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ONE Campaign
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Sierra Club
Sustainable Energy & Economy Network
The Borgen Project
United Methodist General Board of Church and Society
United Steelworkers
United to End Genocide

February 16, 2016

By E-Mail:
Chair Mary Jo White
Commissioner Michael Piwowar
Commissioner Kara Stein

Re: Disclosure of Payments by Resource Extraction Issuers, File No. S7-25-15, Release No. 34-76620

Dear Chair White and Commissioners:

I am pleased to submit the attached comments on behalf of the Publish What You Pay - United States coalition ("PWYP-US") on the proposed rule published by the Securities and Exchange Commission (the "Commission") to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

Publish What You Pay ("PWYP") is a global civil society coalition made up of over 800 member organizations operating in more than 70 countries. The US coalition was founded in 2004 and consists of 40 anti-corruption, financial transparency, anti-poverty, tax justice, faith-based and human rights organizations. PWYP-US members have been actively involved in all stages the rulemaking process and the litigation over the 2012 Rule.

We welcome the Commission's proposed rule and commend the Commission for its efforts. The attached document contains a summary of our key comments, responses to questions, and suggested regulatory language.

We appreciate the opportunity to comment and would welcome the chance to discuss our recommendations with you in further detail. Please do not hesitate to contact us with any questions.

Sincerely,

Jana L. Morgan

Director, Publish What You Pay - US

CC:
Mr. Brent J. Fields, Secretary of the Commission, Office of the Secretary
Ms. Elizabeth Murphy, Associate Director, Division of Corporation Finance
Ms. Tamara Brightwell, Senior Special Counsel to the Director, Division of Corporation Finance
Mr. Barry Summer, Associate Director, Division of Corporation Finance
Mr. Elliot Staffin, Special Counsel, Division of Corporation Finance
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Publish What You Pay – US Comments on Proposed Rule 13q-1

PWYP-US welcomes and supports the Securities and Exchange Commission's proposed rule. We would like to commend the Commission and its staff for the open and transparent public comment and rulemaking process, as well as the thoughtfulness demonstrated in the Commission's justification, and the questions raised for public comment.

Immediately below is a summary of the most important points we view as imperative to maintaining the strength of the proposed rule, and upholding Congressional intent and the transparency objectives of the statute. Appendix A includes recommended regulatory language, and Appendix B highlights the numerous letters of support from investors through 2015.

Executive Summary

A. Definition of "Resource Extraction Issuer"

- We strongly support the Commission's proposal to cover all resource extraction issuers with no categorical exemptions. See response to Question 1.
- The Commission should not provide for delayed implementation for any category of issuer, including smaller reporting companies. See response to Question 2.
- The proposed rule will not present unique challenges for any particular category of issuer. Oil, gas, and mining companies are already reporting voluntarily, or expressing their commitment to transparency of payments in keeping with the Commission's 2012 Rule ("2012 Rule") and/or the transparency objectives of the statute. See response to Question 3.

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

- We support the Commission's proposal that "commercial development of oil, natural gas, or minerals" means "exploration, extraction, processing, export, and the acquisition of a license for any such activity." See response to Question 6.
- We recommend that the Commission expand the definition of "export" to include trading-related payments, when an issuer purchases oil, natural gas, or minerals sold by a government (including a state-owned company). In many countries, the sale of the state's share of production constitutes the largest commonly recognized revenue stream to the government in the extractive industry. See responses to Questions 6 and 12.

C. Definition of "Payment"

- We agree with the Commission's proposal to include the payments listed in the Section 13(q) statute, as well as payments of dividends and infrastructure payments. However, this list should be expanded to include social payments and trading-related payments in order to accurately reflect the statute and Congressional intent. See response to Question 13.
- The Commission should require disclosure of all fees, bonuses, and royalties that are required to be paid to governments, and should include non-exclusive lists of these payment types. See response to Question 14.
- We strongly endorse the inclusion of an anti-evasion provision. This would align with Congressional intent, as well as with the similar European and Canadian laws. However, additional guidance needs to be adopted to ensure the provision is consistent with those regimes. See response to Question 16.

- We agree with the Commission's proposal on the definition of "not de minimis." See response to Question 16.

D. Payments by "a Subsidiary...or an Entity Under the Control of…"

- While Rule 12b-2 provides an appropriate definition of "control", accounting principles can also be acceptable, provided this includes the accounting concept of "significant influence", in addition to consolidation and proportional consolidation. See response to Questions 20-23.

E. Definition of "Project"

- We support the Commission's proposal to define "project" as operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government. The proposed definition meets the intent of the statute and advances the governmental interest in promoting transparency and combating global corruption. It reduces compliance costs for covered issuers, as it aligns with the definition of project adopted by both the EU and Canada, and is supported by investors with assets under management of over $9.8 trillion. See response to Question 24.
- However, the Commission can best promote the objectives of Section 13(q) and ensure equivalency by aligning its definition of "interconnected agreements" with that of the EU and Canada. The Commission should only permit two or more agreements that are both operationally and geographically **integrated** to be treated by the issuer as a single project, provided that they **also have substantially similar terms**, as in the European and Canadian laws. These terms should be defined unambiguously and exclusively. Rather than a list of non-exclusive factors to consider in making the determination on whether agreements are interconnected, the Commission should be clear in its instructions on what would and would not be acceptable. See response to Question 27.

G. Disclosure Required and Form of Disclosure

G.2. Public Filing

- We support the Commission's proposal for public, company-by-company disclosure by project, and agree that the rules should not permit an issuer to submit the information on a confidential basis. Confidential submissions would deprive investors, communities, and issuers alike of the benefits Congress intended, and increase compliance burdens on cross-listed issuers. Overwhelming evidence in the record supports the Commission's proposal. See response to Question 40.
- We support the Commission's proposal that the rules should not include any exemption for existing or future agreements that contain confidentiality provisions. We also believe that issuers should not be able to obtain case-by-case exemptions for any case of conflicting contractual provisions. See response to Question 41.
- We oppose exemptions for safety and security concerns, and exemptions for purportedly competitively sensitive information. There is no evidence to support blanket exemptions from the public disclosure requirement of any kind. See responses to Questions 42 and 43.

G.3. <u>Exemption from Compliance</u>

- No exemptions of any kind, including for alleged host government prohibitions, are necessary. However, a case-by-case exemptive process using the Commission's existing authority would only be acceptable if it is transparent, open to public comment, and requires adequate supporting documentation. See responses to Questions 45 and 46.
- There are no foreign laws prohibiting disclosure of the information required under Section 13(q). Although some issuers claimed previously that Angola, Cameroon, China, and Qatar prohibit disclosures, subsequent events have proven them wrong with respect to Angola and Cameroon, and they were (and remain) incorrect with regard to China and Qatar. Significantly, the Commission has already found these assertions unfounded. In response to the American Petroleum Institute's ("API") request for a stay of the 2012 Rule pending litigation, the Commission concluded that evidence of foreign disclosure prohibitions was "unpersuasive and vigorously contested." This formal finding of fact still stands, and no additional information has been provided to the Commission that would call into question its determination. See response to Question 47.
- To date, no companies have reported experiencing any problems with legal conflicts in implementing the Norwegian laws, nor through voluntary disclosures. EU, Canadian and Norwegian laws provide for no exemptions for alleged host government prohibitions. See response to Question 48.

G.4. <u>Alternative Reporting</u>

- We support the Commission's proposal to allow issuers subject to reporting requirements in certain foreign jurisdictions or the US Extractive Industry Transparency Initiative ("USEITI") to submit these reports in satisfaction of the requirements, provided they are substantially equivalent to reports under this rule. In particular, we would not be opposed to orders allowing substituted compliance for issuers reporting in the EU, Canada, and Norway, as long as the Commission requires supplemental disclosures for key elements that are not included in those regimes. See responses to Questions 49-57.
- The Commission should clearly indicate the criteria that it will use to determine whether a foreign jurisdiction's reporting regime or the USEITI reports are an appropriate substitute for Rule 13q-1 disclosures. These criteria should include those already proposed by the Commission, as well as those included in the EU Directives and additional criteria related to availability of exemptions and penalties. See response to Question 49.

G.5. <u>Exhibits and Interactive Data Format Requirements</u>

- We agree with the Commission that the disclosures should be electronically formatted in XBRL and provided in an exhibit to Form SD. Issuers should provide the actual payment data in an interactive data format in the exhibits and should be encouraged to provide additional contextual information in the body of Form SD. See responses to Questions 57-66.
- Rather than relying on the concept of "a reasonable user," we recommend the Commission require that geographic locations be disclosed as specified in the agreement or multiple agreements which have been used to establish the project for reporting purposes. See response to Question 64.
- We agree with the Commission that the statutory requirement is satisfied by making each resource extraction issuer's disclosures available in EDGAR in XBRL format. Alternative approaches to providing a "compilation" that have been advanced by some commentators are not adequate because, as we have demonstrated, they would be insufficient to satisfy the needs

of key data users, are not warranted by the evidence on the record, and would undermine the US government's international transparency promotion efforts. See responses to Questions 66 and 78.

H. Effective Date

- We agree with the Commission that the compliance date should be linked to the end of the nearest commonly used quarterly period following the effective date. The transition period should *not* be longer than what the Commission has recommended. See response to Question 69.

III. Economic Analysis

- We do not agree with certain elements of the Commission's cost estimates. We do not believe it is accurate for the Commission to include in its cost estimates the losses companies may theoretically incur as a result of losing or having to sell assets at a steep discount (a fire sale), given the lack of credible and compelling evidence that any country prohibits the disclosures outlined in the Commission's proposed rule. While we strongly believe, based on all available evidence, that no such country prohibitions exist, *should* the Commission decide to include in its cost estimates any potential losses that issuers might hypothetically incur as the result of so-called country prohibitions, it must take into consideration that for issuers cross-listed in the EU, Norway, or Canada, any losses stemming from payment disclosure would occur as the result of their foreign listing. See responses to Questions 75.
- Since the law was passed, no concrete evidence has been submitted that would permit the Commission to conclude that the rule as proposed will have anti-competitive effects. See response to Question 80.
- There are additional benefits that should be reflected in the final rule. Investors and other commentators have illustrated a variety of benefits of Section 13q-1 that are not reflected in the proposed rule. On numerous occasions throughout the Section 13(q) rulemaking process, investors representing more than $9.8 trillion in assets under management, as well as other commentators, have provided detailed explanations of the value of disclosures resulting from the statute. Investor comments have made it clear that the final rule will best serve the core interests of investors, coincide with the Congressional intent behind Section 13(q), and align with the Commission's central role as an investor advocate if it requires fully public disclosures at the project-level, without exemptions. See response to Question 82.

Comments on Proposed Rule 13q-1

A. Definition of "Resource Extraction Issuer"

1. Should we exempt certain categories of issuers from the proposed rules, such as smaller reporting companies, emerging growth companies, or foreign private issuers? If so, which ones and why? If not, why not? Should we exempt companies that are unlikely to make payments above the proposed de minimis threshold of $100,000? For example, should we provide that a resource extraction issuer with annual revenues and net cash flows from investing activities below the de minimis threshold in a fiscal year would not be subject to the proposed disclosure rules for the subsequent fiscal year? Should we use a threshold that is different from the de minimis threshold or some other measure of an issuer's ability to make such payments to make this determination? Alternatively, should our rules provide for different disclosure and reporting obligations for these or other types of issuers? If so, what should the requirements be?

We strongly support the Commission's proposal to cover all resource extraction issuers with no categorical exemptions.

We agree with the Commission's proposed rule requiring disclosure of "all U.S. companies and foreign companies that are required to file annual reports pursuant to Section 13 or 15(d) of the Exchange Act and are engaged in the commercial development of oil, natural gas, or minerals."[1] We note that the Commission is not "proposing exemptions to the definition of resource extraction issuer based on size, ownership, foreign private issuer status, or the extent of business operations constituting commercial development of oil, natural gas, or minerals."[2] Applying the disclosure requirements with the broadest possible coverage of resource extraction issuers is key to satisfying the transparency objectives of Section 13(q).

Categorical exemptions based on the size, ownership, foreign private issuer status, or other broad characteristics would be inconsistent with the statute and Congressional intent as well as with transparency laws in other jurisdictions: both the European Union's Transparency and Accounting Directives ("EU Directives") and Canada's Extractive Sector Transparency Measures Act ("ESTMA") require reporting by all public companies, regardless of size.

It is important that smaller issuers be included because they are generally exposed to greater equity risk than larger issuers, and often take on more risks due to the nature of their operations, as noted in our February 2011 comment.[3] We are in agreement with the API that smaller companies should not be exempt from disclosure requirements.[4]

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[1] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,062.
[2] Ibid. at 80,068.
[3] Ibid. at 80,068. Comment submitted by PWYP-US (25 Feb. 2011), p. 10. Available at: http://www.sec.gov/comments/s7-42-
[3] Comment submitted by PWYP-US (25 Feb. 2011), p. 10. Available at: http://www.sec.gov/comments/s7-42-10/s74210-29.pdf (citing Metals Economics Group. "World Exploration Trends," 2010 ("according to the Metals Economics Group, junior miners, those with annual revenues of less than $50 million, led exploration spending

2. Should we provide for a delayed implementation date for certain categories or types of issuers in order to provide them additional time to prepare for the disclosure requirements and the benefit of observing how other companies comply?

The Commission should not provide for delayed implementation for any category of issuer, including smaller reporting companies.

Compliance costs for smaller companies are likely to be significantly lower than for large issuers because, by definition, they have more limited operations and projects and would therefore have fewer payments to disclose as compared to larger companies. Furthermore, the statute requires the disclosure of payments that companies track in the normal course of doing business. This is akin to other recordkeeping obligations, such as tax reporting and compliance with the Foreign Corrupt Practices Act ("FCPA") recordkeeping requirements, which apply to all companies regardless of size. It is thus reasonable to expect that small, as well as large companies can easily adapt existing systems to comply with the Section 13(q) requirements.

A number of extractive companies will soon begin reporting according to Canada's or the EU's payment disclosure requirements. In the interest of meeting the transparency objectives of the statute and aligning with the global standard of payment disclosure, all resources extraction issuers should begin reporting as soon as possible, with no exemptions or delay.

For further discussion on smaller companies see the response to Question 75.

4. Would our proposed rules present unique challenges for particular categories of issuers? If so, what is the nature of these challenges and could they be mitigated?

The proposed rule will not present unique challenges for any particular category of issuer.

The statute is clear in requiring disclosure of payments that companies track in the normal course of doing business. As noted above in our response to Question 2, all resource extraction issuers already follow FCPA record-keeping requirements, and the disclosures required by Section 13(q) should be easily adapted and integrated into their record keeping and reporting practices.

In fact, a number of companies, both large and small, are *voluntarily* reporting their payments to governments, citing the business benefits of transparency. The Columbia Center on Sustainable Investment ("CCSI") noted in its submission to the Commission on October 30, 2015, that several oil, gas, and mining companies have already embraced voluntary project-level reporting including US-listed companies BHP Billiton and Kosmos Energy, and UK-listed Tullow Oil.[5] As noted in a submission to the

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from 2003 to 2008. The exploration phase of a mining project generally carries substantial risks, including both geological risk and often high-risk engagement with host governments on financial and contract considerations. This underscores the importance of ensuring that smaller companies be required to make the Section 13(q) disclosures.")

[4] Comment submitted by American Petroleum Institute (28 Jan. 2011), p.2. Available at: http://www.sec.gov/comments/s7-42-10/s74210-10.pdf.

[5] Comment submitted by Columbia Center on Sustainable Investment (30 Oct. 2015), p.10. Available at:

Commission from Publish What You Pay - Canada dated February 6, 2014, Canadian mining and exploration associations and civil society actors had jointly called on the Canadian government to develop mandatory payment reporting standards based on the Commission's 2012 Rule.[6] Oil, gas, and mining companies are already reporting voluntarily, or expressing their commitment to transparency of payments in keeping with the 2012 Rule, or the transparency objectives of the statute. It is unlikely that the proposed rule will present unique challenges for issuers.

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

6. Should we, as proposed, define "commercial development of oil, natural gas, or minerals" as the term is described in the statute? Should it be defined more broadly or more narrowly? If more broadly, should the definition of "commercial development of oil, natural gas, or minerals" include any additional activities not expressly identified in the statute? If so, what activities should be covered? Would including additional activities impose any significant additional costs on issuers? Does our proposed definition further the U.S. Government's foreign policy objective of battling corruption and, in so doing, potentially improve governance and accountability in resource-rich countries? If not, what would?

We support the Commission's proposal that "commercial development of oil, natural gas, or minerals" means "exploration, extraction, processing, export, and the acquisition of a license for any such activity."

This definition is consistent with the statutory language of Section 13(q) and is in line with the established international transparency standard. We agree with the Commission's proposed definition of "extraction" as well as the examples of what the "processing" of natural resources could include. To better advance the US government's foreign policy objectives, the definition should be expanded as suggested below.

6.1 Expand the definition of "export" to include trading-related payments

We recommend that the definition for "export" include trading-related payments when an issuer makes a payment for the purchase of oil, natural gas, or minerals sold by a government (including a state-owned company). In many countries, the sale of the state's share of production constitutes the largest commonly recognized revenue stream to the government in the extractive industry. From 2011 to 2013, the total value of oil sales by national oil companies in sub-Saharan Africa's top ten oil producers equaled $254 billion. The $254 billion sum is the equivalent of 56 percent of the combined total government revenues for these countries.[7] In Iraq, a country of great US foreign policy interest,

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https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-93.pdf.

[6] Comment submitted by Publish What You Pay - Canada (6 Feb. 2014), p.1. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-29.pdf.

[7] Natural Resource Governance Institute, Swissaid and Berne Declaration, "Big Spenders – Swiss Trading Companies, African Oil and the Risks of Opacity" (2014), p.2. Available at: http://www.resourcegovernance.org/sites/default/files/BigSpenders_20141014.pdf.

payments made in 2013 for the state's share of crude oil by international buyers amounted to approximately $80 billion. These payments, which were made to the Iraqi Oil Marketing Company (SOMO) by 42 companies, including a number of US-listed companies, constituted most of Iraq's federal budget and foreign exchange earnings for 2013.[8]

By including these revenue streams, the Commission will be contributing to international transparency promotion efforts in two important ways. First, the Extractive Industries Transparency Initiative ("EITI") Standard now includes a requirement on disclosure of payments related to the sale of the state's share of production.[9] The Commission would therefore be supporting this provision within the EITI Standard. Second, Switzerland, which is the world's leading commodities trading center, has signaled that it will include a requirement to disclose trading-related payments in its upcoming extractives transparency law, as part of an "internationally agreed process."[10] The Commission would therefore be supporting the development of payment disclosure related to trading with a key international partner.

Unless the definition of "export" explicitly includes these trading-related payments, these major revenue streams will not be disclosed. Disclosure of these payments would undoubtedly benefit investors[11] and advance the US government's foreign policy objectives. For further discussion on trading-related payments and proposed amendments to the regulatory language, see our responses to Questions 9, 12, and 13.

For additional discussion on disclosure of trading-related payments, see the February 2016 submission by the Natural Resource Governance Institute.[12]

6.2 Clarify that all payments made "on behalf of" an issuer are covered

We support the requirement that payments made by a third party on behalf of a resource extraction issuer (or entities the issuer controls) must be included in disclosures. To avoid any doubt, Form SD should be revised to be consistent with the text of the proposing release as well as with the 2012 Rule, to make clear that this requirement applies to payments made by any third party on behalf of an issuer, regardless of whether such third party is a service provider.[13]

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[8] Iraq, EITI Report for 2013 (Dec. 2015), pp.39-40. Available at: https://eiti.org/files/ieiti_2013_final_report_-_v2_5_0.pdf.

[9] The EITI Standard (1 Jan. 2015), Requirement 4.1.c, p.27. Available at: https://eiti.org/files/English_EITI_STANDARD.pdf.

[10] Swiss Federal Council, "Company law to be modernised" (28 Nov. 2014). Available at: http://www.ejpd.admin.ch/ejpd/en/home/aktuell/news/2014/2014-11-28.html; Swiss Federal Council, "Federal Council determines basis for new company law" (4 Dec. 2015). Available at: http://www.ejpd.admin.ch/ejpd/en/home/aktuell/news/2015/2015-12-04.html.

[11] Comment submitted by Bennett Freeman and Paul Bugala, Calvert Investments, and Lisa Wolf, Social Investment Forum (15 Nov. 2010), p.5. Available at: https://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-49.pdf.

[12] Comment submitted by the Natural Resource Governance Institute (16 Feb. 2016). Available at: http://www.resourcegovernance.org/sites/default/files/nrgi_sec_trading.pdf.

[13] SEC, *Disclosure of Payments by Resource Extraction Issuers,* Proposed Rule, 80 Fed. Reg. at 80,078 ("As noted in the 2012 Adopting Release, if a resource extraction issuer makes a payment that meets the definition of payment

The volume and significance of payments made via third parties should not be underestimated by the Commission. As an example of the magnitude of the issue, in Statoil's 2014 report on payments to governments under the Norwegian transparency law, over 61% of the value of Statoil's total reported payments to governments worldwide, excluding Statoil's home country Norway, are attributable to production entitlement payments for projects where Statoil is not the operator; such payments would therefore most likely have been made via a third party. This category of payments from Statoil alone had a value of over $3 billion in 2014.[14] The Commission's rule should therefore be clear that resource extraction issuers are required to report all payments made on their behalf. Otherwise an important portion of the payments that Section 13(q) is meant to cover could be missed and the associated impact of the rule would be significantly reduced.

We therefore also disagree with the suggestion made in the January 2016 submission by Encana Corporation that non-operating parties should not be required to reflect covered payments made by the operator in joint arrangements or situations of joint control.[15] While Encana's assertion that disclosure should be based on the arrangement that exists between the payor and the government payee may be generally correct, their submission fails to acknowledge that the Commission's proposed rule, the ESTMA in Canada, and the EU Directives all require disclosure of covered payments made on behalf of a resource extraction issuer. Accordingly, disclosure is based not only on the arrangement existing between the payor and the government payee, but also, where applicable, the relationship between the payor and the resource extraction issuer on whose behalf the payment is made. Although Encana draws on the draft ESTMA Guidance,[16] it fails to mention that this guidance specifically provides that "Payment attribution rules set out in the Act may apply in situations of joint control, depending on the facts and circumstances."[17] Significantly, the draft ESTMA Guidance includes the example of payments made by an operator on behalf of a resource extraction issuer as an illustrative case of payment attribution.[18]

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to a third party to be paid to the government on its behalf, disclosure of that payment would be covered under the proposed rules."); SEC, *Disclosure of Payments by Resource Extraction Issuers,* Final Rule, 77 Fed. Reg. at 56,389 ("[I]f a resource extraction makes a payment that meets the definition of payment to a third party to be paid to the government on its behalf, disclosure of that payment is covered under the rules.")

[14] Statoil, 2014 Payments to Governments (Mar. 2015), p.5. Available at: http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf. In Angola alone the value of production entitlement payments reported by Statoil for projects where Statoil was not the operator was over $2 billion and constituted over 77% of Statoil's total reported payments to the government of Angola.

[15] Comment submitted by Encana Corporation (25 Jan. 2016), p.3. Available at: https://www.sec.gov/comments/s7-25-15/s72515-11.pdf.

[16] Natural Resources Canada, "Extractive Sector Transparency Measures Act – Guidance – For Consultation" (29 July 2015), p.3. Available at: https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/estma/ESTMA_Guidance_e.pdf. ("This Guidance has been developed to help businesses in the exploration and extractive sectors understand the requirements of the Extractive Sector Transparency Measures Act. It may also be useful to the general public to understand the type of information that is required to be reported under the Act.")

[17] Ibid. p.16.

[18] Ibid.

Given the magnitude of payments made by third parties on behalf of resource extraction issuers and the apparent risk of misinterpretation in certain circumstances, such as where an operator is involved, we have suggested revisions to Form SD instructions to bring them closer in line with the draft ESTMA Guidance and to make clear that disclosure is required where covered payments are made on behalf of a resource extraction issuer by an operator.

> We recommend amending proposed Instruction (6) to Item 2.01 of Form SD as follows:
>
> "... where ~~such a service provider~~ **a third party (including, without limitation, an operator of a joint venture)** makes a payment that falls within the definition of "payment" to a government on behalf of a resource extraction issuer, the resource extraction issuer must disclose such payment."[19]

6.3 Anti-evasion provision

We also fully support the Commission's inclusion of an anti-evasion provision to discourage issuers from attempting to avoid disclosure by re-characterizing covered activities as transportation, or any other activities that are not covered. For further discussion on the anti-evasion provision and proposed amendments to the regulatory language, see our response to Question 16 below.

7. Should any of the activities listed in the statute be excluded from the definition of "commercial development of oil, natural gas, or minerals?" If any activities should be excluded, which activities and why?

No.

The activities of exploration, extraction, processing, export, and the acquisition of licenses for any such activity should be included in the definition of "commercial development of oil, natural gas, or minerals," and none should be excluded. See our response to Question 6 above and Questions 6 through 9 in the February 2011 PWYP Submission.[20]

8. Should activities that are ancillary or preparatory, such as services associated with or in support of activities included in Section 13(q), be expressly included in activities covered by the rules, resulting in the companies performing such services being considered "resource extraction issuers?" Why or why not? Should we provide any additional guidance regarding the types of activities that may be "directly related" to the "commercial development of oil, natural gas, or minerals," as opposed to activities that are ancillary or preparatory? For example, are other types of services so critical to the commercial development of oil, natural gas, or minerals that they should be covered expressly by the rules? Why or why not?

[19] See Appendix A for the full list of recommended regulatory language. Bold text denotes suggested additions, and strikethroughs denote deletions to the regulatory language.
[20] Comment submitted by PWYP-US (25 Feb. 2011), pp.13-14. Available at: http://www.sec.gov/comments/s7-42-10/s74210-29.pdf.

We support the Commission's decision not to include activities that are ancillary or preparatory.

9. Should we provide additional guidance on which activities would be covered by the terms "extraction," "processing," and "export?" If so, what guidance would be helpful?

Yes, additional guidance should be provided.

The guidance on activities covered by the term "export" should explicitly include trading-related activities when an issuer purchases oil, natural gas, or minerals sold by a government (including a state-owned company). See our response to Questions 6 and 12.[21]

10. As noted above, "extraction" would mean the production of oil and natural gas as well as the extraction of minerals. Are the activities covered too narrow or too broad?

We agree with the Commission's proposed definition of extraction, and recommend the rule clearly define not only the activities but also the specific resources that are covered by the Commission's use of the term "extraction."

In order to be consistent with the international transparency standard, the Commission should set out clear definitions for oil, natural gas, and minerals covered by the Commission's rule. We propose definitions of oil, natural gas, and minerals that align with the definitions set out in Canada's ESTMA.[22]

We recommend amending proposed Item 2.01(c) of Form SD by adding the following:

> ***Natural gas* means all forms of natural gas, and includes all substances, other than oil, that are produced in association with natural gas.**
>
> ***Minerals* means all naturally occurring metallic and non-metallic minerals, including coal, salt, quarry and pit material, and all rare and precious metals.**
>
> ***Oil* means crude petroleum, bitumen, and oil shale.**

11. As noted above, "processing" would include midstream activities such as (a) the processing of gas to remove liquid hydrocarbons, (b) the removal of impurities from natural gas prior to its transport through a pipeline, (c) the upgrading of bitumen and heavy oil, through the earlier of the point at which oil, gas, or gas liquids (natural or synthetic) are either sold to an unrelated third party or delivered to a main pipeline, a common carrier, or a marine terminal, and (d) the crushing and processing of raw ore prior to the smelting phase. Are these examples of "processing" too narrow or too broad? Why or why not?

[21] For additional information, see the comment submitted by the Natural Resource Governance Institute (16 Feb. 2016). Available at: http://www.resourcegovernance.org/sites/default/files/nrgi_sec_trading.pdf.
[22] Extractive Sector Transparency Measures Act (22 Dec. 2015), p.2. Available at: http://laws-lois.justice.gc.ca/PDF/E-22.7.pdf.

We support a definition of processing that includes the activities listed above.

The definition of processing in the proposed rule is consistent with the activities relevant to the statute.

12. As discussed above, the definition of "commercial development of oil, natural gas, or minerals" would not cover transportation made for a purpose other than export and "export" would mean transportation from the resource's country of origin to another by a person with an ownership interest in the resource. Are the activities covered too narrow or too broad? Why or why not? For example, should the definition be broadened to include "transportation" more generally? Should "export" include all transportation from one country to another, regardless of ownership interest or whether the resource originated in the country from which it is being transported?

We welcome and support the Commission's proposal to include transport activities related to export in the definition of "export" and we recommend that "export" also cover trading activities.

Including payments associated with transport is consistent with the interests of investors. As noted in our 2011 submission, the method that investors such as Calvert Asset Management use for equity valuations "involve[s] assessment of an entire entity and not just its upstream or exploration and production operations," which supports their statement that "payments related to a resource extraction company's entire operations are a necessary element of meaningful disclosure."[23]

12.1 Inclusion of trading-related payments within the scope of "export":

As discussed in the response to Question 6, it is important that trading-related payments that are made when an issuer purchases oil, natural gas, or minerals sold by a government (including a state-owned company) are included within the scope of "export" activities. The point at which this "first sale" is made between the state and the trading company generally constitutes the first time that the ownership interest is transferred from the state to the company.

