unit paid it."[314] Rather than saving issuers from adapting their internal systems and providing less manipulation of data under an aggregated reporting regime, under the API definition of project, "issuers will themselves" have to take the extra step to "aggregate the various payment flows in their Section 13(q) disclosures, while under a contract-level definition, issuers could choose not to do so."[315]

Given the prevalence of contract level reporting around the world, the Commission must consider the possibility that the Modified Project Definition would complicate compliance efforts and could in fact *increase* costs for issuers.[316] Recent industry commenters reject the premise that the Modified Project Definition would result in cost savings. BHP, the world's largest mining company by market capitalization, for example, writes that the EITI Standard provides "companies with the most efficient manner of compliance, helps reduce related costs and simplifies data consistency."[317] The Commission's failure to acknowledge the extent to which tracking contract-level payment information is already standard in existing systems, and failure to analyze the relative costs and benefits of the Modified Project Definition as it pertains to both issuers and users of data, is a major omission in its economic analysis.[318]

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[314] 2016 Final Rule, 81 Fed. Reg. 49421

[315] *Id.*

[316] *See e.g.* Comment submitted by Alan Detheridge, Former VP Shell (Mar. 16, 2016), at 2, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6955597-212686.pdf ("The modified project definition is atypical and would require disclosure of information at a level of aggregation (i.e. major subnational political jurisdiction) that is not typically found in internal accounting systems. Therefore, such a system would have to be developed.").

[317] Comment submitted by BHP (Mar. 16, 2020), *available at:* https://www.sec.gov/comments/s7-24-19/s72419-6960337-212716.pdf; *see also* Comment submitted by Equinor (Mar. 13, 2020), *available at* https://www.sec.gov/comments/s7-24-19/s72419-6952843-212532.pdf (stating that " costs involved preparing our annual disclosure of payments to governments . . . have been modest," and that alignment with the EU directives and other international regimes, specifically with regard to project definition and the de minimis threshold, "will ensure that companies such as ours can keep compliance costs at a reasonable and proportional level).

[318] The Commission's analysis also appears inconsistent with respect to foreign law prohibitions. The possibility of future prohibitions are portrayed as a significant risk in terms of costs to issuers: issuers "could bear substantial costs" and might be forced to cease existing operations, forego potential future operations, or lose out on potential operations to foreign issuers not subject to disclosure regimes. Proposed Rule, 85 Fed. Reg. 2588. However, in considering the loss of transparency benefits resulting from exemptions, the Commission finds the likelihood of such future laws minimal, stating that while "we acknowledge" an exemption "may provide an incentive for foreign jurisdictions to enact [anti-disclosure] laws," that "the absence of a similar exemption under the EU Directives or ESTMA, which generally require disclosure at a more granular level, should serve to limit the likelihood that jurisdictions will pass such laws. In this regard, one previous commenter observed that no country has adopted a rule or law prohibiting payment disclosures since the initial adoption of Section 13(q) in July 2010." *Id.* at 2544. This distinction appears opportunistic in its framing of costs and benefits.

2. The assumptions as to competitive harm associated with contract-level disclosures are at odds with the evidence in the record and current market realities.

Since our first submission to the Commission in 2011, and in subsequent submissions, we (and a range of other commenters) have maintained that the assertions of alleged competitive harm have no basis in fact, contradict the realities of the competitive environment, and are undermined by the fact that contract-level information can be accessed through pay-to-see databases that are normally out of reach for most of the intended beneficiaries of the statute: investors and citizens of resource-rich countries. Five years of successful reporting by a range of multinational and state-owned companies, as well as emerging growth and small reporting companies, has confirmed the fact that there is <u>no evidence</u> that the theoretical competitive harm on which the Commission based its extensive revisions to the 2016 rule have come to pass. We briefly summarize flaws in the Commission's assumptions as to competitive harm.

First, and as discussed above, we are aware of no evidence of any competitive harm reported by companies publicly reporting national level and project-level payments according to each contract, according to disclosure rules in other markets. Issuers reporting in other markets under the contract-level definition have submitted comments to the Commission voicing support for the definition, noting the benefits and calling for alignment. BP, for example, notes in its most recent comment that the contract-level project definition provides "meaningful, material data … in a manner that avoids commercial harm to companies."[319] BHP likewise wrote that "consistent mandatory and voluntary reporting requirements across jurisdictions and initiatives such as EITI actually reduces overall costs and increases efficiencies for both issuers and data users."[320] In addition, as noted above, regulatory reviews from the EU confirm no negative competitive impacts from reporting.[321]

Second, the Commission asserts that "competitive harm could occur if the definition of 'project' reveals sensitive and proprietary commercial information to competitors,"[322] and, relying on comments from API and Exxon, suggests "a contract-based definition of ''project'' would result in the loss of trade secrets and intellectual property more generally."[323] That assumption is entirely baseless. Indeed, the Commission noted in 2016 that neither commenter had "explain[ed] how the project-level disclosure of certain payments to foreign governments would result in the revelation of trade secrets and intellectual property."[324] They still have not.

