



March 14, 2014

By E-Mail:

Chair Mary Jo White
Commissioner Luis Aguilar
Commissioner Daniel Gallagher
Commissioner Michael Piwowar
Commissioner Kara Stein

Re: Position Statement on Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Chair White:

I am pleased to submit the attached position statement on behalf of the Publish What You Pay – United States (“PWYP-US”) coalition to the Securities and Exchange Commission (“Commission”) with our recommendations to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Section 1504”).

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 35 anti-corruption, financial transparency, anti-poverty, tax justice, faith-based and human rights organizations. PWYP-US members were actively involved in the previous rulemaking and litigation proceedings.

The members of the PWYP-US coalition urge the Commission to:

- Promptly issue a proposed rule that mandates public disclosure of payments by individual issuers, down to the project level, with no exemptions, and;
- By April 1, 2014, publicly commit to issuing a revised final rule in 2014.

We are grateful for the opportunity to provide our perspective and look forward to discussing these recommendations with you in greater detail.

Sincerely,

A handwritten signature in black ink that reads "Jana L. Morgan". The signature is fluid and cursive, with the first name "Jana" being more prominent.

Jana L. Morgan
National Coordinator, Publish What You Pay – United States

CC:

Ms. Tamara Brightwell, Senior Special Counsel to the Director, Division of Corporation Finance

Mr. Barry Summer, Associate Director, Division of Corporate Finance

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

**Publish What You Pay – United States Position Statement on
Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act
March 14, 2014**

The members of the Publish What You Pay – United States (“PWYP-US”) coalition call on the Securities and Exchange Commission (“Commission”) to issue a rule implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) that is as robust as that released in August 2012 (“2012 rule”) and ensure that it aligns with the standard that has been developed in the European Union (“EU”) and elsewhere, as detailed below. We also urge the Commission to publicly commit by April 1, 2014, that it will issue a final rule in 2014. By promptly re-issuing a strong rule in line with the new global transparency standard, the Commission can spare companies the burden of having to navigate disparate disclosure regimes and ensure that the United States remains a global leader in the promotion of transparency – an area where it has long led.

Section 1504 of the Dodd-Frank Act serves two key purposes: it provides investors with information needed to assess risk and make better investment decisions, and it helps empower citizens of resource-rich countries to hold their governments and the extractive companies that operate within their borders to account. The final rule cannot achieve these goals unless it: 1) makes full disclosure information available to the public, requiring company-specific disclosure; 2) includes a sufficiently granular definition of “project”; 3) allows for no categorical, pre-determined exemptions; and 4) uses a definition of control based on federal securities law rather than accounting standards.

We commend the Commission for its careful and considered rulemaking which led to the 2012 rule. We also appreciate the strong defense put forward by the Commission during the subsequent litigation. Although the District Court ultimately vacated the rule on narrow grounds, the 2012 rule has catalyzed momentum around the world, and global developments have validated the wisdom of the 2012 rule. These developments include passage of strong payment disclosure laws in the EU and Norway, and the enhancement of the Extractive Industry Transparency Initiative’s (“EITI”) requirements. Steady progress is also underway in numerous other markets, including Canada and Switzerland. Each of these jurisdictions has undertaken publicly-inclusive consultation processes which have included extractive industry companies. These lawmakers and regulators have carefully considered and ultimately rejected calls for categorical exemptions and anonymous and highly-aggregated public disclosure, recognizing that robust disclosure requirements have huge benefits to a range of stakeholders but only impose negligible costs on extractive industry issuers. Any new rule issued by the Commission should therefore align with this new global standard and require extractive issuers to publicly disclose project-by-project information, without exemptions.

In support of the points addressed above, this position statement will proceed as follows: It will begin by providing a brief overview of the now established global payment transparency standard – catalyzed by, and largely modeled after the 2012 rule (Section I). It will then lay out the benefits that robust disclosure would afford to investors, businesses, governments, and communities (Section II). From here, it will articulate how and why the benefits evaporate when disclosure is not fully public (Section III). Next, the

position statement will address why it is imperative that disclosure occur at the project level (Section IV), and then move on to demonstrate the importance of producing a rule that does not allow for exemptions (Section V). The position statement will then address and marshal evidence to refute the argument that public disclosure of payments by extractives companies to governments will result in any competitive disadvantage (Section VI). Finally, it will conclude with a discussion on “control” in relation to Section 1504 reporting (Section VII).

We are confident that the evidence put forward in this position statement will provide the SEC with the information necessary to produce a new rule that requires issuer specific public disclosure, at the project-level, with no exemptions.

I. A Global Transparency Standard

Catalyzed by and modeled on the 2012 rule, a global transparency standard has emerged. The EU has passed transparency laws as has Norway, and there has been significant progress towards equivalent mandates in Canada and Switzerland, as documented in the December 2013 comment of PWYP member Global Witness.¹ In all, less than two years after the release of the 2012 rule, over 30 countries with large numbers of oil, gas and mining companies incorporated within their borders or listed on their stock exchanges have adopted or have begun the process of adopting mandatory disclosure laws. The reach of these transparency provisions has been enormous; of the world’s 100 largest oil and gas companies by market capitalization, 38 are now subject to public disclosure mandates in the EU, Canada, or Norway.² Of the top 100 mining companies, 43 are required to publicly report.³ For an analysis of the top 200 cross-listed oil, gas and mining companies, please see Appendix A on page 45.

Even in the very short time since the December 2013 comment from Global Witness was submitted, there has been further strengthening of this global transparency standard:

- **Canada** – In January 2014, mining associations representing over 1,200 companies with a combined market capitalization of over \$550 billion called on the Canadian government to implement recommendations which would require all mining companies listed on Canadian stock exchanges to publicly disclose project-level payments, with no exemptions.⁴ In the recommendations and other statements, the associations specifically endorse the 2012 rule.⁵

¹ Comment submitted by Global Witness (18 December 2013). Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>.

² 22 of these 38 companies are cross-listed with the United States, see Appendix A.

³ 25 of these 43 companies are cross-listed with the United States, see Appendix A.

⁴ Comment submitted by The Resource Revenue Transparency Working Group (16 January 2014). Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-26.pdf>. See also: <http://www.pwypusa.org/node/192>.

⁵ See: Ashley Renders, “Canadian Oil Companies Ready to Disclose More of Their Payments than US,” *Thomson Reuters Foundation* (14 February 2014). Available at: <http://www.trust.org/item/20140214154836-6ymzh>.

The recommendations were reviewed and approved by board members of the Prospectors and Developers Association of Canada (“PDAC”), as well as the Mining Association of Canada (“MAC”), the two most important Canadian mining trade associations (representing most of the largest mining companies in the world).⁶ The major Canadian oil industry association, the Canadian Association of Petroleum Producers (“CAPP”), representing companies responsible for the production of almost 90 percent of Canada’s oil and gas, has also expressed its support for mandatory disclosure of payments at the project-level, similar to the 2012 rule.⁷

On March 5th, the Canadian government began consultations on the proposed standard which will continue throughout the next few months. The government’s proposed approach includes requirements for public disclosure of payments to all levels of government, by company and on a project-by-project basis with no exemptions.⁸ The government has committed to have legislation passed by April of 2015, with mandatory reporting standards in place by June of 2015.⁹

- **Norway** – In December 2013, Norway’s parliament approved legislation requiring public, project-level payment reporting for the extractive and forestry sectors.¹⁰ The Ministry of Finance has issued implementing regulations that do not allow country-based exemptions.¹¹ The reporting requirements are effective for all fiscal years beginning on or after January 1, 2014, so reports will be available in Norway starting in 2015.¹²
- **United Kingdom** – As part of its G8 and Open Government Partnership commitments, the UK has agreed to early transposition of the EU Accounting Directive.¹³ As of the date hereof, the UK Department for Business, Innovation and Skills is about to announce the launch of its public consultation for UK implementation of the EU Accounting Directive’s extractive industries reporting requirement.

⁶ The Mining Association of Canada membership list is available at: <http://mining.ca/members-partners/our-members>; the Prospectors and Developers Association of Canada membership list can be found at: <http://www.pdac.ca/members/membership/corporate-members>.

⁷ See: Ashley Renders, “Canadian Oil Companies Ready to Disclose More of Their Payments than US,” *Thomson Reuters Foundation* (14 February 2014). Available at: <http://www.trust.org/item/20140214154836-6ymzh>. CAPP members include affiliates of some major US oil companies that are subject to Section 1504: ExxonMobil Canada, Shell Canada, Chevron Canada Resources, BP Canada Energy, ConocoPhillips Canada, Total E&P Canada, Marathon Oil Canada, Apache Canada, and Murphy Oil.

⁸ See: http://www.pwyp.ca/images/Consultation_Paper_Spring_2014_March-EN.PDF.

⁹ For background on the Canadian decision, see: <https://www.nrcan.gc.ca/media-room/backgrounder/2014/15565>

¹⁰ See: <http://pwyp.no/en/press-statement-fight-against-capital-flight-continues>.

¹¹ For regulations on country-by-country reporting, see:

http://www.regjeringen.no/nb/dep/fin/dok/lover_regler/forskrifter/2013/forskrift-om-land-for-land-rapportering.html?id=748525.

¹² *Ibid.*, Part II.

¹³ Global Witness, “UK Lead on Oil and Mining Transparency Law Sends Strong Signal to U.S.” (31 October 2013). Available at: <http://www.globalwitness.org/library/uk-lead-oil-and-mining-transparency-law-sends-strong-signal-us>.

In addition to the progress in these jurisdictions, the Extractive Industries Transparency Initiative (“EITI”) has developed new standards which now require public, company and project-level reporting in all member countries.¹⁴ The revised standard is backed by governments in both developed and developing countries,¹⁵ by investors with \$19 trillion in assets under management,¹⁶ and by over 80 of the largest oil, gas and mining companies in the world, including leading members of the American Petroleum Institute (“API”).¹⁷ Apart from EITI, a number of extractive companies recognize the benefits of transparency and are already voluntarily disclosing their payments to governments.¹⁸ Recently, Tullow Oil announced its intention to begin project-level reporting this year, noting that the compliance costs for Tullow are negligible.¹⁹

In addition, global development institutions including the World Bank’s International Finance Corporation (“IFC”)²⁰ and the European Bank for Reconstruction and Development (“EBRD”) have adopted reporting requirements for investments in extractive projects. EBRD adopted a new policy in December 2013 requiring that its energy sector clients disclose extractive payments to governments and follow “the most stringent level of disclosure that is outlined in the EITI principles, the SEC rule and the EU directives.” It will require these disclosures from clients operating in all countries, regardless of EITI status.²¹

In a short period of time, a global transparency standard has developed, consistent with the 2012 rule. This standard confirms the validity of the Commission’s decisions behind its 2012 rule. Each of the jurisdictions and authorities cited above have considered the concerns raised by certain extractive companies, consulted widely with industry, investors and civil society, subjected each 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 2012 rule would impinge on corporate competitiveness or impose serious compliance costs.

¹⁴ The new EITI Standard requires that the project-level reporting be consistent with both Section 1504 and the EU requirements. The project definition proposed in the API comment would be drastically out of alignment with the EU definition, and thus sow confusion among EITI countries on how to report consistently with both the EU and US requirements.

¹⁵ For a list of EITI stakeholders and participants, see: <http://eiti.org/supporters/countries> and <http://eiti.org/countries>.

¹⁶ See: <http://eiti.org/supporters/institutionalinvestors>.

¹⁷ See: <http://eiti.org/supporters/companies>.

¹⁸ Comment submitted by Global Witness (18 December 2013), p. 24. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>.

¹⁹ Statement made in February 2014 by Simon Thompson, Chairman of Tullow Oil, at the Oxfam and Brookings conference titled “East Africa’s Oil and Gas Boom – Promise and Peril.” Video of the event is available at: <http://www.brookings.edu/events/2014/02/20-east-africa-oil-gas>.

²⁰ See: http://www.ifc.org/wps/wcm/connect/Industry_EXT_Content/IFC_External_Corporate_Site/Industries/Oil,+Gas+and+Mining/Development_Impact/Development_Impact_Extractive_Industries_Review.

²¹ European Bank for Reconstruction and Development, *Energy Sector Strategy* (10 December 2013), p. 60. Available at: <http://www.ebrd.com/downloads/policies/sector/energy-sector-strategy.pdf>.

II. The Benefits of Fully Public Project-Level Reporting With No Categorical Exemptions

The benefits of fully public, issuer-by-issuer, project-level reporting with no exemptions are many, and were the driving Congressional purpose behind the enactment of Section 1504. They are already amply documented in the administrative and judicial record. In this section, we summarize and update this record on the many important benefits to investors, companies, governments, and communities, including evidence that robust disclosures protect investors, maintain market integrity and promote capital formation, consistent with the Commission's core mission.²²

A. *Benefits to Investors*

Fully public issuer and project-level disclosure without exemptions serves the core interests of investors, consistent with Congressional intent behind Section 1504 and with the Commission's central role as an investor advocate.²³ The Commission recognized that Section 1504 would provide benefits to investors on a number of occasions when it adopted the rule and during the litigation. 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,"²⁴ 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."²⁵ During the subsequent litigation, the Commission argued that disclosure would "provide valuable information to investors when assessing risks and making investment decisions."²⁶ It also pointed out 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.²⁷ Crucially, the Commission acknowledged that these benefits would accrue *only* if the information were available on an issuer-by-issuer basis, contrary to the proposal in API's most recent comment.²⁸

During the rulemaking, commentators provided copious evidence that these benefits are substantial. It bears noting that investors collectively managing assets worth over \$1 trillion wrote in support of public disclosure, noting that this information would be of material importance to shareholders.²⁹ That number

²² See: <http://www.sec.gov/about/whatwedo.shtml>.

²³ Ibid.

²⁴ Commissioner Luis A. Aguilar's remarks can be found at: <http://www.sec.gov/news/speech/2012/spch082212laa-extraction.htm>.

²⁵ Commissioner Elisse B. Walter's remarks can be found at: <http://www.sec.gov/News/Speech/Detail/Speech/1365171490910>.

²⁶ *API v. SEC*, No. 12-1668 (JDB), Oral Argument Tr. at 51 (D.D.C. June 7, 2013) [*"API I"*]; see also SEC Rel. No. 68197, Order Denying Stay at 9 n.5 (Nov. 8, 2012) [*"SEC Stay Order"*].

²⁷ *API II*, Oral Argument Tr. At 57:24 – 58:2.

²⁸ See: *API v. SEC*, No. 12-1398, Br. of Resp. SEC, Dkt. No. 1413016 at 44 (D.C. Cir. Jan. 2, 2013) [*"API I"*] ("such information would be relevant to investors *only* if it were disclosed on an issuer-by-issuer basis.") (emphasis in original); *API II*, Oral Argument Tr. at 37-38 ("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.").

²⁹ See: *API I*, Br. of Intervenor Oxfam America, Inc., Dkt. No. 1415552 at 8 & nn. 5 & 6 (D.C. Cir. Jan. 16, 2013).

climbed to more than \$5.6 trillion following the District Court's decision.³⁰ US legislators concurred, noting that issuer and project-level disclosures are key to give investors information about the commercial, political, and legal risks companies may face.³¹

Investors 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.³² Calvert Investments raised the example of Guatemala, where Glamis Gold had to abandon valuable tax benefits as a result of the reputational damage arising from criticism that the company was contributing insufficiently to the national welfare.³³
- 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.³⁴
- Differentiate projects within countries that have different risk-profiles.³⁵
- Analyze individual companies for exposure to unexpected changes to tax and other regulatory regimes.³⁶

³⁰ See: Investor Letter to Mary Jo White, Chair, SEC (14 August 2013). Available at:

<http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-3.pdf>.

³¹ See: *API I*, Br. for Representatives Edward J. Markey, Maxine Waters, Eliot I. 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, Dkt. No. 1415530 at 12, 15, 16 (D.C. Cir. Jan. 16, 2013) ["House Amicus Br."]; see also *API I*, Br. of United States Senator Benjamin Cardin, Former Senator Richard Lugar, and United States Senator Carl Levin as Amici Curiae in Support of Respondent, Dkt. No. 1415721 at 2 (D.C. Cir. Jan. 17, 2013) ["Senate Amicus Br."].

