

# **SECURITIES AND EXCHANGE COMMISSION**

## **17 CFR Parts 240 and 249**

**Release No. 34-78167; File No. S7-25-15**

**RIN 3235-AL53**

### **Disclosure of Payments by Resource Extraction Issuers**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting Rule 13q-1 and an amendment to Form SD to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to the disclosure of payments by resource extraction issuers. Rule 13q-1 was initially adopted by the Commission on August 22, 2012, but it was subsequently vacated by the U.S. District Court for the District of Columbia. Section 1504 of the Dodd-Frank Act added Section 13(q) to the Securities Exchange Act of 1934, which directs the Commission to issue rules requiring resource extraction issuers to include in an annual report information relating to any payment made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer, to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Section 13(q) requires a resource extraction issuer to provide information about the type and total amount of such payments made for each project related to the commercial development of oil, natural gas, or minerals, and the type and total amount of payments made to each government. In addition, Section 13(q) requires a resource extraction issuer to provide information about those payments in an interactive data format.

**DATES:**

Effective date: The final rule and form amendment are effective [insert date 60 days after publication in the Federal Register].

Compliance date: A resource extraction issuer must comply with the final rule and form for fiscal years ending on or after September 30, 2018.

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**SUPPLEMENTARY INFORMATION:** We are adopting Rule 13q-1<sup>1</sup> and an amendment to Form SD<sup>2</sup> under the Securities Exchange Act of 1934 (“Exchange Act”).<sup>3</sup>

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<sup>1</sup> 17 CFR 240.13q-1.

<sup>2</sup> 17 CFR 249.448.

<sup>3</sup> 15 U.S.C. 78a et seq.

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## **I. INTRODUCTION AND BACKGROUND**

On December 11, 2015, we re-proposed a rule and form amendments<sup>4</sup> to implement Section 13(q) of the Exchange Act (the “Proposing Release”). Rules implementing Section 13(q) were previously adopted by the Commission on August 22, 2012 (the “2012 Rules”),<sup>5</sup> but were vacated by the U.S. District Court for the District of Columbia by order dated July 2, 2013.<sup>6</sup>

### **A. Section 13(q) of the Exchange Act**

Section 13(q) was added in 2010 by Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“the Act”).<sup>7</sup> It directs the Commission to “issue final rules that require each resource extraction issuer to include in an annual report . . . information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including—(i) the type and total amount of such payments made for each project of the

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<sup>4</sup> Exchange Act Release No. 34-76620 (Dec. 11, 2015), 80 FR 80057 (Dec. 23, 2015) available at <http://www.sec.gov/rules/proposed/2015/34-76620.pdf>.

<sup>5</sup> See Exchange Act Release No. 67717 (Aug. 22, 2012), 77 FR 56365 (Sept. 12, 2012) available at <http://www.sec.gov/rules/final/2012/34-67717.pdf> (the “2012 Adopting Release”). See also Exchange Act Release No. 63549 (Dec. 15, 2010), 75 FR 80978 (Dec. 23, 2010) available at <http://www.sec.gov/rules/proposed/2010/34-63549.pdf> (the “2010 Proposing Release”).

<sup>6</sup> API v. SEC, 953 F. Supp. 2d 5 (D.D.C., 2013) (“API Lawsuit”).

<sup>7</sup> Pub. L. No. 111-203 (July 21, 2010).

resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government.”<sup>8</sup>

Based on the statutory text and the legislative history, we understand that Congress enacted Section 1504 to increase the transparency of payments made by oil, natural gas, and mining companies to governments for the purpose of the commercial development of their oil, natural gas, and minerals. As discussed in more detail below, the legislation reflects U.S. foreign policy interests in supporting global efforts to improve transparency in the extractive industries.<sup>9</sup> The goal of such transparency is to help combat global corruption and empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources.<sup>10</sup> Section 13(q) also defines several key terms, such as “resource extraction issuer,”<sup>11</sup> “commercial development of oil, natural gas, or minerals,”<sup>12</sup> “foreign government,”<sup>13</sup> and “payment,”<sup>14</sup> each of which is addressed in detail below.

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<sup>8</sup> 15 U.S.C. 78m(q)(2)(A). As discussed below, Section 13(q) also specifies that the Commission’s rules must require certain information to be provided in interactive data format.

<sup>9</sup> See Section I.C below.

<sup>10</sup> See, e.g., 156 CONG. REC. S3816 (daily ed. May 17, 2010) (Statement of Senator Lugar, one of the sponsors of Section 1504) (“Adoption of the Cardin-Lugar amendment would bring a major step in favor of increased transparency at home and abroad. . . . More importantly, it would help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues. . . . The essential issue at stake is a citizen’s right to hold its government to account. Americans would not tolerate the Congress denying them access to revenues our Treasury collects. We cannot force foreign governments to treat their citizens as we would hope, but this amendment would make it much more difficult to hide the truth.”); id. at S3817-18 (May 17, 2010) (Statement of Senator Dodd) (“[C]ountries with huge revenue flows from energy development also frequently have some of the highest rates of poverty, corruption and violence. Where is all that money going? [Section 13(q)] is a first step toward addressing that issue by setting a new international standard for disclosure.”).

<sup>11</sup> 15 U.S.C. 78m(q)(1)(D).

<sup>12</sup> 15 U.S.C. 78m(q)(1)(A).

<sup>13</sup> 15 U.S.C. 78m(q)(1)(B).

<sup>14</sup> 15 U.S.C. 78m(q)(1)(C).

Section 13(q) provides that “[t]o the extent practicable, the rules . . . shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.”<sup>15</sup> In light of this directive, we have considered significant international initiatives in connection with the final rules, such as the Extractive Industries Transparency Initiative (“EITI”) and the regulations enacted by the European Union and Canada.<sup>16</sup>

Pursuant to Section 13(q), the rules we adopt must require a resource extraction issuer to submit the payment information included in an annual report in an electronic data format in which the information is identified using a standardized list of electronic tags.<sup>17</sup> Section 13(q) lists certain electronic tags that must be included in the rules to identify specified information<sup>18</sup> while also authorizing the Commission to require additional electronic tags for other information that it determines is necessary or appropriate in the public interest or for the protection of investors.<sup>19</sup>

Section 13(q) further requires, to the extent practicable, that the Commission make publicly available online a compilation of the information required to be submitted by resource

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<sup>15</sup> 15 U.S.C. 78m(q)(2)(E).

<sup>16</sup> See Section I.C below for a discussion of these disclosure regimes, including why they are significant. See also Proposing Release, nn.13-18 and accompanying text.

<sup>17</sup> 15 U.S.C. 78m(q)(1)(E), (1)(F), (2)(C), (2)(D).

<sup>18</sup> These tags include: (I) the total amounts of the payments, by category; (II) the currency used to make the payments; (III) the financial period in which the payments were made; (IV) the business segment of the resource extraction issuer that made the payments; (V) the government that received the payments and the country in which the government is located; (VI) and the project of the resource extraction issuer to which the payments relate. 15 U.S.C. 78m(q)(2)(D)(ii).

<sup>19</sup> 15 U.S.C. 78m(q)(2)(D)(ii)(VII).



extraction issuers under the new rules.<sup>20</sup> The statute does not define the term compilation or describe how it should be generated.

Finally, Section 13(q) provides that the final rules “shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the fiscal year . . . that ends not earlier than one year after the date on which the Commission issues final rules . . . .”<sup>21</sup>

## **B. The 2012 Rules and Litigation**

We adopted final rules implementing Section 13(q) on August 22, 2012.<sup>22</sup> Subsequently, in October 2012, the American Petroleum Institute (“API”), the U.S. Chamber of Commerce, and two other industry groups challenged the 2012 Rules.<sup>23</sup> On July 2, 2013, the U.S. District Court for the District of Columbia vacated the rules.<sup>24</sup> The court based its decision on two findings: first, that the Commission misread Section 13(q) to compel the public disclosure of the issuers’ reports; and second, the Commission’s explanation for not granting an exemption for

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<sup>20</sup> 15 U.S.C. 78m(q)(3).

<sup>21</sup> 15 U.S.C. 78m(q)(2)(F).

<sup>22</sup> We received over 150 unique comment letters on the 2010 Proposing Release, as well as over 149,000 form letters (including a petition with 143,000 signatures). The letters, including the form letters designated as Type A, Type B, and Type C, are available at <http://www.sec.gov/comments/s7-42-10/s74210.shtml>. In addition, to facilitate public input on the Act before the comment periods for specific rulemakings opened, the Commission provided a series of e-mail links, organized by topic, on its website at <http://www.sec.gov/spotlight/regreformcomments.shtml>. The public comments we received on Section 1504 of the Act, which were submitted prior to the 2010 Proposing Release, are available on our website at <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specialized-disclosures.shtml>. Many comments were also received between the issuance of the 2012 Adopting Release and the recent Proposing Release and are available at <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resource-extraction-issuers.shtml>.

<sup>23</sup> See *API et al. v. SEC*, No. 12-1668 (D.D.C. Oct. 10, 2012). Petitioners also filed suit in the U.S. Court of Appeals for the D.C. Circuit, which subsequently dismissed the suit for lack of jurisdiction. See *API v. SEC*, 714 F. 3d 1329 (D.C. Cir. 2013).

<sup>24</sup> *API v. SEC*, 953 F. Supp. 2d 5 (D.D.C., 2013) (“API Lawsuit”).

when disclosure is prohibited by foreign governments was arbitrary and capricious. On September 18, 2014, Oxfam America, Inc. filed suit in the U.S. District Court for the District of Massachusetts to compel the Commission to promulgate a final rule implementing Section 1504. On September 2, 2015, the court issued an order holding that the Commission unlawfully withheld agency action by not promulgating a final rule.<sup>25</sup> The Commission filed an expedited schedule for promulgating the final rule with the court on October 2, 2015. Consistent with that schedule, the Commission re-proposed rules and form amendments on December 11, 2015. The comment period for the re-proposal was divided into an initial comment period and a reply comment period. These comment periods were subsequently extended in response to a request by the API.<sup>26</sup> The Commission received 369 letters (including one form letter submitted 308 times and a petition with 116,923 signatures) responding to the requests for comment in the Proposing Release.<sup>27</sup>

### **C. International Transparency Efforts**

As discussed at length in the Proposing Release, Section 13(q) reflects the U.S. foreign policy interest in supporting global efforts to improve the transparency of payments made in the extractive industries in order to help combat global corruption and promote accountability.<sup>28</sup> We

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<sup>25</sup> Oxfam America, Inc. v. United States Securities and Exchange Commission, 126 F. Supp. 3d 168 (D. Mass. 2015).

<sup>26</sup> In response to API's request, the Commission extended the initial comment period from January 25, 2016 to February 16, 2016 and the reply comment period from February 16, 2016 to March 8, 2016. See letter from API (Jan. 7, 2016) and Exchange Act Release No. 34-76958 (Jan. 21, 2016), 81 FR 4598 (Jan. 27, 2016), available at <http://www.sec.gov/rules/proposed/2016/34-76958.pdf>.

<sup>27</sup> These letters, including the form letters designated as Type A and B, are available at <http://www.sec.gov/comments/s7-25-15/s72515.shtml>.

<sup>28</sup> See Section I.E of the Proposing Release, which we hereby expressly incorporate by reference. See also 156 CONG. REC. S3976 (May 19, 2010) (Sen. Feingold) (explaining that Section 13(q) is intended to “empower[]

formulated the proposed rules with the purpose of furthering these interests, and federal agencies with specific expertise in this area submitted comments affirming that the proposed rules would accomplish that purpose.<sup>29</sup> Notably, the U.S. Department of State expressed the view that, if adopted, the proposed rule would be a “strong tool to increase transparency and combat corruption” and stated that it would advance “the United States’ strong foreign policy interests in promoting transparency and combatting corruption globally.”<sup>30</sup> In addition, the U.S. Agency for International Development (“USAID”) stated that the proposed rule, if adopted, would be “a significant step toward greater energy and mineral industry transparency and, correspondingly, strengthened governance and civil society anti-corruption efforts.”<sup>31</sup> According to USAID,

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citizens in resource-rich countries in their efforts to combat corruption and hold their governments accountable”). The importance placed by the United States and other members of the international community on reducing global corruption was recently illustrated through the international anti-corruption summit that British Prime Minister David Cameron hosted in London on May 12, 2016. The summit brought together world leaders, business, and civil society to agree to a package of steps to, among other things, promote transparency measures that expose corruption. The summit adopted a Global Declaration Against Corruption that specifically endorsed the promotion of transparency and governance in the resource extraction sector. *See Global Declaration Against Corruption* (May 12, 2016), available at <https://www.gov.uk/government/publications/global-declaration-against-corruption/global-declaration-against-corruption> (last visited June 16, 2016). President Obama and the other leaders of the G7 nations in Japan during their annual conference similarly emphasized the importance of combatting global corruption. *See G7 Ise-Shima Leaders’ Declaration* (May 26, 2016), available at <http://www.mofa.go.jp/files/000160266.pdf> (last visited June 16, 2016) (“[r]ecognizing the magnitude of the global problem of corruption” and “reiterat[ing] that our collective and individual action to fight corruption is critical for economic growth, sustainable development and maintaining peace and security”).

<sup>29</sup> We note that the legislative history also indicates that Congress intended for the Section 13(q) disclosures to serve as an informational tool for investors. *See, e.g.*, 156 CONG. REC. S3815 (May 17, 2010) (Sen. Cardin) (“Investors need to know the full extent of a company’s exposure”); *id.* at S3816 (May 17, 2010) (Sen. Lugar) (“[the disclosures] would empower investors to have a more complete view of the value of their holdings”).

<sup>30</sup> Letter from the United States Department of State (Jan. 21, 2016) (“State Department”).

<sup>31</sup> Letter from U.S. Agency for International Development (Feb. 16, 2016) (“USAID”). According to its website, USAID “carries out U.S. foreign policy by promoting broad-scale human progress at the same time it expands stable, free societies, creates markets and trade partners for the United States, and fosters good will abroad.” USAID, *Who We Are*, available at <https://www.usaid.gov/who-we-are> (last visited June 16, 2016). USAID is particularly committed to transparency, such as the President’s Open Government Initiative. *See* USAID, *Our Commitment to Transparency*, available at <https://www.usaid.gov/results-and-data/progress-data/transparency> (last visited June 16, 2016).

“enforcement of the proposed rule would contribute towards U.S. Government foreign policy goals of supporting stable and democratic governments, and in particular towards USAID’s goal of providing assistance to resource-rich countries in support of economic growth, good governance, transparency, and building civil society.”<sup>32</sup>

Other commenters, including individuals and non-governmental organizations, supported the view that Section 13(q) was enacted to further the U.S. Government’s interest in improving transparency in an effort to help combat global corruption and promote accountability.<sup>33</sup> For example, one commenter stated that “the governmental interest of reducing corruption and potentially enhancing governmental accountability . . . underpins [Section 13(q)].”<sup>34</sup> Another commenter stated that “[p]romoting revenue transparency in the extractives sector with a robust implementation of Section 1504 would provide civil society the necessary tools to prevent and combat corruption worldwide” and that since “natural resource extraction accounts for at least 10% of GDP in 61 countries, the potential benefits of strong rules under Section 1504 are significant in terms of healthier and better educated populations, creating more productive societies and higher economic growth rates.”<sup>35</sup> Comments we received on the Proposing Release from former and current members of the U.S. Congress supported our interpretation of the

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<sup>32</sup> Id.

<sup>33</sup> See, e.g., letters from American Security Project (Jan. 21, 2016) (“ASP”); Elise J. Bean (Feb. 16, 2016) (“Bean”); BHP Billiton (Jan. 25, 2016) (“BHP”); Pietro Poretti (Feb. 15, 2016) (“Poretti”); Publish What You Pay – US (Feb. 16, 2016) (“PWYP-US 1”); and Transparency International – USA (Feb. 16, 2016) (“TI-USA”).

<sup>34</sup> See letter from Poretti.

<sup>35</sup> See letter from TI-USA.

transparency and anti-corruption goals of Section 13(q).<sup>36</sup> These current and former U.S. senators stated that “transparency is a critical tool to ensure that citizens in resource rich countries can monitor the economic performance of oil, gas and mining projects and ensure that revenues, especially if more meager than hoped, are used responsibly.”<sup>37</sup> Significantly, this view was not limited to government, civil society, and individual commenters. Industry commenters also attested to a link between Section 13(q)’s promotion of increased transparency and reducing corruption.<sup>38</sup>

To determine how best to achieve the policy objectives of Section 13(q) and to meet the statutory directive to “support the commitment of the Federal Government to international transparency promotion efforts” to the extent practicable, we also have considered the current state of international transparency efforts. The following discussion addresses the global transparency initiatives that have developed since the 2012 Adopting Release was issued, including in the European Union, Canada, and through the EITI.<sup>39</sup> As discussed below, these

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<sup>36</sup> See letter from Senators Cardin, Baldwin, Brown, Coons, Durbin, Leahy, Markey, Menendez, Markley, Shaheen, Warren, and Whitehouse (Feb. 5, 2016) (“Sen. Cardin et al.”) and letter from retired Senators Lugar, Dodd, and Levin (Feb. 4, 2016) (“Sen. Lugar et al.”).

<sup>37</sup> Id.

<sup>38</sup> See letters from BHP (“Transparency by governments and companies alike regarding revenue flows from the extraction of natural resources in a manner which is meaningful, practical and easily understood by stakeholders reduces the opportunity for corruption”) and Total S.A. (Jan. 13, 2016) (“Total”) (“Total considers that the re-introduction of Rule 13q-1 under the Dodd Frank Act should both restore a level playing field among major publicly-listed oil and gas companies and improve transparency to help combat global corruption and increase accountability.”).

<sup>39</sup> We look to the EITI because it is a significant international transparency framework, it was mentioned in the legislative history of Section 13(q), and the definition of “payment” in Section 13(q)(1)(C)(ii) [15 U.S.C. 78m(q)(1)(C)(ii)] specifically refers to the EITI. See, e.g., 156 CONG. REC. S3816 (daily ed. May 17, 2010) (Statement of Senator Lugar) (“This domestic action will complement multilateral transparency efforts such as the Extractive Industries Transparency Initiative—the EITI—under which some countries are beginning to require all extractive companies operating in their territories to publicly report their payments.”).

initiatives govern a significant percentage of the companies that will be impacted by the final rules.<sup>40</sup>

## **1. European Economic Area**

The European Parliament and Council of the European Union adopted two directives that include payment disclosure rules.<sup>41</sup> The EU Accounting Directive and the EU Transparency Directive (the “EU Directives”) are very similar to each other in content. They determine the applicability and scope of the disclosure requirements and set the baseline in each EU member state and European Economic Area (“EEA”)<sup>42</sup> country for annual disclosure requirements for oil, gas, mining, and logging companies concerning the payments they make to governments on a per country and per project basis.<sup>43</sup> The EU Accounting Directive regulates the provision of financial information by all “large” companies<sup>44</sup> incorporated under the laws of an EU member

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<sup>40</sup> See Section III.B.2.b below for our estimates regarding the number of resource extraction issuers that are already subject to other disclosure regimes. We estimate that approximately 25% of resource extraction issuers are already subject to the EU Directives or ESTMA, but this percentage does not include resource extraction issuers subject to the EITI.

<sup>41</sup> 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 (“EU Accounting Directive”); and Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC on transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC on the implementation of certain provisions of Directive 2004/109/EC (“EU Transparency Directive”).

<sup>42</sup> See European Commission Memo (June 12, 2013) (“Commissioner Barnier welcomes European Parliament vote on the Accounting and Transparency Directives (including country by country reporting)”). The EEA is composed of the EU member states plus Iceland, Liechtenstein, and Norway.

<sup>43</sup> Unlike the proposed rules and the rules we are adopting today, the EU Directives also apply to companies active in the logging of primary forests.

<sup>44</sup> See Article 3(4) of the EU Accounting Directive, which defines large companies (i.e., “large undertakings”) to mean those which on their balance sheet dates exceed at least two of the three following criteria: (a) balance sheet totaling €20 million (approximately \$22.5 million (USD) as of June 16, 2016); (b) net turnover of €40 million (approximately \$44.9 million (USD) as of June 16, 2016); and (c) average number of employees of 250.

state or those of an EEA country, even if the company is privately held. It requires covered oil, gas, mining, and logging companies to disclose specified payments to governments. The EU Transparency Directive applies these disclosure requirements to all companies listed on EU-regulated markets<sup>45</sup> even if they are not registered in the EEA or are incorporated in other countries.<sup>46</sup> The EU Directives also apply to payments made by entities that are part of a company's consolidated report.<sup>47</sup>

The EU Directives generally cover the following activities: “exploration, prospection, discovery, development, and extraction of minerals, oil, natural gas deposits or other materials.”<sup>48</sup> The types of payments that must be disclosed when made in connection with those activities include: (a) production entitlements; (b) taxes levied on the income, production, or profits of companies, excluding taxes levied on consumption such as value added taxes, personal income taxes, or sales taxes; (c) royalties; (d) dividends; (e) signature, discovery, and production bonuses; (f) license fees, rental fees, entry fees, and other considerations for licenses and/or concessions; and (g) payments for infrastructure improvements.<sup>49</sup> These payments are covered whether made “in money or in kind.”<sup>50</sup>

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<sup>45</sup> The term “regulated market” is defined in the EU’s Markets in Financial Instruments Directive 2004/39/EC (“MiFID”), as amended by 2010/78/EU. The list of regulated markets can be found on the European Securities and Markets Authority’s website at [http://registers.esma.europa.eu/publication/searchRegister?core=esma\\_registers\\_mifid\\_rma](http://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_mifid_rma) (last visited June 16, 2016).

<sup>46</sup> See EU Transparency Directive, Art. 2(1)(d) and Art. 6.

<sup>47</sup> See, e.g., EU Accounting Directive, Art. 44.

<sup>48</sup> EU Accounting Directive, Art. 41(1).

<sup>49</sup> See, e.g., EU Accounting Directive, Art. 41(5).

<sup>50</sup> Id.

Disclosure of payments is made on a per project and per government basis. “Project” is defined 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.”<sup>51</sup> The definition goes on to state that “if multiple such agreements are substantially interconnected, this shall be considered a project.”<sup>52</sup> “Substantially interconnected” under the EU Directives means “a set of operationally and geographically integrated contracts, licenses, leases or concessions or related agreements with substantially similar terms that are signed with a government, giving rise to payment liabilities.”<sup>53</sup>

The EU Directives require public disclosure of the payment information, including the issuer’s identity.<sup>54</sup> Further, the EU Directives do not provide any exemptions unique to the resource extraction payment disclosure requirements. They do, however, allow issuers to use reports prepared for foreign regulatory purposes to satisfy their disclosure obligations under EU law if those reports are deemed equivalent pursuant to specified criteria.<sup>55</sup> These criteria include: (i) target undertakings; (ii) target recipients of payments; (iii) payments captured; (iv) attribution of payments captured; (v) breakdown of payments captured; (vi) triggers for reporting on a consolidated basis; (vii) reporting medium; (viii) frequency of reporting; and (ix) anti-evasion measures. No equivalency determinations have been made to-date in the EEA.

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<sup>51</sup> See, e.g., EU Accounting Directive, Art. 41(4).

<sup>52</sup> Id. Contrary to the proposed rules and those we are adopting today, the EU Directives appear to require aggregation of “substantially interconnected” agreements rather than providing such aggregation as an option.

<sup>53</sup> See, e.g., EU Accounting Directive, Recital 45.

<sup>54</sup> See, e.g., EU Accounting Directive, Arts. 43, 45.

<sup>55</sup> See, e.g., EU Accounting Directive, Arts. 46, 47.



Member states are granted some leeway for when the report is due and what penalties will result from violations of the regulations.<sup>56</sup> Required public disclosure of payments in an annual report by companies has begun in the European Union<sup>57</sup> and will occur in all European Union and EEA member countries once the essential provisions have been transposed into domestic law in each country.<sup>58</sup>

## **2. Canada**

Canada also adopted a federal resource extraction disclosure law, the Extractive Sector Transparency Measures Act (“ESTMA”) after the 2012 Adopting Release was issued.<sup>59</sup> Since the Proposing Release, Canada finalized, substantially as proposed, its previously issued ESTMA

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<sup>56</sup> See, e.g., EU Accounting Directive, Art. 45 (“The report . . . on payments to governments shall be published as laid down by the laws of each Member State . . .”); Id. at Article 51 (“Member States shall provide for penalties applicable to infringements of the national provisions adopted in accordance with this Directive . . .”).

<sup>57</sup> See, e.g., RDS Report discussed in note 302 below.

<sup>58</sup> The requirements of the EU Directives are implemented through the enacting legislation of each EEA member country. The deadlines for implementing the EU Accounting Directive and the EU Transparency Directive were July 20, 2015 and November 26, 2015 respectively. It is our understanding that as of the date of this release, 24 countries have implemented the EU Accounting Directive and 15 countries have implemented the EU Transparency Directive. In general, non-EU EEA countries enact implementing legislation after an EU Directive is adopted into the EEA by Joint Committee decision. The EEA Joint Committee adopted the Accounting Directive on October 30, 2015. As of the date of this release, it is our understanding that the EEA Joint Committee has not yet adopted a decision on the Transparency Directive. As of June 16, 2016, Austria, Belgium, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Slovenia, Spain, Sweden, and the United Kingdom have filed notifications of full transposition (i.e., implementation) of the Accounting Directive with the European Commission. As of June 16, 2016, Austria, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, The Netherlands, Slovakia, Sweden, and the United Kingdom have filed notifications of full transposition of the Transparency Directive with the European Commission. Norway, a non-EU member of the EEA, adopted legislation that complies with both the Accounting and Transparency Directives, effective for fiscal years beginning on or after January 1, 2014. Other EU and EEA member countries are working towards implementation. Updates about member country progress towards full transposition can be found at: [http://ec.europa.eu/finance/enforcement/directives/index\\_en.htm#accounting](http://ec.europa.eu/finance/enforcement/directives/index_en.htm#accounting). See also letter from Arlene McCarthy OBE (Mar. 8, 2016) (“McCarthy”) (stating that “most Member States have transposed the EU Directives”).

<sup>59</sup> See ESTMA, 2014 S.C., ch. 39, s. 376 (Can.), which came into force on June 1, 2015.

Guidance<sup>60</sup> and the ESTMA Technical Reporting Specifications (“ESTMA Specifications”).<sup>61</sup> ESTMA covers entities that are engaged in the commercial development of oil, gas, or minerals or that control another entity that is engaged in those activities, subject to certain limitations.<sup>62</sup> ESTMA defines “control” as being controlled by another entity “directly or indirectly, in any manner,” including those entities in a chain of control.<sup>63</sup> The ESTMA Guidance also addresses issues related to how payments are reported in situations of joint control.<sup>64</sup>

ESTMA defines “commercial development of oil, gas or minerals” as the exploration or extraction of oil, gas, or minerals; the acquisition of a permit, license, lease, or any other authorization to carry out the exploration or extraction of oil, gas, or minerals; or any other prescribed activities in relation to oil, gas, or minerals.<sup>65</sup> The ESTMA Guidance clarifies that exploration or extraction refers to “the key phases of commercial activity which occur during the

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<sup>60</sup> ESTMA Guidance, available at [http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA-Guidance\\_e.pdf](http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA-Guidance_e.pdf).

<sup>61</sup> ESTMA Specifications, available at [http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA-Technical\\_e.pdf](http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA-Technical_e.pdf).

<sup>62</sup> ESTMA, Section 2. The reporting obligation applies to (a) an entity that is listed on a stock exchange in Canada; (b) an entity that has a place of business in Canada, does business in Canada or has assets in Canada and that, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years: (i) it has at least \$20 million (CAD) in assets (approximately \$15.4 million (USD) as of June 16, 2016), (ii) it has generated at least \$40 million (CAD) in revenue (approximately \$30.8 million (USD) as of June 16, 2016), (iii) it employs an average of at least 250 employees; and (c) any other prescribed entity. ESTMA, Section 8.

<sup>63</sup> ESTMA, Section 4(1)-(2). For example, in the statute’s words an “entity that controls another entity is deemed to control any entity that is controlled, or deemed to be controlled, by the other entity.” ESTMA, Section 4(2).

<sup>64</sup> ESTMA Guidance, Section 3.6 clarifies that if a Reporting Entity makes a payment, it must report it, whether made as an operator of a joint arrangement or as a member of a joint arrangement. Also, if a payment is made by an entity that is not subject to ESTMA but is controlled by a Reporting Entity, the Reporting Entity must report it. Payment attribution rules set out in ESTMA may apply in situations of joint control. The ESTMA Guidance goes on to say that Reporting Entities should consider the facts and circumstances of payments when determining whether to report and which payments to report in situations of joint control.

<sup>65</sup> ESTMA, Section 2. Canada does not appear to have prescribed any additional activities at this time. See ESTMA Guidance, Section 1, which only refers to the first two prongs of ESTMA’s definition of “commercial development of oil, gas and minerals.”

life cycle of an oil, gas or mineral project” and extend to prospecting, remediation, and reclamation.<sup>66</sup> The ESTMA Guidance also states that these terms are not limited to “active phases of operations on the ground, but also captures temporary periods of inactivity.”<sup>67</sup> The definition is not meant to cover ancillary or preparatory activities such as manufacturing equipment or the construction of extraction sites.<sup>68</sup> The definition also generally does not cover post-extraction activities, such as refining, smelting, processing, marketing, distribution, transportation, or export.<sup>69</sup> Nevertheless, certain initial processing activities that are integrated with extraction operations may be considered commercial development of oil, gas, or minerals.<sup>70</sup>

Canada’s regulations capture the following payment types: taxes (other than consumption taxes and personal income taxes); royalties; fees (including rental fees, entry fees and regulatory charges, as well as fees or other consideration for licenses, permits or concessions); production entitlements; bonuses (including signature, discovery and production bonuses); dividends (other than dividends paid to payees as ordinary shareholders); and infrastructure improvement payments.<sup>71</sup> The ESTMA Guidance also includes a provision similar to the anti-evasion provision included in the Proposing Release. It states that entities should look to the substance, rather than the form, of payments in determining which category is applicable,

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<sup>66</sup> ESTMA Guidance, Section 1.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> ESTMA Guidance, Section 3.1.

and that in certain circumstances a philanthropic or voluntary contribution made in lieu of one of the payment categories would need to be reported.<sup>72</sup>

Unlike the EU Directives, which do not provide for any exemptions unique to resource extraction payment disclosure, ESTMA authorizes the adoption of regulations respecting, among other matters, “the circumstances in which any provisions of this Act do not apply to entities, payments or payees.”<sup>73</sup> As of the date of this release, the Minister of Natural Resources Canada has not authorized any regulations pursuant to that provision that provide for exemptions under ESTMA. ESTMA did, however, defer the requirement for issuers to report payments made to Aboriginal governments in Canada until June 1, 2017.<sup>74</sup>

Canada has adopted project-level reporting, and the definition of “project” used in the ESTMA Specifications is identical to the definition of that term in the EU Directives.<sup>75</sup> Reports prepared under ESTMA must be published on the internet “so they are available to the public” and a link to the report must be provided to the Canadian government.<sup>76</sup>

Like the EU Directives, ESTMA allows for the Minister of Natural Resources Canada to determine that the requirements of another jurisdiction are an acceptable substitute for the domestic requirements.<sup>77</sup> As noted in the Proposing Release, on July 31, 2015 the Minister

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<sup>72</sup> ESTMA Guidance, Section 3.5.

<sup>73</sup> See ESTMA, Section 23(1).

<sup>74</sup> ESTMA Guidelines, Section 3.3.

<sup>75</sup> See ESTMA Specifications, Section 2.3.2.

<sup>76</sup> ESTMA Specifications, Section 2.4.

<sup>77</sup> See ESTMA, Section 10(1) (“If, in the Minister’s opinion, and taking into account any additional conditions that he or she may impose, the payment reporting requirements of another jurisdiction achieve the purposes of the reporting requirements under this Act, the Minister may determine that the requirements of the other jurisdiction are an acceptable substitute . . .”).

determined that the reporting requirements set forth in the EU Directives were an acceptable substitute for Canada's requirements under ESTMA.<sup>78</sup> Canada's current substitution policy makes an assessment based on whether a jurisdiction's reporting requirements (1) achieve the purposes of the reporting requirements under ESTMA (as stated, to "deter corruption through public transparency") and (2) address a similar scope of the reporting requirements under ESTMA.<sup>79</sup> Canada requires that an issuer must be subject to the reporting requirements of the other jurisdiction and must have provided the report to the other jurisdiction's competent authority. Although it has adopted a reporting deadline of 150 days after the end of an issuer's financial (i.e., fiscal) year, Canada allows for substituted reports to be filed according to the other jurisdiction's deadline if the Department of Natural Resources Canada is notified by e-mail within the 150 day period.<sup>80</sup> If the other jurisdiction's deadline is shorter than 150 days, the issuer may still follow the 150 day deadline when submitting the report in Canada.<sup>81</sup>

### **3. EITI**

The EITI is a voluntary coalition of oil, natural gas, and mining companies, foreign governments, investor groups, and other international organizations. The coalition was formed to foster and improve transparency and accountability in resource-rich countries through the publication and verification of company payments and government revenues from oil, natural

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<sup>78</sup> Substitution Process and Determination, available at <http://www.nrcan.gc.ca/mining-materials/estma/18196> (last visited June 16, 2016).

<sup>79</sup> See id.

<sup>80</sup> Id.

<sup>81</sup> Id.

gas, and mining.<sup>82</sup> A country volunteers to become an EITI candidate and must complete an EITI validation process to become a compliant member.<sup>83</sup> Currently 51 countries are EITI implementing countries.<sup>84</sup> Furthermore, several countries not currently a part of the EITI have indicated their intention to implement the EITI.<sup>85</sup> We analyze the EITI using the guidance in the EITI Standard and the EITI Handbook on what should be included in a country's EITI plan, as well as reports made by EITI member countries.<sup>86</sup> The U.S. Extractive Industries Transparency

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<sup>82</sup> See Implementing EITI for Impact-A Handbook for Policymakers and Stakeholders (2011) ("EITI Handbook"), at xii.

<sup>83</sup> Notably, in enacting Section 13(q)'s mandatory disclosure requirement, Congress sought to complement the EITI's existing voluntary transparency efforts that too many countries and too many companies either had not joined or would not. 156 CONG. REC. S3815 (May 17, 2010) (Sen. Lugar). See also *id.* S3815 (May 17, 2010) (Sen. Cardin) (stating that "We currently have a voluntary international standard for promoting transparency. A number of countries and companies have joined [EITI], an excellent initiative that has made tremendous strides in changing the cultural secrecy that surrounds extractive industries. But too many countries and too many companies remain outside this voluntary system."); *id.* S3818 (May 17, 2010) (Sen. Dodd) (stating that "broad new requirements for greater disclosure by resource extractive companies operating around the world . . . would be an important step" to complement EITI's "voluntary program").

<sup>84</sup> See <https://eiti.org/countries/> (last visited June 16, 2016). Of those, 31 have achieved "EITI compliant" status, two have had their EITI status temporarily suspended, and the rest are implementing the EITI requirements but are not yet compliant. *Id.* When becoming an EITI candidate, a country must establish a multi-stakeholder group, including representatives of civil society, industry, and government, to oversee implementation of the EITI. The stakeholder group for a particular country agrees to the terms of that country's EITI plan, including the requirements for what information will be provided by the governments and by the companies operating in that country. Generally, under the EITI, companies and the host country's government submit payment information confidentially to an independent administrator selected by the country's multi-stakeholder group, which is frequently an independent auditor. The auditor reconciles the information provided to it by the government and by the companies and produces a report. While the information provided in the reports varies among countries, the reports must adhere to the EITI requirements provided in the EITI Standard (2016). See the EITI's website at <http://eiti.org> (last visited June 16, 2016).

<sup>85</sup> See <https://eiti.org/countries/other> (last visited June 16, 2016).

<sup>86</sup> The EITI Standard encompasses several documents fundamental to the EITI: (1) the "EITI Principles," which set forth the general aims and commitments of EITI participants; (2) the "EITI Requirements," which must be followed by countries implementing the EITI; (3) the "Validation Guide," which provides guidance on the EITI validation process; (4) the "Protocol: Participation of Civil Society," which provides guidance regarding the role of civil society in the EITI; and (5) documents relevant to the governance and management of the EITI (e.g., the EITI Articles of Association, the EITI Openness Policy, and the EITI Code of Conduct). The EITI Handbook provides guidance on implementing the EITI, including overcoming common challenges to EITI implementation. All references to the EITI Standard are to the 2016 edition.

Initiative (“USEITI”) issued its first report in December 2015.<sup>87</sup> The report covered payments made to the U.S. Federal Government in 2013, including \$12.6 billion for extraction on federal lands and \$11.8 billion in corporate income tax receipts from mining and petroleum and coal products manufacturing industries.<sup>88</sup>

At a minimum, the EITI requires the disclosure of material payment and revenue information related to the upstream activities of exploration and production, but permits each country’s multi-stakeholder group to broaden the scope of the EITI report to include revenue streams (i.e., payments made in cash or in kind) related to other natural resource sectors, such as forestry, or to those related to non-upstream activities, such as export.<sup>89</sup> Revenue streams required to be disclosed under the EITI include production entitlements to the host government and to its national, state-owned company; profits taxes; royalties; dividends; bonuses, such as signature, discovery and production bonuses; and license fees, including rental fees, entry fees and other considerations for licenses or concessions.<sup>90</sup> The EITI also requires the disclosure of

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<sup>87</sup> The Executive Summary and other aspects of the USEITI 2015 Report are available at <https://useiti.doi.gov/about/report/>. In December 2012, the U.S. Government established a multi-stakeholder group, the USEITI Advisory Committee, headed by the Department of the Interior (“Department of Interior”) and including the Departments of Energy and Treasury, as well as members of industry and civil society. See Multi-Stakeholder Group List of Members, at [http://www.doi.gov/eiti/FACA/upload/List-of-Members\\_03-16-15.pdf](http://www.doi.gov/eiti/FACA/upload/List-of-Members_03-16-15.pdf). On March 19, 2014, the United States completed the process of becoming an EITI candidate country.