We recommend amending proposed Item 2.01(c)(4) of Form SD as follows:

> (4) *Export* means the movement of a resource across an international border from the host country to another country by a company with an ownership interest in the resource. **This includes trading activities where an issuer purchases a government's (including a state-owned company's) oil, natural gas, or minerals.** Cross-border transportation activities by an issuer that is functioning solely as a service provider, with no ownership interest in the resource being transported, would not be considered to be export.

C. Definition of "Payment"

[23] Comment submitted by PWYP-US (25 Feb. 2011), p.15. Available at: http://www.sec.gov/comments/s7-42-10/s74210-29.pdf (quoting comment submitted by Bennett Freeman and Paul Bugala, Calvert Investments, and Lisa Wolf, Social Investment Forum (15 Nov. 2010), p.5.)

13. Should we add other payment types, such as social or community payments, or remove certain payment types from the proposed list of covered payment types? If so, please explain which payment types should or should not be considered part of the commonly recognized revenue stream for resource extraction issuers and why. If we exclude social or community payments from the list of covered payment types, as proposed, should we provide additional guidance concerning how an issuer would distinguish social or community payments from infrastructure payments? Why or why not?

<u>We agree with the Commission's proposal to include the payments listed in the Section 13(q) statute, as well as payments of dividends and infrastructure payments. However, this list should be expanded to include social payments and trading-related payments in order to accurately reflect the statute and Congressional intent.</u>

In order to remain consistent with the statute and Congressional intent, the Commission should not remove any payment types from the proposed list of covered payment types.

13.1 Taxes, royalties, fees, production entitlements, and bonuses

These payments are specified in Section 13(q), are part of the commonly recognized revenue stream from natural resource extraction, and are covered by the EU Directives, ESTMA, and the EITI Standard. The Commission should not remove any of these payment types from the proposed list of covered payment types, as doing so would clearly contravene the statute and Congressional intent.

13.2 Payments for infrastructure improvements

We agree with the Commission's proposal to include payments for infrastructure improvements. The large-scale nature of many infrastructure improvements paid for by extractive companies, such as the development of roads, ports, or bridges, makes them of material benefit in resource producing countries. This is a commonly recognized revenue stream from natural resource extraction. These payments are covered by the EU Directives,[24] ESTMA,[25] and the EITI Standard.[26] Including payments for infrastructure improvements is therefore consistent with the definition of "payments" under Section 13(q) and Congressional intent to further international transparency efforts.

Natural resources are frequently located in remote or under-developed areas and many extractive companies, in particular mining companies, make infrastructure-related payments. These payments are generally viewed as part of the cost of doing business in those areas. In many developing countries, particularly in Africa and specifically in countries emerging from civil war, transport infrastructure is frequently non-existent, and financing to improve that infrastructure is often crucial for the export of natural resources.

In Guinea, for example, one of the world's largest iron ore deposits (Simandou) is landlocked and unconnected to the deepwater port in the west of the country at Matakan, because there is no railway.

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[24] Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Article 41(5)(g). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF.

[25] Extractive Sector Transparency Measures Act (22 Dec. 2015), Section 2. Available at: http://laws-lois.justice.gc.ca/PDF/E-22.7.pdf.

[26] The EITI Standard (1 Jan. 2015), Requirement 4.1(d), p.27. Available at: https://eiti.org/files/English_EITI_STANDARD.pdf.

This means that the commitment to reconstruct the railway, known as the Trans Guinean, has been a crucial element of all negotiations over rights to the Simandou deposits. Bellzone Mining was awarded the right to develop its deposits in the west of the country based on its commitment to invest $2.7 billion dollars to improve Guinea's infrastructure, specifically the railway and a port.[27]

13.3 Dividends

We agree with the Commission's decision to include dividends in the list of payments that are required to be disclosed. We believe that excluding dividends from the list would contravene Congressional intent, as dividend payments are material benefits that are part of the commonly recognized revenue stream. The EU Directives,[28] ESTMA,[29] and EITI Standard[30] all require dividends to be disclosed. Exxon[31] and API[32] have also commented that the rule should include dividends.

13.4 Social payments

The Commission should require disclosure of social or community payments that are made to governments, required either by law or contract, and intended to further the commercial development of oil, natural gas, or minerals.

This would be consistent with the EITI Standard, which requires disclosure of mandatory social payments:

> Where material social expenditures by companies are mandated by law or the contract with the government that governs the extractive investment, the EITI Report must disclose and, where possible, reconcile these transactions.[33]

Social payments meet the definition in Section 13(q) for "payment" because 1) they are made to further the commercial development of oil, natural gas, or minerals, and 2) they are material benefits that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. First, social payments included in the terms of natural resource contracts are made for the purpose of the "acquisition of a license for" the "exploration, extraction, processing, export, and other

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[27] Bellzone Mining Plc, Definitive Agreements Signed with China International Fund with the Addition of a Mine Development Financing Package (2 Aug. 2010). Available at: http://www.morningstar.co.uk/uk/News/NewsFeedItem.aspx?id=113284060809147.

[28] Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Article 41(5)(d). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF.

[29] Extractive Sector Transparency Measures Act. (22 Dec. 2015), Section 2. Available at: http://laws-lois.justice.gc.ca/PDF/E-22.7.pdf.

[30] The EITI Standard (1 Jan. 2015), Requirement 4.1(b)(v), p.26. Available at: https://eiti.org/files/English_EITI_STANDARD.pdf.

[31] Comment submitted by ExxonMobil (31 Jan. 2011), p.10. Available at: http://www.sec.gov/comments/s7-42-10/s74210-11.pdf.

[32] Comment submitted by API (28 Jan. 2011), p.10. Available at: http://www.sec.gov/comments/s7-42-10/s74210-10.pdf.

[33] The EITI Standard (1 Jan. 2015), Requirement 4.1(e), p.27. Available at: https://eiti.org/files/English_EITI_STANDARD.pdf.

significant actions relating to oil, natural gas, or minerals." They thus qualify as payments made to further the "commercial development of oil, natural gas, or minerals" as defined in the statute.[34]

Second, social payments are clearly of material benefit in resource-dependent countries, both to governments and to local communities. Shell is supportive of the inclusion of such payments as a type of "other material benefit" if these are found to be material to the overall payments made to a foreign government.[35] US-listed companies that already disclose social payments include Statoil,[36] Newmont,[37] and Kosmos Energy.[38] Including social payments would also be consistent with the position of AngloGold Ashanti, which states in its comment to the Commission that "such payments should be considered part of the commonly recognized revenue stream to the extent that they constitute part of the issuer's overall relationship with the government pursuant to which the issuer engages in the commercial development of oil, natural gas, or minerals."[39]

The Section 13(q) definition of payment supports the inclusion of social payments, as they are "other material benefits" that "are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals."[40]

The magnitude of these payments clearly qualifies them as a material benefit. A KPMG survey of the international mining sector found 10 mining, metals and engineering companies had combined social investments of $1.2 billion in 2013.[41] In Kazakhstan, extractive companies' social and local infrastructure payments totaled approximately $2 billion between 1996 and 2009.[42] In Angola, a 2008 study found that foreign oil companies' contractual social payments amounted to approximately $200 million per year on average – more than half the total amount of official development assistance received by Angola in 2008.[43] Contractual obligations for social payments have reached into the hundreds of millions of dollars per oil block in Angola. The terms for the consortium that won the bidding round for blocks 15, 16, and 17 in 2006 included $200 million in social payments for each of the blocks.[44] Chevron has contributed more than $1.7 billion in social investments to local communities over the past nine years, and currently

[34] 15 U.S.C. 78m(q)(1)(A).

[35] Comment submitted by Royal Dutch Shell (28 Jan. 2011), p.11. Available at: http://www.sec.gov/comments/s7-42-10/s74210-18.pdf.

[36] See Statoil, 2014 Payments to Governments. Available at: http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf.

[37] See: http://sustainabilityreport.newmont.com/2014/economic/economic-investments.php.

[38] See: http://www.kosmosenergy.com/responsibility/society-and-communities.php.

[39] Comment submitted by AngloGold Ashanti (31 Jan. 2011), p.9. Available at: http://www.sec.gov/comments/s7-42-10/s74210-15.pdf.

[40] 15 U.S.C. 78m (q)(1)(c)(ii).

[41] KPMG Global Mining Institute, Valuing Social Investments in Mining (2014). Available at: https://assets.kpmg.com/content/dam/kpmg/pdf/2014/10/valuing-social-investment-mining-v3.pdf.

[42] Comment submitted by PWYP-US (25 Feb. 2011), p.25, FN 104. Available at: http://www.sec.gov/comments/s7-42-10/s74210-29.pdf.

[43] Inge Amundsen and Arne Wiig, Social Payments in Angola: Channels, Amounts and Impact (2008), Chr. Michelson Institute, p.12. Available at: http://www.cmi.no/publications/file/3196-social-funds-in-angola-channels.pdf.

[44] Ibid., p.10.

funds community projects and partnerships in 29 countries.[45] In Zambia, social investments from only four mines amounted to nearly $70 million in 2012.[46] In Equatorial Guinea, the government encourages oil companies to spend more on social investments than the minimum required by law. In 2008, for instance, six foreign-owned oil and gas companies spent approximately $35 million on social development and training projects, well above the combined $3.5 million they were legally required to pay.[47]

The large number of countries where social payments are required shows that they are part of the commonly recognized revenue stream. A recent paper commissioned by the World Bank revealed that as of January 2016, 40 countries had adopted provisions in their mining laws and policies that require extractive companies to make social payments.[48] The laws and policies identified in the study specifically target communities living in proximity to mining operations, and mandate either mining companies and/or governments to carry out socio-economic development projects in those communities. EITI implementing countries that already disclose or reconcile mandatory and/or voluntary social expenditures in their EITI Reports include Kazakhstan, Kyrgyzstan, Liberia, Mauritania, Mongolia, Mozambique, Peru, Republic of Congo, Togo, Yemen, and Zambia.[49]

Inclusion of mandatory social payments would serve the statutory purpose of Section 13(q) to deter corrupt deals and allow investors to understand the secret financial transactions that can threaten the legality and stability of their investments in the extractive industries. Although they have been disclosed in some EITI reports, there remains a severe lack of transparency for social payments. Of the 40 national mining laws that include social payment requirements analyzed by the World Bank, only three include transparency provisions relating to social payments.[50] Experience has shown that social payments are vulnerable to corruption and mismanagement.[51] For example, research by Global Witness shows that $175 million in social contributions from a single Angolan oil block may have been corruptly diverted, and that a further $175 million in social contributions due to be paid from the same block are also at risk

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[45] See: http://www.chevron.com/corporateresponsibility/community/.

[46] International Council on Mining and Metals, Press Information Sheet 3 (undated). Available at: https://www.icmm.com/document/6292.

[47] Joseph Kraus, *The "Business" of State-Building: The Impact of Corporate Social Responsibility on State Development in Equatorial Guinea* (Dec. 2010), p.172. Available at: http://etd.fcla.edu/UF/UFE0042514/kraus_j.pdf.

[48] Kendra Dupuy, *Community Development in Mining: A Global Analysis of Legal Requirements* (Jan. 2016), Summary Report Written for the World Bank, Governance Global Practices Group (available on request). The 40 countries are: Afghanistan, Australia, Burkina Faso, Canada, Central African Republic, China, Colombia, Cote d'Ivoire, Democratic Republic of Congo, Ecuador, Equatorial Guinea, Ethiopia, Fiji, Ghana, Greenland, Guinea, India, Indonesia, Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Laos, Mali, Mongolia, Mozambique, Niger, Nigeria, Oman, Papua New Guinea, Peru, Philippines, Sierra Leone, South Africa, South Sudan, Tanzania, Togo, Vietnam, Yemen, and Zimbabwe.

[49] EITI Guidance Note 17 on Social Expenditures, Requirement 4.1(e). Available at: https://eiti.org/files/GN/Guidance_note_17_social_expenditure_EN.pdf.

[50] Sierra Leone's community development agreement (CDA) provision makes explicit mention of the fact that CDAs are not confidential, while Guinea's legislation states that principles of transparency will be adhered to in CDA management. Indonesia's legislation calls on mining companies to implement socio-economic activities transparently.

[51] Comment submitted by Dr. Harry G. Broadman and Bruce H. Searby (25 Jan. 2016), p.4. Available at: https://www.sec.gov/comments/s7-25-15/s72515-10.pdf.

of being misappropriated.[52] In Kazakhstan, civil society organizations have reported social investment funds being misused.[53] In Equatorial Guinea, where mandatory social payments are not publicly disclosed despite being required by law, the government has used social payments as cover under which to approach US-listed oil and gas companies about financing projects that appear to have been motivated by the whims of individual government officials and had little to do with social development. For instance, companies have been approached by government officials with requests to drill a well for a local church attended by a high ranking government official, to donate equipment to the government for an international oil and natural gas conference, and to finance a kickboxing tournament.[54] This raises concerns that social payments, if allowed to remain opaque, could be misused to channel corrupt payments, special favors, and kickbacks, creating a gray zone of illicit payments that may not be easily monitored or policed by the FCPA.

We believe that including contractually and legally mandated social payments in the final rule would obviate the need for producing additional guidance, as well as reduce the reporting burden for companies. As all legally or contractually required social payments, payments for infrastructure improvements, and payments in kind would need to be disclosed, extractive issuers would not need to make decisions as to which types of payment to omit from reports.

We recommend amending proposed Item 2.01(c)(9)(iii) of Form SD by adding the following:

> **(H) Mandatory social payments**

We also recommend amending the proposed Instructions to Item 2.01 by adding the following:

> **"Mandatory social payments," as used in this Item 2.01, are expenditures mandated by law or contract in addition to taxes and other mandatory payments, which are for the purpose of directly furthering the socio-economic well-being of communities or the population within the country where the expenditures are made.**

13.5 Trading-related payments

As noted in the response to Question 6 and 12, trading-related payments should be included as an additional payment type. Payments to governments should be disclosed when an issuer purchases oil, natural gas, or minerals sold by a government (including a state-owned company). In many countries,

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[52] Justin Scheck, Anticorruption Group Questions BP Payments in Angola, Wall Street Journal (5 Aug. 2014). Available at: http://blogs.wsj.com/corporate-intelligence/2014/08/05/anticorruption-group-questions-bp-payments-in-angola/; Global Witness, BP and Partners' $350 Million Payments in Corruption-Prone Angola Show Need for US Transparency Rules (4 Aug. 2014). Available at: https://www.globalwitness.org/en/archive/bp-and-partners-us350-million-payments-corruption-prone-angola-show-need-us-transparency/.

[53] Emma Wilson and James van Alstine, *Localising Transparency: Exploring EITI's Contribution to Sustainable Development* (2014), University of Leeds and International Institute for Environment and Development, p.42. Available at: http://pubs.iied.org/16555IIED.html.

[54] Joseph Kraus, *The "Business" of State-Building: The Impact of Corporate Social Responsibility on State Development in Equatorial Guinea* (Dec. 2010), p.180. Available at: http://etd.fcla.edu/UF/UFE0042514/kraus_j.pdf.

the sale of the state's share of production constitutes the largest commonly recognized revenue stream to the government in the extractive industry. For example, Nigeria's state-owned national oil company, the Nigerian National Petroleum Corporation (NNPC), sells around one million barrels of oil a day, or almost half of the country's total production. In 2013, NNPC oil was worth an estimated $41 billion, and constitutes the government's largest revenue stream.[55]

The scale of such payments simply cannot be ignored by the Commission. The statutory language clearly provides for the inclusion of "other material benefits" that "are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals."[56] As we have demonstrated, trading-related payments are often *the most material* benefit that a government receives in relation to the commercial development of oil, natural gas, or minerals.

By including trading-related payments in the Section 13(q) rule, the Commission will contribute to international transparency promotion efforts in significant ways. Requirement 4.1.c of the EITI Standard reads as follows:

> ***Sale of the state's share of production or other revenues collected in-kind:***
>
> *Where the sale of the state's share of production or other revenues collected in-kind is material, the government, including state owned enterprises, are required to disclose the volumes sold and revenues received. The published data must be disaggregated to levels commensurate with the reporting of other payments and revenue streams (Requirement 5.2.e). Reporting could also break down disclosures by the type of product, price, market, and sale volume.*[57]

It is clear that the EITI Standard now encompasses revenues received for the sale of the state's share of production and encourages buying companies to be included in EITI Reports. Requirement 4.1.c has triggered initial implementation efforts by different EITI implementing countries, such as Nigeria, Iraq, and the Republic of Congo.[58] As noted in our response to Question 6, in Iraq, payments made in 2013 for the state's share of crude oil (crude oil export sales) by international buyers amounted to approximately $80 billion. These buyers included subsidiaries or entities controlled by the following US-listed companies: BP, Chevron, ENI, ExxonMobil, Phillips 66, Royal Dutch Shell, Total, and Valero.

In recognition of this important revenue stream and the EITI's expansion to include disclosure of revenues received for the sale of the state's share of production, in November 2015, Trafigura became the first company to voluntarily publish trading-related payments to governments. Trafigura's report, limited to EITI implementing countries, underscores the magnitude of these revenue streams to

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[55] Natural Resource Governance Institute, *Inside NNPC Oil Sales: A Case for Reform*, August 2015, p.2. Available at: http://www.resourcegovernance.org/sites/default/files/NRGI_InsideNNPCOilSales_MainReport.pdf.
[56] 15 U.S.C. 78m(q)(1)(C).
[57] The EITI Standard (1 Jan. 2015), Requirement 4.1.c., p.27. Available at: https://eiti.org/files/English_EITI_STANDARD.pdf.
[58] For more on implementing country reporting, see: EITI, *The EITI, NOCs and the First Trade* (Mar. 2015). Available at: https://eiti.org/files/EITI_Brief_NOC_FirstTrade_March2015.pdf.

governments. Trafigura disclosed a total of $4.3 billion in payments to the national oil companies of Colombia, Ghana, Nigeria, Norway, Peru, and Trinidad and Tobago.[59]

The Africa Progress Panel, which is chaired by former UN Secretary-General Kofi Annan and includes former EITI International Chair Peter Eigen, has called for the inclusion of commodity trading within the scope of Section 13(q) and the EU Directives.[60] Speaking in terms of the need to improve governance of trading, the EITI International Secretariat noted in its own brief that efforts in major trading hubs such as the US, Switzerland, and UK are important: "disclosure requirements in the home jurisdictions of trading companies may contribute."[61]

For further discussion on trading-related payments and proposed regulatory language, see our responses to Questions 6, 9, and 12.

We recommend amending proposed Item 2.01(c)(9)(iii) of Form SD by adding the following:

> **(I) Payments, including payments in-kind, derived from trading activities where an issuer purchases a government's (including a state-owned company's) oil, natural gas, or minerals.**

14. Should we provide different or additional guidance on how to interpret the proposed list of covered payment types? For example, should we specify additional types of fees or bonuses in Instruction 8 to Form SD or should we clarify what other types of payment mean, such as royalties?

<u>The Commission should require disclosure of all fees, bonuses, and royalties that are required to be paid to governments, and should provide non-exclusive lists of these payment types.</u>

An EITI review of fees in ten EITI countries demonstrates that a wide range of fees paid to governments are considered part of the commonly recognized revenue stream, including, for example, application fees; seismic data fees; permit fees; flat fees; acreage fees; administrative fees; water fees; and fees for forestry use.[62] Similarly, bonuses in the upstream segments of the oil, gas, and mining industries are often individually tailored to suit different contractual contexts, and can take various different forms. We therefore agree with the Commission that its list of included fees and bonuses is a non-exclusive one, and this should be reflected clearly in the Instructions to Item 2.01.

To ensure all royalties required to be paid pursuant to state-investor contracts, licenses, leases, concessions, or similar legal agreements are disclosed, the Commission should include a non-exclusive list of royalties, similar to its approach to fees and bonuses. We recommend using the categories cited

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[59] Trafigura, 2015 Responsibility Report, p.17. Available at: http://www.trafigura.com/media/3250/trafigura-2015-responsibility-report-en.pdf.

[60] Africa Progress Panel, *Equity in Extractives*, 2013, p.97: "All countries should adopt and enforce the project-by-project disclosure standards of the US Dodd-Frank Act and comparable EU legislation, applying them to all extractive industry companies listed on their stock exchanges. *These standards should also include commodity trading.*" [emphasis added]. Available at: http://www.africaprogresspanel.org/wp-content/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf.

[61] EITI, *The EITI, NOCs and the First Trade* (Mar. 2015), p.4. Available at: https://eiti.org/files/EITI_Brief_NOC_FirstTrade_March2015.pdf.

[62] EITI, *Overview of EITI Reports* (29 July 2009). Available at: https://eiti.org/files/Overview%20EITI%20Reports.pdf.

in the World Bank's publication, *Mining Royalties: Their Impact on Investors, Government and Civil Society*.[63]

We agree with the Commission's proposal to include an instruction in the final rule to clarify that a resource extraction issuer would be required to disclose payments for taxes levied on corporate profits, corporate income, and production, but would not be required to disclose taxes levied on consumption.

We recommend amending proposed Instruction 9 to Item 2.01 as follows:

> (9) Fees include **but are not limited to** license fees, rental fees, entry fees, and other considerations for licenses or concessions. Bonuses include **but are not limited to** signature, discovery, and production bonuses.

We also recommend amending the proposed Instructions to Item 2.01 by adding the following:

> **Royalties include but are not limited to unit based, value-based, or profit-based royalties.**

15. Should we prescribe a specific method for determining the fair market value of in-kind payments? If so, please explain how fair market value should be determined for such payments. Should we provide guidance concerning appropriate methods for determining fair market value for in-kind payments?

<u>We urge the Commission to require issuers to describe the methods employed for calculating the monetary value of in-kind payments, and to require the volume to be disclosed where applicable.</u>

The final rule should clearly require extractive issuers to provide a description of how they calculated the monetary value of in-kind payments, such as production entitlements. This would enhance transparency for users of the data; it would also be consistent with the EU Directives[64] and the draft ESTMA Technical Reporting Specifications.[65] We also urge the Commission to require disclosure of the volume of in-kind payments, where applicable. This would be consistent with the EU Directives;[66] it would also allow users of the information to better understand the methodology used to calculate the value of in-kind payments, as well as to hold governments to account for the volumes of resources

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[63] These categories are cited in World Bank, *Mining Royalties: Their Impact on Investors, Government and Civil Society* (2006), pp.50-54. Available at: http://siteresources.worldbank.org/INTOGMC/Resources/336099-1156955107170/miningroyaltiespublication.pdf.

[64] Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Article 43 (3). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF.

[65] Extractive Sector Transparency Measures Act - Technical Reporting Specifications (1 Aug. 2015), Section 2, p.5. Available at: http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/estma/Technical_Reporting_Specifications_EN.pdf.

[66] Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Article 43 (3). "Where payments in kind are made to a government, they shall be reported in value and, where applicable, in volume. Supporting notes shall be provided to explain how their value has been determined." Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF.

received. This latter element is particularly important in countries such as Nigeria where the handling of the sale of the government's production entitlement has been an area of particular concern with respect to corruption and lack of transparency.[67] The Nigerian government's oil sales constitute its largest revenue stream, and were worth an estimated $41 billion in 2013. Early in 2014, Nigeria's central bank governor Lamido Sanusi raised an alarm that $20 billion in oil sale revenues had gone missing.[68]

We recommend amending proposed Item 2.01(a) of Form SD by adding the following:

> **Where payments are made in-kind, the value of such payments together with a description of the method for determining this value, and, where applicable, the relevant volume;**

We also recommend amending proposed Instruction 11 to Item 2.01 as follows:

> If a resource extraction issuer makes an in-kind payment of the types of payments required to be disclosed, the issuer must disclose the payment. When reporting an in-kind payment, an issuer must determine the monetary value of the in-kind payment and tag the information as ''in-kind'' for purposes of the currency. For purposes of the disclosure, an issuer may report the payment at cost, or if cost is not determinable, fair market value**.**~~ and should~~ **The issuer must** provide a brief description of how the monetary value was calculated**, and where applicable, report the relevant volume**.

16. Will the proposed anti-evasion provision promote compliance with the disclosure requirements? Should additional guidance be provided about when the anti-evasion provision would apply?

<u>We strongly endorse the inclusion of an anti-evasion provision in the final rule. This would align with Congressional intent, as well as with the EU Directives, and ESTMA.</u>

We believe the proposed anti-evasion provision should be adopted, but with the added wording below to ensure consistency with the EU Directives[69] and ESTMA.[70]

We recommend amending proposed § 240.13q-1(b) by adding the following:

> **Activities and payments must not be artificially structured, split or aggregated to avoid the application of the rules.**

17. Should we define "not de minimis" differently than as proposed? For example, are there any data or have there been any recent developments suggesting that a $100,000 threshold is too low or too

[67] Natural Resource Governance Institute, *Inside NNPC Oil Sales: A Case for Reform*, August 2015. Available at: http://www.resourcegovernance.org/sites/default/files/NRGI_InsideNNPCOilSales_MainReport.pdf.
[68] Ibid.
[69] Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Article 43 (4). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF.
[70] Extractive Sector Transparency Measures Act (22 Dec. 2015), Section 24 (3), p.12. Available at: http://laws-lois.justice.gc.ca/PDF/E-22.7.pdf.

high? What would be the effect if we adopted a threshold significantly different from those established by other countries for their payment disclosure regimes? Should we include a mechanism to adjust periodically the de minimis threshold to reflect the effects of inflation? If so, what is an appropriate interval for such adjustments and what should the basis be for making any such adjustments in light of our understanding that the appropriate focal point for determining whether a payment is "not de minimis" is in relation to host countries?

We agree with the Commission's proposal to define "not de minimis" to mean "any payment, whether a single payment or a series of related payments, that equals or exceeds $100,000 during the most recent fiscal year."

The Commission's proposed definition of "not de minimis" is appropriate; it is also similar to the EU Directives[71] and ESTMA.[72]

D. Payments by "a Subsidiary...or an Entity Under the Control of..."

20. Should we define the term "control" based on applicable accounting principles, rather than using Rule 12b–2 of the Exchange Act? Why or why not? If so, should we allow resource extraction issuers to report eligible payments made by proportionately consolidated entities on a proportionate basis, as proposed, or modify this requirement? Please provide your supporting rationale. Is there some other definition we should use? If so, why?

While Rule 12b-2 provides an appropriate definition of "control", the Commission could also use accounting principles as an appropriate basis for defining "control," provided that it incorporates the accounting concept of "significant influence", in addition to consolidation and proportional consolidation.

We agree with the Commission that control for purposes of this rule exists whenever an entity or an operation is proportionately or wholly consolidated. However, control may also exist in the absence of such consolidation. See our response to Question 21 below for more details.

It is critical to capture payments made by entities that are proportionately consolidated, and not limit control only to those entities that are fully consolidated. Reporting based on proportional consolidation is consistent with positions expressed by certain industry groups.[73] We therefore agree with the Commission that issuers must report payments made by proportionately consolidated entities. Where an issuer controls the entity that is proportionately consolidated, then a proportionate amount of such payments should be reported, as proposed.

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[71] Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Article 43 (1). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF.
[72] Extractive Sector Transparency Measures Act (22 Dec. 2015), Section 9 (2), p.5. Available at: http://laws-lois.justice.gc.ca/PDF/E-22.7.pdf.
[73] Comment submitted by National Mining Association (2 Mar. 2011), p.19. Available at: http://www.sec.gov/comments/s7-42-10/s74210-45.pdf.

While welcome, the addition of proportionate consolidation would not be sufficient to capture all relevant payments, particularly with regard to joint arrangements, as described in our answer to Question 21 below. To our knowledge, proportional consolidation is optional for oil and gas companies under U.S. GAAP, and is rarely used. Therefore, the Commission should also require that issuers report payments made by entities or arrangements over which they have "significant influence," as defined by the U.S. GAAP and International Financial Reporting Standards (IFRS).[74] As with proportionate consolidation, the report should show payments made by such entities on a proportionate basis. Pro rata reporting is consistent with reporting by companies that have already prepared reports in accordance with the EU Directives. For example, Tullow Oil reported its proportionate share of production entitlement payments of $11,379,000 during 2013 for its License CI-26 Espoir Field where it held a stake of 21.33% in 2013, with the remainder held by its JV partner PETROCI (Cote D'Ivoire's national oil company).

We recommend amending proposed Item 2.01(c)(3) of Form SD as follows:

> (3) Control means that the resource extraction issuer consolidates the entity or proportionately consolidates an interest in**, or has significant influence over,** an entity or operation under the accounting principles applicable to the financial statements included in the resource extraction issuer's periodic reports filed pursuant to the Exchange Act (i.e., under generally accepted accounting principles in the United States (U.S. GAAP) or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS), but not both). A foreign private issuer that prepares financial statements according to a comprehensive set of accounting principles, other than U.S. GAAP or IFRS, and files with the Commission a reconciliation to U.S. GAAP must determine control using U.S. GAAP.

We also recommend amending proposed Instruction 5 to Item 2.01 as follows:

> When a resource extraction issuer proportionately consolidates**, or has significant influence over,** an entity or operation under U.S. GAAP or IFRS, as applicable, and must disclose payments made by such entity or operation pursuant to this Item, such payments must be disclosed on a proportionate basis and must describe the proportionate interest.

21. Are there significant differences between the scope of the entities that would be covered by our proposed rules and by Rule 12b–2? If so, please identify the potential differences and the types of entities and payments that would be affected. Are there certain industries, jurisdictions, or project types that may be more impacted by using the proposed rules' definition of "control" rather than the Rule 12b–2 definition?