The reason is obvious. The types of information that constitute trade secrets are fundamentally different in character than the payment information that will be disclosed under Section 13(q)—this is true even in a regime with a contract-level definition of 'project,' as was the case in the 2016 Final Rule. Fundamentally, something that is generally known or can be

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[319] Comment submitted by BP (Mar. 16, 2020), at 2.

[320] Comment submitted by BHP (Mar. 16, 2020), *available at:* https://www.sec.gov/comments/s7-24-19/s72419-6960337-212716.pdf

[321] Section I.

[322] Proposed Rule, 85 Fed. Reg. 2557.

[323] *Id.* at n. 346 (citing Letters from API (Feb. 16, 2016) and ExxonMobil (Feb. 16, 2016))

[324] 2016 Final Rule, 81 Fed. Reg. 49419

known within the industry cannot be considered a trade secret, and as discussed above, competitors already have access to this information.[325]

Equally baseless is the assumption that "a contract-based definition of ''project'' would allow competitors to reverse-engineer proprietary commercial information," for example, "to determine the commercial and fiscal terms of the agreements, get a better understanding of an issuer's strategic approach to bidding and contracting, and identify rate of return criteria."[326] The monetary value of Section 13(q) disclosures to competitors is far from clear, and commenters have explained at length that these disclosures cannot be used to reverse-engineer companies bidding strategies, reserve valuation, or proprietary technologies.[327] Notably, none of the companies already reporting under such a definition in other regimes have raised this concern either in the reviews by other governments, nor here.[328]

The Commission nonetheless states categorically that providing for "disclosure that is less detailed and not as closely linked to individual contracts" under the Modified Project Definition, "would assuage concerns that competitors could reverse-engineer proprietary commercial information."[329] But it makes no effort to analyze whether that is actually possible, nor to inquire as to whether that has been the experience of any companies already reporting. The Commission should not credit an argument that relies entirely on an unexplored and controversial assumption.

Significantly, global trends toward greater contract disclosure in the extractive industry further undermine the premise that there is a need to use the speculative strategy of "reverse engineering" to determine contract terms.[330] Further, payment disclosures do not exist in a vacuum, and the Commission fails to acknowledge the evidence it has documented in the record describing the multitude of other avenues by which such information becomes public, irrespective of payment disclosure information.[331]

The Commission also assumes that "a contract-based definition of ''project'' would allow competitors to derive important information about the new areas under exploration for potential resource development, the value the company places on such resources, and the costs

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[325] *See, e.g.* Peter Rosenblum & Susan Maples, CONTRACTS CONFIDENTIAL: Ending Secret Deals in the Extractive Industries (2009), at 38, *available at* https://resourcegovernance.org/sites/default/files/RWI-Contracts-Confidential.pdf

[326] Proposed Rule, 85 Fed. Reg. at 2557 n. 348 (citing Letters from API (Feb. 16, 2016) and ExxonMobil (Feb. 16, 2016)).

[327] Dr. Robert Conrad addresses similar assumptions at length in his recent letter to the Commission, refuting the notion that Section 13(q) requires disclosure of proprietary or commercially sensitive information. Comment submitted by Dr. Robert Conrad (Jul.17, 2015), *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-81.pdf

[328] *See e.g.* Comment submitted by BP (Mar. 16, 2020), at 2, *available at* https://www.sec.gov/comments/s7-24-19/s72419-6952845-212570.pdf (explaining the contract definition "avoids commercial harm to companies, and would improve the quality" of the data).

[329] Proposed Rule, 85 Fed. Reg. 2537; *see also id.* at 2555 (asserting competitive disadvantage could result from …ability of market participants to use the information disclosed by reporting issuers to derive contract terms, reserve data, or other confidential information").