<sup>88</sup> Revenues reported to the federal government were for the fiscal year ended September 30, 2013. Corporate income taxes and most other payments were reported as of the calendar year ended December 31, 2013. See the 2015 USEITI Executive Summary at 2.

<sup>89</sup> See EITI Standard at 22-23 and EITI Handbook at 31 and 33. As an initial matter, each country’s multi-stakeholder group is required to establish the thresholds for materiality and to determine which payments and revenues are material. While the EITI Standard requires each implementing country to provide export data for the fiscal year covered by the EITI Report, including total export volumes and the value of exports by commodity, the reporting of export payments by individual companies is not required and is at the option of the multi-stakeholder group.

<sup>90</sup> See EITI Standard at 23.

any other “significant payment” and “material benefit” to the host government.<sup>91</sup> These include material infrastructure works,<sup>92</sup> as well as material social expenditures if mandated by law or contract.<sup>93</sup>

The EITI has long required the disclosure of the particular type of revenue stream and government entity that received each payment in the EITI Report.<sup>94</sup> Since 2013, the EITI has also required the public reporting of these revenue streams by individual company, rather than as aggregated data, and by project, provided that such project level disclosure is consistent with the European Union and Commission rules.<sup>95</sup>

Currently each implementing country’s multi-stakeholder group determines which companies should be included in the EITI Report. Out of concern that developing countries have lost significant revenues “as a result of corrupt or illegal deals” involving “anonymous companies” that have “hidden behind a structure of complex and secret company ownership,”<sup>96</sup> the EITI has recently commenced a process that, by January 2020, will require individual companies that bid for, operate or invest in the extractive assets of an EITI implementing country

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<sup>91</sup> See EITI Standard at 23.

<sup>92</sup> See EITI Standard at 24.

<sup>93</sup> See EITI Standard at 28. In addition, if the multi-stakeholder group determines that revenues from the transportation of oil, gas and minerals are material, the EITI expects governments and state-owned enterprises to disclose the revenues received. See EITI Standard at 24.

<sup>94</sup> See, e.g., the EITI Source Book (2005) at 26.

<sup>95</sup> See EITI Standard at 25.

<sup>96</sup> See EITI Beneficial Ownership Fact Sheet (2016) available at [https://eiti.org/files/eiti\\_bo\\_factsheet\\_en\\_final\\_may\\_2016.pdf](https://eiti.org/files/eiti_bo_factsheet_en_final_may_2016.pdf).



to identify their beneficial owners, disclose the level of ownership, and describe how ownership or control is exerted in the EITI Report.<sup>97</sup>

#### **D. Summary of the Final Rules**

The final rules, which are described in more detail in Part II below, are being adopted mostly as proposed, with a few significant changes based on feedback from commenters and other developments since the Proposing Release was issued. The final rules require resource extraction issuers to file a Form SD on an annual basis that includes information about payments related to the commercial development of oil, natural gas, or minerals that are made to governments. The following are key provisions of the final rules:

- The term “resource extraction issuer” means all U.S. companies and foreign companies that are required to file annual reports pursuant to Section 13 or 15(d) of the Exchange Act<sup>98</sup> and are engaged in the commercial development of oil, natural gas, or minerals.
- The term “commercial development of oil, natural gas, or minerals” means, consistent with Section 13(q), exploration, extraction, processing, and export, or the acquisition of a license for any such activity.

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<sup>97</sup> See EITI Standard at 19-21; see also EITI Beneficial Ownership Fact Sheet. Currently the EITI requires that, by January 1, 2017, each multi-stakeholder group publish a roadmap for disclosing the beneficial ownership information mandated in 2020. The EITI also recommends that each implementing country establish a public register of beneficial ownership to the extent none exists. See EITI Standard at 19-21. The EITI defines “beneficial ownership” to mean “the natural person(s) who directly or indirectly ultimately owns or controls the corporate entity.” EITI Standard at 20. We note that, in these ways, the EITI is concerned with more than just the actual revenue flows that result after a deal is entered, but is also concerned with providing transparency so that citizens and civil society can help ensure that the deals themselves do not involve corrupt or suspect arrangements. As we discuss below in Section II.E, we similarly believe that Section 13(q) is concerned not just with corruption after a deal is entered, but also with exposing potential corruption that may surround the underlying deal and the resulting payment flows.

<sup>98</sup> 15 U.S.C. 78m and 78o(d).

- The term “payment” means payments that are made to further the commercial development of oil, natural gas, or minerals, are “not de minimis,” and includes taxes, royalties, fees (including license fees), production entitlements, and bonuses, consistent with Section 13(q), as well as community and social responsibility payments (“CSR payments”) that are required by law or contract, dividends, and payments for infrastructure improvements.
- “Not de minimis” means any payment, whether a single payment or a series of related payments, that equals or exceeds \$100,000 during the most recent fiscal year.
- A resource extraction issuer is required to disclose payments made by its subsidiaries and other entities under its control. Under the final rules, an issuer must disclose the payments made by entities that are consolidated, or its proportionate amount of the payments made by entities or operations that are proportionately consolidated, in its consolidated financial statements as determined by applicable accounting principles.<sup>99</sup>
- The term “project” means operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government. Agreements that are both operationally and geographically interconnected may be treated by the resource extraction issuer as a single project.
- The term “foreign government” means a foreign government, a department, agency, or instrumentality of a foreign government, or a company at least majority owned by a foreign government. It includes a foreign national government as well as a foreign

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<sup>99</sup> We note that Exchange Act Rule 12b-21 provides that required information need be given only insofar as it is known or reasonably available to the registrant, subject to certain conditions. 17 CFR 240.12b-21.

subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.

- The term “Federal Government” means the United States Federal Government.
- A resource extraction issuer must file its payment disclosure on Form SD using the Commission’s Electronic Data Gathering, Analysis, and Retrieval System (“EDGAR”), no later than 150 days after the end of its fiscal year. In addition to this EDGAR compilation of Form SD filings, a separate public compilation of the payment information submitted in the Form SD filings will be made available online by the Commission’s staff.
- A resource extraction issuer must disclose the payment information and its identity publicly.
- The final rules include two exemptions that provide for transitional relief or delayed reporting in limited circumstances. These exemptions provide a longer transition period for recently acquired companies that were not previously subject to reporting under the final rules and a one-year delay in reporting payments related to exploratory activities. In addition, resource extraction issuers may apply for, and the Commission will consider, exemptive relief for other situations on a case-by-case basis pursuant to Rule 0-12 of the Exchange Act.<sup>100</sup>

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<sup>100</sup> 17 C.F.R. 240.0-12.

- Resource extraction issuers may use alternative reports to comply with the final rules if the Commission determines that the requirements applicable to those reports are substantially similar to our own.<sup>101</sup>
- The Commission has determined that the current reporting requirements of the EU Directives, Canada’s ESTMA, and the USEITI are substantially similar to the final rules, subject to the conditions specified below in Section II.J. Applications for additional alternative reporting determinations may be submitted under Rule 0-13 by issuers, governments, industry groups, and trade associations.
- Resource extraction issuers, including those using alternative reports, must present the payment disclosure using the eXtensible Business Reporting Language (“XBRL”) electronic format and the electronic tags identified in Form SD. The tags listed in Form SD include those specified in Section 13(q), as well as tags for the type and total amount of payments made for each project, the type and total amount of payments made to each government, the particular resource that is the subject of commercial development, and the subnational geographic location of the project.
- Resource extraction issuers are required to comply with the rules starting with their fiscal year ending no earlier than September 30, 2018.

As we discuss more fully throughout the remainder of this release, in developing the final rules we have sought to balance the various statutory interests at issue in this rulemaking: on the one hand, providing transparency to help combat corruption and promote accountability, and on

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<sup>101</sup> See Item 2.01(c) of Form SD.

the other hand, doing so in ways that reflect a consideration of competition, efficiency, capital formation, and costs.<sup>102</sup> For example, with regard to the appropriate definition of project and the public disclosure of each issuer’s annual reports—two discretionary decisions that, in many respects, are central to the transparency regime being adopted—we determined that the anti-corruption and accountability concerns underlying Section 13(q) will be significantly advanced by the public disclosure of each issuer’s contract-based payment data. In making these discretionary decisions, we were mindful of the potential economic consequences that issuers might experience. As another example of our consideration of the various policy interests at stake, given the potential for competitive harm to issuers, we are adopting a targeted exemption to permit issuers to delay reporting payment information in connection with certain exploratory activities for one year. Further, we intend to consider using our existing authority under the Exchange Act to afford resource extraction issuers exemptive relief when other circumstances warrant. For example, issuers may seek exemptive relief when foreign laws may prohibit the Section 13(q) disclosures. This exemptive process should help mitigate the final rules’ potential adverse effects on issuers while still preserving the transparency objectives of the statute. Similarly, we have adopted a revised definition of control and allowed for issuers to satisfy the rules’ requirements by providing reports prepared in compliance with other jurisdictions’ reporting requirements, which should help lower direct compliance costs for issuers.

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<sup>102</sup> See letter from API 1 (Feb. 16, 2016) (“API 1”) (asserting that Congress intended that the Commission consider investor protection, as well as competition, efficiency, and cost concerns, when issuing the final rules under Section 13(q)).

## **II. FINAL RULES UNDER SECTION 13(q)**

### **A. Definition of “Resource Extraction Issuer”**

#### **1. Proposed Rules**

Section 13(q) defines a “resource extraction issuer” as an issuer that is “required to file an annual report with the Commission” and “engages in the commercial development of oil, natural gas, or minerals.”<sup>103</sup> The proposed definition followed the statute without providing any exemptions based on size, ownership, foreign private issuer status,<sup>104</sup> or the extent of business operations constituting commercial development of oil, natural gas, or minerals.

We proposed to cover only issuers filing annual reports on Forms 10-K, 20-F, or 40-F.<sup>105</sup> Specifically, the proposed rules defined the term “resource extraction issuer” to mean an issuer that is required to file an annual report with the Commission pursuant to Section 13 or 15(d) of the Exchange Act and that engages in the commercial development of oil, natural gas, or minerals. The proposed definition excluded issuers subject to Tier 2 reporting requirements under Regulation A or subject to Regulation Crowdfunding’s reporting requirements. In addition, we did not subject investment companies registered under the Investment Company Act of 1940 (“Investment Company Act”) to the proposed rules.

#### **2. Comments on the Proposed Rules**

In the Proposing Release we solicited comment on whether certain categories of issuers should be exempt from the rules, such as smaller reporting companies, emerging growth

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<sup>103</sup> Section 13(q)(1)(D).

<sup>104</sup> We did not, however, propose to extend the disclosure requirements to foreign private issuers that are exempt from Exchange Act registration and reporting obligations pursuant to Exchange Act Rule 12g3-2(b).

<sup>105</sup> See Section II.A of the Proposing Release.

companies, or foreign private issuers.<sup>106</sup> In addition to these categories addressed in existing Commission rules, we asked whether the Commission should exempt issuers based on a financial test that would measure the likelihood of the issuer making resource extraction payments above the proposed de minimis threshold. We offered the example of using annual revenues and net cash flows from investing activities to make this measurement. We also solicited comment on whether, instead of an exemption, the rules should provide for different disclosure and reporting obligations for certain types of issuers. Finally, we solicited comment on whether we should provide for a delayed implementation date for certain categories or types of issuers in order to provide them additional time to prepare for the disclosure requirements and the benefit of observing how other companies comply.<sup>107</sup>

Only one commenter on the Proposing Release recommended changing the scope of the definition of resource extraction issuer to add an exemption based on the type of issuer.<sup>108</sup> This commenter sought an exemption for foreign private issuers on the grounds that issuers should only bear the compliance burden associated with their home jurisdiction. Other commenters on the Proposing Release that addressed this topic were generally supportive of the proposed definition of “resource extraction issuer” and opposed excluding any category of issuer from the definition.<sup>109</sup> No commenter specifically addressed our exclusion of investment companies and

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<sup>106</sup> See the definition of “smaller reporting company” in Exchange Act Rule 12b-2 [17 CFR 240.12b-2], the definition of “emerging growth company” in Exchange Act Section 3(a)(80) [15 U.S.C. 78c(a)(80)], and the definition of “foreign private issuer” in Exchange Act Rule 3b-4 [17 CFR 240.3b-4].

<sup>107</sup> For a discussion of this request for comment, see Section II.G below.

<sup>108</sup> See letter from BP p.l.c. (Feb. 16, 2016) (“BP”).

<sup>109</sup> See letters from Africa Centre for Energy Policy (Feb. 16, 2016) (“ACEP”); Calvert Investments (Feb. 16, 2016) (“Calvert”); U.S. Department of Interior, Office of Natural Resources Revenue (Feb. 17, 2016)

companies required to file annual reports other than pursuant to Section 13 or 15(d) of the Exchange Act.

Of the commenters that expressed support for the proposed definition, several indicated that the proposed rules did not present unique challenges for particular categories of issuers and thus no exemptions were necessary.<sup>110</sup> One of these commenters stated that because smaller reporting companies and foreign private issuers were exposed to significant political regulatory risks, excluding them would undermine the value of the rules to investors.<sup>111</sup> The Department of Interior noted that the USEITI covers all companies that conduct extractive activities on public and tribal lands in the United States, without exemption.<sup>112</sup> It also recommended not providing an exemption that would allow an issuer to avoid reporting in a subsequent year based on financial metrics due to the “cyclical nature of extractive commodity prices.”

### **3. Final Rules**

We are adopting the proposed definition of “resource extraction issuer.” Under the final rules, resource extraction issuers are issuers that are required to file an annual report with the

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(“Department of Interior”); Form Letter A; Form Letter B; Global Witness (Feb. 16, 2016) (“Global Witness 1”); Oxfam America (Feb. 16, 2016) (“Oxfam 1”); Natural Resource Governance Institute (First of two letters on Feb. 16, 2016) (“NRGI 1”); Sarah Peck and Sarah Chayes (Feb. 16, 2016) (“Peck & Chayes”); PWYP-US 1; Jacqueline Quinones (Feb. 4, 2016) (“Quinones”); Sen. Cardin et al.; Sen. Lugar et al.; TI-USA; and US SIF: The Forum for Sustainable and Responsible Investment (Mar. 8, 2016) (“USSIF”).

<sup>110</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>111</sup> See letter from USSIF.

<sup>112</sup> Letter from Department of Interior.



Commission pursuant to Section 13 or 15(d) of the Exchange Act and engage in the commercial development of oil, natural gas, or minerals.<sup>113</sup>

As discussed above, almost all of the commenters on the Proposing Release supported the proposed definition or called for the rules to cover all companies without exemptions. We disagree with the commenter that suggested foreign private issuers should be excluded from the definition of “resource extraction issuer.”<sup>114</sup> This commenter stated that an exemption for all foreign private issuers was justifiable so that issuers only bear the compliance burden associated with one set of transparency rules. We note, however, that not all foreign private issuers will be required to report in other jurisdictions. Further, even if the issuer is required to file reports in another jurisdiction, an exemption for all foreign private issuers leaves open the possibility that the foreign private issuer’s reporting could be pursuant to a jurisdiction’s requirements that are significantly different than the Commission’s rules. Instead, we believe that it is more appropriate to address concerns over duplicative reporting through the alternative reporting provisions we are adopting today.<sup>115</sup>

No commenters on the Proposing Release specifically requested that the Commission extend the disclosure requirements to foreign private issuers that are exempt from Exchange Act registration and reporting obligations pursuant to Exchange Act Rule 12g3-2(b). As we

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<sup>113</sup> We continue to interpret “engages” as used in Section 13(q) and Rule 13q-1 to include indirectly engaging in the specified commercial development activities through an entity under a company’s control. See Section II.D below for a discussion of “control” as used in the final rules. See also Proposing Release, n.101.

<sup>114</sup> See letter from BP.

<sup>115</sup> See Section II.J below. We note that the commenter that raised these concerns indicated that if the Commission did not adopt an exemption for foreign private issuers, it would support an alternative reporting provision. See letter from BP.

discussed in the Proposing Release,<sup>116</sup> we continue to believe that expanding the statutory definition to include such issuers is not appropriate because it would discourage reliance on Rule 12g3-2(b) and would be inconsistent with the effect, and we believe the purpose, of that rule.<sup>117</sup>

Although, as we stated in the Proposing Release, we believe that the statutory language could reasonably be read either to cover or to exclude issuers that file annual reports on forms other than Forms 10-K, 20-F, and 40-F, we also continue to believe that covering other issuers would do little to further the transparency objectives of Section 13(q). It would, however, add costs and burdens to the existing disclosure regimes governing those categories of issuers. For example, and as noted in the Proposing Release, none of the Regulation A issuers with qualified offering statements between 2009 and 2014 appear to have been resource extraction issuers at the time of those filings.<sup>118</sup> That remains the case for Regulation A issuers that qualified offering statements in 2015. We also continue to believe that it is unlikely that an entity that fits within

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<sup>116</sup> See Section II.A. of Proposing Release.

<sup>117</sup> As we discussed in the Proposing Release, Rule 12g3-2(b) provides relief to foreign private issuers that are not currently Exchange Act reporting companies (*i.e.*, they are neither listed nor have made a registered offering in the United States) and whose primary trading market is located outside the United States. In these circumstances, we do not believe it would be appropriate to require foreign private issuers whose connections with the U.S. markets do not otherwise require them to make reports with the Commission to undertake such an obligation solely for the purpose of providing the required payment information. Moreover, imposing a reporting obligation on such issuers would seem to go beyond what is contemplated by Section 13(q), which defines a “resource extraction issuer” as an issuer that is “required to file an annual report with the Commission.”

<sup>118</sup> Based on a review of their assigned Standard Industrial Classification (SIC) codes. We recognize that Tier 2 of Regulation A, with a maximum offering amount of \$50 million, is still relatively new and that the types of companies previously or currently using Regulation A may not be representative of its future use. In addition, since Regulation A issuers were not required to file annual reports when Section 13(q) was enacted, it seems unlikely that Congress contemplated Regulation A issuers having to comply with Section 13(q). Given the added costs and burdens discussed in the Proposing Release, we continue to believe that it is not prudent to extend the rule to Regulation A issuers at this time. See Proposing Release, Section II.A.

the definition of an “investment company”<sup>119</sup> would be one that is “engag[ing] in the commercial development of oil, natural gas, or minerals.” Accordingly, the final rules we are adopting will not apply to such issuers.<sup>120</sup>

## **B. Definition of “Commercial Development of Oil, Natural Gas, or Minerals”**

### **1. Proposed Rules**

Section 13(q) defines “commercial development of oil, natural gas, or minerals.”

Consistent with the statute, we proposed defining “commercial development of oil, natural gas, or minerals” as exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any such activity. Although we have discretionary authority to include other significant activities relating to oil, natural gas, or minerals,<sup>121</sup> we did not propose expanding the definition beyond the explicit terms of Section 13(q).

As discussed in the Proposing Release, the proposed definition of “commercial development” was intended to capture only activities that are directly related to the commercial development of oil, natural gas, or minerals, and not activities ancillary or preparatory to such commercial development.<sup>122</sup> We also proposed additional guidance on several terms contained within the definition of “commercial development of oil, natural gas, or minerals.”<sup>123</sup> For

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<sup>119</sup> See Section 3(a)(1) of the Investment Company Act (15 U.S.C. 80a-3(a)(1)).

<sup>120</sup> See Proposing Release, Section II.A for a discussion of the factors we considered.

<sup>121</sup> See Section 13(q)(1)(A).

<sup>122</sup> See Proposing Release, at Section II.B.

<sup>123</sup> Id.

example, we identified activities that would be covered by the terms “extraction” and “export,” and we provided examples of the activities that would be covered by the term “processing.”<sup>124</sup>

## **2. Comments on the Proposed Rules**

### **a. Scope of the Definition**

In the Proposing Release we solicited comment on how we should define “commercial development of oil, natural gas, or minerals.” For example, we asked whether the definition should include any activities that were not expressly identified in the statute and what definition would further the U.S. Government’s foreign policy objective of battling corruption through improved transparency. In light of the Commission’s general exemptive authority, we solicited comment on whether certain activities listed in the statute should be excluded from the definition. We also sought input on whether activities that are ancillary or preparatory to resource extraction should be included in the activities covered by the rules and whether the Commission should provide additional guidance on the types of activities that would be considered “directly related” to the “commercial development of oil, natural gas, or minerals.”

All but one of the commenters that addressed this aspect of the Proposing Release supported the proposed definition,<sup>125</sup> stating that it was consistent with established international

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<sup>124</sup> Id. See also Section II.B.1.3 below for a discussion of this guidance.

<sup>125</sup> See letters from ACEP; Department of Interior; Exxon Mobil Corp. (Mar. 8, 2016) (“ExxonMobil 2”); Global Witness 1; Oxfam 1; and PWYP-US 1. One commenter, Encana Corporation, did not expressly support or object to our definition of commercial development of oil, natural gas, or minerals, but rather requested that the Commission provide additional guidance “to clarify the activities covered by the proposed terms used to define ‘commercial development of oil, natural gas, or minerals.’” See letter from Encana Corporation (Jan. 25, 2016) (“Encana”). Specifically, Encana requested guidance that would “reflect consistency with the definition of ‘Oil and Gas Producing Activities’ in Rule 4-10 of Regulation S-X and ‘exclude post-extraction activities such as refining, smelting, processing, marketing, distribution, transportation, or export.’”

transparency standards.<sup>126</sup> An industry commenter disputed that view, but otherwise generally supported the proposed definition.<sup>127</sup> The Department of Interior also supported the definition despite noting that the USEITI does not cover revenues from processing, exporting, or the acquisition of licenses to engage in those activities.<sup>128</sup>

**b. Guidance on “Extraction,” “Processing,” and “Export.”**

In the Proposing Release we solicited comment on whether additional guidance should be provided on the activities covered by the terms “extraction,” “processing,” or “export” and whether the proposed definitions and guidance were too narrow or too broad. For the term “export,” we specifically asked whether the definition should be broadened to include all transportation from one country to another, regardless of ownership interest or whether the resource originated in the country from which it is being transported.

Several commenters supported the proposed definition of “extraction” and the proposed guidance on “processing.”<sup>129</sup> Certain commenters, however, recommended providing additional guidance on “processing.”<sup>130</sup> For example, one commenter requested clarification that “processing” only includes “initial processing activities that are integrated with extraction operations” and “does not extend to ancillary or preparatory activities such as manufacturing

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<sup>126</sup> See, e.g., letter from PWYP-US 1.

<sup>127</sup> See letter from ExxonMobil 2.

<sup>128</sup> See letter from Department of Interior.

<sup>129</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>130</sup> See letters from Encana and Petróleo Brasileiro S.A. (Feb. 16, 2016) (“Petrobras”).

equipment or construction of extraction sites.”<sup>131</sup> Another commenter requested additional guidance on the scope of “midstream” activities that would be covered by “processing.”<sup>132</sup>

As for the definition of “export,” one commenter requested clarification on whether that term covers commodity trading-related activities and situations such as when an issuer exports oil, natural gas, or minerals purchased from a government or from a state-owned company.<sup>133</sup> Another commenter requested clarification of the term “mineral,” stating that it could have a variety of meanings, such as homogeneous crystalline substances (which would exclude gravel or non-crystalline rocks) or naturally occurring inorganic solids (which would exclude coal).<sup>134</sup>

### **3. Final Rules**

We are adopting the proposed definition of “commercial development of oil, natural gas, or minerals” but with additional guidance on its application. Although commenters pointed out that both the statutory definition and the proposed definition are broader than the activities typically covered by the EITI<sup>135</sup> and, in some respects, other comparable disclosure regimes,<sup>136</sup> most commenters supported the proposal.

Despite one commenter’s recommendation that the final rules exclude “processing” and “export,” both terms are expressly included in the statutory definition, and we believe that these

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<sup>131</sup> See letter from Encana.

<sup>132</sup> See letter from Petrobras.

<sup>133</sup> See letter from Poretti.

<sup>134</sup> See letter from Keith Bishop (Jan. 5, 2016) (“Bishop”).

<sup>135</sup> An EITI plan typically covers the “upstream activities” of exploration and production but not “downstream activities,” such as processing or export. The relevant multi-stakeholder group does, however, have the option of expanding the scope of its EITI program by including some downstream activities. See the EITI Handbook, at 35.

<sup>136</sup> For example, as discussed in Section I.C.1-2 above, processing, export, and the acquisition of licenses are not specifically mentioned by the EU Directives, and ESTMA generally does not include processing or export.

are important aspects of the commercial development of oil, natural gas, or minerals.<sup>137</sup>

Although there are differences between the definition we are adopting today and that used in other transparency regimes, we believe our approach enhances international transparency by covering activities similar to those covered by the EU Directives, Canada's ESTMA, and the EITI, while remaining consistent with Section 13(q).<sup>138</sup> In this regard, the final rules focus only on issuers engaged in the extraction or production of oil, natural gas, or minerals. Where a service provider makes a payment to a government on behalf of a resource extraction issuer that meets the definition of "payment," the resource extraction issuer will be required to disclose such payment.

Although we are adopting the general definition of "commercial development of oil, natural gas, or minerals" as proposed, as well as reiterating much of the related guidance, we are revising certain key terms found in that definition in response to commenters' concerns. We note, however, that whether an issuer is a resource extraction issuer ultimately depends on the specific facts and circumstances. We are adopting the definition of "extraction" as proposed. Thus, "extraction" means the production of oil and natural gas as well as the extraction of

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<sup>137</sup> See letter from Encana. In light of the statutory definition and the purpose of Section 13(q), we are not narrowing the definition of "commercial development" to make it consistent with the definition of "Oil and Gas Producing Activities" in Rule 4-10 of Regulation S-X. The definition of "Oil and Gas Producing Activities" in Rule 4-10 of Regulation S-X excludes all natural resources other than oil and gas. Using that definition would exclude minerals and be contrary to the plain language of Section 13(q). Moreover, narrowing the definition in that manner would limit the level of transparency provided by the final rules and would be significantly different from the approach taken in the EU Directives, ESTMA, and the EITI. In the 2012 Adopting Release we took the same approach in response to similar suggestions from commenters. See 2012 Adopting Release, Section II.C.3

<sup>138</sup> The EU Directives cover "exploration, prospection, discovery, development, and extraction of minerals, oil, natural gas deposits or other materials." See, e.g., EU Accounting Directive, Art. 41(1). ESTMA defines "commercial development of oil, gas or minerals" as "(a) the exploration or extraction of oil, gas or minerals; (b) the acquisition or holding of a permit, licence, lease or any other authorization to carry out any of the activities referred to in paragraph (a); or (c) any other prescribed activities in relation to oil, gas or minerals."

minerals.<sup>139</sup> Also as proposed, “processing” includes, but is not limited to, midstream activities such as the processing of gas to remove liquid hydrocarbons, the removal of impurities from natural gas prior to its transport through a pipeline, and the upgrading of bitumen and heavy oil, through the earlier of the point at which oil, gas, or gas liquids (natural or synthetic) are either sold to an unrelated third party or delivered to a main pipeline, a common carrier, or a marine terminal. It also includes the crushing and processing of raw ore prior to the smelting phase.<sup>140</sup> “Processing” does not include downstream activities, such as refining or smelting. As we noted in the Proposing Release, the focus of the disclosures required by Section 13(q) is on transparency in connection with the payments that resource extraction issuers make to governments. Those payments are primarily generated by “upstream” activities like exploration and extraction and not in connection with refining or smelting.<sup>141</sup> Finally, we note that including refining or smelting within the rules under Section 13(q) would go beyond what is contemplated by the statute, EITI, EU Directives, and ESTMA.<sup>142</sup>

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<sup>139</sup> Proposed Item 2.01(c)(5) of Form SD.

<sup>140</sup> See proposed Instruction 7 to Item 2.01 of Form SD.

<sup>141</sup> We also noted in the Proposing Release that in other contexts Congress has treated midstream activities like “processing” and downstream activities like “refining” as separate activities, which further supports our view that Congress did not intend to include “refining” and “smelting” as “processing” activities. For example, the Sudan Accountability and Divestment Act of 2007 (“SADA”), which also relates to resource extraction activities, specifically includes “processing” and “refining” as two distinct activities in its list of “mineral extraction activities” and “oil-related activities . . .” See 110 P.L. No. 174 (2007). Similarly, the Commission’s oil and gas disclosure rules exclude refining and processing from the definition of “oil and gas producing activities” (other than field processing of gas to extract liquid hydrocarbons by the company and the upgrading of natural resources extracted by the company other than oil or gas into synthetic oil or gas). See Rule 4-10(a)(16)(ii) of Regulation S-X [17 CFR 210.4-10(a)(16)(ii)] and 2012 Adopting Release, n.108.

<sup>142</sup> See, e.g., the EITI Handbook, at 35; EU Accounting Directive, Art. 41(1) (including “exploration, prospection, discovery, development, and extraction” in the definition of an “undertaking active in the extractive industry,” but not including refining or smelting). See also ESTMA Guidance at Section 1 (“Commercial development generally does not include post-extraction activities. Refining, smelting or processing of oil, gas or minerals, as well as the marketing, distribution, transportation or export, is generally not captured as commercial



The final rules define “export” as the transportation of a resource from its country of origin to another country by an issuer with an ownership interest in the resource, with certain exceptions described below.<sup>143</sup> This definition of the term “export” reflects the significance of the relationship between upstream activities such as exploration and extraction and the categories of payments to governments identified in the statute. In contrast, we do not believe that Section 13(q) was intended to capture payments related to transportation on a fee-for-service basis across an international border by a service provider with no ownership interest in the resource.<sup>144</sup> Nor do we believe that “export” was intended to capture activities with little relationship to upstream or midstream activities, such as commodity trading-related activities. Accordingly, the definition of “export” we are adopting does not cover the movement of a resource across an international border by a company that (a) is not engaged in the exploration, extraction, or processing of oil, natural gas, or minerals and (b) acquired its ownership interest in the resource directly or indirectly from a foreign government or the Federal Government.<sup>145</sup> The definition does cover, however, the purchase of such government-owned resources by a company otherwise engaged in resource extraction due to the stronger link between the movement of the resource across an international border and the upstream development activities. This link would

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development for the purposes of the Act. However, certain initial processing activities are often integrated with extraction operations and may comprise commercial development of oil, gas or minerals.”)

<sup>143</sup> See Item 2.01(d)(4) of Form SD.

<sup>144</sup> It is noteworthy that Section 13(q) includes export, but not transportation, in the list of covered activities. In contrast, SADA specifically includes “transporting” in the definition of “oil and gas activities” and “mineral extraction activities.” The inclusion of “transporting” in SADA, in contrast to the language of Section 13(q), suggests that the term export means something different than transportation.

<sup>145</sup> See Item 2.01(d)(4) of Form SD. See also letter from Poretti (seeking clarification of the scope of “export” under the rules).

be particularly strong in instances where the company is repurchasing government production entitlements that were originally extracted by that issuer.<sup>146</sup>

Contrary to the recommendation of one commenter, we have not defined “minerals” in the final rules.<sup>147</sup> Although ESTMA defines minerals as “all naturally occurring metallic and non-metallic minerals, including coal, salt, quarry and pit material, and all rare and precious minerals and metals,” the EU Directives do not provide a definition.<sup>148</sup> We believe that this term is commonly understood in the industry,<sup>149</sup> as are the terms “oil” and “natural gas,” and is not “indefinite” as claimed by this commenter.<sup>150</sup> We also believe that the commonly understood meaning of “mineral” is consistent with the definition of that term in ESTMA described above.

The definition of “commercial development of oil, natural gas, or minerals” in the final rules does not capture activities that are ancillary or preparatory to such commercial development.<sup>151</sup> We do not consider an issuer that is only providing products or services that support the exploration, extraction, processing, or export of such resources to be a “resource

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<sup>146</sup> See Section C below for a more detailed discussion of when and how such payments must be reported.

<sup>147</sup> See letter from Bishop.

<sup>148</sup> ESTMA, Section 2.

<sup>149</sup> In this regard, we note that none of the industry commenters, or for that matter any commenters other than Bishop, indicated a need to define this term. We believe that this also supports our view that, as commonly used when referring to mineral resources, “mineral” refers to the broader, non-technical meaning, which is any organic or inorganic natural resource extracted from the earth for human use.

<sup>150</sup> We do note, however, that we consider the commonly understood meaning of “mineral” to include, at a minimum, any solid material for which an issuer with mining operations would provide disclosure under the Commission’s existing disclosure requirements and policies, including Industry Guide 7, or any successor requirements or policies. The Commission’s staff has previously provided similar guidance. See Disclosure of Payments by Resource Extraction Issuers FAQ 3 (May 30, 2013), available at <https://www.sec.gov/divisions/corpfin/guidance/resourceextraction-faq.htm>.

<sup>151</sup> This is consistent with Canada’s ESTMA. See ESTMA Guidance at Section 1 (“Commercial development is not intended to extend to ancillary or preparatory activities for the exploration or extraction of oil, gas or minerals. For example, activities such as manufacturing equipment or construction of extraction sites would not be included.”)

extraction issuer,” such as an issuer that manufactures drill bits or provides hardware to help companies explore and extract.<sup>152</sup> Similarly, an issuer engaged by an operator to provide hydraulic fracturing or drilling services, thus enabling the operator to extract resources, is not a resource extraction issuer. Nevertheless, a resource extraction issuer must disclose payments when a service provider makes a payment to a government on its behalf that meets the definition of “payment” in the final rules.<sup>153</sup>

## **C. Definition of “Payment”**

### **1. Proposed Rules**

Section 13(q) defines “payment” to mean a payment that:

- is made to further the commercial development of oil, natural gas, or minerals;
- is not de minimis; and
- includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the EITI’s guidelines (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.

The proposed definition of “payment” included the specific types of payments identified in the statute, as well as payments of certain dividends and infrastructure payments.

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<sup>152</sup> Marketing activities would also not be included. Section 13(q) does not include marketing in the list of activities covered by the definition of “commercial development.” In addition, including marketing activities within the final rules under Section 13(q) would go beyond what is covered by the EITI and other international regimes. See, e.g., the EITI Handbook, at 35. For similar reasons, the definition of “commercial development” does not include activities relating to security support. See 2012 Adopting Release at Section II.D for a related discussion of payments for security support.

<sup>153</sup> As we discuss in Section II.I.3 below, we are providing for delayed reporting for payments related to exploratory activities. See Item 2.01(b) of Form SD.

Consistent with Section 13(q), the proposed rules required a resource extraction issuer to disclose taxes. In addition, the proposed rules included an instruction stating that a resource extraction issuer would be required to disclose payments for taxes levied on corporate profits, corporate income, and production, but would not be required to disclose payments for taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes.<sup>154</sup> In response to earlier concerns expressed about the difficulty of allocating certain payments that are made for obligations levied at the entity level, such as corporate taxes, to the project level,<sup>155</sup> the proposed rules provided that issuers could disclose those payments at the entity level.<sup>156</sup>

Also consistent with Section 13(q), the proposed rules required a resource extraction issuer to disclose fees, including license fees, and bonuses paid to further the commercial development of oil, natural gas, or minerals. The proposed rules included an instruction stating that fees include rental fees, entry fees, and concession fees, and that bonuses include signature, discovery, and production bonuses.<sup>157</sup> The fees and bonuses identified, however, were not an exclusive list, and under the proposed rules, the issuer could have been required to disclose other fees and bonuses as well.

For payments of dividends, which, along with infrastructure payments, is not specified in the statute, an instruction in the proposed rules stated that an issuer generally would not need to disclose dividends paid to a government as a common or ordinary shareholder of the issuer as

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<sup>154</sup> See proposed Instruction 8 to Item 2.01 of Form SD.

<sup>155</sup> See 2012 Adopting Release, n.155 and accompanying text.

<sup>156</sup> See proposed Instruction 4 to Item 2.01 of Form SD.

<sup>157</sup> See proposed Instruction 9 to Item 2.01 of Form SD.

long as the dividend is paid to the government under the same terms as other shareholders.<sup>158</sup>

Under the proposed rules, the issuer would, however, have been required to disclose any dividends paid to a government in lieu of production entitlements or royalties. Under the proposed approach, ordinary dividend payments were not considered part of the commonly recognized revenue stream, because they are not made to further the commercial development of oil, natural gas, or minerals.<sup>159</sup> We also proposed requiring a resource extraction issuer to disclose in-kind payments.<sup>160</sup> The proposed rules specified that an issuer must report in-kind payments at cost, or if cost was not determinable, fair market value, and required the issuer to provide a brief description of how the monetary value was calculated.<sup>161</sup>

The proposed rules defined a “not de minimis” payment as one that equals or exceeds \$100,000, or its equivalent in the issuer’s reporting currency, whether made as a single payment or series of related payments.<sup>162</sup> Finally, the proposed rules required disclosure of activities or

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<sup>158</sup> See proposed Instruction 10 to Item 2.01 of Form SD.

<sup>159</sup> See Proposing Release, at Section II.C.1.

<sup>160</sup> See proposed Instruction 11 to Item 2.01 of Form SD.

<sup>161</sup> See proposed Instruction 11 to Item 2.01 of Form SD. See also Section 3(e) of ESTMA (“[T]he value of a payment in kind is the cost to the entity—or, if the cost cannot be determined, the fair market value—of the goods and services that it provided.”). The EU Directives do not specify how in-kind payments should be calculated, but require “supporting notes . . . to explain how their value has been determined.” See, e.g., Section 43(3) of the EU Accounting Directive.