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[74] U.S. GAAP Accounting Standards Codification 323-10-15-6 to 323-10-15-11; IFRS 10 *'Consolidated Financial Statements'* and IAS 28 *'Investments in Associates and Joint Ventures'*.

<u>Yes, especially with respect to entities or arrangements such as joint ventures over which an issuer can have control without necessarily consolidating them for accounting purposes.</u>

Accounting principles for determining consolidation may not be the most appropriate guide here, given that their goal is completely different from, and unrelated to, the goals of this rule. While consolidation accounting aims to present overall financial statements of a complex parent company as a single economic entity, Section 13(q) aims to "provide the broadest possible coverage of extractive companies so as to create a level playing field."[75] The Commission could fall short of fulfilling this central objective of Section 13(q) if it follows accounting principles to determine "control." Given that consolidation accounting principles differ in their objective from Section 13(q), they can yield different results. Certain disclosures that would likely be required pursuant to the Rule 12b-2 definition of control could be omitted if consolidation accounting is followed. For example, even entities that are fully held by an issuer can be accounted for using the equity method rather than being consolidated in some cases (for example, Eni's operations in Brazil via fully held Eni do Brasil Investimentos em Exploração e Produção de Petróleo Ltda).[76] It is possible for a company to hold a majority stake in a joint venture yet account for it using the equity method: for example, BP's operations in Argentina, Bolivia and Chile are conducted through Pan American Energy LLC, a joint venture with Bridas Corporation, in which BP has a 60% interest.[77]

One particular concern is that consolidation accounting is not suitable for situations where multiple parties may have joint control under Rule 12b-2, because consolidation accounting generally provides for a single controlling entity. Given the prevalence of joint ventures in resource extraction, it is critical that joint venture payments are captured in order to meet Section 13(q)'s objectives. In particular, we are concerned that the application of consolidation accounting principles could lead to omission of payments made through joint ventures that include participants that are subject to Section 13(q) (or a similar reporting regime) as well as those that are not. The concern is that participants may be able to evade payment reporting by structuring the arrangement so that it is not controlled by any of the participants that would be required to report.

We also believe that full reporting by joint ventures is practicable. Many oil, gas, and mining projects are undertaken through joint arrangements whereby parties have rights to the assets or net assets of an operation. In these cases, all parties to a joint arrangement have a right to audit the operator and to prepare and disclose independent reserve reports to their shareholders outlining their share in the reserves held by the joint arrangement, and they must account for their assets and liabilities.

Indeed, companies that have published reports to date have included joint venture payments. For example, Statoil's *Payments to Governments* report states that it includes "direct payments to

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[75] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,068.
[76] Eni SpA, Form 20-F (2014) p. F-117. Available at: https://www.eni.com/en_IT/attachments/publications/reports/reports-2014/Annual-Report-On-Form-20-F-2014.pdf.
[77] BP, Annual Report and Form 20-F (2014), p. 214. Available at: http://www.bp.com/content/dam/bp/pdf/investors/bp-annual-report-and-form-20f-2014.pdf.

governments from subsidiaries, joint operations and joint ventures, regardless of whether Statoil is the operator or not."[78] Therefore, the Commission should support rather than weaken this aspect of the global standard.

22. Is there an alternative approach to what we have proposed, other than using Rule 12b–2, that would better achieve the transparency objectives of Section 13(q) while minimizing the cost of compliance? For example, are there any aspects of the EU Directives, ESTMA or other international transparency initiatives that should be considered so as to enhance the comparability and consistency of the disclosed payments? If so, which aspects and why.

<u>We believe that the accounting-based approach is workable provided it is expanded to capture situations of "significant influence".</u>

See our responses to Questions 20 and 21. In addition, we do not anticipate significant additional compliance costs of the approach we propose, given that issuers have already made the determination of "significant influence" for purposes of their financial reporting.

23. Are there significant differences between the consolidation principles in U.S. GAAP and IFRS that could affect the comparability of the disclosure that would be required by the proposed rules? If so, is there a way to modify the definition of "control" to enhance the comparability of the disclosure?

<u>Differences between the consolidation principles in U.S. GAAP and IFRS do not appear to be sufficiently significant to impede comparability of disclosures made by US and non-US issuers.</u>

We are not aware of any significant differences in how "control" and "significant influence" are defined under IFRS and U.S. GAAP. In particular, both reporting systems define "significant influence" by reference to a rebuttable presumption with respect to 20% of the voting power: an issuer is presumed to have significant influence over any entity in which it holds 20% or more of the voting stock, and is presumed not to have significant influence over any entity in which it holds less than 20% of the voting stock.[79] Therefore, we expect that the addition of "significant influence" will produce similar reporting results for US and non-US issuers.

E. <u>Definition of "Project"</u>

24. Should we, as proposed, define "project" as operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government? Why or why not? Given the U.S. foreign policy interests reflected in Section 13(q), does our proposed definition advance the governmental interests in promoting transparency and combating global corruption? Should we define "project" in a different manner? If

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[78] Statoil, 2014 Payments to Governments (2015). Available at: http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf.

[79] ASC 323-10-15-8; IAS 28 *"Investments in Associates and Joint Ventures"*.

yes, how should we define the term? For example, should we adopt a definition of "project" that is identical to that found in the EU Directives and the ESTMA Specifications?

<u>We support the Commission's proposed definition of "project."</u>

The proposed definition meets the intent of the statute. It advances the governmental interest in promoting transparency and combating global corruption.[80] It reduces compliance costs for covered issuers, as it aligns with the definition of project adopted by both the EU and Canada.[81] It reflects existing reporting by resource extraction issuers.[82] It is supported by investors with assets under management of over $9.8 trillion.[83]

In addition, as shown previously, this definition aligns with petroleum and mineral fiscal systems,[84] the predominant structure of contracting arrangements for activities covered by Section 13(q),[85] and the general understanding of the term 'project' by issuers as demonstrated by their Exchange Act reports.[86]

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[80] Comment submitted by US Department of State (13 Nov. 2015). Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-102.pdf; Comment submitted by US Department of State (21 Jan. 2016). Available at: http://www.sec.gov/comments/s7-25-15/s72515-13.pdf; Comment submitted by Department of Interior (6 Nov. 2015). Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-96.pdf; Comment submitted by US Agency for International Development (15 July 2011). Available at: http://www.sec.gov/comments/s7-42-10/s74210-101.pdf.

[81] Comment submitted by PWYP-US (12 Nov. 2015). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-100.pdf.

[82] See e.g. Comment submitted by Kosmos Energy (19 Oct. 2015). Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-95.pdf; BHP Billiton Economic Contribution and Payments to Government Report (2015). Available at: http://www.bhpbilliton.com/~/media/bhp/documents/investors/annual-reports/2015/bhpbillitoneconomiccontributionandpaymentstogovernments2015.pdf?la=en; Statoil, 2014 Payments to Governments (2015). Available at: http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf.

[83] See Appendix B for full list of investor letters; SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,075, FN 185.

[84] International Monetary Fund, *Fiscal Regimes for Extractive Industries: Design and Implementation* (15 August 2012), p. 15. Available at: http://www.imf.org/external/np/pp/eng/2012/081512.pdf. In particular note: "There are two main approaches to fiscal regime design for EI: contractual schemes (including production sharing or service contracts), and tax/royalty systems with licensing of areas. The latter dominates in mining; for oil and gas, both are common; and some countries use a hybrid." See also PWYP-US letter to Commissioner Walter (23 Feb. 2012). Available at: http://www.sec.gov/comments/s7-42-10/s74210-191.pdf (summarizing key points from government and industry publications that "make clear that all existing petroleum fiscal systems are based on licenses, concessions and contracts.")

[85] Allen & Overy LLP, *World Bank Guide to Extractive Industries Documents* (Jan. 2013), p. 4. Available at: http://www.eisourcebook.org/cms/Jan%202014/Guide%20to%20Mining%20Documents.pdf. Note especially: "The notion of the state sharing production of minerals with companies as part of a commercial enterprise has been in existence throughout the latter half of the twentieth century. Such agreements are commonly recorded in a Mining Development Agreement or a Mining Exploration and Development Agreement, which are widely used to record arrangements for mineral exploration and production, traditionally in countries with developing economies."

The proposed definition also advances the governmental interest to promote transparency and combat corruption. To achieve the "international transparency" benefits envisioned in the statute, payments must be disclosed in a manner that can be reconciled at the country level by governments, oversight and audit institutions, as well as citizens. The vast majority of countries audit and track payments from oil and mining companies at the company level as well as the level of a lease or license, concession or contract. This includes for example, leases (US), concessions (Angola), and production sharing contracts (Indonesia).[87]

However, in order to be "substantially interconnected," agreements must be both 1) operationally and geographically ***integrated***, rather than interconnected; ***and*** 2) have substantially similar terms. For further discussion, please see our answer to Question 27.

25. Is there an alternative to using a contract based definition of "project" that would promote international transparency while mitigating compliance costs to resource extraction issuers?

No.

The proposed definition reflects existing reporting practice, is supported by investors, civil society groups from 40 countries[88] and a range of issuers.[89] It also mitigates costs by allowing cross-listed issuers to submit reports from other markets to fulfill their obligations under Section 13(q).

See also responses to Questions 49-57.

26. Would our proposed contract-based definition of "project" lead to more granular disclosure than API's suggested definition? What is the typical geopolitical and geographic scope of contracts in the resource extraction industry? Are the examples discussed above representative of current industry practice?

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[86] As the Commission stated in the 2012 Rule: "[W]e note that individual issuers routinely provide disclosure about their own projects in their Exchange Act reports and other public statements, and as such, we believe "project" is a commonly used term whose meaning is generally understood by resource extraction issuers and investors. In this regard, we note that resource extraction issuers routinely enter into contractual arrangements with governments for the purpose of commercial development of oil, natural gas, or minerals." SEC, Disclosure of Payments by Resource Extraction Issuers, Final Rule, 77 Fed. Reg. at 56,385. See also Royal Dutch Shell PLC, Form 20-F (2012), p. 23. Available at: http://s01.static-shell.com/content/dam/shell-new/local/corporate/corporate/downloads/pdf/investor/reports/2012/20f/2012-annual-report20fsec.pdf. ("The conditions of the leases, licences and contracts under which oil and gas interests are held vary from country to country. In almost all cases outside North America the legal agreements are generally granted by or entered into with a government, government entity or government-run oil and gas company, and the exploration risk usually rests with the independent oil and gas company. In North America these agreements may also be with private parties who own mineral rights. Of these agreements, the following are most relevant to Shell's interests: licenses (or concessions)…lease agreements… production-sharing contracts (PSCs)…").

[87] Comment submitted by PWYP-US (20 Dec. 2011). Available at: http://www.sec.gov/comments/s7-42-10/s74210-117.pdf.

[88] Comment submitted by PWYP Coalition (14 Apr. 2014). Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-32.pdf.

[89] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Final Rule, 77 Fed. Reg. at 56,385.

Yes. The proposed contract-based definition of "project" would lead to more granular disclosure than API's suggested definition.

We agree with the Commission's finding in the proposed rule release that suggested alternatives would result in disclosure that is more aggregated and less granular than what the Commission has proposed.[90] This has also been made clear in multiple submissions to the Commission.[91]

The typical geopolitical and geographic scope of contracts in the resource extraction industry is as described in the proposed rule.

In a review of their contract database, OpenOil has found that the vast majority of contracts (780 out of 806 contracts) explicitly reference the location of the contract area. At least 308 of those contracts define the contract area in regards to a "block" (i.e. "block 2"), while many more reference a block name (i.e. "area 25/34"). A minority of contracts use the name of oil fields to refer to the contract area (i.e. "Amu Darya"), whereas oil blocks can be named after oil fields as well.[92] This is also made clear in the following examples:

- Angola: Block Map[93]
- Peru: See Oil Block Map,[94] contracts,[95] model contract.[96]
- Trinidad & Tobago: Bid round documentation and model contract[97]
- Colombia: Block CPO-9[98]
- Dominican Republic: Pueblo Viejo Mine[99]

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[90] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,076. We agree with the Commission that defining "project" at the country level, as a reporting unit, in relation to a particular geologic resource, such as a "geologic basin" or "mineral district," or defining project in reference to a materiality standard, would be unsatisfactory and would not serve the statute's objective of promoting payment transparency to combat global corruption.

[91] Comment submitted by NRGI (23 Sept. 2015), p.12. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-84.pdf; Comment submitted by PWYP Coalition (14 April 2014). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-32.pdf; Comment submitted by Global Witness (25 Feb. 2011), p.16-17. Available at: https://www.sec.gov/comments/s7-42-10/s74210-34.pdf.

[92] OpenOil, "Location References in Petroleum Contracts - Some Observations" (12 Feb. 2016). Available at: http://openoil.net/2016/02/10/location-references-in-contracts.

[93] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,076 FN207.

[94] See: http://www.perupetro.com.pe/wps/wcm/connect/perupetro/site-en/ImportantInformation/Block%20Maps/Block%20Maps.

[95] See: http://www.perupetro.com.pe/wps/wcm/connect/perupetro/site-en/Investors/Contracting/Exploration%20and%20Exploitation%20Contracts.

[96] See: http://www.perupetro.com.pe/wps/wcm/connect/3e502458-feb7-435d-a9da-4db307e97412/ModeloContrato.pdf?MOD=AJPERES.

[97] See: http://www.energy.gov.tt/services/guidelines/.

[98] In Colombia, Talisman has a 45% working interest in the CPO-9 block with its co-participant Ecopetrol. Block CPO-9 would constitute a project based on a single agreement, as the license for each block forms the basis for separate payment liabilities with the government. See Talisman, *2013 Annual Information Form* (Mar. 2014). Available at: http://www.talisman-energy.com/upload/ir_briefcase/178/01/annual_information_form.pdf.

If the Commission adopts a contract-based definition of "project" that aligns with the EU and Canada (including the requirement for any projects based on multiple agreements to have substantially similar terms), it will ensure that users are able to access payment information at a sufficiently granular level. We note that some voluntary reports on payments to governments, such as BHP Billiton's 2015 Economic Contribution and Payments to Governments Report,[100] have provided information for "production units," a term that is not sufficiently granular to meet the definition of "project" under EU and Canadian law.[101] On this point, we note that BHP Billiton's 2015 report was prepared "taking into account the intent of the EU Accounting Directive by reference to the UK Reports on Payments to Governments Regulations 2014."[102] It is noteworthy that BHP Billiton is not claiming that its voluntary report is in full legal compliance with the EU Accounting Directive or the UK Reports on Payments to Governments Regulations 2015.

27. Should we permit two or more agreements that are both operationally and geographically interconnected to be treated by the issuer as a single project, as proposed? What are the advantages or disadvantages of such a treatment? Should we instead require that these agreements have substantially similar terms as in the EU Directives and the ESTMA Specifications?

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[99] In Dominican Republic, the Pueblo Viejo mine is owned 60% by Barrick Gold and 40% by Goldcorp is one single project, held through a Special Lease Agreement first negotiated by Placer Dome (which was later purchased by Barrick) in 2000. The Special Lease Agreement includes a description of payment liabilities, outlining capital investment recovery allowances, corporate income tax rates, net smelter royalties, net profits tax etc. See Barrick Announces Agreement in Principle on Amendments to Pueblo Viejo Special Lease Agreement, (8 May 2013). Available at: http://barrick.com/investors/news/news-details/2013/Barrick-Announces-Agreement-in-Principle-on-Amendments-to-Pueblo-Viejo-Special-Lease-Agreement/default.aspx.

[100] See BHP Billiton, *Economic Contribution and Payments to Government Report 2015*. Available at: http://www.bhpbilliton.com/~/media/bhp/documents/investors/annual-reports/2015/bhpbillitoneconomiccontributionandpaymentstogovernments2015.pdf?la=en.

[101] For example, BHP Billiton reported payments to Australian governments for its *Australia Production Unit – Western Australia* "project," which it describes as "Operated offshore oil and onshore gas processing facilities." Upon closer examination, there are in fact a number of distinct projects which would need to be disclosed separately in order to conform to the EU and Canadian project definitions. The 2015 Annual Report describes at least three separate projects that sit within the company's *Australia Production Unit –Western Australia*:

- Macedon - offshore gas field located approximately 75 kilometres west of Onslow, Western Australia, and an onshore gas processing facility, located approximately 17 kilometres southwest of Onslow. Production license WA-42-L.
- Pyrenees – crude oil produced from six oil fields in Pyrenees, which are located offshore approximately 23 kilometres northwest of Northwest Cape, Western Australia. Production licenses WA-42-L and WA-43-L. A commercial arrangement has been made between the WA-42-L and WA-43-L Joint Ventures, whereby oil from production license WA-43-L will be produced into the WA-42-L owned facility via a tie-in agreement.
- Stybarrow - crude oil field located 55 kilometres west-northwest of Exmouth, Western Australia (ceased production in June 2015). Production licence WA-32-L.

See BHP Annual Report (2015), p.73. Available at: http://www.bhpbilliton.com/~/media/bhp/documents/investors/annual-reports/2015/bhpbillitonannualreport2015.pdf.

[102] Ibid. p.22.

The Commission should permit two or more agreements that are both operationally and geographically **integrated** to be treated by the issuer as a single project, provided that they **also have substantially similar terms**, as in the EU Directives and the ESTMA Specifications. These terms should be defined unambiguously and exclusively.

27.1 The Commission can best promote the objectives of Section 13(q) by aligning its definition of "interconnected agreements" with that of the EU and Canada

Unless the Commission's definition of "interconnected agreements" includes the requirement of "substantially similar terms," as in the EU and Canada,[103] there is a risk that issuers could artificially aggregate payments and obfuscate payment information, undermining the anticorruption objectives of Section 13(q). We therefore recommend that the Commission adopt the same language as the EU and ESTMA regarding multiple agreements, and we support the inclusion of the anti-evasion provision.[104] See our answer to Question 16.

While we understand the Commission's effort to allow increased flexibility for issuers, there is no evidence that the alleged cost to issuers of including the "substantially similar terms" requirement for multiple agreements outweighs the gains of equivalency with other markets. Likewise, we have seen no evidence that the omission of the "substantially similar terms" in particular, would "reduce burdens of disaggregating payments" while "providing payment information that is useful to citizens in resource-rich countries."[105]

As made clear by previous submissions,[106] and our responses to Questions 40-44, no credible evidence has been submitted to substantiate claims that Section 13(q) disclosures, if disclosed per agreement as proposed, would reveal competitively sensitive information, create competitive harm for covered issuers, or threaten the security of personnel or assets. We therefore do not find the Commission's justifications for omitting the "substantially similar terms" language – to "reduce risk of sensitive information being released" or to "alleviate concern for competitive harm and the security of personnel and assets"[107] – to be warranted.

27.2 The Commission should ensure equivalency with the EU and Canadian regimes' definition of "substantially interconnected" agreements

In order to achieve the benefits of equivalency stated by the Commission in the proposed rule release, including to "reduce costs for companies listed in both the United States and those jurisdictions by not requiring different disaggregation of project-related costs due to different definitions of the term

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[103] Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Recital 45. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF.

[104] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,070; 80,101.

[105] Ibid. at 80,076.

[106] See e.g. Comment submitted by Robert F. Conrad (17 July 2015). Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-81.pdf (providing a detailed analysis showing that project-level reporting will not result in the disclosure of confidential or competitively sensitive information that could put a Resource Extraction Issuer at a competitive disadvantage).

[107] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,076.

'project'" and "enable companies to take advantage of equivalency provisions available in other jurisdictions,"[108] the Commission should fully align its project definition with the EU and Canada. Equivalency is supported by members of Congress,[109] the US government,[110] and numerous companies.[111]

Specifically, the Commission's prerequisites for allowing issuers to treat multiple agreements as one project for reporting purposes, should be defined in the same manner as the EU and Canada. For example, the UK has adopted the EU definition of "substantially interconnected" as follows:

> 'Substantially interconnected' means forming a set of operationally and geographically ***integrated*** contracts, licenses, leases or concessions or related agreements ***with substantially similar terms*** that are signed with a government, giving rise to payment liabilities.[112]

The draft reporting specifications released by Natural Resources Canada adopt precisely the same language.[113]

The Commission's proposed definition of "interconnected" agreements diverges from that required by the EU and Canada, in that it does not require issuers to demonstrate that such agreements are 1) operationally and geographically ***integrated***, rather than interconnected; nor does it require the agreements to 2) have substantially similar terms.

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[108] Ibid. at 80,075-80,076. The Commission states, "[T]aking an approach that shares certain core elements with the definition used in the EU Directives and the ESTMA specifications would further international transparency promotion efforts. Such an approach should also reduce costs for companies listed in both the United States and those jurisdictions by not requiring different disaggregation of project-related costs due to different definitions of the term 'project'. In addition, a definition have substantial similarities might enable companies to take advantage of equivalency provisions available in other jurisdictions."

[109] See e.g. 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; Comment submitted by Sen. Cardin, et al. (1 May 2014). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-41.pdf; Rep. Maxine Waters, et al. (11 June 2014). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-50.pdf. See also comment submitted by Former Senators Richard Lugar, Carl Levin, and Christopher Dodd (4 Feb. 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-20.pdf.

[110] Comment submitted by US Department of State (13 Nov. 2015). Available at: https://www.sec.gov/comments/s7-25-15/s72515-1.pdf; Comment submitted by US Department of State (21 Jan 2016) Available at: https://www.sec.gov/comments/s7-25-15/s72515-13.pdf.

[111] See e.g. Comment submitted by BHP Billiton (25 Jan. 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-9.pdf; Comment submitted by Encana (25 Jan. 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-11.pdf; Comment submitted by Chevron (7 May 2014). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-40.pdf ("We believe 'equivalency' between the EU and U.S. reporting regimes is critical as the EU Member States move to implement the transparency reporting Directives.")

[112] Statutory Instrument No. 3209, The Reports on Payments to Governments Regulations 2014 (1 Dec. 2014), art. 2(5), art. 2(6), p.4. Available at: http://www.legislation.gov.uk/uksi/2014/3209/pdfs/uksi_20143209_en.pdf.

[113] Natural Resources Canada, Extractive Sector Transparency Measures Act - Technical Reporting Specifications, s. 2.2.3 (Aug. 2015). Available at: http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/estma/Technical_Reporting_Specifications_EN.pdf.

The use of “interconnected” rather than “integrated” in the definition creates the possibility of divergent interpretations. The omission of “substantially similar terms” could lead to aggregation of payments that reduce the utility of disclosed revenue information. This could produce the same type of unwarranted aggregation that the Commission has found would prevent the disclosures from meeting some of Section 13(q)’s intended objectives.[114] Both sources of divergence could prevent the EU or Canada from certifying the US regime as equivalent for the purposes of alternate reporting.

In the absence of a requirement that multiple agreements only be treated as a project if they have substantially similar terms, a “project” could potentially include multiple agreements, each with a different structure (e.g., production sharing contract vs. tax/royalty concession vs. service contract) or different terms (e.g., different royalty or taxation rates, different requirements for local community or government funding). This would in turn make it difficult, if not impossible, to meet the objectives of the statute. Users would be unable to assess the “costs and benefits of particular licenses and leases” or to “monitor individual company’s contributions … and ensure firms are meeting their payment obligations.”[115]

For illustration purposes, imagine a scenario where three separate oil contracts, each with a duration of 20 years, that are entered into with a government over 10 years (one every 5 years, i.e. one in year 0, one in year 5 and one in year 10), are sufficiently “operationally and geographically interconnected” to qualify as a single project under the Commission’s proposed language. The contracts could be different types, for example:

- A concession (involving the payment of taxes and royalties to the government);
- A first production sharing contract (involving both a royalty – but at a different rate than the concession – and the split of production between the company and the government); and
- A second production sharing contract (involving no royalty and only a split of production between the company and the government).

Even if the country has taken the increasingly common step of publishing its contracts and production volumes, if the three contracts are treated as one “project” per the Commission’s proposed rule, a civil society group would not be able to effectively use project disclosures to achieve one of the objectives outlined by the Commission, namely to estimate whether the right amount of royalties have been paid. That is because the different royalty rates (as between the concession and the production sharing contract) could not be matched to the aggregated amount of royalties paid, for example in year 18 when

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[114] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,077. The Commission rejected the API definition of project due to its potential to lead to overly aggregated information, stating that as a result “local communities (and others assisting them) would be unable to” (i) "assess certain costs and benefits of particular licenses and leases to help ensure that the national government or the subnational government had not struck a corrupt or otherwise inappropriate arrangement", (ii) "meaningfully compare the revenues from the individual extraction efforts within the subnational jurisdiction to potentially verify that companies were paying a fair price for the concessions", (iii) "to monitor individual company’s contributions to the public finances and ensure firms are meeting their payment obligations.”
[115] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,067.

all contracts are valid, under all the contracts included in the "project". If these contracts were treated as different "projects" due to their different terms, however, a civil society group could look to match royalties paid for a particular project to the royalty rate set out in that project's underlying contract.

Furthermore, given the likelihood that government policy on revenue sharing may change during the timeframe assumed in the above example, it is feasible that the different contracts may differ in their requirements to pay revenues directly to local government or communities. One contract (or the law applicable at the time of entry into the contract) might not have any such requirement, while another contract may require a certain portion of royalties to be paid to a local fund or the local government, and a third contract may require payment at a different rate. Accordingly, by allowing the payments for all "operationally and geographically interconnected" contracts to be reported as one project, irrespective of the terms of such contracts, the Commission's proposal would deprive local community groups of the ability to use the disclosed information to ensure that the right amounts are being transferred to their communities under a particular contract that includes such a requirement.

Similarly, an "operationally and geographically interconnected" project could, in certain cases (for example, multiple offshore gas contracts all feeding into the same onshore LNG regasification terminal), implicate contracts involving different subnational jurisdictions with potentially different rules for subnational revenue sharing.[116]

> 27.3 Inclusion of "substantially similar terms" in the definition of "substantially interconnected agreements" will support the Federal Government's commitment to international transparency promotion efforts.

The EITI revised its standard in 2013 to require project level disclosure consistent with the EU law and Commission rule.[117] With no Commission rule in force, EITI implementing countries, including the United States, have struggled to implement project level reporting due to some participants claiming that consistency with the Commission rule and EU law could not be established. If the Commission adopts a definition of project that is consistent with the EU, which requires substantially similar terms for a "project" with multiple agreements, EITI implementing countries will be able to operationalize the EITI project reporting requirement. If the Commission were to adopt an approach to project level reporting that did not align with the EU, such as by leaving out "substantially similar terms" from the definition of "substantially interconnected agreements," it could reintroduce uncertainty and delay or prevent the adoption of a harmonized project-level reporting requirement in the over 40 countries now implementing the EITI. This would significantly undermine the statutory intent to support international transparency promotion efforts, by preventing or delaying project disclosures by private and other companies not already covered by the US, EU, ESTMA and Norwegian regimes. It would also introduce

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[116] In Indonesia, for example, there are different revenue sharing rules across provinces. Aceh and West Papua, for example, receive 70 percent of all oil revenues in their region while other local governments receive considerably less. See Natural Resource Governance Institute, NRGI Reader: Subnational Revenue Distribution (Mar. 2015), p.3. Available at: http://www.resourcegovernance.org/sites/default/files/nrgi_Subnational-Distribution.pdf.

[117] The EITI Standard Requirement 5.2.e (1 Jan. 2015), p.31. Available at: https://eiti.org/files/English_EITI_STANDARD.pdf.

new costs, and reduce comparability between extractives payment transparency mandates and initiatives around the world.

We recommend amending Item 2.01(c)(10) of Form SD as follows:

> (10) Project means operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government. Agreements **with substantially similar terms** that are both operationally and geographically ~~interconnected~~ **integrated** may be treated by the resource extraction issuer as a single project.

27.4 The Commission should make clear in the rule what constitutes "geographic integration"

It is important for the Commission to clearly and unambiguously define what it means for agreements to be operationally and geographically interconnected, and for them to have substantially similar terms.

The following examples from Canada illustrate projects that consist of multiple licenses but are geographically and operationally interconnected, with substantially similar terms.

- The Deep Panuke Project is a natural gas project located offshore in Nova Scotia. The project encompasses several different licenses: production licenses 2902 and 2901, significant discovery license 2255H and exploration licenses 2360 and 2387.118 Natural Gas produced by the Deep Panuke projects is processed offshore and transported via a subsea pipeline.119 Multiple wells are connected to a mobile offshore production unit. The project is underpinned by an Offshore Energy Agreement signed by Encana corporation and the Government of Nova Scotia. This agreement details payment liabilities for the Deep Panuke project.120 While the Deep Panuke project includes several different licenses, the project is governed by a single agreement with the Government of Nova Scotia. Thus the different licenses could properly be considered one project.
- The Highland Valley Copper Mine is composed of 1,125 leases, crown grants and minerals claims. Teck Resources has a 97.5% stake in the Highland Valley Copper Mine in British Columbia. In Canada, companies are required to pay an annual fee on leases, while crown grants require an annual tax (similar to an annual fee). The leases, crown grants and mineral claims underlay three open pits: Highmont, Valley and Lornex. The leases, crown grants and minerals

[118] See: Encana, Deep Panuke Offshore Gas Development - Development Plan (Nov. 2006). Available at: http://www.cnsopb.ns.ca/pdfs/DP_DPA_VOL2.pdf.
[119] See: http://www.encana.com/operations/canada/deep-panuke.html.
[120] See: Offshore Strategic Energy Agreement (22 June 2006). Available at: http://energy.novascotia.ca/sites/default/files/Offshore-Strategic-Energy-Agreement-June-22-2006.pdf.

claims that comprise the Highland Valley Copper Mine are geographically interconnected.121 The mines are operationally interconnected by shared operating facilities, including mills, concentrators and pipelines. The three open pit mines are based on leases, crown grants and mineral claims with the same terms. Thus these multiple agreements could be considered one project.