³² Comment submitted by Global Witness (24 February 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 February 2012); Comment submitted by Conflict Risk Network (7 February 2012); Comment submitted by five U.S. Senators (31 January 2012), p. 1; Comment submitted by TIAA-CREF (2 March 2011), p. 2; Comment submitted by British Columbia Investment Management Corporation (2 March 2011), p. 1; Comment submitted by Bon Secours Health System (1 March 2011); Comment submitted by PGGM Investments (1 March 2011); Comment submitted by SNS Asset Management (28 February 2011); Comment submitted by Railpen Investments (25 February 2011); Comment submitted by Global Witness (25 February 2011), p. 2; Comment submitted by Syena Investments (17 February 2011), p. 1; Comment submitted by Senator Carl Levin (1 February 2011), p. 1; Comment submitted by Calvert Asset Management Company (1 March 2011), Exhibit B. All comments can be found on the Commission's website at: <http://www.sec.gov/comments/s7-42-10/s74210.shtml>.

³³ Comment submitted by Calvert Asset Management Company (1 March 2011), Exhibit B p. 3. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-40.pdf>.

³⁴ Comment submitted by Publish What You Pay U.S. (20 December 2011), p. 5. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-117.pdf>.

³⁵ Comment submitted by EarthRights International (20 September 2011), p. 7. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-111.pdf>; Comment submitted by Global Witness (25 February 2011), p. 16-17. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-34.pdf>.

- Calculate the profitable life of significant projects, as part of general algorithms for analyzing individual investment targets.³⁷
- 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.³⁸
- 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.³⁹
- Mitigate investment risk regarding smaller companies whose assets are concentrated in a small number of countries.⁴⁰
- Make socially responsible investment decisions.⁴¹

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.⁴²

B. Benefits to Companies

Commentators from companies, civil society, labor groups, think tanks, and government all concluded that robust, project and issuer-level disclosures would have important benefits for companies themselves. For example, mandating such disclosure would accomplish the following:

- Reduce information asymmetries between investors and companies, which empirical studies have shown create greater investor confidence and promote capital formation.⁴³

³⁶ Comment submitted by Calvert Asset Management Company (1 March 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). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-40.pdf>; Comment submitted by Global Witness, (25 February 2011), p.2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-34.pdf>; Comment submitted by Oxfam America (21 February 2011), p. 8. Available at: <http://www.sec.gov/comments/s7-45-10/s74210-76.pdf>.

³⁷ Comment submitted by Calvert Asset Management Company, *ibid.*, 2 Ex.A.

³⁸ *Ibid.*

³⁹ *Ibid.*, 3, and 1 – 2 Ex. B.

⁴⁰ Comment submitted by Railpen Investments (25 February 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-28.pdf>; Comment submitted by SNS Asset Management (28 February 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-30.pdf>.

⁴¹ 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), 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-67.pdf>.

⁴² Comment submitted by 14 Members of the U.S. House of Representatives (15 February 2012). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-162.pdf>; Comment submitted by British Columbia Investment Management Corporation (2 March 2011), p. 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-62.pdf>; Comment submitted by Newground Social Investment (1 March 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-39.htm>; Comment submitted by Bâtirente (28 February 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-66.pdf>; Comment submitted by California Public Employees' Retirement System (28 February 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-32.pdf>; Comment submitted by Syena Investments (17 February 2011), p. 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-22.pdf>.

- Deny opportunities for corruption and enhance political stability, thereby creating a more stable business environment.⁴⁴
- Allow companies to avoid the appearance of collusion with regimes that may be unstable, thereby improving their prospects when those regimes change.⁴⁵
- Create a safer working environment by preventing disputes and misunderstandings with other stakeholders.⁴⁶
- Reduce compliance costs by harmonizing international standards on disclosure of extractive payments to governments.⁴⁷
- Assist companies to avoid pressure to enter into unethical business deals.⁴⁸
- Increase liquidity and lower the costs of capital in the long run, due to greater stability and lower uncertainty in the industry.⁴⁹
- Boost confidence in management's decision making and give greater stability to companies' asset bases, thereby attracting capital from long-term equity investors.⁵⁰

Empirical analysis by Columbia University confirms that increased transparency in the extractive industries is positively correlated with: the price/earnings ratio, return on equity, and return on invested capital.⁵¹

⁴³ Comment submitted by EarthRights International (20 September 2011), p. 7 (citing empirical studies). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-111.pdf>.

⁴⁴ Comment submitted by Global Witness (24 February 2012), p. 5. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-200.pdf>; Comment submitted by Vale Columbia Center on Sustainable International Investment (16 December 2011), p. 5. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-115.pdf>; 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>.

⁴⁵ Comment submitted by Global Witness (24 February 2012), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-196.pdf>.

⁴⁶ Comment submitted by Publish What You Pay U.S. (20 December 2011), p. 5-6. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-117.pdf>; Comment submitted by Nigeria Union of Petroleum and Natural Gas Workers (8 July 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-97.pdf>; Comment submitted by Petroleum & Natural Gas Senior Staff Association of Nigeria (27 June 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-93.pdf>; Comment submitted by United Steelworkers Union (29 March 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-78.pdf>.

⁴⁷ Comment submitted by Publish What You Pay US (19 December 2011), p. 5. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-116.pdf>; Comment submitted by Oxfam America (21 February 2011), p. 8. Available at: <http://www.sec.gov/comments/s7-45-10/s74210-76.pdf>; Comment submitted by Syena Investments (17 February 2011), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-22.pdf>.

⁴⁸ Comment submitted by EG Justice (29 March 2011), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-77.pdf>; Comment submitted by TIAA-CREF (2 March 2011), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-54.pdf>; Comment submitted by Sen. Carl Levin (1 February 2011), p. 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-19.pdf>.

⁴⁹ Comment submitted by Revenue Watch Institute (6 December 2010), p. 3. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-304.pdf>.

⁵⁰ Comment submitted by Calvert Asset Management Company (1 March 2011), p. 6, Ex. A. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-40.pdf>.

C. Benefits to Governments

The Commission has already recognized that full public disclosure of issuers' project-level payments to governments promotes important governance goals of both the US and foreign governments. These goals include supporting stability,⁵² reducing global poverty, fighting terrorism,⁵³ and stabilizing the US energy supply.⁵⁴ These benefits were reaffirmed by members of both the US Senate⁵⁵ and the US House of Representatives in the course of litigation.⁵⁶

Investors, civil society groups from several continents, and US government commentators provided evidence that fully public, issuer and project-level disclosure would be highly beneficial for governments and governance in general, both abroad and in the United States. These benefits include:

- Increased ability to track the flow of revenue and to prevent corruption and diversion of revenues from national budgets,⁵⁷ thereby promoting the aims of the Foreign Corrupt Practices Act ("FCPA").⁵⁸ A group of petitioners from Angola specifically called attention to discrepancies and gaps in the official revenue numbers released by their government and noted that payment

⁵¹ Comment submitted by Vale Columbia Center on Sustainable International Investment (16 December 2011), p. 3 - 5. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-115.pdf>.

⁵² See: SEC Stay Order, p. 9; *API I*, Br. of Resp. SEC, p. 28-29 (noting that even the companies that make up the API appear to agree that "payment transparency can contribute to better governance, helping to yield the very social benefits that Congress sought.").

⁵³ *API I*, Br. of Resp. SEC, p. 60.

⁵⁴ *Ibid.*, 8, 60.

⁵⁵ See Senate Amicus Br., p. 2 ("The Cardin-Lugar Amendment furthers the critical public policy goals of i) protecting United States interests in both national and energy security, ii) ensuring investor awareness and protection, and iii) promulgating American core principles of transparency, integrity and good governance worldwide"), 4 ("Reliance on . . . [countries with weak governance] for resources raises the twin specters of insecurity of energy supply and terrorist threats posed by nationals of failed or failing states. The Cardin-Lugar Amendment, as implemented by the S.E.C., addresses those threats through enhanced transparency and integrity in the payment and allocation of resource revenues."), and 6 ("When resource revenues can be tracked, the United States government, United States citizens, and citizens of countries in which extraction is occurring can more effectively combat corruption, encourage economic development, and safeguard capital investments through rule of law.").

⁵⁶ See House Amicus Br., p. 15 ("In addition, increased transparency that supports good governance in resource-rich states directly advances the foreign policy interests of the United States.").

⁵⁷ Comment submitted by Global Movement for Budget Transparency, Accountability, and Participation (30 March 2012). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-305.htm>; Petition submitted by Angolan citizens and civil society organizations (13 March 2012). Available at: <https://www.sec.gov/comments/s7-42-10/s74210-264.pdf>; Comment submitted by Global Witness (24 February 2012), p. 5. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-200.pdf>; Comment submitted by Grupo FARO (13 February 2012), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-160.pdf>; Comment submitted by United States Senate (31 January 2012), p. 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-122.pdf>; Comment submitted by EarthRights International (20 September 2011), p. 8. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-111.pdf>; Comment submitted by ONE Foundation (2 March 2011), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-61.pdf>.

⁵⁸ Comment submitted by Bill and Melinda Gates Foundation (9 February 2012), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-159.pdf>.

disclosures would assist to resolve them.⁵⁹ EarthRights International noted the use of revenue figures to identify and track funds diverted from the national budget of Burma, which would be possible on a regular basis with robust disclosures but was only possible in that event because of numbers that were disclosed by an oil company in the process of litigation.⁶⁰

- Greater transparency for regulators to verify that taxes and other payments are properly assessed. This is a particular concern in countries where ring-fencing of corporate costs and revenues is weak, allowing the losses from poor-performing projects to cancel out high-performing projects, whose returns should generate revenue for the government.⁶¹
- Reduced violent conflict based on natural resource extraction.⁶²
- More secure energy supplies.⁶³
- Assurance that taxpayers are receiving proper returns for extractive leases, both on US federal lands⁶⁴ and in foreign countries.⁶⁵
- More efficient use of US taxpayers' foreign assistance dollars through the promotion of better, more transparent governance.⁶⁶
- A boost for the US foreign policy goal of supporting good governance and stable, democratic governments.⁶⁷

D. Benefits to Citizens in Resource-rich Countries

As the Commission has extensively acknowledged, robust, issuer and project-level disclosure can be expected to produce tremendous benefits for citizens in resource-rich countries.⁶⁸ Members of the US Senate have corroborated these benefits in the course of litigation.⁶⁹

⁵⁹ Petition submitted by Angolan citizens and civil society organizations (13 March 2012). Available at: <https://www.sec.gov/comments/s7-42-10/s74210-264.pdf>.

⁶⁰ Comment submitted by EarthRights International (20 September 2011), p. 8. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-111.pdf>.

⁶¹ Comment submitted by La Coalition Nationale des OSC sur la Gouvernance des Ressources Minerales du Sénégal (14 February 2012), p. 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-158.pdf>.

⁶² Comment submitted by United States Senate (31 January 2012), p. 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-122.pdf>; Comment submitted by Nigeria Union of Petroleum and Natural Gas Workers (8 July 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-97.pdf>; 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), 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-67.pdf>.

⁶³ Comment submitted by United States Senate, *ibid.*, p. 1.

⁶⁴ Comment submitted by U.S. Representative Raúl Grijalva (15 November 2011), p. 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-120.pdf>; Comment submitted by U.S. Department of the Interior, Office of Natural Resource Revenue (4 August 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-108.pdf>.

⁶⁵ Comment submitted by Bantay Kita (15 December 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-303.pdf>.

⁶⁶ Comment submitted by US Agency for International Development (15 July 2011), p. 4. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-101.pdf>.

⁶⁷ *Ibid.*, p. 1.

Commentators from international civil society organizations as well as individuals and organizations representing communities affected by extractive development worldwide provided extensive evidence to the administrative record of a variety of benefits, including:

- Furnishing information on public revenues and extractive operations to citizens whose governments deny them such information.⁷⁰
- Assisting citizens to monitor public expenditures for efficiency and effectiveness.⁷¹
- Providing a basis for communities to advocate with the government for public services.⁷²
- Allowing citizens and governments to ensure that revenues are being redistributed by the central government to localities properly, according to benefit-sharing agreements.⁷³
- Empowering citizens and civil society organizations to ensure that extractive revenues are used to generate public benefits for all and not just to enrich the elite.⁷⁴

⁶⁸ See e.g. SEC, *Disclosure of Payments by Resource Extraction Issuers*, Final Rule, 77 Fed. Reg. 56,365, 56,397/3 (12 September 2012) (acknowledging benefits to civil society in resource-rich countries from increased economic and political stability); *API I*, Br. of Resp. SEC, p. 7 (recognizing that giving citizens information about how payments are made in their country can give them a better chance to hold their government accountable); *Ibid.*, p. 45 (noting that “requiring disclosure of detailed payment information is also consistent with the congressional intent to create a new historic transparency standard that empowers citizens around the world to hold their governments, including their sub-national governments, accountable for resource extraction revenues.”); See also: SEC, Order Denying Stay, Rel. No. 68197 at 9 (S.E.C. 8 November 2012).

⁶⁹ See Senate Amicus Br., p. 15 (noting that “[p]roject level reporting” enables communities that host resource extraction operations to measure “whether resources are benefiting the population” and enables them to “maximize use of the data disclosed”).

⁷⁰ Comment submitted by Bill and Melinda Gates Foundation (9 February 2012), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-159.pdf>; Comment submitted by Oxfam America (21 February 2011), p. 17 – 18. Available at: <http://www.sec.gov/comments/s7-45-10/s74210-76.pdf>.

⁷¹ Comment submitted by US Agency for International Development (15 July 2011), p. 4. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-101.pdf>; Comment submitted by Publish What You Pay US (25 February 2011), p. 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-29.pdf>; Comment submitted by Sen. Carl Levin (1 February 2011), p. 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-19.pdf>.

⁷² Comment submitted by ONE Foundation (2 March 2011), p. 3. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-61.pdf>.

⁷³ Comment submitted by Global Movement for Budget Transparency, Accountability, and Participation (30 March 2012). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-305.htm>; Comment submitted by George Soros (21 February 2012). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-188.pdf>; Comment submitted by Publish What You Pay US (20 December 2011), p. 6 – 7. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-117.pdf>.

⁷⁴ Comment submitted by Derecho Ambiente y Recursos (23 March 2012). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-302.htm>; Comment submitted by Association of Forest Communities in Guatemala (8 March 2012). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-247.pdf>; Comment submitted by Global Witness (24 February 2012), p. 5. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-200.pdf>; Comment submitted by Libyan Transparency Association (22 February 2012). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-189.pdf>; Comment submitted by EG Justice (7 February 2012), p. 3. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-128.pdf>; Comment submitted by Grupo FARO (13 February 2012), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-160.pdf>; Comment submitted by Bill and Melinda Gates Foundation (9 February 2012), p. 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-159.pdf>; Comment submitted by WACAM Ghana (2 February 2012), p. 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-159.pdf>.

- Assisting citizens to assess the development impact of extraction locally.⁷⁵
- Promoting economic and social development, especially in communities that host natural resource extraction operations.⁷⁶ Civil society groups from Burma, for example, drew attention to important natural resource projects that have imposed great costs on the local population without bringing concomitant benefits.⁷⁷

This summary of the administrative record clearly indicates that 1504 disclosures provide enormous benefits to investors, companies, governments and citizens.

III. Full Public Disclosure is Necessary to Protect Investors and Empower Citizens

The Commission should ensure that each annual report submitted by the resource extraction issuer is made *publicly* available. Contrary to API's assertion that "the statutory language indicates an approach under which companies file payment information confidentially with the SEC and the SEC compiles the data for use by the public,"⁷⁸ the District Court narrowly held that the statutory language was ambiguous with regard to public filing.⁷⁹ Nothing in the District Court's opinion would prevent the Commission from concluding that fully public disclosure of payments is a reasonable interpretation of the statute under *Chevron* Step Two. In fact, it is the *only* reasonable interpretation of the statute that would confer upon both investors and citizens of resource-rich countries the benefits that Congress intended.

First, there is overwhelming evidence that issuers should be required to publicly file each annual report submitted under Section 1504 in order to serve the needs of investors and other intended users of data.

[42-10/s74210-125.pdf](http://www.sec.gov/comments/s7-42-10/s74210-125.pdf); Comment submitted by ONE (2 March 2011), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-61.pdf>; Comment submitted by World Resources Institute (1 March 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-37.pdf>; Comment submitted by Publish What You Pay US (25 February 2011), p. 1. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-29.pdf>.

⁷⁵ Comment submitted by Global Movement for Budget Transparency, Accountability, and Participation (30 March 2012). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-305.htm>; Comment submitted by Senegal Coalition (14 February 2012), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-158.pdf>; Comment submitted by WACAM (2 February 2012), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-125.pdf>.