<sup>162</sup> See proposed Item 2.01(c)(8)(ii) of Form SD. For example, a resource extraction issuer that paid a \$150,000 signature bonus would be required to disclose that payment. The proposed definition also clarified that disclosure would be required for related periodic payments (e.g., rental fees) when the aggregate amount of such payments exceeds the payment threshold. This is similar to other instructions in our rules requiring disclosure of a series of payments. See, e.g., Instructions 2 and 3 to Item 404(a) of Regulation S-K (17 CFR 229.404(a)). Therefore, under the proposed rules, a resource extraction issuer obligated to pay royalties to a government annually and that paid \$10,000 in royalties on a monthly basis to satisfy its obligation would be required to disclose \$120,000 in royalties.

payments that, although not within the categories included in the proposed rules, are part of a plan or scheme to evade the disclosure requirements under Section 13(q).<sup>163</sup>

## **2. Comments on the Proposed Rules**

### **a. Types of Payments**

In the Proposing Release we solicited comment on whether we should add other payment types, such as CSR payments, or remove certain payment types from the proposed list. In particular, we asked whether other types of payments should be considered part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. We also asked whether the Commission should provide additional guidance on how to interpret the proposed list of covered payment types, particularly whether additional guidance should be provided on the types of fees or bonuses that would be covered by the rules and how to distinguish CSR payments from infrastructure payments. Finally, we also included a request for comment on whether the rules should prescribe a specific method for determining the fair market value of in-kind payments.

Several commenters supported the proposed definition of “payment,”<sup>164</sup> while others recommended adding additional payment types or changing our approach to particular payment types. A number of commenters, including one industry commenter, recommended adding CSR payments to the definition.<sup>165</sup> These commenters stated that CSR payments are common in the

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<sup>163</sup> See proposed Rule 13q-1(b).

<sup>164</sup> See letters from ACEP; Encana; Department of Interior; Global Witness 1; Oxfam 1; PWYP-US 1; and USAID.

<sup>165</sup> See letters from ACEP; Prof. Harry G. Broadman and Bruce H. Searby (Jan. 25, 2016) (“Broadman & Searby”); Exxon Mobil Corp. (Feb. 16, 2016) (“ExxonMobil 1”); Eugen Falik (Mar. 7, 2016) (“Falik”); Global Witness 1; Oxfam 1; PWYP-US 1; and USAID.

industry and should be considered part of the commonly recognized revenue stream for resource extraction.<sup>166</sup> One of these commenters also questioned the characterization in the Proposing Release that the European Union and Canada are consistent in not requiring CSR payments.<sup>167</sup> An industry commenter was particularly concerned with distinguishing between CSR payments and infrastructure payments and recommended requiring both types of payments when required by contract with the host government.<sup>168</sup> Another industry commenter, however, opposed including CSR payments, stating that those payments were not part of the commonly recognized revenue stream due to their “philanthropic or voluntary . . . nature.”<sup>169</sup>

Several commenters recommended adding commodity trading-related payments to the definition of “payment.”<sup>170</sup> These commenters stated that purchases of resources sold by a government or a state-owned company are prone to corruption and are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. They also stated that in many countries commodity trading-related payments constitute the largest revenue stream to the government. Another commenter expressed uncertainty as to whether such payments were covered by the proposed rules and noted that confusion may arise for others as well since the current EITI Standard leaves it to the discretion of a country’s multi-stakeholder group whether to require the reporting of payments to governments for the purchase

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<sup>166</sup> See, e.g., Broadman & Searby and ExxonMobil 1.

<sup>167</sup> See Broadman & Searby (stating that “there is no consistency after all between Europe’s and Canada’s regimes to which the Commission should adhere for the sake of equalizing standards and reporting burdens.”). See note 212 below and accompanying text.

<sup>168</sup> See letter from ExxonMobil 1.

<sup>169</sup> See letter from Encana.

<sup>170</sup> See letters from PWYP-US 1; NRG 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

of natural resources by buying companies.<sup>171</sup> Other commenters stated that covering commodity trading-related payments would inappropriately expand the reach of the rules beyond payments associated with in-country extractive development and would substantially increase the cost of reporting without apparent benefit.<sup>172</sup> These commenters stated that such an approach would double-count government revenues given that the government's share of production is already required to be disclosed under the rules.

Beyond CSR payments and commodity trading-related payments, commenters recommended that the rules cover other types of payments, such as when an issuer covers government expenses, provides jobs to persons related to government officials, or invests in companies created by officials or related persons.<sup>173</sup> For example, one commenter recommended that guidance be added to either the discussion of reportable payments or the proposed anti-evasion provision indicating that payments in excess of the de minimis threshold should be disclosed if: (1) the payments were subtracted from or substituted for otherwise reportable payments; (2) the payments were requested by or associated with a government official suspected of corruption; or (3) the payments raise corruption concerns, including by creating an appearance of possible corruption, and those payments would otherwise be undisclosed to the public.<sup>174</sup> Another commenter recommended including fines and penalties in the definition.<sup>175</sup>

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<sup>171</sup> See letter from Poretti (noting that some EITI reports (e.g., Iraq's EITI Reports for the years 2011, 2012, and 2013) contain information about payments reported by buyers of exported crude oil).

<sup>172</sup> See letters from API (Mar. 8, 2016) ("API 2") and ExxonMobil 2.

<sup>173</sup> See letters from Bean and USAID.

<sup>174</sup> See letter from Bean.

<sup>175</sup> See letter from TI-USA.



This commenter also stated that the EITI standard requires “any other significant payments and material benefit to government” to be reported and that the USEITI’s multi-stakeholder group has interpreted that to include penalties.<sup>176</sup> This commenter noted that fines and penalties represent significant payments to governments and that Section 13(q) instructs the Commission to define payment consistently with the EITI standard.

Commenters supported the proposed requirement for issuers to disclose the method they used to calculate the value of in-kind payments.<sup>177</sup> One commenter recommend that in-kind payments be reported at cost or fair market value, as determined by the issuer, rather than allowing only the use of fair market value if cost is not determinable.<sup>178</sup> This commenter also noted that, under ESTMA, in-kind payments are reported at the cash value of the production entitlements that the payee takes possession of during the relevant financial period. Several other commenters supported requiring issuers to disclose the volume of resources associated with the in-kind payments.<sup>179</sup> These commenters noted that the EU Directives require disclosure of volume and that such a requirement would enhance government accountability and understanding of an issuer’s methodology.<sup>180</sup> Another commenter, however, stated that adding a requirement for issuers to report the volume of in-kind payments is unnecessary and could cause

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<sup>176</sup> Section 4.1(b) of EITI Standard.

<sup>177</sup> See letters from Encana and PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>178</sup> See letter from Encana.

<sup>179</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>180</sup> See EU Accounting Directive, Art. 43(3) (“Where payments in kind are made to a government, they shall be reported in value and, where applicable, in volume.”)

competitive harm by effectively disclosing contractual selling prices.<sup>181</sup> This commenter stated that reporting fair market value of in-kind payment types was sufficient.<sup>182</sup> Another commenter requested that the Commission provide examples for determining fair market value for in-kind payments.<sup>183</sup>

A number of commenters also requested additional guidance on the types of payments covered by the rules.<sup>184</sup> Several commenters supported including a non-exclusive list of the types of royalties in a manner similar to what was proposed for fees and bonuses.<sup>185</sup> The recommended instruction would further clarify that the examples of fees, bonuses, and royalties are non-exclusive and the list of royalties would include unit based, value-based, and profit-based royalties. One commenter requested additional guidance on how to isolate the corporate income tax payments made on income generated from the commercial development of oil, natural gas, or minerals given that income earned from business activities beyond resource extraction would be taxed as well.<sup>186</sup> Another commenter recommended clarifying in Form SD that payments may be reported either on a cash basis or on an accrual basis.<sup>187</sup> This commenter noted the contrast between the Proposing Release, which seems to leave open the question as to

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<sup>181</sup> See letter from ExxonMobil 2.

<sup>182</sup> Although ExxonMobil only mentions using fair market value and not cost, from the context it does not appear to be recommending a change to our proposed approach that calls for cost reporting, or if cost is not determinable, fair market value.

<sup>183</sup> See letter from Petrobras.

<sup>184</sup> See letters from Encana; ExxonMobil 1; Petrobras; and PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>185</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>186</sup> See letter from Petrobras.

<sup>187</sup> See letter from Cleary.

whether an issuer may elect to present payments on either basis, and prior staff guidance, which indicates that payment information is required to be presented on an unaudited, cash basis for the year in which the payments are made.<sup>188</sup>

**b. The “Not De Minimis” Requirement**

A key component of the definition of “payment” is how “not de minimis” should be defined. In the Proposing Release, we solicited comment on various aspects of this definition. For example, we requested comment on whether a \$100,000 threshold is too low or too high, whether a different threshold should apply to smaller reporting companies or other categories of issuers, and whether we should provide additional guidance on how and when an issuer would have to aggregate a series of related payments. If commenters thought a different threshold should apply, we asked for their input on how that threshold would interact with the thresholds established by other countries. We also asked whether the final rules should include a mechanism to adjust periodically the de minimis threshold to reflect the effects of inflation.

Most commenters supported the proposed definition of “not de minimis.”<sup>189</sup> For example, the Department of Interior noted that it was the same standard that is used in its disclosure of revenue data.<sup>190</sup> It also recommended not including an automatic adjustment mechanism because a stable threshold would allow the USEITI and industry to plan better for making ongoing disclosures. Several commenters also noted the similarity of the proposed threshold to

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<sup>188</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act FAQs: Disclosure of Payments by Resource Extraction Issuers (May 30, 2013) (“Resource Extraction FAQs”), FAQ 7, available at <https://www.sec.gov/divisions/corpfin/guidance/resourceextraction-faq.htm>.

<sup>189</sup> See letters from Department of Interior; Form Letter A; PWYP-US 1; and Quinones. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>190</sup> See letter from Department of Interior.

those used in the European Union and Canada.<sup>191</sup> Another commenter stated that the threshold was “unreasonably low for companies working on massive scale projects” and would thus be too costly.<sup>192</sup> Finally, one commenter requested clarification on whether the de minimis threshold is meant to be calculated based on the currency conversion in effect at the time of payment, or at the end of the period covered by the report.<sup>193</sup>

### **c. Anti-Evasion Provision**

In the Proposing Release we also solicited comment on whether the proposed anti-evasion provision would promote compliance with the disclosure requirements and whether we should provide additional guidance on when the anti-evasion provision would apply. Several commenters supported this provision.<sup>194</sup> As described above, one commenter recommended that guidance be added to either the discussion of reportable payments or the proposed anti-evasion provision indicating that payments in excess of the de minimis threshold should be disclosed if: (1) the payments were subtracted from or substituted for otherwise reportable payments; (2) the payments were requested by or associated with a government official suspected of corruption; or (3) the payments raise corruption concerns, including by creating an appearance of possible corruption, and those payments would otherwise be undisclosed to the public.<sup>195</sup> Several other commenters endorsed the proposed anti-evasion provision, but recommended adding language

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<sup>191</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>192</sup> See letter from Nouveau (Feb. 16, 2016) (“Nouveau”).

<sup>193</sup> See letter from Bishop.

<sup>194</sup> See letters from Bean; PWYP-US 1; Sen. Cardin et al.; and Sen. Lugar et al. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>195</sup> See letter from Bean.

stating that “activities and payments must not be artificially structured, split or aggregated to avoid application of the rules.”<sup>196</sup>

### **3. Final Rules**

We are adopting the proposed definition of “payment” with certain changes to the rule and related guidance. The definition we are adopting includes the specific types of payments identified in the statute as well as CSR payments that are required by law or contract, payments of certain dividends, and payments for infrastructure. As we noted in the Proposing Release, the statute and the EITI guidelines include most of the types of payments included in the definition.<sup>197</sup> Most of the components of our definition of “payment” are also used in the EU Directives and ESTMA. Thus, including them is consistent with the statutory directive for our rules to support international transparency promotion efforts.

In addition to the types of payments expressly included in the definition of payment in the statute, Section 13(q) provides that the Commission include within the definition “other material benefits” that it determines are “part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.” According to Section 13(q), these “other material benefits” must be consistent with the EITI’s guidelines “to the extent practicable.”<sup>198</sup> The other material benefits we have included in the final rules—CSR payments

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<sup>196</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>197</sup> See EITI Standard, at 23.

<sup>198</sup> 15 U.S.C. 78m(q)(1)(C)(ii).

required by law or contract, dividends, and infrastructure payments—are all found in the EITI guidelines as well.<sup>199</sup>

Unlike with the 2012 Proposing Release, none of the commenters on the Proposing Release suggested a broad, non-exhaustive list of payment types or a category of “other material benefits.” In light of this, and because we continue to believe that Section 13(q) directs us to make an affirmative determination that the other “material benefits” are part of the commonly recognized revenue stream, we are not adopting such a non-exclusive list or category. Accordingly, under the final rules, resource extraction issuers will be required to disclose only those payments that fall within the specified list of payment types in the rules.

We have determined that the payment types specified in the rules represent material benefits that are part of the commonly recognized revenue stream and that otherwise meet the definition of “payment.” In support of this determination, we note that the EU Directives and ESTMA also require most of these payment types to be disclosed.<sup>200</sup> In this regard, we also looked to the EITI and determined that it would be appropriate to add some of the types of payments included under the EITI that are not explicitly mentioned under Section 13(q). As such, the final rules require disclosure of CSR payments that are required by law or contract, dividend, and infrastructure payments. We note that none of the commenters on the Proposing Release objected to the inclusion of dividend and infrastructure payment, while views were

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<sup>199</sup> See the EITI Standard at Sections 4.1(b) (dividends), 4.3 (infrastructure payments), and 6.1 (social expenditures).

<sup>200</sup> See, e.g., EU Accounting Directive, Art. 41(5) and Section 2 of ESTMA (both including, as discussed in Section I.C above, the following payment types: production entitlements, taxes, royalties, dividends, bonuses, fees, and infrastructure payments).

mixed on CSR payments. We also note that payments for infrastructure improvements have been required under the EITI since at least 2011,<sup>201</sup> payments for dividends since at least 2005,<sup>202</sup> and CSR payments that are required by law or contract since 2013.<sup>203</sup>

The proposed rules did not require the disclosure of CSR payments. We noted in the Proposing Release that other recently enacted international transparency promotion efforts, such as the EU Directives and ESTMA, do not include CSR payments as a specified covered payment type. Although we noted that the EITI includes the disclosure of material “social expenditures” in an EITI report when those expenditures are required by law or contract,<sup>204</sup> we stated that disclosure of CSR payments appeared to be outside of the scope of the more recent international efforts in the European Union and Canada.<sup>205</sup> In addition, we noted that there was no clear

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<sup>201</sup> In February 2011, the EITI Board issued revised EITI rules that require participants to develop a process to disclose infrastructure payments under an EITI program. See EITI Rules 2011, available at <http://eiti.org/document/rules>. See also EITI Requirement 9(f) in EITI Rules 2011, at 22 (“Where agreements based on in-kind payments, infrastructure provision or other barter-type arrangements play a significant role in the oil, gas or mining sectors, the multi-stakeholder group is required to agree [to] a mechanism for incorporating benefit streams under these agreements in to its EITI reporting process . . .”) and EITI Standard, at 24 (“The multi-stakeholder group and the independent administrator are required to consider whether there are any agreements, or sets of agreements, involving the provision of goods and services, including loans, grants and infrastructure works, in full or partial exchange for oil, gas or mining exploration or production concessions or physical delivery of such commodities. . . Where the multistakeholder group concludes that these agreements are material, the multistakeholder group and the Independent Administrator are required to ensure that the EITI Report addresses these agreements, providing a level of detail and transparency commensurate with the disclosure and reconciliation of other payments and revenues streams.”).

<sup>202</sup> See EITI, Source book, Chapter 2, Section D (Mar. 2005).

<sup>203</sup> As is currently the case under the 2016 EITI Standard, the 2013 version of the EITI Standard required social contribution payments to be disclosed if the company was legally or contractually required to make those payments.

<sup>204</sup> See EITI Standard, at 28 (“Where material social expenditures by companies are mandated by law or the contract with the government that governs the extractive investment, the EITI Report must disclose and, where possible, reconcile these transactions.”).

<sup>205</sup> See EU Accounting Directive, Art. 41(5) and ESTMA, Section 2, both of which list types of payments covered by their respective disclosure regulations without including CSR payments. But see ESTMA Guidance, Section 3.5 (outlining that “payments made for corporate social responsibility purposes” may be required to be disclosed if “made in lieu of one of the payment categories that would need to be reported under [ESTMA]”).

consensus among the commenters on whether the proposed rules should include CSR payments as part of identified payments that are required to be disclosed.<sup>206</sup> Nevertheless, we sought public input on the matter.

Upon further consideration of our approach in the proposed rules and taking into account the comments discussed above, we believe that CSR payments that are required by law or contract are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.<sup>207</sup> As noted above, CSR payments that are required by law or contract must be disclosed under the EITI. Also, as noted by one commenter, “[p]ublic manifestations of how common in [the resource extraction] industry CSR payments have become include prolific conferences, studies, guidance, and compliance manuals.”<sup>208</sup> Notably, this view was not limited to academia or civil society organizations. One industry commenter also stated that CSR payments are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals, at least when required by law or contract.<sup>209</sup>

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<sup>206</sup> See Proposing Release, n.148 and accompanying text.

<sup>207</sup> We note that our decision to require disclosure of such payments is further supported by the fact that such payments can be used as a mechanism for the corrupt or suspicious diversion of payment revenues to governmental officials for their personal use. See, e.g., KEN SILVERSTEIN, *THE SECRET WORLD OF OIL* 79 (2014) (noting that “money specifically marked for social programs has been stolen” by the leaders of Equatorial Guinea and quoting a court filing by the U.S. Department of Justice that states: “The Inner Circle routinely demands that companies operating in E.G. contribute money to what are disguised as public service campaigns [to build housing and other social programs. However] the contributions are not used for their alleged purpose, but instead are largely taken by members of the Inner Circle ... for their personal benefit.”) (bracketed additions were included in *THE SECRET WORLD OF OIL*).

<sup>208</sup> See letter from Broadman & Searby (noting publications such as IPIECA, *Creating Successful, Sustainable Social Investment: Guidance document for the oil and gas industry* (2008); Alison Colwell of BSR, *Driving Business and Social Benefits Through Inclusive Community Investment* (July 2015); Anglo American Corp., *Socio-Economic Assessment Toolbox, Version 3* (2013); FSG, “Shared Value In Extractives,” prepared materials for the Next-Gen CSR and Shared Value Forum (Feb. 2014); FSG, “Extracting with Purpose: Creating Shared Value in the Oil and Gas and Mining Sectors’ Companies and Communities” (Oct. 2014).

<sup>209</sup> See letter from ExxonMobil 1.



Furthermore, there is other evidence supporting the significant role that CSR payments have in the extractive industries. For example, several EITI implementing countries already disclose mandatory or voluntary social expenditures in their EITI Reports.<sup>210</sup> In addition, several issuers already report their required or voluntary CSR payments.<sup>211</sup> We recognize that significant disclosure regimes such as the EU Directives and ESTMA do not include CSR payments as a specified covered payment type. Nonetheless, we find that the evidence on balance supports the conclusion that such payments are now part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.<sup>212</sup>

We do not believe it is appropriate to add the other payment types recommended by some commenters because we have not determined that they are material benefits that are part of the

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<sup>210</sup> See EITI Guidance, Note 17 (Apr. 24, 2014) (noting that Kazakhstan, Kyrgyzstan, Liberia, Mongolia, Mozambique, Peru, Republic of Congo, Togo, Yemen and Zambia require or reconcile social expenditures in their EITI reports).

<sup>211</sup> See, e.g., Statoil ASA, 2015 Sustainability Report, p. 29 (disclosing that in 2015 Statoil made NOK 37 million in social investments, of which NOK 5 million were contractual obligations); Newmont Mining Corporation, Beyond the Mine-Our 2014 Social and Environmental Performance (reporting that Newmont invested \$28 million globally “to support a wide range of community investments”); Kosmos Energy Ltd., 2014 Corporate Responsibility Report (reporting that Kosmos Energy spent \$2,936,000 in social investments in 2014); BHP Billiton Ltd., 2015 Sustainability Report (reporting that BHP’s voluntary community investment totaled \$225 million USD in 2015); and Tullow Oil plc, 2015 Corporate Responsibility Report (disclosing that Tullow spent \$7,537,000 on discretionary social projects in 2015).

<sup>212</sup> One commenter questioned our conclusion in the Proposing Release that the European Union and Canada were consistent in generally not requiring disclosure of CSR payments, particularly with respect to Canada. See letter from Broadman & Searby. Although Canada does not list CSR payments as a separate payment type, the ESTMA Guidance states that “the onus is on the Reporting Entity to determine whether a voluntary or philanthropic payment does in fact relate in some way to its commercial development of oil, gas or minerals. This may include payments for corporate social responsibility purposes.” In this regard, the guidance also states that entities “should look to the substance, rather than the form, of payments in determining which [payment] category is applicable.” ESTMA Guidance, Section 3.5. The ESTMA Guidance further states that “payments made for corporate social responsibility purposes” may be required to be disclosed if “made to a payee in lieu of one of the payment categories that would need to be reported under [ESTMA].” *Id.* Finally, the ESTMA Guidance provides an example of how providing a local municipal government with a payment for a scholarship endowment and to build a community center should be reported under the bonus payment category. *Id.* at Box A.

commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. With respect to commodity trading-related payments, we believe that our definition of “export” and the categories of payments in the final rules, particularly in-kind payments, accurately reflect the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. We acknowledge that significant payments may be made by buying/trading companies and others to purchase the commodities covered by the final rules. Nevertheless, we do not believe that purchasing or trading oil, natural gas, or minerals, even at a level above the de minimis threshold, is on its own sufficiently related to the “commercial development” of those resources to be covered by the rules, particularly when the rules already require disclosure of in-kind payments of production entitlements. We have, however, addressed below how such production entitlements must be valued when initially made in-kind but subsequently purchased by the same issuer from the recipient government.

We are also not specifically requiring disclosure of payments for government expenses, providing jobs or tuition to persons related to government officials, investing in companies created by officials or related persons, or other similar payments that could reasonably raise corruption concerns. We find it unnecessary to do so because, when these payments are made to further the commercial development of oil, natural gas or minerals (in connection with or in lieu of the identified payments), they will already be covered by the anti-evasion provision we are adopting.<sup>213</sup>

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<sup>213</sup> See generally U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON GOVERNMENT AFFAIRS, MONEY LAUNDERING AND FOREIGN CORRUPTION: ENFORCEMENT AND EFFECTIVENESS OF THE PATRIOT ACT, CASE STUDY INVOLVING RIGGS BANK REPORT, at 98-111 (July 14, 2004) (providing examples of

With respect to payments for fines and penalties, we do not believe they relate sufficiently to the commercial development of natural resources to warrant inclusion. Although we acknowledge that the USEITI multi-stakeholder group has included penalties, we also note that the EITI Standard does not address the reporting of penalties or fines. In this regard, we understand that actual practice in countries applying the EITI Standard appears to vary depending on the particular interpretations of a country's multi-stakeholder group.<sup>214</sup> Furthermore, we note that neither the EU Directives nor ESTMA include fines or penalties as an explicit payment category.

We are adopting the proposed approach to in-kind payments with one modification. In the past, many commenters supported the inclusion of in-kind payments, particularly in connection with production entitlements and none of the commenters on the Proposing Release objected to their inclusion in the rules.<sup>215</sup> We also note that the EU Directives and ESTMA require disclosure of in-kind payments.<sup>216</sup> In addition to production entitlements, in-kind payments could include building a road or school, refurbishing a government building, or numerous other activities that do not involve providing monetary payments to the host country government. Although certain commenters recommended allowing issuers to choose between reporting in-kind payments at cost or fair market value, we continue to believe that such

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the roles that resource extraction companies can play in facilitating the suspect or corrupt practices of foreign officials seeking to divert resource extraction payments that belong to the government).

<sup>214</sup> Based upon our review of EITI reports published in English on the EITI website, many of the reports do not report payments of fines and penalties.

<sup>215</sup> See 2012 Adopting Release, nn.170, 211 and accompanying text. In-kind payments include, for example, making a payment to a government in oil rather than a monetary payment.

<sup>216</sup> Article 41 of the EU Accounting Directive and Section 2 of ESTMA specifically include "in kind" payments in their definitions of "payment."

disclosure would be more consistent and comparable if issuers are required to report in-kind payments at cost, and are only permitted to report using fair market value if historical costs are not reasonably available or determinable. We are providing guidance, however, on how to report payments made to a foreign government or the Federal Government to purchase the resources associated with production entitlements that are reported in-kind.<sup>217</sup> If the issuer must report an in-kind production entitlement payment under the rules and then repurchases the resources associated with the production entitlement within the same fiscal year, the issuer must use the purchase price (rather than using the valuation methods described above) when reporting the in-kind value of the production entitlement. If the in-kind production entitlement payment and the subsequent purchase are made in different fiscal years and the purchase price is greater than the previously reported value of the in-kind payment, the issuer must report the difference in values in the latter fiscal year if that amount exceeds the de minimis threshold. In other situations, such as when the purchase price in a subsequent fiscal year is less than the in-kind value already reported, no disclosure relating to the purchase price is required. We believe that this approach more accurately captures the value of in-kind payments for production entitlements than the proposed approach and addresses commenters concerns without adding significantly to the burden of resource extraction issuers.

We have also considered whether to require issuers to report the volume of in-kind payments. As discussed above, commenters were divided on this suggestion.<sup>218</sup> We generally

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<sup>217</sup> See Instruction 11 to Item 2.01 of Form SD.

<sup>218</sup> See Section II.C.2 above.

agree with the commenter that stated such information was unnecessary.<sup>219</sup> Based on these considerations, we are not requiring disclosure related to volume. We note that issuers are required to provide a brief description of how the monetary value was calculated, which will provide some additional context for assessing the reasonableness of the disclosure.

We are adopting as proposed an instruction setting forth a non-exclusive list of fees (rental fees, entry fees, and concession fees) and bonuses (signature, discovery, and production bonuses). As discussed in the Proposing Release, the EITI specifically mentions these types of fees and bonuses as payments that should be disclosed by EITI participants.<sup>220</sup> This supports our view that these types of fees and bonuses are part of the commonly recognized revenue stream. As recommended by certain commenters, we are also adding a non-exclusive list of royalties since we believe that would provide additional clarity for issuers.<sup>221</sup> Thus, the term “royalties” would include, but not be limited to, unit-based, value-based, and profit-based royalties.<sup>222</sup> Of course, resource extraction issuers may be required to disclose other types of fees, bonuses, and royalties depending on the particular facts and circumstances.

In response to commenters’ concerns about compliance costs, we noted in the Proposing Release that issuers would not be required to have the payment information audited or reported

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<sup>219</sup> See letter from ExxonMobil 2.

<sup>220</sup> See EITI Standard, at 23.

<sup>221</sup> See Instruction 9 to Item 2.01 of Form SD. See also letter from PWYP-US 1

<sup>222</sup> These types of royalties were recommended by PWYP-US based on the following publication: World Bank, *Mining Royalties: Their Impact on Investors, Government and Civil Society* (2006), pp.50-54, available at <http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2006/09/11/00009034120060911105823/Rendered/PDF/372580Mining0r101OFFICIAL0USE0ONLY1.pdf>.

on an accrual basis.<sup>223</sup> As noted above, one commenter questioned whether this was a shift from the position taken in prior staff guidance, which indicates that issuers are not permitted to provide the payment information on an accrual basis.<sup>224</sup> We have revised Form SD to expressly state that the payment information need not be audited and must be made on a cash basis. As we discussed in the 2012 Adopting Release, we believe that this is the best approach because (1) these payment disclosures are largely cash-based, so reporting them on a cash basis will not result in a significant compliance burden, and (2) requiring a consistent approach will improve comparability and therefore result in greater transparency.

We are adopting the proposed definition of “not de minimis” for the reasons stated in the Proposing Release. A “not de minimis” payment is one that equals or exceeds \$100,000, or its equivalent in the issuer’s reporting currency,<sup>225</sup> whether made as a single payment or series of related payments. We continue to believe that this definition provides a clear standard for determining which payments a resource extraction issuer must disclose. Furthermore, several countries have established payment thresholds that approximate the proposed \$100,000 standard.<sup>226</sup> We believe that the establishment of a similar payment threshold by these countries

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<sup>223</sup> See Section II.G.5 of the Proposing Release.

<sup>224</sup> Resource Extraction FAQ 7, available at <https://www.sec.gov/divisions/corpfin/guidance/resourceextraction-faq.htm>.

<sup>225</sup> Instruction 2 to Item 2.01 allows an issuer to choose several methods to calculate currency conversions for payments not made in U.S. dollars or the issuer’s reporting currency. We have clarified in that instruction that the same methods are available to issuers when calculating whether a payment not made in U.S. dollars exceeds the de minimis threshold. However, an issuer must use a consistent method for such de minimis payment currency conversions and must disclose which method it used.

<sup>226</sup> See EU Accounting Directive, Art. 43(1) and Recital 46 (using €100,000, or approximately \$112,280 (USD) as of June 16, 2016); UK Reports on Payments to Governments Regulations 2014 (2014 Statutory Instrument No. 3209), Part 1, 5.- (3) (using £86,000, or approximately \$122,180 (USD) as of June 16, 2016); Norwegian

diminishes any potential additional compliance burden and potential competitive harm that otherwise could be caused by disclosure rules that include a payment threshold that varies significantly from the standard used in other jurisdictions. As discussed above, only one of the many commenters that addressed the definition thought that the reporting threshold was too low.<sup>227</sup> Although we acknowledge this commenter’s concerns that the threshold might be considered low for companies working on “massive” scale projects, we note that none of the large issuers commenting on the Proposing Release expressed similar concerns. For this reason and the reasons stated above, we are not increasing the threshold.

Finally, despite the changes recommended by commenters, we are adopting the anti-evasion provision as proposed. Thus, the final rules require disclosure with respect to an activity (or payment) that, although not within the categories included in the proposed rules, is part of a plan or scheme to evade the disclosure required under Section 13(q).<sup>228</sup> This provision is designed and intended to emphasize substance over form or characterization and to capture any and all payments made for the purpose of evasion. Accordingly, we believe that it covers most of the situations that appeared to concern commenters. For example, the provision would cover payments that were substituted for otherwise reportable payments in an attempt to evade the disclosure rules,<sup>229</sup> as well as activities and payments that were structured, split, or aggregated in

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Regulations, Section 3 (using 800,000 kr, or approximately \$95,302 (USD) as of June 16, 2016); and ESTMA, Section 9(2) (using \$100,000 (CAD), or approximately \$77,140 (USD) as of June 16, 2016).

<sup>227</sup> See letter from Nouveau. Comments received prior to the Proposing Release were divided on whether the threshold should be increased or decreased. See Section II.C.2 of the Proposing Release for a discussion of those comments.

<sup>228</sup> See Rule 13q-1(b).

<sup>229</sup> See letter from Bean.

an attempt to avoid application of the rules.<sup>230</sup> Similarly, as noted in the Proposing Release, a resource extraction issuer could not avoid disclosure by re-characterizing an activity as transportation that would otherwise be covered under the rules, or by making a payment to the government via a third party in order to avoid disclosure under the proposed rules.

## **D. Definition of “Subsidiary” and “Control”**

### **1. Proposed Rules**

In addition to requiring an issuer to disclose its own payments, Section 13(q) also requires a resource extraction issuer to disclose payments by a subsidiary or an entity under the control of the issuer made to a foreign government or the Federal Government relating to the commercial development of oil, natural gas, or minerals. The proposed rules defined the terms “subsidiary” and “control” using accounting principles rather than other alternatives, such as using the definitions of those terms provided in Rule 12b-2.<sup>231</sup>

Within the context of the proposed rules, a resource extraction issuer would have “control” of another entity if the issuer consolidated that entity or proportionately consolidated an interest in an entity or operation under the accounting principles applicable to the financial statements it includes in periodic reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act. Thus, for determining the eligible payments, or portions thereof, that must be disclosed, the

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<sup>230</sup> See, e.g., letter from PWYP-US 1.

<sup>231</sup> Under Exchange Act Rule 12b-2 [17 CFR 240.12b-2], “control” (including the terms “controlling,” “controlled by” and “under common control with”) is defined to mean “the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise.” Rule 12b-2 also defines a “subsidiary” of a specified person as “an affiliate controlled by such person directly, or indirectly through one or more intermediaries.” See also the definitions of “majority-owned subsidiary,” “significant subsidiary,” and “totally-held subsidiary” in Rule 12b-2.



resource extraction issuer would follow the consolidation requirements under generally accepted accounting principles in the United States (“U.S. GAAP”) or under the International Financial Reporting Standards as issued by the International Accounting Standards Board (“IFRS”), as applicable.<sup>232</sup> The extent to which the entity making the eligibility payment is consolidated would determine the extent to which payments made by that entity must be disclosed. For example, a resource extraction issuer that proportionately consolidates an interest in an entity or an operation would be required to disclose the issuer’s proportionate amount of that entity’s or operation’s eligible payments indicating the issuer’s proportionate interest.

## **2. Comments on the Proposed Rules**

In the Proposing Release we solicited comment on how the term “control” should be defined. For example, we asked whether it was preferable to base the definition of “control” on applicable accounting principles, rather than using Rule 12b-2 of the Exchange Act, and whether there would be significant differences between these approaches. We also asked whether we should allow resource extraction issuers to report eligible payments made by proportionately consolidated entities on a proportionate basis. Finally, we solicited comment on whether there were any aspects of other international transparency initiatives or differences between U.S. GAAP and IFRS that we should address so as to promote the comparability of this type of disclosure.

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<sup>232</sup> See Accounting Standards Codification (“ASC”) 810, Consolidation, IFRS 10, Consolidated Financial Statements and IFRS 11, Joint Arrangements for guidance. A foreign private issuer that prepares financial statements according to a comprehensive set of accounting principles, other than U.S. GAAP or IFRS, and files with the Commission a reconciliation to U.S. GAAP would be required to determine whether or not an entity is under its control using U.S. GAAP.

All of the commenters addressing this aspect of the proposal generally supported using accounting consolidation principles instead of Rule 12b-2.<sup>233</sup> Several of these commenters, however, stated that using accounting principles would be acceptable only if the concept of “significant influence” was used in conjunction with proportional consolidation.<sup>234</sup> These commenters expressed concern that proportional consolidation is optional for oil and gas companies under U.S. GAAP and is rarely used. They were also concerned that companies might structure joint ventures to avoid disclosure. Other commenters disagreed with adding a “significant influence” concept to the definition of control.<sup>235</sup> For example, one expressed concerns about the ability to access payment-level financial information from an entity over which it only had “significant influence.”<sup>236</sup> Another commenter stated that there was no support for the assertion that joint ventures would be structured to avoid disclosure and that any reporting gap is inherent to Section 13(q), which applies only to companies subject to the Commission’s jurisdiction.<sup>237</sup>

Several of the commenters that otherwise supported the proposed approach had concerns about using proportional consolidation to determine control.<sup>238</sup> These commenters were generally concerned that issuers who use proportional consolidation might not have access to the

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<sup>233</sup> See letters from API 1; BP; Chevron Corporation (Feb. 16, 2016) (“Chevron”); Encana; ExxonMobil 1; Petrobras; PWYP-US 1; and Royal Dutch Shell plc (Feb. 5, 2016) (“RDS”). See also letters from ACEP; Global Witness; and Oxfam 1.

<sup>234</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>235</sup> See letters from API 2 and ExxonMobil 2.

<sup>236</sup> See letter from ExxonMobil 2.

<sup>237</sup> See letter from API 2.

<sup>238</sup> See letters from API 1; BP; Chevron; Encana; ExxonMobil 1; Petrobras; and RDS.

required payment information from operators of existing joint ventures. These commenters stated that issuers have access only to high-level data regarding revenues and costs of the proportionally consolidated entities or operations. One of these commenters was concerned that the resulting disclosure could be confusing or misleading because there will be situations where an issuer has multiple operations with different ownership interests that would be both operationally and geographically interconnected and therefore would be classified as a single project for reporting purposes.<sup>239</sup> Another recommended addressing this issue by clarifying that Rule 12b-21 would permit an issuer to exclude information with respect to entities where the issuer does not have access to the information required to be disclosed.<sup>240</sup>

Several of the commenters who had concerns with proportional consolidation for determining “control” recommended that when the payments relate to joint ventures the rules should only require disclosure of payments by the operator of the joint venture.<sup>241</sup> Under this recommendation, the operator would report all of the eligible payments it makes, rather than its proportional share. A number of these commenters indicated that this approach would be more consistent with the requirements under the EITI, EU Directives, and ESTMA.<sup>242</sup> One of these commenters recommended specific changes to the rules and instructions that it stated would accomplish this purpose and would clarify that “control” extends down an organizational chain to entities controlled by other controlled entities.<sup>243</sup> Other commenters acknowledged that this

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<sup>239</sup> See letter from ExxonMobil 1.

<sup>240</sup> See letter from RDS.

<sup>241</sup> See letters from API 1; BP; Chevron; Encana; ExxonMobil 1; and Petrobras.

<sup>242</sup> See letters from API 1; BP; Chevron; Encana; and ExxonMobil 1.

<sup>243</sup> See letter from Encana.

recommended change to the Commission’s proposed definition of “control” could result in payments not being reported when the operator of a joint venture is not subject to the rules, even if minority partners in the joint venture are subject to the rules.<sup>244</sup> These commenters stated, however, that a similar gap in coverage would exist under the proposed definition when a company subject to the rule is the operator in a joint venture but the joint venture partners are not subject to the reporting requirement. In that situation, these commenters stated that the operator would be required to report only its own proportional share of the payment made to the host government.