Based on these and other examples, we recommend that instead of a non-exclusive list of factors for issuers to consider in order to make the determination of whether agreements are "operationally and geographically interconnected", the Commission should be more clear in what would and would not be acceptable. Specifically, geographic interconnectedness should be demonstrated by whether agreements relate to the same resource and the same or contiguous part of a field, reservoir, mineral district, or mineral ore body. However, the term "other geographic area," which the Commission proposes to use in Instruction 12 to Item 2.01, is too imprecise to guide the aggregation of related agreements given that it could encompass geologic basins and formations, and the Commission has already rejected these as options for the definition of "project."122 Operational interconnectedness could be demonstrated by shared key personnel as proposed, but the Commission should clarify that these should be "operational level" personnel and not simply shared head office personnel. And "substantially similar terms" should be clarified to make clear that it refers to the payment and revenue-related provisions of the agreements.

We recommend amending proposed Instruction 12 to Item 2.01 as follows:

~~Interconnected~~ ***Integrated*** *Agreements*

(12) ~~The following is a non-exclusive list of factors to consider when determining whether agreements are~~ **Agreements are** ''operationally and geographically ~~interconnected~~ **integrated**" for purposes of the definition of ''project'' **if**: (a) ~~whether~~ the agreements relate to the same resource and the same or contiguous part of a field, **reservoir,** mineral district, or **mineral ore body** ~~other geographic area~~; (b) ~~whether~~ the agreements will be performed by shared key personnel **at the operational level** or with shared equipment; and (c) ~~whether~~ they are part of the same operating budget.

We also recommend amending the proposed Instructions to Item 2.01 by adding the following:

Agreements have "substantially similar terms" for purposes of the definition of "project" if they contain substantially similar terms with respect to fiscal provisions, revenues payable directly to local communities or subnational governments, and other payment related terms.

[121] Highland Valley Copper Mine Technical Report, Section 4-3, filed on SEDAR (8 Mar. 2013). Available at: http://sedar.com/GetFile.do?lang=EN&docClass=24&issuerNo=00001787&fileName=/csfsprod/data139/filings/02025655/00000001/C%3A%5CSEDAR%5CFILINGS%5CHVC13TR.pdf.

[122] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,076 FN 199.

28. Should we use another jurisdiction's definition of "project" or one suggested by commenters, such as API? If so, which definition and why?

The Commision's proposed definition of project is necessary and sufficient to meet the intent of the statute.

See our responses to Questions 24 and 25.

29. Would defining "project" in the manner we are proposing, or a similar manner, allow for comparability of data among issuers? How could the proposed rules be changed to improve such comparability?

The proposed "project" definition would allow for comparability of data.

Should the Commission adopt the proposed definition, and include the "substantially similar terms" requirements recommended above, this would produce comparable disclosures not only among US issuers, but also those in Canada, the EU, Norway, and ultimately the EITI.

See our responses to Questions 24 and 27.

30. Should we adopt the approach we took in the 2012 Rules and not define "project?" If so, please explain why.

The Commission should not take the approach from 2012 Rules and not define "project".

As we noted in previous comments, "project" must be defined.[123] See our response to Question 24.

F. Definition of "Foreign Government" and "Federal Government"

31. Should the definition of "foreign government" include a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as proposed? If not, why not? Should it include anything else?

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

[123] Comment submitted by PWYP-US (25 Feb. 2011), p.28. Available at: http://www.sec.gov/comments/s7-42-10/s74210-29.pdf. In order for Section 13(q) to (i) reflect congressional intent, (ii) produce meaningful project-level disclosures related to the site-specific financial flows affiliated with extractive industry activities, and (iii) ensure equal treatment of resource extraction issuers, the Commission must provide a clear definition of "project." A number of other commentators agree that a definition is needed, including Senator Levin, and several industry commentators.

This definition is in line with the statute and Congressional intent. As the Commission notes in the proposed rule release, this definition is also consistent with the EU Directives, the ESTMA, and the EITI.[124]

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

<u>We agree that the definition of "foreign government" should include "a company owned by a foreign government," and we urge the Commission to clarify that this includes companies in which the government has a controlling shareholding.</u>

We recommend a definition of "a company owned by a foreign government" that focuses on a controlling shareholding by the state, and not only a pure numerical majority of shares. The companies covered under the two definitions would overlap in most cases, but it is possible for the government to retain voting control over the company (including and especially via board appointments) even where it does not own a majority of all shares. In the oil sector, state-owned enterprises are commonly required by law to be controlled by the government via majority of voting stock. For example, the Brazilian government owns only 28.67% of all shares in the Brazilian oil giant Petrobras,[125] which would not qualify it as "a company owned by a foreign government" under the Commission's proposed definition. However, as explained by Petrobas, when it comes to voting shares: "The Brazilian federal government is required by law to own at least a majority of our voting stock and currently owns 50.26% of our common shares, which are our only voting shares. The Brazilian federal government does not have any different voting rights, but as long as it holds a majority of our voting stock, it will have the right to elect a majority of our directors, irrespective of the rights our minority shareholders may have to elect directors, set forth in our bylaws."[126]

In our view, a company should be treated as "owned by a foreign government" where the government has a controlling shareholding, enabling it to make the major decisions about the strategy and activities of the company.

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[124] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,078.
[125] Petrobras, 2014 20-F (April 2015). Available at: https://www.sec.gov/Archives/edgar/data/1119639/000129281415001242/pbraform20f_2014.htm#_Toc418234480.
[126] Ibid.

We recommend amending proposed Item 2.01(c)(7) of Form SD as follows:

> Foreign government means a foreign government, a department, agency, or instrumentality of a foreign government, or a company at least majority owned **(including with respect to voting shares)** by a foreign government. As used in this Item 2.01, foreign government includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.

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

No levels of subnational government should be excluded from the proposed definition of foreign government.

The subnational government levels proposed by the Commission satisfy the requirements of the statute and meet Congressional intent. For further discussion, see our response to Question 64 in our February 2011 submission.[127]

G. Disclosure Required and Form of Disclosure

G.1. Annual Report Requirements

35. Section 13(q) requires disclosure of the payment information in an annual report but does not specify the type of annual report. Should we require resource extraction issuers to provide the payment disclosure mandated under Section 13(q) on Form SD, as proposed? Should we require, or permit, resource extraction issuers to provide the payment information in an annual report on Forms 10-K, 20-F, or 40-F or on a different form? What would be the costs and benefits of each approach for users of the information or resource extraction issuers?

Consistent with the approach in the 2012 Rule, we agree with the Commission that resource extraction issuers should provide the required disclosure about payments on Form SD.

Given that Section 13(q) disclosures are filed, not furnished, as indicated in the proposed rule, maintaining the approach of requiring the disclosures in Form SD is satisfactory.

We suggest that Form SD disclosures for Section 13(q) be renamed to reflect the significant differences between these disclosures and those required by Section 13(p).

[127] Comment submitted by PWYP-US (25 Feb. 2011), p.54. Available at: http://www.sec.gov/comments/s7-42-10/s74210-29.pdf.

We suggest using the name Form PD to reference “payment disclosure”. This change would help address any confusion between these two very different statutes, as noted in our answer to Question 39.

36. Should the proposed disclosure be subject to the officer certifications required by Exchange Act Rules 13a-14 and 15d-14 or a similar requirement? Why or why not?

<u>The requirement that Section 13(q) submissions are filed provides sufficient assurance of their accuracy.</u>

The Commission recognized the importance of Section 13(q) disclosures to investors in the proposal by requiring the reports to be filed rather than furnished. Filed reports are subject to Section 18 of the Exchange Act, which supplies a private cause of action to investors who suffer injuries due to misstatements in public reports. We believe the proposed rule’s requirement that Section 13(q) disclosures are filed will provide sufficient assurances that the disclosures may be used reliably as the basis for investment analysis and the purposes of other users.

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

<u>Issuers should provide the required information for the fiscal year covered by the applicable annual report.</u>

It is reasonable to require resource extraction issuers to provide the mandated information for the fiscal year covered by the applicable annual report. Such an approach is consistent with our view that the mandated disclosures are akin to other material disclosures included in a resource extraction issuer’s annual report. It is true that other users of this information (i.e., non-investors) may have an interest in seeing such disclosures made with respect to a calendar year, so as to afford greater comparability of such disclosures, e.g. country EITI reports. However, we believe that these other users will generally be able to calculate calendar year figures using the electronic data tags required by Section 13(q)(2)(D)(ii), which should indicate the quarter to which any reported payments relate. Given the ability of users to use these tags to calculate calendar year figures, we see no reason to deviate from the standard practice of reporting on a fiscal year basis in the annual report. Many issuers subject to Section 13(q) have fiscal calendars that end on December 31. EITI reporting in many countries, including the US, requires disclosure on a calendar year basis.

Reporting based on a company’s fiscal year could reduce resource extraction issuers’ compliance costs when compared to a fixed, annual reporting requirement by allowing them to use their existing tracking and reporting systems for their public reports to also track and report payments under Section 13(q). It could also reduce compliance costs for issuers subject to ESTMA or the EU Directives, both of which require reporting based on the fiscal year, with ESTMA using the same deadline contained in the proposed rule.[128]

38. Should the filing deadline for Form SD be 150 days after the end of the most recent fiscal year as proposed? Should it be longer or shorter? Should issuers be able to apply for an extension on a case-by-case basis? Or should there be a provision for an automatic extension with or without a showing of cause? Should we amend Exchange Act Rule 12b-25 240 to allow it to be used for an extension for Form SD filings?

The filing deadline of Section 13(q) disclosures as proposed is satisfactory, and the reports should be treated like other filings under Sections 13 and 15(d) of the Securities Exchange Act of 1934, including the application of Exchange Act Rule 12b-25.

The disclosures related to Section 13(q) involve factual and routine data that should be collectable in a timely manner without unreasonable effort or expense. They should be treated like any other disclosure covered by Sections 13 and 15(d) of the Exchange Act, including the application of Exchange Act Rule 12b-25. Further, the registrant should make representations in the Form 12b-25 regarding any delay in filing and file the delayed information in the prescribed time period, as required by 17 CFR 240.12b-25 (a)(2)(i) and (ii). We suggest extensions for Section 13(q)-related Form SD disclosures should be limited to 15 days, as is the case with 10-K extensions.

The Commission's proposed approach is in line with approaches taken in other jurisdictions. Canada's ESTMA requires that extractive payment reports are filed no later than 150 days after the end of each of its financial years.[129] Through the Reports on Payments to Governments Regulations 2014 law, which transposes the 2013 EU Transparency Directives in the United Kingdom, the Financial Conduct Authority ("FCA"), the UK listing authority requires UK-listed issuers to prepare a report annually on payments to governments for each financial year, at the latest six months after the end of each financial year.[130]

39. Should the proposed rules provide an accommodation to filers that are subject to both Rules 13p-1 and 13q-1, such as an alternative filing deadline, to minimize the possibility that a resource

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[128] Extractive Sector Transparency Measures Act (22 Dec. 2015), Section 9(1), p.5. Available at: http://laws-lois.justice.gc.ca/PDF/E-22.7.pdf. ("Every entity must, not later than 150 days after the end of each of its financial years, provide the Minister with a report that discloses, in accordance with this section, the payments that it has made during that year."); Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Article 43(2). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF. ("The report shall disclose the following information . . . in respect of the relevant financial year."); Directive 2013/50/EU of the European Parliament and of the Council (22 Oct. 2013), Article 6. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0050&from=EN. ("The report shall be made public at the latest six months after the end of each financial year . . .")

[129] Extractive Sector Transparency Measures Act. (22 Dec. 2015), Section 9(1) p.5. Available at: http://laws-lois.justice.gc.ca/PDF/E-22.7.pdf. ("Every entity must, not later than 150 days after the end of each of its financial years, provide the Minister with a report that discloses, in accordance with this section, the payments that it has made during that year.")

[130] See: FCA rules, 4.3A.5-6, https://www.handbook.fca.org.uk/handbook/DTR/4/3A.html.

extraction issuer would be required to file two Form SD filings in the same year? If so, how should that deadline be structured?

No accommodations are necessary with respect to filers that are subject to both Rules 13(p) and 13(q).

The mechanism and purpose of reporting for Rules 13(p) and 13(q) are very different. Furthermore, the overlap between filers is not likely to be significant and therefore does not merit special considerations. See our response to Question 35.

G.2. Public Filing

40. Should the rules permit an issuer to submit the required payment disclosure on a confidential basis? Why or why not?

No. The rules should not permit an issuer to submit the information on a confidential basis.

Confidential submissions would deprive investors, communities, and issuers alike of the benefits Congress intended[131] and increase compliance burdens on cross-listed issuers. We therefore agree with the Commission's proposal for public, company-by-company disclosure by project. Overwhelming evidence in the record supports the Commission's proposal.[132] Specifically:

- Confidential submissions would conflict with the clear request for public reporting by investors currently managing over $9 trillion in assets, including, for example, the largest public pension fund in the US, and the world's largest private wealth manager.[133]

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[131] See e.g. floor statement by Senator Lugar. 156 Cong. Rec. S3816 (17 May 2010). ("[I]t would help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas and mineral resources and revenues."); Comment submitted by Senator Cardin et al. (1 Mar. 2011), p.2. Available at: http://www.sec.gov/comments/s7-42-10/s74210-42.pdf. ("Section 1504 requires companies to report the information in an interactive format so that the information is readily usable by investors and the public - the basic intent of the section. Section 1504 also suggests that if practicable, the SEC can make a compilation of all the data available to investors and the public for ease of use. This compilation would be in addition to the public availability of the original company data and in no way is expected to replace the public availability of that data."); Comment submitted by Rep. Maxine Waters, et al. (11 June 2014). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-50.pdf. ("The existing rulemaking record should provide the necessary basis to swiftly schedule a new rulemaking and to reissue a rule mandating public disclosure by company and by project with no exemptions. Anything less would undermine the intended purpose and benefits of Section 1504 for investors, companies, governments and their citizens.")

[132] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,080 FN 241. See e.g. Comment submitted by Robert F. Conrad (17 July 2015); Comment submitted by Joseph Kraus, The ONE Campaign (6 Nov. 2015); Comment submitted by Ali Neema, Iraqi Transparency Alliance for Extractive Industries (28 Sept. 2015); Comment submitted by Cecilia Mattia, National Advocacy Coalition on Extractives in Sierra Leone (10 Feb. 2015); Comment submitted by Cameroon Coalition of Publish What You Pay (8 June 2015); Comment submitted by Anupama Jha, former executive director Transparency International India (15 June 2015); Comment submitted by Gilbert Makore, Publish What You Pay - Zimbabwe (20 Feb. 2015); Comment submitted by Elias Isaac, Open Society Institute for Southern Africa-Angola (29 Jan. 2015).

[133] See Appendix B.

- Confidential submission of payments by covered issuers would negate the international transparency promotion efforts intended by Congress, and would fail to advance US policy interests made clear in letters from the Department of State,[134] Department of Interior,[135] and USAID.[136] These letters demonstrate that US policy interests are underpinned by public access to company-specific, project-level data.
- Confidential submissions would conflict with reporting in other markets, which require public, company-by-company reporting at the project level.[137] A number of covered issuers such as BHP Billiton,[138] Chevron,[139] ExxonMobil,[140] Total,[141] Eni SpA,[142] and Rio Tinto[143] have called on the

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[134] Comment submitted by US Department of State (13 Nov. 2015). Available at: https://www.sec.gov/comments/s7-25-15/s72515-1.pdf; Comment submitted by US Department of State (21 Jan 2016) Available at: https://www.sec.gov/comments/s7-25-15/s72515-13.pdf.

[135] Comment submitted by US Department of Interior (6 Nov. 2015). Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-96.pdf.

[136] Comment submitted by US Agency for International Development (15 July 2011). Available at: http://www.sec.gov/comments/s7-42-10/s74210-101.pdf.

[137] Comment submitted by PWYP (12 Nov. 2015). Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-100.pdf.

[138] Comment submitted by BHP Billiton (25 Jan. 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-9.pdf ("A globally consistent mandatory framework will create a level playing field amongst the resource sector while minimizing the reporting burden and compliance costs for companies operating in multiple jurisdictions and ensuring stakeholders are able to access and analyze uniform data.")

[139] Comment submitted by Chevron Corporation (7 May 2014). Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-40.pdf ("We believe 'equivalency' between the EU and U.S. reporting regimes is critical as the EU Member States move to implement the transparency reporting Directives. No one benefits from an outcome in which multinational resource companies are required to file multiple reports in multiple jurisdictions, providing substantially the same information in different forms.")

[140] Comment submitted by Royal Dutch Shell plc and ExxonMobil Corporation (1 May 2014). Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-37.pdf ("Equivalency, we believe, is critical as the EU member states move to implement the transparency reporting directives. No one benefits from an outcome under which multinational resource companies are required to file multiple reports in multiple jurisdictions providing substantially the same information in different forms.").

[141] Comment submitted by Total (13 Jan. 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-14.pdf. ("Total believes equivalency recognition should help global transparency initiatives evolve toward a common standard, thereby improving the quality and comparability of information. It encourages foreign jurisdictions that have not yet adopted resource extraction payment disclosure laws to provide a level of disclosure that is consistent with U.S. and EU rules.").

[142] Comment submitted by Eni SpA (31 Jan. 2016). Available at: https://www.sec.gov/comments/s7-25-15/s72515-12.pdf. ("While we are currently working to implement the EU Directives regarding 2016 payments, asymmetry remains between companies that are subject to reporting obligations and companies that are immune. We therefore welcome the new Rule proposed by the SEC in the USA, as it goes in the direction of levelling the field in the industry and addresses the issue of multiple reporting obligations and the associated compliance costs.").

[143] Comment submitted by Rio Tinto (19 July 2011). Available at: http://www.sec.gov/comments/s7-42-10/s74210-102.pdf. ("[T]he regulatory burden on extractive industry companies, and the risk of competitive disadvantage based on country of listing, would both be minimized if regulators adopted a common disclosure standard. The converging timelines of the SEC rule making process and the work of the European Commission in developing a directive on revenue transparency provides an excellent opportunity for the US and European regulators to meet to discuss the development of such a common disclosure standard."); See also Rio Tinto, Taxes Paid Report 2014,

Commission to ensure its rules are equivalent with the EU, citing, inter alia, the need to reduce costs and ensure a level playing field.

- Confidential submissions would prevent issuers from communicating the economic contributions of their operations with respect to each project.[144]
- Confidential submission would stymie the ability of local communities and governments to use disclosure to combat corruption.[145]

We therefore disagree fundamentally with the proposal set forth in industry comments that Section 13(q) reports on Form SD should be considered "confidential" filings.[146] Investors and citizens of resource-rich countries will only receive the benefits that Congress intended if issuers file company-specific payment publicly. Moreover, industry critics have not articulated any use the Commission itself would have for confidentially filed disclosures, further reinforcing the conclusion that there is no reasoned basis for adopting such an approach.[147] See also our response to Question 78.

Like the 2012 Rule and this proposed rule, Canada's ESTMA, the EU Directives, and the EITI Standard require publicly available company-specific data on payments to governments. The Commission would undermine global momentum in extractive industries transparency and violate Section 13(q)'s mandate to support the Federal Government's commitment to international transparency efforts if it allowed anonymous reporting.

41. Should the rules provide an exemption from public disclosure for existing or future agreements that contain confidentiality provisions? Would such an exemption be consistent with the purpose of Section 13(q) or would it frustrate it? Would it be necessary or appropriate in the public interest and consistent with the protection of investors?

No. We support the Commission's proposal that the rules should not include any exemption for existing or future agreements that contain confidentiality provisions, and also believe that issuers should not be able to obtain case-by-case exemptions for contractual provisions.

As we have noted previously, it is standard industry practice to draft contracts allowing for disclosure of otherwise confidential information when required by the relevant regulatory authorities.[148] This is well documented in the record. In a review of its database of more than 800 contracts from 73 countries, the

p.6. Available at: http://www.riotinto.com/documents/RT_taxes_paid_in_2014.pdf ("We [ ] believe governments should work together to adopt a consistent global approach….")

[144] Comment submitted by PWYP-US (14 Mar. 2014), pp.14-15, 23 and FN 131, FN 133. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.

[145] Comment submitted by PWYP-US (14 Mar. 2014), pp.22-23, 29-30. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.

[146] Comment submitted by American Petroleum Institute (7 Nov. 2013), p.4. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf.

[147] Comment submitted by Global Witness (18 Dec. 2013), pp.7-8. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf.

[148] Comment submitted by PWYP-US (14 Mar. 2014), pp.31-32 FN 175,176. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.

energy consultancy OpenOil found that “[m]ost contracts in the database explicitly allow for disclosure when required by law. This represents standard industry practice, as evidenced by the model confidentiality agreement form produced by AIPN [Association of International Petroleum Negotiators].” They also found that “[n]egotiations are conducted, and contracts signed, based on an understanding of the need to comply with state and market regulations, even as these change over the lifetime of a project. The regulations currently under consideration should not therefore be considered as an unusual or unreasonable burden,” and conclude that “[t]he existence of confidentiality exemptions in so many contracts demonstrates that developing disclosure requirements have already been anticipated during negotiation processes. In our view, the inclusion of compliance related confidentiality exemptions is already standard industry practice.The effect of weakening disclosure regulations would be to reward those few companies who have failed to make allowance for possible compliance regulations, at the expense of the majority who have taken their potential legal obligations into consideration.”[149]

Even if the disclosures required by Section 13(q) were subject to confidentiality requirements – which we believe to be rare if not unheard of – it would be inappropriate for the Commission to grant an exemption to an issuer that had neglected to follow standard industry practice to ensure that it could comply with regulatory requirements. Given this long-standing and widespread industry practice, to the extent that issuers face conflicting obligations as a result of Section 13(q), it is they who placed themselves in that position. This is precisely how the Commission characterized the behavior of five accounting firms that were recently sanctioned for failing to disclose audit documents.[150] In the context of Section 13(q), an issuer that fails to negotiate an adequate contractual carve-out from confidentiality or obtain other approval from a foreign government to make legally mandatory disclosures is behaving similarly irresponsibly as the audit firms. It has entered into a business arrangement despite knowing it may not be able to comply with all legal disclosure requirements that might apply to it, simply assuming that the political, administrative, and judicial authorities will accommodate its negligence or worse, bad faith. As noted above, a company facing conflicting disclosure requirements would be protected pursuant to the AIPN model agreement. The Commission should neither reward nor encourage companies that actively choose to depart from this long-standing standard industry practice in contract negotiations.[151] As the Commission noted in its decision to sanction the audit firms, “Such behavior does not demonstrate good faith, indeed, quite the opposite – it demonstrates gall.”[152]

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[149] Comment submitted by OpenOil (26 Oct. 2015), pp.2-4; Comment submitted by AIPN Model Form Confidentiality Agreement, attached as Exhibit A to the Comment submitted by Oxfam (20 March 2012); Comment submitted by Susan Maples, Vale Columbia Center for Sustainable Investment, Columbia University Law School (2 Mar. 2011); See also Peter Rosenblum and Susan Maples, Contracts Confidential: Ending Secret Deals in the Extractive Industries (14 Sept. 2009), p.27. Available at: http://www.revenuewatch.org/publications/contracts-confidential-endingsecret-deals-extractive-industries.

[150] SEC, *In the Matter of BDO China Dahua CPA Co., Ltd. et al.*, Initial Decision Release No. 553 at 105 (S.E.C. 22 January 2014). (Rejecting the firms' arguments that disclosure would subject them to potential penalties under Chinese law, the Commission sanctioned them in part because “to the extent Respondents found themselves between a rock and a hard place, it is because they wanted to be there.”)

[151] Because this practice long predates the enactment of Section 1504, companies should not be entitled to any sort of grandfathered exemption with respect to contracts that fail to include this provision.

[152] *BDO China Dahua*, p.105.

See our response to Question 45 for proposed regulatory language.

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

No. The rules should not provide an exemption for these concerns, which are unwarranted.

In the five years since the law was passed, no credible evidence or concrete examples have been provided to support these concerns, despite the increasing numbers of companies that are reporting at the project level.[153] Our previous submissions[154] and submissions to the Commission from labor unions representing employees who are allegedly being put at risk, have firmly rebutted these claims and confirmed precisely the opposite. For example:

United Steelworkers ("USW"), the principal labor union representing oil and gas industry and mine workers in North America, states: "Industry commentators have raised concerns that revenue transparency as proposed in the [2012] rule could jeopardize employee safety. We believe that enhanced transparency would in fact enhance employee safety." In response to concerns that project level information "could be used by groups or individuals to destabilize a country's economy and in the process put workers at the production site at risk," USW states that they "believe that this concern is overstated," that this "information is reported on in local, national and international media," and in any case "terrorists would not need to rely on SEC filings to identify these locations." USW instead finds that:

> "[S]ecrecy surrounding flows of resources from companies to governments at the project level contributes to an environment where disputes can thrive. In the case of resource extraction projects, these disputes can turn violent, thereby destabilizing investments to the detriment of workers and shareholders," and that "project level disclosure is in fact critical for workers and their communities to achieve benefits from investment transparency."[155]

Similarly, oil and gas labor unions in Nigeria, a country well known for high levels of conflict and insecurity around oil and gas operations, have confirmed the sentiments of USW in formal submissions supporting Section 13(q) and public, company-specific, project-level disclosure. The Nigeria Union of Petroleum and Natural Gas Workers ("NUPENG"), which represents thousands of workers in prospecting, drilling, distribution and marketing of oil and gas operations, "strongly disagree[s]" with industry commentators that revenue transparency would jeopardize employee safety. They instead "believe that enhanced transparency will in fact enhance employee safety, especially in volatile places

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[153] Comment submitted by PWYP-US (25 Feb. 2011), pp.38-39 and 50. Available at: http://www.sec.gov/comments/s7-42-10/s74210-29.pdf. (Response to Questions 44 and 58); Comment submitted by PWYP-US (14 Mar. 2014), pp.25-27. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.

[154] Ibid.

[155] Comment submitted by United Steelworkers (29 Mar. 2011), p.3. Available at: http://www.sec.gov/comments/s7-42-10/s74210-78.pdf.

like Nigeria's Niger Delta." NUPENG cites concrete benefits of project-level payment disclosure, including that it "will help to create incentives for investment that benefits communities alleviating much of the violence in the volatile Niger Delta and improving the safety of [NUPENG] members."[156]

The Petroleum & Natural Gas Senior Staff Association of Nigeria (PENGASSAN), representing over 20,000 senior and middle management employees in a variety of oil and gas companies throughout Nigeria, including Chevron Nigeria Limited, and Shell Nigeria Limited, has also echoed NUPENG's statements in comments to the Commission.[157]

43. Are there any other circumstances in which we should provide an exemption from the public disclosure requirement? For instance, should we provide an exemption for competitively sensitive information, or when disclosure would cause a resource extraction issuer to breach a contractual obligation?

No. There is no evidence to support blanket exemptions of any kind, and we oppose exemptions based on purported competitively sensitive information.

No evidence has been submitted to substantiate the range of alleged competitive harms that some commentators have used to argue that the Commission should provide an exemption for competitively sensitive information. On the contrary, there is compelling evidence that these concerns are entirely unfounded.[158]

We thus agree with the Commission's proposal not to allow blanket exemptions of any kind.

Moreover, proponents of exemptions based on the commercial sensitivity of required disclosures have not provided sufficient justification for the availability of case-by-case exemptive relief, either.

Section 13(q) disclosures could constitute competitively sensitive information that justifies an exemption only if both of the following assumptions were true: 1) Section 13(q) leads to the disclosure of commercially sensitive or confidential information unavailable to competitors from any other source; ***and*** 2) the competitive environment is such that the use of this data would be determinative in providing competitors with an advantage.

In fact, neither assumption is true. The record makes clear that that the rule as proposed would not require the disclosure of competitively sensitive information. As Professor Robert Conrad, an economist with expertise in natural resource economics, pointed out, "No contractual relationships with downstream processors are disclosed, the contribution of the project to the overall profitability of the reporting issuer is not disclosed, trade secrets are not disclosed, and techniques related to intellectual

[156] Comment submitted by NUPENG (8 July 2011). Available at: http://www.sec.gov/comments/s7-42-10/s74210-97.pdf.

[157] Comment submitted by PENGASSAN (27 June 2011). Available at: http://www.sec.gov/comments/s7-42-10/s74210-93.pdf.

[158] See e.g. Comment submitted by Robert F. Conrad (17 July 2015). Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-81.pdf.

property are not disclosed."[159] Claims to the contrary rely on assumptions regarding the competitive environment that are not borne out in fact. These include the assumptions that: 1) payment transparency is a decisive factor in competitive bidding processes with host states to access resources; 2) project payment disclosure can be used by competitors to reverse-engineer commercial terms and succeed in future bids; 3) competitors – including state-owned firms – have no other way to access payment data; 4) payment transparency will be decisive in issuers losing bids when competing against state-owned firms; and 5) governments consider payment information commercially sensitive and will overlook competitive bids by covered issuers in order to avoid payment disclosure.