⁷⁶ Comment submitted by Grupo FARO (13 February 2012), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-160.pdf>; Comment submitted by Human Rights Foundation of Monland (15 July 2011), p. 2. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-99.pdf>; Comment submitted by Ta'ang Student Youth Organization (28 June 2011), p. 5. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-92.pdf>; Comment submitted by Human Rights Foundation of Monland (8 March 2011), p. 3. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-71.pdf>.

⁷⁷ For an example of Shwe pipeline abuses, see the comment submitted by Ta'ang Student Youth Organization, *ibid.*, p. 5; For an example of Kanbawk to Myaing Kalay pipeline, see the 8 March 2011 comment submitted by Human Rights Foundation of Monland, *ibid.*, p. 3.

⁷⁸ Comment submitted by American Petroleum Institute (7 November 2013), p. 2. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf>.

⁷⁹ *API II*, Judgment (D.D.C. July 2, 2013)

Confidential filing, and making public only a highly aggregated selection of the data, would be of little use to the intended users. Moreover, industry critics have not articulated any use the SEC itself would have for the confidentially filed disclosures, further reinforcing the conclusion that there is no reasoned basis for adopting such an approach.⁸⁰

Second, the 2012 rule provided a framework which led to the establishment of similar standards on payment transparency by extractive companies in the EU and through the EITI in 2013. Like the 2012 rule, both the EU law and EITI standard require publicly available company-specific data on payments to governments. The Commission would undermine global momentum in extractive industries transparency if it allowed anonymous, aggregated reporting. This would also produce divergence – rather than harmonization – of financial regulation between the US and EU, thereby increasing compliance burdens for cross-listed companies.⁸¹ To promote rather than undermine these efforts, the Commission should therefore choose the same course as the EU, Norway, the EITI, the Canadian government and Canadian extractive industries, and require full publication of issuers’ project-level disclosures. Doing otherwise would violate the mandate of Section 1504 to “support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals . . . [.]”⁸²

A. Full Public Disclosure is Necessary to Serve the Needs of Investors and Other Users

Investors, civil society and government officials need public access to *all* the information in each issuer’s annual Section 1504 report – especially the information that links individual issuers to project-level payments to governments. The anonymized model of disclosure put forward by the API ignores the needs of investors. Without the identity of the disclosing company, investors would be unable to evaluate risks specific to individual issuers as Congress intended. And as risk assessment is an inherently comparative exercise, API’s model would also prevent investors from comparing payment patterns among issuers. API’s anonymous model undermines the statutory purpose of Section 1504 and appears to provide little, if any, value to investors since the data would be useless for issuer-specific analysis.

In contrast to API’s proposal, the 2012 rule required public filing of annual Section 1504 reports, and investors publicly commended the Commission for this approach. In fact, investors representing more than US\$5.6 trillion in assets under management noted that the “rules were carefully considered and reflected investors’ substantial interest in oil, gas and mining industry payment transparency.”⁸³ These investors include UBS, the largest private wealth manager in the world, ,⁸⁴ ING IM International, the global asset management arm of the world’s largest banking,⁸⁵ financial services and insurance

⁸⁰ See also: Comment submitted by Global Witness (18 December 2013), p. 7-8. Available at:

<http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>.

⁸¹ For a full picture of the top 100 oil/gas and top 100 mining companies cross-listed with the US, see Appendix A.

⁸² 15 U.S.C. § 78m(q)(2)(E).

⁸³ See: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-3.pdf>.

⁸⁴ See: http://www.ubs.com/global/en/asset_management.html.

⁸⁵ See: <http://www.inginvestment.com/>.

conglomerate, APG, the third largest pension fund in the world⁸⁶ and CalPERS, the largest U.S. pension fund. These investors also made clear that “the availability of entity level, project-by-project payment information provided without exemptions for reporting in particular countries is critical to ensure the disclosures required by Section 1504 are of use to investors.”⁸⁷ Indeed, as Calvert Investment Management recently explained, “The aggregation of the disclosure required by Section 13(q) into a compilation...would undermine the value of this law to investors to a very significant extent.”⁸⁸ Without knowing whether a specific company has made a payment, investors are unable to use this information to assess risk and allocate capital efficiently. API’s proposed model therefore ignores the critical importance of an issuer’s accountability to its shareholders.

The Commission recognized the importance of Section 1504 disclosures to investors in the 2012 rule by requiring the reports to be filed rather than furnished.⁸⁹ 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. However, if the Commission were to publish only an aggregation or compilation of the data disclosed, then investors would have no effective remedy for erroneous information in that compilation without additionally being able to identify individual issuers with their payments to governments. The protection of investors therefore demands full public disclosure of payments.

For oversight actors such as civil society or parliamentarians, public project-level disclosure by individual companies is critical to hold governments accountable for the use of revenues generated by each project. With project-level data on payments made by individual companies, local communities will be able to monitor the payments due to them for each project at subnational and community levels and hold government bodies accountable for their fair shares of the revenue. For example, in Cameroon, civil society are investigating why residents of the Figuil region are not receiving their legally mandated share of revenue for local mining projects: the regulations implementing the mining code call for 25% of tax revenue to be allocated to compensation for communities affected by the mining activity (of which 10% should go directly to local communities and 15% to the relevant communal councils).⁹⁰ Public, project-level payment reporting is necessary to help communities in Cameroon and elsewhere to collect their legal entitlements, as well as help the government to keep track of the royalties generated.

Public disclosure at the project level by individual companies provides industry with a clear, credible means to demonstrate local economic benefit that would not be possible with anonymous aggregated disclosure. In fact, the two largest Canadian mining industry associations, which represent many of the

⁸⁶ See: <http://www.apg.nl>.

⁸⁷ Comment submitted by SNS Asset Management (31 July 2013), p. 1-2. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-1.pdf>.

⁸⁸ Comment submitted by Calvert Investment Management, Inc. (18 July 2013), p. 1-2. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-17.pdf>.

⁸⁹ 77 Fed. Reg. at 56394-56396.

⁹⁰ Cameroon Coalition Publish What You Pay, “CCPWYP Supports the Struggle for Local Level Transparency,” (30 January 2013) (quoting art 137 of 2002 decree of application of the mining code). Available at: <http://www.publishwhatyoupay.org/resources/ccpwyp-supports-struggle-local-level-transparency>.

largest mining companies in the world, endorsed public, project level reporting for just this reason: they believe that it will assist companies to communicate the benefits they bring to the countries and communities where they operate.⁹¹

B. Full Public Disclosure is Necessary to Maintain Consistency with International Transparency Efforts

Following the passage of Section 1504 in 2010 and the release of the Commission's 2012 rule, project-level, fully public reporting has become a global standard. If the Commission's new rule were to allow anonymous, aggregated reporting, it would undermine this progress, and be contrary to the statutory language and intent.

- i. Anonymous project reporting in the US would undermine the "international transparency efforts" that Section 1504 urges the Commission to support.*

Section 1504 requires the Commission to promulgate rules that, to the extent practicable, support and further "international transparency promotion efforts".⁹² This includes efforts such as the EITI and the laws enacted in Europe and under development in Canada.⁹³ API's proposal conflicts with all these initiatives. The Commission should therefore reject API's approach and issue a rule that meets the standard set by the EU Transparency and Accounting Directives and the Canadian recommendations.

- In the EU, the 2013 amendments to the Accounting and Transparency Directives clearly and unambiguously require that extractive companies publicly traded on regulated markets in the EU and large private extractive companies registered in the EU must submit annual project-level reports on payments to governments, and that these reports will be made publicly available. In choosing this approach, the EU considered submissions and advice from companies, civil society and investors, and evidently concluded that the benefits of public, project-level reporting outweighed any potential costs to extractive companies. The Accounting Directive, which regulates the provision of financial information by all limited liability companies registered in the EU and European Economic Area ("EEA"), provides that "Member States shall require large undertakings and all public-interest entities active in the extractive industry or the logging of primary forests to prepare and *make public* a report on

⁹¹ The Prospectors and Developers Association of Canada has emphasized this point in its support for mandatory payment disclosure. "Crucial for the Canadian mining industry, detailed reporting also highlights the financial contributions of companies engaged in mineral resource development, improving trust between companies, governments and citizens, and aids fuller investor analysis of project risks." PDAC Applauds the Federal Government's Support for Revenue Transparency, 12 June 2013, available at: <http://www.pdac.ca/publications/press-releases/publications---press-releases/2013/06/12/june-12-2013>.

⁹² After enactment of the Dodd-Frank Act, the White House issued a statement saying that "The United States is committed to working with other countries to ensure the implementation of similar disclosure requirements in other financial markets and will make this a priority in the year ahead." <http://www.whitehouse.gov/the-press-office/statement-press-secretary-transparency-energy-sector>.

⁹³ See 15 U.S.C. § 78m(q)(2)(E); See also 77 Fed. Reg. at 56, 367, n. 15.

payments made to governments on an annual basis” (emphasis added).⁹⁴ The Transparency Directive, which applies the disclosure requirements to all relevant companies listed on EU regulated markets even if they are not registered in the EU/EEA and are incorporated in other countries, provides that “The report shall be *made public* at the latest six months after the end of each financial year and shall remain *publicly available* for at least 10 years” (emphasis added).⁹⁵

- Norway has followed the lead of the EU and also required public, project-level reporting for all extractive issuers. In February 2014, the final regulations implementing the Norwegian law were enacted and – just as in the EU – expressly mandated the publication of government payment reports.⁹⁶
- In January 2014, Canada’s two largest mining associations approved a set of recommendations that, if implemented, would require “company disclosure of information on payments to governments be reported on a disaggregated basis in an annual securities filing *made available to the public in full*.”⁹⁷ The position of Canada’s mining industry, which includes over 1,612 public companies – almost 100 of which are cross-listed on the New York Stock Exchange,⁹⁸ helped to influence the Canadian government’s proposal to require mandatory public reporting by June 2015. On March 3, 2014, the Canadian government announced that its “proposed pan-Canadian approach would require Canadian extractive companies to *publicly report* payments C\$100,000 and over to all levels of government both domestic and abroad (including Aboriginal entities), on a project-by-project basis. The approach would apply to public and private, medium and large mining, oil and gas companies operating in Canada.”⁹⁹
- The new EITI standard, finalized in May 2013, was endorsed by API members Chevron, ExxonMobil, Shell, BP, Total, Statoil in their positions as members or alternate members of the EITI Global Board.¹⁰⁰ This standard includes the unambiguous requirement that EITI

⁹⁴ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings art. 42(1). http://new.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:JOL_2013_182_R_0019_01&from=EN.

⁹⁵ Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market art. 6. http://new.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:JOL_2013_294_R_0013_01&from=EN.

⁹⁶ For regulations on country-by-country reporting, see: http://www.regjeringen.no/nb/dep/fin/dok/lover_regler/forskrifter/2013/forskrift-om-land-for-land-rapportering.html?id=748525.

⁹⁷ Comment submitted by The Resource Revenue Transparency Working Group (16 January 2014). Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-26.pdf>.

⁹⁸ TMX Market Intelligence Group data identifies 93 mining companies which are dual listed with the SEC and Canadian exchanges. See: http://www.tmx.com/en/pdf/mig/TSX_TSXV_Dual-Listed-Issuers.xls.

⁹⁹ Natural Resources Canada Backgrounder, “Mandatory Reporting in the Canadian Extractive Sector” (3 March 2014). Available at: <http://www.nrcan.gc.ca/media-room/backgrounder/2014/15565>.

¹⁰⁰ See: <http://eiti.org/about/board>.

reports be made “publicly accessible” and must include payment data by “individual company,”¹⁰¹ Moreover, API’s anonymous reporting model conflicts with EITI country practice, which API and its members endorse. The EITI 2013 standard unequivocally requires company by company payment reporting. The US has recently submitted its application for EITI candidacy,¹⁰² and API’s proposal would conflict with the reporting required in the USEITI which will cover both listed and unlisted companies.

API’s Nigeria reporting¹⁰³ example specifically conflicts with existing EITI reporting in Nigeria, which is set in Nigerian law, and requires public reporting on a company by company basis.¹⁰⁴ API’s proposal would seemingly put its members that participate in the Nigeria Extractive Industries Transparency Initiative (NEITI), as well as other EITI countries, at odds with the national reporting standards already agreed. The proposal would also appear to undermine NEITI’s recent calls for even greater transparency;¹⁰⁵ NEITI is conducting an audit of 2012 revenues to “establish what companies paid to government and what government received into the Federation account.”¹⁰⁶

ii. *Confidential reporting in the US would increase compliance burdens on cross-listed companies.*

Any inconsistency with international transparency efforts, including any form of confidential reporting in the US, would have the effect of increasing the compliance burdens on companies that are covered by both the EU and US reporting regimes.¹⁰⁷ The EU Accounting Directive includes an “equivalence” provision, which allows covered companies to satisfy their reporting obligation to European regulators with a report that is substantially equivalent and that has been *publicly* submitted in a non-European jurisdiction.¹⁰⁸ Because the Accounting Directive requires that “reporting medium” be taken into account when establishing equivalence, a confidential report to the Commission would not be deemed equivalent, and the companies

¹⁰¹ See EITI Requirement 6: “The EITI requires EITI Reports that are comprehensible, actively promoted, *publicly accessible*, and contribute to public debate.” Note also the excerpt from EITI Requirement 5.2.e: “It is required that EITI data is presented by *individual company*...” Available at: http://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf.

¹⁰² See: <http://www.doi.gov/EITI/index.cfm>.

¹⁰³ Comment submitted by American Petroleum Institute (7 November 2013), p. 4. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf>.

¹⁰⁴ See: <http://www.neiti.org.ng/sites/default/files/documents/uploads/neitiact.pdf>.

¹⁰⁵ “NEITI Calls for Transparency in the Acquisition and Awards of Oil Prospecting Licenses and Mining Leases” (5 September 2013). Available at: <http://www.neiti.org.ng/index.php?q=news/2013/09/05/neiti-calls-transparency-acquisition-and-awards-oil-prospecting-licences-and-mining->.

¹⁰⁶ “Enlightenment on 2012 Oil and Gas Industry Audit” (6 February 2014). Available at: <http://www.neiti.org.ng/sites/default/files/news/uploads/neiti-full-page.pdf>.

¹⁰⁷ As Global Witness notes, the EU regime covers EU-registered subsidiaries of major US oil companies (including ExxonMobil and Chevron). See: Comment submitted by Global Witness (18 December 2013), p. 4-5. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>; For a snapshot on extractive companies cross listed with the US, see Appendix A.

¹⁰⁸ Accounting Directive, art. 46. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF>.

would have to bear the unnecessary costs of preparing and making public a separate report to European regulators.¹⁰⁹

In sum, public disclosure of payments in annual reports filed by each individual resource extraction issuer is fundamental to achieving the objectives Congress intended in enacting Section 1504, and there is no evidence that this would be impracticable for any reason.

IV. Payments Must Be Disclosed for Each Issuer on a Project-by-Project Basis

The Commission was correct in its 2012 rule to require each issuer to disclose publicly, and on a project-by-project basis. Only public, company-specific, project-level disclosure meets the needs of investors and other stakeholders that Section 1504 was intended to serve.

A. Public, Company-by-Company, Project-level Disclosure is a Global Standard

As outlined above, project-level reporting was passed into law by the EU and Norway, has been adopted as a requirement by the EITI, and is included in the reporting requirements for extractives investments of two major development institutions, the IFC and the EBRD. It has also been endorsed in Canada by the government, civil society groups and the mining industry. The confluence of these various international standards, together with existing corporate disclosure practice, demonstrates that project-level reporting has already emerged as a global standard for transparency.

B. The Commission Should Adopt the Project Reporting Definition Passed into Law by the EU.

The EU Accounting Directive defines a project as “the operational activities that are governed by a single contract, license, lease, concession or similar legal agreements and form the basis for payment liabilities with a government.”¹¹⁰

This approach is consistent with what we have argued previously.¹¹¹ The Commission should adopt the same definition of project for the following reasons:

- i. *Investors with over \$5.6 trillion in assets under management have made clear to the Commission that they support US rules that align with EU requirements.*

In a letter to the Commission, investors made clear that “[i]t is in the interest of investors and companies subject to both the US and EU requirements that the reporting obligations in these

¹⁰⁹ Accounting Directive, art. 46(3)(a)(vii). Available at: *ibid*.