### **3. Final Rules**

We are adopting the proposed definitions of “subsidiary” and “control.” We continue to believe that using accounting principles to determine control, rather than Rule 12b-2, is appropriate in light of the significant international developments since the 2012 Rules were vacated. Specifically, this approach, although not identical, complements two major international transparency regimes, the EU Directives and ESTMA, and should therefore support international transparency promotion efforts by fostering consistency and comparability of disclosed payments.<sup>245</sup> Also, as noted above, all of the commenters that addressed this aspect of the proposed rules generally supported using accounting principles to define “control.”

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<sup>244</sup> See, e.g., letter from API 2.

<sup>245</sup> See, e.g., EU Accounting Directive, Art. 44 (providing for the preparation of consolidated reports, subject to limited exceptions). ESTMA provides that “control” includes both direct and indirect control, but Section 2.1.3 of the ESTMA Guidance states that “[w]here one business controls another enterprise under the accounting standards applicable to it . . . that will generally be sufficient evidence of control for purposes of the Act.”

We believe that the definition we are adopting today better balances transparency for users of the payment disclosure and the burden on issuers than the use of the Rule 12b-2 definition of “control” or alternatives recommended by commenters. Issuers already apply the concept of control for financial reporting purposes, which should facilitate compliance. Assuming a reporting issuer consolidates the entity making the eligible payment,<sup>246</sup> this approach also should have the benefit of limiting the potential overlap of the disclosed payments because generally, under applicable financial reporting principles, only one party can control, and therefore consolidate, that entity. Further, this approach may enhance the quality of the reported data since each resource extraction issuer is required to provide audited financial statement disclosure of its significant consolidation accounting policies in the notes to the audited financial statements included in its existing Exchange Act annual reports.<sup>247</sup> The disclosure of these accounting policies should provide greater transparency about how the issuer determined which entities and payments should be included within the scope of the required disclosures. Finally, a resource extraction issuer’s determination of control under the final rules is subject to the audit process as well as to the internal accounting controls that issuers are required to have in place with respect to reporting audited financial statements filed with the Commission.<sup>248</sup>

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<sup>246</sup> See below for a discussion of a resource extraction issuer’s disclosure obligations concerning proportionately consolidated entities or operations.

<sup>247</sup> See ASC 235-10-50; IFRS 8. See also Rules 1-01, 3-01, and 4-01 of Regulation S-X [17 CFR 210.1-01, 2-01 and 4-01].

<sup>248</sup> See Exchange Act Section 13(b)(2)(B) [15 U.S.C. 78m(b)(2)(B)]. See also Rules 13a-15 [17 CFR 240.13a-15] and 15d-15 [17 CFR 240.15d-15]. We note, however, that the proposed rules would not create a new auditing requirement.

We considered the recommendation of some commenters to include a “significant influence” test for determining control in addition to the accounting consolidation principles we proposed. We do not believe, however, that we should define control such that significant influence by itself would constitute control.<sup>249</sup> The concept of significant influence does not reflect the same level of ability to direct or control the actions of an entity that is generally reflected in the concept of consolidation. As such, we believe that the consolidation principles are better aligned with the purposes underlying Section 13(q) than a significant influence test. Moreover, unlike a potential significant influence test, the consolidation principles used to define control for the purposes of Section 13(q) more closely capture the situations where the resource extraction issuer has access to the information that is required to be reported.<sup>250</sup> We also note that the European and Canadian reporting regimes do not measure control based on “significant influence” alone. For these reasons, we have chosen not to include a significant influence test in the final rules.

The final rules also require disclosure of the proportionate amount of the eligible payments made by a resource extraction issuer’s proportionately consolidated entities or operations. We believe this approach is consistent with using accounting principles to determine control because, when proportionate consolidation is applied, an entity has an undivided interest

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<sup>249</sup> In this regard, we note that under U.S. GAAP and IFRS, significant influence alone does not represent a level of control that would result in consolidation. See ASC 323-10-15, paragraphs 6 through 11 and IAS 28, paragraph 3.

<sup>250</sup> Compared to an issuer that consolidates an entity, an issuer applying proportionate consolidation may not have the same level of ability to direct the entity or operations making the eligible payments. However, an issuer applying proportionate consolidation has a direct or undivided ownership in the assets and liabilities of the entity or operations, and the issuer’s ability to apply proportionate consolidation indicates a higher likelihood that it is able to obtain the information necessary to satisfy the reporting requirements.

in or contractual rights and obligations in specified assets, liabilities and operations. Under this approach, the proportionate amount of eligible payments reported by the issuer reflects the underlying interest in the economics associated with the specified assets, liabilities, and operations. Although we acknowledge commenters' concerns about the ability of an issuer to obtain sufficiently detailed payment information from proportionately consolidated entities or operations when it is not the operator of that venture, we note that the delayed compliance date in the final rules will provide issuers two years to make arrangements with joint venture operators to obtain the required payment information. If, after reasonable effort, the issuer is unable to obtain such information, it would be able to rely on Exchange Act Rule 12b-21 to omit the information if the information is unknown and not reasonably available.<sup>251</sup> We expect, however, that for future joint ventures, non-operator issuers can and should negotiate for access to the appropriate information.

## **E. Definition of “Project”**

### **1. Proposed Rules**

We proposed requiring a resource extraction issuer to disclose payments made to governments relating to the commercial development of oil, natural gas, or minerals by type and

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<sup>251</sup> 17 C.F.R. 240.12b-21. Specifically Rule 12b-21 states that “[i]nformation required need be given only insofar as it is known or reasonably available to the registrant. If any required information is unknown and not reasonably available to the registrant, either because the obtaining thereof would involve unreasonable effort or expense, or because it rests peculiarly within the knowledge of another person not affiliated with the registrant, the information may be omitted . . . .” The rule goes on to provide two additional conditions. The first is that the registrant must give such information on the subject that it possesses or can acquire without unreasonable effort or expense, together with the sources of that information. The second is that the registrant must include a statement either showing that unreasonable effort or expense would be involved or indicating the absence of any affiliation with the person within whose knowledge the information rests and stating the result of a request made to such person for the information.

total amount per project.<sup>252</sup> The proposed definition of “project” was modeled on the definition found in the EU Directives and the ESTMA Specifications, albeit modified to provide resource extraction issuers with additional flexibility on how to treat operations involving multiple, related contracts.

Similar to the EU Directives and the ESTMA Specifications, we proposed to define “project” as operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government.<sup>253</sup> The proposed definition was also similar to the EU Directives and the ESTMA Specifications in allowing issuers to treat multiple agreements that are both operationally and geographically interconnected as a single project.<sup>254</sup> Unlike the EU Directives and Canadian definitions, however, our proposed definition of “project” provided additional flexibility to issuers by excluding a requirement that the agreements have “substantially similar terms.”

In order to assist resource extraction issuers in determining whether two or more agreements may be treated as a single project, we proposed an instruction that provided a non-exclusive list of factors to consider when determining whether agreements are “operationally and geographically interconnected” for purposes of the definition of project. No single factor was necessarily determinative. Those factors included: whether the agreements related to the same resource and the same or contiguous part of a field, mineral district, or other geographic area; whether they were performed by shared key personnel or with shared equipment; and whether

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<sup>252</sup> See Section II.E of the Proposing Release.

<sup>253</sup> See proposed Item 2.01(c)(10) of Form SD.

<sup>254</sup> Id.



they were part of the same operating budget.<sup>255</sup> Furthermore, we proposed an instruction stating that issuers were not required to disaggregate payments that are made for obligations levied on the issuer at the entity level rather than the project level.<sup>256</sup>

## **2. Comments on the Proposed Rules**

In the Proposing Release we solicited comment on many possible approaches to defining the term “project,” as well as the broader question of whether we should define “project” at all. We sought public comment on how best to craft a definition that advanced the U.S. governmental interest in combatting global corruption and promoting public accountability with respect to extractive resources. Specifically, we asked about alternative definitions found in other jurisdictions, such as the European Union and Canada, as well as the API’s proposed definition. We asked commenters to consider how alternative definitions might enhance transparency and the comparability of data. For example, we asked whether we should align our definition more closely with the EU Directives and ESTMA and whether there was an alternative to a contract-based definition of “project” that would be preferable. We also asked commenters about specific aspects of the proposed rules, such as under what circumstances should the rules allow for multiple agreements to be aggregated as a single project.

Numerous commenters supported the statute’s directive to require disclosure at the project level.<sup>257</sup> Many other commenters supported defining “project” in relation to a legal agreement, such as a contract, lease, license, or concession, consistent with the definition in the

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<sup>255</sup> See proposed Instruction 12 to Item 2.01 of Form SD.

<sup>256</sup> See proposed Instruction 4 to Item 2.01 of Form SD.

<sup>257</sup> See letters from Peck & Chayes; Quinones; Sen. Cardin et al.; Sen. Lugar et al.; and Form Letter A.

European Union and Canada.<sup>258</sup> A number of other commenters specifically supported the proposed definition.<sup>259</sup> One of these commenters stated that project-level disclosure by contract was necessary to evaluate and implement effective oil and mineral revenue sharing policies in Ghana.<sup>260</sup> USAID stated that the EITI standard also encourages public disclosure of the details of contracts and licenses that provide the terms for the exploitation of oil, gas, and minerals.<sup>261</sup>

Of the commenters supporting the proposed definition of “project,” one supported the proposed non-exclusive list of factors to consider when determining whether agreements are “operationally and geographically interconnected.”<sup>262</sup> This commenter stated that these factors would help ensure that issuers are in compliance with the proposed rules. Other commenters that were supportive of the “project” definition, however, recommended eliminating the list of non-exclusive factors and providing clear instructions on when agreements could be aggregated.<sup>263</sup> Also, several commenters recommended only allowing for agreements to be aggregated if they have substantially similar terms<sup>264</sup> and are operationally and geographically “integrated” rather

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<sup>258</sup> See Form Letter B.

<sup>259</sup> See letters from ACEP; ACTIAM NV, AP1/Första AP-Fonden (First Swedish National Pension Fund), Andra AP2-Fonden (Second Swedish National Pension Fund), AP3/Tredje AP-Fonden (Third Swedish National Pension Fund), AP4/Fjärde AP-Fonden (Fourth Swedish National Pension Fund), Aviva Investors, Bâtirente, BMO Global Asset Management, BNP Paribas Investment Partners, British Columbia Investment Management Corporation, California State Teachers' Retirement System (CalSTRS), Calvert Investments, Cartica Capital, Ethos Foundation, Switzerland, Henderson Global Investors, Hermes Equity Ownership Services Ltd., Legal & General Investment Management, NEI Investments, RPMI Railpen Investments, and Sandglass Capital Management (Mar. 8, 2016) (“ACTIAM et al.”); Bean; BHP; Calvert; Department of Interior; State Department; Encana; Global Witness 1; McCarthy; NRG 1; Oxfam 1; PWYP-US 1; TI-USA; USAID; and USSIF.

<sup>260</sup> See letter from ACEP.

<sup>261</sup> See letter from USAID.

<sup>262</sup> See letter from BHP.

<sup>263</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>264</sup> See letters from PWYP-US 1 and USAID. See also letters from ACEP; Global Witness 1; and Oxfam 1.

than “interconnected.”<sup>265</sup> These commenters expressed concern that the proposed rules might allow issuers to “artificially aggregate payments and obfuscate payment information.”<sup>266</sup> These commenters also questioned whether the “cost to issuers of [requiring] ‘substantially similar terms’ outweighs the gains of equivalency” with other transparency regimes.<sup>267</sup> On the other hand, the Department of Interior noted that the proposed level of aggregation correlated to on-the-ground operations on U.S. federal lands.<sup>268</sup>

Several other commenters opposed the proposed definition of “project.”<sup>269</sup> For example, one of these commenters criticized the definition as too vague and was concerned that disclosing payments to foreign and subnational governments on a per contract or project basis would severely disadvantage competition against state-affiliated firms that are not subject to similar rules.<sup>270</sup> Another of these commenters questioned “the utility of adopting an overly expansive EU definition” of “project” when it results in companies using “different definitions to describe largely similar activities” and provides “great volumes of data” with “no framework in place that allows everyday citizens to have even a fighting chance of understanding what’s actually being reported.”<sup>271</sup> Most of the commenters that opposed the Commission’s proposed definition of project supported the API’s alternative definition (the “API Proposal”). These commenters stated that the API Proposal would have lower compliance costs, generate more useful data due

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<sup>265</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>266</sup> See *id.*

<sup>267</sup> See *id.*

<sup>268</sup> See letter from Department of Interior.

<sup>269</sup> See letters from API 1; ASP; BP; Chevron; ExxonMobil 1; Nouveau; and RDS.

<sup>270</sup> See letter from Encana.

<sup>271</sup> See letter from ASP.

to the use of consistent geographic descriptions and project descriptions across the data set, and would cause less competitive harm due to the higher level of aggregation, while still achieving the purposes of the statute. In this regard, two supporters of the API definition suggested that the use of International Organization for Standardization (“ISO”) codes would provide consistent subnational geographic descriptions when using the API’s project naming system.<sup>272</sup> One industry commenter supporting the API Proposal also expressed support for the proposed rules if certain changes were made to the alternative reporting provisions and the definition of “control.”<sup>273</sup>

Several of the commenters that supported the proposed definition also specifically criticized the API Proposal for not providing a sufficiently granular level of information to meet the statute’s transparency goals and for being inconsistent with international transparency promotion efforts.<sup>274</sup> One of these commenters specifically argued that the use of ISO codes to identify subnational geographic location would be too broad geographically, and disputed the contention that the data generated under the EU Directives would be difficult to evaluate.<sup>275</sup>

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<sup>272</sup> See letters from ASP and ExxonMobil 1. ISO is an independent, non-governmental international organization with a membership composed of various national standards bodies. See *About ISO*, available at <http://www.iso.org/iso/home/about.htm> (last visited June 16, 2016).

<sup>273</sup> See letter from RDS (requesting that the Commission recognize UK implementation of the EU Directive as an approved alternative reporting scheme and clarify that Rule 12b-21 would permit a company to exclude information with regard to proportionally consolidated non-operated entities where it does not have access to the required information needed to be disclosed. See Section II.J.3, *infra*, and Section II.D.3, *supra*, for discussion of these requests.

<sup>274</sup> See, e.g., ACEP and PWYP-US 1.

<sup>275</sup> See letter from McCarthy.

### 3. Final Rules

After considering commenters' recommendations and international developments<sup>276</sup> since the Proposing Release, we are adopting the definition of "project" as proposed. The final rules define "project" as operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government.<sup>277</sup>

Commenters continue to express strong disagreement over the level of granularity that should be adopted for the definition of "project." After carefully considering the comments received, we remain persuaded that the definition of project that we proposed is necessary and appropriate to achieve a level of transparency that will help advance the important anti-corruption and accountability objectives underlying Section 13(q).<sup>278</sup> In the Proposing Release, we explained specific considerations that supported this contract-based definition of project:

- Such disaggregated information may help local communities and various levels of subnational government combat corruption by enabling them to verify that they are receiving the resource extraction revenue allocations from their national governments that they may be entitled to under law. In this way, project-level disclosure could help reduce

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<sup>276</sup> See Section I.C. above.

<sup>277</sup> We expressly incorporate the Proposing Release's discussion of the rationales for the definition of project. See Proposing Release, Section II.E.

<sup>278</sup> One commenter asserted that foreign governments might use the Section 13(q) disclosure requirement as "a pretext for expropriating" the assets of a resource extraction issuer. See letter from API 1. We note that an issuer facing such a situation could seek exemptive relief from the Commission to potentially delay or avoid its Section 13(q) reporting obligation and, thus, to potentially forestall the expropriation. See Section II.I below for our discussion of exemptive relief. We also note that the commenter stated that the required disclosures would be a "pretext" for expropriation. If a country is intent on expropriating a resource extraction issuer's assets, it is not clear that there is any action the Commission could take, either in this rulemaking or later through exemptive relief, that could dissuade the action.

instances where government officials are depriving subnational governments and local communities of revenue allocations to which they are entitled.

- Project-level reporting at the contract level could potentially allow for comparisons of revenue flow among different projects, and the potential to engage in cross-project revenue comparisons may allow citizens, civil society groups, and others to identify payment discrepancies that reflect potential corruption and other inappropriate financial discounts.
- To the extent that a company's contractual or legal obligations to make resource extraction payments to a foreign government are known, company-specific, project-level disclosure may help assist citizens, civil society groups, and others to monitor individual companies' contributions to the public finances and ensure firms are meeting their payment obligations.<sup>279</sup> Such data may also help various actors ensure that the government is properly collecting and accounting for payments.
- Company-specific, project-level data may also act as a strong deterrent to companies underpaying royalties or other monies owed.<sup>280</sup> Such data may also discourage

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<sup>279</sup> In this regard, we note that one industry commenter has observed that, at least for contracts for projects that are older or well-established, "the general terms are likely to be known even if technically not public." See letter from API 1.

<sup>280</sup> More broadly, we believe that, in contrast to the API Proposal of aggregated disclosure at the major subnational jurisdiction level, contract-level disclosure will better help deter corruption by all participants in the resource extraction sector. As we explained in the Proposing Release, detailed or granular disclosure makes hidden or opaque behavior more difficult. See Proposing Release, Section I.E.1. Specifically, the granular information makes it easier for the public and others to observe potential improprieties with respect to the payment flows and such disclosure makes it more difficult for actors to hide any impropriety from scrutiny. See generally 156 CONG. REC. S3815 (explaining that Section 13(q) is intended to create "a historic transparency standard that will pierce the veil of secrecy that fosters so much corruption and instability in resource-rich countries ...."). This, in turn, has an enhanced deterrent effect that may discourage improper conduct in the first instance.

companies from either entering into agreements that contain suspect payment provisions or following government officials' suspect payment instructions.<sup>281</sup>

- Such disaggregated reporting may help local communities and civil society groups to weigh the costs and benefits of an individual project. Where the net benefits of a project are small or non-existent, this may be an indication that the foreign government's decision to authorize the project is based on corruption or other inappropriate motivations.<sup>282</sup>

In advancing these potential uses for the granular transparency that our definition of project would yield, we relied on concrete examples that commenters from countries across the globe provided to us.<sup>283</sup> Moreover, two Executive Branch agencies with significant expertise in promoting the U.S. Government's anti-corruption and accountability foreign policy goals

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<sup>281</sup> For examples of the role that resource extraction companies can play in facilitating the suspect or corrupt practices of foreign officials seeking to divert for their own personal use resource extraction payments that belong to the government, see U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON GOVERNMENT AFFAIRS, MONEY LAUNDERING AND FOREIGN CORRUPTION: ENFORCEMENT AND EFFECTIVENESS OF THE PATRIOT ACT, CASE STUDY INVOLVING RIGGS BANK REPORT, at 98-111 (July 14, 2004). Among other examples, this report discusses instances where, both at the direction of government officials of Equatorial Guinea ("E.G.") and pursuant to suspect terms of the underlying contracts with the government, resource extraction companies diverted payments that should have been paid to the government to other accounts and to persons connected with E.G. government officials. *Id.* at 98 (finding that "Oil companies operating in Equatorial Guinea may have contributed to corrupt practices in that country by making substantial payments to, or entering into formal business ventures with, individual E.G. officials, their family members, or entities they control, with minimal public disclosure of their actions"); *see also id.* at 99 & 104 (explaining that the E.G. government instructs oil companies where to send payments owed to the government and has directed oil companies to divert payments for potentially corrupt purposes such as paying the educational costs of the children and other relatives of E.G. government officials). By requiring the public disclosure of the identity of the resource extraction issuers who are making payments, we believe this may help to deter their willingness to participate in any such diversions of government revenues or to enter into any contracts that have suspect payment terms.

<sup>282</sup> *See* Proposing Release, Section I.E.2.

<sup>283</sup> *See* letter from ACEP (public disclosure of payments made by company and by project are critical in order to ensure that statutory allocation of mining royalties to Ghanaian subnational governments was received.). *See also* Proposing Release at n.94 and accompanying text (providing several additional examples).

strongly supported our proposed approach. Specifically, the U.S. Department of State stated that the “level of transparency required by the proposed rule is key for ensuring that citizens have the necessary means to hold their governments accountable. As written, the rule’s requirements directly advance the United States’ foreign policy interests in increasing transparency and reducing corruption in the oil, gas, and minerals sectors and strengthen the United States’ credibility and ability to fight corruption more broadly[.]”<sup>284</sup> Similarly, USAID supported the proposed approach to defining project and explained that “[o]nly through more granular, project-level reporting will disclosure produce meaningful data for citizens, civil society, and local groups that seek to break cycles of corruption that involve government and corporations.”<sup>285</sup>

We acknowledge that some commenters, in particular the API and certain industry-affiliated commenters, challenged the appropriateness of the contract-based definition of project that we are adopting.<sup>286</sup> In particular, one of the principal criticisms of this definition was that “contract-specific disclosure actually frustrates Section 13(q)’s transparency objective.”<sup>287</sup> In advancing this view, the API contends that “Section 13(q)’s goal of transparency is best served by a definition of project that aggregates payments to a more useful—*i.e.*, higher—level of

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<sup>284</sup> See letter from State Department.

<sup>285</sup> See letter from USAID.

<sup>286</sup> The API asserts that the requirement that resource extraction issuers “disclose payments at the contract-level is unmoored from the statute.” Letter from API 1. The API, however, fails to explain why a contract-level focus is an unreasonable frame of reference for the term “project.” In commercial relations, contracts are frequently used to define the scope of a project that one party is undertaking for another. Also, as discussed above, the EU Directives and the ESTMA Specifications define project at the contract-level, further confirming that our definition is (at a minimum) reasonable. Furthermore, nothing in the text or legislative history of Section 13(q) forecloses a contract-level definition. For these reasons, and for the reasons that we expressed in Section II.E. of the Proposing Release, we continue to believe that a contract-based definition of “project” is reasonable and appropriate.

<sup>287</sup> See letter from API 1.



generality, instead of burying the public in an avalanche of data that is irrelevant to the law’s avowed purpose.”<sup>288</sup> After carefully considering the record (including filings that some companies have already prepared in accordance with a definition of project similar to our own), we do not share the API’s view that the disclosures we are requiring would be counterproductive. Many of the commenters who have demonstrated a detailed understanding of the various possible disclosure regimes, particularly those civil society organizations and related actors that have experience using revenue data and that have expressed the greatest interest in the data that would be released under the final rules, disagree and have explained through specific examples how the granular data would be important to help reduce corruption and promote accountability.<sup>289</sup> We are persuaded by both the arguments they have advanced and the evidence they have produced that a more granular approach to the definition of “project” like the one we are adopting today is necessary.<sup>290</sup>

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<sup>288</sup> See *id.* (“In addition, overly granular information could very likely make it more difficult for the public to make use of the disclosures.”) (emphasis in original).

<sup>289</sup> See letters from PWYP-US 1 and Oxfam-ERI.

<sup>290</sup> See letter from Oxfam-ERI and letters cited therein. The API asserts that contract-level reporting would “give insurgents or terrorists valuable information about where the government is most financially vulnerable” and “[i]nsurgents can use that information to plan attack[s].” Letter from API 1. We acknowledge that such groups can pose a threat. See, e.g., *Saboteurs Hit Nigerian Oil*, THE WALL STREET JOURNAL, at A1 (June 6, 2016). However, we note that it appears that substantial information is already reasonably available to the public about the major resource extraction projects and facilities operating in countries around the world. For example, an internet search reveals the following non-exhaustive list of items: William Pentland, *World’s Five Largest Offshore Oil Fields*, FORBES (Sept. 7, 2013), available at <http://www.forbes.com/sites/williampentland/2013/09/07/worlds-five-largest-offshore-oil-fields/#674f017b4bea>; James Burgess, *Six of the Largest Oil Fields in the World Still Waiting To Be Developed*, OilPrice.com (April 1, 2012), available at <http://oilprice.com/Latest-Energy-News/World-News/6-of-the-Largest-Oil-Fields-in-the-World-Still-Waiting-to-be-Developed.html>; Nick Cunningham, *Here Are the World’s Five Most Important Oil Fields*, OilPrice.com (June 5, 2014), available at <http://oilprice.com/Energy/Energy-General/Here-Are-The-Worlds-Five-Most-Important-Oil-Fields.html>; Fredrik Robelius, *Giant Oil Fields of the World* (presentation on May 23, 2005) (listing 25 of the world’s giant oil fields), available at [http://www.peakoil.net/AIMseminar/UU\\_AIM\\_Robelius.pdf](http://www.peakoil.net/AIMseminar/UU_AIM_Robelius.pdf); Christopher Helman, *In Depth: The Top 10 Oil Fields of the Future*, FORBES (Jan. 1, 2010), available at

We also believe that, in advancing its view, the API appears to have an unduly narrow understanding of Section 13(q)’s purpose. The API stated that Section 13(q) is limited “to provid[ing] the public with information about the overall revenue that national governments receive from natural resources, so that the public can seek to hold the government accountable for how much it is receiving and how it spends that money.”<sup>291</sup> We believe that Section 13(q)’s anti-corruption and accountability goals are broader and include, among other things, providing transparency to members of local communities so that they can hold their government officials and others accountable for the underlying resource extraction agreements to help ensure that those agreements themselves are not corrupt, suspect, or otherwise inappropriate. To cabin

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[http://www.forbes.com/2010/01/20/biggest-oil-fields-business-energy-oil-fields\\_slide.html](http://www.forbes.com/2010/01/20/biggest-oil-fields-business-energy-oil-fields_slide.html); U.S. Energy Information Administration, *Top 100 U.S. Oil and Gas Fields* (March 2015), available at <http://www.eia.gov/naturalgas/crudeoilreserves/top100/pdf/top100.pdf>. See also Perry-Castañeda Library Map Collection, available at [http://www.lib.utexas.edu/maps/map\\_sites/oil\\_and\\_gas\\_sites.html](http://www.lib.utexas.edu/maps/map_sites/oil_and_gas_sites.html) (last visited June 16, 2016) (providing web links to maps detailing location of oil fields in Asia, Europe, the Middle East, Africa, North America, and South America); Collection of the U.S. Geological Survey’s World Petroleum Assessment Publications, available at <http://energy.usgs.gov/OilGas/AssessmentsData/WorldPetroleumAssessment.aspx> (last visited June 16, 2016); INTERNATIONAL PETROLEUM ENCYCLOPEDIA FOR 2015 (includes certain oil field production statistics); NATURAL GAS INFORMATION 2015 (providing information on natural gas extraction pipeline trade); U.K. Oil and Gas: Field Data, available at <https://www.gov.uk/guidance/oil-and-gas-uk-field-data#oil-and-gas-wells> (last visited June 16, 2016) (data for oil and gas wells in the United Kingdom). The API’s comment letter does not acknowledge the information that is already reasonably available nor does it explain why the payment data that would be made available under the Commission’s rules would create an appreciably greater risk to safety than already may exist. In any event, as we discuss in Section II.I.3 below, the Commission will consider requests exemptive relief based on potential safety and terrorism concerns on a case-by-case basis, and resource extraction issues will have an opportunity in making such a request to demonstrate why an exemption is warranted with respect to a specific project, region, or country.

<sup>291</sup> See letter from API 1. The text of Section 13(q) itself suggests that the API’s understanding of the statute’s purpose is unduly narrow. Section 13(q) requires two broad categories of disclosure: “the type and total amount of [resource extraction] payments made to each government” (government-level disclosure), see Exchange Act Section 13(q)(2)(ii), and “the type and total amount of such payments made for each project” (project-level disclosure), see Exchange Act Section 13(q)(2)(i). Were the API correct that Section 13(q) is limited “to provid[ing] the public with information about the overall revenue that national governments receive from natural resources, so that the public can seek to hold the government accountable for how much it is receiving and how it spends that money,” Congress could have achieved this objective by simply mandating the government-level disclosure. That Congress did not stop there but instead also mandated project-level disclosure suggests to us that the anticorruption and accountability objectives underlying Section 13(q) are broader than the API asserts.

Section 13(q)'s goals as the API would do, in our view, would severely limit the potential transparency and anti-corruption benefits that the disclosures might provide to citizens of resource-rich countries.<sup>292</sup>

For the reasons discussed above, and for the reasons set forth in the Proposing Release, we believe that the definition of project that we are adopting will provide the type of granular transparency that is necessary to advance in a meaningful way the statute's anti-corruption and accountability objectives.<sup>293</sup> In arriving at our determination, we carefully considered the API Proposal.<sup>294</sup> Under that proposal, all of an issuer's resource extraction activities within the first-

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<sup>292</sup> We note that the API contends that a local community does not "need contract-level disclosure to determine that someone is drilling for oil nearby or whether the community is receiving enough money from its national government." See letter from API 1. However, the API does not explain how the fact that a local community knows that a nearby project is ongoing can—absent the type of granular disclosure that the final rules will provide—allow that community to assess where it is receiving the portion of total revenues from the national government that are associated with the project.

<sup>293</sup> We believe that the project-level public-disclosure mechanism that we are adopting is a sensible, carefully tailored policy prescription to help combat corruption and promote accountability in connection with resource extraction. We acknowledge, however, that this new transparency alone will not likely eliminate corruption in this area. As we stated in the Proposing Release, the ultimate impact of the disclosures will largely depend on the ability of all stakeholders—particularly civil society, media, parliamentarians, and governments—to use the available information to improve the management of their resource extractive sector. See Proposing Release, n.97 and accompanying text (quoting Alexandra Gillies & Antoine Heuty, *Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries*, 6 YALE J. INT'L AFF. 25 (2011)). We also find it relevant that the U.S. Government may have few other means beyond the disclosure mechanism required by Section 13(q) to directly target the myriad forms of corruption that can develop in connection with resource extraction (many of which extend well-beyond the quid-pro-quo payments that are the target of the Foreign Corrupt Practices Act), or to promote greater accountability in the use of extractive resources and the revenues generated therefrom.

<sup>294</sup> Among other arguments, the API stated that we should adopt the API Proposal in order to avoid potential constitutional issues under the First Amendment. See letter from API 1. We have carefully considered that argument but believe that the public disclosure of the type of commercial payment information involved here does not run afoul of the First Amendment. Section 13(q) and the rules that we are adopting require the disclosure of payment information involving resource extraction activities so that the citizens of each country and those acting on their behalf can help combat corruption in connection with the sale of their nation's oil, gas, and mineral resources, and can hold relevant actors accountable. See generally EITI Progress Report 2016, *From Reports to Results*, available at <http://progrep.eiti.org/2016/glance/what-eiti-does> (last visited June 16, 2016) ("A country's natural resources, such as oil, gas, metals and minerals, belong to its citizens."). We believe that the foreign policy interests involved here are compelling and substantial, as the administrative

level of subnational political jurisdiction of a country below the national government would be treated as a single “project” to the extent that these activities involve the same resource (e.g., oil, natural gas, coal) and to the extent that they are extracted in a generally similar fashion (e.g., onshore or offshore extraction, or surface or underground mining). To illustrate how its proposed definition would work, the API explained that all of an issuer’s extraction activities producing natural gas in Aceh, Indonesia (which comprises approximately 22,500 square miles) would be identified as “Natural Gas/Onshore/Indonesia/Aceh.” Similarly, the API explained that a project to develop oil offshore of Sakhalin Island, Russia (which comprises approximately 28,000 square miles) would be identified as “Oil/Offshore/Russia/Sakhalin.”<sup>295</sup>

We continue to believe that the reasons advanced in the Proposing Release demonstrating why the API Proposal’s definition of project is not appropriate remain valid and persuasive.<sup>296</sup>

Those include the following:

- We do not agree that engaging in similar extraction activities across the territory comprising the first-level subnational political jurisdictions of countries provides the type of defining

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record demonstrates, and the means we have chosen to help advance those interests (including the public disclosure of contract-level payment information) are carefully tailored to do so.

<sup>295</sup> The API included a third example, stating that “[o]nshore development in the Niger River delta area would be ‘Oil/Onshore/Nigeria/Delta.’” See letter from the API (Nov. 7, 2013) (emphasis added). We relied on that example in the Proposing Release, but in a recent comment, the API explained that the data for the “nine separate states in the Niger River Delta” would not in fact “be aggregated into one project”—“each state would be separate projects.” See letter from API 1.

<sup>296</sup> The API stated that Congress, by requiring payment disclosure with respect to “‘each project’” and “‘each government’,” “wanted companies to provide information about . . . the region in which the resource is located.” Letter from API 1. We agree with the API on this general point, but, as discussed above, we disagree that defining the region by the major subnational political jurisdiction is required (or even suggested) by the statute as the appropriate level of transparency. See also Proposing Release, Section II.E.

feature to justify aggregating those various activities together as a solitary project.<sup>297</sup>

Relatedly, by so heavily focusing on subnational political jurisdictions as a defining consideration, the API's definition appears to disregard the economic and operational considerations that we believe would more typically—and more appropriately—be relevant to determining whether an issuer's various extraction operations should be treated together as one project.

- Separately, the API Proposal in our view would not generate the level of transparency that, as discussed above, we believe would be necessary or appropriate to help meaningfully achieve the U.S. Government's anti-corruption and accountability goals. By permitting companies to aggregate their oil, natural gas, and other extraction activities over large territories, the API's definition would not provide local communities with payment information at the level of granularity necessary to enable them to know what funds are being generated from the

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<sup>297</sup> We also note the API Proposal appears to be inconsistent with how companies in the resource extraction sector often refer to their "projects" with foreign countries. Similar to the definition we are adopting, it appears that companies use the term project to refer to their concession-level or field-level operations. See, e.g., Texaco's web page available at <https://www.texaco.com/ecuador/en/history/background.aspx> (last visited June 16, 2016) (describing "Texaco Petroleum's involvement with the [Oreinte] project [that] was governed by a 28-year concession agreement"); Crescent Petroleum's web page available at <http://www.crescentpetroleum.com/> (last visited June 16, 2016) (listing under the heading "select projects" two concession-level extraction projects—the "Onshore Sharjah Concession" and "The Mubarek Field"); New World Oil and Gas web page available at <http://www.nwoilgas.com/projects/> (last visited June 16, 2016) (describing the "Blue Creek Project" as consisting of "one 315 sq km onshore oil concession divided into two blocks located in NW Belize"); The Dodsall Group web page available at <http://dodsall.com/mining/projects.shtml> (last visited June 16, 2016) (listing the company's various hydrocarbon and mineral projects, each of which is described at the concession level, including Itingi, which is a "concession from the Ministry of Energy and Minerals, Government of Tanzania, for mining at a location approximately 1,250 km South-West of Dar es Salaam" and "which is approximately 101 sq. km"). See also, e.g., Chevron web page available at <https://www.chevron.com/projects> (listing as separate projects various oil fields around the globe, including the Kern River Field in California, the Captain EOR Field in the United Kingdom, and the Duri Field in Indonesia); British Petroleum's web page available at <http://tools.bp.com/investor-tools/upstream-major-projects-map.aspx> (last visited June 16, 2016) (describing various British Petroleum projects by reference to field operations, such as the Amenas "wet-gas field," the Culzean "lean gas condensate field," and the "Clair Ridge Project" that "develops new resources from the giant Clair Field which . . . extends over an area of 85 square miles").

extraction activities in their particular areas.<sup>298</sup> This would deprive them of the ability, for example, to assess the relative costs and benefits of the particular license or lease to help ensure that the national government or subnational government has not entered into a corrupt, suspect, or otherwise inappropriate arrangement.

Beyond these considerations, our own experience in implementing the Foreign Corrupt Practices Act leads us to believe that the granular disclosures that our definition will produce will better help combat corruption than the aggregated (and anonymized) disclosures that the API Proposal would yield. We have found that requiring issuers to maintain detailed, disaggregated records of payments to government officials significantly decreases the potential for issuers and others to hide improper payments and as such their willingness to make such payments. This experience has led us to believe that, where corruption is involved, detailed, disaggregated

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<sup>298</sup> An additional deficiency with the API Proposal, which relies on the major subnational political jurisdiction as the defining characteristic of “project,” is that it could produce vastly disparate transparency from one jurisdiction to another. Residents of subnational jurisdictions that occupy a relatively small area (e.g., State of Sergipe, Brazil (approximately 8,400 square miles)) would receive data that, because of the jurisdictions limited size, may be more localized; but residents of subnational jurisdictions that are relatively large in size (e.g., State of Pará, Brazil (approximately 481,700 square miles)) would receive disclosures that provide potentially less localized transparency given the potentially large number of extractive activities that might be included within the project-level disclosure. By contrast, as we explained in the Proposing Release (and which no commenter disputed), oil, gas, and mining contracts not only typically cover areas that are much smaller than a major subnational political jurisdiction, there is also a relative degree of uniformity in the size of the covered area. For example, we explained that the typical contract area for oil and gas exploration is between approximately 400 to 2,000 square miles. See Proposing Release, Section II.E.2. Also, mining concessions typically cover only a single mine. Id. Thus, we believe that our contract-level definition of project has the additional advantage of producing a level of transparency that will be more consistent across jurisdictions than the API Proposal.