[330] *See supra* Section I (discussing trends in contract transparency)

[331] 2016 Final Rule, 81 Fed. Reg. 49420. *See also id.* at 49389.

associated with acquiring the right to develop these new resources."[332] But the entire premise of the assumption that payment disclosures result in a competitive disadvantage assumes access to information competitors do not already have. And critically, it is precisely competitors who already have access to payment information as well as contract terms through a range of other means.[333] It is the citizens of resource rich countries, investors, the public, and local governments who lack this information. Fixing this asymmetry of information is precisely the point of Section 13(q). Resting on baseless and disproven competitive harm assertions as the Commission proposes will not prevent competitors from accessing this information, but it will ensure the information remains hidden from the people who need it most. Indeed, in the context of the present volatile market, it is reasonable to expect that the Commission's assessment of the state of information available to investors and issuers is, at a minimum, of a comprehensive and sophisticated nature.

D. The Commission's assessment of the benefits of the rules is untethered to the current rule proposal.

The Commission's approach to benefits in the proposed rule is also highly problematic. In addition to ignoring certain key benefits, such as those to investors, the Commission appears to have recycled largely the same text from the benefits discussion in the 2016 Adopting Release, effectively assuming the same benefits will result from a wholly different rule. It does so despite at other points recognizing that certain choices in the design of the proposed rule may narrow the transparency benefits it produces.[334] That is plainly insufficient given the magnitude of changes currently proposed, every single one of which would further *limit* transparency benefits. Yet there is no consideration of the aggregate result in terms of loss of benefits.

For example, in 2016, the SEC noted numerous ways in which the contract definition would produce greater benefits than the Modified Project Definition. For example, the Modified Project Definition "would not provide local communities with payment information at the level of granularity necessary to enable them to know what funds are being generated from the extraction activities in their particular areas. This would deprive them of the ability … to assess

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[332] *Id.*

[333]*See* comment submitted by Oxfam America and EarthRights International (Mar. 8, 2016), 26-28, available at: https://www.sec.gov/comments/s7-25-15/s72515-59.pdf (arguing that there is no evidence demonstrating that competitors could not find contract-level information on new, frontier projects using the alternative sources of information established in the record, such as oil and gas market intelligence services). These arguments are no more compelling when the competitor is a state-owned firm as opposed to a private market participant. The Commission cites a statement by Representative Hensarling, saying the 2016 Rule "forces American public companies to disclose proprietary information that can be obtained by foreign competitors, including state-owned companies in China and Russia." 85 fed. Reg. at 2525 n.56 (quoting Rep. Hensarling). But that statement does not change the fact that payment disclosures are *not* proprietary information. Moreover, it suggests that Representative Hensarling was unaware of the scope of reporting outside the U.S., or simply fails to acknowledge the fact that Chinese and Russian state-owned companies are already reporting contract-level payments to governments and are thus currently *more* transparent than many US-listed issuers. The Commission does not make any effort to question or even consider whether U.S.-issuers, or others, have attempted to make use of this supposed proprietary information.

[334] *See, e.g*. 85 Fed. Reg. at 2537 ("In proposing the Modified Project Definition, we acknowledge that we may be narrowing the scope of the transparency benefits that the disclosures under Section 13(q) were intended to produce," as they "would no longer provide the additional transparency benefits associated with contract-level information")

the relative costs and benefits of the particular license or lease to help ensure that the national government or subnational government has not entered into a corrupt, suspect, or otherwise inappropriate arrangement."[335] The Commission recognized numerous commenters had shown reasons "why the benefits to civil society of contract-based, project-level reporting would help to reduce corruption and promote accountability more effectively than more aggregated reporting, such as country-level reporting."[336] And the Commission noted that its own experience in implementing the FCPA shows that "granular disclosures" under a contract-level definition "will better help combat corruption than the aggregated (and anonymized) disclosures that the API Proposal would yield."[337] More granular disclosures "relative to the API Proposal" will also "provide a powerful incentive for community-based involvement in monitoring corruption and holding officials accountable by making clear to those communities in a direct and concrete fashion what revenues are being generated from their local natural resources."[338] In the new economic analysis, however, the Commission generally fails to account for – let alone discuss or analyze – the significant difference in anti-corruption benefits between a contract definition and the Modified Project Definition, despite having previously outlined specifically why the contract-definition would be significantly more effective in this regard.

The Commission also fails to account for the fact that it is producing a rule that is *not* "in accordance with the emerging international transparency regime" as Section 13(q) requires.[339] And rather than "further[ing] the Federal Government's foreign policy interests in promoting international transparency by, among other things, fostering compatibility with the existing European Union and Canadian transparency regimes,"[340] it may actually undermine those efforts, including the EITI, and significantly limit comparability.[341] The Commission does not take this into account in largely reiterating the benefits section from the 2016 rule, nor does it consider this in terms of considering alternatives to the current proposal.