¹¹⁰ Accounting Directive, art. 41(4) (emphasis added). Available at: *ibid*.

¹¹¹ Comment submitted by Publish What You Pay (20 December 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-117.pdf>; Comment submitted by Publish What You Pay (25 February 2010). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-29.pdf>.

jurisdictions are *as uniform as possible*.”¹¹² These investors called on the Commission to “take all necessary steps to ensure that the rules go into effect as early as possible and that they *maintain continuity with regulations in other jurisdictions*.”¹¹³

- ii. *The EU project definition was developed in consultation with some of the largest oil and mining firms in the world as a practical approach that accommodates a variety of oil and mineral project contexts.*

The EU definition reflects the outcome of a robust discussion which included issuers representing several of the largest oil and mining companies in the world with operations covering between 25 to 90 countries, as well as government representatives and civil society stakeholders, including members of Publish What You Pay.¹¹⁴

- iii. *The EU’s definition represents a practicable, common sense approach.*

The EU’s definition of project agrees with definitions of project that are structured and defined by industry, the new EITI standard and governments. This definition aligns with:

- Petroleum and mineral fiscal systems¹¹⁵ and the predominant structure of contracting arrangements for activities covered by Section 1504.¹¹⁶

¹¹² See: Investor Letter to Mary Jo White, Chair, SEC (14 August 2013). Available at:

<http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-3.pdf>.

¹¹³ Ibid (emphasis added).

¹¹⁴ See also: Comment submitted by Global Witness (18 December 2013), p. 9. Available at:

<http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>

¹¹⁵ See 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 the Publish What You Pay US letter to Commissioner Walter, (23 February 2012), which cites to publications that “make clear that all existing petroleum fiscal systems are based on licenses, concessions and contracts.” Available at: <http://www.sec.gov/comments/s7-42-10/s74210-191.pdf>.

¹¹⁶ Allen & Overy LLP, *World Bank Guide to Extractive Industries Documents* (January 2013), p. 4. 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.” Available at: <http://www.eisourcebook.org/cms/Jan%202014/Guide%20to%20Mining%20Documents.pdf>. See also Royal Dutch Shell PLC Form 20-F, 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>. Note: “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)...”

- The general understanding of the term ‘project’ by issuers as demonstrated by their Exchange Act reports.¹¹⁷
- The Commission in its August 2012 rule, “[t]he contract defines the relationship and payment flows between the resource extraction issuer and the government, and therefore, we believe it generally provides a basis for determining the payments, and required payment disclosure, that would be associated with a particular ‘project.’”¹¹⁸
- Existing reporting practice within EITI. In Indonesia, as part of EITI, all active oil companies are already reporting payments on the basis of Production Sharing Contracts, consistent with EU project definition.¹¹⁹ This includes a number of companies covered by Section 1504 (including two major Chinese companies): Exxon, Chevron, Shell, BP, CNOOC, and PetroChina. This confirms the practicability of project-level reporting consistent with the EU definition.
- The manner in which governments and oversight institutions audit payments from companies.¹²⁰ To achieve the “international transparency” benefits envisioned in the law, 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 track payments from oil and mining companies at both the company level and the level of a lease or license, concession or contract.

iv. *The EU definition was crafted to be flexible for issuers to accommodate a wide variety of project configurations.*

The EU definition provides that “multiple such agreements” that are “substantially interconnected” will be considered a single project. The “substantially interconnected” provision is meant to accommodate reporting companies so that “a set of operationally and geographically integrated contracts, licenses, leases or concessions or related agreements with substantially similar terms that are signed with the government” and “give rise to payment liabilities” can be reported as one project.¹²¹ This is because such multiple agreements “can be governed by a single contract, joint venture, production sharing agreement, or other overarching legal agreement.”

¹¹⁷ As stated by the Commission in its August 2012 Rules: “[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.” See: Final Rule, 77. Fed. Reg. 56,385.

¹¹⁸ See: Final Rule, 77. Fed. Reg. 56,385.

¹¹⁹ *Indonesia 1st EITI Reconciler’s Report 2009* (22 April 2013), pp. 76-77; also, see Appendix B for payment data from PSC Blocks according to type of revenue stream. Available at: http://eiti.org/files/Indonesia_2009_EITI_Report.pdf.

¹²⁰ As shown in the record, governments track and routinely disclose payments at a level that aligns with the EU project definition, allowing the comparison of payments to receipts in government accounts. This includes for example, leases (US), concessions (Angola), and production sharing contracts (Indonesia). See the Comment submitted by Publish What You Pay US (20 December 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-117.pdf>.

¹²¹ Accounting Directive, Art. 41(4), Recital 45. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:182:0019:0076:EN:PDF>.

This flexible definition aligns with the ways in which US-listed resource extraction issuers currently report on their projects to investors in their Exchange Act reports. For example, Royal Dutch Shell describes in its 20-F an agreement made with CNOOC “to appraise and potentially develop two offshore oil and gas blocks in the Yinggehai Basin under a PSC [production sharing contract], signed in July 2012 (Shell interest 49%).”¹²² If developed, these blocks would likely be substantially interconnected, and Shell would report on its payments for the two blocks to the Chinese government as one project, just as it already does with respect to other information on the two blocks. Shell also reports in this way in other public materials. For example, its 2007-2011 Investor Handbook explains, “We have an interest of 55% in the Pearls PSC production sharing contract, covering an area of approximately 900 square kilometres located in the Kazakh sector of the Caspian Sea that includes two oil discoveries (Auezov and Khazar) and several exploration prospects.”¹²³

C. Existing Project Reporting Practice by Covered Issuers Aligns with the EU Definition

A limited review of the annual reports of covered issuers demonstrates that when they communicate information regarding their most important upstream projects to investors, the unit of operations discussed as a “project” is associated with the legal agreement signed with a government (from which payment liabilities arise). For example, PWYP-US reviewed the most recent annual reports of the five largest oil companies in the world by market capitalization, ExxonMobil, Shell, Chevron, PetroChina and BP, and analyzed the information provided regarding upstream operations. Of the 75 operations in 36 countries referred to with the term “project”, nearly 60% referred to operations governed by a lease, license or production sharing agreement. In the reports reviewed, issuers used the term “project” in alignment with the EU definition, and referenced the specific agreement, license or contract, and in some cases, the basic terms of these agreements, relating to the project in question. See Appendix B on page 46 for details of that review. This demonstrates that covered issuers 1) recognize the need to publicly disclose information to investors on their operations at the project level, and 2) refer to licenses, contracts and agreements associated with these activities. This supports our recommendation that the Commission adopt the EU definition, as it aligns with the way that covered issuers already communicate information about projects to investors and is therefore practicable.

D. Critique of API’s Approach

API does not provide an alternative definition of the term “project,” and its proposed approach to public reporting would deprive investors, communities, and issuers alike of the benefits Congress intended. It also fails to provide evidence that its aggregated approach would be necessary to prevent competitive harm to covered issuers. As noted in Section (VI), API has provided no convincing evidence that project-level disclosures would, in fact, create competitive harm. It is flawed reasoning to suggest that because the alleged competitive harm “could” happen, no such disclosures should occur.

¹²² See Royal Dutch Shell PLC Form 20-F (14 March 2013), p.24. Available at: <http://s01.static-shell.com/content/dam/shell-new/local/corporate/corporate/downloads/pdf/investor/reports/2012/20f/2012-annual-report20fsec.pdf>.

¹²³ See the Royal Dutch Shell PLC. Investors’ Handbook 2007-2011. Available at: <http://reports.shell.com/investors-handbook/2011/upstream/asia/kazakhstan.html>.

i. *API's proposal does not define project.*

API's recent proposal does not offer a definition of project at all, but rather makes the case for aggregated, anonymous reporting that would not be beneficial for reasons that are already well-established. Moreover, this proposal is clearly inconsistent with the statutory demand for project-level reporting. In the guise of offering a constructive way forward, API is essentially falling back on their previous, and previously discredited, case for country-level aggregation. Their proposal only identifies certain tagged information that API (rather than the users of the disclosed data) deems material: what resource, how it is extracted and in what country. Crucially, it says nothing about how the companies are to determine at what level of granularity they will apply those questions. What precisely constitutes the reporting unit of a project would thus be left largely to the discretion of individual issuers, an approach which is suboptimal for reasons discussed below in Section (IV.E).

ii. *API's anonymous reporting model does not meet the needs of investors or citizens.*

API falsely claims that "aggregated data" is sufficient for the public and that knowing "the total amounts collected by their governments" is all that citizens of resource-rich nations need in order to "help empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources."¹²⁴ This dramatically misunderstands and understates: 1) the range of users that will benefit from Section 1504 disclosures, as it excludes investors; and 2) the objectives and benefits of payment transparency, with respect to citizens of resource-rich countries.

Investors – Investor commentators during both the rulemaking process¹²⁵ and following the District Court decision¹²⁶ indicated that company by company, project-level disclosure was a priority. In addition to the numerous benefits catalogued in Section (II.A), investors also noted that project-level disclosure, "should shed light on the financial relationship between companies and host governments by linking the definition of project to the individual contracts between the issuer and host governments,"¹²⁷ and "provides evidence to shareholders that issuers have an efficient capital structure and that the company is doing all it can to provide an attractive return on investment."¹²⁸

¹²⁴ See Exchange Act Release No. 34-67717 (22 August 2012), p. 138 et seq. See also the statement by Senator Richard Lugar at 156 Cong. Rec. 53816 (17 May 2010).

¹²⁵ Comment submitted by SNS Asset Management (31 July 2013). Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-1.pdf>; Comment submitted by California Public Employees' Retirement System (28 February 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-32.pdf>; Comment submitted by Calvert Investments (1 March 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-40.pdf>; Comment submitted by Hermes Equity Ownership Services (2 March 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-47.pdf>.

¹²⁶ See: Investor Letter to Mary Jo White, Chair, SEC (14 August 2013). Available at:

<http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-3.pdf>.

¹²⁷ Comment submitted by TIAA CREF (2 March 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-54.pdf>.

¹²⁸ Comment submitted by Calvert Investments (1 March 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-40.pdf>.

Citizens - API seriously errs in arguing that their proposal covers all the information needed to “help empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources.”¹²⁹ In many cases, citizens’ groups already have general information on “**what** resource is being extracted; **how** that resource is being extracted; and **where** the extractive activity takes place.”¹³⁰ The missing pieces of information are **which corporate entity** is making a payment for that activity, the amounts of payments and which legal agreement assigns that corporate entity with that payment liability.

iii. *API’s anonymous reporting model would prevent the realization of a key and fundamental benefit to covered issuers: the communication of the economic contribution of each of their projects.*

Project payment reporting is a critically important tool for companies to communicate the economic contributions of each of their projects.¹³¹ Covered issuers increasingly face host governments under pressure from citizens to maximize their revenues from natural resources. The lack of clarity around the public revenues contributed by specific companies *and* specific projects can inhibit informed public debate regarding extractives tax reforms. The lack of transparency can also create unrealistic expectations by local populations of the economic benefits delivered by specific projects, and if local benefits are not perceived by the local populations, this can lead to protests and project stoppages.¹³² Transparency of project payments can be used by each company to make clear its specific contribution to national and local budgets, and to specific communities within the project area. This benefit underpins the support of project-level disclosure by Canadian mining associations and their members.¹³³

¹²⁹ Comment submitted by American Petroleum Institute (7 November 2013), p. 3. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf>.

¹³⁰ Ibid.

¹³¹ For example, Newmont has commented to the Commission that they believe that “revenue transparency and reporting [...] is not only good for our business, but good for our shareholders and communities that host our operations.” Comment submitted by Newmont (11 December 2013). Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-20.pdf>. Former chief executive of BP has argued that in the absence of project-level reporting, “[c]ommunities living near projects would be unable to determine how much wealth is generated nearby and where it ends up.” Lord John Browne, “Europe must enforce oil sector transparency” *Financial Times* (24 April 2012). Available at: <http://www.ft.com/intl/cms/s/0/40dc74aa-8d3a-11e1-8b49-00144feab49a.html>.

¹³² For a summary of previous evidence and updates on the four countries, see generally the comment submitted by Global Witness (18 December 2013), p. 18, n.79. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>.

¹³³ Comment submitted by The Resource Revenue Transparency Working Group (16 January 2014). Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-26.pdf>.

E. Leaving the Term “Project” Undefined is No Longer the Best Approach

We are in agreement with API that leaving the term “project” undefined would be less useful from the perspective of disclosure users, and would only increase the costs of compliance by requiring companies to develop their own definitions. Furthermore, the lack of a standardized definition would also complicate the Commission’s job of producing any compilation that is provided in Section 1504.

While we believe the 2012 rule’s flexible approach to defining “project” was suitable to meet the intent of Section 1504 at the time the original rule was finalized, it is now no longer a suitable approach given the existence and soundness of the legally binding definition of “project” adopted in the EU. This approach would also create confusion within the EITI pursuant to its new reporting standard, which calls disclosure at the project-level consistent with the US *and* EU disclosure requirements. In light of these developments, and because leaving the term “project” undefined would reduce benefits and could increase the costs issuers in developing their own internal project definitions, the Commission should adopt the same definition as the EU.

V. Exemptions are Unnecessary and Harmful to Transparency Aims

We urge the Commission to adopt a rule with no categorical, pre-determined exemptions. The District Court decision invites the Commission to balance the Congressionally-sanctioned need for detailed disclosures against the burden on issuers, with a particular focus on the four countries that industry commentators claimed prohibit Section 1504 disclosures.¹³⁴ The Commission should strike that balance by rejecting a categorical exemption for any particular country, for the following reasons: there is no persuasive evidence that disclosure prohibitions exist in any country, disclosures from the four identified countries are important to the aims of Section 1504, and there is a risk that any potential legal conflicts would be attributable to a lack of good faith on the part of issuers. Finally, even in a counter-factual scenario where an exemption was warranted, the Commission already possesses the authority to grant exemptions on a case-by-case basis.¹³⁵

A. Exemptions for Particular Countries are Not Needed to Avoid Imposing a Competitive Burden on Issuers.

The Commission has already found that the evidence of foreign legal prohibitions on Section 1504 disclosures that API members submitted was “unpersuasive” and that they had provided no evidence that any company would face sanctions for making the required disclosures.¹³⁶ In the forthcoming

¹³⁴ *API II*, Judgment, slip op. at 25-26 (D.D.C. 2 July 2013). The four countries are: Angola, Cameroon, China and Qatar.

¹³⁵ 15 U.S.C. 78l(h).

¹³⁶ See SEC, Order Denying Stay, Rel. No. 68197 at 7 (S.E.C. 8 November 2012). The Commission issued the Order denying API’s requested stay after the API filed suit, subsequent to the rule release. This finding was not part of

rulemaking, the Commission should reiterate and adopt this finding as a basis for a new rule that denies categorical, country-based exemptions. This finding alone will suffice to justify rejection of exemptions and will satisfy the District Court's concern with imposing inappropriate competitive burdens on issuers. The District Court noted that a "high probability of vast costs" could justify pre-determined exemptions.¹³⁷ But in the absence of any evidence of such costs, there is no reason for the Commission to depart from its principled determination. Thus, the Commission can make an unequivocal finding that there is no persuasive evidence that companies face sanctions for disclosure in any country, based on the evidence submitted in previous comments, together with further evidence presented here.¹³⁸ Consistent with the District Court decision, such a finding would support the denial of pre-determined exemptions.

- i. *There is no evidence that any country prohibits disclosures, or that companies lose competitive advantage because of transparency in any country.*

Industry critics have argued that China, Angola, Cameroon and Qatar may prohibit disclosure of payments. API's recent comment demands "conflict of laws exemptions" so by its own terms, no such exemptions are called for if no conflict of laws exist.¹³⁹ There is no evidence that supports the argument that *any* country prohibits or penalizes corporate payment disclosure. As a recent submission by Global Witness has shown and as this section will confirm, far from suffering competitive harm, those companies that are already disclosing information or will be covered by EU and US disclosure requirements continue to win new contracts with ease, including in China.

The existing record is already clear that none of the four countries prohibit disclosure.¹⁴⁰ We take this opportunity to supplement the record with additional evidence on two of these countries, Qatar and China.

Qatar. Qatar, which has the world's third largest natural gas reserves and is the single largest supplier of liquefied natural gas globally,¹⁴¹ includes a standard exception to confidentiality where disclosure is required by law in its joint venture and production sharing agreements. This was

the Commission's justification for the 2012 rule, and the District Court did not consider it because its review was limited to the administrative record. See *API II*, Judgment, slip op. n.9.