We also note that the API asserts that the contract-level approach to project may, “at times, cover a broad geographic area.” Letter from API 1. While we acknowledge that this may occur, we believe (as the discussion above demonstrates) that the potentially broad geographic areas that our definition may in some instances apply to are still much smaller than the geographic areas that the API’s proposed definition of project would cover. Moreover, as we explained in the Proposing Release, all of the alternative approaches to defining project that were recommended would likely result in disclosure that is more aggregated (and therefore less detailed) on a geographical basis and would thus potentially be less useful for purposes of realizing the statute’s objectives of increasing payment transparency to combat global corruption and promote accountability. See Proposing Release, Section II.E.2.

disclosures of payments minimizes the potential to engage in corruption undiscovered. We thus believe that the more granular the disclosure in connection with the transactions between governments and extractive corporations, the less room there will be for hidden or opaque behavior.<sup>299</sup>

We acknowledge that the API Proposal's definition of "project" could lower the potential for competitive harm when compared to our proposed approach, which requires public disclosure of contract-level data. Nevertheless, we continue to believe that the potential for competitive harm resulting from the final rules is significantly reduced, although not eliminated, by the adoption of a similar definition of "project" in the European Union and Canada.<sup>300</sup> In this regard, we note that the transposition of the EU Directives has progressed since we issued the Proposing Release and Canada has finalized the ESTMA Guidelines and ESTMA Specifications,<sup>301</sup> and some issuers have already disclosed (and we expect others will shortly be disclosing) such project level information.<sup>302</sup> Furthermore, several commenters have questioned

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<sup>299</sup> We also believe that the more granular disclosures that will result from the final rules relative to the API Proposal will help provide a powerful incentive for community-based involvement in monitoring corruption and holding officials accountable by making clear to those communities in a direct and concrete fashion what revenues are being generated from their local natural resources.

<sup>300</sup> We disagree with the API's assertion that the implementation of the EU Directives and ESTMA does not mitigate competitive harm because "[f]orty-six of the top 100 oil and gas companies are listed only in the United States." See letter from API 1. Although these companies may lose the competitive advantage they previously had in the absence of rules implementing Section 13(q), an argument disputed by other commenters, we believe that any competitive harm caused by the final rules will be significantly less than what would occur in the absence of the EU Directives and ESTMA.

<sup>301</sup> See ESTMA Guidance (2016) and ESTMA Technical Reporting Specifications (2016).

<sup>302</sup> For example, see the following reports:

- Royal Dutch Shell plc, *Report on Payments to Governments for the Year 2015*, available at <http://www.shell.com/sustainability/transparency/revenues-for-governments.html> ("RDS Report");
- Total, *2015 Registration Document* (Mar. 15, 2016), available at [http://www.total.com/sites/default/files/atoms/files/registration\\_document\\_2015.pdf](http://www.total.com/sites/default/files/atoms/files/registration_document_2015.pdf) ("Total Report");

the API's assertion that a more granular definition of "project" would reveal commercially sensitive information.<sup>303</sup> For example, one of these commenters argued that "contract terms are generally known within the industry."<sup>304</sup> We also believe that, beyond the potential for reduced competitive harm, a disclosure requirement that is in accordance with the emerging international transparency regime is consistent with Section 13(q), including its instruction that, "[t]o the extent practicable," the Commission's rules "shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals."<sup>305</sup> Thus, we believe that the definition of project

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- Tullow Oil plc, *2015 Annual Report & Accounts* (Mar. 15, 2016), available at [http://www.tulloil.com/Media/docs/default-source/3\\_investors/2015-annual-report/tullow-oil-2015-annual-report-and-accounts.pdf](http://www.tulloil.com/Media/docs/default-source/3_investors/2015-annual-report/tullow-oil-2015-annual-report-and-accounts.pdf) ("Tullow Report")
  - BHP Billiton, *Economic Contribution and Payments to Governments Report 2015* (Sept. 23, 2015), available at <http://www.bhpbilliton.com/~media/bhp/documents/investors/annual-reports/2015/bhpbillitoneconomiccontributionandpaymentstogovernments2015.pdf> ("BHP Report");
  - Statoil, *2015 Payments to Governments*, available at [http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2015/Documents/DownloadCentreFiles/01\\_KeyDownloads/2015%20Payments%20to%20governments.pdf](http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2015/Documents/DownloadCentreFiles/01_KeyDownloads/2015%20Payments%20to%20governments.pdf) ("Statoil Report");
  - Kosmos Energy, *Transparency*, available at <http://www.kosmosenergy.com/responsibility/transparency.php> ("Kosmos Report").

See also letters from Oxfam America (May 2, 2016) ("Oxfam 2") and Publish What You Pay – US (Apr. 7, 2016) ("PWYP-US 5").

<sup>303</sup> See letters from Oxfam American and EarthRights International (Mar. 8, 2016) ("Oxfam-ERI") and PWYP-US 1.

<sup>304</sup> See letter from Oxfam-ERI (noting that host countries and competitors, including state-owned companies, have the resources to access services that provide the information that the API and others have argued is commercially sensitive).

<sup>305</sup> See generally The Brussels G7 Summit Declaration ¶17 (June 5, 2014), available at [http://europa.eu/rapid/press-release\\_MEMO-14-402\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-402_en.htm) (last visited June 16, 2016) ("We remain committed to work towards common global standards that raise extractives transparency, which ensure disclosure of companies' payments to all governments. We welcome the progress made among G7 members to implement quickly such standards. These global standards should continue to move towards project-level reporting."). We acknowledge that Congress's instruction to "support the commitment of the Federal Government to international transparency promotion efforts" is subject to the qualification "[t]o the extent practicable." See Exchange Act Section 13(q)(2)(E). We believe that our project-level public disclosure regime comports with this instruction. It is now apparent that the reporting that we are requiring is practicable—that is, it is capable of being done or accomplished—because companies are already making similar disclosures pursuant to the EU Directives.



that we are proposing is, on balance, necessary and appropriate notwithstanding the potential competitive concerns that may result in some instances.<sup>306</sup>

We are also adopting the proposed approach to aggregating multiple agreements. Despite the concerns of some commenters that the standards in the proposed rule for aggregating multiple projects could result in a reduction of meaningful payment information, we continue to believe that the additional flexibility afforded by this approach would benefit issuers and would have limited impact on the overall level of transparency provided by the rules. As noted above, we believe that there are relatively minor differences between the approach we are adopting today and other international regimes<sup>307</sup> and note that many commenters supported the proposed definition.<sup>308</sup> As we indicated in the Proposing Release, we understand that operations under one agreement may lead to the parties entering into a second agreement for operations in a geographically contiguous area. If a change in market conditions or other circumstances

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Moreover, as both the Department of State and USAID have confirmed, our disclosure regime furthers the Federal Government's foreign policy interests in promoting international transparency by, among other things, fostering compatibility with the existing European Union and Canadian transparency regimes. We also believe that our, contract-based, public disclosure regime is consistent with, and furthers, the EITI, which, as noted in the comment letter from USAID, encourages implementing countries "to publicly disclose any contracts and licenses that provide the terms attached to the exploitation of oil, gas and minerals." EITI Standard at 19. See note 261 above and accompanying text.

<sup>306</sup> In this regard, and as we discuss in Section II.G.3 below, we will consider using our existing authority under the Exchange Act to provide exemptive relief at the request of a resource extraction issuer, if and when warranted. We believe that this case-by-case approach to exemptive relief would permit us to tailor any relief to the particular facts and circumstances presented, which could include facts related to potential competitive harm.

<sup>307</sup> The EU Directives and ESTMA Specifications both state that a "project" means "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. Nonetheless, if multiple such agreements are substantially interconnected, this shall be considered a project." Article 41(4) of the EU Accounting Directive; ESTMA Specifications, Section 2.3.2 The EU Directives and ESTMA Specifications go on to define "substantially interconnected" as "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." Recital 45 of the EU Accounting Directive; ESTMA Specifications, Section 2.3.2.

<sup>308</sup> See note 259 above and accompany text.

compels a government to insist on different terms for the second agreement, then under our definition the use of those different terms by themselves would not preclude treating the second agreement as the same project when, operationally and geographically, work under the second agreement is a continuation of work under the first. In that way, it should reduce the burdens associated with disaggregating payments.

## **F. Definition of “Foreign Government” and “Federal Government”**

### **1. Proposed Rules**

In Section 13(q), Congress defined “foreign government” to mean a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, while granting the Commission the authority to determine the scope of the definition.<sup>309</sup> Consistent with the 2012 Rules, we proposed a definition of “foreign government” that would include a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.<sup>310</sup> The proposed definition is consistent with Section 13(q), which requires an issuer to identify, for each disclosed payment, the government that received the payment and the country in which the government is located.<sup>311</sup> It is also consistent with the EU Directives, ESTMA Guidance, and the EITI.<sup>312</sup> The Proposing Release also indicated that “Federal Government” means the United States Federal Government.

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<sup>309</sup> 15 U.S.C. 78m(q)(1)(B).

<sup>310</sup> See proposed Item 2.01(c)(7) of Form SD.

<sup>311</sup> See 15 U.S.C. 78m(q)(2)(D)(ii)(V).

<sup>312</sup> See EU Accounting Directive, Art. 41(3) (“Government means any national, regional or local authority . . .”); ESTMA Guidance, Section 3.2 (“[A] Payee is . . . any government . . . at a national, regional, state/provincial or

## **2. Comments on the Proposed Rules**

The Proposing Release solicited comment on the scope of the definitions of “foreign government” and “Federal Government.” For example, we asked whether the definition of “foreign government” should include a foreign government, a department, agency, or instrumentality of a foreign government, a company owned by a foreign government, or anything else. We also asked about the level of ownership that would be appropriate for a company to be considered owned by a foreign government. With respect to “Federal Government,” we requested comment on whether we should provide additional guidance on its meaning.

We received few comments on this aspect of the proposal. Several commenters generally supported the proposed definition of “foreign government.”<sup>313</sup> These commenters, however, recommended that the rules be revised so that “a company owned by a foreign government” would include a company where the “government has a controlling shareholding, enabling it to make the major decisions about the strategy and activities of the company,” rather than requiring majority ownership as proposed. As for the definition of “Federal Government,” one commenter supported the proposed approach.<sup>314</sup>

## **3. Final Rules**

We are adopting the definitions of “foreign government” and “Federal Government” as proposed. Under the final rules, a “foreign government” is defined as a foreign government, a department, agency, or instrumentality of a foreign government, or a company at least majority

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local/municipal level . . .”); EITI Standard, at 25 (requiring the disclosure and reconciliation of material payments to subnational government entities in an EITI Report).

<sup>313</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>314</sup> See letter from Department of Interior.

owned by a foreign government. Foreign government includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.<sup>315</sup> “Federal Government” means the U.S. Federal Government and does not include subnational governments within the United States.

As we discussed in the Proposing Release, for purposes of identifying the foreign governments that received the payments, an issuer must identify the administrative or political level of subnational government that is entitled to a payment under the relevant contract or foreign law. Also, if a third party makes a payment on a resource extraction issuer’s behalf, disclosure of that payment is covered under the final rules. Additionally, as proposed, a company owned by a foreign government means a company that is at least majority-owned by a foreign government.<sup>316</sup> Although we acknowledge the concerns of the commenters that argued for a more expansive definition, we believe it would be difficult for issuers to determine when the government has control over a particular entity outside of a majority-ownership context. In this regard, we note that the statute refers to a company “owned” by a foreign government, not “controlled” by a foreign government. The control concept, of course, is explicitly used in other contexts in Section 13(q).<sup>317</sup>

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<sup>315</sup> To the extent that aboriginal, indigenous, or tribal governments are subnational governments in foreign countries, payments to those government entities would be covered by the final rules.

<sup>316</sup> See proposed Item 2.01(c)(7) of Form SD.

<sup>317</sup> Compare Section 13(q)(1)(B) with Section 13(q)(2)(A).

## **G. Annual Report Requirement**

### **1. Proposed rules**

We proposed requiring issuers to make their resource extraction payment disclosure annually on Form SD. The proposed amendments to Form SD required issuers to include a brief statement in the body of the form directing readers to the detailed payment information provided in the exhibits to the form. Consistent with the approach under ESTMA, the proposed rules also required resource extraction issuers to file Form SD on EDGAR no later than 150 days after the end of the issuer's most recent fiscal year.<sup>318</sup>

### **2. Comments on the Proposed Rules**

The Proposing Release solicited comment on whether issuers should provide the payment disclosure mandated under Section 13(q) on Form SD or whether that information should be provided on Forms 10-K, 20-F, or 40-F or a different form. We also asked whether the proposed disclosure should be subject to the officer certifications required by Exchange Act Rules 13a-14 and 15d-14 or a similar requirement.<sup>319</sup> In addition to requesting comment on the proposed 150 day filing deadline, we solicited comment on whether the rules should require disclosure on a fiscal year basis or an annual year basis, whether we should provide a mechanism for requesting extensions (such as by amending Exchange Act Rule 12b-25<sup>320</sup>), and whether the rules should provide an accommodation to filers that are subject to both Rules 13p-1 and 13q-1, such as an alternative filing deadline.

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<sup>318</sup> See proposed General Instruction B.2 to Form SD.

<sup>319</sup> We solicited comment on a similar question in Section II.G.6 of the Proposing Release. We address the responses to that request for comment in this section as well.

<sup>320</sup> 17 CFR 240.12b-25.

Several commenters specifically supported using Form SD, and no commenters suggested an alternative approach.<sup>321</sup> Nevertheless, some of the commenters conditioned their support for Form SD on the disclosures being filed rather than furnished.<sup>322</sup> The commenters addressing the filing deadline all supported the proposed 150 day requirement,<sup>323</sup> although several commenters recommended providing a phase-in period for newly public companies or newly acquired companies.<sup>324</sup> One of these commenters agreed with our assessment that the proposed deadline would reduce compliance costs by allowing issuers to use their existing processes and reporting systems to produce the disclosure.<sup>325</sup> Other commenters noted that the proposal was consistent with the Canadian and United Kingdom regimes.<sup>326</sup> These commenters also supported allowing issuers to rely on Rule 12b-25 to request extensions, subject to certain conditions.

No commenters suggested requiring officer certifications. Some commenters stated that certifications were unnecessary in light of the possibility for Exchange Act Section 18 liability.<sup>327</sup> One commenter opposed such a requirement, stating that it would add significant costs with little benefit.<sup>328</sup>

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<sup>321</sup> See letters from PWYP-US 1 and USSIF. See also letters from ACEP; Encana; Global Witness 1; and Oxfam 1.

<sup>322</sup> See letter from PWYP-US 1. See also letters from ACEP; Encana; Global Witness 1; and Oxfam 1.

<sup>323</sup> See letters from Encana and PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>324</sup> See letters from Cleary and Michael R. Littenberg, Ropes & Gray (Feb. 16, 2016) (“Ropes & Gray”).

<sup>325</sup> See letter from Encana.

<sup>326</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>327</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>328</sup> See letter from Encana.

Some commenters specifically supported the proposed approach of using an issuer's fiscal year as the reporting period.<sup>329</sup> These commenters, however, incorrectly assumed that the data was tagged by quarterly period so that users could generate their own calendar year reports if they chose to do so. It is unclear whether those commenters would have recommended a different approach if, as proposed, the data is not tagged by fiscal quarter.<sup>330</sup> The Department of Interior did not make a specific recommendation regarding the reporting period, but noted that the USEITI MSG decided to use calendar year reporting for the USEITI because it reduced the burden on reporting companies, many of which use the calendar year as their fiscal year.<sup>331</sup>

### **3. Final Rules**

We are adopting the final rules as proposed, with two new targeted exemptions that provide for transitional relief or delayed reporting in limited circumstances. These exemptions provide a longer transition period for recently acquired companies that were not previously subject to reporting under the final rules and a one-year delay in reporting payments related to exploratory activities.<sup>332</sup>

Section 13(q) requires a resource extraction issuer to provide the required payment disclosure in an annual report but otherwise does not specify the location of the disclosure. We believe Form SD is an appropriate form since it is already used for specialized disclosure not

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<sup>329</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>330</sup> The proposed rules provided for tagging of the "financial period in which the payments were made" and defined "financial period" as "the fiscal year in which the payment was made." See proposed Item 2.01(a)(5), (c)(6) of Form SD. The final rules take the same approach, although we have clarified the text so as to avoid similar confusion. See Item 2.01(a)(5).

<sup>331</sup> See letter from Department of Interior.

<sup>332</sup> See Section II.I.3 below for a discussion of the latter provision.

included within an issuer's periodic or current reports, such as the disclosure required by the rule implementing Section 1502 of the Act.<sup>333</sup> We also believe that using Form SD would facilitate interested parties' ability to locate the disclosure and address issuers' concerns about providing the disclosure in their Exchange Act annual reports on Forms 10-K, 20-F, or 40-F.<sup>334</sup> For example, requiring the disclosure in a separate form, rather than in issuers' Exchange Act annual reports, eliminates concerns about the disclosure being subject to the officer certifications required by Exchange Act Rules 13a-14 and 15d-14 and allows the Commission to adjust the timing of the submission without directly affecting the broader Exchange Act disclosure framework.<sup>335</sup>

While Section 13(q) mandates that a resource extraction issuer include the relevant payment disclosure in an "annual report," it does not specifically mandate the time period in which a resource extraction issuer must provide the disclosure. We continue to believe that the fiscal year is the more appropriate reporting period for the payment disclosure. Despite the USEITI's use of calendar year reporting, we believe fiscal year reporting would reduce resource extraction issuers' compliance costs by allowing them to use their existing tracking and reporting systems for their public reports to also track and report payments under Section 13(q). Finally,

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<sup>333</sup> Rule 13p-1 [17 CFR 240.13p-1]. See also Exchange Act Release No. 34-67716 (Aug. 22, 2012), 77 FR 56273 (Sept. 12, 2012) ("Conflict Minerals Release").

<sup>334</sup> See also 2012 Adopting Release, nn.366-370 and accompanying text. Under the rules proposed in the 2010 Proposing Release, a resource extraction issuer would have been required to furnish the payment information in its annual report on Form 10-K, Form 20-F, or Form 40-F. Certain commenters continued to support this approach prior to the Proposing Release. See letter from Susan Rose-Ackerman (Mar. 28, 2014) ("[t]here is no need for the cost of a separate report."). No commenters raised similar concerns after the Proposing Release.

<sup>335</sup> In this regard, we previously considered permitting the resource extraction payment disclosure to be filed in an amendment to Form 10-K, 20-F, or 40-F, as applicable, but were concerned that this might give the false impression that a correction had been made to a previous filing. See 2012 Adopting Release, n.379 and accompanying text.



we note that ESTMA and the EU Directives also require reporting based on the fiscal year, with ESTMA using the same deadline contained in the proposed rules.<sup>336</sup> Thus, using a fiscal year reporting period should promote consistency and comparability across payment transparency regimes.

We are also adopting the proposed 150 day deadline. As discussed above, none of the commenters on the Proposing Release suggested a different deadline, and we continue to believe that it is reasonable to provide a filing deadline that is later than the deadline for an issuer's annual report under the Exchange Act. Although certain commenters discussed above supported allowing issuers to rely on Rule 12b-25 to request an extension to the filing deadline, we do not believe that is necessary. In this regard, we note that none of the potential issuers that provided comments recommended including an extension process. Moreover, we believe 150 days is sufficient time to prepare timely disclosure regarding the prior fiscal year.

Nevertheless, we do believe it is appropriate to provide transitional relief for recently acquired companies where such companies were not previously subject to the rules, as recommended by certain commenters.<sup>337</sup> As these commenters noted, we included a similar provision in Rule 13p-1.<sup>338</sup> The final rules therefore allow issuers that have acquired or

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<sup>336</sup> See ESTMA, Section 9(1) ("Every entity must, not later than 150 days after the end of each of its financial years, provide the Minister with a report that discloses, in accordance with this section, the payments that it has made during that year."); EU Accounting Directive, Art. 43(2) ("The report shall disclose the following information . . . in respect of the relevant financial year."); EU Transparency Directive, Art. 6 ("The report shall be made public at the latest six months after the end of each financial year . . .").

<sup>337</sup> See letters from Cleary and Ropes & Gray.

<sup>338</sup> Instruction (3) to Item 1.01 of Form SD states that "[a] registrant that acquires or otherwise obtains control over a company that manufactures or contracts to manufacture products with conflict minerals necessary to the functionality or production of those products that previously had not been obligated to provide a specialized disclosure report with respect to its conflict minerals will be permitted to delay reporting on the products

otherwise obtain control over an issuer whose resource extraction payments are required to be disclosed under the final rules, and that has not previously been obligated to provide such disclosure pursuant to Rule 13q-1 or another “substantially similar” jurisdiction’s requirements in its last full fiscal year, to not commence reporting payment information for the acquired company until the Form SD filing for the fiscal year immediately following the effective date of the acquisition.<sup>339</sup> Unlike the targeted exemption for payments related to exploratory activities described in Section II.I.3 below, the excluded payment information is not required to be disclosed in the Form SD filing covering the immediately following fiscal year. We do not believe it is necessary to provide similar transitional relief for newly acquired companies that were already required to report such payments or companies conducting initial public offerings. Such companies should already be familiar with the reporting requirements or would have sufficient notice of them to establish reporting systems and prepare the appropriate disclosure prior to undertaking the initial public offering.

## **H. Public Filing**

### **1. Proposed Rules**

Recognizing the purposes of Section 13(q) and the discretion provided by the statute, and taking into account the views expressed by various commenters,<sup>340</sup> we proposed requiring resource extraction issuers to provide the resource extraction payment disclosure publicly. We

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manufactured by the acquired company until the end of the first reporting calendar year that begins no sooner than eight months after the effective date of the acquisition.” The final rules differ, however, from what is provided for under Rule 13p-1 because disclosure under Rule 13p-1 occurs on a calendar year basis, not a fiscal year basis.

<sup>339</sup> See Item 2.01(b) of Form SD.

<sup>340</sup> See Proposing Release, n.241 and accompanying text.

believed that requiring public disclosure, including the issuer's name, would best accomplish the purpose of the statute. As explained more fully below, we were not persuaded by certain commenters' suggestion that issuers should submit their annual reports to the Commission confidentially and that the Commission should use those confidential submissions to produce an aggregated, anonymized compilation that would be made available to the public.<sup>341</sup>

## **2. Comments on the Proposed Rules**

In the Proposing Release we solicited comment on whether issuers should be permitted to submit the required payment disclosure on a confidential basis. We also asked whether issuers should be required to file certain aggregate information publicly if we allow them to file certain disaggregated information with us confidentially.

Numerous commenters supported, as a general policy matter, the concept of publicly disclosing payment information.<sup>342</sup> A number of other commenters supported public filing in the specific manner we proposed.<sup>343</sup> These commenters generally stated that allowing for confidential submission would undermine the transparency goals of Section 13(q) and compromise the usefulness of the disclosure. For example, the Department of Interior stated that permitting confidential disclosure would contravene the transparency objectives of the statute and that continued successful USEITI implementation requires the public disclosure of payments for all revenue streams and by project.<sup>344</sup>

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<sup>341</sup> See Proposing Release, Section II.G.2. See also id. at n.301.

<sup>342</sup> See Form Letter A and Form Letter B.

<sup>343</sup> See letters from ACEP; Bean; Department of Interior; State Department; Global Witness 1; Peck & Chayes; Oxfam 1; PWYP-US 1; Quinones; Sen. Cardin et al.; Sen. Lugar et al.; TI-USA; USAID; and USSIF.

<sup>344</sup> See letter from Department of Interior.

On the other hand, several commenters recommended allowing for confidential submission of the detailed payment information, which would then be aggregated in an anonymized format by the Commission before being publicly released.<sup>345</sup> These commenters stated that their recommended approach would reduce the burden and competitive harm caused by public disclosure of each issuer's specific filings. These commenters said that such public disclosure forces issuers to reveal highly confidential, commercially-sensitive information and could endanger the safety of an issuer's employees. They also stated that these harms would not be mitigated by the European Union or Canadian disclosure regimes because 46 of the top 100 oil and gas companies are listed only in the United States, with many having no reportable operations in Europe or Canada, or only limited operations in those jurisdictions conducted through subsidiaries.

### **3. Final Rules**

Section 13(q) provides the Commission with the discretion to require public disclosure of payments by resource extraction issuers or to permit confidential filings.<sup>346</sup> In addition, the statute directs the Commission to provide, to the extent practicable, a public compilation of this disclosure. Consistent with the proposed rules, we continue to believe that requiring public disclosure of each issuer's specific filings (including all the payment information) would best accomplish the purpose of the statute. Therefore, taking into account commenters' views, we are exercising the discretion to adopt final rules that require issuers to disclose the full payment information publicly, including the identity of the issuer.

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<sup>345</sup> See letters from API 1; Chevron; ExxonMobil 1.

<sup>346</sup> See API v. SEC, 953 F. Supp. 2d 5 (D.D.C., 2013).

As discussed in the Proposing Release, several factors continue to influence our approach.<sup>347</sup> First, the statute requires us to adopt rules that further the interests of international transparency promotion efforts, to the extent practicable.<sup>348</sup> In this regard, we find it significant that several existing transparency regimes now require public disclosure of each reporting company’s annual report, including the identity of the company, without exception.<sup>349</sup> A public disclosure requirement under Section 13(q) would further the statutory directive to support international transparency promotion efforts by enhancing comparability among companies, as it would increase the total number of companies that provide public, project-level disclosure. It would also be consistent with the objective of ensuring that the United States is a global “leader in creating a new standard for revenue transparency in the extractive industries.”<sup>350</sup>

Second, the United States is currently a candidate country under the EITI, which requires it to provide a framework for public, company-by-company disclosure in the EITI report. At least with respect to reporting of payments to the Federal Government, requiring issuers to provide their annual reports publicly on Form SD is consistent with the U.S. Government’s

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<sup>347</sup> We incorporate the discussion from Section II.G.2 of the Proposing Release.

<sup>348</sup> Section 13(q)(2)(E).

<sup>349</sup> See, e.g., ESTMA Specifications, Section 2.4 (“Reporting Entities are required to publish their reports on the Internet so they are available to the public”); EITI Standard (2013) at 6 (requiring all EITI reports to show payments by individual company rather than aggregated data) and EITI Standard (2016) at Section 2.5(c) (in addition to individual company disclosure, requiring disclosure of the company’s beneficial owners in EITI reports by 2020); and EU Accounting Directive Arts. 42(1) and 45(1) (requiring disclosure of payments to governments in a report made public on an annual basis and published pursuant to the laws of each member state.)

<sup>350</sup> 156 CONG. REC. S5873 (July 15, 2010) (Statement of Senator Cardin); id. at S3815 (May 17, 2010) (Statement of Senator Cardin) (describing Congress’s intention to create “a historic transparency standard that will pierce the veil of secrecy that fosters so much corruption and instability in resource-rich countries”).

policy commitments under the USEITI. As noted above, the Department of Interior has stated that permitting confidential disclosure would contravene USEITI implementation.

Third, we continue to believe that exercising our discretion to require public disclosure of the information required to be submitted under the statute is supported by the text, structure, and legislative history of Section 13(q).<sup>351</sup> In our view, our exercise of discretion in this manner is consistent with the statute’s use of the term “annual report,” which is typically a publicly filed document,<sup>352</sup> and Congress’s inclusion of the statute in the Exchange Act, which generally operates through a mechanism of public disclosure.<sup>353</sup> Furthermore, we observe that Section 13(q) requires issuers to disclose detailed information in a number of categories, without specifying any particular role for the Commission in using that information. For example, Section 13(q) requires disclosure of “the business segment of the resource extraction issuer that made the payments” and “the currency used to make the payments.” We generally do not

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<sup>351</sup> We acknowledge that the statutory interpretation arguments we identify do not demonstrate an unambiguous Congressional intent to require public disclosure. Nevertheless, these arguments, and the related ambiguity, do lead us to reject the API’s contrary contention that “the plain language of the statute confirms that the Commission should require companies to disclose payment information to the Commission confidentially[.]” Letter from API 1 (emphasis added). We believe that, at a minimum, Congress provided the Commission with discretionary authority. As such, based on our assessment of the record evidence and our weighing of the various policy considerations, we have determined to exercise that discretion by requiring public disclosure of each issuer’s annual report on Form SD. Moreover, we believe that the statutory interpretation considerations discussed in this Section II.H demonstrate that our approach is a permissible under the statute.

<sup>352</sup> See e.g., Form 10-K, Form 20-F, Form 10-Q, Form 8-K, etc.

<sup>353</sup> The Exchange Act is fundamentally a public disclosure statute. See generally Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 12 (1985) (“the core mechanism” is “sweeping disclosure requirements” that allow “shareholder choice”); Longman v. Food Lion, Inc., 197 F.3d 675, 682 (4th Cir. 1999) (embodies a “philosophy of public disclosure”); Franklin v. Kaypro Corp., 884 F.2d 1222, 1227 (9th Cir. 1987) (“for[es] public disclosure of facts”). Accordingly, the reports that public companies are required to submit under the Exchange Act—such as the annual report on Form 10-K giving a comprehensive description of a public company’s performance—have always been made public. Adding a new disclosure requirement to the Exchange Act, and doing so for the clear purpose of fostering increased transparency and public accountability, is a strong indication that Congress intended for the disclosed information to be made public.

believe that these data points would be useful to the Commission for preparing an aggregated, anonymized compilation as the data points would not be necessary to present aggregated payment information and otherwise would not be reflected in such a compilation. We believe that this is a further indication that Congress intended for the information to be made publicly available. We believe that this is a further indication that Congress intended for the information to be made publicly available. Finally, neither the statute’s text nor legislative history includes any suggestion that the required payment disclosure should be confidential. In fact, the legislative history supports our view that the information submitted under the statute should be publicly disclosed.<sup>354</sup>

More fundamentally, we believe that the public release of issuers’ annual reports is necessary to achieve the U.S. interest in providing a level of payment transparency that will help combat corruption and promote accountability in resource-rich countries, as Section 13(q) was intended to do. The comments that we have received, as well as our own consideration of the

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<sup>354</sup> See, e.g., 156 CONG. REC. S3976 (May 19, 2010) (Statement of Senator Feingold) (“This amendment would require companies listed on U.S. stock exchanges to disclose in their SEC filings extractive payments made to foreign governments for oil, gas, and mining. This information would then be made public, empowering citizens in resource-rich countries in their efforts to combat corruption and hold their governments accountable.”); id. at S5872 (July 15, 2010) (Sen. Cardin) (“This [amendment] will require public disclosure of those payments.”); see also id. at S3649 (May 12, 2010) (proposed “sense of Congress” accompanying amendment that became Section 13(q)) (encouraging the President to “work with foreign governments” to establish their own “domestic requirements that companies under [their jurisdiction] publicly disclose any payments made to a government” for resource extraction) (emphasis added); id. at H5199 (June 29, 2010) (Joint Explanatory Statement of the Committee of Conference) (the amendment “requires public disclosure to the SEC of any payment relating to the commercial development of oil, natural gas, and minerals”) (emphasis added).

record and the views that we have received from other U.S. and foreign governmental agencies with expertise in this area, persuade us of this.<sup>355</sup>

We have carefully considered the API's assertion that the "purpose of enabling people to hold their governments accountable for the revenues generated from resource development is achieved as long as citizens know the amount of money the government receives, not the companies that make each individual payment."<sup>356</sup> We have also carefully considered the API's related assertion that the Commission has failed "to connect [Section 13(q)'s] objectives to the specific approach in the proposed rule—mandatory public disclosure by issuers in their annual reports, as opposed to confidential disclosure by issuers followed by a public compilation produced by the Commission."<sup>357</sup> For the reasons discussed below, we do not agree with either of these assertions.

We believe that disclosing an issuer's identity is important to help achieve the objectives of Section 13(q). In this regard, we note that one of the proponents of the API's approach stated that "[f]or the API model to work," each payer's identity must be revealed.<sup>358</sup> We further note

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<sup>355</sup> The API asserted that publication of each issuer's annual report could cause competitive harm, but that keeping the disclosures confidential with the public release of only an aggregated, anonymized compilation will "minimize . . . the competitive harm to issuers by omitting the most sensitive data." See letter from API 1. We believe the targeted exemption we are providing in connection with payments relating to exploratory activities should help to mitigate such competitive harms. See Section II.I.3 below. In addition, as we discuss in the economic analysis, see Section III.B.2.c below, we believe that the other claimed competitive harms may be overstated. Moreover, the data that the API would exclude from public disclosure is, as we discuss above, necessary to provide the type of granular and localized transparency that will, in our view, help to combat corruption and promote accountability. We thus believe that, on balance, the potential competitive harms that might result from the public disclosure of each issuer's annual report is necessary and appropriate in furtherance of Section 13(q)'s objectives.

<sup>356</sup> See letter from API 1.

<sup>357</sup> See id.

<sup>358</sup> See letter from ASP.



that, after a decade of experience, the EITI (to which the API and many of its members are active participants) has now determined that company-specific, project-level disclosure is necessary to further the EITI's goals.<sup>359</sup>

Furthermore, as we explained in the Proposing Release, the record supports a number of specific ways in which company-specific public disclosures can facilitate the twin goals of helping to reduce corruption in the extractives sector and promoting governmental accountability. For example, public disclosure of company-specific, project-level payment information may help assist citizens, civil society groups, and others to monitor individual issuer's contributions to the public finances and ensure firms are meeting their payment obligations. We explained that such data may also help various actors ensure that the government is properly collecting and accounting for payments.<sup>360</sup> We also explained that, relatedly, an important additional benefit of company-specific and project-level transparency is that it would act as a strong deterrent to issuers underpaying royalties' or other monies owed. We believe the record also supports the potential that the public disclosure of company-specific, project-level data may reduce the willingness of resource extraction issuers to participate in deals where they believe the revenues may be corruptly diverted from the government coffers.<sup>361</sup> With

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<sup>359</sup> See Proposing Release, Section II.E.1, n.194, and Section II.G.2.

<sup>360</sup> See Proposing Release, Section I.E.2.

<sup>361</sup> See letter from Publish What You Pay – US (second of three letters on Mar. 8, 2016) (“PWYP-US 3”) (explaining that a resource extraction issuer took part in a transaction in Nigeria knowing that the revenues were going to be diverted from the Nigerian government to a Nigerian oil minister, and explaining that aggregation and anonymization of such payments would have made it more difficult for the public and civil society “to trace where the payment ended up or even find out that it had been made”). See generally U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON GOVERNMENT AFFAIRS, MONEY LAUNDERING AND FOREIGN CORRUPTION: ENFORCEMENT AND EFFECTIVENESS OF THE PATRIOT ACT, CASE STUDY INVOLVING RIGGS BANK REPORT, at 98-111 (July 14, 2004) (providing examples of the roles that resource extraction

our decision to include contractually required social and community payments among the required disclosures, we now perceive an additional potential benefit of company-specific, project-level public disclosure.<sup>362</sup> Local communities may be able to ensure that they are in fact receiving the promised payments and that those payments are being used by the governments receiving the funds for the benefit of the community. We believe much the same is true with respect to contractual obligations regarding in-kind infrastructure development.<sup>363</sup>

We note that the API asserts that “Section 13(q) was passed to increase the accountability of governments, not to force public companies to pay more to develop natural resources, or to expose them to activism by special interest groups.”<sup>364</sup> While we recognize the API’s point, we nonetheless believe that its view of the anti-corruption and accountability objectives underlying Section 13(q) is unduly narrow. In our view, the U.S. foreign policy interest in helping citizens to hold their governments accountable for the management of the public’s natural resources (and preventing corruption in connection with the extraction of those resources)<sup>365</sup> includes, among

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companies can play in facilitating the suspect or corrupt practices of foreign officials seeking to divert resource extraction payments that belong to the government).

<sup>362</sup> See Section II.C above.

<sup>363</sup> See, e.g., letter from PWYP-US 1 (explaining that in Equatorial Guinea, “the government has used social payments as cover under which to approach U.S.-listed oil and gas companies about financing projects that appear to have been motivated by the whims of individual government officials and had little to do with social development. . . . This raises concerns that social payments, if allowed to remain opaque, could be misused to channel corrupt payments, special favors, and kickbacks, creating a gray zone of illicit payments that may not be easily monitored or policed by the [Foreign Corrupt Practices Act].”). See also letter from ASP (“Even with an explicit legal prohibition on bribery, however, it is not always clear what constitutes corruption, as contracts can be written that favor individuals or companies . . .”).

<sup>364</sup> See letter from API 1.

<sup>365</sup> See 156 CONG. REC. S3816 (May 17, 2010) (Sen. Lugar) (explaining that Section 13(q) is intended to “help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues”). See also id. at S5873 (July 15, 2010) (Sen. Cardin) (explaining that Section 13(q) will help citizens “ensure that their country’s natural resource wealth is used wisely for the benefit of the entire nation and for future generations”).

other things, providing transparency to help ensure that the transactions that the government enters are producing a return that the citizens believe is appropriate, and providing transparency to citizens and members of civil society to help ensure that the transactions do not involve suspect or corrupt payment arrangements. We thus agree with the position advanced by USAID that “[i]t is through disaggregated data, which includes the identity of the payer and the location and type of the project, that transparency will be promoted.”<sup>366</sup> As USAID explained in its comment:

[T]ransparency about corporate payments to governments is a prerequisite to the effective engagement of citizens to ensure that such revenues are managed responsibly and for the benefit of a country’s citizens. Such engagement is only possible if the citizens know which company is paying what kind of payment to which government entity relating to which project in which location. Aggregate data about multiple resources, projects, or geographic locations does not allow citizens of a particular[] region to speak up and insist that the revenues associated with the project impacting them be used for their benefit, rather than to personally benefit potentially corrupt government officials.<sup>367</sup>

In addition, we believe that providing an issuer’s Form SD filings to the public through the searchable, online EDGAR system, which will enable users of the information to produce their own up-to-date compilations in real time, is both consistent with the goals of the statute and the Commission’s obligation, to the extent practicable, to “make available online, to the public, a

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<sup>366</sup> See letter from USAID. See also letter from BHP (“Transparency by governments and companies alike regarding revenue flows from the extraction of natural resources in a manner which is meaningful, practical, and easily understood by stakeholders reduces the opportunity for corruption.”)