The record shows that:

- Deal negotiations between issuers and host states involve a range of highly complex factors, and neither payment transparency nor confidentiality of payments is a decisive factor in determining an issuer's success in bargaining and winning bids with host governments.[160]
- Project payment disclosures cannot yield information to allow companies to reverse-engineer an issuer's return on investment or contract terms.
- Competitors have other, more timely ways of accessing this information that don't require them to wait for Section 13(q) disclosures.
- Disclosure of payment information is not a decisive factor in losing bids when competing with state-owned companies.
- There is no evidence that governments consider payment information "commercially sensitive" and would overlook competitive bids by covered issuers to avoid payment disclosure.[161]

See our response to Question 45 for proposed regulatory language.

44. If issuers are permitted to provide certain information on a confidential basis, should such issuers also be required to publicly file certain aggregate information? Should the Commission consider such an approach? What would be the costs and benefits of this approach?

<u>No. Issuers should not be permitted to provide information on a confidential basis.</u>

See our response to Question 40.

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[159] Ibid. See also Comment submitted by Oxfam America (21 Feb. 2011) Available at: https://www.sec.gov/comments/s7-42-10/s74210-24.pdf; Comment submitted by PWYP-US (25 Feb. 2011) ("It does not require issuers to reveal any contract terms aside from the payment price to a government. Section 13(q) will not require issuers to reveal contemplated transactions, business models, proprietary technology, or confidential communications.")
[160] Comment submitted by PWYP-US (14 Mar. 2014), pp.35-37. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.
[161] Ibid., pp.40-41.

G.3. Exemption from Compliance

45. As noted above, we will consider using our existing exemptive authority, where appropriate, to exempt issuers from the resource payment disclosure requirements. This could include, for example, situations where host country laws prohibit the disclosure called for by the rules. Is a case-by-case exemptive process a better alternative than providing a rule-based blanket exemption for specific countries or other circumstances, or providing no exemptions?

No exemptions are necessary at all, and a case-by-case exemptive process would be acceptable only if it provides for transparency and requires adequate supporting documentation.

We continue to believe that, as explained in our answers to Questions 41, 42, and 43, and consistent with the Commission's approach in the 2012 Rule, there is no need to provide for exemptions of any kind.

Our response to this Question will focus on the scenario in which an issuer claims an exemption on the basis of a purported foreign law that prohibits disclosure called for by Section 13(q). As detailed further in response to Question 47, there are no countries that prohibit these disclosures, in law or in fact.

If the Commission were nonetheless to provide for a rule-based blanket exemption for disclosure of certain payments out of the belief that some countries forbid disclosures, it could have a number of serious, negative consequences, including:

- Creating an incentive to engage in secretive and corrupt payments that would be available only to non-listed and US-listed companies but not to those listed on European or Canadian exchanges. One of the goals of Section 13(q) is to deter corrupt natural resource deals that harm communities and threaten investors alike, and foreign law-based exemption would have the opposite effect, essentially creating a carve-out for US-listed companies to more easily engage in the very type of transactions with corrupt governments that the statute attempts to address. Commentators arguing for exemptions insist that these exemptions are necessary to preserve their competitive edge against non-listed companies, but this appeal to the Commission's statutory mandate to avoid anti-competitive regulatory action is misplaced. Such exemptions are not required, and it would not be appropriate for the Commission – the same agency that that has championed the use of the FCPA to combat bribery and corruption – to promote competitiveness by providing more opportunities for corruption.
- Reducing transparency, contrary to congressional intent, in the countries where it is most needed– i.e. in countries whose government officials would prefer to keep financial transactions secret in order to divert funds for corrupt purposes.[162] As has been well documented,[163] this

[162] See e.g. Comment submitted by Senator Cardin et al., (1 Mar. 2011) p.2. Available at: http://www.sec.gov/comments/s7-42-10/s74210-42.pdf ("With regard to potential host government restrictions on disclosure, the statute makes clear that the intent is to make this information available from all countries, and this is particularly relevant in countries where governments may purposefully seek to keep this information hidden.")

corruption can lead to frictions between communities, companies, and governments and place in question a company's license to operate. It can also lead to instability, conflict, and even civil war, which can jeopardize a company's assets and harm investors. Allowing reporting exemptions for these countries would also undermine the ability of citizens to promote responsible resource revenue management and government accountability.

- Creating an incentive for secretive governments to pass new laws prohibiting disclosures, which would frustrate the intentions of Congress to support the Federal Government's international transparency promotion efforts.[164] As Senator Cardin warned, this could "create a dangerous precedent, by making the US lawmaking process subservient to governments around the world, including dictators who do not share our commitment to transparency, good governance, and the rule of law."[165]
- Creating a gap between the European/Canadian regulatory schemes and the US that would risk the Commission subjecting cross-listed issuers to different requirements than those listed only in the United States, thereby creating tension with foreign regulatory approaches.
- Allowing companies to irresponsibly enter into business arrangements despite knowing they may not be able to comply with all relevant legal disclosure requirements, in the knowledge that they will be exempt from their compliance obligations. This would contrast with the Commission's approach to the Big Four accounting firms, which objected to turning over audit work papers from their affiliates in China because of their interpretation of Chinese state secrecy laws. The firms had registered in the US, knowing full well that they might not be able to comply with US law if called upon to do so, assuming that the US and China would work out any regulatory differences and counting on the Commission to relieve them of the burdens of compliance if necessary. An administrative law judge found that the firms could not choose to flout US law indefinitely in order to benefit from doing business in China.[166] Rather than backing

[163] See e.g. Comment submitted by Senator Cardin et. al. (31 Jan. 2012), p.2. Available at: http://www.sec.gov/comments/s7-42-10/s74210-122.pdf; Comment submitted by Mesa de la Sociedad Civil para la Transparencia en las Industrias Extractivas (13 Nov. 2015), p.6. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-99.pdf.

[164] See e.g. Comment submitted by Senator Cardin et al. (1 Mar. 2011), p.2. Available at: http://www.sec.gov/comments/s7-42-10/s74210-42.pdf. ("We know of no foreign law that specifically prohibits disclosure of payment information. However, we do know that if an exemption is granted, many countries would exploit such an exemption and enact such prohibitions against disclosure in order to circumvent Section 1504. Therefore, granting an exception for host-country laws would be contrary to the spirit and intent" of 1504); Comment submitted by Senator Levin (1 Feb. 2011), p.4. Available at: http://www.sec.gov/comments/s7-42-10/s74210-19.pdf. ("Exemptions for companies where laws in the host-country prohibit required reporting would contradict the purpose of the legislation and create a clear incentive for those countries, who want to prevent transparency, to pass laws against disclosure. In fact, it is precisely those jurisdictions for which investors and the public need additional transparency."); Comment submitted by Senator Cardin et. al. (31 Jan. 2012), p.2. Available at: http://www.sec.gov/comments/s7-42-10/s74210-122.pdf. (warning that "any exemptions, including exceptions for conflicting host country laws" would "encourage other countries to enact laws reducing transparency and start a 'race to the bottom'")

[165] Comment submitted by Senator Cardin et. al. (31 Jan. 2012), p.2. Available at: http://www.sec.gov/comments/s7-42-10/s74210-122.pdf.

[166] See *In the Matter of BDO China Dahua CPA Co. Ltd. et al.*, SEC Initial Decision Rel. No. 553 at 105 (Jan. 22, 2014).

down in the face of US auditing firms' insistence that the Commission's actions would exclude American firms from Chinese markets and lead to a mass delisting of Chinese companies from US exchanges, the Commission and the PCAOB negotiated with Chinese securities regulators to ensure access to the types of papers in question in the future,[167] and deferred prosecution of the auditing firms in exchange for a fine and a promise to provide access to the papers over time.[168]

- Undermining the EITI and the regulatory approaches chosen by the European Union, Canada, and Norway, which do not allow such exemptions, thereby countermanding Congress's requirement that the rules implementing Section 13(q) should promote US international transparency efforts.

If, however, the Commission does believe that it is necessary to allow for the possibility of exemptions, then a case-by-case process is more appropriate than a rule-based blanket exemption. The Commission is accustomed to considering requests for reporting exemptions under its existing authority, which works well for unusual and uncommon circumstances, such as the hypothetical case of foreign disclosure prohibitions. Moreover, as explained in the proposed rule release, a case-by-case approach would enable the Commission to examine evidence and appropriately tailor any exemption that might be granted.

The Commission should provide criteria for applying for such exemptions, including certain circumstances that would render an issuer ineligible for exemptive relief, even where they can demonstrate the existence of a disclosure prohibition law. The Commission should make clear that: 1) foreign rules or laws that were established in order to frustrate US transparency interests do not merit exemptions and thus exemptive relief will not be available based on foreign laws passed after the enactment of Section 13(q); and 2) an issuer must first try to obtain permission from the relevant foreign government to disclose any prohibited information before applying for an exemption. Companies can – and do – secure permission to comply with the laws of their regulators, for example, by including carve-out terms in their contracts[169] or by requesting authorization from the host government. The Commission should not create a moral hazard by guaranteeing an exemption to issuers that have created their own problem by neglecting to include appropriate clauses in their

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[167] See e.g. Julia Irvine, *US Signs Deal with China over Audit Papers*, ECONOMIA (24 May 2013). Available at*:* http://economia.icaew.com/news/may-2013/us-signs-deal-with-china-over-audit-papers.

[168] SEC, Press Release, *SEC Imposes Sanctions Against China-Based Members of Big Four Accounting Networks for Refusing to Produce Documents* (6 Feb. 2015).

[169] Comment submitted by PWYP-US (14 Mar. 2014), pp.31-32. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf; Comment submitted by Global Witness (18 Dec. 2013) pp.10-14, 17. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf; Peter Rosenblum & Susan Maples, Contracts Confidential: Ending Secret Deals in the Extractive Industries (2009).

contracts, contrary to established industry practice, or failing to make adequate efforts to obtain authorization to disclose.[170]

Any case-by-case exemptive relief based on a foreign law prohibition must be strictly limited in duration. The Commission should limit any exemption granted to a specified number of reporting cycles, after which it will automatically expire, unless the issuer reapplies to extend it. Otherwise, the effect could be to grant an issuer perpetual permission to flaunt US disclosure laws and deprive investors and communities of the information that was the object of Section 13(q). Time-bound exemptive relief would provide protection for a company only as long as absolutely necessary, during which the company could continue its efforts to obtain permission from the host government.[171]

Likewise, any exemption must be narrowly tailored to cover only the specific information that an issuer proves is expressly prohibited, and for which disclosure is clearly punishable, under the relevant foreign law. Some issuers have claimed previously that China prohibits disclosure of natural resource payments. This assertion is untrue (see response to Question 47), and even the legal opinion that Shell offered to support its assertion only claimed that *some* of the payment information required under Section 13(q) might be considered secret under Chinese law.[172] Thus, at most, only a narrowly tailored exemption covering the specific payment information expressly prohibited by law would be appropriate. Where an issuer requests unnecessarily broad relief based on a narrow prohibition, the Commission should exercise its authority to grant an exemption that is appropriately tailored to exclude all unwarranted relief.

If the Commission were to offer a blanket exemption for disclosure prohibition laws, by contrast, it would not be possible to tailor its response in these ways.[173]

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[170] In his decision in the Big Four case, Judge Cameron commented that a decision by a company to knowingly build up its business in a country whose laws do not permit it to comply with US securities laws, relying on an assumption that the Commission will exempt it from compliance, demonstrates "gall" and not good faith. *BDO Dahua*, Initial Decision Rel. No. 553 at 105.

[171] The Commission rightfully recognized that a blanket exemption "would remove any incentive for issuers to diligently negotiate with host countries for permission to make the required disclosures." SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,097.

[172] Comment submitted by Royal Dutch Shell plc (17 May 2011), App. C. Available at: https://www.sec.gov/comments/s7-42-10/s74210-90.pdf.

[173] We note that the Commission has adopted a more generalized approach to confidentiality in the context of reporting on petroleum reserves. However, a tailored, case-based approach would be more appropriate for Section 13(q) for a number of reasons. First, there is no reliable evidence that any foreign disclosure prohibitions actually exist; thus the Commission would be rewarding only countries that enacted such prohibitions in the future in order to block the effect of its regulations. By contrast, it is likely that countries already consider their oil reserves to be confidential, and that they prohibited the disclosure of such information prior to the Commission's rules on that subject. Second, Congress clearly directed the Commission to adopt rules to implement Section 13(q) in order to shine a light on deals taking place in precisely the countries that would be most likely to adopt blocking legislation; the reserve reporting rules, by contrast, exist for the more general purpose of assessing companies' long-term economic prospects.

If the Commission adopts a case-by-case approach, all applications for exemptions based on alleged foreign law prohibitions must be made public and subject to public comments, as the Commission suggests in its proposed rule release. This would allow interested members of the public to explain whether the exemption is "necessary or appropriate in the public interest, and is consistent with the protection of investors."[174] Although Exchange Act Rule 0-12 provides an appropriate framework, the Commission should specify that applications for exemptive relief under Section 13(q) are subject to mandatory publication and a public comment period; these procedural safeguards should not be merely discretionary, as provided in Rule 0-12(g).[175]

As detailed immediately below, we urge the Commission to incorporate into the final rule a list of required documents and supporting evidence that must accompany an application before it will be considered.

We recommend amending proposed § 240.13q-1 by adding the following:

(d) Applications for Exemptions. All requests for exemptions from any of the disclosure requirements in this section must be made pursuant to the procedures set forth in Exchange Act Rule 0-12. The Commission will publish any such application in the Federal Register and provide opportunity for members of the public to comment, pursuant to § 240.0-12(g). Any application for exemptive relief must be based on the existence of a foreign legal provision enacted or adopted after July 21, 2010. Any such application must be accompanied by sufficient supporting information pursuant to § 240.0-12(a), including but not limited to:

(1) the text of the foreign law and/or regulations, along with an English translation if necessary, including date of enactment or adoption;

(2) an opinion of qualified counsel identifying a clear conflict with the disclosure requirements of this section;

(3) a description of the penalties or sanctions for violating the foreign legal provision, including information about whether the prohibition has been enforced in the past; and

(4) a description of all steps the issuer has taken to secure permission from the foreign government authority to comply with this section, and the outcomes of any such steps.

174 See 15 U.S.C. 78m(a)(1).
175 See 17 C.F.R. 240.0-12(g).

46. What are the advantages and disadvantages, if any, of relying on our existing exemptive authority under the Exchange Act?

<u>While no exemptions are necessary at all, if the Commission does provide for exemptions it should use its existing, *case-by-case* exemptive authority.</u>

As explained in detail in our response to Question 45, if the Commission does provide for the possibility of foreign law-based or any other exemptions, then its existing case-by-case exemptive authority is both an appropriate and adequate means of considering requests for exemptions because it allows the Commission to respond flexibly and in a narrowly tailored fashion, provides for public process and transparency, and takes into account the interests of the public in granting or denying an exemption.

However, we strongly urge the Commission to subject the process to the additional caveats described above in response to Question 45 in order to prevent the process from being used to hide uncomfortable information or to gain a strategic advantage in transparency-averse countries. We note that while certain issuers previously advised the Commission that four countries legally prohibit disclosure of resource extraction payments, they may already have abandoned their claims about Angola and Cameroon.[176] As is explained further in response to Question 47, there is no credible evidence to support industry's claims regarding reporting prohibitions in these countries. Since the publication of the Commission's 2012 Rule, additional developments have occurred that further undermine the industry's baseless claims. In particular, Cameroon became an EITI-compliant country in October 2013,[177] and therefore must require, rather than prohibit, disclosure of resource extraction payments. In 2015, the Norwegian oil giant Statoil published its project-level payments to the Angolan government in its report to the Norwegian government without ill effect.[178]

These developments, which confirm the evidence put forth to refute industry's claims, highlight the importance of ensuring that any exemption requests are subjected to a transparent and inclusive process that allows for public comment, and that if any exemptions are ultimately granted, they can be narrowly tailored in both scope and duration.

47. Do any foreign laws prohibit the disclosure that would be required by the proposed rules? Is there any information that has not been previously provided by commenters to support an assertion that such prohibitions exist and are not limited in application? If so, please provide such information and identify the specific law and the corresponding country.

<u>There are no foreign laws prohibiting disclosure of the information required under Section 13(q).</u>

Although some issuers claimed previously that Angola, Cameroon, China, and Qatar prohibit disclosures, subsequent events have proven them wrong with respect to Angola and Cameroon, and they were (and remain) incorrect with regard to China and Qatar. Significantly, the Commission has already found these

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[176] Geman, Ben, *The Resource Curse, Big Oil, and the Dodd-Frank Battle That Won't Die*, National Journal (Dec. 11, 2015) (quoting API spokesman as saying that China and Qatar prohibit Section 1504 disclosures, but not mentioning Angola and Cameroon).

[177] See: Extractive Industries Transparency Initiative, *Cameroon*. Available at: https://eiti.org/Cameroon/.

[178] Statoil, 2014 Payments to Governments at 10 (2015). Available at: http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf.

assertions unfounded. In response to API's request for a stay of the 2012 Rule pending litigation, the Commission concluded that evidence of foreign disclosure prohibitions was "unpersuasive and vigorously contested."[179] This formal finding of fact still stands, and no additional information has been provided to the Commission that would call into question its determination.

Attorneys with EarthRights International and Global Witness also analyzed the materials that issuers submitted with regard to all four countries and concluded that there was no evidence of an actual prohibition on the disclosures required by Section 13(q).[180]

Global developments since the 2012 Rule was vacated have only further confirmed the absence of disclosure prohibition laws. First, Norway, the European Union, and Canada have all implemented resource extraction transparency rules without providing for any exemptions. The fact that most of the largest markets for securities of resource extraction companies require Section 13(q)-type disclosures without allowing for exemptions should give the Commission confidence that its original conclusions are correct. Indeed, like the Commission, the United Kingdom concluded that there was insufficient evidence to warrant exemptions. The UK regulations implementing the EU Accounting Directive explain that they "[do] not allow any exemptions related to conflict of law or conflicts of contracts. The government has considered these two issues carefully, and discussed them with representatives in other countries. Although a number of companies raised these issues, they did not present sufficient evidence that action would be taken in other countries for criminal offences against directors or individual companies for complying with the EU Directive."[181]

Prior submissions had already discredited industry claims that Cameroon prohibited disclosures; moreover, in 2013, Cameroon became an EITI-compliant country, thus confirming that it does not (and cannot) prohibit disclosure.[182] Norwegian oil company Statoil, one of the most proactively transparent companies, has been reporting country-level payments made to the Angolan government, including taxes, signature bonuses and production entitlements, for years.[183] In 2015, Statoil reported project-level payments to the Angolan government in its first statutorily-required report[184] and has suffered no repercussions.

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[179] *In the Matter of American Petroleum Institute et al.*, SEC Rel. No. 68197 at 7 (Nov. 8, 2012).

[180] Comment submitted by EarthRights International (20 Sept. 2011), p.10-12. Available at: https://www.sec.gov/comments/s7-42-10/s74210-111.pdf; Comment submitted by Global Witness (18 Dec. 2013) p.10-17. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf; Comment submitted by PWYP-US (14 Mar. 2014), pp.27-29. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.

[181] BIS, UK Implementation of the EU Accounting Directive, Chapter 10: Extractive industries reporting - Government response to consultation (August 2014), para. 89. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/343599/bis-14-1006-eu-accounting-directive-implementation-extractive-industries-reporting-response.pdf.

[182] See Extractive Industries Transparency Initiative, *Cameroon*. Available at: https://eiti.org/Cameroon/.

[183] Comment submitted by Global Witness (12 Dec. 2013), p.12. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf; Statoil, Annual Report 2012: Payments to Governments (2012). Available at: http://www.statoil.com/annualreport2012/en/sustainability/ourperformance/economicperformance/pages/paymentstogovernments.aspx.

[184] See Statoil, 2014 Payments to Governments (2015), p.10. Available at: http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf.

In China, government and stock exchange rules require companies to report on a wide range of payment data related to the extractive sector.[185] While these rules do not cover the full range of disclosures required under Section 13(q), Chinese extractive companies regularly report on the amounts paid for mineral extraction and exploration rights, as well as their tax liabilities.[186]

48. We note that the EU Directives and ESTMA do not provide an exemption for situations when disclosure is prohibited under host country law. Has this presented any problems for resource extraction issuers subject to these reporting regimes? If so, please identify specific problems that have arisen and explain how companies are managing those situations.

No.

To date, no companies have reported experiencing any problems with legal conflicts.[187] The only reports that have been published based on mandatory disclosure regimes have been those published by Norwegian resource extraction companies in 2015, and no Norwegian-listed companies have reported experiencing any problems with legal conflicts. As noted above, Norwegian oil company Statoil reported project-level payments to the Angolan government, apparently without incident.

Moreover, issuers that are covered by the Norwegian, European Union, Canadian, and US rules have been granted new resource extraction contracts in Angola, Cameroon, and China since Dodd-Frank was enacted (and since the Commission's first rulemaking in 2012), notwithstanding the fact that they will be required to report their payments under mandatory disclosure regimes.[188] In their first reports under

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[185] See e.g. Ministry of Finance, Accounting Standard for Business Enterprises No.27 – Extraction of petroleum and natural gas, ch. 6 art. 25(b) (2006); Shanghai Stock Exchange, No.18 Format Instruction on Temporary Announcements of Listed Companies: Announcement on Acquisition & Transfer of Mineral Rights by Listed Companies, ch. 3(a) (2008); Shenzhen Stock Exchange, Information Disclosure Memo No.14 – Information Disclosure of Mining Rights, ch. 2 art. 4(b) (2008); Rules Governing the List of Securities on the Stock Exchange of Hong Kong Limited, Chapter 18. Available at: http://www.hkex.com.hk/eng/rulesreg/listrules/mbrules/documents/chapter_18.pdf. (Mandating country-by-country disclosure of payments by newly-listed extractive companies to host country governments in respect of tax, royalties and other significant payments).

[186] For example, in the prospectus for its initial public offering in 2010, Sinomine Resource Exploration Co., Ltd. disclosed the amounts that it had paid for mineral exploration rights for a project in Zambia over the previous years, as well as the taxes it has paid both inside and outside of China. See: http://www.p5w.net/stock/ssgsyj/zqgg/201009/P020100926594817923618.pdf, pp.182, 356-60. Similarly, Wintime Energy Co. Ltd.'s liability for a broad range of taxes and fees to be paid to the Chinese government is disclosed in the publicly available Mining Rights Assessment Report for its 2013 tender offer to Xingqing Ling Shi Yinyuan Shanxi Coal Industry Co., Ltd. These include environmental restoration bonds, resource compensation fees, educational supplements, natural resource tax, and corporate income tax. Available at: http://stock.finance.qq.com/sstock/list/view/notice.php?id=62996346&c=sh600157&d=20130827, pp.43-45.

[187] Reporting under the EU Directives will begin in 2016 in most EU countries; ESTMA reporting will also begin in Fall 2016.

[188] See e.g. Media Release: Shell signs new upstream deal with CNOOC (8 Jan. 2013). Available at: http://www.shell.com.cn/en/aboutshell/media-centre/news-and-media-releases/archive/2013/new-contract-with-cnooc-20130801.html (noting that the new deal for block 35/10 "is the third offshore oil and gas PSC Shell and CNOOC have signed in the Yinggehai Basin," west of the Hainan Island, China "following the signing of PSCs 62/02 and 62/17 in July 2012"); Hess, PetroChina sign China's first shale oil deal, Reuters (24 Jul. 2013). Available at: http://www.reuters.com/article/us-cnpc-hess-shale-idUSBRE96N0EL20130724 (announcing new production-

the EU Directives, companies such as Royal Dutch Shell and Total will be required to report on their payments in Qatar, while Shell, Eni, and BP will report on their payments in China.

G.4. Alternative Reporting

49. Should we include a provision in the rules that would allow for issuers subject to reporting requirements in certain foreign jurisdictions or under the USEITI to submit those reports in satisfaction of our requirements? Why or why not? If so, what criteria should we apply when making a determination that the alternative disclosure requirements are substantially similar to the disclosure requirements under Rule 13q-1? Are there additional criteria, other than those identified above, that we should apply in making such a determination? Are there criteria identified above that we should not apply? Should we align our criteria with criteria used in foreign jurisdictions, such as the EU Directives?

Yes, such a provision is useful, and we believe additional criteria should be added in order to align with the EU Directives.

We support the inclusion of a provision allowing for substitute reporting in appropriate cases. Such a provision would be helpful both to ease the reporting burden on companies subject to reporting requirements in multiple jurisdictions, and to ensure consistent reporting that meets the global standard.

The Commission should clearly indicate the criteria that it will use to determine whether a foreign jurisdiction's reporting regime is an appropriate substitute for Rule 13q-1 disclosures. These criteria should include those already proposed by the Commission, as well as those included in the EU Directives and additional criteria related to availability of exemptions and penalties.[189] As indicated in our response to Question 50, we believe that the standard should be "substantial equivalence," rather than merely "substantial similarity" as proposed.

If an issuer is permitted to submit an alternative report, pursuant to a substitute compliance order, this must be disclosed in their Form SD. If that report was originally submitted in a language other than English, a translation should be provided.

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sharing contract between Hess and PetroChina to develop a shale oil block in China); BP, Total among winners of Angola deepwater blocks, Reuters, (24 Jan. 2011). Available at: http://www.reuters.com/article/ozabs-angola-sonangol-idAFJOE70N0A620110124 (reporting BP, Total, ENI, ConocoPhillips, Statoil, and Cobalt International Energy were among the winners awarded concessions to explore Angola deep water blocks); Kosmos to explore for oil in Cameroon, Reuters, (12 Jan. 2012). Available at: http://af.reuters.com/article/investingNews/idAFJOE80B0BC20120112 (reporting "U.S. Kosmos Energy signed an agreement with Cameroon's state oil company SNH on Thursday allowing it to explore in the central African state's offshore Fako block").

[189] Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Article 46 (3)(a). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF.

We recommend amending proposed § 240.13q-1 by adding the following:

(e) Applications for Alternate Reporting. In order for the Commission to consider whether an alternate disclosure regime is substantially equivalent pursuant to an application submitted under Exchange Act Rule 0-13, the application must be accompanied by adequate supporting information, including but not limited to: (1) a copy of the foreign jurisdiction's relevant law and/or regulations, including an English translation, if necessary; (2) an opinion of qualified counsel that compares the alternate regime with this section, which must, at a minimum, meet the criteria listed below; and (3) a copy of the most recent report submitted by the issuer in the foreign jurisdiction, or if the applicant is not an issuer, a copy of the reporting template required by the foreign jurisdiction, and an English translation, if necessary. Upon receipt of a complete application, the Commission will publish the application and allow a public comment period. The Commission will grant the application if it determines that the alternate regime has requirements that are substantially equivalent to those of this section. In particular, the Commission will not grant a full substituted compliance order unless the alternate regime is at least as stringent as this section with respect to at least the following elements:

(1) the types of payments that are required to be disclosed;

(2) the types of payment recipients (including subnational governments and entities controlled by the government);

(3) whether project-level disclosure is required and, if so, the definition of ''project'';

(4) whether the disclosure must be publicly filed and whether it includes the identity of the issuer;

(5) whether the disclosure must be provided using an interactive data format that includes electronic tags;

(6) the availability of exemptions from reporting;

(7) frequency of reporting;

(8) anti-evasion measures; and

(9) the availability of civil, criminal, and/or administrative liability or penalties for violations of the disclosure requirements.

If the alternate disclosure regime is at least as stringent as this section with respect to some but not all of the elements listed above, the Commission may grant a partial substitute compliance order that requires covered issuers to submit supplemental information. For example, if a reporting regime is substantially equivalent in most respects but does not require disclosure in an interactive data format with electronic tags, the Commission should

require the issuer to present the payment disclosures using a machine-readable electronic format such as XBRL with electronic tags in an exhibit to Form SD.

If it comes to the attention of the Commission that a previously approved alternate reporting regime has changed in any way that substantially affects the elements listed above, the Commission shall reconsider the substituted compliance order and shall give members of the public an opportunity to comment before withdrawing the order.

We also recommend amending proposed Item 2.01(b) of Form SD as follows:

(b) *Alternate Reporting*. A resource extraction issuer may satisfy its disclosure obligations under paragraph (a) of this Item by including as an exhibit to this Form SD a report complying with the reporting requirements of any alternative reporting regime that are deemed by the Commission to be substantially ~~similar~~ **equivalent** to the requirements of Rule 13q–1 (17 CFR 240.13q–1)**, provided that the Commission has first confirmed the substantial equivalence of such regime pursuant to an application duly submitted by an issuer or a foreign jurisdiction under Exchange Act Rule 0-13.** The issuer must state in the body of the Form SD that it is relying on this provision and identify the alternative reporting regime for which the report was prepared. The issuer must also specify that the payment disclosure required by this Form is included in an exhibit to this Form SD and state where the report was originally filed. **If the Commission's order under Exchange Act Rule 0-13 requires the alternate report to be supplemented with additional information in order to be compliant, the issuer must include such information as an exhibit to Form SD. If the original report was submitted in a language other than English, the issuer must provide an English translation.**

50. We propose to base our determination on a finding that the foreign jurisdiction's or the USEITI's requirements are substantially similar to our own. Is this the standard we should use? Should we consider other standards, for example, a determination that a foreign jurisdiction's or the USEITI's requirements are "equivalent" or "comparable?"