The sweeping changes the Commission proposes are largely justified on the basis of supposed cost savings, but its economic analysis is incomplete and does not support the assumption that it would actually result in such savings. By contrast, the proposed rule would unquestionably result in a dramatic loss of benefits. In light of the significant gaps in the economic analysis, re-proposal is warranted.

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[335] 81 Fed. Reg. At 49381-82.

[336] *Id*. at 49401

[337] *Id*. at 49382.

[338] *Id.* at 49382 n. 299.

[339] *Id.* at 49382

[340] *Id*.

[341] In its comment to the Commission, the EITI Secretariat states "A SEC rule that is well aligned with the EITI will encourage more resource-rich countries to join the EITI. A weaker rule risks undermining the EITI's outreach efforts, and the stated goal of supporting the commitment of the Federal Government to international transparency promotion."

APPENDIX

Contract Transparency - Highlights of Global Norm Advances

International Monetary Fund	● 2005 - IMF endorsed contract disclosure for oil, gas and mining projects as best practice for governments in its Guide for Resource Revenue Transparency.[i] ● 2007 – Codified in 2007 IMF Code of Good Practices on Fiscal Transparency[ii] ● 2019 – IMF Fiscal Transparency Code updated to state that contract disclosure is a global norm, added into formal evaluations on client country performance.[iii]
UNHRC	UN Principles for Responsible Contracts (2015):[iv] "Principle 10: The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications." "**Disclosure of the contract also promotes accountability of both parties to implement the promises agreed in the contract and notifies third parties of the rights and obligations of the parties to the contract.**" "The contract delineates responsibility for making the contract terms accessible. The contract requires publication in an accessible manner, taking into account possible barriers to access such as linguistic, technological, financial, administrative, legal or other practical constraints."
UNDP	"Transparency in the sector is enhanced by publishing government contracts, revenues and the names of owners associated with the country's oil and gas reserves."[v]
OECD	Guiding Principles for Durable Extractives Contracts: "Recognising the benefits of transparency and reporting in the extractives sector, the parties should anticipate during the negotiation process the public disclosure of their future signed contracts in accordance with international good practice, with due regard taken to both protecting proprietary or commercially sensitive information and the public interest in transparency. Agreeing to publish contracts adds an important dimension of ex post accountability to negotiation processes. This means that the parties are likely to negotiate and draft in a manner to ensure that terms are able to withstand public and commercial scrutiny." [vi] "…Countries should be encouraged to publicly disclose contracts and licenses. Such disclosures can promote more effective management of countries' extractive resources by enabling stakeholders to monitor all relevant actors and ensure that they act responsibly during the implementation of the project."[vii]
IFC International Finance Corporation World Bank Group	In 2012, the World Bank Group's International Finance Corporation (IFC) established mandatory contract disclosure as a requirement for oil, gas and mining projects it finances.[viii]
European Bank for Reconstruction and Developmen	In 2013, the European Bank for Reconstruction and Development (EBRD) included a requirement for contract publication for upstream hydrocarbon projects that receive financing from the bank as part of its Energy Strategy.[ix]