<sup>367</sup> See letter from USAID. See also id. (“Aggregated information that contains numerous companies’ payment histories does not allow for citizens to understand or engage with extraction companies operating in their geographical area.”); letter from State Department (expressing “approval” of the proposed rule’s “company-specific, project-level public disclosure” provisions and explaining that “[t]his level of transparency required by the proposed rule is key for ensuring that citizens have the necessary means to hold their governments accountable. . . . [T]he rule’s requirements directly advance the United States’ foreign policy interests in increasing transparency and reducing corruption in the oil, gas, and minerals sectors and strengthen the United States’ credibility and ability to fight corruption more broadly . . .”).

compilation of the information required to be submitted” by issuers.<sup>368</sup> Under this approach, all the filings will be separately searchable on EDGAR and the information provided can be extracted and viewed on an individual basis or as a compilation. Indeed, this approach provides users of the disclosure with more current and immediately available information than the API’s proposed compilation, which would provide only one annual update.<sup>369</sup> That said, we appreciate that some commenters have asserted that the statutory language could be read to require that the Commission periodically make available its own compilation of the information that issuers

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<sup>368</sup> The legislative history surrounding the adoption of Section 13(q) indicates that Congress likely did not intend for the public compilation requirement to serve as a substitute for the public disclosure of an issuer’s annual reports. Rather, the public compilation requirement, added to an earlier version of the legislation that became Section 13(q), was intended for the convenience of the users of that data—many of whom were not seeking the information for purposes of investment activity and thus would potentially be unfamiliar with locating information in the extensive annual reports that issuers file. In the earlier versions of the draft legislation, the resource extraction payment disclosures were required to be made in the annual report that each issuer was already required to file under the securities laws. See, e.g., Extractive Industries Transparency Disclosure Bill (H.R. 6066) (May 2008) (“requir[ing] that each issuer required [to] file an annual report with the Commission shall disclose in such report” the resource extraction payments that the issuer makes) (emphasis added). For the convenience of non-investor users of the data, the provision included a separate section entitled “Public Availability of Information” that provided in pertinent part: “The Securities and Exchange Commission shall, by rule or regulation, provide that the information filed by all issuers . . . be compiled so that it is accessible by the public directly, and in a compiled format, from the website of the Commission without separately accessing . . . the annual reports of each issuer filing such information.” *Id.* (emphasis added). As the proposed legislative language was later being incorporated into the Exchange Act, the Commission’s staff gave technical advice that led to the modification of the legislative text to provide the Commission with additional flexibility to permit the disclosures in an annual report other than “the annual report” that issuers already file so as to avoid unnecessarily burdening issuers. See 156 CONG. REC. S3815 (May 17, 2010) (Statement of Senator Cardin) (“We have been working with a lot of groups on perfecting this amendment, and we have made some changes that will give the SEC the utmost flexibility in defining how these reports will be made so that we get the transparency we need without burdening the companies.”). Our decision to utilize Form SD rather than to require the disclosures in an issuer’s annual report, when coupled with the functionality that the EDGAR system provides, in our view sufficiently addresses the Congressional concern that originally led to the separate requirement of a publicly available compilation.

<sup>369</sup> Our recommended approach would provide investors with information that would be immediately available to all users upon filing. In contrast, under the API Proposal, users of the information could have to wait to access the information for months after an issuer files its Form SD (when the Commission publishes its next periodic compilation). For example, assume that the Commission issues a compilation annually on December 1st of each year. If an issuer files its annual Form SD on January 1st, the information in that report would not be publicly available for another eleven months if the Forms SD were held confidentially. Under the approach being adopted, however, the information will be made publicly available as soon as the Form SD is filed on EDGAR.

provide in their annual reports on Form SD.<sup>370</sup> Accordingly, we are including a provision in the final rules providing that the Commission’s staff will periodically make a separate public compilation of the payment information submitted in issuers’ Forms SD available online. Under the final rules, the staff may determine the form, manner, and timing of each compilation, except that no information included therein may be anonymized.<sup>371</sup>

In sum, we believe that public disclosure of each issuer’s Form SD is important to further Section 13(q)’s foreign policy objectives of helping to reduce corruption and enhance the ability of citizens to hold their governments accountable for the management of the natural resources in their country and the use of the revenues generated by those resources.<sup>372</sup> We therefore have exercised our discretion under Section 13(q) to require issuers to disclose publicly their Forms SD.

## **I. Exemption from Compliance**

### **1. Proposed Rules**

In the Proposing Release, we noted that many commenters previously had requested exemption from Section 13(q)’s disclosure requirements, in particular in cases where the

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<sup>370</sup> See letter from API 1 (discussing the compilation requirements in Section 13(q)(3)).

<sup>371</sup> See Rule 13q-1(e). We do not anticipate that the staff will produce such a compilation more frequently than once a year.

<sup>372</sup> The API contends that, “[b]y requiring disaggregated, contract-level public disclosures,” our rule “will make it more difficult for parties seeking information about how much governments are ultimately receiving to obtain that information.” Letter from API 1. The API claims that, by contrast, a “public compilation that aggregates the total amount of money paid to governments for oil, gas, and minerals” would be “more informative.” *Id.* We note that, in advancing this contention, the API appears to assume that the Section 13(q) disclosures are designed only to provide information about how much governments are ultimately receiving. Nevertheless, as we have described above, we believe that the transparency provided by the disaggregated, project-level disclosures significantly advances broader anti-corruption and accountability goals. Even so, we note that to the extent a particular user is focused on learning about how much money governments are ultimately receiving, EDGAR’s functionality will allow them to generate this information from the filed annual reports.

required payment disclosure is prohibited under the host country's laws. We noted that some commenters had identified specific countries that they claimed prohibit disclosure while other commenters challenged those statements. Given commenters' conflicting positions and representations, and consistent with the EU Directives and ESTMA, we did not propose any blanket or per se exemptions. Instead, we indicated that we would consider using our existing authority under the Exchange Act to provide exemptive relief at the request of issuers, if and when warranted.<sup>373</sup> We stated our belief that a case-by-case approach to exemptive relief using our existing authority was preferable to either adopting a blanket exemption or providing no exemptions. We also stated that, among other things, such an approach would permit us to tailor the exemptive relief to the particular facts and circumstances presented, such as by permitting some alternative form of disclosure that might comply with the foreign country's law or by phasing out the exemption over an appropriate period of time.<sup>374</sup>

## **2. Comments on the Proposed Rules**

In the Proposing Release we solicited comment on whether a case-by-case exemptive process was a better alternative than providing a rule-based blanket exemption for specific countries or other circumstances, or providing no exemptions. We also asked whether any foreign laws prohibit the disclosure that would be required by the proposed rules, or if there was any information that had not been previously provided by commenters that supports an assertion

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<sup>373</sup> See Section 36(a) of the Exchange Act (15 U.S.C. 78mm(a)).

<sup>374</sup> For example, if a resource extraction issuer were operating in a country that enacted a law that prohibited the detailed public disclosures required under our proposal, the Commission could potentially issue a limited exemptive order (in substance and/or duration). The order could be tailored to either require some form of disclosure that would not conflict with the host country's law and/or provide the issuer with time to address the factors resulting in non-compliance.

that such prohibitions exist and are not limited in application. We also asked whether the EU Directives’ and ESTMA’s lack of an exemption for situations when disclosure is prohibited under host country law had presented any problems for resource extraction issuers subject to those reporting regimes.

A number of commenters supported the proposed approach.<sup>375</sup> One of these commenters, while “strongly support[ing]” our approach, urged the Commission to consider existing commercial relationships when responding to requests for exemptive relief.<sup>376</sup> This commenter noted that contractual confidentiality clauses usually allow the contractual parties to provide confidential information requested by court order or regulatory bodies, but condition such disclosure on the maintenance of confidentiality by the receiving entity.

Many other commenters supported the proposed approach, but preferred not providing any exemptions.<sup>377</sup> A number of these commenters recommended granting an exemption only if the request relates to a foreign law prohibition pre-dating the passage of Section 1504.<sup>378</sup> Commenters also disputed claims that foreign law prohibitions exist or that they would have competitive harm.<sup>379</sup>

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<sup>375</sup> See letters from ACTIAM et al. (Calvert separately commenting that it preferred no exemption despite being a signatory to this letter); Bean; Cleary; and Petrobras.

<sup>376</sup> See letter from Petrobras.

<sup>377</sup> See letters from ACEP; Calvert; Global Witness 1; Oxfam 1; PWYP-US 1; Sen. Cardin et al.; Sen. Lugar et al.; TI-USA; and USSIF.

<sup>378</sup> See letters from Sen. Cardin et al.; Sen. Lugar et al.

<sup>379</sup> See letters from Global Witness (Mar. 8, 2016) (“Global Witness 2”) (“Nor is there any persuasive evidence of the existence of secrecy laws that are in conflict with Section 13(q), as the Commission itself determined in 2012, and as we and others have argued.”); Natural Resource Governance Institute (Second of two letters on Feb. 16, 2016) (“NRGI 2”) (“In practice, there is therefore no blanket exclusion of covered companies from awards in [Angola, Cameroon, China, and Qatar]. Our findings further show that the covered companies have not been significantly affected in their ability to secure contracts in [those] countries after the adoption of

Numerous commenters recommended not providing any exemptions.<sup>380</sup> For example, the Department of Interior noted that federal leases for natural resource development on federal lands and waters are public and do not contain confidentiality provisions. This commenter stated that, consistent with the contract transparency provisions under the EITI Standard, USEITI reporting includes disclosure of these leases and that providing an exemption would contravene the transparency objectives of Section 13(q) and the Federal Government.

Several commenters supported blanket exemptions instead of the proposed case-by-case approach.<sup>381</sup> These commenters sought exemptions for disclosure that would violate a host country's laws, conflict with the terms of existing contracts, or reveal commercially sensitive information. These commenters also sought an exemption for disclosure that would jeopardize the safety of an issuer's personnel.<sup>382</sup> They were concerned that the cost of not receiving an exemption, particularly when a foreign law prohibition was in place, could be very high if the issuer was required to cease operations in the host country as a result of the prohibition and liquidate its fixed assets at a steep discount. They also noted the volatility of the regions in

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Section 1504.”); McCarthy (stating that Angola’s Production Sharing Agreements provide a standard exception from confidentiality to comply with any applicable laws or regulations and disputing any competitive harm to companies required to report payments to host governments in Angola, Cameroon, China, or Qatar); Oxfam 2 (noting the disclosure of payments to governments in China and Qatar in the RDS Report and providing additional evidence of a lack of foreign law prohibition on payment disclosure under Qatari law); Oxfam-ERI (“No country prohibits disclosure, and the Commission should not grant any categorical exemptions.”); PWYP-US 1 (“There are no foreign laws prohibiting disclosure of the information required under Section 13(q).”); TI-USA (“[W]hile it has been alleged that Angolan law prohibits the disclosure of resource extraction payments . . . Statoil publicly reports such payments to the Angolan government.”); PWYP-US 5 (noting the disclosure of payments to governments in China and Qatar in the Total Report and Tullow Report).

<sup>380</sup> See Form Letter A; Form Letter B and letters from Department of Interior; Peck & Chayes; Quinones; and NRG 1.

<sup>381</sup> See letters from API 1; Chevron; ExxonMobil 1; and Nouveau.

<sup>382</sup> See 2012 Adopting Release, n.69 and accompanying text. See also letters from API 1 and Chevron. Other commenters opposed such an exemption and stated that increased transparency would instead increase safety for employees. See 2012 Adopting Release, n.70 and accompanying text. See also letter from Oxfam-ERI.



which they operate, the potential for terrorist attacks, and the existence of confidentiality provisions in older resource extraction agreements.

The API and certain other industry commenters sought various blanket exemptions.<sup>383</sup> With respect to an exemption for foreign law prohibitions on disclosure, these commenters asserted that both Qatar and China prohibit the required disclosure.<sup>384</sup> They were also concerned that it would be difficult to obtain timely exemptive relief on a case-by-case basis if exemptions would have to be granted by the full Commission. To address these concerns, they recommended the following three alternatives to the proposed approach, in order of preference: (1) exempting issuers from reporting payments in any country whose laws prohibit the disclosure; (2) exempting issuers from reporting payments in any country whose laws prohibited the disclosures, so long as those laws existed before the Commission adopted its rules; and (3) exempting issuers from reporting payments in specific countries where the risk to issuers is particularly acute.

As for disclosure that would reveal commercially sensitive information, these commenters recommended allowing issuers to redact payment information temporarily until a later time when the disclosure would be less harmful (e.g., after news of a new discovery is public knowledge). The API explained that such an exemption would be particularly appropriate for exploratory activities and new finds, but acknowledged that the commercial terms of older projects are generally publicly known (even if the contracts are not technically publicly

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<sup>383</sup> See letters from API 1; Chevron; and ExxonMobil 1.

<sup>384</sup> We note in this regard that the API did not reiterate its previous assertions that Angola and Cameroon have laws prohibiting the disclosure of payment information.

disclosed), thus suggesting that an exemption would generally not be necessary to protect commercially sensitive information for older projects. They also recommended exempting disclosure in situations where revealing payment information would breach contractual obligations that existed before Congress passed Section 13(q) or when it might jeopardize the safety of an issuer's employees (including physical harm or criminal prosecution) or the national security of a host nation.

In addition to these broader recommendations about the types of exemptions that should be included in the rules, commenters also made recommendations with respect to the process for granting exemptions. A few commenters were concerned that the exemption requests would be considered in a public forum, which could result in disclosure of competitively sensitive information or violate host country law.<sup>385</sup> One of these commenters requested, at a minimum, that the rules follow an exemptive approach where any claimed exemption would require issuers to make reasonable efforts to obtain permission for disclosure, file legal opinions supporting any non-disclosure, and be subject to review by the Commission, but would otherwise be self-executing.<sup>386</sup> Another commenter recommended using a no-action letter process with delegated authority to the Division of Corporation Finance, which it believed would be both flexible and practical.<sup>387</sup>

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<sup>385</sup> See letters from Cleary and ExxonMobil 1.

<sup>386</sup> See letter from ExxonMobil 1.

<sup>387</sup> See letter from Cleary.

Numerous commenters recommended a public process for exemption applications.<sup>388</sup> Many of these commenters specifically called for a process that involved notice and comment.<sup>389</sup> Some of them specifically recommended requiring issuers to apply for exemptions using Exchange Act Rule 0-12.<sup>390</sup> Some of these commenters recommended that the rules provide clear guidance on the criteria that would be used to evaluate applications for exemptions.<sup>391</sup> One of them also recommended an instruction clarifying that exemptions will be granted rarely and only for extremely compelling reasons.<sup>392</sup>

A number of commenters made specific recommendations for the types of supporting documentation the rules should require from those seeking an exemption due to a foreign law prohibition on disclosure.<sup>393</sup> These commenters recommended requiring the text of the relevant law, a legal opinion identifying the conflicts with the disclosure rules, and a description of the steps taken by the issuer to obtain permission from the host country to disclose, such as waivers, exceptions, or exemptions. Some of these commenters also recommended requiring a description of the penalties or sanctions for violating the foreign legal provision, including information about whether the prohibition has been enforced in the past.<sup>394</sup> One of them also

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<sup>388</sup> See letters from ACEP; ACTIAM et al.; Bean; Calvert; Global Witness 1; Oxfam 1; PWYP-US 1; Sen. Cardin et al.; Sen. Lugar et al.; TI-USA; and USSIF.

<sup>389</sup> See letters from ACEP; Bean; Calvert; Global Witness 1; Oxfam 1; PWYP-US 1; Sen. Cardin et al.; Sen. Lugar et al.; TI-USA; and USSIF.

<sup>390</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>391</sup> See letters from Bean and USSIF.

<sup>392</sup> See letter from Bean.

<sup>393</sup> See letters from ACEP; Bean; Global Witness 1; Oxfam 1; PWYP-US 1; Sen. Cardin et al. and Sen. Lugar et al.

<sup>394</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

recommended requiring that the issuer provide the text of the foreign law and the legal opinion in English and also provide the date of enactment or promulgation of the foreign law or rule.<sup>395</sup>

### **3. Final Rules**

While we continue to believe, for the reasons discussed below, that a case-by-case approach to providing exemptions under our existing authority is generally preferable in this context, we are also including a targeted exemption for payments related to exploratory activities.<sup>396</sup> We believe this exemption, as described and discussed below, should help mitigate any potential competitive harm that issuers might experience while not materially reducing the overall benefits of the disclosure to its users. To address any other potential bases for exemptive relief, beyond the exemptions for payments related to exploratory activities and recently acquired companies, issuers may apply for exemptions on a case-by-case basis using, as recommended by certain commenters,<sup>397</sup> the procedures set forth in Rule 0-12 of the Exchange Act.<sup>398</sup> This approach will allow the Commission to determine if and when exemptive relief may be warranted and how broadly it should apply, based on the specific facts and circumstances presented in the application.<sup>399</sup>

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<sup>395</sup> See letter from Bean.

<sup>396</sup> See Item 2.01(b) of Form SD. As discussed above in Section II.G.3, the final rules also include transitional relief for certain recently acquired companies.

<sup>397</sup> See letters from ACEP; Global Witness 1; Oxfam; and PWYP-US 1. See also note 388 and accompanying text.

<sup>398</sup> 17 C.F.R. 240.0-12.

<sup>399</sup> For example, an issuer claiming that a foreign law prohibits the required payment disclosure under Section 13(q) will be able to make the case that it would suffer substantial commercial or financial harm if relief is not granted. An issuer could also apply for an exemption in situations where disclosure would conflict with the terms of a material preexisting contract, reveal commercially sensitive information not otherwise available to the public, or have a substantial likelihood of jeopardizing the safety of an issuer's personnel, among other possible bases for an exemption. The Commission could then determine the best approach to take based on the facts and circumstances, including denying an exemption, providing an individual exemption, providing a

With respect to the request for a blanket exemption in countries where the law may prohibit the disclosure, however, we believe that there continues to be sufficient uncertainty in the record such that this approach is not necessary or appropriate at this time. For example, while the API initially identified four countries whose laws would prohibit Section 13(q) disclosures, its most recent comment letter listed only two of those countries as currently prohibiting such disclosures.<sup>400</sup> In addition, with respect to those two remaining countries, we note that several large resource extraction issuers have recently made payment disclosures related to those jurisdictions.<sup>401</sup> We think this state of uncertainty, which at a minimum raises questions about the existence and scope of disclosure prohibitions in these foreign jurisdictions, counsels against adoption of any blanket exemptions for foreign law conflicts at this time. Moreover, as more companies begin to report under the EU Directives and ESTMA, the existence of alleged conflicts between those disclosure regimes and foreign laws may be clarified prior to any reports being due under the rules we are adopting today.<sup>402</sup> This, along with the fact that issuers will have a two-year period before any reports are due under our rules in which to

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broader exemption for all issuers operating in a particular country, or providing some other appropriately tailored exemption. See letters from ACEP; ACTIAM et. al.; Bean; Calvert; Cleary; Oxfam I; Oxfam-ERI; Petrobras; PWYP-US I; Sen. Cardin et al.; Sen. Lugar et al.; TI-USA and USSIF (each supporting a case-by-case exemptive approach, although some expressed a preference for not providing any exemptions).

<sup>400</sup> See letter from API 1.

<sup>401</sup> See note 299 above.

<sup>402</sup> For example, reports under the United Kingdom's implementation of the EU Directives will be due by November 2016 at the latest (with certain reports due by June 2016) covering payments made in fiscal 2015; and reports under Canada's ESTMA will be due for many issuers (i.e., for those issuers with fiscal years ending December 31, 2016) in May 2017 covering payments made in 2016. Significantly, we note that several reports that already have been filed pursuant to the EU Directives have disclosed payments made to the governments of Angola, China, and Qatar, which commenters previously indicated prohibited such disclosure. See BHP Report (China); Shell Report (China and Qatar), Statoil Report (Angola); and Total Report (Angola, China, Qatar). See also note 302 above. As additional reports are filed, we expect to gain further insight into the permissibility and feasibility of disclosure in these and other jurisdictions.

submit an exemptive application (along with appropriate supporting materials), further supports the conclusion that a case-by-case exemptive approach is preferable.

Separately, we also believe that the case-by-case exemptive approach is significantly less likely than a blanket approach to encourage foreign governments to enact laws prohibiting the Section 13(q) disclosures. A blanket exemption could lead a foreign government contemplating such a law to conclude that enactment of the law would have its intended effect of preventing the disclosures. With a case-by-case exemptive approach, however, that foreign government would not be able to reach that conclusion, as it would face a number of uncertainties concerning the potential results of enacting such a law. Specifically, the foreign government would not have any basis to assume that the Commission would grant exemptive relief, and, even if it did so, whether such relief would apply on a permanent basis or in a more limited fashion (such as a grandfathering provision or a time-limit to allow issuers to divest their interests in the country in an orderly manner). This uncertainty about whether the law would have its intended effect, in our view, should help to discourage foreign governments from adopting such a law. Relatedly, we note that one commentator opposed the case-by-case exemptive approach because of the uncertainty that it may cause issuers.<sup>403</sup> While we appreciate this concern, we believe that it is on balance outweighed by the countervailing considerations discussed above, and elsewhere in this release and the Proposing Release, which counsel against our adopting most of the blanket exemptions that commenters proposed.

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<sup>403</sup> See letter from API 1 (“issuers need the certainty of knowing how the rule will affect them now”).

With respect to the request for an exemption to prevent the disclosure of commercially sensitive information, we are persuaded that a targeted exemption for payments made in connection with exploratory activities, in line with commenters' suggestions, is appropriate.<sup>404</sup> Specifically, issuers will not be required to report payments related to exploratory activities in the Form SD for the fiscal year in which payments are made but can instead delay reporting such payments in the Form SD until the fiscal year following the fiscal year in which the payments were made. In this regard, we believe that the likelihood of competitive harm (in regards to a new discovery) from the disclosure of payment information related to exploratory activities diminishes over time starting from when the exploratory activities on the property or any adjacent property have begun.<sup>405</sup>

For purposes of this exemption, we consider payments to be related to exploratory activities if they are made as part of the process of identifying areas that may warrant examination or examining specific areas that are considered to have prospects of containing oil and gas reserves, or as part of a mineral exploration program. In all cases, however, exploratory activities are limited to activities conducted prior to the development or extraction of the oil and gas or minerals that are the subject of the exploratory activities. Furthermore, this targeted exemption is not permitted for payments related to exploratory activities on the property or any adjacent property once the issuer has commenced development or extraction activities anywhere on the property, on any adjacent property, or on any property that is part of the same project.

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<sup>404</sup> See letter from API 1 (asserting as an example of competitive harm payments to local governments in connection with "high-potential exploratory territory" and maintaining that case-by-case exemptions would be insufficient to protect against competitive harm in such situations).

<sup>405</sup> See note 406 below.

In providing this exemption, we also considered the fact that the total payment streams from the first year of exploration that would be covered by the exemption should often be relatively small compared to, for example, the annual payment streams that would likely occur once an issuer commences development and production. Given this likelihood, we believe, on balance, that any diminished transparency as a result of the one-year delay in reporting of such payments that we are permitting is justified by the potential competitive harms that we anticipate may be avoided as a result of this exemptive relief. Nevertheless, we have limited the exemption to one year because we believe that the likelihood of competitive harm related to a new discovery from disclosing the payment information diminishes over time once exploratory activities on the property or any adjacent property have begun.<sup>406</sup>

Beyond these accommodations for exploratory activities and certain recently acquired companies, we are not persuaded that we should adopt exemptions for other purposes in the final rules. As a threshold matter, we note that many commenters advanced credible arguments challenging the claims raised by industry commenters for broad exemptive relief in these areas.<sup>407</sup> Further, we are mindful that global resource extraction payment transparency touches on a host of issues that are constantly changing and evolving and as such do not lend themselves

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<sup>406</sup> We appreciate that the exploratory phase may vary from project to project, and that this variance can depend on such considerations as the geographic area in which the exploration is being undertaken and the type of resource being sought. In determining to provide a one-year reporting delay, we looked to considerations in the oil and gas industry in particular as oil and gas industry commenters asserted a specific need for the exemptive relief. We understand that the exploratory period for oil and gas generally involves a seismic survey / analysis phase followed by an exploratory drilling phase. We further understand that, while the time periods for those activities can vary considerably, conducting seismic surveys and analyzing the data can take six months or more, while (at least for conventional onshore hydrocarbons) exploratory drilling and site clearance can potentially take a similar length of time. These considerations lead us to believe that one year is an appropriate period for a delay in reporting exploratory payments.

<sup>407</sup> See Section II.I.2 above.



to static exemptive regimes. In this regard, we note the enactment of significant transparency laws in major economic markets, the expanding implementation of the EITI, the increasing prevalence of voluntary payment disclosure, evolution in the terms typically included in agreements with host governments, and the constantly changing geopolitical security landscape.<sup>408</sup> As such, we believe that crafting exemptions that balance the transparency goals of Section 13(q) with the myriad concerns that could arise is best done through a flexible facts-and-circumstances based approach. Furthermore, although we have included only two targeted exemptions in the final rules, nothing prevents the Commission from using its existing exemptive authority to provide broader relief if the facts and circumstances should warrant such action in the future.<sup>409</sup>

A separate but related consideration is that developing objective criteria for exemptive relief for potential competitive harm (beyond the exploratory phase) or safety that could be uniformly applied would be difficult. In our view, issues related to such competitive and safety concerns are inherently case-specific, requiring an analysis of the underlying facts and circumstances. We are therefore concerned that adopting a broad exemption with respect to competitive concerns (beyond the exploratory phase) or safety concerns could result in issuers applying the exemption in an overly broad way. Specifically, the effective and appropriate

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<sup>408</sup> We note in this regard that, in contrast to the 2012 Rules, commenters have not reiterated previous assertions that Cameroon and Angola prohibit the disclosure of resource extraction payments.

<sup>409</sup> See Section 36(a) of the Exchange Act (15 U.S.C. 78mm(a)). We contemplate relying on Section 36(a) and the application process set forth in Rule 0-12 as the principal means of considering exemptive relief from the requirements of the final rules, except that, where exigent circumstances warrant, the staff, acting pursuant to delegated authority from the Commission, may rely on Section 12(h) of the Exchange Act (15 U.S.C. 78l(h)) for the limited purpose of providing interim relief while the Commission is considering a Section 36(a) exemptive application.

utilization of broad exemptions in these areas would be dependent on the independent assessment and good faith implementation by issuers, potentially producing inconsistent application, if not overuse.<sup>410</sup> With a case-by-case exemptive approach, however, the Commission can ensure that exemptions are afforded only where the facts and circumstances warrant.

Finally, we are not persuaded that there is a need for an exemption in the final rules for contracts that may prohibit the disclosure. We note that various commenters opposing such an exemption provided evidence indicating that many contracts allow for disclosure of payment information where it is required by law.<sup>411</sup> Moreover, we believe that the two-year period that we are providing issuers before the reporting obligation takes effect should allow most issuers a sufficient opportunity to obtain the necessary modifications to existing contracts so that they can make the required disclosures. With respect to any future contracts that issuers may enter, we anticipate that issuers can and should include express provisions permitting them to make the disclosures required under Section 13(q).

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<sup>410</sup> Cf. generally letter from API 1 (noting potential difficulties when rule text is “susceptible to varying interpretations” among issuers).

<sup>411</sup> Several commenters provided persuasive evidence demonstrating that exceptions to confidentiality for laws or stock exchange requirements that require disclosure are frequently a standard component of oil, gas and mining contracts. See letter from PWYP-US 3. For instance, we understand that the Association of International Petroleum Negotiators (AIPN) has included this type of exception to confidentiality in its model contract used by its members for the last two decades. See letter from Oxfam America (Mar. 20, 2012) (“Oxfam 2 (pre-proposal)”) (noting that the AIPN Model Form Confidentiality Agreement authorizes the disclosure of otherwise confidential information that is required “under applicable law, including by stock exchange regulations or by a governmental order, decree, regulation or rule.”). Another commenter provided a database of over 800 contracts from 73 countries and reported that over half of the contracts in the database explicitly allow for disclosure when required by law. See letter from OpenOil UG (Oct. 26, 2015) (“OpenOil (pre-proposal)”).

Commenters were also divided about whether the exemptive application process should be public (with notice and comment) or confidential. We agree that public input can be beneficial in understanding the complexities of the resource extraction industry. Accordingly, Rule 0-12 allows the Commission to provide notice in the Federal Register and to receive public comment on applications for exemptions when it deems such an approach appropriate. Notwithstanding our appreciation for public input, we also do not believe it is appropriate to require an issuer to reveal the very information it seeks to protect in order to apply for an exemption. In this regard, we note that although an applicant would need to describe the particular payment disclosure it seeks to omit and the specific facts and circumstances that warrant an exemption, it need not include specific payment amounts to support its application. We believe that in most cases the application could present sufficient information to describe the circumstances warranting an exemption and the corresponding harm without revealing the precise information that the issuer seeks to keep confidential. We also note that Rule 0-12 does allow applicants to request temporary confidential treatment to the extent provided under Rule 81,<sup>412</sup> which may further alleviate concerns by delaying public access to the exemptive application for up to 120 days from the time of the Commission's response. Further, issuers will be permitted to withdraw their application if it appears to the staff that the request for confidential treatment should be denied, in which case the application would remain in the Commission's files but would not be made public.<sup>413</sup>

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<sup>412</sup> 17 C.F.R. 200.81.

<sup>413</sup> 17 C.F.R. 200.81(b). The information could be subject to a request made pursuant to the Freedom Of Information Act (FOIA). In this regard, however, we note that FOIA provides an exemption from public

Finally, we note that Rule 0-12 requires an application to be made in writing, including “any supporting documents necessary to make the application complete.” Commenters were divided on whether the Commission should require certain specified documentation as part of the application or whether we should follow a more flexible, non-prescriptive approach, where the registrant would initially determine what supporting information is appropriate. We believe a non-prescriptive, flexible process is more appropriate given that we are adopting a case-by-case approach to exemptions that is driven by particular facts and circumstances. We do note, however, that the Commission, through the Division of Corporation Finance, may request, as appropriate, supporting documentation such as a legal opinion, the text of applicable foreign laws (translated as necessary), representations as to the public availability of the information in question, or a description of the steps taken by the issuer to obtain permission to disclose.<sup>414</sup> Failure to provide such information upon request could cause the application to be deemed incomplete or denied. We note that, as with any exemptive application, the burden is on the applicant to demonstrate that such relief is necessary and appropriate in the public interest.

## **J. Alternative Reporting**

### **1. Proposed Rules**

As noted in the Proposing Release, several jurisdictions have implemented resource extraction payment disclosure laws since the 2012 Rules.<sup>415</sup> Around the time of the Proposing

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release for “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” See 5 U.S.C. 552(b)(4).

<sup>414</sup> See Rule 0-12(a), (f) [17 C.F.R. 240.0-12(a), (f)].

<sup>415</sup> See Section I.C above.

Release, the USEITI also published its first report.<sup>416</sup> In light of these developments and with a view towards reducing compliance costs, we proposed a provision that would allow issuers to meet the requirements of the proposed rules by providing disclosure that complies with a foreign jurisdiction's rules or that meets the USEITI's reporting requirements, if the Commission has determined that those rules or requirements are substantially similar to the rules adopted under Section 13(q).<sup>417</sup> The Proposing Release contemplated that the Commission would be able to make a determination about the similarity of a foreign jurisdiction's or the USEITI's disclosure requirements either unilaterally or pursuant to an application submitted by an issuer, jurisdiction, or other party.<sup>418</sup>

We proposed requiring resource extraction issuers to file the substantially similar report as an exhibit to Form SD with a statement in the body of its filing that it was relying on the accommodation and identifying the alternative reporting regime for which the report was prepared (e.g., a foreign jurisdiction or the USEITI).

## **2. Comments on the Proposed Rules**

In the Proposing Release we solicited comment on whether we should include an alternative reporting process that would allow for an issuer that is subject to the reporting requirements of a foreign jurisdiction or the USEITI to submit those reports in satisfaction of our requirements. In addition, we solicited comment on whether a "substantially similar" standard was appropriate and which criteria should apply when evaluating the similarity of another

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<sup>416</sup> See note 87 above.

<sup>417</sup> Proposed Item 2.01(b) of Form SD.

<sup>418</sup> See Proposing Release, Section II.G.4.

jurisdiction's reporting requirements. We also solicited comment on various aspects of the procedures surrounding an alternative reporting process, such as whether the Commission should unilaterally make the determination, what types of parties should be allowed to submit an application for alternative reporting, what supporting evidence should be required, and what application procedures should be implemented. For example, we requested comment on whether Exchange Act Rule 0-13 would provide appropriate procedures for requesting alternative reporting. We also solicited comment on whether the Commission should recognize certain foreign reporting requirements or the USEITI reporting framework as substantially similar when the final rule is adopted.

All of the commenters that addressed this aspect of the Proposing Release supported the concept of alternative reporting in some form.<sup>419</sup> Despite general support, several commenters recommended using a standard different from "substantially similar," such as "equivalent,"<sup>420</sup> "substantially equivalent,"<sup>421</sup> "broadly similar,"<sup>422</sup> or "broadly comparable."<sup>423</sup> Several commenters also recommended criteria that the Commission should focus on when assessing the similarity of other regimes. For example, one commenter recommended using the two criteria set forth in Canada's substitution policy.<sup>424</sup> A variety of other recommendations were made by

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<sup>419</sup> See letters from ACEP; ACTIAM et al.; API 1; Bean; BHP; BP; Calvert; Chevron; Cleary; Department of Interior; Encana; ExxonMobil 1; Global Witness 1; Oxfam 1; PWYP-US 1; RDS; Ropes & Gray; Sen. Cardin et al.; Sen. Lugar et al.; and Total.

<sup>420</sup> See letter from Cleary.

<sup>421</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>422</sup> See letter from BP.

<sup>423</sup> Id.

<sup>424</sup> See letter from Cleary. For a discussion of Canada's substitution policy, see Section I.C.2 above.

other commenters, such as comparing (1) the types of payments that are required to be disclosed; (2) the types of payment recipients (including subnational governments and entities controlled by the government); (3) whether project-level disclosure is required and, if so, the definition of “project;” (4) whether the disclosure must be publicly filed and whether it includes the identity of the issuer; (5) whether subsidiaries under the control of and consolidated by the issuer are reported; (6) the threshold for de minimis payments; (7) whether the disclosure must be provided using an interactive data format that includes electronic tags; (8) the availability of exemptions from reporting; (9) frequency of reporting; (10) anti-evasion measures; and (11) the availability of liability or penalties for violations of the disclosure requirements.<sup>425</sup>

One commenter recommended that the Commission not require issuers to convert data into a different interactive data format as a condition to alternative reporting.<sup>426</sup> Another commenter recommended that the EU Directives and ESTMA be deemed substantially similar requirements despite not requiring inclusion of a tag for the particular resource subject to commercial development.<sup>427</sup>

Other commenters made specific recommendations on the procedures that the Commission should follow when making an alternative reporting determination. For example, several commenters supported using the procedures set forth in Exchange Act Rule 0-13,<sup>428</sup> while other commenters supported a less prescriptive approach.<sup>429</sup> A few commenters also

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<sup>425</sup> No one commenter recommended all of these factors. See, e.g., letters from PWYP-US 1 and Encana.

<sup>426</sup> See letter from BHP.

<sup>427</sup> See letter from Encana.

<sup>428</sup> See letters from Calvert and PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>429</sup> See letters from Cleary and Ropes & Gray.

recommended allowing issuers, foreign jurisdictions, and industry groups to submit applications supporting the substantial similarity of other jurisdictions' requirements.<sup>430</sup>

A number of commenters called for the Commission to recognize substantially similar alternative reporting regimes in the adopting release.<sup>431</sup> Most of those commenters recommended recognizing the EU Directives<sup>432</sup> and/or Canada.<sup>433</sup> Commenters also recommended the UK specifically<sup>434</sup> or Norway.<sup>435</sup> The Department of Interior recommended allowing for alternative reporting under the USEITI, with several other commenters supporting that recommendation.<sup>436</sup>

### **3. Final Rules**

#### **a. Requirements for Alternative Reports**

We are adopting an alternative reporting mechanism similar to what we proposed whereby issuers will be able to meet the requirements of the final rules by providing disclosure that complies with a foreign jurisdiction's or the USEITI's resource extraction payment disclosure requirements if they are deemed "substantially similar" by the Commission.<sup>437</sup> As

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<sup>430</sup> See letters from Cleary and Ropes & Gray.

<sup>431</sup> See letters from ACEP; BHP; BP; Cleary; Encana; Global Witness 1; Oxfam 1; PWYP-US 1; RDS; Ropes & Gray; and Total.

<sup>432</sup> See letters from ACEP; BHP (recommending recognizing the EU's reporting system for a finite period of five years); BP; Cleary; Encana; Global Witness 1; Oxfam 1; PWYP-US 1; and Total.

<sup>433</sup> See letters from Cleary; Encana; and PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>434</sup> See letters from BP; Cleary; and RDS. The letters from BP and Cleary also recommended the European Union more generally.

<sup>435</sup> See letters from Cleary and PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>436</sup> See letters from BP; Calvert; and PWYP-US 1.

<sup>437</sup> See Item 2.01(c) of Form SD.



noted above, commenters broadly supported the concept of alternative reporting despite differing opinions on how it should be applied. The framework for alternative reporting in the final rules allows a resource extraction issuer that has already prepared a report pursuant to “substantially similar” requirements to avoid costs associated with having to prepare a separate report meeting the requirements of our disclosure rules.<sup>438</sup> We are adopting the proposed “substantially similar” standard because we are not persuaded that the alternative standards recommended by commenters would allow the Commission to evaluate better whether a regime requires sufficient disclosure to serve the underlying goals of Section 13(q) while also avoiding unnecessary costs.<sup>439</sup>

We note that the alternative reporting provision is generally consistent with the approach taken in the EU Directives and ESTMA and should promote international transparency efforts by incentivizing foreign countries that are considering adoption of resource extraction payment disclosure laws to provide a level of disclosure that is consistent with our rules and the other major international transparency regimes. Under the final rules, an issuer may only use an alternative report for an approved foreign jurisdiction or regime if the issuer is subject to the resource extraction payment disclosure requirements of that jurisdiction or regime and has made the report prepared in accordance with that jurisdiction’s requirements publicly available prior to filing it with the Commission.<sup>440</sup> An issuer choosing to avail itself of this accommodation must submit as an exhibit to Form SD the same report that it previously made publicly available in

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<sup>438</sup> See Section III.C.2 below for a discussion of these costs.