<u>The Commission should require that other standards are substantially equivalent to its own.</u>

The Commission should require that alternative reporting requirements in other jurisdiction(s) are substantially equivalent – rather than merely "comparable" or "similar" – to the Commission's own requirements. If an alternative reporting regime does not require such detailed information as the rule demands, it is unlikely that a report under such a regime would be able to meet the objective and purpose of the legislation. See our response to Question 49 for further details and proposed regulatory language.

51. Given the specificity of the disclosures required, should we consider a stricter or more flexible standard? Are there other standards for determining when reliance on foreign or USEITI requirements is appropriate that we should consider? If so, please describe the standard and why it should be used.

The Commission should only consider a stricter standard, and should require that foreign requirements be substantially equivalent, rather than merely substantially similar.

See our answers to Questions 49 and 50 above.

52. In making the determination that a foreign jurisdiction's or the EITI's disclosure requirements are substantially similar to our own, should we make the determination unilaterally on our own initiative, require an issuer to submit an application prior to making the determinations, allow jurisdictions to submit an application, or allow all of these methods? If we should require an application, what supporting evidence should we require? For example, should we require a legal opinion that the disclosure requirements are substantially similar?

Issuers or foreign jurisdictions should be required to submit an application. Once a regime is considered substantially equivalent, the Commission should accept reports submitted in accordance with those requirements.

Before making a determination as to whether a foreign jurisdiction's requirements are substantially equivalent – rather than merely "similar" – to the US requirements, the Commission should require either an issuer or a foreign jurisdiction to submit an application in accordance with the procedure outlined in Exchange Act Rule 0-13 and should require applicants to provide the evidence listed in responses to Questions 49 and 53.

Once an alternative reporting regime is established as substantially equivalent, the Commission should accept reports submitted in accordance with those requirements. The fact that they will be able to rely on previous orders establishing substantial equivalence rather than submitting a new application for each annual report will reduce the burden on companies. Should the legal framework for an approved alternative disclosure regime change, the Commission should reassess whether or not it remains substantially equivalent, giving members of the public an opportunity to comment before changing its equivalency determination.

53. Under Exchange Act Rule 0-13, we could consider requests for substituted compliance upon application by an applicant or the jurisdiction itself and after notice and an opportunity for public comment. Does Rule 0-13 provide an appropriate structure for the Commission to make decisions regarding the similarity of resource extraction payment disclosure requirements in foreign jurisdictions or under the USEITI's reporting regime for purposes of Rule 13q-1?

We support the use of the Exchange Act Rule 0-13 process to consider requests for substituted compliance from issuers or foreign jurisdictions, following a mandatory public notice and comment period. The final rule must specify the documentary evidence required in order for the Commission to consider the request and the substantive criteria the Commission will consider.

Rule 0-13 provides a suitable framework to consider requests for substitute compliance. It is critical that there is a sufficient opportunity for public comment on any proposal to accept payment disclosure reports from alternative reporting regimes as equivalent to the requirements under Rule 13q-1.[190]

The Commission should require applications to be accompanied with sufficient supporting documentation. As noted above, this should include the text of the foreign legal provision, a legal opinion establishing substantial equivalence with respect to at least all the elements listed in our response to Question 49, and the most recent report of the issuer in the foreign jurisdiction, or, if the applicant is not an issuer, a copy of the reporting template required by that jurisdiction. See our response to Question 49 for more detail and proposed regulatory language.

In assessing an application for a substitute compliance order, the Commission must consider the methods and ability of foreign regulators to monitor and enforce compliance with the alternative regime.[191]

If the Commission grants a substitute compliance order pursuant to Rule 0-13, it should specify whether that decision will apply to all listed entities in the jurisdiction. This will significantly cut compliance costs to cross-listed issuers. However, if such an order is granted and the disclosure requirements subsequently change – whether in the US or in the foreign jurisdiction – or the ability of that foreign regulator to enforce compliance is somehow diminished, the Commission should reconsider if the foreign jurisdiction's requirements remain equivalent. See our answer to Question 52.

54. Is there another process for the Commission to use to consider substituted compliance requests other than the Rule 0-13 process? For example, should the Commission use the process set forth in Rule 0-12? Should the Commission permit someone other than a resource extraction issuer or a foreign or domestic authority to submit an application for substituted compliance?

<u>The Commission should not use Rule 0-12 when considering applications for substituted compliance. Only resource extraction issuers and foreign/domestic authorities should be allowed to submit applications for substituted compliance.</u>

The process provided for in Rule 0-13 is specifically geared towards requests for substitute compliance, and is thus more appropriate than the process in Rule 0-12 for requesting exemptive relief. Moreover, Rule 0-12 lacks the same guarantees of transparency and opportunity for public comment as found in Rule 0-13. All applications for substitute compliance must be publicly available and there must be a public comment period.

55. As noted above, in making a determination about the similarity of a foreign jurisdiction's disclosure requirement, the Commission would consider, among other things, whether the disclosure

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[190] In the European Union, any such decision regarding equivalency made by the European Commission is subject to a two-month notification period, in which either the European Parliament or the Council can express an objection. See Directive 2013/34/EU of the European Parliament and of the Council (26 June 2013), Article 49 (5). Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF.

[191] See 17 C.F.R. §240.0-13(e).

must be provided using an interactive data format that includes electronic tags. If a foreign jurisdiction requires an interactive data format other than XBRL, but otherwise calls for disclosure substantially similar to our own, should we nonetheless require resource extraction issuers to file these disclosures in XBRL? Would having the payment data tagged using different interactive formats adversely affect the ability of users to compile and analyze the data? In these circumstances, are there other alternatives we should consider?

Yes, the Commission should consider whether the foreign jurisdiction requires an interactive data format with electronic tags, and it should require issuers to supplement their otherwise-equivalent foreign reports if that jurisdiction does not require an interactive data format.

In order to provide users with standardized payment disclosures by resource extraction issuers, we believe that any determination about whether a foreign jurisdiction's disclosure requirements are "substantially equivalent" must include the requirement that the disclosure is provided in an interactive data format that includes electronic tags. Data becomes interactive when it is tagged using a computer markup language that can be processed by software for sophisticated viewing and analysis. Disclosing data in this format will provide investors, local communities, and other users with the ability to pinpoint the data which is most relevant to them in an easily accessible manner. We recommend that the Commission allow for disclosure only in an interactive data format that includes electronic tags. This would include but would not be limited to XBRL. For example, the XML-based reporting schema, which has been prescribed for the UK Reports on Payments to Governments Regulations 2014, would provide a suitable alternative.[192] If a foreign jurisdiction has not prescribed an interactive data reporting format that includes electronic tags,[193] we recommend that the resource extraction issuer be required to present the payment disclosure using the XBRL electronic format with electronic tags as an exhibit to Form SD as proposed. We note that this would not pose an undue burden on resource extraction issuers since the required information will already have been collected by the resource extraction issuer and XBRL is a common financial reporting format.

56. Given the progress in the development of resource extraction payment disclosure rules in certain jurisdictions, should we consider making a determination regarding the similarity of certain foreign reporting requirements when the final rule is adopted? Currently, payment disclosure rules are in

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[192] Companies House, *Registrar's rules (Volume 1)*, Part 6 - Extractives Report Service (In force 1 Jan. 2016). Available at: http://resources.companieshouse.gov.uk/about/policyDocuments/registrarsRules/volume1.pdf; Reporting schema available at: http://xmlgw.companieshouse.gov.uk/extractives.shtml. Note that a reporting format has not yet been prescribed for companies which are listed on an EU regulated market in the UK but are not registered in the UK. However, HM Treasury "has now requested that the FCA [UK Financial Conduct Authority] prescribe a reporting format for the annual reports on payments to governments prepared under the TD by issuers who are active in the extractive or logging of primary forest industries". See FCA, *Implementation of the Transparency Directive Amending Directive (2013/50/ EU) and other Disclosure Rule and Transparency Rule Changes including feedback on CP15/11 and final rules*, November 2015, p. 25. Available at: https://www.fca.org.uk/static/fca/article-type/policy%20statement/ps15-26.pdf; We expect a consultation on a reporting format to be launched in March 2015.

[193] Foreign jurisdictions which have not prescribed an interactive data reporting format that includes electronic tags include Canada, Norway and France.

place in the United Kingdom, Norway, and Canada. Should we determine whether rules in all of these jurisdictions are substantially similar for purposes of the final rule? Are there other jurisdictions that also have payment disclosure rules in place that we should consider for purposes of compliance with Rule 13q-1?

Orders allowing substituted compliance for issuers reporting in the EU, Canada, and Norway, should only be permitted as long as the Commission requires supplemental disclosures for key elements that are not included in those regimes.

We believe that the reporting regimes adopted in EU countries (particularly the UK), Canada, and Norway likely align sufficiently with Rule 13q-1 as proposed and that they should be eligible for at least partial substituted compliance orders. Once the rule is finalized, the Commission should provide for a separate public process with a dedicated comment period, pursuant to the criteria described in our responses to Questions 49 and 53 in order to determine whether there are elements of Rule 13q-1 that are not met in each jurisdiction's rules, and if so, require all issuers benefiting from the substituted compliance order for that jurisdiction to provide the missing information in an exhibit to Form SD. See, for example, our response to Question 55 with respect to interactive data format and electronic tags. This is the approach taken by the Government of Canada in its recent substitution determination for the EU Directives, in which it requires reporting entities to include an attestation statement with their report in order to meet the requirements set out in the ESTMA.[194]

57. The USEITI reporting framework only requires disclosure of payments made to the U.S. federal government while the proposed rules would require disclosure of payments to foreign governments and the Federal Government. Thus, as proposed, if the Commission were to find that the USEITI reporting standards are "substantially similar" to the requirements of the proposed rules, the Commission would permit issuers to file reports submitted in full compliance with the USEITI in lieu of the disclosure required by the proposed rules concerning payments made by resource extraction issuers to the Federal Government. In these circumstances, any payments made to foreign governments would still need to be reported in accordance with Form SD. In light of the reporting differences between the USEITI and our proposed rules, however, should the Commission preclude the use of USEITI reports under the alternative reporting provision when a resource extraction issuer would also have to disclose payments made to foreign governments pursuant to the proposed rules?

The Commission can allow for USEITI reports to be used in partial substitution of an issuer's obligations, provided they are substantially equivalent to reports under this rule.

Although it would be preferable from data users' perspective for companies to submit a single report, rather than two separate reports – USEITI report plus an addendum detailing payments to foreign companies – we are not opposed to companies choosing to use their USEITI reports to fulfill part of their Section 13(q) obligations. This can be acceptable only if USEITI reports are deemed substantially

[194] Natural Resources Canada, *Assessment of the European Union Accounting and Transparency Directives,* Extractive Sector Transparency Measures Act - Substitution Determination (31 July 2015). Available at: http://www.nrcan.gc.ca/acts-regulations/17754.

equivalent such that the Commission grants a partial substitute compliance order that requires covered issuers to submit supplemental information, after a public comment period (and in accordance with our answer to Question 49).

G.5. Exhibits and Interactive Data Format Requirements

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

Issuers should provide the actual payment data in an interactive data format in the exhibits and should be encouraged to provide additional information in the body of Form SD.

While all required disclosures should be in the exhibit, the Commission should allow issuers to provide a narrative explanation of the disclosures in the body of the annual report. Issuers may wish to use this opportunity to put their disclosures in context or to explain features that may not be apparent from the raw data. For example, Statoil has provided a consolidated overview and brief country-specific introductions in its 2014 Payments to Governments report which go beyond Norway's regulatory requirements.[195] BHP Billiton's 2015 *Economic Contribution and Payments to Governments Report* includes a map which provides a visual representation of where its payments have been made around the world on a project basis.[196]

We recommend amending proposed Item 2.01 of Form SD by adding the following:

> **(d) *Optional Disclosure.* Issuers may include in Form SD additional information about the data provided in the exhibits to this Form SD, such as contextual information, or any further explanation.**

59. How should the total amount of payments be reported when payments are made in multiple currencies? Do the three proposed methods for calculating the currency conversion described above provide issuers with sufficient options to address any possible concerns about compliance costs, the comparability of the disclosure among issuers, or other factors? Why or why not?

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[195] Statoil, 2014 Payments to Governments (2015). pp.3-26. Available at: http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf. Note that Statoil's report also includes a "Contextual information" section (pp.27-32), which is mandated by the Norwegian regulation.

[196] BHP Billiton, Economic Contribution and Payments to Government Report 2015, pp.3, 9-11 and 14-19.

In addition to the approach proposed by the Commission, we recommend that any payments that are not made in US dollars or the issuer's reporting currency should also be disclosed in the currency in which the payment was made. The XBRL disclosures should include electronic tagging for each currency according to ISO currency codes (ISO 4217).[197] Communities in foreign countries and other users of the information will be better able to demand accountability if they are aware of the actual amounts paid in local currencies. We note that this requirement should not impose an undue burden on the resource extraction issuer, as issuers must record payments in the original currency in order to be able to convert them using the conversion method proposed by the Commission.

We recommend amending proposed Item 2.01(a)(4) of Form SD as follows:

> (4) The currency used to make the payments**, using ISO currency codes (ISO 4217)**;

We also recommend amending proposed Instruction 2 to Item 2.01 as follows:

> An issuer must report the amount of payments made for each payment type, and the total amount of payments made for each project and to each government, during the reporting period in U.S. dollars or the issuer's reporting currency. If an issuer has made payments in currencies other than U.S. dollars or its reporting currency, **it must report those payments both in (a) U.S. dollars or its reporting currency, and (b) in the currency in which the payment was made. I**t may choose to calculate the currency conversion between the currency in which the payment was made and U.S. dollars or the issuer's reporting currency, as applicable, in one of three ways: (a) by translating the expenses at the exchange rate existing at the time the payment is made; (b) using a weighted average of the exchange rates during the period; or (c) based on the exchange rate as of the issuer's fiscal year end. A resource extraction issuer must disclose the method used to calculate the currency conversion.

60. Should we require the resource extraction payment disclosure to be electronically formatted in XBRL and provided in a new exhibit, as proposed? Is XBRL the most suitable interactive data standard for purposes of this rule?

<u>We agree with the Commission that the disclosures should be electronically formatted in XBRL and provided in an exhibit to Form SD.</u>

This represents the most feasible option for the Commission at present. As the Commission notes in the proposed rule release, future alternatives such as Inline XBRL could be considered if and when a determination is made to accept Inline XBRL submissions in the EDGAR system.

[197] See: http://www.iso.org/iso/home/standards/currency_codes.htm.

61. Section 13(q) and our proposed rules require an issuer to include an electronic tag that identifies the issuer's business segment that made the payments. Should we define "business segment" differently than we have proposed? If so, what definition should we use?

We recommend the Commission define "business segment" to mean the subsidiary or an entity under the control of the issuer that makes payments to a government.

"Business segment" should not have the same meaning for purposes of Form SD, as it does in general financial reporting. If Congress had intended that "segments" have the same meaning, the statute would have required reporting by "financial reporting segment" but instead it reads "business segment," which indicates a clearer link to the particular company making the payment. This is helpful information because in many cases, the legal entity or subsidiary that actually makes a payment or set of payments to a government will have a different name from the "parent" resource extraction issuer that is reporting to the Commission.[198] To aid accountability and to provide users with the means to follow up locally, "business segment" should be defined as the subsidiary or entity under the control of the issuer that actually made the payment to a government.

Users will not be provided with sufficient granularity or consistency if "business segment" is defined in relation to the reportable segments used by the resource extraction issuer for purposes of financial reporting. For example, Royal Dutch Shell plc's 2014 Annual Report uses just three reporting segments - Upstream, Downstream and Corporate - to account for a multitude of activities.[199] BP plc's 2014 Annual Report also has just three segments, which are not identical those reported by Royal Dutch Shell: Upstream, Downstream and Rosneft.[200] Neither Royal Dutch Shell plc nor BP plc have reportable segments related to different hydrocarbons such as oil or natural gas. On the other hand, BHP Billiton has four reportable segments that are aligned with the commodities they extract and market: Petroleum and Potash, Copper, Iron Ore and Coal.[201] Given the lack of consistency in terms of each issuer's approach to reportable segments, we do not recommend using reportable segments as a basis for defining "business segment." In the oil industry, reportable segments are likely to be principally related to upstream activities in any case and would therefore add little to a user's understanding. Furthermore, given the Commission's welcome proposal to require tagging for the particular resource that is the

[198] For example, see the list of subsidiaries and legal entities that make up the corporate structure of BP plc. Many entities such as "Terre de Grace Partnership" (Canada), "Atlantic LNG 4 Company of Trinidad and Tobago Unlimited" (Trinidad and Tobago) or "Pan American Fueguina S A" (Argentina) are not immediately identifiable as subsidiaries or entities controlled by BP Plc. BP plc, 2015 Annual Return to the UK Registrar of Companies, pp.28-53. Available at: https://beta.companieshouse.gov.uk/company/00102498/filing-history/MzEyNDU1NDMwOWFkaXF6a2N4/document?format=pdf&download=0.

[199] See Royal Dutch Shell plc, Annual Report and Form 20-F for the year ended December 31, 2014, p.117. Available at: http://reports.shell.com/annual-report/2014/servicepages/welcome.php?accept=1&cat=b.

[200] See BP plc, Annual Report and Form 20-F (2014), p.119. Available at: http://www.bp.com/content/dam/bp-country/de_de/PDFs/brochures/BP_Annual_Report_and_Form_20F_2014.pdf.

[201] See BHP Billiton, Annual Report 2015, p.211. Available at: http://www.bhpbilliton.com/~/media/bhp/documents/investors/annual-reports/2015/bhpbillitonannualreport2015.pdf?la=en.

subject of commercial development, reportable segments based on commodities or particular resources would also be redundant.

Defining "business segment" in relation to the specific subsidiary or entity under the control of the issuer that made the payment to a government provides a consistent approach across issuers that will aid local actors in demanding accountability from legal entities they recognize.

We recommend amending proposed Item 2.01(c)(1) of Form SD as follows:

> Business segment **for purposes of this form** means ~~a business segment consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting~~ **the subsidiary or entity under the control of the resource extraction issuer that made the payments**.

62. As proposed, should we require resource extraction issuers to tag the particular resource that is the subject of commercial development and the subnational geographic location of the project? Why or why not? Would these additional tags further enhance the usefulness of the data without significantly increasing compliance costs?

We agree that the Commission should require resource extraction issuers to tag the particular resource that is the subject of commercial development and the subnational geographic location of the project.

Tags will aid users to more easily identify the projects to which payments have been attributed.

62.1 Particular resource

We recommend that the Commission adopt a detailed taxonomy for different resource types. For example, the International Monetary Fund (IMF) has recently developed a template, based on the revenue classification of the IMF Government Finance Statistics Manual, to collect data on government revenues from natural resources.[202] This template includes a list of natural resource central product classification codes which could form a useful basis for tagging particular resources for purposes of Section 13(q) reporting.[203] We urge the Commission to adopt the IMF classification (or a comparable one)[204] and require issuers to tag the relevant resource.

We recommend that the Commission publish a standardized list of resources (i.e. a fixed electronic tag for each resource) at the same time as it adopts its final rule in order to promote consistency. A

[202] IMF, *Template to collect data on government revenues from natural resources* (Jan. 24, 2014). Available at: https://www.imf.org/external/pubs/ft/gfs/manual/pdf/templatedata.pdf.
[203] Ibid., pp. 11-12.
[204] EITI has commissioned a study which includes a detailed list of commodities related to mining under the following headings: Alloying Metals, Base Metals, Bulk Commodities, Bulk/Energy, Chromite Group, Energy, Fertilizers, Gemstones, Heavy Mineral Sands, Precious Metals, Rare Earth Elements, Specialty/Industrial. *Scoping Study for EITI Data Reporting and Access Standards*, 2015, Annex III, pp.62-67. Available at: https://eiti.org/files/scoping_study_for_eiti_data_standards_2015.pdf.

customizable list allowing each issuer to effectively create its own list of "particular resources" would severely undermine the usefulness of this tag. For example, crude oil and crude petroleum risk being understood as two different resources unless the Commission adopts a standardized list.

Tagging the particular resource will significantly enhance the usefulness of the data for users since their understanding of the particular resource being developed will be improved. We agree with the Commission that tagging the particular resource will lead to an insignificant corresponding increase in compliance costs since no further investigation will be required of the issuer. See our response to Question 10.

We recommend the inclusion of an additional Item 2.01(c)(13) in Form SD to define "particular resource" as follows:

> **(13) <u>Particular resource</u> means a resource selected from the Commission's standardized list of resource types.**

62.2 Subnational geographic location of the project

We welcome the Commission's proposal to require issuers to tag the subnational geographic location of each project, provided the Commission provides further clarity around the definition of "subnational geographic location." See our response to Question 64.

63. As we have noted, we believe that it is important that the project-level disclosures enable local communities to identify the revenue streams associated with particular extractive projects. When combined with the other tagged information, would our proposed approach to describing the geographic location of the project provide sufficient detail to users of the disclosure? Would users be able to identify the location of the project and distinguish that project from other projects in the same area? Would allowing resource extraction issuers flexibility in describing the location of their projects reduce comparability and the usefulness of the disclosure? Should we prescribe a different method for describing the location of a project? If so, what should that method be?

<u>To provide sufficient detail to users, geographic location of the project should be described as specified in the agreement or multiple agreements which have been used to establish the project for reporting purposes.</u>

See our response to Question 64.

64. Proposed Instruction 3 to Item 2.01 states that the "geographic location of the project" must be sufficiently detailed to permit a "reasonable user of the information" to identify specific, subnational geographic locations. Should we provide more guidance as to what is a sufficient level of detail or how such instruction should be applied?

Rather than relying on the concept of "a reasonable user", we recommend the Commission require that geographic locations be disclosed as specified in the agreement or multiple agreements that have been used to establish the project for reporting purposes.

Consistent with the approach to project-level reporting, we believe that the geographic location of the project must be disclosed as specified in the agreement or multiple agreements that have been used to establish the project for reporting purposes. In general, this will be a set of geographical coordinates contained in the agreement defined by reference to latitude, longitude or altitude.[205] In addition, we agree with the Commission that additional tags related to the subnational jurisdiction and/or other commonly recognized descriptions should be used to aid users in locating projects. Given that more than one project could easily be located in the same subnational jurisdiction together with the same commonly recognized subnational, geographic or geological description,[206] it is essential that that the geographic location of the project is disclosed as specified in the agreement or multiple agreements which have been used to establish the project for reporting purposes.

We recommend amending proposed Instruction 3 to Item 2.01 of Form SD as follows:

Subnational Geographic Location Tagging

(3) The "geographic location of the project" as used in Item 2.01(a)(10) must be **disclosed as specified in the agreement(s) that have been used to establish the project for reporting purposes. In general this will be the geographic coordinates (e.g., latitude, longitude, and altitude) contained in the agreement(s).** ~~sufficiently detailed to permit a reasonable user of the information to identify the project's specific, subnational, geographic location. In identifying the location, resource extraction issuers~~ **Resource extraction issuers** ~~may~~ **should also** use the subnational jurisdiction(s) (e.g., a state, province, county, district, municipality, territory, etc.) and/or a commonly recognized, subnational, geographic or geological description (e.g., oil field, basin, canyon, delta, desert, mountain, etc.) **to identify the location of the project**. ~~More than one descriptive term may be necessary when there are multiple projects in close proximity to each other or when a project does not reasonably fit within a commonly recognized, subnational geographic location. In considering the appropriate level of detail, resource extraction issuers may need to consider how the relevant contract identifies the location of the project.~~

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[205] For example, see the description of Contract Area K in this Production Sharing Contract (S-06-06) in Timor Leste, p.43. Available at: https://s3-eu-west-1.amazonaws.com/downloads.openoil.net/contracts/tl/tl_06-06K_dd20061116_PSC_Reliance-Industries.pdf; See the description of the licensed area for Block 205/4c for Seaward Production License P2016 in the United Kingdom, p.31. Available at: https://itportal.decc.gov.uk/web_files/recent_licences/licences/P2016.pdf.

[206] Comment submitted by NRGI (23 Sept. 2015), p.12. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-84.pdf. The submission identifies multiple projects in East Kalimantan Province (i.e. subnational jurisdiction) and which could also be grouped together in a geographic area known as the Makassar Straight.

65. Is there additional or other information that should be required to be electronically tagged to make the disclosure more useful to local communities and other users of the information? If so, what additional information should be required and why?

We recommend that the Commission additionally require disclosure and electronic tagging of the specific name of the agreement or multiple agreements that have been used to establish the project for the purposes of reporting.

There will be many cases where the name of the project does not match the agreement or multiple agreements that form the basis for payment liabilities with a government. It is therefore essential that the Commission further require disclosure of the name of the agreement[207] or multiple agreements that have been used to establish the project for the purposes of reporting. Without this information, a user might be unable to verify the grounds upon which an issuer has reported on a project. In the case of single projects based upon multiple "agreements **with substantially similar terms** that are both operationally and geographically **integrated**,"[208] the user must have access to the names of the multiple agreements in order to establish whether or not the agreements a) do in fact have substantially similar terms, and b) are in fact both "operationally and geographically integrated."

We recommend amending Item 2.01(a) of Form SD by adding the following:

> **Either a) the name of the single contract, license, lease, concession, or similar legal agreement that forms the basis for payment liabilities with a government which is treated by the resource extraction issuer as a project, or b) the individual names of the agreements with substantially similar terms that are both operationally and geographically integrated which are treated by the resource extraction issuer as a single project.**

66. Section 13(q)(3) directs the Commission, to the extent practicable, to provide a compilation of the disclosure made by resource extraction issuers. We believe that we satisfy the statutory requirement by making each resource extraction issuer's disclosures available on EDGAR in XBRL format. Is a different compilation necessary? If so, what information should this compilation include and how often should it be provided? Should a compilation be provided on a calendar year basis, or would some other time period be more appropriate?

We agree with the Commission that the statutory requirement is satisfied by making each resource extraction issuer's disclosures available on EDGAR in XBRL format.

Alternative approaches to providing a "compilation" that have been advanced by some commentators are not adequate, because, as we have demonstrated, they would be insufficient to satisfy the needs of

[207] For example "The Republic of the Gambia: Petroleum (Exploration, Development & Production) Licence Block A5". Available at: https://s3-eu-west-1.amazonaws.com/downloads.openoil.net/contracts/gm/gm_Block-A-5_dd20120524_Exp-Dev-Prod_Camac.pdf.

[208] Bold text denotes our recommended amendment to Item 2.01(c)(10) of Form SD.

key data users, are not warranted by the evidence on the record, and would undermine the US government's international transparency promotion efforts.[209] See also our answer to Question 78.

G.6. Treatment for Purposes of Securities Act and Exchange Act

67. Should we, as proposed, require the resource extraction payment disclosure to be filed, rather than furnished? If not, why not? Are there compelling reasons why the disclosures should not be subject to Section 18 liability?

We agree that resource extraction payment disclosures should be filed, not furnished.

We continue to believe that Section 13(q) disclosures should be filed for the reasons detailed in our February 2011 submission.[210] Section 13(q) provides information that is material for investors and asset managers to manage investment risk, as the comments from firms representing over $9.8 trillion in assets under management have amply demonstrated. These investors should have all the traditional tools that the Exchange Act provides – including Section 18 liability – when issuers provide false material information that harms investors. While Section 13(q) does aim to provide benefits to other constituencies *in addition to* investors, the fact that such a significant cross-section of investors – representing major mainstream firms, public pension funds, and investment firms with ethical screens, among others – believe the information provided under Section 13(q) will be material to their investment decisions is sufficient justification for the information to be filed rather than furnished. This is consistent with Congress's determination that the information required by Section 13(q) is important to put in the hands of investors and communities alike.

68. Should we require that certain officers, such as the resource extraction issuer's principal executive officer, principal financial officer, or principal accounting officer, certify the Form SD filing's compliance with the requirements of Section 13(q) of the Exchange Act or that the filing fairly presents the information required to be disclosed under Rule 13q-1? Are there any other certifications we should require officers of resource extraction issuers to make?

No.

We agree with the Commission's assessment that the disclosures required under Rule 13q-1 need not be subject to the officer certifications required by Rules 13a–14 and 15d–14 under the Exchange Act, or to other officer certification requirements.

[209] Comment submitted by PWYP-US (14 Mar. 2014), pp.12-18. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf. See also Comment submitted by Global Witness (18 Dec. 2013), pp.7-8. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf.

[210] Comment submitted by PWYP-US (25 Feb. 2011), pp.63-66. Available at: http://www.sec.gov/comments/s7-42-10/s74210-29.pdf.

H. Effective Date

69. Should we provide a compliance date linked to the end of the nearest commonly used quarterly period following the effective date, as proposed? Should we adopt a shorter or longer transition period?

Yes, the compliance date should be linked to the end of the nearest commonly used quarterly period following the effective date. The transition period should *not* be longer than what the Commission has recommended.

70. Should our rules provide for a longer transition period for certain categories of resource extraction issuers, such as smaller reporting companies or emerging growth companies? Should the rules provide for a longer transition period for smaller reporting companies or emerging growth companies to allow for data to be collected on the impact the EU Directives or ESTMA would have on companies of similar size? Why or why not?

No.

See our response to Question 2.

III. Economic Analysis

D. Request for Comments

71. We seek information that would help us quantify or otherwise qualitatively assess the benefits of the proposed rules. Please provide any studies or other evidence that show a causal link between transparency efforts, particularly the EITI, EU Directives or ESTMA, and societal outcomes.