¹³⁷ *API II*, Judgment, slip op. n.8.

¹³⁸ See: Comment submitted by Global Witness (18 December 2013), p. 12-17. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>; Comment submitted by Publish What You Pay U.S. (20 December 2011), p. 5. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-117.pdf>; Comment submitted by EarthRights International (20 September 2011), p. 11. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-111.pdf>

¹³⁹ Comment submitted by American Petroleum Institute (7 November 2013), p. 7. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf>.

¹⁴⁰ For a summary of previous evidence and updates on the four countries, see generally the comment submitted by Global Witness (18 December 2013), p. 12-17. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>.

¹⁴¹ See: <http://www.eia.gov/countries/cab.cfm?fips=QA>.

confirmed in a letter from the Qatar Ministry of Petroleum submitted by ExxonMobil to the Commission, which also pointedly failed to list government payments among the types of information deemed by Qatar to be “commercially sensitive information.”¹⁴² There is no evidence that payment information is commercially sensitive, as discussed in Section (VI).

There are also significant economic and strategic incentives for the Qatari government to ensure the success of its operating partnerships with companies covered by Section 1504. According to the US Energy Information Administration, “Qatar often focuses its natural gas development on integrated large-scale projects linked to LNG exports or downstream industries that use natural gas as a feedstock. These projects tend to include investment from international oil companies (IOCs) with the technology and expertise in integrated mega-projects, including ExxonMobil, Shell, and Total.”¹⁴³ Moreover, as we have noted previously, in light of Qatar’s dependency and extensive partnerships with companies covered by Section 1504, it is difficult to imagine that disclosure would force an issuer to withdraw from projects in the country. For example, Royal Dutch Shell is Qatar’s largest foreign investor, partnering on a wide array of capital intensive projects, which are extensively co-branded and marketed to the Qatari public, including with Qatar Petroleum on the Pearl GTL project based on proprietary Shell technology.¹⁴⁴

China. As Global Witness indicates in its December 2013 comment, some Chinese as well as Canadian companies listed in Hong-Kong disclose in their listing documents project-level information on payments made to the Chinese government, in compliance with the relevant Hong Kong listing rules, without suffering any repercussions.¹⁴⁵ Moreover, issuers active in China already report to the Commission on their production volumes and reserves in China, notably including Royal Dutch Shell plc, the company that has most vocally argued for an exemption for China.¹⁴⁶ In addition, Chinese companies that are US-listed also report to the Commission on their production volumes and their proven and estimated reserves in China, broken down by region.¹⁴⁷ This contradicts the conclusion in Shell’s legal opinion that payment information on upstream activities may be considered a state secret chiefly if it can be used to deduce “the production volume of petroleum resources, the reserve of petroleum resources, the discovery of new petroleum

¹⁴² Comment submitted by ExxonMobil (15 March 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-73.pdf>.

¹⁴³ US Energy Information Administration, *Qatar* (last updated Jan. 30, 2014). See: <http://www.eia.gov/countries/cab.cfm?fips=qa>.

¹⁴⁴ See: Comment submitted by Publish What You Pay US (25 February 2011), p. 48. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-29.pdf>; and “Shell in Qatar” at: <http://www.shell.com.qa/en.html>.

¹⁴⁵ See the comment submitted by Global Witness (18 December 2013), p. 16. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>.

¹⁴⁶ *Ibid.*, p. 15, n.69.

¹⁴⁷ *Ibid.*

resources and other information of the petroleum resources in China.”¹⁴⁸ As we have argued elsewhere, knowledge of the amounts companies are paying to governments does not enable industry competitors to deduce these sensitive figures.¹⁴⁹ Even if such a deduction were possible, the fact that Shell and other US-listed companies have been directly reporting on production volumes and estimated and proven reserves in China renders implausible the notion that companies would be restrained from reporting payment amounts.

The possibility that revenue amounts might be classified as a state secret in China is made even more remote by a recent regulation signed by Chinese Premier Li Keqiang. In an attempt to boost transparency and curtail abuse of the state secrets law, Premier Li has ordered that state agencies must refrain from designating as state secrets items that should by law be public.¹⁵⁰

As discussed below in Section (V), the successes of companies subject to Section 1504 and the EU Directives confirm that transparency does not have competitive relevance. In particular, there is no evidence that China discriminates against those companies that will be subject to mandatory transparency. For example, since the enactment of Section 1504 and the EU Accounting Directive, Shell has signed at least one major Production Sharing Contract to produce offshore oil and gas with the Chinese company CNOOC.¹⁵¹ Since Section 1504 was enacted, Shell has landed at least two other important extractive contracts in China.¹⁵² ConocoPhillips, also subject to Section 1504, recently announced a major deal to jointly explore for shale gas in southwestern China.¹⁵³ Any argument that companies will suffer competitive disadvantage in China as a result of Section 1504 is baseless.

¹⁴⁸ See: Comment submitted by Shell (17 May 2011), Appendix C. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-90.pdf>.

¹⁴⁹ See: Comment submitted by Publish What You Pay US (25 February 2011), p. 4. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-29.pdf>; Comment submitted by Oxfam (21 February 2011), p. 23-24. Available at: <http://www.sec.gov/comments/s7-45-10/s74210-76.pdf>; Comment submitted by Global Witness (18 December 2013), p. 14-15. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issues/resourceextractionissues-22.pdf>.

¹⁵⁰ See: “Li Signs Regulation on State Secrets Law,” *China Daily* (2 February 2014). Available at: http://usa.chinadaily.com.cn/2014-02/02/content_17267626.htm. And also: “China Says No Cover-ups Using State Secrecy as Excuse,” *Reuters* (3 February 2014). Available at: <http://www.reuters.com/article/2014/02/03/china-secrets-idUSL3N0L81EI20140203>.

¹⁵¹ See: “Shell Signs New Upstream Deal with CNOOC” (1 August 2013). Available at: <http://www.shell.com.cn/en/aboutshell/media-centre/news-and-media-releases/2013/new-contract-with-cnooc-20130801.html>.

¹⁵² See: “CNPC and Shell Sign First Shale Gas Production Sharing Contract in China” (20 March 2012). Available at: <http://www.shell.com/global/aboutshell/media/news-and-media-releases/2012/cnpc-shell-shale-gas-psc-china-20032012.html>; and also: Chen Aizhu, “Shell, Sinopec Drilling for Shale Gas in Central China,” *Rigzone* (14 November 2013). Available at: http://www.rigzone.com/news/oil_gas/a/130132/Shell_Sinopec_Drilling_for_Shale_Gas_in_Central_China#sthash.UJcvfeg.dpuf.

¹⁵³ See: “Sinopec to Research China Shale Gas Development with ConocoPhillips,” *Reuters* (25 December 2013). Available at: <http://www.reuters.com/article/2012/12/25/china-sinopec-conocophillips-idUSL4N09Z1IQ20121225>.

- ii. *Regulators and industry participants in other markets have considered exemptions and rejected them as unnecessary and anti-competitive.*

The Commission's original determination on this issue has been confirmed and followed outside of the United States since the 2012 rule was released. In adopting the EU directives, the EU officials rejected arguments for exemptions and chose the same course of action as the Commission's 2012 rule.¹⁵⁴ Norwegian regulators were faced with exactly the same situation as the Commission faces here: Norway's Parliament passed a statute calling for project-level reporting and gave regulators the discretion to adopt exemptions as necessary.¹⁵⁵ And, just as the Commission should do here, the Ministry of Finance enacted implementing regulations that reject the idea of country-based exemptions.¹⁵⁶ Canada's Resource Revenue Transparency Working Group's recent recommendations for mandatory payment disclosure explicitly reject country-based exemptions, and make it clear that such exemptions would not level the playing field, and could be *anti-competitive*: "Reporting exemptions run counter to the spirit of improving transparency with enhanced company disclosures, and would result in uneven reporting and differential treatment of companies."¹⁵⁷ In a recent consultation document, the Canadian government proposes to develop a payment transparency standard that does not allow exemptions, arguing that no company has provided evidence to suggest there is a need for such exemptions.¹⁵⁸

These international developments further show that even a limited categorical exemption, such as a "grandfather clause,"¹⁵⁹ would be counter-productive as it would cause differential treatment of companies, a result opposed by the Canadian mining associations. As noted above, we have already

¹⁵⁴ See: Arlene McCarthy, "Unanimous Backing for McCarthy Report on New Rules for the Extractive Industries" (30 May 2013). Available at: <https://www.politicshome.com/uk/article/79229/arlene-mccarthy-mep-unanimous-backing-for-mccarthy-report-on-new-rules-for-the-extractive-industries.html>; See also: <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130321/debtext/130321-0001.htm#13032161000011>.

¹⁵⁵ Lov om endringer i lov 17. juli 1998 nr. 56 om årsregnskap [Law amending Act No. 56 of 17 July 1998 on annual accounts], § 3-3d ("The Ministry may by regulations provide that the reporting obligation pursuant to this subsection shall only apply to the reporting of a given size and payments above certain threshold values, and determine other exceptions to the first paragraph.") (original in Norwegian, emphasis added).

¹⁵⁶ For regulations on country-by-country reporting, see: http://www.regjeringen.no/nb/dep/fin/dok/lover_regler/forskrifter/2013/forskrift-om-land-for-land-rapportering.html?id=748525.

¹⁵⁷ Resource Revenue Transparency Working Group, *Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments* at 9 (16 January 2014). Available at: http://www.revenuewatch.org/sites/default/files/working_group_transparency_recommendations_eng20140116.pdf.

¹⁵⁸ See: http://www.pwyp.ca/images/Consultation_Paper_Spring_2014_March-EN.PDF.

¹⁵⁹ The District Court suggested this as a possibility: "The Commission could have limited the exemption to the four countries cited by the commentators or to all countries that prohibited disclosure as of a certain date, fully addressing this concern. *API II*, Judgment, slip op. at 26, 27 n.9.

rebutted the inadequate evidence proffered by the oil industry representatives, and the Commission itself was convinced that this evidence was “unpersuasive.”¹⁶⁰

B. Payment Transparency in Each of the Four Countries that API Claims Forbid Disclosure is Essential to Congress’s Aims in Enacting Section 1504.

The District Court acknowledged that “[i]t may be entirely reasonable for the Commission to conclude that requiring disclosure [...] about a certain country goes to the heart of the provision’s goal, and that the [competitive] burden reduction is not worth this loss.”¹⁶¹ The Commission’s conclusion that no country actually prohibits disclosures, discussed above, is sufficient to dispose of this inquiry and makes a country-by-country analysis of the costs and benefits of exemptions unnecessary. Nevertheless, we take this opportunity to note that disclosures from each of the four countries identified by API are important to the aims of Section 1504.

Angola. There is little question that Angola fits the paradigm of resource-rich countries in which the extractive sector is plagued by corruption, thus creating liability and reputational risks for companies. In February, *Foreign Policy* magazine uncovered a major scandal in which a leading Angolan government official secretly acquired an interest of over \$750 million in a subsidiary of a major oil trading company.¹⁶² PWYP member Global Witness has been exposing obscure resource deals made by international extractive companies with front companies connected to a tiny elite in Angola for almost 20 years.¹⁶³

Section 1504 disclosures will assist extractive companies in Angola in avoiding pressure to engage in corrupt deals, investors to evaluate and minimize reputational and financial risk, and citizens to detect and root out corruption in the extractive sector and ensure they are receiving a fair share of their natural resources. In particular, the oil producing-provinces of Zaire and Cabinda, which produce the majority of Angola’s oil, are entitled to 10 percent of the revenue from taxes collected on the oil produced in each province, but in reality, they receive a fraction of that (in 2011, the figure was less than 1 percent).¹⁶⁴ This illustrates the inadequacies of API’s proposal to publicly disclose payments at the

¹⁶⁰ Comment submitted by Global Witness (18 December 2013). Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>. See also: SEC, Order Denying Stay, Rel. No. 68197 at 7.

¹⁶¹ *API II*, Judgment, slip op. at 5.

¹⁶² See: Michael Weiss, “The 750 Million Dollar Man,” *Foreign Policy* (13 February 2014). Available at www.foreignpolicy.com/articles/2014/02/12/the_750_million_dollar_man_trafigura_angola_general_dino. See also: Zorka Milin and Barnaby Pace, “Slick Moves,” *Foreign Policy* (7 March 2014). Available at: www.foreignpolicy.com/articles/2014/03/07/slick_moves_angola_sec_oil_industry.

¹⁶³ Comment submitted by Global Witness (18 December 2013), p. 12-13. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>.

¹⁶⁴ Maria Lya Ramos, *Angola’s Oil Industry Operations* (30 October 2012), p. 32. Available at: http://www.osisa.org/sites/default/files/angola_oil_english_final_less_photos.pdf.

national level only. That proposal would deprive the residents of oil-rich communities in Angola of their right to benefit from their resources.

Cameroon. The Cameroonian mining code mandates that 25 percent of mining royalties paid by companies must return to the local community, but it does not appear that companies and the government are consistently complying with this legal obligation.¹⁶⁵ In the absence of reliable disclosure, attempts by Cameroonian civil society to verify and investigate this compliance have been met with intimidation.¹⁶⁶ This experience underscores why payments made in Cameroon need to be disclosed at the project-level rather than only in the aggregate, as API has argued.

Problems are pervasive at the national level as well, especially in the oil sector. Overall, analysts have concluded that Cameroon is an example of unsustainable development policies fueled in part by mismanagement in the petroleum sector.¹⁶⁷ In 2009, a study published by the Oxford Centre for the Analysis of Resource Rich Economies could not account for the majority of the estimated oil revenues that the Cameroonian government had received between 1997 and 2006.¹⁶⁸ Section 1504 disclosures will assist civil society and communities to identify discrepancies between what companies say they pay and the national and local budgets, and to demand social services that are proportionate to those amounts.

China. Recent revelations of the pervasive use of offshore shell companies to siphon money from official accounts in China's largely state-owned petroleum industry underline the importance to investors of Section 1504 disclosures.¹⁶⁹ China is currently investigating top executives at PetroChina - a US-listed company - as well as at PetroChina's parent company, China National Petroleum Company, and other group affiliates, for massive bribery and embezzlement, as part of a nationwide crackdown on corruption.¹⁷⁰ Moreover, given China's notoriously interventionist policies in key sectors,¹⁷¹ Section 1504 disclosures would help protect investors by enabling them to detect troubling payment patterns, such as

¹⁶⁵ Cameroon Coalition Publish What You Pay, "CCPWYP Supports the Struggle for Local Level Transparency" (30 January 2013). Available at: <http://www.publishwhatyoupay.org/resources/ccpwyp-supports-struggle-local-level-transparency>.

¹⁶⁶ Ibid.

¹⁶⁷ Bernard Gauthier and Albert Zeufack, *Governance and Oil Revenues in Cameroon*, OxCarre Research Paper 38 (7 October 2009), p. 5. Available at: <http://www.oxcarre.ox.ac.uk/images/stories/papers/RevenueWatch/oxcarrerp201038.pdf>.

¹⁶⁸ Ibid.

¹⁶⁹ Marina Walker Guevara et al., "Leaked Records Reveal Offshore Holdings of China's Elite," *The International Consortium of Investigative Journalists* (21 January 2014). Available at: <http://www.icij.org/offshore/leaked-records-reveal-offshore-holdings-chinas-elite>.

¹⁷⁰ See: Chen Aizhu and Charlie Zhu, "China Investigates More Top PetroChina Executives Over Corruption," *Reuters* (27 August 2013).

¹⁷¹ For example, the Chinese government recently delayed the progress of a multi-stage, multi-billion dollar natural gas project that Chevron is constructing in Sichuan Province in 2013. See: Chen Aizhu, "Chevron's \$6.4 billion China Gas Project Pushed Back Again," *Reuters* (6 December 2013). Available at: <http://www.reuters.com/article/2013/12/06/chevron-cnpc-gas-idUSL4N0JK1GA20131206>.

overly large bonuses and royalty payments that could indicate corruption, or delayed payments that would otherwise be expected and may be a sign of impending political trouble in a joint venture relationship.