<sup>439</sup> See notes 420-423 above and accompanying text.

<sup>440</sup> See Item 2.01(c)(1)-(2) of Form SD.

accordance with the approved alternative jurisdiction's requirements.<sup>441</sup> The issuer must include a statement in the body of Form SD that it is relying on this accommodation and identifying the alternative reporting regime for which the report was prepared.<sup>442</sup>

In addition, the alternative reports must be tagged using XBRL.<sup>443</sup> Although a commenter recommended not requiring issuers to convert data into a different interactive data format to qualify for alternative reporting,<sup>444</sup> we believe that requiring a consistent data format for all reports filed with the Commission will improve the usefulness of the compilations created by the Commission and will enhance the ability of users to create their own up-to-date compilations in real time. We also do not believe that this requirement will add significantly to the costs of alternative reporting given that most of these costs are associated with collecting the required information, not the particular data format.

An issuer relying on the alternative reporting accommodation must also provide a fair and accurate English translation of the entire report if prepared in a foreign language.<sup>445</sup> Project

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<sup>441</sup> See Item 2.01(c)(2). The format of the report may differ to the extent necessary due to the conditions placed by the Commission on the alternative reporting accommodation. See *id.* For example, the report may not have been originally submitted in the home jurisdiction in XBRL or may not have been in English.

<sup>442</sup> See Item 2.01(c)(3) of Form SD.

<sup>443</sup> See Item 2.01(c)(4) of Form SD.

<sup>444</sup> See letter from BHP.

<sup>445</sup> See Item 2.01(c)(5) of Form SD. Rule 306 of Regulation S-T (17 CFR 232.306) requires that all electronic filings and submissions be in the English language. If a filing or submission requires the inclusion of a foreign language document, Rule 306 requires that the document be translated into English in accordance with Securities Act Rule 403(c) (17 CFR 230.403(c)) or Exchange Act Rule 12b-12(d) (17 CFR 240.12b-12(d)). Both of these rules require the submission of a fair and accurate English translation of an entire foreign language document that is being submitted as an exhibit or attachment if the document consists of certain specified material. If the foreign language document does not consist of such material, and the form permits it, a fair and accurate English language summary may be provided in lieu of an English translation. Given the level of specificity of the disclosure and the electronic tagging required under Rule 13q-1 and Form SD, we do not believe it would be appropriate to permit an English summary of a foreign language document that is being provided as an alternative report. We have therefore added a requirement to Form SD requiring a registrant to

names may be presented in their original language in addition to the English translation of the project name if the issuer believes such an approach would facilitate identification of the project by users of the disclosure.<sup>446</sup>

As noted in the Proposing Release, the “substantially similar” standard would not require the alternative reporting regime to be equivalent or identical. Under the final rules, the Commission could consider the following criteria, among others, to make its determination that another reporting regime is substantially similar: (1) the types of activities that trigger disclosure; (2) the types of payments that are required to be disclosed; (3) whether project-level disclosure is required and, if so, the definition of “project;” (4) whether the disclosure must be publicly filed and whether it includes the identity of the issuer; and (5) whether the disclosure must be provided using an interactive data format that includes electronic tags. When considering whether to allow alternative reporting based on a foreign jurisdiction’s reporting requirements, the Commission will likely also consider whether disclosure of payments to subnational governments is required and whether there are any exemptions allowed and, if so, whether there are any conditions that would limit the grant or scope of the exemptions. This non-exclusive list of factors does not preclude the Commission from considering other factors, such as those recommended in the comments described above.<sup>447</sup>

As discussed above in Section I.C.2, Canada allows for substituted reports to be filed according to the approved substitute jurisdiction’s deadline if the Department of Natural

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provide a fair and accurate English translation of the entire foreign language document being submitted as an exhibit to Form SD pursuant to the alternative reporting provision.

<sup>446</sup> See Item 2.01(c)(5) of Form SD.

<sup>447</sup> See Section II.J.2 above.

Resources Canada is notified by e-mail prior to the expiration of ESTMA's 150 day deadline.<sup>448</sup>

In light of the requirement in the final rules that the alternative report be publicly available in the alternative jurisdiction prior to the submission of the alternative report to the Commission, we believe that an approach similar to Canada's will increase the usefulness of the alternative reporting accommodation.<sup>449</sup> Therefore, an issuer filing an alternative report prepared pursuant to foreign reporting regimes recognized by the Commission as substantially similar may follow the reporting deadline in the alternative jurisdiction.<sup>450</sup> To do so, however, it must submit a notice on Form SD-N on or before the due date of its Form SD indicating its intent to submit the alternative report using the alternative jurisdiction's deadline.<sup>451</sup> To deter abuse of this accommodation, the final rules provide that if an issuer fails to submit such notice on a timely basis, or submits such a notice but fails to submit the alternative report within two business days of the alternative jurisdiction's deadline, it will become ineligible for the alternative reporting accommodation for the following fiscal year.<sup>452</sup>

**b. Recognition of EU Directives, Canada's ESTMA, and the USEITI as Alternative Reporting Regimes**

In conjunction with our adoption of the final rules, we are issuing an order recognizing the EU Directives, Canada's ESTMA, and the USEITI in their current forms as substantially similar disclosure regimes for purposes of alternative reporting under the final rules, subject to

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<sup>448</sup> See note 80-81 above and accompanying text.

<sup>449</sup> Although Canada uses the same 150 day deadline as the final rules, the EU Directives leave the annual deadline to the discretion of the member states. See note 56 above and accompanying text.

<sup>450</sup> See Item 2.01(c)(6) of Form SD.

<sup>451</sup> See Item 2.01(c) of Form SD.

<sup>452</sup> Id.

certain conditions. We have determined that these three disclosure regimes are substantially similar to the final rules.<sup>453</sup> For example, all three regimes require annual, public disclosure, including the identity of the filer; do not provide for any blanket exemptions; include the same or similar activities when defining commercial development of oil, natural gas, or minerals; require project-level reporting at the contract level (or in the case of the USEITI, calls for project-level reporting consistent with the European Union and Commission definitions of “project”); cover similar payment types; cover similar controlled entities and subsidiaries; and require foreign subnational payee reporting. Although we acknowledge differences between these regimes and the final rules, we do not believe that such differences, as identified and discussed above,<sup>454</sup> support reaching a different conclusion, particularly in light of the requirements we are imposing on alternative reporting.<sup>455</sup> We note that, among those commenters who addressed the issue, there was agreement that the Commission should allow alternative reporting under the EU

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<sup>453</sup> For a lengthier discussion of significant aspects of these regimes, see Section I.C above.

<sup>454</sup> See Section II.C.3 above (discussing variations in the treatment of CSR payments under the final rules, the EU Directives, and ESTMA) and Section II.E.3 above (discussing when multiple agreements may be aggregated as a single project under the final rules and how that differs from the approach used by the EU Directives and the ESTMA Specifications). We recognize that our decision to include CSR payments within the list of payment types specifically covered by the final rules reflects a difference from how CSR payments are treated under the European Union and Canadian disclosure regimes. On balance, considering the benefits to users and issuers from permitting alternative reporting and the fact that the recent trend has been toward inclusion of such payments (the EITI revised its standard to include CSR payments after the EU and Canadian disclosure standards were developed), we do not feel this difference should prevent us from recognizing the EU Directives and ESTMA as “substantially similar” reporting regimes at this time. In weighing whether to recognize these reporting regimes as substantially similar, we also have considered that several companies reporting under these regimes may provide disclosure about CSR payments. See Section II.C.3 above. Furthermore, the ESTMA Guidance indicates that CSR payments disclosure may be required in Canada in certain circumstances, despite not being specifically listed as a covered payment type. See note 212 and accompanying text.

<sup>455</sup> For example, the final rules require alternative reports to be submitted in XBRL format. See Section II.J.3.a above.

Directives, Canada's ESTMA, and the USEITI.<sup>456</sup> This further persuades us that it is appropriate at this time to grant these three regimes alternative reporting status in their current form.

Although we are recognizing the USEITI's requirements as substantially similar, we are mindful of the more limited scope of those requirements. For example, the USEITI does not cover payments to foreign governments and currently uses calendar year reporting instead of fiscal year reporting.<sup>457</sup> Due to these limitations, as set forth in the accompanying order, USEITI reports will only satisfy the disclosure requirements in Rule 13q-1 for payments made by an issuer to the Federal Government, not to foreign governments. An issuer will have to supplement its USEITI report by disclosing in its Form SD all payment information to foreign governments required by the final rules. In addition, the issuer may need to supplement its USEITI report so that the required payment information is provided on a fiscal year basis.<sup>458</sup> We note that the requirement to provide fiscal year reporting will have limited impact on issuers with a December 31 fiscal year end. In this regard, the Department of Interior has stated that "many" U.S. EITI reporting companies use the calendar year as their fiscal year.<sup>459</sup>

### **c. Application Procedures**

With respect to applications to request recognition of other jurisdictions' payment transparency rules as substantially similar, applicants should follow the procedures set forth in

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<sup>456</sup> See letters from ACEP; BHP (recommending recognizing the EU's reporting system for a finite period of five years); BP; Calvert; Cleary; Encana; Global Witness 1; Oxfam 1; PWYP-US 1; and Total.

<sup>457</sup> See Section I.C.3 above.

<sup>458</sup> For example, in addition to covering any gaps between the calendar year and fiscal year, the issuer will need to disclose any series of payments that exceeded the de minimis threshold on a fiscal year basis rather than on a calendar year basis. See Section II.C above for a discussion of the de minimis threshold.

<sup>459</sup> See letter from Department of Interior.

Rule 0-13 of the Exchange Act, which permits an application to be filed with the Commission to request a “substituted compliance order” under the Exchange Act. Although applicants should follow the procedures set forth in Rule 0-13(b) through (i), applications may be submitted by issuers, governments, industry groups, and trade associations.<sup>460</sup> The application must include supporting documents and will be referred to the Commission’s staff for review. The Commission must publish a notice in the Federal Register that a complete application has been submitted and allow for public comment. The Commission may also, in its sole discretion, schedule a hearing before the Commission on the matter addressed by the application.

## **K. Exhibits and Interactive Data Format Requirements**

### **1. Proposed Rules**

The proposed rules required a resource extraction issuer to file the required disclosure on EDGAR in an XBRL exhibit to Form SD. Consistent with Section 13(q), the proposed rules required issuers to submit the payment information using electronic tags—a taxonomy of defined reporting elements—that identify, for any payment required to be disclosed:

- the total amounts of the payments, by category;<sup>461</sup>
- the currency used to make the payments;
- the financial period in which the payments were made;
- the business segment of the resource extraction issuer that made the payments;
- the government that received the payments and the country in which the government is located; and

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<sup>460</sup> See Rule 13q-1(c).

<sup>461</sup> For example, categories of payments could be bonuses, taxes, or fees.

- the project of the resource extraction issuer to which the payments relate.<sup>462</sup>

In addition to the electronic tags specifically required by the statute, we proposed requiring issuers to provide and tag:

- the type and total amount of payments made for each project,
- the type and total amount of payments for all projects made to each government;
- the particular resource that is the subject of commercial development, and
- the subnational geographic location of the project.

For purposes of identifying the subnational geographic location of the project, we proposed an instruction specifying that issuers must provide information regarding the location of the project that is sufficiently detailed to permit a reasonable user of the information to identify the project's specific, subnational location.<sup>463</sup> We stated that, depending on the facts and circumstances, this could include the name of the subnational governmental jurisdiction(s) (e.g., state, province, county, district, municipality, territory, etc.) or the commonly recognized subnational geographic or geologic location (e.g., oil field, basin, canyon, delta, desert, mountain, etc.) where the project is located, or both. We anticipated that more than one descriptive term would likely be necessary when there are multiple projects in close proximity to each other or when a project does not reasonably fit within a commonly recognized, subnational geographic location. We also stated that when considering the appropriate level of detail, issuers may need to consider how the relevant contract identifies the location of the project.<sup>464</sup>

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<sup>462</sup> See proposed Item 2.01(a) of Form SD.

<sup>463</sup> See proposed Instruction 3 to Item 2.01 of Form SD.

<sup>464</sup> See id.



We also proposed an instruction to Form SD that would have required issuers to report the amount of payments made for each payment type and the total amount of payments made for each project and to each government in U.S. dollars or in the issuer's reporting currency if not U.S. dollars.<sup>465</sup> The proposed rules allowed a resource extraction issuer to calculate the currency conversion in one of three ways: (1) by translating the expenses at the exchange rate existing at the time the payment is made; (2) by using a weighted average of the exchange rates during the period; or (3) based on the exchange rate as of the issuer's fiscal year end.<sup>466</sup> A resource extraction issuer was also required to disclose the method used to calculate the currency conversion.<sup>467</sup>

Consistent with the statute, the proposed rules required a resource extraction issuer to include an electronic tag that identified the business segment of the resource extraction issuer that made the payments. We proposed defining "business segment" as the reportable segments used by the resource extraction issuer for purposes of financial reporting.<sup>468</sup>

We also proposed that to the extent payments, such as corporate income taxes and dividends, are made for obligations levied at the entity level, issuers could omit certain tags that

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<sup>465</sup> See proposed Instruction 2 to Item 2.01 of Form SD. Currently, foreign private issuers may present their financial statements in a currency other than U.S. dollars for purposes of Securities Act registration and Exchange Act registration and reporting. See Rule 3-20 of Regulation S-X [17 CFR 210.3-20].

<sup>466</sup> See proposed Instruction 2 to Item 2.01 of Form SD.

<sup>467</sup> See *id.*

<sup>468</sup> See proposed Item 2.01(c)(1) of Form SD. The term "reportable segment" is defined in FASB ASC Topic 280, Segment Reporting, and IFRS 8, Operating Segments.

may be inapplicable (e.g., project tag, business segment tag) for those payment types as long as they provide all other electronic tags, including the tag identifying the recipient government.<sup>469</sup>

Finally, we noted that Section 13(q)(3) directs the Commission, to the extent practicable, to provide a compilation of the disclosure made by resource extraction issuers. To satisfy this requirement, the proposed rules required the disclosures to be filed on EDGAR in an XBRL exhibit, which would allow the data to be searched and extracted by users.

## **2. Comments on the Proposed Rules**

In the Proposing Release we solicited comment on a variety of matters related to the format of the disclosure, the proposed tags, and the related instructions. For example, we asked how the total amount of payments should be reported when payments are made in multiple currencies and whether the three proposed methods for calculating the currency conversion described above provide issuers with sufficient options to address any possible concerns about compliance costs, the comparability of the disclosure among issuers, or other factors. We also asked whether XBRL is the most suitable interactive data standard, whether “business segment” should be defined differently, and whether the non-statutory tags we proposed were appropriate. In addition, we requested comment on whether the proposed “reasonable user” approach to describing the geographic location of the project provided sufficient detail to users of the disclosure when combined with the other tagged information. Finally, we solicited comment on whether the proposed approach to making a compilation available was consistent with Section 13(q)(3) or whether a different compilation would be necessary.

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<sup>469</sup> See 2012 Adopting Release, n.432 and accompanying text.

All of the commenters that addressed the proposed interactive data format supported using XBRL.<sup>470</sup> One of them generally recommended that the rules provide issuers with the flexibility to present information in either the body of the Form SD or on an exhibit, as well as the flexibility to decide whether to summarize or include selected information contained in the exhibit in the base Form SD.<sup>471</sup>

One commenter specifically supported the proposed approach to describing the geographic location of projects.<sup>472</sup> Another commenter recommended that, rather than relying on the concept of “a reasonable user,” the rules require geographic locations to be disclosed as specified in the agreement or multiple agreements which have been used to establish the project for reporting purposes.<sup>473</sup> By contrast, the commenters that supported the API Proposal disagreed with tagging the geographic location of the project at a level below the largest subnational political jurisdiction.<sup>474</sup> As described above, those commenters recommended using ISO codes to standardize geographic location tagging down to the first subnational geographic level.<sup>475</sup>

Several commenters requested changes or clarifications to the data tagging requirements.<sup>476</sup> One of them recommended defining “business segment” to mean the subsidiary or other entity under the control of the issuer that makes payments to a government because that

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<sup>470</sup> See letters from AICPA; PWYP-US 1; and XBRL US.

<sup>471</sup> See letter from Ropes & Gray.

<sup>472</sup> See letter from Department of Interior.

<sup>473</sup> See letter from PWYP-US 1.

<sup>474</sup> See Section III.E. above.

<sup>475</sup> Id.

<sup>476</sup> See letters from AICPA; Encana; Petrobras; PWYP-US 1; and XBRL US.

entity often has a different name from the parent issuer that is reporting to the Commission.<sup>477</sup>

This commenter stated that providing the name of the entity making the payment would aid accountability and provide users with the means to follow up locally when compared to the Commission’s proposed approach of defining “business segment” as a reportable segment used for purposes of financial reporting. Other commenters disagreed with this suggestion believing that it was outside the scope of the statute.<sup>478</sup>

Another commenter, noting our guidance on entity-level disclosure, requested clarification of whether it could omit the project tag with respect to its export activities, which it stated were not project-specific.<sup>479</sup> Another commenter was unclear on whether the tag for the “particular resource that is the subject of commercial development” should be assigned to each project or whether it should be assigned to each government payee.<sup>480</sup> This commenter recommended that, if the particular resource must be disclosed, the tag should be associated with a project rather than a government payee. This commenter also noted that the proposed rules did not specify the level of granularity at which the “particular resource” must be disclosed.<sup>481</sup> This commenter also had concerns that reporting payments at a particular resource level would pose challenges for some issuers as development projects often target more than one resource as the

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<sup>477</sup> See letter from PWYP-US 1.

<sup>478</sup> See letters from ExxonMobil 2 and Petrobras.

<sup>479</sup> See letter from Petrobras.

<sup>480</sup> See letter from Encana.

<sup>481</sup> For example, this commenter sought clarification of whether the “particular resource” disclosure should be the primary resource targeted, such as oil, natural gas, or natural gas liquids, or if it should be the resource product types, such as coal bed methane, natural gas liquids, bitumen, heavy oil, light crude oil, and natural gas excluding natural gas liquids.

subject of development and not all payments to a government payee are determined or dependent on a particular resource (i.e., property taxes).

Another commenter recommended adopting the AICPA Audit Data Standards within the new XBRL taxonomy. This commenter stated that using these standards would enable issuers and their auditors to share “business operational, business and accounting data,” creating potential cost savings by reducing duplicative data standards used by issuers and thereby leveraging the cost of complying with the rule for a range of purposes including internal and external use in the audit function.<sup>482</sup>

Another commenter recommended incorporating in EDGAR robust validation of the data submitted in the XBRL exhibits for both technical structure as well as content.<sup>483</sup> This commenter stated that doing so would ensure that the information provided to users is accurate and reliable. This commenter also recommended publishing the data as a set of CSV files to simplify automated analysis for some users, similar to what the Commission does for XBRL financial data. Generally this commenter thought that the Commission should seek input on the draft taxonomy through a public review and comment process prior to implementing the reporting requirements. Noting our statement in the Proposing Release that Inline XBRL<sup>484</sup> was another possible alternative for providing the information in interactive data format, the commenter questioned whether Inline XBRL would improve the usability of the data, or whether it merely adds an additional burden on filers to convert their data to HTML as well as XBRL.

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<sup>482</sup> See letter from AICPA.

<sup>483</sup> See letter from XBRL US.

<sup>484</sup> Inline XBRL would allow registrants to file the required information and data tags in one document rather than requiring a separate exhibit for the interactive data.

One commenter stated that the three proposed methods for calculating the currency conversion when payments are made in multiple currencies provides issuers with sufficient options to address any possible concerns about compliance costs and comparability of the disclosure among issuers.<sup>485</sup>

Finally, several commenters specifically supported the proposed approach as meeting the statutory requirements to provide a compilation.<sup>486</sup> Other commenters stated that the proposed approach abandons the Commission's statutory obligation to create a compilation.<sup>487</sup> We discuss our approach to providing a compilation in Section II.H.3 above.

### **3. Final Rules**

We are adopting the proposed requirements regarding interactive data exhibits and tagging with limited modifications. The approach we are adopting today provides the disclosure elements in a machine readable (electronically-tagged) XBRL format that should enable users to search, extract, aggregate, and analyze the information in a manner that is most useful to them. As we discussed in the Proposing Release, this approach will allow the information received from issuers to be converted by EDGAR and other commonly used software and services into an easily-readable tabular format.<sup>488</sup> The final rules do not require Inline XBRL. Given the nature

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<sup>485</sup> See letter from Petrobras.

<sup>486</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>487</sup> See letters from API 1; Chevron; ExxonMobil 1.

<sup>488</sup> The use of XBRL will allow the Commission to improve the quality and usefulness of the data compilation on EDGAR by including data validation measures to improve data quality. Given the disbursement ledger nature of the Resource Extraction data, using existing disbursement taxonomies would be relevant both for minimizing implementation costs and also potentially enhancing the reusability by different consumers (e.g. management, internal auditors, external auditors, regulators). The AICPA Audit Data Standards include disbursement ledger taxonomies and thereby may be useful in this effort.

of the disclosure required by the final rules, which is primarily an exhibit with tabular data, we do not believe that Inline XBRL would improve the usefulness or presentation of the required disclosure. As noted above, commenters supported using XBRL as the interactive data format but did not similarly support Inline XBRL, with one commenter specifically questioning its usefulness in this context. Unlike the comments we received on the 2010 Proposing Release, none of commenters on the Proposing Release recommended that the Commission allow issuers to use an interactive data format of their preference.<sup>489</sup>

Commenters were divided on how issuers should tag the subnational geographic location of the project.<sup>490</sup> On the one hand, those supporting the API Proposal favored using the first order subnational geographic location. Some of those commenters recommended using ISO codes to standardize references to those subnational geographic locations. These commenters were generally concerned that the proposed method for describing the location of a project would cause confusion and could potentially reduce transparency. On the other hand, many other commenters, including those expressing the greatest interest in using the disclosure to further the transparency goals of the statute, disagreed with an approach that would only disclose the geographic location of a project at the highest level of political organization below the national level. For the reasons discussed in Section II.E.3 above, we agree with the latter commenters that additional granularity is needed to accomplish the goals underlying Section 13(q). Nevertheless, we are sympathetic to the concern that differing descriptions of a project's location

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<sup>489</sup> See Section II.G.5 of the Proposing Release.

<sup>490</sup> Commenters were also divided on how to name the project for the “project of the resource extraction issuer to which the payments relate” tag. We address issues relating to the definition of “project” in Section II.E. above.

might make it more difficult to sort the data compiled in EDGAR. For this reason, we believe it is appropriate to add an additional tag for the subnational geographic location that uses the ISO codes suggested by commenters.<sup>491</sup> In this way, users of the disclosure would be able to sort the data in the more generalized fashion that industry commenters, such as the API, said would be more useful while also having access to the more specific data that many civil society organizations have supported. With respect to the suggestion of one commenter to use the geographic locations disclosed in the agreement(s) associated with a project, we believe the proposed approach accomplishes the same purpose while providing the issuer additional flexibility.<sup>492</sup>

With respect to the requirement to provide and tag the type and total amount of payments made for each project and to each government, we are adopting the three currency conversion methods as proposed.<sup>493</sup> As discussed above, the one commenter that addressed these methods thought that the options that were provided were sufficient to address concerns about compliance costs and comparability of disclosure.<sup>494</sup> Nevertheless, to avoid confusion, we are requiring that an issuer must choose a consistent method for all such currency conversions within a particular Form SD filing.<sup>495</sup>

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<sup>491</sup> Similarly, to enhance comparability, we are requiring issuers to use the ISO 3166 code, if available, to identify the country in which a payee government is located. See Instruction 3 to Item 2.01 of Form SD.

<sup>492</sup> See letter from PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>493</sup> See Instruction 2 to Item 2.01 of Form SD.

<sup>494</sup> See letter from Petrobras.

<sup>495</sup> See Instruction 2 to Item 2.01 of Form SD.



With respect to the required business segment tag, despite the concerns of one commenter, we are adopting the proposed definition of “business segment.”<sup>496</sup> We believe defining business segment in a manner consistent with the reportable segments used by resource extraction issuers for purposes of financial reporting provides sufficient granularity when combined with the detailed geographic and project-level information required to be disclosed by the final rules. In addition, the proposed approach would have cost advantages by aligning the disclosure requirements with the issuer’s existing financial reporting systems and procedures.

## **L. Treatment for Purposes of Securities Act and Exchange Act**

### **1. Proposed Rules**

The statutory language of Section 13(q) does not specify that the information about resource extraction payments must be “filed.” Rather, it states that the information must be “include[d] in an annual report[.]”<sup>497</sup> The proposed rules required resource extraction issuers to file, rather than furnish, the payment information on Form SD.

### **2. Comments on the Proposed Rules**

In the Proposing Release we solicited comment on whether the payment disclosure should be filed or furnished. We also asked whether certain officers, such as the resource extraction issuer’s principal executive officer, principal financial officer, or principal accounting officer, should certify the Form SD filing’s compliance with the requirements of Section 13(q) of

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<sup>496</sup> See letter from PWYP-US 1 (recommending defining “business segment” as the subsidiary or entity under the control of the issuer that makes payments to a government because that would aid accountability and facilitate local follow-up by data users). See also proposed Item 2.01(c)(1) of Form SD.

<sup>497</sup> 15 U.S.C. 78m(q)(2)(A).

the Exchange Act or that the filing fairly presents the information required to be disclosed under Rule 13q-1.<sup>498</sup>

Commenters were divided on whether the disclosure should be filed as proposed, thus incurring Section 18 liability, or whether it should be furnished.<sup>499</sup> The commenters supporting the proposed approach stated that requiring the disclosure to be filed would ensure that it could be used reliably for investment analysis and for other purposes.<sup>500</sup> The commenters that recommended allowing the disclosure to be furnished stated that the rules were not material to the “vast majority of investors” and that users of the data did not need the level of protection associated with Section 18 liability.<sup>501</sup> These commenters expressed concern about the costs issuers might incur from Section 18 liability.

One commenter recommended allowing foreign private issuers to furnish Form SD,<sup>502</sup> while another commenter made a similar recommendation for foreign private issuers that are providing alternative reports.<sup>503</sup> The latter commenter pointed to other instances where foreign private issuers have been permitted to furnish reports and noted that the antifraud provisions of the Exchange Act would still apply. This commenter also stated that the courts in home jurisdictions would be better suited to interpret the laws governing the alternate report.

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<sup>498</sup> We address responses to this request for comment and a similar one in Section II.G. above.

<sup>499</sup> For those in favor of filing, see letters from Bean; PWYP-US 1; TI-USA; and USSIF. For those in favor of furnishing, see letters from API 1; Chevron; Encana; and ExxonMobil 1.

<sup>500</sup> See, e.g., letter from PWYP-US 1.

<sup>501</sup> See, e.g., letter from API 1.

<sup>502</sup> See letter from BP.

<sup>503</sup> See letter from RDS.

Another commenter recommended that to the extent an issuer wishes to include additional, voluntary disclosures in its Form SD, it should be permitted to furnish rather than file that information.<sup>504</sup> This commenter noted that many issuers avoid making elective disclosures in Commission filings due to liability concerns and that issuers could indicate what disclosure is being furnished under a separate heading or using other explanatory text.

### **3. Final Rules**

The rules we are adopting today require the disclosure to be filed on Form SD. Section 13(q) does not state how the information should be submitted and instead leaves that question to the Commission to determine. We believe that the Form SD disclosure, including any voluntary disclosure, will benefit from potential Section 18 liability by providing issuers with further incentive to submit complete and accurate information. Although several commenters argued that the information is not material to investors and should therefore be furnished, we note that other commenters, including a number of large institutional investors who have expressed an intention to use the Section 13(q) disclosures, continue to argue that the information is material or important to investors.<sup>505</sup> Given this disagreement, and that materiality is a fact specific inquiry, we are not persuaded that this is a reason to permit the information to be furnished. While we are mindful of the costs associated with Section 18 liability, as we noted in the Proposing Release, Section 18 does not create strict liability for filed

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<sup>504</sup> See letter from Ropes & Gray.

<sup>505</sup> See letters from ACTIAM et al.; Bean; Calvert; International Transport Workers' Federation (Mar. 7, 2016) ("ITWF"); Oxfam 1; PWYP-US; Sen. Cardin et al.; Sen. Lugar et al.; TI-USA; and USSIF.

information.<sup>506</sup> Rather, it states that a person shall not be liable for misleading statements in a filed document if such person can establish that he or she acted in good faith and had no knowledge that the statement was false or misleading.<sup>507</sup>

Although a commenter stated that in certain other contexts issuers may furnish, rather than file, disclosure prepared in accordance with a foreign jurisdiction's requirements, we note that the disclosure furnished on Form 6-K, such as quarterly reports, is not required by the Commission's reporting requirements.<sup>508</sup> Instead, such reports need only be furnished when they are made or required to be made public in such issuer's home jurisdiction. Foreign private issuers must file, and are not permitted to furnish, reports required by the Commission's rules, such as annual reports on Form 20-F and Form 40-F, and Form 6-K reports that have been specifically incorporated by reference into a Securities Act registration statement.

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<sup>506</sup> See Proposing Release, Section II.G.6.

<sup>507</sup> Exchange Act Section 18(a) provides: "Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant." A plaintiff asserting a claim under Section 18 would need to meet the elements of the statute to establish a claim, including reliance and damages.

<sup>508</sup> See letter from RDS. A foreign private issuer is required to submit under cover of a Form 6-K (17 CFR 249.306) information that the issuer: makes or is required to make public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized; files or is required to file with a stock exchange on which its securities are traded and which was made public by that exchange; or distributes or is required to distribute to its security holders. The Form 6-K report is deemed furnished, and not filed for purposes of Section 18, unless it has been specifically incorporated by reference into a previously filed Securities Act or Exchange Act registration statement or Exchange Act report, which is itself subject to Section 18.

## **M. Compliance Date**

### **1. Proposed Rules**

Section 13(q) provides that, with respect to each resource extraction issuer, the final rules issued under that section shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the issuer's fiscal year that ends not earlier than one year after the date on which the Commission issues the final rules under Section 13(q).<sup>509</sup> We proposed requiring resource extraction issuers to comply with Rule 13q-1 and Form SD for fiscal years ending no earlier than one year after the effective date of the adopted rules.<sup>510</sup> We also proposed selecting a specific compliance date that corresponds to the end of the nearest calendar quarter following the effective date, such as March 31, June 30, September 30, or December 31.<sup>511</sup>

### **2. Comments on the Proposed Rules**

In the Proposing Release we asked whether we should provide a compliance date linked to the end of the nearest commonly used quarterly period following the effective date or whether we should adopt a shorter or longer transition period. We also solicited comment on whether the rules should provide for a longer transition period for certain categories of resource extraction issuers, such as smaller reporting companies or emerging growth companies.

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<sup>509</sup> 15 U.S.C. 78m(q)(2)(F).

<sup>510</sup> Adopted rules typically go into effect 60 days after they are published in the Federal Register.

<sup>511</sup> See 2012 Adopting Release at 2 [77 FR 56365].

Several commenters opposed a longer transition period for any category of issuer, including smaller reporting companies.<sup>512</sup> These commenters stated that issuers are generally on notice of the impending requirements and that companies track the required payment types in the normal course of doing business. They also noted that compliance costs for smaller companies are likely to be significantly lower than for large issuers since they usually have fewer payments to disclose. The Department of Interior noted that the USEITI does not make distinctions between issuers.

Some commenters recommended delaying the effective date for all issuers.<sup>513</sup> One of these commenters recommended an effective date beginning with a fiscal year ending no earlier than December 31, 2017,<sup>514</sup> while another deferred to industry comments.<sup>515</sup> Other commenters recommended delaying the effective date for specific categories of issuers.<sup>516</sup>

### **3. Final Rules**

The final rules require a resource extraction issuer to comply with Rule 13q-1 and Form SD for fiscal years ending no earlier than two years after the effective date of the adopted rules. We believe that this phase-in period is appropriate to provide all issuers with sufficient time to establish the necessary systems and procedures to capture and track all the required payment information before the fiscal year covered by their first Form SD filing starts. It also

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<sup>512</sup> See letters from Department of Interior and PWYP-US 1. See also letters from ACEP; Global Witness 1; and Oxfam 1.

<sup>513</sup> See letters from Encana and Ropes & Gray.

<sup>514</sup> See letter from Encana.

<sup>515</sup> See letter from Ropes & Gray.

<sup>516</sup> See letters from Cleary and Ropes & Gray. We address these comments in Section II.G above.

should afford issuers an appropriate opportunity to make any other necessary arrangements (such as obtaining modifications to existing contracts or seeking exemptive relief where warranted) to comply with Section 13(q) and these rules. This compliance date should also provide issuers with more time to consider the experience of companies reporting under similar payment transparency regimes, such as the EU Directives and ESTMA, which should reduce compliance costs.

As proposed, we are also selecting a specific compliance date that corresponds to the end of the nearest calendar quarter following the effective date. Thus, under the final rules, the initial Form SD filing for resource extraction issuers would cover the first fiscal year ending on or after September 30, 2018 and would not be due until 150 days later. Since most issuers use a December 31 fiscal year end, the filing deadline would not be until May 30, 2019 for most issuers. Given the length of time between the adoption of these rules and the start of the first fiscal year that must be reported, we do not believe any additional accommodations are necessary for smaller reporting companies, emerging growth companies, or other categories of issuers. We note that not providing longer phase-in periods for specific categories of issuers is consistent with the EITI and, for public companies, with the EU Directives and ESTMA.

### **III. ECONOMIC ANALYSIS**

#### **A. Introduction and Baseline**

We are adopting Rule 13q-1 and an amendment to Form SD to implement Section 13(q), which was added to the Exchange Act by Section 1504 of the Act. Section 13(q) directs the Commission to issue rules that require a resource extraction issuer to disclose in an annual report filed with the Commission certain information relating to payments made by the issuer

(including a subsidiary of the issuer or an entity under the issuer’s control) to a foreign government or the U.S. Federal Government for the purpose of the commercial development of oil, natural gas, or minerals.

As discussed above, Congress intended that the rules issued pursuant to Section 13(q) would help advance the important U.S. foreign policy objectives of combatting global corruption and helping to promote accountability, thereby potentially improving governance in resource-rich countries around the world.<sup>517</sup> The statute seeks to achieve this objective by mandating a new disclosure provision under the Exchange Act that requires resource extraction issuers to identify and report payments they make to governments relating to the commercial development of oil, natural gas, or minerals. While these objectives and benefits differ from the investor protection benefits that our rules typically strive to achieve, investors and other market participants, as well as civil society in countries that are resource-rich, may benefit from any increased economic and political stability and improved investment climate that such transparency promotes.<sup>518</sup> In addition, some commenters stated that the information disclosed

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<sup>517</sup> See Section I.E of the Proposing Release.

<sup>518</sup> See also 156 CONG. REC. S5873 (May 17, 2010) (Statement from Senator Cardin) (“Transparency helps create more stable governments, which in turn allows U.S. companies to operate more freely – and on a level playing field – in markets that are otherwise too risky or unstable.”); and 156 CONG. REC. S3816 (May 17, 2010) (Statement of Senator Lugar) (“Transparency empowers citizens, investors, regulators, and other watchdogs and is a necessary ingredient of good governance for countries and companies alike. . . . Transparency also will benefit Americans at home. Improved governance of extractive industries will improve investment climates for our companies abroad, it will increase the reliability of commodity supplies upon which businesses and people in the United States rely, and it will promote greater energy security.”)



pursuant to Section 13(q) would benefit investors by, among other things, helping them model project cash flows and assess political risk, acquisition costs, and management effectiveness.<sup>519</sup>

We are sensitive to the costs and benefits of the rules we adopt, and Exchange Act Section 23(a)(2) requires us, when adopting rules, to consider the impact that any new rule would have on competition. In addition, Section 3(f) of the Exchange Act directs us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.<sup>520</sup> We have considered the costs and benefits that would result from the final rules, as well as the potential effects on efficiency, competition, and capital formation. Many of the potential economic effects of the final rules would stem from the statutory mandate, while others would stem from the discretion we are exercising in implementing the statutory mandate. The discussion below addresses the costs and benefits that might result from both the statute and our discretionary choices, as well as the comments we received about these matters.<sup>521</sup> In addition, as discussed elsewhere in this release, we recognize that the final rules could impose a burden on competition, but we believe that any such burden that might result would be necessary and appropriate in furtherance of the purposes of Exchange Act Section 13(q).

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<sup>519</sup> See, e.g., letters from Calvert Investments (Mar. 1, 2011) (“Calvert 1 (pre-proposal)”); California Public Employees Retirement System (Feb. 28, 2011) (“CalPERS (pre-proposal)”; and George Soros (Feb. 21, 2012) (“Soros (pre-proposal)”).

<sup>520</sup> Some commenters incorrectly asserted that we are required by statute to minimize costs. See, e.g., letter from API 1 at 15. Although we do not agree with this assertion, in crafting the final rules, we have sought to minimize costs to the extent possible, and we have attempted to ensure that any costs we are imposing are either necessary or appropriate in light of the foreign policy interests underlying Section 13(q).

<sup>521</sup> As discussed above, our discretionary choices are informed by the statutory mandate, and thus, discussion of the benefits and costs of those choices will necessarily involve the benefits and costs of the underlying statute.