The benefits of fully public, issuer-by-issuer, project-level reporting with no exemptions are numerous, and were the driving Congressional purpose behind the enactment of Section 13(q). Many of these benefits, including those for investors, companies, governments, and citizens, are extensively documented in the administrative and judicial records, and summarized in our March 2014 submission.[211] Since the 2014 submission, numerous organizations, investors and individuals from around the world have provided the Commission with additional evidence on how they or other groups would benefit from project-level payment disclosure as it is detailed in the Commission's proposed rule.[212]

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[211] Comment submitted by PWYP-US (14 Mar. 2014), pp.5-13. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.

[212] Comment submitted by Publish What You Pay Coalition (14 April 2014); Comment submitted by Steve Berexa, Allianz Global Investors, et al. (28 April 2014) (on behalf of 34 institutional investors with over $6.4 trillion in assets under management); Comment submitted by Peter Lundkvist, Third Swedish National Pension Fund, et al. (28 April 2014) (on behalf of investors with over $2.85 trillion in assets under management); Comment submitted by Prof Michael L. Ross, UCLA Professor of Political Science, member of Multi-stakeholder Group, USEITI (21 May 2014) (on Section 1504 protecting the interests of US-based investors, and the need to better manage corruption risks in the

Scholarly research also provides evidence that transparency yields concrete benefits. For instance, Londoño (2014) finds that changes in a country's EITI status (i.e. by announcing interest, achieving candidacy, or achieving compliance) are associated with net FDI inflow increases of over 50 percent on the year of the status change.[213] This supports Schmaljohann's (2013) finding that joining the EITI increases a country's rate of growth of FDI (as a share of GDP) by approximately 40 percent.[214] Corrigan (2014) finds that EITI membership is correlated with a positive impact on GDP per capita.[215]

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oil and gas sector); Comment submitted by David Buxton, Arachnys Information Service (28 May 2014) (on the benefit of managing corruption risks for extractive companies in emerging markets); Comment submitted by Elias Isaac, Open Society Institute for Southern Africa-Angola (29 Jan. 2015) (on applying project-level payment data to hold the Angolan government accountable); Comment submitted by Cecilia Mattia, National Advocacy Coalition on Extractives in Sierra Leone (10 Feb. 2015) (on the benefit of project-level payment data); Comment submitted by Gilbert Makore, Publish What You Pay - Zimbabwe (20 Feb. 2015) (on the benefit of project-level payment data, and importance of data at sub-national level); Comment submitted by Maryati Abdullah, Publish What You Pay - Indonesia (11 Mar. 2015) (on the benefit of project-level payment data); Comment submitted by Ambassador (Ret.) Mary Ann Peters, The Carter Center (21 April, 2015) (on the benefit of project-level payment data, and importance of data at sub-national level); Comment submitted by Irene Ssekyana, Civil Society Coalition on Oil and Gas in Uganda (18 May 2015) (on the benefit of project-level payment data); Comment submitted by Cameroon Coalition of Publish What You Pay (8 June 2015) (on the benefit of project-level payment data, and importance of data at sub-national level); Comment submitted by Anupama Jha, former executive director Transparency International India (15 June 2015) (on the importance of granular disaggregated disclosures); Comment submitted by Jana Morgan, PWYP-US (10 Aug. 2015) (The benefit of project-level payment data); Comment submitted by Ali Neema, Iraqi Transparency Alliance for Extractive Industries (28 Sept. 2015) (on the benefit of project-level payment data); Comment submitted by Claudia Dumas, Transparency International - USA (2 Oct. 2015) (on the benefit of project-level payment data); Comment submitted by Rebecca Adamson, First Peoples Worldwide, et al. (13 Oct. 2015) (on the benefit of project-level payment data, with particular attention to extraction in the US); Comment submitted by Reg Manhas, Kosmos Energy (19 Oct. 2015) (on the fact that Kosmos already reports payments to governments at the project-level); Comment submitted by Simon Clements, Alliance Trust PLC (28 Oct. 2015) (on behalf of investment trust with $8 billion in assets under management); Comment submitted by Jeffrey D. Sachs, Columbia Center for Sustainable Investment (30 Oct. 2015) (detail on the investor benefits of extractive industry payment transparency); Comment submitted by Joseph Kraus, The ONE Campaign (6 Nov. 2015) (provides several case studies of extractive sector transparency leading to accountability); Comment submitted by Andrés Hernández, Civil Society Roundtable for Transparency in the Extractive Sector in Colombia (13 Nov. 2015); Comment submitted by Dotun Oloko, anti-corruption activist in Nigeria (10 Dec. 2015) (on the benefit of project-level payment data); Comment submitted by Patrick Pouyanne, Total (13 Jan. 2016) (Total cites the benefit of restoring a "level playing field" among oil and gas companies).

[213] Fernando Londoño, Does Joining the Extractive Industries Transparency Initiative Have an Impact on Extractive and Non-Extractive FDI Inflows? (2014). Available at: http://gppreview.com/wp-content/uploads/2014/02/Londono-F.pdf.

[214] Maya Schmaljohann, Enhancing Foreign Direct Investment via Transparency? Evaluating the Effects of the EITI on FDI (Jan. 2013). Available at: http://archiv.ub.uni-heidelberg.de/volltextserver/14368/1/Schmaljohann_2013_dp538.pdf.

[215] Caitlin Corrigan, Breaking the Resource Curse: Transparency in the Natural Resource Sector and the Extractive Industries Transparency Initiative (2014). Available at: https://www.researchgate.net/publication/259124294_Breaking_the_Resource_Curse_Transparency_in_the_Natural_Resource_Sector_and_the_Extractive_Industries_Transparency_Initiative.

75. Is our approach to cost estimates accurate? What is the proportion of fixed costs in the direct compliance costs structure of potentially affected resource extraction issuers? Would smaller resource extraction issuers incur proportionally lower compliance costs than larger resource extraction issuers? Why or why not? Would affiliated issuers be able to save on fixed costs of developing compliance systems through sharing such costs? If so, what is the estimate of such savings?

<u>We do not agree with certain elements of the Commission's cost estimates</u>.

We agree with the Commission's approach to exclude from its cost estimates those issuers already required to report in foreign jurisdictions. However, we do not believe it is accurate for the Commission to include in its cost estimates the losses companies may theoretically incur as a result of losing or having to sell assets at a steep discount (a fire sale) given the lack of credible and compelling evidence that any country prohibits the disclosures outlined in the Commission's proposed rule (on this point, see our responses to Questions 45-48 above). As we note in our response to Question 47, the Commission has already concluded that the evidence provided by certain commentators to support their claims about the existence of foreign disclosure prohibitions was "unpersuasive".[216] Having already weighed the evidence, found it wanting, and then exercised its regulatory discretion to deny relief, it would be inappropriate for the Commission – without any new evidence to support a reversal of that position – to include those costs in its cost estimate. Furthermore, as we also note in our response to Question 47, Norway, the European Union, and Canada weighed the evidence about potential country prohibitions provided by certain commentators and determined that there was no credible evidence to support these claims and thus there is no need for exemptions.

While <u>we strongly believe, based on all available evidence, that country prohibitions do not exist</u>, *should* the Commission decide to include in its cost estimates any potential losses that issuers might hypothetically incur as the result of purported country prohibitions, it must take into consideration that for issuers dual-listed in the EU, Norway, or Canada, any losses stemming from payment disclosure would occur regardless of the Commission's rule, as a result of their foreign listing. As such, those issuers' losses should be excluded from the Commission's cost estimate, consistent with the Commission's treatment of dual-listed issuers elsewhere in its cost estimate.[217]

Furthermore, should the Commission decide to include those costs, it should attach a probability that such loss-inducing events and results may actually occur. In other words, those costs should be discounted according to the vanishingly small likelihood that countries would actually impose greater restrictions on disclosure in the future, and that such restrictions, in the extremely rare chance they are implemented, would necessarily result in a significant or wholesale loss of investors' assets, either through a forced fire sale or expropriation. In addition, extractive companies may have access to public and private insurance vehicles (providing protection against expropriation and/or breach of contract) or

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[216] *In the Matter of American Petroleum Institute et al.*, SEC Rel. No. 68197 at 7 (8 Nov. 2012).

[217] "[I]n determining which issuers are likely to bear the full costs of compliance with the proposed rules, we…exclude those issuers that would be subject to foreign jurisdictions' rules substantially similar to our proposed rules and therefore would likely already be bearing compliance costs." SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. 80,086 (23 Dec. 2015) and 80,093.

treaty-based or commercial arbitration mechanisms that would allow them to recover some or all of their losses in the case of government interference with their assets.[218] Estimates of potential company losses should be reduced to take into account the fact that issuers may have recourse to these instruments in the very unlikely event that future disclosure restrictions would result in a loss of assets.

Smaller reporting issuers, by definition, will have more limited operations and projects, and therefore fewer payments to disclose as compared to larger companies. Without substantial operations, these issuers will at most have a limited number of payments that can be easily tracked without the need to put into place sophisticated tracking and reporting systems. As such, their compliance costs should be proportionally lower than for larger resource extraction issuers. It should be noted that small issuers in Canada supported ESTMA, and presumably they would not have done so if the costs of compliance were high.[219]

As we note in our response to Question 2, the statute requires the disclosure of payments that companies track in the normal course of doing business, and it is thus reasonable to expect that such systems can be adapted to the Section 13q-1 requirements.

76. Is our approach to identify small issuers that likely do not make any payments above the proposed de minimis amount of $100,000 to any government entity accurate? Are annual revenues and net cash flows from investing activities taken together an appropriate measure for such purpose?

<u>Yes, we agree with the Commission's proposed approach.</u>

We believe that the Commission's approach to identifying small issuers not likely to make any payments above the proposed de minimis amount of $100,000 to any government entity is accurate and appropriate, including the use of annual revenues and net cash flows from investing activities.[220]

78. What are the costs and benefits arising from confidential submission of the payment information? What are the costs and benefits arising from public disclosure of the payment information? How do the potential costs of public disclosure to issuers compare to its potential benefits to users of the information?

<u>The costs of public disclosure to issuers are insignificant when compared to the enormous benefits to users of the payment information.</u>

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[218] See e.g., Scot W. Anderson, Expropriation, Nationalisation and Risk Management, Touch Briefings (2008). Available at: http://www.dgslaw.com/images/materials/AndersonScot_expropriation.pdf; OPIC, Expropriation and Other Forms of Unlawful Government Interference. Available at: https://www.opic.gov/what-we-offer/political-risk-insurance/types-of-coverage/expropriation; Multilateral Investment Guarantee Agency, Investment Guarantee Guide (July 2015). Available at: https://www.miga.org/documents/IGG_English_final.pdf.

[219] The Prospectors & Developers Association of Canada (PDAC), a trade association that represents the interests of the Canadian mineral exploration and development industry and claims "more than 1,000 corporate members (including senior, mid-size and junior mining companies and organizations providing services to the mineral industry)" actively supported the passage of ESTMA, as did the Mining Association of Canada (MAC), which represents many small extraction issuers. See: http://www.pdac.ca/about-pdac/about-pdac.

[220] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,093.

We would like to draw the attention of the Commission to our submission of March 14, 2014, which outlined in great detail the costs associated with the confidential submission of payment information as well as the benefits arising from public disclosure of payment information.[221] Confidential filing – or making public only a highly aggregated selection of the submitted payment information – would be of little use to the intended users, would detract from the benefits to investors and citizens in resource-rich countries that Congress intended, and would stand in contrast to an emerging international reporting standard, thereby creating a dual-reporting burden for cross-listed extractive companies.

See our response to Question 71.

80. Are there studies on the potential effects of the proposed rules, the EU or Canadian disclosure rules, or EITI compliance on efficiency, competition, and capital formation? What are potential competitive effects of the proposed rules and how might they be impacted when the regulations promulgated pursuant to the EU Directives and ESTMA come into full effect? What fraction of international extractive companies would be affected by at least one of the U.S., EU, or Canadian rules?

<u>The proposed rules will have no adverse competitive effects on resource extraction issuers.</u>

When devising and implementing their own mandatory payment disclosure requirements modeled after the Commission's 2012 Rule, authorities in the EU and Canada considered the concerns raised by certain extractive companies, consulted widely with industry, investors and civil society, subjected each competitive concern to a rigorous debate, and in every case determined that such concerns were unfounded. In hewing closely to the 2012 Rule and mandating public disclosure at the project level with no exemptions, dozens of countries have rejected arguments that the standards of the 2012 Rule would negatively affect corporate competitiveness or impose serious compliance costs.

The concerns expressed by some resource extraction issuers about competitive risks stemming from mandatory payment disclosure regulations have not been supported by credible evidence. For instance, as is noted in our responses to Questions 45-48, claims by certain commentators that China, Angola, Cameroon and Qatar prohibit disclosure of payments[222] have been soundly refuted.[223] Similarly, other

[221] Comment submitted by PWYP-US (14 Mar. 2014), pp.5-18, 22-23. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.
[222] Comment submitted by American Petroleum Institute (7 Nov. 2013). Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf.
[223] For a summary of previous evidence and updates on the four countries, see generally the comment submitted by Global Witness (18 Dec. 2013), p.12-17. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf. See also Comment submitted by PWYP-US (14 Mar. 2014), pp.25-27. Available at: https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.

industry concerns about supposed competitive disadvantages have been systematically refuted in previous PWYP submissions.[224] See also our response to Question 40.

The comment submitted to the Commission by Professor Robert Conrad, offers compelling evidence that "no competitive disadvantages will result from project level reporting by issuers relative to either owners of natural resources or to competitive resource producers, including state enterprises." He bases this conclusion, in part, on his view that the disclosure of project level payment information "does not require disclosure of...commercially sensitive data" and that it is not possible to use payment information to infer confidential information, as has been claimed by some commentators.[225]

In 2014, PWYP-US calculated that 84 of the world's 100 largest oil and gas companies and 58 of the world's 100 largest mining companies (by market capitalization) would be required to disclose their payments to governments as the result of listings in the US, EU, Canada, and Norway.[226] Canada ranks first globally in the number of listed extractives companies, with more than 55 percent (1,492) of the world's publicly listed mining companies, and 30 percent (337) of publicly listed oil and gas companies.[227]

81. What are the benefits and costs of an alternative reporting option for issuers that are subject to a foreign jurisdiction's resource extraction payment disclosure requirements that are determined to be substantially similar to our requirements? How much would such issuers save in compliance costs if they have the option to satisfy their filing obligations by filing the report required by that foreign jurisdiction with the Commission?

The Commission's approach to alternative reporting has considerable benefits for both issuers and users.

We agree with the Commission's treatment of issuers that are subject to substantially equivalent payment reporting requirements in the EU, Canada or Norway. As the Commission rightfully notes, the costs of compliance with Section 13q-1 for such firms would be significantly lower than costs for other issuers, since issuers subject to a foreign jurisdiction's resource extraction payment disclosure requirements would not necessarily need to prepare a second report to comply with Section 13q-1.[228]

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[224] Comment submitted by PWYP-US (14 Mar. 2014), pp.24-41; Comment submitted by PWYP-US (25 Feb. 2011), p.4; Comment submitted by Oxfam America (21 Feb. 2011), p.23- 24; Comment submitted by Global Witness (18 Dec. 2013), p.14-15.
[225] Comment submitted by Robert F. Conrad (17 July, 2015). Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-81.pdf.
[226] Comment submitted by PWYP-US (14 Mar. 2014), p.45. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf.
[227] Natural Resources Canada, Canada's Positive Investment Climate for Mineral Capital (Jan. 2015). Available at: http://www.nrcan.gc.ca/mining-materials/publications/8782; TSX Inc., A Capital Opportunity: A Global Market for Mining Companies (2015). Available at: http://www.tsx.com/resource/en/193; TSX Inc., A Capital Opportunity: A Global Market for OIl & Gas Companies (2015). Available at: http://www.tsx.com/resource/en/108.
[228] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Proposed Rule, 80 Fed. Reg. at 80,093.

82. Are there additional benefits associated with the proposed rules? For example, would disclosure of payment information required by the proposed rules be useful to investors in smaller reporting companies who may not otherwise receive disclosure about country-specific risk? Why or why not?

Investors and other commentators have illustrated a variety of benefits of Section 13q-1 that are not reflected in the proposed rule release.

On numerous occasions throughout the Section 13(q) rulemaking process, investors representing more than $9.8 trillion in assets under management, as well as other commentators, have provided detailed explanations of the value of disclosures resulting from the statute. The most recent example is the October 30, 2015 comment by CCSI and Jeffrey Sachs, noted development economist and chair of the CCSI advisory board. The letter includes thorough demonstrations of how Section 13(q) disclosures may be used in the valuation and analysis of securities in several different asset classes, using both active and passive management strategies.[229]

Another example is Calvert Investments' November 25, 2013 submission, which also provides specific details of how Section 13(q) disclosures may be used in routine investment analysis, including the calculations of project net present values. Further, the letter notes the following:

> Currently investors do not have access to sufficiently detailed, reliable, and comparable data regarding oil, gas and mining companies' payments to host governments to account for material and distinct social, political and regulatory risks to accurately assess cash flows or account for factors such as acquisition costs and management effectiveness. Section 13(q) of the Exchange Act addresses these challenges.[230]

The Commission recognized the benefits to investors when it adopted the 2012 Rule. During the meeting at which the 2012 Rule was announced, Commissioner Aguilar stated plainly, "[t]he final rule we consider today is in the interest of investors,"[231] and Commissioner Walter reiterated that, "[a]s numerous commentators 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."[232]

Likewise, during the subsequent litigation over the 2012 Rule, the Commission argued that disclosure would "provide valuable information to investors when assessing risks and making investment

[229] Comment submitted by Columbia Center of Sustainable Investment (30 Oct. 2015), pp.3, 9. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-17.pdf.
[230] Comment submitted by Calvert Investments (25 Nov. 2013), pp.4, 5. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-17.pdf.
[231] Commissioner Luis A. Aguilar's remarks. Available at: http://www.sec.gov/news/speech/2012/spch082212laa-extraction.htm.
[232] Commissioner Elisse B. Walter's remarks. Available at: http://www.sec.gov/News/Speech/Detail/Speech/1365171490910.

decisions."[233] The Commission also recognized that some investors legitimately want to avoid being seen as complicit in socially unjust ventures where companies are not paying a fair price for natural resources.[234] Crucially, the Commission acknowledged that these benefits would accrue only if the information were available on an issuer-by-issuer basis.[235] In amicus briefs, US legislators similarly noted that issuer and project-level disclosures are key to giving investors information about the commercial, political, and legal risks companies may face.[236]

Throughout the rulemaking process, investor comments have continued to emphasize that fully public issuer disclosures at the project-level, without exemptions, serve the core interests of investors, are consistent with Congressional intent behind Section 13(q), and align with the Commission's central role as an investor advocate.

More specifically, investors, US legislators, and other commentators explained that issuer-specific, project-level disclosures would enable investors to do the following:

- Calculate riskiness of extractive companies as investments, especially in opaque, resource-rich countries where projects may cause social unrest or loss of the social license to operate, and where the size and frequency of payments may influence a company's reputation and provide a window into the company's reliance on high-risk projects and its risk diversification strategy.[237] Calvert Investments raised the example of Guatemala, where Glamis Gold had to abandon

[233] *API v. SEC*, No. 12-1668 (JDB), Oral Argument Tr. at 51 (D.D.C. June 7, 2013); see also SEC Rel. No. 68197, Order Denying Stay at 9 n.5 (8 Nov. 2012).
[234] *API v. SEC,* No. 12-1668 (JDB), Oral Argument Tr. at 57:24 – 58:2.
[235] See *API v. SEC*, No. 12-1398, Br. of Resp. SEC, at 44 (D.C. Cir. Jan. 2, 2013) ("such information would be relevant to investors only if it were disclosed on an issuer-by-issuer basis.") (emphasis in original); *API v. SEC*, No. 12-1668 (JDB), Oral Argument Tr. at 37-38 (D.D.C. June 7, 2013) 37 ("aggregated, anonymised [sic] disclosure mechanism" sought by API "would effectively eliminate one of the two legs on which this provision stands, and that's providing information to investors.")
[236] See Br. for Representatives Edward J. Markey, Maxine Waters, Eliot l. Engel, Jim McDermott, Gregory W. Meeks, Betty McCollum, Jim Moran, Earl Blumenauer, André Carson, Sam Farr, Peter Welch, and Barbara J. Lee as Amici Curiae Supporting Respondent at 12, 15, 16, *API v. SEC*, No. 12-1398 (D.C. Cir. Jan 16, 2013); Br. of United States Senator Benjamin Cardin, Former Senator Richard Lugar, and United States Senator Carl Levin as Amici Curiae in Support of Respondent at 2, *API v. SEC*, No. 12-1398 (D.C. Cir. Jan. 17, 2013).
[237] Comment submitted by Global Witness (24 Feb. 2012), p.2; Comment submitted by Presbyterian Church (U.S.A.) (Feb. 15, 2012), p.2; Comment submitted by 14 Members of the U.S. House of Representatives (15 Feb. 2012); Comment submitted by Conflict Risk Network (7 Feb. 2012); Comment submitted by five U.S Senators (31 Jan. 2012), p.1; Comment submitted by TIAA-CREF (2 Mar. 2011), p.2; Comment submitted by British Columbia Investment Management Corporation (2 Mar. 2011), p.1; Comment submitted by Bon Secours Health System (1 Mar. 2011); Comment submitted by PGGM Investments (1 Mar. 2011); Comment submitted by SNS Asset Management (28 Feb. 2011); Comment submitted by Railpen Investments (25 Feb. 2011); Comment submitted by Global Witness (25 Feb. 2011), p.2; Comment submitted by Syena Investments (17 Feb. 2011), p.1; Comment submitted by Senator Carl Levin (1 Feb. 2011), p.1; Comment submitted by Calvert Asset Management Company (1 Mar. 2011), Exhibit B.

valuable tax benefits as a result of the reputational damage arising from criticism that the company was contributing insufficiently to the national welfare.[238]

- Identify anomalous, individual payments that could indicate particular risks to investments – such as conflict-related insecurity or government interference in a project – or internal problems – such as corruption – but would otherwise be hidden by a high level of aggregation.[239]
- Differentiate projects within countries that have different risk-profiles.[240]
- Analyze individual companies for exposure to unexpected changes to tax and other regulatory regimes.[241]
- Analyze industry cost curves to forecast commodity prices and identify projects that would be more susceptive to declining commodity prices.[242]
- Better understand the impact of effective tax and royalty rates on individual projects.[243]
- Calculate the profitable life of significant projects, as part of general algorithms for analyzing individual investment targets.[244]
- Properly discount future production of individual issuers in resource-rich countries based on analysis of each country's dependence on the extractive sector and historical scenarios.[245]
- Analyze how individual project payments will affect development costs or operating cash flow in case of disruptions, as in Nigeria, where shutdowns have affected operating performance.[246]
- Mitigate investment risk regarding smaller companies whose assets are concentrated in a small number of countries.[247]
- Make socially responsible investment decisions.[248]

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[238] Comment submitted by Calvert Asset Management Company (1 Mar. 2011), Exhibit B p.3. Available at: http://www.sec.gov/comments/s7-42-10/s74210-40.pdf.

[239] Comment submitted by PWYP - US (20 Dec. 2011), p.5. https://www.sec.gov/comments/s7-42-10/s74210-117.pdf; Comment submitted by EarthRights International, (Sept. 20, 2011) p.7. Available at: https://www.sec.gov/comments/s7-42-10/s74210-111.pdf.

[240] Comment submitted by EarthRights International (20 Sept. 2011), p.7. Available at: https://www.sec.gov/comments/s7-42-10/s74210-111.pdf; Comment submitted by Global Witness (25 Feb. 2011), pp.16-17. Available at: https://www.sec.gov/comments/s7-42-10/s74210-34.pdf.

[241] Comment submitted by Calvert Asset Management Company (1 Mar. 2011), p.2 Ex. A and Ex. B (listing regulatory, taxation, political, and reputational risks, as well as threats of unanticipated natural resource tax and permitting policy changes up to and including resource nationalization, even in developed countries); Comment submitted by Global Witness, (25 Feb. 2011), p.2; Comment submitted by Oxfam America (21 Feb. 2011), p.8.

[242] Comment submitted by Columbia Center of Sustainable Investment (30 Oct. 2015), p.6. Available at: http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-17.pdf.

[243] See e.g. Comment submitted by Simon Clements, Alliance Trust (28 Oct. 2015), p.1; Comment submitted by Columbia Center of Sustainable Investment (30 Oct. 2015), p.8.

[244] Comment submitted by Calvert Asset Management Company (1 Mar. 2011), p. 2 Ex. A. Available at: http://www.sec.gov/comments/s7-42-10/s74210-40.pd2 Ex.A.

[245] Ibid.

[246] Ibid., 3, and 1 – 2 Ex. B.

[247] Comment submitted by Railpen Investments (25 February 2011); Comment submitted by SNS Asset Management (28 February 2011).

[248] Comment submitted by Catholic Relief Services and the Committee on International Justice and Peace of the United States Conference of Catholic Bishops (9 February 2011), p.1. Available at: http://www.sec.gov/comments/s7-42-10/s74210-67.pdf.

Investors also supported project-level disclosures on the grounds of improving the investment climate overall by diminishing opportunities for corruption and ameliorating the political instability risks associated with a lack of transparency.[249]

[249] Comment submitted by Columbia Center of Sustainable Investment (30 Oct. 2015), pp.7-8.; Comment submitted by Steve Berexa, Allianz Global Investors, et al., (28 Apr. 2014), pp.3-4; Comment submitted by 14 Members of the U.S. House of Representatives (15 February 2012); Comment submitted by British Columbia Investment Management Corporation (2 Mar. 2011), p.1; Comment submitted by Newground Social Investment (1 Mar. 2011); Comment submitted by Bâtirente (28 Feb. 2011); Comment submitted by California Public Employees' Retirement System (28 Feb. 2011); Comment submitted by Syena Investments (17 Feb. 2011), p.1.

Appendix A

Recommended Language for Rule 13q-1[250]

§ 240.13q-1 Disclosure of payments made by resource extraction issuers.

(a) A resource extraction issuer must file a report on Form SD (17 CFR 249b.400) within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form.

(b) Disclosure is required under this section in circumstances in which an activity related to the commercial development of oil, natural gas, or minerals, or a payment or series of payments made by a resource extraction issuer to a foreign government or the Federal Government for the purpose of commercial development of oil, natural gas, or minerals is not, in form or characterization, within one of the categories of activities or payments specified in Form SD, but is part of a plan or scheme to evade the disclosure required under this section. Activities and payments must not be artificially structured, split or aggregated to avoid the application of the rules.

(c) Definitions. For the purpose of this section the terms "resource extraction issuer," "commercial development of oil, natural gas, or minerals," "foreign government," and "payment" are defined in Form SD.

(d) Applications for Exemptions. All requests for exemptions from any of the disclosure requirements in this section must be made pursuant to the procedures set forth in Exchange Act Rule 0-12. The Commission will publish any such application in the Federal Register and provide opportunity for members of the public to comment, pursuant to § 240.0-12(g). Any application for exemptive relief must be based on the existence of a foreign legal provision enacted or adopted after July 21, 2010. Any such application must be accompanied by sufficient supporting information pursuant to § 240.0-12(a), including but not limited to:

(1) the text of the foreign law and/or regulations, along with an English translation if necessary, including date of enactment or adoption;

[250] The following are our recommended changes to the regulatory language. Red text denotes additions, and strikethroughs denote deletions to the regulatory language.

(2) an opinion of qualified counsel identifying a clear conflict with the disclosure requirements of this section;

(3) a description of the penalties or sanctions for violating the foreign legal provision, including information about whether the prohibition has been enforced in the past; and

(4) a description of all steps the issuer has taken to secure permission from the foreign government authority to comply with this section, and the outcomes of any such steps.

(e) Applications for Alternate Reporting. In order for the Commission to consider whether an alternate disclosure regime is substantially equivalent pursuant to an application submitted under Exchange Act Rule 0-13, the application must be accompanied by adequate supporting information, including but not limited to: (1) a copy of the foreign jurisdiction's relevant law and/or regulations, including an English translation, if necessary; (2) an opinion of qualified counsel that compares the alternate regime with this section, which must, at a minimum, meet the criteria listed below; and (3) a copy of the most recent report submitted by the issuer in the foreign jurisdiction, or if the applicant is not an issuer, a copy of the reporting template required by the foreign jurisdiction, and an English translation, if necessary. Upon receipt of a complete application, the Commission will publish the application and allow a public comment period. The Commission will grant the application if it determines that the alternate regime has requirements that are substantially equivalent to those of this section. In particular, the Commission will not grant a full substituted compliance order unless the alternate regime is at least as stringent as this section with respect to at least the following elements:

(1) the types of payments that are required to be disclosed;

(2) the types of payment recipients (including subnational governments and entities controlled by the government);

(3) whether project-level disclosure is required and, if so, the definition of ''project'';

(4) whether the disclosure must be publicly filed and whether it includes the identity of the issuer;

(5) whether the disclosure must be provided using an interactive data format that includes electronic tags;

(6) the availability of exemptions from reporting;

(7) frequency of reporting;

(8) anti-evasion measures; and

(9) the availability of civil, criminal, and/or administrative liability or penalties for violations of the disclosure requirements.

If the alternate disclosure regime is at least as stringent as this section with respect to some but not all of the elements listed above, the Commission may grant a partial substitute compliance order that requires covered issuers to submit supplemental information. For example, if a reporting regime is substantially equivalent in most respects but does not require disclosure in an interactive data format with electronic tags, the Commission should require the issuer to present the payment disclosures using a machine-readable electronic format such as XBRL with electronic tags in an exhibit to Form SD.