Qatar. Qatar suffers from major deficiencies in resource governance and transparency: a leading index by PWYP-US member Revenue Watch Institute gives Qatar a “failing” score of 14 out of 100 for reporting practices, ranking it 54th out of 58 countries surveyed.¹⁷² Moreover, as a key US energy partner and ally in the Persian Gulf region, Qatar is heavily dependent on exporting oil and gas, which comprised 57.8% of its national gross domestic product in 2012.¹⁷³ Qatar’s government is notoriously non-transparent, and as an important regional political actor, it is essential for the US government and investors to understand individual oil companies’ contributions to the government.¹⁷⁴

C. Even if Disclosure Prohibition Laws did Exist, There is No Legal Precedent to Support Pre-determined Categorical Exemptions.

As the Commission has already found, and as the evidentiary record clearly shows, no foreign laws prohibit Section 1504 disclosures. However, even if they did, that would not be sufficient to justify departures from the Commission’s general case-by-case approach to disclosure exemptions in situations like Section 1504 where the US has strong policy interests in mandating these disclosures, and where any bind that companies find themselves in is of their own making.

- i. The Commission should not provide exemptions for foreign law conflicts for which issuers are responsible in the first place.*

Even if any foreign law did conflict with Section 1504, the responsibility for that conflict would fall squarely with issuers for neglecting to include standard contractual clauses allowing for disclosures required by securities regulators and stock exchanges. As PWYP-US member Oxfam America informed the Commission in a comment during the previous rulemaking, these clauses have long been an industry standard, as is evident from the long-standing practice of the Association of International Petroleum Negotiators (“AIPN”).¹⁷⁵ This is confirmed in a 2009 study by Revenue Watch Institute and Columbia Law

¹⁷² See: <http://www.revenuwatch.org/countries/middle-east-and-north-africa/qatar/overview>.

¹⁷³ See: <http://www.eia.gov/countries/cab.cfm?fips=qa>.

¹⁷⁴ See: Aryn Baker, “Qatar Haunted by Its Decision to Back the Arab Spring’s Islamists,” *Time* (26 September 2013). Available at: <http://world.time.com/2013/09/26/qatar-haunted-by-its-decision-to-back-the-arab-springs-islamists/>. See also: <http://www.nytimes.com/aponline/2014/03/05/world/middleeast/ap-ml-qatar-gulf-ambassadors.html> and <http://www.foreignaffairs.com/articles/141006/bilal-y-saab/break-up-in-the-gulf>.

¹⁷⁵ See the AIPN Model Form Confidentiality Agreement, attached as Exhibit A to the Comment submitted by Oxfam (20 March 2012). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-294.pdf>.

School, which canvassed 150 extractive industry contracts around the world and found that disclosure to stock exchanges was a standard exception to confidentiality obligations, and has been for decades.¹⁷⁶

Given this long-standing and widespread industry practice, to the extent that issuers face conflicting obligations as a result of Section 1504, 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. Rejecting their 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.”¹⁷⁷ They 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.

In the context of Section 1504, 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 oil contract negotiations.¹⁷⁸ 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.”¹⁷⁹

- ii. *Categorical exemptions would be inconsistent with the good faith obligation on issuers to seek authorization to disclose.*

When a party claims an exemption from a generally applicable legal obligation due to a foreign law conflict, it must demonstrate good faith, i.e. that it has diligently sought authorization to disclose the information.¹⁸⁰ The Commission is familiar with the application of the good faith standard in the context of securities law. For example, in the audit firm case discussed above, the court held that the firms must

¹⁷⁶ Peter Rosenblum and Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (14 September 2009), p. 27. Available at: <http://www.revenuewatch.org/publications/contracts-confidential-ending-secret-deals-extractive-industries>.

¹⁷⁷ See: 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).

¹⁷⁸ Because this practice long predates the enactment of Section 1504, companies should not be entitled to any sort of grandfather exemption.

¹⁷⁹ *BDO China Dahua*, p. 105.

¹⁸⁰ See: Restatement (Third) of the Foreign Relations Law of the United States § 442(2)(b) and (c); see also: *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 201 (1958).

make a good faith effort to seek authorization from foreign authorities to disclose information that is required by generally applicable securities laws.¹⁸¹

In the Section 1504 context, categorical, pre-determined exemptions at the country level would be inherently inconsistent with the principle that companies are under a good-faith obligation to seek authorization to make disclosures. Good faith is predicated on the idea that issuers should always comply with US law, and that exemptions are reserved for extraordinary circumstances; thus the Commission should not consider granting exemptions except as a last resort in individual cases. The existence of any foreign laws in conflict with Section 1504 would at most be a justification for triggering the Commission's general authority to consider case-by-case exemptions, which should not be granted unless the issuer has first in good faith sought and failed to obtain authorization to disclose.

iii. Important US interests weigh against categorically exempting disclosures from operations in countries with alleged disclosure prohibitions.

Even if the Commission takes into account any foreign law conflicts when mandating disclosure, and finds that the issuer can make a showing of good faith, that does not end the inquiry. For Section 1504 disclosures, the Commission should also consider the interests of the United States which weigh heavily in favor of requiring disclosure, and against categorical exemptions from disclosure obligations. Analogizing to the discovery context, US courts have applied the balancing test prescribed in the Restatement of Foreign Relations, which suggests that agencies should take into account, *inter alia*, the extent to which noncompliance with the request would undermine important interests of the United States.¹⁸² The Second Circuit recently applied these factors to dismiss arguments by a bank that it could not turn over bank account information in a terrorism financing lawsuit because of the bank secrecy laws in three countries.¹⁸³ The court sanctioned the bank by citing the strong interests of the United States and emphasized that the interests of *all* nations, and not just those whose laws allegedly forbid disclosure, should be considered in this analysis.¹⁸⁴ The absence of any evidence in the record that the bank would actually be prosecuted for bank secrecy law violations in the identified countries weighed against granting relief.¹⁸⁵

¹⁸¹ See: *BDO Dahua* at 103. Similarly, in *Full Value Advisors, LLC v. SEC*, the court noted that an institutional investment manager must first seeking confidential treatment “in good faith” before seeking an exemption under subsection 13(f) of the Exchange Act. 633 F.3d 1101 (D.C. Cir. 2011). This indicates a case-by-case approach whereby issuers are expected to make a good faith effort to avoid withholding disclosures to the extent possible, and limited exemptions must be carefully justified.

¹⁸² Restatement (Third) of the Foreign Relations Law of the United States § 442(1)(c).

¹⁸³ *Linde v. Arab Bank*, 706 F.3d 92 (2d Cir. 2012).

¹⁸⁴ *Ibid.*, 111-112 (also noting cases in which other purposes, such as combatting commodities fraud and racketeering, were found to weigh strongly in favor of enforcing disclosure orders despite foreign secrecy laws). See also: *United States v. Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984).

¹⁸⁵ *Ibid.*, 114.

Similarly, Congress has enacted Section 1504 for compelling purposes: to provide investors with crucial information, fight corruption and the resource curse, support international transparency efforts, and secure the nation's energy supply. As demonstrated above, information from all resource-rich nations – and particularly including Angola, Cameroon, China, and Qatar – is central to that purpose. This alone distinguishes Section 1504 from the Commission's oil and gas reserves disclosure rules, which allow issuers to decline to disclose reserves information where prohibited by foreign law. Unlike Section 1504, where Congress specifically addressed the disclosures that would be required of industry, the oil and gas reserves disclosure rules were an exercise of the Commission's own discretion. Categorical, pre-determined exemptions would be inimical to Congress's aims for Section 1504, especially given that the Commission has the authority to grant exemptions on a case-by-case basis. When considering such a case-by-case application, the Commission should follow the principles described above and determine, whether the issuer can offer compelling proof of a prohibition that pre-dates the enactment of Dodd-Frank, has sought in good faith and failed to obtain authorization to disclose, can show a clear danger of criminal prosecution as a result of unauthorized disclosure, and then weigh this against the important interests of the United States.

In sum, proposals to exempt issuers from disclosing payment information to governments are based on three faulty premises, that 1) four countries prohibit disclosure; and 2) no remedy for these alleged prohibitions can be provided by the Commission other than pre-determined, categorical exemptions; and 3) exemptions will not harm the transparency goals of Section 1504 and other important interests of the United States. As demonstrated above, there is no reliable evidence that any such prohibitions exist, disclosures from the four identified countries are in fact important to the aims of Section 1504, and any potential legal conflicts that might exist or arise would be of the issuers' own making. In addition, the Commission already possesses sufficient authority to grant exemptions on a case-by-case basis in the unlikely event that an issuer is faced with conflicting legal requirements, has acted in good faith, and the exemption would be consistent with investor protection and the public interest. Thus a decision not to grant categorical, pre-determined exemptions for foreign law conflicts imposes no burden on issuers, and the balance of interests favors a decision not to grant such exemptions.

VI. Section 1504 Disclosure Will Not Put Covered Issuers at a Competitive Disadvantage

There is no convincing evidence that publicly disclosing payment information at the project level will affect competition or create commercial risks for issuers. In the previous rulemaking and since the District Court decision, oil industry commentators have alleged a range of unsubstantiated competitive harms for covered issuers that they hypothesize would result from disclosure at the company and project level. These include:

- “Host governments could select business partners on future opportunities that do not have similar reporting requirements; or
- Host governments could remove US listed companies as operators of existing operations; or

- Competitors [including state-owned companies] could utilize the disaggregated information to gain an advantage in future bidding and contract negotiations.”¹⁸⁶
- “[e]ven with the pendency of similar reporting requirements in the EU and elsewhere, reporting companies still face intense and growing global competition from *state-owned companies* not subject to these requirements.”¹⁸⁷

In an attempt to support these claims, API provided several hypothetical situations that were meant to illustrate scenarios in which these alleged harms would come to pass.¹⁸⁸ Apart from hypothetical scenarios, there has been no conclusive evidence provided to substantiate industry claims of competitive harm. Without this evidence, the Commission is left to evaluate the assumptions on which these claims are based.

In the following, we provide evidence and analysis to support the Commission’s examination of these assumptions and its consideration of claims raised by industry commentators. The claims regarding the alleged competitive costs of disclosure rest on the following unsubstantiated assumptions:

Assumption 1. Transparency of payments is a decisive factor in the competitive bidding and bargaining process with host states to access hydrocarbon resources.

Assumption 2. Project payment disclosure can be used by competitors to reverse-engineer commercial terms and can be used to improve competitiveness in future bids.

Assumption 3. Competitors – including state-owned companies - have no other ways to access the information to be disclosed under Section 1504.

Assumption 4. Transparency of payments at the project level will be decisive in issuers losing bids when competing against state-owned companies.

Assumption 5. Governments consider payment information “commercially sensitive” and will overlook competitive bids by covered issuers and grant licenses to non-covered issuers in order to avoid payment disclosure.

Analysis of Assumption 1. Neither payment transparency nor confidentiality of payments is a decisive factor in determining an oil company’s success in bargaining and winning bids with host governments.

As is clear from the record, the negotiations for each deal between oil companies and host states include a range of highly complex factors, including geology, quality of the oil, technical and financial capacity and experience of the oil company, above-ground political risks, and economic characteristics of the project.¹⁸⁹ As a result, bidding protocols and bidder evaluation criteria laid out by each host government differ widely, since they depend on those complex factors, as well as on the host country’s

¹⁸⁶ Comment submitted by the American Petroleum Institute (28 January 2011), p. 46. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-10.pdf>.

¹⁸⁷ Comment submitted by the American Petroleum Institute (7 November 2013), p. 2-3. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf>.

¹⁸⁸ These claims were summarized in API’s November 2013 letter. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf>.

¹⁸⁹ See: Comment submitted by Oxfam America (21 February 2011), p. 24, Section V, Point B. Available at: <http://www.sec.gov/comments/s7-42-10/s74210.shtml>.

strategic development objectives for the sector, the fields under development, and the specific blocks up for bid. Many factors unrelated to transparency affect whether covered issuers are eligible to bid, and are competitive in the process. This is confirmed by the Independent Petroleum Association of America (IPAA), which also documented the complex factors involved in bidding and the range of criteria used by governments to evaluate bids in its “International Primer” aimed at guiding IPAA members that are considering international operations.¹⁹⁰

It is also confirmed by examples of bidding criteria in specific countries:

- **Nigeria’s** most recent licensing round of November 2013 is open only to Nigerian exploration and production companies, with 51% of the shares of the eligible bidding company to be owned by Nigerian citizens.¹⁹¹ The Department of Petroleum Resources Q&A on the Submission Requirements for the round makes clear that transparency does not factor into bidding success: “Evaluation would be based on evidence of *Technical Competence* of the bidders or that of their technical partners in relation to the operation of the field in question as well as the *ability of the entity or group of companies to muster the financial resources required* for the operation of the asset.”¹⁹² (Emphasis added).
- **Brazil’s** bidding round in 2013 included strict bidder eligibility criteria based on the location and complexity of the block (i.e. ultra deep water, deepwater, shallow water, onshore).¹⁹³ This included minimum net asset requirements for bidders based on block depth, and bidder qualification was scored on prior operational experience with each depth, as well as the amount invested in exploration activities and production volumes over the previous five years. The bids of eligible companies were scored based on the cash bonus offered, the exploration work program and its value, and the local content commitment (a percentage of the exploration and development and production phase that will use national services and equipment). The winning proposal is one presenting a higher number of points summed from a weighted computation of the cash bonus (40%), work program (40%) and local content (20%).¹⁹⁴ Section 1504 disclosures would not provide information on a company’s local content commitment or its work program, and Brazil already discloses bonus payments by company and by block.¹⁹⁵ The number of successful bidders that will be

¹⁹⁰ See p. 5 of the Independent Petroleum Association of America’s (“IPAA”) International Primer. Available at: <http://www.ipaa.org/wp-content/uploads/downloads/2011/12/IPAAInternationalPrimer.pdf>.

¹⁹¹ See p. 7 of *Marginal Fields Licensing Round 2013* for responses to the question: “What is the main criterion for evaluating the bids since all selected companies would be paying the same Signature Bonus?” Available at: <http://dprnigeria.org.ng/requirements/>.

¹⁹² Ibid., p. 8.

¹⁹³ See: http://www.brasil-rounds.gov.br/arquivos/g_habilitacao/Guia_de_Habilitacao_Vfinal_27022013.pdf. See also: “The 11th Oil and Gas Bid Round for Brazil” English summary webinar presentation produced by Lawrence Graham LLP, MMA Lawyers, and Haynes and Boone LLP. Available at: http://www.spectrumasa.com/wp-content/uploads/HB-FINAL-11th-Oil-and-Gas-Bid-Round-for-Brazil-Webinar-Presentation_2033956-2.pdf.

¹⁹⁴ Ibid., p. 13.

¹⁹⁵ See: *Brasil Round 11 Resumo das Ofertas Vencedoras*, (2013) p. 42-65. Available at: http://www.brasil-rounds.gov.br/arquivos/g_habilitacao/Guia_de_Habilitacao_Vfinal_27022013.pdf.

required to disclose payments under the US or EU disclosure laws also suggests that transparency is not a concern for the Brazilian government as it selects winning bids.¹⁹⁶

Further, a recent study also undermines the view that transparency has an oversized influence during bidding. The study reviewed host state and oil company bargaining models since the 1970s, and based on this review, produced an updated model to illustrate the bargaining dynamics between IOCs and host states. Notably, neither payment transparency nor payment confidentiality was referenced as a factor that would influence the bargaining dynamics between companies and host states.¹⁹⁷

The evidence above undermines the assumption that transparency would be a decisive or even a relevant factor in winning or losing a bid. Such claims oversimplify the competitive landscape and the realities of the bargaining environment.

Analysis of Assumption 2. Project payment disclosures cannot yield information that would allow companies to reverse engineer an issuer's return on investment or contract terms.¹⁹⁸ This would require far more information, including production levels, capital investments, production costs, cost recovery rates and costs recovered for the given year, tax holidays, customs exemptions, and prices for production sold.¹⁹⁹ Extractive projects tend to be long term projects with investor returns being determined over the course of 10 to 25 years and potentially fluctuating a great deal during that period due to a variety of factors. Single-year, backwards-looking snapshots of payments to government such as those required under Section 1504 would not provide a good picture of the investor's overall return on investment (which would be the basis for an investment decision).

The notion of reverse engineering payment data for use in improving the competitiveness of future bids also rests on the assumption that contract terms are uniform. As noted by the International Petroleum Association of America (IPAA), the range of fiscal incentives used by governments²⁰⁰ to attract investment can lead to variety in the terms of individual deals. In the case of Production Sharing

¹⁹⁶ See: "Report Analyzing the 11th Round of Bids For Grant of Activities of Exploration and Production of Oil and Natural Gas," p. 41-66. Available at: http://www.brasil-rounds.gov.br/arquivos/relatorio_r11/relatorio_analise_r11.pdf.