MIGA Multilateral Investment Guarantee Agency WORLD BANK GROUP	"MIGA will encourage governments and corporations to make extractive industry contracts public, and commencing two years from the date of its Board approval of this policy MIGA will require, in the case of extractive industries projects it guarantees, that the principal contract with government that sets out the key terms and conditions under which a resource will be exploited, and any significant amendments to that contract, be made public."[x]
ICMM International Council on Mining & Metals	"Transparent contracts allow citizens to hold their government and mining companys to account for the commitments and obligations that have been negotiated on their behalf. Contract transparency goes hand-in-hand with revenue transparency. Revenue transparency allows citizens to see what a company has paid, while contract transparency allows citizens to see what should have been paid. These activities reduce opportunities for corruption and help citizens to lobby for mining revenues to be invested responsibly. Although it's not a condition of ICMM membership, the majority of our members are willing to make public the general terms of their contracts in any specific country, assuming that proper protection for competitively-sensitive information is in place. This is a good practice that we support. To best support contract transparency, ICMM expects its members to support the Extractive Industries Transparency Initiative (EITI), a global standard that promotes open and accountable management of natural resources."[xi]
IPIECA	"Transparency in the sector is enhanced by publishing government contracts, revenues and the names of owners associated with the country's oil and gas reserves."[xii]
THE B TEAM	"Ideally, tax exemptions and reliefs should be specified by law and generally available to all market participants. Where there are exceptions, we will work with relevant authorities to encourage publication of those incentives and contracts."[xiii]
THE WORLD BANK	● World Bank Extractive Industries Source Book states that good practice requires host-state governments to "be responsible for the publication and widespread, easily accessible dissemination of contract terms and credible data on EI revenues received and related allocation and expenditures".[xiv] ● World Bank has integrated contract disclosure performance into governance assessments through the Mining Sector Diagnostic.[xv] ● World Bank co-manages ResourceContracts.org, the oil and mining contract repository, and participates in the Open Contracting Partnership.[xvi]
INTERNATIONAL BAR ASSOCIATION	In 2011, the International Bar Association Model Mining Agreement Project produced a public model mining agreement that includes a section entitled 'This Contract is a Public Document', designed to provide negotiators and drafters of mineral investment contracts with a comprehensive reference to inform future negotiations.[xvii]
IRMA Initiative for Responsible Mining Assurance	"The material terms for mineral exploration, development and production agreed between the operating company and government entities shall be freely and publicly accessible, with the exception of confidential business information in the national language(s) of the country in which the mining project is located. a. Where these terms are negotiated, rather than governed by law, the company shall make the relevant agreements, licences or contracts freely and publicly accessible. b. Where these terms are governed by law, free, public access to the relevant statutory documentation is deemed sufficient to meet the IRMA requirement."[xviii]
NATURAL RESOURCE CHARTER	The Natural Resource Charter is used to benchmark government performance. The 2014 revision to the charter added that 'the government should disclose information on allocation procedures; the contracts awarded, including fiscal and tax terms; the beneficial ownership of all license holders; the agreed work program; and financial commitments and any fiscal terms particular to the license'.[xix]

Notable Industry Positions on Contract Disclosure

Company	Position
Total	"Total supports government efforts towards advancing transparency in accordance with the EITI framework, and advocates for the public disclosure by countries of their Petroleum contracts and licenses. To do this, Total strives to: • Foster dialogue between the relevant Group officials and representatives of States, civil society and the EITI; • Participate in the efforts of the EITI Board; • Promote the EITI and its principles among the States in which it operates and, more generally, whenever it has the opportunity; Share resources and recommendations based on our experience."[xx]
BP	"BP supports transparency of the contracts under which oil and gas development rights are granted. This can strengthen understanding of our industry and government accountability by allowing citizens and host communities to assess the terms on which oil and gas are produced and revenues shared. We believe that in order to manage commercial risks, the process should be led by host governments."[xxi]
Equinor	"The EITI has evolved from payment disclosures into providing context and use of revenue data. In the 2019 EITI Standard, new contracts awarded by governments from 2021 must be made public. Equinor has made public its position that we support and will advocate for the public disclosure by host countries of their petroleum contracts and licenses."[xxii]
Shell	"We encourage governments to share contracts and licences, in line with the EITI's revised standard on contract transparency. This requires countries implementing the EITI standard to disclose contracts and licences that are granted, entered into or amended from January 1, 2021. We also aim to support governments' ambitions to achieve contract transparency."[xxiii]
Rio Tinto	"As a founding member of the Extractive Industries Transparency Initiative (EITI) and signatory to the B-team's Tax Principles, Rio Tinto believes that greater transparency and accountability is key to building trust and encouraging sustainable business practices. We will disclose contracts with governments in relation to minerals development, where they are not subject to a confidentiality undertaking and encourage governments to allow such disclosure. Rio Tinto commits to disclosing taxes paid and payments to governments. We also support beneficial ownership disclosure and will strive to provide information of the beneficial owners of those entities that we have joint ventures with, in line with the EITI Standard and expectations. Rio Tinto will engage with governments and other stakeholders to share our experiences on disclosure and transparency and encourage the harmonisation of reporting obligations aligned with global best practice."[xxiv]
BHP Billiton	"We understand the connection between the disclosures we make about the taxes and royalties we pay to governments, which enable the public to see what we have paid, and transparency over the contracts that we have with governments, allowing comparison of our actual payments against what is required to be paid. Accordingly, we would support an initiative of a host government to publicly disclose the content of our licences or contracts for the development and production of oil, gas or minerals that forms the basis of our payments to governments, as outlined in the EITI Standard."[xxv]
Freeport-McMoRan	"FCX has been transparent with respect to its contracts with host governments and intends to continue to be transparent in the future." "FCX publicly files all material contracts regarding its business, including all material contracts with host governments, in accordance with the rules of the Securities and Exchange Commission (SEC)."[xxvi]

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