If it comes to the attention of the Commission that a previously approved alternate reporting regime has changed in any way that substantially affects the elements listed above, the Commission shall reconsider the substituted compliance order and shall give members of the public an opportunity to comment before withdrawing the order.

PART 249b – FURTHER FORMS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for part 249b is amended by revising the sub-authority for § 249b.400 to read as follows:

Authority: 15 U.S.C. 78a et seq., unless otherwise noted.

* * * * *

Section 249b.400 is also issued under secs. 1502 and 1504, Pub. L. No. 111-203, 124 Stat. 2213 and 2220.

* * * * *

4. Amend Form SD (referenced in § 249b.400) by:

a. Adding a check box for Rule 13q-1;

b. Revising instruction A. under "General Instructions";

c. Redesignating instruction B.2. as B.3 and adding new instructions B.2. and B.4. under the "General Instructions"; and

d. Redesignating Section 2 as Section 3, adding new Section 2, and revising newly redesignated Section 3 under the "Information to be Included in the Report".

The addition and revision read as follows:

Note: The text of Form SD does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM SD

SPECIALIZED DISCLOSURE REPORT

(Exact name of the registrant as specified in its charter)

(State or other jurisdiction of incorporation or organization) (Commission File Number) (I.R.S. Employer Identification No.)

(Full mailing address of principal executive offices)

(Name and telephone number, including area code, of the person to contact in connection with this report.)

Check the appropriate box to indicate the rule pursuant to which this Form is being filed, and provide the period to which the information in this Form applies:

___ Rule 13p-1 under the Securities Exchange Act (17 CFR 240.13p-1) for the reporting period from January 1 to December 31, __________.

___ Rule 13q-1 under the Securities Exchange Act (17 CFR 240.13q-1) for the fiscal year ended _________.

GENERAL INSTRUCTIONS

A. Rule as to Use of Form SD.

This Form shall be used for a report pursuant to Rule 13p-1 (17 CFR 240.13p-1) and Rule 13q-1 (17 CFR 240.13q-1) under the Securities Exchange Act of 1934 (the "Exchange Act").

B. Information to be Reported and Time for Filing of Reports.

1. * * *

2. *Form filed under Rule 13q-1*. File the information required by Section 2 of this form on EDGAR no later than 150 days after the end of the issuer's most recent fiscal year.

3. If the deadline for filing this Form occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, then the deadline shall be the next business day.

4. The information and documents filed in this report shall not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, unless the registrant specifically incorporates it by reference into such filing.

* * * * *

INFORMATION TO BE INCLUDED IN THE REPORT

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Section 2 – Resource Extraction Issuer Disclosure Item

2.01 Resource Extraction Issuer Disclosure and Report

(a) *Required Disclosure*. A resource extraction issuer shall file an annual report on Form SD with the Commission, and include as an exhibit to this Form SD, information relating to any payment made during the fiscal year covered by the annual report by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer, to a foreign government or the Federal Government, for the purpose of the commercial development of oil, natural gas, or minerals. The issuer must provide a statement in the body of the Form SD that the specified payment disclosure required by this Form is included in such exhibit. The resource extraction issuer must include the following information in the exhibit, which must present the information in the eXtensible Business Reporting Language (XBRL) electronic format:

(1) The type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(2) The type and total amount of such payments for all projects made to each government;

(3) The total amounts of the payments, by category listed in paragraph (c)(9)(iii) of this Item;

(4) The currency used to make the payments, using ISO currency codes (ISO 4217);

(5) The financial period in which the payments were made;

(6) The business segment of the resource extraction issuer that made the payments;

(7) The governments (including any foreign government or the Federal Government) that received the payments and the country in which each such government is located;

(8) The project of the resource extraction issuer to which the payments relate;

(9) The particular resource that is the subject of commercial development; ~~and~~

(10) The subnational geographic location of the project;

(11) Where payments are made in-kind, the value of such payments together with a description of the method for determining this value, and, where applicable, the relevant volume; and

(12) Either a) the name of the single contract, license, lease, concession, or similar legal agreement that forms the basis for payment liabilities with a government which is treated by the resource extraction issuer as a project, or b) the individual names of the agreements with substantially similar terms that are both operationally and geographically integrated which are treated by the resource extraction issuer as a single project.

(b) *Alternate Reporting*. A resource extraction issuer may satisfy its disclosure obligations under paragraph (a) of this Item by including as an exhibit to this Form SD a report complying with the reporting requirements of any alternative reporting regime that are deemed by the

Commission to be substantially ~~similar~~ equivalent to the requirements of Rule 13q-1 (17 CFR 240.13q-1), provided that the Commission has first confirmed the substantial equivalence of such regime pursuant to an application duly submitted by an issuer or a foreign jurisdiction under Exchange Act Rule 0-13. The issuer must state in the body of the Form SD that it is relying on this provision and identify the alternative reporting regime for which the report was prepared. The issuer must also specify that the payment disclosure required by this Form is included in an exhibit to this Form SD and state where the report was originally filed. If the Commission's order under Exchange Act Rule 0-13 requires the alternate report to be supplemented with additional information in order to be compliant, the issuer include such information as an exhibit to Form SD. If the original report was submitted in a language other than English, the issuer must provide an English translation.

(c) *Definitions*. For purposes of this item, the following definitions apply:

(1) Business segment for purposes of this form means ~~a business segment consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting.~~ the subsidiary or entity under the control of the resource extraction issuer that made the payments.

(2) Commercial development of oil, natural gas, or minerals means exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any such activity.

(3) Control means that the resource extraction issuer consolidates the entity or proportionately consolidates an interest in, or has significant influence over, an entity or operation under the accounting principles applicable to the financial statements included in the resource extraction issuer's periodic reports filed pursuant to the Exchange Act (i.e., under generally accepted accounting principles in the United States (U.S. GAAP) or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS), but not both). A foreign private issuer that prepares financial statements according to a comprehensive set of accounting principles, other than U.S. GAAP or IFRS, and files with the Commission a reconciliation to U.S. GAAP must determine control using U.S. GAAP.

(4) Export means the movement of a resource across an international border from the host country to another country by a company with an ownership interest in the resource. This includes trading activities where an issuer purchases a government's (including a state-owned company's) oil, natural gas, or minerals. Cross-border transportation activities by an issuer that is functioning solely as a service provider, with no ownership interest in the resource being transported, would not be considered to be export.

(5) Extraction means the production of oil and natural gas as well as the extraction of minerals.

(i) Natural gas means all forms of natural gas, and includes all substances, other than oil, that are produced in association with natural gas.

(ii) Minerals means all naturally occurring metallic and non-metallic minerals, including coal, salt, quarry and pit material, and all rare and precious metals.

(iii) Oil means crude petroleum, bitumen, and oil shale.

(6) Financial period means the fiscal year in which the payment was made.

(7) Foreign government means a foreign government, a department, agency, or instrumentality of a foreign government, or a company at least majority owned (including with respect to voting shares) by a foreign government. As used in this Item 2.01, foreign government includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.

(8) Not de minimis means any payment, whether made as a single payment or a series of related payments, which equals or exceeds $100,000, or its equivalent in the issuer's reporting currency, during the fiscal year covered by this Form SD. In the case of any arrangement providing for periodic payments or installments, a resource extraction issuer must consider the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that series of payments, and accordingly, whether disclosure is required.

(9) Payment means an amount paid that:

(i) Is made to further the commercial development of oil, natural gas, or minerals;

(ii) Is not de minimis; and

(iii) Is one or more of the following:

(A) Taxes; (B) Royalties;

(C) Fees;

(D) Production entitlements;

(E) Bonuses;

(F) Dividends; ~~and~~

(G) Payments for infrastructure improvements;~~.~~

(H) Mandatory social payments; and

(I) Payments, including payments in-kind, derived from trading activities where an issuer purchases a government's (including a state-owned company's) oil, natural gas, or minerals.

(10) Project means operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government. Agreements with substantially similar terms that are both operationally and geographically ~~interconnected~~ integrated may be treated by the resource extraction issuer as a single project.

(11) Resource extraction issuer means an issuer that:

(i) Is required to file an annual report with the Commission pursuant to Section

13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)); and

(ii) Engages in the commercial development of oil, natural gas, or minerals.

(12) Subsidiary means an entity controlled directly or indirectly through one or more intermediaries.

(13) Particular resource means a resource selected from the Commission's standardized list of resource types.

(d) *Optional Disclosure*. Issuers may include in Form SD additional information about the data provided in the exhibits to this Form SD, such as contextual information, or any further explanation.

Instructions to Item 2.01

Disclosure by Subsidiaries and other Controlled Entities

(1) If a resource extraction issuer is controlled by another resource extraction issuer that has filed a Form SD disclosing the information required by Item 2.01 of this Form for the controlled entity, then such controlled entity shall not be required to file the disclosure required by this Item 2.01 separately. In such circumstances, the controlled entity must file a notice on Form SD indicating that the required disclosure was filed on Form SD by the controlling entity, identifying the controlling entity and the date it filed the disclosure. The reporting controlling entity must note that it is filing the required disclosure for a controlled entity and must identify the controlled entity on its Form SD filing.

Currency Disclosure and Conversion

(2) An issuer must report the amount of payments made for each payment type, and the total amount of payments made for each project and to each government, during the reporting period in either U.S. dollars or the issuer's reporting currency. If an issuer has made payments in currencies other than U.S. dollars or its reporting currency, it must report those payments both in (a) U.S. dollars or its reporting currency, and (b) in the currency in which the payment was made. ~~i~~It may choose to calculate the currency conversion between the currency in which

the payment was made and U.S. dollars or the issuer's reporting currency, as applicable, in one of three ways: (a) by translating the expenses at the exchange rate existing at the time the payment is made; (b) using a weighted average of the exchange rates during the period; or (c) based on the exchange rate as of the issuer's fiscal year end. A resource extraction issuer must disclose the method used to calculate the currency conversion.

Subnational Geographic Location Tagging

(3) The "geographic location of the project" as used in Item 2.01(a)(10) must be disclosed as specified in the agreement(s) that have been used to establish the project for reporting purposes. In general this will be the geographic coordinates (e.g., latitude, longitude, and altitude) contained in the agreement(s). ~~sufficiently detailed to permit a reasonable user of the information to identify the project's specific, subnational, geographic location. In identifying the location, resource extraction issuers~~Resource extraction issuers ~~may~~ should also use subnational jurisdiction(s) (e.g., a state, province, county, district, municipality, territory, etc.) and/or a commonly recognized, subnational, geographic or geological description (e.g., oil field, basin, canyon, delta, desert, mountain, etc.) to identify the location of the project. ~~More than one descriptive term may be necessary when there are multiple projects in close proximity to each other or when a project does not reasonably fit within a commonly recognized, subnational geographic location. In considering the appropriate level of detail, resource extraction issuers may need to consider how the relevant contract identifies the location of the project.~~

Entity Level Disclosure and Tagging

(4) If a government levies a payment obligation, such as a tax or a requirement to pay a dividend, at the entity level rather than on a particular project, a resource extraction issuer may disclose that payment at the entity level. To the extent that payments, such as corporate income taxes and dividends, are made for obligations levied at the entity level, an issuer may omit certain tags that may be inapplicable (e.g., project tag, business segment tag) for those payment types as long as it provides all other electronic tags, including the tag identifying the recipient government.

Payment Disclosure

(5) When a resource extraction issuer proportionately consolidates, or has significant influence over, an entity or operation under U.S. GAAP or IFRS, as applicable, and must disclose payments made by such entity or operation pursuant to this Item, such payments must be disclosed on a proportionate basis and must describe the proportionate interest.

(6) Although an entity providing only services to a resource extraction issuer to assist with exploration, extraction, processing or export would generally not be considered a resource extraction issuer, where ~~such a service provider~~a third party (including, without limitation, an operator of a joint venture) makes a payment that falls within the definition of "payment" to a

government on behalf of a resource extraction issuer, the resource extraction issuer must disclose such payment.

(7) "Processing," as used in this Item 2.01, would include, but is not limited to, midstream activities such as the processing of gas to remove liquid hydrocarbons, the removal of impurities from natural gas prior to its transport through a pipeline, and the upgrading of bitumen and heavy oil, through the earlier of the point at which oil, gas, or gas liquids (natural or synthetic) are either sold to an unrelated third party or delivered to a main pipeline, a common carrier, or a marine terminal. It would also include the crushing and processing of raw ore prior to the smelting phase. It would not include the downstream activities of refining or smelting.

(8) "Mandatory social payments," as used in this Item 2.01, are expenditures mandated by law or contract in addition to taxes and other mandatory payments, which are for the purpose of directly furthering the socio-economic well-being of communities or the population within the country where the expenditures are made.

(9~~8~~) A resource extraction issuer must disclose payments made for taxes on corporate profits, corporate income, and production. Disclosure of payments made for taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes, is not required.

(10~~9~~) Fees include but are not limited to license fees, rental fees, entry fees, and other considerations for licenses or concessions. Bonuses include but are not limited to signature, discovery, and production bonuses. Royalties include but are not limited to unit based, value-based, or profit-based royalties.

(11~~10~~) Dividends paid to a government as a common or ordinary shareholder of the issuer that are paid to the government under the same terms as other shareholders need not be disclosed. The issuer, however, must disclose any dividends paid in lieu of production entitlements or royalties.

(12~~11~~) If a resource extraction issuer makes an in-kind payment of the types of payments required to be disclosed, the issuer must disclose the payment. When reporting an in-kind payment, an issuer must determine the monetary value of the in-kind payment and tag the information as "in-kind" for purposes of the currency. For purposes of the disclosure, an issuer may report the payment at cost, or if cost is not determinable, fair market value. ~~and should~~ The issuer must provide a brief description of how the monetary value was calculated, and where applicable, report the relevant volume.

~~Interconnected~~ Integrated Agreements

(13~~12~~) ~~The following is a non-exclusive list of factors to consider when determining whether agreements are~~Agreements are "operationally and geographically ~~interconnected~~integrated" for purposes of the definition of "project" if: (a) ~~whether~~ the agreements relate to the same resource and the same or contiguous part of a field, reservoir, mineral district, or ~~other geographic area~~mineral ore body; (b) ~~whether~~ the agreements will be performed by shared key personnel at the operational level or with shared equipment; and (c) ~~whether~~ they are part of the same operating budget.

(14) Agreements have "substantially similar terms" for purposes of the definition of "project" if they contain substantially similar terms with respect to fiscal provisions, revenues payable directly to local communities or subnational governments, and other payment related terms.

Section 3 – Exhibits

Item 3.01 Exhibits

List below the following exhibits filed as part of this report:

Exhibit 1.01 – Conflict Minerals Report as required by Items 1.01 and 1.02 of this Form.

Exhibit 2.01 – Resource Extraction Payment Report as required by Item 2.01 of this Form.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the duly authorized undersigned.

____
(Registrant)

_______________________________________ ____________________________
By (Signature and Title)* (Date)

* Print name and title of the registrant's signing executive officer under his or her signature.

* * * * *

Appendix B

Investor Letters of Support for Section 1504 of the Dodd-Frank Act

Oct. 28, 2015 — Simon Clements, Investment Manager, Global Equities, Alliance Trust PLC (http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-90.pdf)

May 9, 2014 — First Swedish National Pension Fund, et al. (http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-42.pdf)

- AP1/Första AP-Fonden (The First Swedish National Pension Fund) Ossian Ekdahl, Head of Communication and ESG
- AP2/Andra AP-Fonden (The Second Swedish National Pension Fund) Ulrika Danielson, Head of Communications and HR and Coordination Corp. Governance
- AP3 Tredje AP-fonden (The Third Swedish National Pension Fund), Peter Lundkvist, Head of Corporate Governance
- AP4/Fjärde AP-Fonden (The Fourth Swedish National Pension Fund), Arne Lööw, Head of Corporate Governance
- Element Investment Managers, David Couldridge, Senior Investment Analyst
- F&C Management Ltd, Matthias Beer, Associate Director, Governance and Sustainable Investment
- Legal & General Investment Management, Sacha Sadan, Director of Corporate Governance
- Natixis Asset Management and Mirova, Hervé Guez, Director of Responsible Investment Research
- OPSEU Pension Trust, Enrique Cuyegkeng, Managing Director, Public Market Investments
- RPMI Railpen Investments, Frank Curtiss, Head of Corporate Governance
- SNS Asset Management, Jacob de Wit, Chief Executive Officer

Apr. 28, 2014 — Steve Berexa, Managing Director, Global Head of Research, Senior Portfolio Manager, Allianz Global Investors, et al. (http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-35.pdf)

- Allianz Global Investors, Steve Berexa, Managing Director, Global Head of Research, Senior Portfolio Manager
- Aviva Investors, Steve Waygood, Chief Sustainable Investment Officer

- British Columbia Investment Management Corporation (bcIMC), Bryan Thomson, SVP Public Equity Investments
- Amundi Asset Management, Pascal Blanqué, Chief Investment Officer
- AP1/Första AP-Fonden (The First Swedish National Pension Fund), Ossian Ekdahl, Head of Communication and ESG
- AP2/Andra AP-Fonden (The Second Swedish National Pension Fund), Ulrika Danielson, Head of Communications and HR and coordination Corp. Governance
- AP3/Tredje AP-Fonden (The Third Swedish National Pension Fund), Peter Lundkvist, Head of Corporate Governance
- AP4/Fjärde AP-Fonden (The Fourth Swedish National Pension Fund), Arne Lööw, Head of Corporate Governance
- AP7/Sjunde AP-Fonden (The Seventh Swedish National Pension Fund), Richard Gröttheim, Chief Executive Officer
- APG Algemene Pensioen Groep NV, Claudia Kruse, Managing Director Sustainability & Governance
- Bâtirente, François Meloche, Extrafinancial Risks Manager
- BNP Investment Partners, Helena Viñes Fiestas, Head of Sustainability Research
- State of Connecticut, Denise L. Nappier, State Treasurer
- Element Investment Managers, David Couldridge, Senior Investment Analyst
- ERAFP, Philippe Desfossés, Chief Executive Officer
- Ethos Foundation, Switzerland, Dominique Biedermann, CEO
- F&C Management Ltd., Matthias Beer, Associate Director, Governance and Sustainable Investment
- Henderson Global Investors, Antony Marsden, Head of Governance and Responsible Investment
- Hermes Equity Ownership Services Ltd, Bruno Bastit, Senior SRI analyst – Extractive industries specialist
- Governance for Owners, Paola Perotti, Partner
- ING IM International, Hendrik-Jan Boer, Head of Responsible Investments
- Local Authority Pension Fund Forum (LAPFF), Cllr Kieran Quinn, Chairman
- Legal & General Investment Management Ltd., Sacha Sadan, Director of Corporate Governance
- MN, Anatoli van der Krans, Senior Advisor Responsible Investment & Governance
- Natixis Asset Management and Mirova: Hervé Guez, Director of Responsible Investment Research

- Nordea Asset Management, Sasja Beslik, Head of Responsible Investments
- NEI Investments, Robert Walker, Vice President, ESG Services & Ethical Funds
- OPSEU Pension Trust, Enrique Cuyegkeng, Managing Director, Public Market Investments
- PGGM, Marcel Jeucken, Managing Director Responsible Investment
- Royal London Asset Management, Niall O'Shea, Head of Responsible Investing
- Robeco, Carola van Lamoen, Team Lead Governance & Active Ownership
- RPMI Railpen Investments, Frank Curtiss, Head of Corporate Governance
- SNS Asset Management, Jacob de Wit, Chief Executive Officer
- USS Investment Management, David Russell, Co-Head of Responsible Investment

Apr. 28, 2014

Peter Lundkvist, Senior Strategist & Head of Corporate Governance, Third Swedish National Pension Fund, et al. (http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-36.pdf)

- Richard Gröttheim, Chief Executive Officer, AP7/Sjunde AP-Fonden (The Seventh Swedish National Pension Fund)
- Steve Waygood, Chief Sustainable Investment Officer, Aviva Investors
- Helena Viñes Fiestas, Head of Sustainability Research, BNP Paribas Investment Partners
- Brian Rice, Portfolio Manager, Corporate Governance California State Teachers' Retirement System
- Bennett Freeman, Senior Vice President, Sustainability Policy and Research, Calvert Investment Management, Inc.
- Dominique Biedermann, Chief Executive Officer, Ethos Foundation, Switzerland 3
- Matthias Beer, Associate Director, Governance and Sustainable Investment, F&C Asset Management Ltd.
- Paola Perotti, Partner, Governance for Owners
- Hendrik-Jan Boer, Head of Responsible Investments, ING IM International
- Sacha Sadan, Director of Corporate Governance, Legal & General Investment Management Ltd.
- Patrick Doherty, Director, Corporate Governance, New York State, Office of the State Comptroller

- Sasja Beslik, Head of Responsible Investments, Nordea Asset Management
- Christine Shaw, Deputy Treasurer, State of Connecticut

Aug. 14, 2013 Steve Berexa, Managing Director, Global Head of Research, Senior Portfolio Manager, Allianz Global Investors, et al. (http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-3.pdf)

- Steve Berexa, Managing Director, Global Head of Research, Senior Portfolio Manager, Allianz Global Investors
- Pascal Blanqué, Chief Investment Officer, Amundi Asset Management
- Ossian Ekdahl, Head of Communications and ESG, AP1/Första AP-Fonden (First Swedish National Pension Fund)
- Ulrika Danielson, Head of Communications and HR, AP2/Andra AP-Fonden (Second Swedish National Pension Fund)
- Peter Lundkvist, Senior Strategist & Head of Corporate Governance, AP3/Tredje AP-Fonden (Third Swedish National Pension Fund)
- Arne Lööw, Head of Corporate Governance, AP4/Fjärde AP-Fonden (Fourth Swedish National Pension Fund)
- Richard Gröttheim, Chief Executive Officer, AP7/The Seventh Swedish National Pension Fund
- Claudia Kruse, Managing Director, Sustainability & Governance APG Algemene Pensioen Groep NV
- Lauren Compere, Managing Director, Boston Common Asset Management, LLC
- Julie Cays, Chief Investment Officer, CAAT Pension Plan
- Anne Simpson, Senior Portfolio Manager, Investments, Director of Corporate Governance, California Public Employees' Retirement System (CalPERS)
- Bennett Freeman, Senior Vice President, Sustainability Research and Policy, Calvert Investment Management, Inc.
- Helen Wildsmith, Head of Ethical & Responsible Investment, CCLA Investment Management
- Dan Nielsen, Director, Socially Responsible Investing, Christian Brothers Investment Services, Inc.
- Shelley Alpern, Director of Social Research & Advocacy, Clean Yield Asset Management
- Ken Jacobs, President, Colorado Sustainable Financial Planning
- Niall O'Shea, Head of Responsible Investing, Co-operative Asset Management

- Adam Kanzer,, Managing Director & General Counsel, Domini Social Investments LLC
- David Couldridge, Senior Investment Analyst, Element Investment Managers
- Philippe Desfossés, Chief Executive Officer, ERAFP
- Mark Regier, Director of Stewardship Investing, Everence & the Praxis Mutual Funds
- Matthias Beer, Associate Director, F&C Asset Management
- Jeffery W. Perkins, Executive Director, Friends Fiduciary Corporation
- Josiane Fanguinovény, Stewardship Services Director, Governance for Owners
- Mark Harland, Corporate Governance Analyst, Henderson Global Investors
- Darren Brady, Manager-North American Corporate Engagement, Hermes Equity Ownership Services Ltd.
- Jelle van der Giessen, CIO, Insurance, ING IM International
- Laura Berry, Executive Director, Interfaith Center on Corporate Responsibility
- Stephen Jones, Chief Investment Officer, Kames Capital
- Sacha Sadan, Director of Corporate Governance, Legal & General Investment Management Ltd.
- Cllr Kieran Quinn, Chairman, Local Authority Pension Fund Forum (LAPFF)
- Larisa Ruoff, Shareholder Advocacy and SRI Research, Loring, Wolcott & Coolidge
- Kris Douma, Head of Responsible Investment & Governance, MN Services
- Enrique Cuyegkeng, Managing Director, Public Market Investments, OPSEU Pension Trust
- Marcel Jeucken, Managing Director, Responsible Investment, PGGM
- Carola van Lamoen, Team Lead, Governance & Active Ownership, Robeco
- Frank Curtiss, Head of Corporate Governance, RPMI Railpen Investments
- Craig Mackenzie, Head of Sustainability, Scottish Widows Investment Partnership
- Jacob de Wit, Chief Executive Officer, SNS Asset Management
- Jonas Kron, Senior Vice President, Director of Shareholder Advocacy, Trillium Asset Management, LLC
- Paul Clark, Global Head, Corporate Governance Services, UBS Global Asset Management

- Lisa N. Woll, CEO, US SIF: The Forum for Sustainable and Responsible Investment
- David Russell, Co-Head of Responsible Investment, USS Investment Management
- Timothy Smith, Senior Vice President, Director of Environmental Social and Governance Shareowner Engagement, Walden Asset Management

Jul. 31, 2013	Jacob de Wit, Chief Executive Officer, SNS Asset Management (http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-1.pdf)
Dec. 20, 2012	Bennett Freeman, Senior Vice President, Sustainability Research and Policy, Calvert Asset Management Company, Inc. (http://www.sec.gov/comments/s7-42-10/34-67717-comments-stay-motion/34-67717-comments-stay-motion-7.pdf)
Nov. 1, 2012	Bennett Freeman, Senior Vice President, Sustainability Research and Policy, Calvert Asset Management Company, Inc. (http://www.sec.gov/comments/s7-42-10/34-67717-comments-stay-motion/34-67717-comments-stay-motion-3.pdf)
Feb. 10, 2012	François Meloche, Extrafinancial Risks Manager, Bâtirente (http://www.sec.gov/comments/s7-42-10/s74210-163.pdf)

- Atkinson Charitable Foundation
- British Columbia Teachers Foundation
- Compensation Employees Union
- Glasswaters Foundation
- Groupe Investissement Responsable Inc.
- Healthcare of Ontario Pension Plan
- Montrusco Bolton Investments Inc.
- Natcan Investment Management
- NEI Investments
- OceanRock Investments (Meritas Funds)
- Regime de retraite de l'Universite du Quebec
- ScotiaMcleod
- Shareholder Association for Research and Education
- Sustainalytics
- The Catherine Donnelly Foundation
- Vancity Investment Management Ltd.

Mar. 2, 2011	Doug Pearce, Chief Executive Officer and Chief Investment Officer,

	British Columbia Investment Management Corp. (http://www.sec.gov/comments/s7-42-10/s74210-62.pdf)
Mar. 2, 2011	Jon Feigelson, Esq., SVP, General Counsel and Head of Corporate Governance, TIAA-CREF, New York, New York (http://www.sec.gov/comments/s7-42-10/s74210-54.pdf)
Mar. 2, 2011	Darren Brady, Hermes Equity Ownership Service Ltd. (http://www.sec.gov/comments/s7-42-10/s74210-47.pdf)
Mar. 1, 2011	Dr. M. Jeucken, Head of Responsible Investment, PGGM Investments, Zeist, Netherlands (http://www.sec.gov/comments/s7-42-10/s74210-43.pdf)
Mar. 1, 2011	Bennett Freeman, Senior Vice President, Sustainability Research and Policy, and Paul Bugala, Sustainability Analyst, Extractive Industries, Calvert Asset Management Company, Inc. (http://www.sec.gov/comments/s7-42-10/s74210-40.pdf)
Mar. 1, 2011	Larry S. Dohrs, Vice President, Newground Social Investment, Seattle, Washington (http://www.sec.gov/comments/s7-42-10/s74210-39.htm)
Mar. 1, 2011	Edward Gerardo, Director, Community and Social Investments, Bon Secours Health System, Inc., Marriottsville, Maryland (http://www.sec.gov/comments/s7-42-10/s74210-51.pdf)
Mar. 1, 2011	Anne Sheehan, Director of Corporate Governance, California State Teachers' Retirement System (http://www.sec.gov/comments/s7-42-10/s74210-59.pdf)
Feb. 28, 2011	Anne Simpson, Senior Portfolio Manager, Global Equity, CalPERS (http://www.sec.gov/comments/s7-42-10/s74210-32.pdf)
Feb. 28, 2011	Manuel Adamini, Head of ESG-research, SNS Asset Management, 's-Hertogenbosch, Netherlands (http://www.sec.gov/comments/s7-42-10/s74210-30.pdf)
Feb. 28, 2011	Francois Meloche, Extrafinancial Risks Manager, Batirente Inc. (http://www.sec.gov/comments/s7-42-10/s74210-66.pdf)
Feb. 25, 2011	Frank Curtiss, Head of Corporate Governance, Railpen Investments,

	London, United Kingdom (http://www.sec.gov/comments/s7-42-10/s74210-28.pdf)
Feb. 17, 2011	Jasbeena, Managing Director, Syena Capital Management LLC (http://www.sec.gov/comments/s7-42-10/s74210-22.pdf)
Jan. 31, 2011	Ian Greenwood, Chairman, Local Authority Pension Fund Forum, United Kingdom (http://www.sec.gov/comments/s7-42-10/s74210-17.pdf)
Jan. 19, 2011	John Harrington, President and CEO, Harrington Investments, Inc., Napa, California (http://www.sec.gov/comments/s7-42-10/s74210-6.pdf)