¹⁹⁷ Vlado Vivoda, "International Oil Companies and Host States: A New Bargaining Model," *Oil Gas & Energy Law* OGEL 5 (2011). Available at: <http://www.ogel.org/article.asp?key=3174>.

¹⁹⁸ This has been confirmed by the EU Commission which noted that project payments "would not give direct insight into confidential company information..." See: Comment submitted by Publish What You Pay US (20 December 2011), p. 8. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-117.pdf>.

¹⁹⁹ See: Comment submitted by Oxfam America (21 February 2011), p. 23, Section V, Point B. Available at: <http://www.sec.gov/comments/s7-45-10/s74210-76.pdf>. See also: Comment submitted by Global Witness (18 December 2013), p. 15. Especially: "...even translating extractives payments into production or discovery data is impossible without access to the confidential contract terms to which the payments relate." And also: FN 68 "In practice, other confidential operational information would also likely be required, such as details of any production allocated to reimbursement of the companies' costs." Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>.

²⁰⁰ IPAA at P. 12-13, "Fiscal Incentives May Be Offered." Available at: <http://www.ipaa.org/wp-content/uploads/downloads/2011/12/IPAAInternationalPrimer.pdf>.

Contracts, the fiscal system used by over half of hydrocarbon producing countries worldwide, comparing terms would be unlikely. As confirmed by Ernst & Young: “PSCs can take many different forms and the allocation of profits is generally different for each contract.”²⁰¹

Analysis of Assumption 3. Corporate and government competitors have other, more timely methods of acquiring payment and contract information, which does not require them to wait for Section 1504 disclosures to be produced.²⁰²

This includes a wide array of comprehensive business intelligence services such as those provided by HIS,²⁰³ Global Data,²⁰⁴ Barrows Company,²⁰⁵ Wood MacKenzie²⁰⁶ and Rystad Energy,²⁰⁷ which provide access to contract as well as lease-level information. The principal clients of these services are extractive companies themselves; thus covered issuers already have access to much of the information that their competitors will disclose pursuant to Section 1504. Moreover, these commercial databases provide this information in real-time, giving them far more competitive value than Section 1504 disclosures, which will operate on a time delay of between 6 and 17 months.²⁰⁸ However, access to such commercially available information is asymmetrical, as investors and citizens

²⁰¹ Ernst and Young, *US GAAP vs. IFRS: The Basics* (December 2011), p. 10. Available at: [http://www.ey.com/Publication/vwLUAssets/US_GAAP_v_IFRS:_The_Basics/\\$FILE/US%20GAAP%20v%20IFRS%20Dec%202011.pdf](http://www.ey.com/Publication/vwLUAssets/US_GAAP_v_IFRS:_The_Basics/$FILE/US%20GAAP%20v%20IFRS%20Dec%202011.pdf).

²⁰² “An entire industry exists to provide intelligence on natural resources transactions.” See Comment submitted by Oxfam (21 February 2011), p. 23. See also: Comment submitted by Publish What You Pay US (20 December 2011), p. 8. Specifically the discussion about project reporting. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-117.pdf>.

²⁰³ The IHS International Exploration and Production Database includes modules with reserves and production data and “includes more than 27,900 current valid contracts and 34,700 historical ones.” See: <http://www.ihs.com/products/consulting/industries/energy/upstream-oil-gas/index.aspx>.

²⁰⁴ See: Global Data Deals Database “...[T]he most comprehensive source of intelligence for the global oil & gas industry. Covering transactions, terms, metrics, and legal and financing information, you are kept up to date with all upstream, midstream and downstream developments. All major types of deals, both old and new, are included.” See also Industry Project Award Record “IPAR is all about global contracts and tenders. Features include company profiles, real-time project information, pricing structure, and trend analysis. With values, durations, bid deadlines, and contract renegotiations, extensions and terminations, you'll always know what the competition is up to.” Available at: <http://energy.globaldata.com/research-areas/oil-and-gas>.

²⁰⁵ See Barrows Company: “Barrows Company is the world's leading and most comprehensive international reference library for oil, gas, and mineral laws and contracts, serving the Petroleum industry for over 50 years. The vast Barrows Basic Oil Laws & Concession Contracts library contains the complete texts of petroleum laws and contracts, which includes National Oil Company Statutes and LNG Contracts.” Available at: <http://www.barrowscompany.com/>.

²⁰⁶ See Wood MacKenzie Upstream Oil and Gas Research. Available at: <http://public.woodmac.com/public/industry-views/content/11703479>.

²⁰⁷ See Rystad Energy: “UCube (Upstream Database) is an online, field-by-field database for the international upstream oil & gas industry. It is a single source tool integrating detailed asset information, company analysis, economical modeling as well as maps. UCube contains reserves, production, financial figures and a range of additional key parameters for all fields, discoveries and licenses globally, including both conventional and unconventional resources. Data can further be split by variables like geography, on-/offshore, ownership, operators, life cycle and water depth, among others. UCube covers 65,000 assets and 3,200 companies, with historical data from 1900 and forecasted data up to 2100.” See: <http://www.rystadenergy.com/Databases>.

²⁰⁸ For example, Rystad Energy uCube database - “Data is continuously scouted and updated, with new versions available on a monthly basis.” See: <http://www.rystadenergy.com/Databases/UCube>.

may not have the resources to subscribe to these databases.²⁰⁹ This is in addition to a large amount of information made public proactively by governments, including results of bidding rounds at company and lease or contract level,²¹⁰ as well as contracts.²¹¹

Analysis of Assumption 4. There is no evidence to support the claim that transparency of payments at the project level will produce information that will be decisive in issuers losing bids when competing against state-owned companies. Firstly, as shown above, payment transparency is very unlikely to be determinant in winning a bid, but if it were, state-owned companies already have access to a wide array of high quality sources of competitive intelligence and do not need to wait for Section 1504 disclosures.

Secondly, a host of other factors not related to transparency provide state-owned companies with competitive advantage in expanding their asset base. This includes access to significant amounts of capital, the ability to obtain government loans at little or no interest, as well as the capacity to arrange oil for infrastructure packages with host governments, which have developmental and political value.²¹² Seemingly undisturbed by the prospect of payment disclosures, state-owned companies also routinely establish joint ventures with IOCs covered by Section 1504 aimed at expanding their asset base.²¹³ Indeed, in many countries companies wishing to invest must establish a joint venture or operating agreement with a state-owned company.²¹⁴ No evidence has been submitted to the record to

²⁰⁹ PWYP member personal conversation with Rystad Energy representative revealed that the uCube database subscription fee is at least \$50,000 per year.

²¹⁰ See bidding round results in Comment submitted by Global Witness (18 December 2013), footnotes 95-100. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>. See also Appendix in Comment submitted by PWYP (20 December 2011) on Project Reporting for disclosure of lease sale results by company, including by U.S. Dept. of Interior, Bureau of Ocean and Energy Management, p. 13-29, Bureau of Land Management p.31-39, and by the Alaska Department of Natural Resources p. 40-43. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-117.pdf>.

²¹¹ Comment submitted by PWYP (20 December 2011). Available at: <http://www.sec.gov/comments/s7-42-10/s74210-118.pdf>.

²¹² Comment submitted by Global Witness (24 February 2012), p. 8. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-200.pdf>.

²¹³ This includes, for example: ExxonMobil and Rosneft - "Rosneft and ExxonMobil Complete JV Formation to Develop Tight Oil Reserves in Western Siberia." (17 December 2013). Available at: <http://www.rosneft.com/news/pressrelease/171220132.html>; Shell and CNOOC - "Shell signs upstream deal with CNOOC." (1 August 2013). Available at: <http://www.shell.com.cn/en/aboutshell/media-centre/news-and-media-releases/2013/new-contract-with-cnooc-20130801.html>; and ConocoPhillips and Sinopec - "Sinopec to Research China Shale Gas Development with ConocoPhillips," *Reuters* (25 December 2013). Available at: <http://www.reuters.com/article/2012/12/25/china-sinopec-conocophillips-idUSL4N09Z1IQ20121225>.

²¹⁴ For example, in Nigeria, concession agreements in which foreign oil companies had the sole right to explore for and extract petroleum gave way to joint operating agreements and production sharing contracts starting in the 1970s. After this time, the foreign companies were allowed to participate in the Nigerian oil industry only subject to joint ownership of operations with the Nigerian National Petroleum Company. See Madaki O. Ameh, *The Shift from Joint Operating Agreements to Production Sharing Contracts in the Nigerian Oil Industry: Any Benefits for the Players?* (2005). For a general overview of the shift from concession agreements to production sharing contracts in the oil industry, see Talal Al-Emadi, "Joint Venture Contracts (JVCs) among Current Negotiated Petroleum Contracts: A Literature Review of JVCs Development, Concept and Elements," 1 *Georgetown Journal of International Law* 645 (2010).

demonstrate that these competitive advantages of state-owned companies will be enhanced with knowledge of company payments at the project level.

In fact, many state-owned or majority state-owned companies such as Petrobras will be required to report under the US law.²¹⁵ State-owned companies will also report at the company and project level in EITI countries, in the EU²¹⁶ or under the forthcoming Canadian disclosure standards. API's anonymous disclosure model would be inconsistent with the approaches in those markets, and would allow state-owned companies listed in the US to report anonymously. This would undermine both the intent of the statute and, if API's claims of "commercial harm" were assumed to be correct, it would put cross-listed issuers including API member companies, at a disadvantage. In either case, API's anonymous disclosure model appears to provide no value to issuers in the competitive landscape with state-owned oil companies.

The evidence above strongly undermines API's claim that "[e]ven with the pendency of similar reporting requirements in the EU and elsewhere, reporting companies still face intense and growing global competition from state-owned companies not subject to these requirements."²¹⁷ As noted by industry commentators, there exists increasing competition between IOCs and state-owned companies; however, an analysis of the competitive landscape does not support the claim that payment transparency by each issuer – even at the project level - will materially influence the nature of that competition.

Analysis of Assumption 5. There is no evidence to support the notion that governments consider payment information "commercially sensitive" and that they will overlook competitive bids by covered issuers and grant licenses to non-covered issuers in order to avoid payment disclosure. As is clear in the record, companies disclosing voluntarily for years remain profitable and competitive, and covered issuers have remained competitive in countries that industry commentators have alleged prohibit disclosure.²¹⁸ Payment transparency as laid out in Section 1504 is not what is typically considered "commercially sensitive" information by governments.²¹⁹ Section 1504 does not require issuers to reveal contemplated transactions, bids or negotiating position on such transactions, business models, proprietary technology or confidential communications. Public filing of Section 1504 disclosures

²¹⁵ These include for example: CNOOC, Petrochina, Sinopec (China), Petrobras Vale (Brazil), and Ecopetrol (Colombia). Available at: http://www.nyse.com/about/listed/lc_all_overview.html.

²¹⁶ State-owned companies listed on the London Stock Exchange include, for example: Gazprom, Lukoil, Rosneft (Russia). Available at: <http://www.londonstockexchange.com/>.

²¹⁷ Comment submitted by American Petroleum Institute (7 November 2013). Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf>.

²¹⁸ See also: Comment submitted by Global Witness (18 December 2013), p. 22-23. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>.

²¹⁹ For example, Section 13(q) will not require the disclosure of data deemed by the Qatar government to be "commercially sensitive information", including "actual or projected production costs, revenues or reserves." See Comment submitted by ExxonMobil (15 March 2011), p.5. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-73.pdf>.

will only require disclosure of the total amount of a payment type for a specific project made to a government up to 17 months after any payment or set of payments were made.

The typical revenue profile of oil projects also means that in many cases the payments to be reported under 1504 will be with respect to contracts that were signed years earlier, making their relevance to negotiations limited in a changing market. For example, it can take five to seven years for an oil project to come online and generate significant revenues like royalties, profit oil, etc. Even in the extremely unlikely event that any terms for previously signed contracts are revealed as a result of Section 1504 disclosure, as mentioned above, such terms are either generally already known to actors within the industry, or are of such minimal competitive value that they are unlikely to cause substantial harm to an issuer's competitive position.²²⁰ Moreover, as progressively more countries adopt contract disclosure as standard practice, arguments about revealing commercially sensitive terms have less and less validity.

VII. Securities Law Definition of Control Should Govern Section 1504, Consistent With The 2012 Rule

The general definition of control under the federal securities law should govern Section 1504, consistent with the previous rule. In particular, the definition of "control" in Exchange Act Rule 12b-2 is distinct from the Financial Accounting Standards Board ("FASB") definition that was put forward by API, and the statutory text and purpose of Section 1504 clearly favor application of the securities law definition over the accounting definition. The Commission has already considered this question and reached the right conclusion in the 2012 rule, and nothing in the litigation proceedings or in API's subsequent submission provides a reason to revisit it now.

A. Rule 12b-2 Definition Is More in Line with the Text and Purposes of the Statute

The transparency goals of Section 1504 are certainly unrelated to the purpose of FASB financial consolidation standards, which is to provide a picture of complex parent companies as a single economic entity. Reportable payments under Section 1504 must include payments made by all entities under the control of the issuer regardless of whether or not the issuer consolidates the entity for financial accounting purposes. As we have previously maintained, this broad coverage is not only appropriate but is required in light of the statutory language, which covers payments made by 1) the issuer, 2) a subsidiary of the issuer, or 3) an entity under the control of the issuer.²²¹ Because the text of the statute includes controlled entities in addition to subsidiaries, an excessively narrow interpretation of control limiting the disclosure to payments made by consolidated subsidiaries would conflate the second and

²²⁰ Peter Rosenblum and Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (14 September 2009), p. 39. Available at: <http://www.revenuewatch.org/publications/contracts-confidential-ending-secret-deals-extractive-industries>.

²²¹ 15 U.S.C. 78m(q)(2)(A).

third category above, thus limiting the scope of the statute and contravening the Congressional intent to achieve the broadest possible coverage of companies.²²²

In addition to these statutory considerations, the 12b-2 test for “control” is a much better fit and more practicable in this context because it focuses on the control of a related entity’s management and decision-making, which in practice translates into the ability to compel disclosure, as opposed to merely financial interests, which might not be accompanied by such ability.

The Commission’s determination in the previous rulemaking appropriately reflects the differing goals of the accounting standards and of Section 1504. FASB Codification is aimed at presenting overall balance sheets of complex parent companies as a single economic entity. This is completely different from the statutory goals of Section 1504, which are to protect investors from reputational and legal risks arising from corruption and to empower citizens of resource-rich countries to hold their governments and companies accountable. Given that one of the purposes of Section 1504 is to combat corruption, it may be instructive to consider the broad meaning of “control” under the FCPA. In the FCPA enforcement context, the Commission interprets the “agent” language from the FCPA statute to cast a wide net over related entities abroad, applying “traditional agency principles” in determining parent-subsidiary liability.²²³ In this context, the Commission has stated that “[t]he fundamental aspect of agency is control.”²²⁴ Although Section 1504 need not follow the FCPA’s approach to control, this broad approach shows the need for a strong disclosure rule that cannot be easily circumvented by shifting payments via entities that are effectively controlled but unconsolidated. As we have previously maintained, “[c]ontrol must be defined such that where, for example, each party to a project is a US-listed resource extractive issuer, at least one such issuer must meet the control definition.”²²⁵

B. The Commission Has Already Considered this Question and Nothing Requires the Commission to Revisit It Now

The Commission has already taken into account these considerations during the previous rulemaking, and there is no reason to revisit them now. The question of “control” was not addressed in the litigation, and nothing in the District Court decision requires the Commission to reconsider this issue. API’s recent demand for revisiting the definition of “control” is unsubstantiated, merely repeating previous arguments that were already rejected by the SEC. As the Commission noted in the final rule release, “We disagree with commentators who suggested that the definition of “control” not track Rule 12b–2 and instead be entirely consistent with the use of the term for purposes of financial reporting. While

²²² Comment submitted by Publish What You Pay-US (25 February 2011), p. 43. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-29.pdf>.

²²³ Department of Justice and SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (14 November 2012), p.27. Available at: <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

²²⁴ *Ibid.* In the FCPA context, control is tested under traditional common law agency theory, and does not follow Rule 12b-2 definition.

²²⁵ Comment submitted by Publish What You Pay-US (25 February 2011), p. 42. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-29.pdf>.

determinations made pursuant to the relevant accounting standards applicable for financial reporting may be indicative of whether control exists, we do not believe it is determinative in all cases.”²²⁶

C. API’s Arguments on Control Are Misguided and Tired

We disagree with API’s recent proposal for Section 1504 reporting to follow FASB standards of “control” for three reasons.²²⁷ First, we take issue with API’s unsubstantiated claims of “significant additional compliance costs” and vague worries that “the 12b-2 test potentially takes [Section 1504] reporting out of alignment with the issuer’s existing financial data collection and reporting systems.”²²⁸ Our research has found that payment reporting for joint ventures is consistent with existing industry practice and that it “should not adversely impact the cost of compliance with Section 13(q) in a significant way. This level of detailed information is already reported to individual members of a joint venture by the operator of the joint venture, as evidenced by existing industry accounting software in common use.”²²⁹

Second, if the consolidation principles are already familiar to issuers and investors, so is the Rule 12b-2 definition of “control” which has been applied and well understood by issuers as well as investors in other securities law contexts. Familiarity alone is not a reason to choose one standard over the other, and neither are cost considerations.

Finally, we do not share API’s concern about “duplicative reporting” which could allegedly lead to “overstatement of government revenues.”²³⁰ The reported payments should not be aggregated on a country or subnational level as API has suggested, and we have consistently disagreed with any such proposals. Thus, to the extent there is any duplication in reporting by different issuers, we believe this can only be beneficial by promoting consistency in payments reporting across issuers.

In sum, we urge the Commission to again dismiss API’s vague claims, and to follow clear Congressional language and purpose in reinstating a broad definition of control pursuant to Rule 12b-2.

²²⁶ SEC final rule, 77 Fed. Reg. at 56,387 (references omitted).

²²⁷ API’s submission selectively references only one paragraph of the FASB Codification, para. 810-10-15-8, and does not even encompass the full scope of the FASB consolidation requirements. API has notably excluded situations other than majority ownership that require consolidation, such as variable interest entities. The paragraph cited by API is not a definition of “control,” but rather an explanation of when the existence of a controlling financial interest generally requires consolidation. The API recommendation attempts to lift one piece of FASB’s consolidation requirement out of context and turn it into a definition of control in a wholly unrelated context.

²²⁸ Comment submitted by American Petroleum Institute (7 November 2013), p. 9-10. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf>.

²²⁹ Comment submitted by PWYP-US (25 February 2011), p. 44. Available at: <http://www.sec.gov/comments/s7-42-10/s74210-29.pdf>.

²³⁰ Comment submitted by American Petroleum Institute (7 November 2013), p.10. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf>.

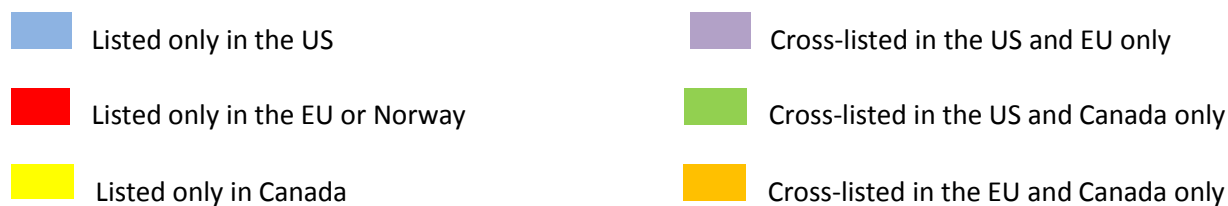
VIII. Conclusion

Publish What You Pay – United States joins with API in urging the Commission to fulfill its statutory obligation and promptly schedule a rulemaking for Section 1504. We applaud the Commission for its strong 2012 rule, and urge the Commission to publicly commit to re-issuing a final rule this year, by April 1, 2014. As supported by the evidence presented throughout this position statement, this rule should mandate project-level reporting in line with the EU definition, require issuer specific public disclosure, and provide no exemptions.

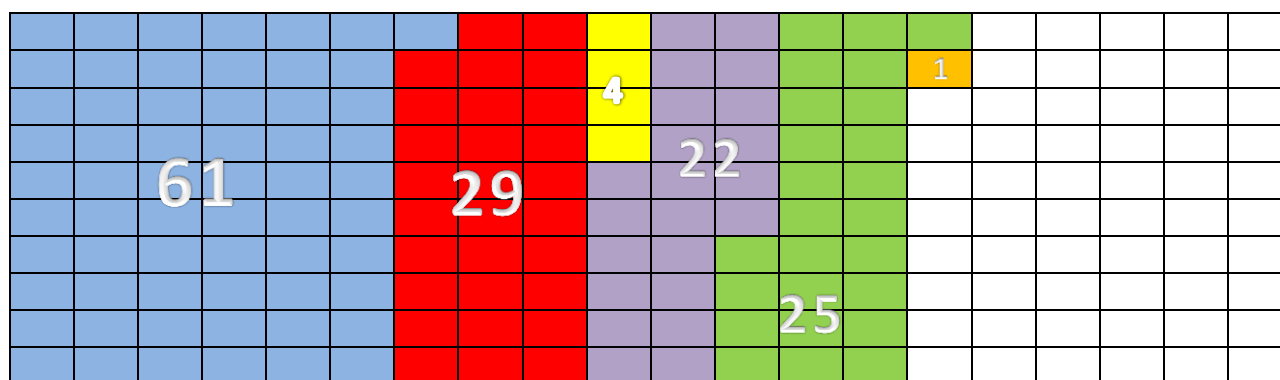
Recognizing the essential role of transparency in informing investors, facilitating stable operating environments for businesses, and aiding governments, regional bodies, and international institutions in collecting the revenue owed to them, countries have hurried to implement disclosure requirements that closely mirror the 2012 rule. Indeed, a global transparency standard has developed.

We are grateful for the opportunity to submit our position statement to the Commission. We look forward to the opportunity to meet with you and discuss the content of our submission in greater detail.

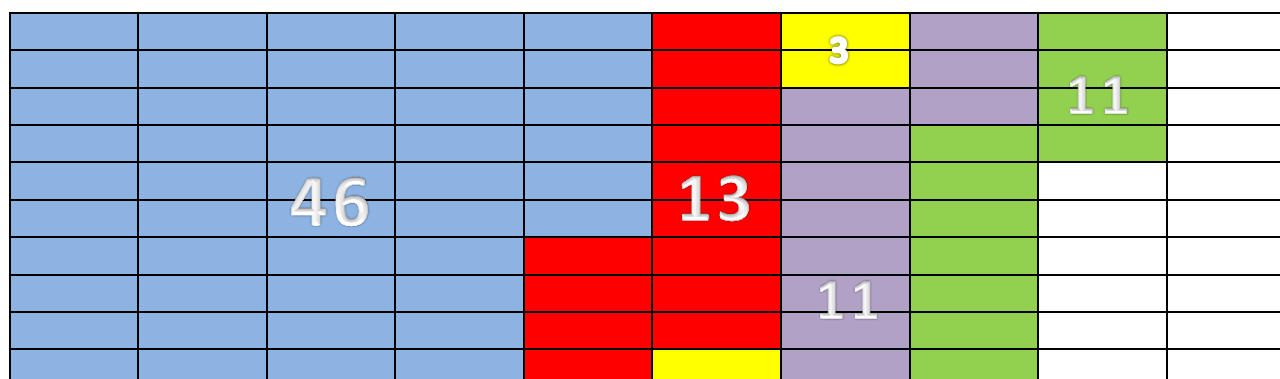
APPENDIX A: Company Coverage



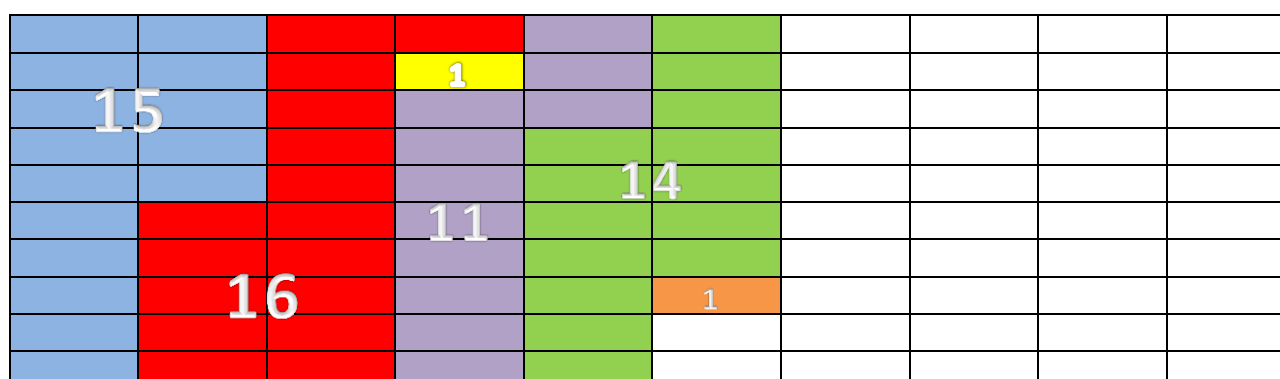
Graphic A.1: Total number of global top-100 oil/gas, **and** top-100 mining companies by market capitalization listed and cross-listed on US, EU, Norwegian, and Canadian exchanges.



Graphic A.2: Total number of global top-100 **oil/gas** companies listed and cross-listed on US, EU, Norwegian, and Canadian exchanges.



Graphic A.3: Total number of global top-100 **mining** companies listed and cross-listed on US, EU, Norwegian, and Canadian exchanges.



APPENDIX B : Examples of “project” cited or referenced in recent 10-K or 20-F filings of Exxon Mobil Corporation, Royal Dutch Shell, Chevron Corporation, PetroChina Company, and BP

Exxon Mobil Corporation:²³¹

Azerbaijan: At year-end 2013, ExxonMobil’s net acreage totaled 9 thousand offshore acres. A total of 0.7 net development wells were completed during the year. Work continued on the Chirag Oil project – page 15 ... The production sharing agreement (PSA) for the development of the Azeri-Chirag-Gunashli field is established for an initial period of 30 years starting from the PSA execution date in 1994. Other exploration and production activities are governed by PSAs negotiated with the national oil company of Azerbaijan. The exploration period consists of three or four years with the possibility of a one to three-year extension. The production period, which includes development, is for 25 years or 35 years with the possibility of one or two five-year extensions. – page 21

ExxonMobil’s investment in developed and undeveloped acreage is comprised of numerous concessions, blocks and leases. The terms and conditions under which the Corporation maintains exploration and/or production rights to the acreage are property-specific, contractually defined and vary significantly from property to property. – page 18

Kazakhstan: Onshore exploration and production activities are governed by the production license, exploration license and joint venture agreements negotiated with the Republic of Kazakhstan. Existing production operations have a 40-year production period that commenced in 1993. Offshore exploration and production activities are governed by a production sharing agreement negotiated with the Republic of Kazakhstan. The exploration period is six years followed by separate appraisal periods for each discovery. The production period for each discovery, which includes development, is for 20 years from the date of declaration of commerciality with the possibility of two ten-year extensions. – page 21

Royal Dutch Shell:²³²

We continued to divest selected Upstream assets during 2012, including our 40% participating interest in the BS-4 oil and gas exploration block in the Santos Basin offshore Brazil; our interest in the Gassled natural gas transport infrastructure joint venture in Norway; our 30% interest in oil mining leases 30, 34 and 40 in the Niger Delta, Nigeria; our 50% interest in the Holstein field in the Gulf of Mexico; and our interest in the Seal area within the Peace River oil sands of Alberta, Canada. Also in Canada, we sold a 20% interest in our Groundbirch tight-gas project. In Australia we completed the sale of a 17.5% interest in the Prelude FLNG project to INPEX, and a 10% interest to KOGAS. We also completed the sale of a further 5% interest to CPC Corporation in the first quarter of 2013. – page 21

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. – page 23

²³¹ Exxon Mobil Corporation’s 10-K filing is available at:

<https://www.sec.gov/Archives/edgar/data/34088/000003408814000012/xom10k2013.htm>.

²³² Royal Dutch Shell’s 20-F filing is available at:

<https://www.sec.gov/Archives/edgar/data/1306965/000119312513106084/d449950d20f.htm>.

Chevron Corporation:

Trinidad and Tobago: The company has a 50 percent nonoperated working interest in three blocks in the East Coast Marine Area offshore Trinidad, which includes the Dolphin and Dolphin Deep producing natural gas fields and the Starfish development. Net production in 2012 averaged 173 million cubic feet of natural gas per day. Development of the Starfish Field commenced in third quarter 2012, and first gas is expected in 2014. Natural gas from the project will supply existing contractual commitments. Proved reserves have been recognized for this project. – page 13²³³

FEED activities for the Moho Nord project, located in the Moho-Bilondo development area, continued in 2012. The project includes a new facilities hub and a subsea tieback to the existing Moho-Bilondo floating production unit. Maximum total daily production is expected to be 127,000 barrels of crude oil per day. A final investment decision is expected in first quarter 2013 and start-up is planned for 2015. At the end of 2012, proved reserves had not been recognized for this project. – page 14²³⁴

PetroChina Company:²³⁵

In May 2012, we, jointly with Shell Canada Limited, Korea Gas Corporation, or KOGAS, and Mitsubishi Corporation invested in a project to build and operate an LNG export terminal with an annual capacity of 12 million tons in Kitimat, British Columbia, Canada. We hold 20% equity interest in the project. Shell Canada Limited has a 40% equity interest in the project while each of KOGAS and Mitsubishi Corporation holds a 20% interest. – page 15

On July 25, 2012, we entered into an agreement with Qatar Petroleum and GDF Suez Qatar to acquire 40% of the exploration and production rights from GDF Suez Qatar under Qatar Petroleum's exploration and production sharing agreement for Block 4, an offshore block located north of Qatar Peninsula. GDF Suez Qatar will continue to be the operator of the block with its 60% stake. We completed the transaction on July 31, 2012. For the remaining exploration period under the said exploration and production sharing agreement, we will pay GDF Suez Qatar 10% of the drilling costs incurred since the effectiveness of the said exploration and production sharing agreement as consideration of our access to Block 4. Such payment in total shall not exceed US\$10 million. – page 15

Sino-foreign cooperation projects and foreign parties in onshore oil and gas exploration and production in China are generally selected through open bids and bilateral negotiations. Those projects are generally conducted through production sharing contracts. – page 46

British Petroleum:²³⁶

We have been involved in Angola since the 1970s. We now hold a position in nine major deepwater licences, along with equity in the Angola LNG project. We achieved two major project start-ups in 2012. – page 7

²³³ Passage taken from Chevron Corporation's 2013 10-K filing, available at:
<https://www.sec.gov/Archives/edgar/data/93410/000009341014000011/cvx-123113x10kdoc.htm>.

²³⁴ Passage taken from Chevron Corporation's 2012 10-K filing, available at:
<https://www.sec.gov/Archives/edgar/data/93410/000009341013000003/cvx-123112x10kdoc.htm>.

²³⁵ PetroChina Company's 20-F filing is available at:
<https://www.sec.gov/Archives/edgar/data/1108329/000119312513177465/d521425d20f.htm>.

²³⁶ Passages taken from BP's 20-F filing, available at:
<https://www.sec.gov/Archives/edgar/data/313807/000119312513093347/d441093d20f.htm>.

In Azerbaijan, BP is the largest foreign investor and operates two PSAs, Azeri-Chirag-Gunashli (ACG) and Shah Deniz, and also holds other exploration leases. BP is expecting to progress the sanctioned Chirag Oil project by starting up the West Chirag production and drilling platform in late 2013. – page 69

In Trinidad & Tobago, BP almost doubled its exploration and production licences acreage during 2012, and now holds licences covering 1,806,000 acres offshore of the east coast. Facilities include 13 offshore platforms and one onshore processing facility. Production is comprised of oil, gas and NGLs. In May, BP announced that it had signed two PSAs with the government of Trinidad & Tobago for the two deepwater exploration and production blocks awarded in 2011. BP has a 100% interest in both these blocks. – page 69

The terms and conditions of the leases, licences and contracts under which our oil and gas interests are held vary from country to country. These leases, licences and contracts are generally granted by or entered into with a government entity or state owned or controlled company and are sometimes entered into with private property owners. These arrangements with governmental or state entities usually take the form of licences or production-sharing agreements (PSAs), although arrangements with the US government can be by lease. – page 94