As part of our analysis, we have quantified the potential economic effects of the final rules wherever possible. Given both the nature of the statute's intended benefits and the lack of data regarding the benefits and the costs, in some cases we have been unable to provide a quantified estimate. Nevertheless, as described more fully below, we provide both a qualitative assessment of the potential effects and a quantified estimate of the potential aggregate initial and aggregate ongoing compliance costs. We reach our estimates by carefully considering comments we received on potential costs and taking into account additional data and information, including recent global developments in connection with resource extraction payment transparency. We rely particularly on those comment letters that provided quantified estimates and were transparent about their methodologies. As discussed in more detail below, after considering the comment letters, we determined that it was appropriate to modify and/or expand upon some of the submitted estimates and methodologies to reflect data and information submitted by other commenters, as well as our own judgment and experience.

The baseline the Commission uses to analyze the potential effects of the final rules is the current set of legal requirements and market practices.<sup>522</sup> To the extent not already encompassed by existing regulations and current market practices, the final rules likely will have a substantial impact on the disclosure practices of, and costs faced by, resource extraction issuers. The overall magnitude of the potential costs of the final disclosure requirements will depend on the number of affected issuers and individual issuers' costs of compliance. We expect that the final rules will affect both U.S. issuers and foreign issuers that meet the definition of "resource extraction

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<sup>522</sup> See Section I above for a discussion of the current legal requirements and significant international transparency regimes that affect market practices.

issuer” in substantially the same way, except for those issuers already subject to similar requirements adopted in the EEA member countries or Canada as discussed below in Section III.C.1. The discussion below describes the Commission’s understanding of the markets that are affected by the final rules. We estimate the number of affected issuers in this section and quantify their costs in Section III.B.2 below.

To estimate the number of potentially affected issuers, we use data from Exchange Act annual reports for 2015, the latest full calendar year. We consider all Forms 10-K, 20-F, and 40-F filed in 2015 by issuers with oil, natural gas, and mining Standard Industrial Classification (“SIC”) codes<sup>523</sup> and, thus, are most likely to be resource extraction issuers. We also considered filings by issuers that do not have the above mentioned oil, natural gas, and mining SIC codes and added them to the list of potentially affected issuers if we determined that they might be affected by the final rules.<sup>524</sup> In addition, we have attempted to remove issuers that use oil, natural gas, and mining SIC codes but appear to be more accurately classified under other SIC codes based on the disclosed nature of their business. Finally, we have excluded royalty trusts from our analysis because we believe it is uncommon for such companies to make the types of payments that would be covered by the final rules. From these filings, we estimate that the number of potentially affected issuers is 755.<sup>525</sup> We note that this number does not reflect the

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<sup>523</sup> Specifically, the oil, natural gas, and mining SIC codes considered are 1000, 1011, 1021, 1031, 1040, 1041, 1044, 1061, 1081, 1090, 1094, 1099, 1220, 1221, 1222, 1231, 1311, 1321, 1381, 1382, 1389, 1400, 2911, 3330, 3331, 3334, and 3339.

<sup>524</sup> These are issuers whose primary business is not necessarily resource extraction but which have some resource extraction operations, such as ownership of mines.

<sup>525</sup> In the Proposing Release, using calendar year 2014 data, we estimated that the number of affected issuers would be 877.

number of issuers that actually made resource extraction payments to governments in 2015, but rather represents the estimated number of issuers that might make such payments.

In the following economic analysis, we discuss the potential benefits and costs and likely effects on efficiency, competition, and capital formation that might result from both the new reporting requirement mandated by Congress and from the specific implementation choices that we have made in formulating the final rules.<sup>526</sup> We analyze these potential economic effects in Sections III.B and III.C and provide qualitative and, wherever possible, quantitative discussions of the potential costs and benefits that might result from the payment reporting requirement and specific implementation choices, respectively.

## **B. Potential Effects Resulting from the Payment Reporting Requirement**

### **1. Benefits**

As noted above, we understand that Section 13(q) and the rules required thereunder are intended to advance the important U.S. foreign policy objective of combatting global corruption and helping to promote accountability, thereby potentially improving governance in resource-rich countries around the world.<sup>527</sup> The statute seeks to realize these goals by improving transparency about the payments that companies in the extractive industries make to national and subnational governments, including local governmental entities.<sup>528</sup> While these statutory goals and intended benefits are of global significance, the potential positive economic effects that may

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<sup>526</sup> Our consideration of potential benefits and costs and likely effects on efficiency, competition, and capital formation also is reflected throughout the discussion in Section II above.

<sup>527</sup> See Proposing Release, Section I.E.

<sup>528</sup> See id.

result cannot be readily quantified with any precision.<sup>529</sup> The current empirical evidence on the direct causal effect of increased transparency in the resource extraction sector on societal outcomes is inconclusive,<sup>530</sup> and several academic papers have noted the inherent difficulty in empirically validating a causal link between transparency interventions and governance improvements.<sup>531</sup>

We received several comments on quantifying the potential economic benefits of the final rules that are discussed in detail below.<sup>532</sup> Although these comments presented studies that

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<sup>529</sup> Further, we note that the Commission is not statutorily required to quantify the benefits here. See Lindeen et al. v. SEC, 2016 WL 3254610, \*9 (Nos. 15-1149, 15-1150) (D.C. Cir. June 14, 2016) (explaining that the Commission is not required to “conduct a rigorous, quantitative economic analysis” nor “to measure the immeasurable”) (internal quotation marks omitted); see also id. (“find[ing] that the SEC’s discussion of unquantifiable benefits fulfills its statutory obligation to consider and evaluate” the potential economic effects of a Commission rule).

<sup>530</sup> For positive findings, see Caitlin C. Corrigan, “Breaking the resource curse: Transparency in the natural resource sector and the extractive industries transparency initiative”, *Resources Policy*, 40 (2014), 17–30 (finding that the negative effect of resource abundance on GDP per capita, the capacity of the government to formulate and implement sound policies and the level of rule of law is mitigated in EITI countries but noting that the EITI has little effect on the level of democracy, political stability and corruption (the author also submitted a comment letter attaching an updated version of the study; see letter from Caitlin C. Corrigan (Feb. 16, 2016) (“Corrigan”)); Liz David-Barrett and Ken Okamura, “The Transparency Paradox: Why Do Corrupt Countries Join EITI?”, Working Paper No. 38, European Research Centre for Anti-Corruption and State-Building (Nov. 2013) (finding that EITI compliant countries gain access to increased aid the further they progress through the EITI implementation process and that EITI achieves results in terms of reducing corruption), available at <https://eiti.org/document/transparency-paradox-why-do-corrupt-countries-join-eiti>, and Maya Schmaljohann, “Enhancing Foreign Direct Investment via Transparency? Evaluating the Effects of the EITI on FDI”, University of Heidelberg Discussion Paper Series No. 538 (Jan. 2013) (finding that joining the EITI increases the ratio of the net foreign direct investment (“FDI”) inflow to GDP by 2 percentage points). For negative empirical evidence, see Ölcer, Dilan (2009): Extracting the Maximum from the EITI (Development Centre Working Papers No. 276): Organisation for Economic Cooperation and Development (finding that the EITI has not been able to significantly lower corruption levels). However, all these papers discuss the earlier version of the EITI, which did not require project-level disclosure and rely on data generated prior to the implementation of the 2013 EITI Standard.

<sup>531</sup> See Andrés Mejía Acosta, “The Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources”, *Development Policy Review*, 31-S1 (2013), s89–s105; and Alexandra Gillies and Antoine Heuty, “Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries”, *Yale Journal of International Affairs*, Spring/Summer 2011, 25–42.

<sup>532</sup> See letter from Profs. Anthony Cannizzaro & Robert Weiner (Feb. 11, 2016) (“Cannizzaro & Weiner”). See also letters from API 1 (Appendix B) and Publish What You Pay – US (third of three letters on Mar. 8, 2016)

attempt to quantify those benefits, as discussed below, they each have certain limitations that we believe prevent us from relying on them to quantify the final rules' potential benefits in improving accountability and governance in resource-rich countries around the world. Furthermore, no other commenters included reliable data that would allow us to quantify the potential economic benefits of the final rules or suggested a source of data or a methodology that we could readily look to in doing so.

It is also important to note, however, that Congress has directed us to promulgate this disclosure rule. Thus, we believe it reasonable to rely on Congress's determination that the rule will produce the foreign policy and other benefits that Congress sought in imposing this mandate. Because of the important foreign policy interests at stake, we believe that Congress' determination that the potential benefits of disclosure justify such a rule is a decision that is owed considerable deference, and we do not believe that Congress intended that we second-guess its determination.

Moreover, as noted above, we concur with Congress' judgment that resource extraction payment disclosures could help to achieve a critical foreign policy objective of the U.S. Government. In reaching this conclusion, we are particularly mindful that a broad international consensus has developed on the potential benefits of revenue transparency.<sup>533</sup> Not only have the

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("PWYP-US 4") (both referring to a study by P. Healy and G. Serafeim). These letters and studies primarily focus on benefits to issuers and investors.

<sup>533</sup> We also credit the views of the State Department and USAID that the disclosures we are requiring will help reduce corruption and promote accountability in resource-rich countries. Both agencies have a high degree of expertise and experience in these matters. Relatedly, we note that USAID has advanced a persuasive explanation for ways that the disclosures may help complement the agency's own efforts to combat corruption and enhance governance globally. See letter from USAID.

Canadian government<sup>534</sup> and the European Union<sup>535</sup> acknowledged the potential benefits by adopting disclosure requirements similar to what we are adopting, but even members of industry through their participation as stakeholders in EITI have acknowledged the benefits that revenue transparency can produce.<sup>536</sup> Perhaps most significantly, industry stakeholders in the EITI process (which notably includes a number of industry organizations)<sup>537</sup> have expressly adopted the position that the EITI disclosures (which now include identification of the issuers responsible

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<sup>534</sup> See, e.g., ESTMA, Section 6 (“The purpose of this Act is to implement Canada’s international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities.”). See also ESTMA Guidance, at 2 (“Canadians will benefit from increased efforts to strengthen transparency in the extractive sector, both at home and abroad. Alongside Canada, the United States and European Union countries have put in place similar public disclosure requirements for their respective extractive industries. Together these reporting systems will contribute to raising global transparency standards in the extractive sector.”).

<sup>535</sup> See, e.g., European Commission Memo, “New disclosure requirements for the extractive industry and loggers of primary forests in the Accounting (and Transparency) Directives (Country by Country Reporting) – frequently asked questions” (June 12, 2013) (“The new disclosure requirement will improve the transparency of payments made to governments all over the world by the extractive and logging industries. Such disclosure will provide civil society in resource-rich countries with the information needed to hold governments to account for any income made through the exploitation of natural resources, and also to promote the adoption of the Extractive Industries Transparency Initiative (EITI) in these same countries. . . . The reporting of payments to government by the extractive and logging industries will provide civil society with significantly more information on what specifically is paid by EU companies to host governments in exchange for the right to extract the relevant countries’ natural resources. By requiring disclosure of payments at a project level, where those payments had been attributed to a specific project and were material, local communities will have insight into what governments were being paid by EU multinationals for exploiting local oil/gas fields, mineral deposits and forests. This will also allow these communities to better demand that government accounts for how the money had been spent locally. Civil society will be in a position to question whether the contracts entered into between the government and extractive and logging companies had delivered adequate value to society and government.”).

<sup>536</sup> For example, in describing its involvement with EITI, ExxonMobil states that these “efforts to promote revenue transparency have helped fight corruption, improve government accountability and promote greater economic stability around the world.” See <http://corporate.exxonmobil.com/en/current-issues/accountability/transparency/overview>. Similarly, when discussing its role in EITI, Chevron has acknowledged that revenue transparency is “an important pathway to improved governance.” See <http://www.chevron.com/Stories/Progress-Partnerships-and-Transparency>. Royal Dutch Shell has also expressed the position that “[r]evenue transparency provides citizens with an important tool to hold their government representatives accountable and to advance good governance.” See <http://www.shell.com/sustainability/transparency/revenues-for-governments.html>.

<sup>537</sup> See *Stakeholders*, available at <https://eiti.org/supporters/partnerorganizations> (last visited June 16, 2016).

for the payments and project-level reporting) produce “[b]enefits for implementing countries” by “strengthening accountability and good governance, as well as promoting greater economic and political stability.”<sup>538</sup> Industry stakeholders in EITI have similarly accepted the view that “[b]enefits to civil society come from increasing the amount of information in the public domain about those revenues that governments manage on behalf of citizens, thereby making governments more accountable.”<sup>539</sup>

Notably, none of the industry commenters expressed the view that the disclosures required by Section 13(q) would fail to help produce these anti-corruption and accountability benefits. Indeed, several commenters expressly acknowledged that transparency produces such benefits (notwithstanding the inability to reliably quantify those benefits). For example, one industry commenter stated that “[t]ransparency by governments and companies alike regarding revenue flows from the extraction of natural resources in a manner which is meaningful, practical and easily understood by stakeholders reduces the opportunity for corruption.”<sup>540</sup> Another industry commenter expressed its view “that the disclosure of revenues received by governments and payments made by the extractive-industry companies to governments could lead to improved governance in resource-rich countries.”<sup>541</sup> Yet another industry commenter stated that resource-revenue transparency efforts “are fundamental building blocks of good resource governance and are key to fostering better decision-making over public revenues.”<sup>542</sup>

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<sup>538</sup> <https://eiti.org/eiti/benefits>.

<sup>539</sup> Id.

<sup>540</sup> See letter from BHP.

<sup>541</sup> See letter from Chevron.

<sup>542</sup> See letter from Eni SpA (Jan. 31, 2016) (“Eni”).



While there is no conclusive empirical evidence that would confirm whether the project-level, public disclosure that we are adopting will in fact reduce corruption, in forming our conclusion that payment transparency will further the identified U.S. foreign policy goals, we find persuasive the arguments and evidence advanced by several commenters throughout this rulemaking that have emphasized the potential benefits to civil society of such public disclosure.<sup>543</sup> We note that many of these commenters provided reasons why the benefits to civil society of contract-based, project-level reporting would help to reduce corruption and promote accountability more effectively than more aggregated reporting, such as country-level reporting.<sup>544</sup>

To support their claims, these commenters provided numerous examples of ways in which disaggregated payment information can be effective in helping to reduce corruption and promote accountability, and no commenters disputed these examples.<sup>545</sup> For example, these commenters stated that public availability of project-level data would enable civil society groups, citizens, and local communities to know how much their governments earn from the resources that are removed from their respective territories when the governments deny them such information. In addition, according to some commenters, the disclosure of project-level data will help citizens to monitor public expenditures for efficiency and effectiveness, allow citizens and governments to ensure that revenues are being redistributed by the central government to localities properly (according to benefit-sharing agreements), and provide a basis for

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<sup>543</sup> See, e.g., letters from Global Witness 1, The ONE Campaign (Mar. 16, 2016) (“ONE Campaign”), Oxfam, PWYP-US 3, TI-USA, and USAID.

<sup>544</sup> See letter from Oxfam, PWYP-US 1, TI-USA.

<sup>545</sup> See Section I of the Proposing Release.

communities to advocate with the government for public services.<sup>546</sup> One commenter suggested that project-level disclosure will empower 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, assist citizens to assess the development impact of extraction locally, and promote economic and social development, especially in communities that host natural resource extraction operations.<sup>547</sup> These commenters also stated that this information would help empower civil society organizations to advocate for a fairer share of revenues, double-check government-published budget data, and better calibrate their expectations from the extractive issuers. Commenters on the 2010 Proposing Release provided similar arguments.<sup>548</sup>

***a. Currently Available Empirical Analyses on Potential Social Gains from Transparency***

As a threshold matter, we think it is important to observe that the EITI and other global transparency efforts are relatively new, which makes it difficult at this time to draw any firm empirical conclusions about the potential long-term benefits that such transparency regimes may produce for resource-rich countries. The causal mechanisms involved are complex (impacted by

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<sup>546</sup> See letter from ACEP, Publish What You Pay – US (Apr. 15, 2014) (“PWYP 7 (pre-proposal)”), and TI-USA.

<sup>547</sup> See letter from PWYP 7 (pre-proposal).

<sup>548</sup> See, e.g., letters from Global Witness (Feb. 25, 2011) (“Global Witness 1 (pre-proposal)”); National Advocacy Coalition on Extractives (Feb. 10, 2015) (“NACE (pre-proposal)”; Oxfam America (Feb. 21, 2011) (“Oxfam 1 (pre-proposal)”; Publish What You Pay U.S. (Feb. 25, 2011) (“PWYP 1 (pre-proposal)”; Publish What You Pay Cameroon (June 8, 2015) (“PWYP-CAM (pre-proposal)”; Publish What You Pay - Indonesia (Mar. 11, 2015) (“PWYP-IND (pre-proposal)”; Publish What You Pay - Zimbabwe (Feb. 20, 2015) (“PWYP-ZIM (pre-proposal)”; Revenue Watch Institute (Feb. 17, 2011) (“RWI 1 (pre-proposal)”; and Syena Capital Management LLC (Feb. 17, 2011) (“Syena (pre-proposal)”).

myriad factors) and it may take several decades before those mechanisms yield empirically verifiable social gains.<sup>549</sup>

A few commenters on the Proposing Release argued that the rules implementing Section 13(q) would generate societal benefits and cited studies that attempt to measure those benefits for countries that join the EITI.<sup>550</sup> While these studies provide useful insight into the potential benefits to be derived from resource payment transparency regimes, as discussed more fully below, we believe that there are limitations associated with each of these studies that make it difficult for us to draw firm conclusions based on their findings.

One commenter presented a study that found a significant increase in GDP when a resource-rich country joins the EITI.<sup>551</sup> The study also found that the increase in GDP appears to be larger the more dependent a country's economy is on natural resource sectors. While the study is informative, we have not relied on it to form any quantitative conclusions. The study does not take into account other factors that could be driving the increase in GDP and that could be correlated with a country's participation in the EITI. While the study controls for time-invariant (or country-specific) factors in the empirical model, it does not control for time-varying factors that could be driving the results, such as the change in the quality of the institutions in a country. It is possible that non-EITI driven institutional improvements over the period of time

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<sup>549</sup> See, e.g., studies cited in the note 531 above.

<sup>550</sup> See letters from PWYP-US 1 and Corrigan.

<sup>551</sup> See letter from Corrigan (citing her earlier study: Corrigan, C. C. (2014). Breaking the Resource Curse: Transparency in the Natural Resource Sector and the Extractive Industries Transparency Initiative. *Resources Policy*, 41(1), 17–30).

used in the study contributed to the increase in GDP. It is also possible that the improvement in institutions had an impact on the country's decision to join the EITI.

Another commenter cited two studies that examined the effect of a country joining the EITI on net foreign direct investment ("FDI").<sup>552</sup> One of the studies found that joining the EITI increased net FDI inflow by 50 percent, although the statistical significance of the results is marginal.<sup>553</sup> The other study also found that joining the EITI increased the net FDI as a fraction of GDP by two percent.<sup>554</sup> This second study, however, did not fully control for other factors that could jointly drive the increase in net FDI and affect the country's decision to join EITI, such as improvements in the quality of the country's institutions and overall improvement in the country's transparency. Thus, both of these studies have limitations that lessen our confidence in their results and hence our willingness to rely on them to quantify benefits from resource extraction payment transparency.

Another commenter presented two single country-based case studies of conflict and unrest, which the commenter attributed to corruption and lack of transparency. The studies measured the economic impact of such conflict and unrest on U.S. oil companies and used the avoidance of such economic costs as a means of quantifying the societal benefits of

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<sup>552</sup> See letter from PWYP-US 1 (citing Fernando Londoño, "Does Joining the Extractive Industries Transparency Initiative Have an Impact on Extractive and Non-Extractive FDI Inflows?" (2014), available at <http://gppreview.com/wp-content/uploads/2014/02/Londono-F.pdf>) ("Londoño Study") and Maya Schmaljohann, "Enhancing Foreign Direct Investment via Transparency? Evaluating the Effects of the EITI on FDI" (Jan. 2013), available at [http://archiv.ub.uni-heidelberg.de/volltextserver/14368/1/Schmaljohann\\_2013\\_dp538.pdf](http://archiv.ub.uni-heidelberg.de/volltextserver/14368/1/Schmaljohann_2013_dp538.pdf) ("Schmaljohann Study").

<sup>553</sup> See Londoño Study.

<sup>554</sup> See Schmaljohann Study.

transparency.<sup>555</sup> In the first case study, the costs are estimated as the difference in revenues in years with conflict and unrest and a base year without such conflicts and unrest. The combined cost estimates from that study are approximately \$17.4 billion over the period 2011-2014. In the second case study, the costs are estimated as unrealized revenues due to shut-in production events that are caused by conflict and unrest. The combined cost estimates from that study are approximately \$14.7 billion over the period 2003-2016. In these case studies, however, it is difficult to distinguish the role that corruption and the lack of transparency played in stirring a country's conflict and unrest from the role that other factors such as ethnic conflicts, religious conflicts, and political repression may have played.

One commenter cited its own study suggesting that high levels of corruption (measured by bribery) correspond to lower levels of economic development.<sup>556</sup> The study found that higher levels of bribery were associated with higher maternal mortality, lower youth literacy rate, and lower access to basic sanitation. The same commenter cited another study that suggested that even small improvements in a country's governance resulted in higher income and lower infant mortality rates in the long run.<sup>557</sup> These findings seem broadly consistent with findings from other studies on the relationship between corruption and economic development.<sup>558</sup>

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<sup>555</sup> See letter from ONE Campaign.

<sup>556</sup> See letter from TI-USA.

<sup>557</sup> See Daniel Kaufmann, Governance Matters 2010: Worldwide Governance Indicators Highlight Governance Successes, Reversals and Failures, available at <http://www.brookings.edu/research/opinions/2010/09/24-wgi-kaufmann>.

<sup>558</sup> See Section I.E of the Proposing Release.

***b. Potential Benefits to Issuers and Investors from Transparency***

To the extent that the final rules increase transparency and thus reduce corruption, they would increase efficiency and capital formation. While the objectives of Section 13(q) may not appear to be ones that would necessarily generate measurable, direct economic benefits to investors or issuers, investors and issuers might benefit from the final rules' indirect effects. In the following paragraphs, we discuss existing theoretical arguments and empirical evidence that reduced corruption and better governance could have longer term positive impacts on economic growth and investment in certain countries where the affected issuers operate, which could in turn benefit issuers and their shareholders.

Although the research and data available at this time does not allow us to draw any firm conclusions, we have considered several theoretical causal explanations for why reductions in corruption may increase economic growth and political stability, which in turn may reduce investor risk.<sup>559</sup> High levels of corruption could introduce inefficiencies in market prices as a result of increased political risks and the potential awarding of projects to companies for reasons other than the merit of their bids. This, in turn, could prop up inefficient companies and limit investment opportunities for others. These potential distortions could have a negative impact on the economies of countries with high corruption, particularly to the extent that potential revenue streams are diminished or diverted. Additionally, the cost of corrupt expenditures, direct or indirect, impacts profitability, and, if the cost is sufficiently high, some potentially economically efficient or productive investments may not be made. Thus, reducing corruption could increase

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<sup>559</sup> See, e.g., reviews by P. Bardhan, "Corruption and Development: A Review of Issues," *Journal of Economic Literature*, 35, no. 3, 1320–1346 (1997) and J. Svensson, "Eight Questions about Corruption," *Journal of Economic Perspectives*, 19, no. 3, 19–42 (2005).

the number of productive investments and the level of profitability of each investment and could lead to improved efficiency in the allocation of talent, technology, and capital. Insofar as these effects are realized, each of them could benefit issuers operating in countries with reduced corruption levels. These and other considerations form a basis for several dynamic general equilibrium models predicting a negative relationship between corruption and economic development.<sup>560</sup>

A number of empirical studies have also shown that reducing corruption might result in an increase in the level of GDP and a higher rate of economic growth through more private investments, better deployment of human capital, and political stability.<sup>561</sup> Other studies find that corruption reduces economic growth both directly and indirectly, through lower investments.<sup>562</sup> To the extent that increased transparency could lead to a reduction in corruption and, in turn, improved political stability and investment climate, some investors may consider such factors in their investment decisions, including when pricing resource extraction assets of

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<sup>560</sup> See, e.g., I. Ehrlich and F. Lui “Bureaucratic Corruption and Endogenous Economic Growth,” *Journal of Political Economy*, 107 (6), 270–293 (1999); K. Blackburn, N. Bose, and E.M. Haque, “The Incidence and Persistence of Corruption in Economic Development,” *Journal of Economic Dynamics and Control* 30, 2447–2467 (2006); and C. Leite and J. Weidmann, “Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth,” International Monetary Fund Working Paper No. 99/85 (July 1999).

<sup>561</sup> See, e.g., P. Mauro, “The effects of corruption on growth, investment and government expenditure: A cross country analysis,” in K.A. Elliot (ed.) *Corruption and the Global Economy*, Washington D.C.: Institute for International Economics, 83–107 (1997); H. Poirson, “Economic Security, Private Investment, and Growth in Developing Countries,” International Monetary Fund Working Paper No. 98/4 (Jan. 1998); Institute for Economics and Peace, *Peace and Corruption Report* (2015).

<sup>562</sup> See Pak Hung Mo, “Corruption and Economic Growth,” *Journal of Comparative Economics* 29, 66–79 (2001); K. Gyimah-Brempong, “Corruption, economic growth, and income inequality in Africa,” *Economics of Governance* 3, 183–209 (2002); and Pierre-Guillaume Méon and Khalid Sekkat, “Does corruption grease or sand the wheels of growth?” *Public Choice* 122, 69–97 (2005).

affected issuers operating in these countries.<sup>563</sup> We note that some commenters on the Proposing Release supported this view.<sup>564</sup>

There also could be positive externalities from increased investor confidence to the extent that improved economic growth and investment climate could benefit other issuers working in those countries. Although we believe the evidence is presently too inconclusive to allow us to predict the likelihood that such a result would occur, we note that there is some empirical evidence suggesting that lower levels of corruption might reduce the cost of capital and improve valuations for some issuers.<sup>565</sup>

One commenter asserted that the studies cited above discuss primarily a single form of corruption – bribery – that in the commenter’s view is not subject to the disclosures required by Section 13(q) and hence the commenter contended that these studies do not support our view that the required disclosures might achieve economic benefits resulting from reduced corruption.<sup>566</sup> We acknowledge that the specific studies that the commenter mentions do focus on bribery as a form of corruption. All the other studies that we cite, which are not specifically mentioned by the commenter, do discuss corruption in general and its effect on economic growth. In fact,

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<sup>563</sup> Several studies present evidence that reduction in corruption increases foreign direct investments. See, e.g., S.-J. Wei, “How Taxing is Corruption on International Investors?” *NBER Working Paper* 6030 (1997) and G. Abed and H. Davoodi, “Corruption, Structural Reforms, and Economic Performance in the Transition Economies,” *International Monetary Fund Working Paper* No. 00/132 (July 2000).

<sup>564</sup> See letter from ACTIAM et al., Calvert, and PWYP-US 1.

<sup>565</sup> See D. Kaufmann and S. J. Wei “Does ‘Grease Money’ Speed Up the Wheels of Commerce?” *NBER Working Paper* 7093 (1999) (finding, based on survey evidence, that firms that pay fewer bribes have lower, not higher, cost of capital); and C. Lee and D. Ng, “Corruption and International Valuation: Does Virtue Pay?” *Journal of Investing*, 18, no. 4, 23–41 (2009) (finding that firms from more corrupt countries trade at significantly lower market multiples).

<sup>566</sup> See letter from API 1. As we explained above, we believe that this commenter has an unduly narrow view of the anti-corruption objectives of Section 13(q) and, thus, we disagree with the claim that Section 13(q) is unconcerned with helping to reduce bribery. See Section II.E.3.



some specifically discuss the type of corruption addressed by the final rules.<sup>567</sup> Furthermore, to the extent that Section 13(q) is successful in reducing the corruption in the form of misuse of funds, it could also reduce quid-pro-quo corruption as well. For example, if the government and issuers are more strictly monitored by citizens and society as a result of the final rules, they may become more reluctant to engage in quid-pro-quo corruption. It is also possible that some of the payments that are reportable under Section 13(q) are an implicit form of bribery: for example, government officials could agree, instead of a bribe, to receive another type of payment from an issuer that could be expropriated by these officials later, after the payment is made. If the disclosure under Section 13(q) is successful in decreasing the misuse of funds, this type of implicit quid-pro-quo corruption could be reduced as well.

We also note that some commenters on the Proposing Release<sup>568</sup> stated that the disclosures required by Section 13(q) could provide useful information to investors in making investment decisions. Although we do not believe this is the primary purpose of the required disclosures, we acknowledge the possibility that the disclosures could provide potentially useful information to certain investors. Some commenters, for example, stated that the new disclosures

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<sup>567</sup> See, e.g., the study by J. Svensson at note 559 above, which defines corruption as misuse of public office for private gain. That study cites examples of corruption that are similar to the types of corruption the final rules are trying to address. For example, the study discusses the diversion of funds allocated to school districts in Uganda and road building projects in Indonesia by government officials in these countries. In Uganda, according to the study, only 13 percent of the funds allocated to the school districts actually reached them; the bulk of the grants was captured by local government officials and politicians. As this evidence became known and the central government began to publish newspaper accounts of monthly transfers to districts, so that school staff and parents could monitor local officials, schools received an average of 80 percent of their annual entitlements.

<sup>568</sup> See letters from Bean, Calvert, ITWF, Peck & Chayes, Sen. Cardin et al., Sen. Lugar et al., TI-USA, and USSIF.

could help investors better assess the risks faced by resource extraction issuers operating in resource-rich countries.<sup>569</sup>

One of these commenters identified several benefits that project-level reporting would generate for investors.<sup>570</sup> First, according to the commenter, such reporting would help investors assess the effectiveness of the diversification of risks within a portfolio by enabling them to understand better the risk profiles of individual projects within a given country and the contribution of each project to the overall returns and variation in returns of the portfolio of projects that an issuer has in that country. Another commenter expressed a similar view.<sup>571</sup> We note, however, that additional information, beyond the disclosure required by Section 13(q), is needed to estimate returns and variation of returns of a project or portfolio of projects in a given country. For example, investors and analysts will need cash flow information (revenues and total costs, not only those paid to the local government) and cost of capital per project, which may not be readily available. Thus, the extent to which the disclosure required by Section 13(q) may generate this particular benefit is unclear.

A second benefit for investors, according to the commenter, is that project-level reporting would help adjust assumptions on a major cost to the project: the effective tax rate of the host government, the total taxes and other payments to governments. The commenter provided a hypothetical example in which information on the effective tax rate paid increases the estimate of

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<sup>569</sup> See letters from Calvert, Columbia Center on Sustainable Investment (Oct. 30, 2015) (“Columbia Center (pre-proposal)”), and ACTIAM et al. Some commenters on the 2010 Proposing Release had similar views. See, e.g., letters from EarthRights International (Sept. 20, 2011) (“ERI 2 (pre-proposal)”); Global Witness 1 (pre-proposal); PGGM Investments (Mar. 1, 2011) (“PGGM (pre-proposal)”; and Oxfam 1 (pre-proposal).

<sup>570</sup> See letter from Columbia Center (pre-proposal).

<sup>571</sup> See letter from Robert F. Conrad, PhD (July 17, 2015) (“Conrad (pre-proposal)”).

the value of the company by three percent. While the benefit of having accurate tax information when valuing a project or a company is indisputable, it is unlikely, as we indicated above, that an investor or analyst will have accurate information for other components (e.g., revenues, total costs, and cost of capital) necessary to value a project. If those components must be estimated, as is typically the case, the detailed tax information may not have a first order effect on project/company value, or at least may not yield a substantial advantage over simply using the marginal tax rate of the host country.

A third benefit for investors, according to the commenter, is that the project-level disclosure would help investors assess the issuer's exposure to commodity price downturns by analyzing industry cost curves to forecast commodity prices. As noted above, such benefit assumes that all other relevant costs (e.g., production costs and capital expenditures), besides the one reported under Section 13(q), are known to investors, which may not be the case.

A fourth benefit for investors, according to the commenter, is that project-level disclosure would result in lower cost of capital because it makes firms more transparent and thus creates trust with investors. The commenter cites two studies that find a positive link between transparency and cost of capital. The studies, however, do not provide evidence that resource extraction transparency in particular leads to lower cost of capital; rather, the studies conclude more generally that earnings transparency and the strength of the country's securities regulations can have a major impact on cost of capital. Transparency regarding key company financial and

accounting information will likely have a stronger effect on cost of capital than transparency regarding the company's resource payments.<sup>572</sup>

A fifth benefit for investors, according to the commenter, is that increased transparency may lead to lower political risk. Such a benefit, however, depends not only on resource extraction payment disclosure, but also on other types of disclosure and the quality of the governance of the host country. Disclosure under Section 13(q) by itself may not result in lower political risk.

While we acknowledge all these comments, we believe that the direct incremental benefit to investors from this information may be limited given that most impacted issuers, other than smaller reporting companies,<sup>573</sup> are already required to disclose their most significant operational and financial risks as well as certain financial information related to the geographic areas in which they operate in their Exchange Act annual reports.<sup>574</sup>

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<sup>572</sup> Finance theory implies that a firm's cost of capital depends primarily on the covariance between its future free cash flows and the cash flows from other available investments in the market. See, e.g., R. Lambert, C. Leuz, and R. Verrecchia, "Accounting information, disclosure, and the cost of capital," *Journal of Accounting Research*, 45, 385-420 (2007). The relevant free cash flows apply to the entire firm, as reflected in its overall disclosures and top line financial measures. Because resource payments are already incorporated within a firm's reported cash flows, improved transparency about resource payments is unlikely to have a large impact on a firm's cost of capital.

<sup>573</sup> About 43 percent of affected issuers are smaller reporting companies that are not obligated to disclose in their Exchange Act annual reports significant risk factors they face. For such companies, the resource extraction payments disclosure could provide incremental information that might benefit some investors, to the extent that they would not otherwise have a requirement to disclose the political or economic risks related to operating in resource-rich countries. We do not, however, have data on whether such companies have material operations in politically volatile regions and whether they have exposure to risks described by commenters.

<sup>574</sup> See Item 1A and Item 10(d)(3) of Form 10-K and Item 3.D of Form 20-F. See also Item 1 of Form 10-K which requires disclosure of revenues from external customers attributed to any individual foreign country, if material, and long lived assets located in any individual foreign country, if material and Item B.2 of Form 20-F which requires disclosure of the principal markets in which the company competes, including a breakdown of total revenues by category of activity and geographic market for each of the last three financial years. In addition, pursuant to Item 7 of Form 10-K and Item 5D Form 20-F, registrants other than smaller reporting companies are required to provide a discussion of any known trends or uncertainties that the registrant reasonably expects will

In response to the Proposing Release, one commenter suggested an additional approach to quantify the rule's benefits to investors.<sup>575</sup> A few other commenters referenced another study using a similar methodology.<sup>576</sup> Both of these studies use issuers' stock price reaction to various events associated with the rulemaking process to measure investors' view on the effect of the rule on the value of their investments.<sup>577</sup> The studies posit that aggregating stock market gains or losses (adjusted for other factors) for resource extraction issuers around the relevant events enables the quantification of the aggregate monetary gains or losses that investors attribute to the rule. We note that even though these two studies use similar approaches (*i.e.*, an event study) to quantify the potential benefits to investors, they arrive at somewhat different conclusions with respect to the rule's perceived benefits.<sup>578</sup>

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have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations or the registrant's liquidity.

<sup>575</sup> See letter from Cannizzaro and Weiner.

<sup>576</sup> See letters from API 1 (Appendix B) and PWYP-US 4 that both refer to the study by P. Healy and G. Serafeim, "Voluntary, Self-Regulatory and Mandatory Disclosure of Oil and Gas Company Payments to Foreign Governments", Working Paper (2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1961404](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961404).

<sup>577</sup> Cannizzaro and Weiner consider four events: the adoption of the rule by the Commission on August 22, 2012, the API lawsuit filing on October 10, 2012, the vacation of the rule by the court on July 2, 2013, and the December 11, 2015, reproposal of the rule. Healy and Serafeim consider seven events: the House-Senate Conference Committee meeting on the Dodd-Frank Act on June 24, 2010, the passage of the Dodd-Frank Act on June 26, 2010, the signing of the Dodd-Frank Act on July 21, 2010, the adoption of the rule by the Commission on August 22, 2012, the API lawsuit filing on October 10, 2012, the vacation of the rule by the court on July 2, 2013, and the API comment letter submission on November 7, 2013.

<sup>578</sup> The studies use different events, sample selection criteria, and measures of expected return. Healy and Serafeim found that investors negatively reacted to relevant events: they find that the average cumulative abnormal return for 26 stocks in their sample for the 3-day window around the days of studied events is -1.90% for events that increase probability that the rules would be implemented and +1.06% for events that decrease the probability that the rules would be implemented. Cannizzaro and Weiner generally found that investors positively reacted to relevant events. They find that the median cumulative abnormal returns for indexes or exchange traded funds that focus on extractive industries for the 3-day (7-day) window around the days of studied events are +0.28% (+0.26%) and +0.66% (+1.83%) for events that increase probability that the rules would be implemented and +0.35% (-0.31%) and -2.77% (-4.83%) for events that decrease the probability that the rules would be implemented.

We carefully considered each of these studies, but note that there are a number of potential limitations in the analysis: certain of the events used in these studies may be confounded by other events;<sup>579</sup> neither of the studies considers alternative measures of expected market return;<sup>580</sup> and neither of the studies reports the statistical significance of their findings. Consequently, we are unable to rely on these studies to draw unambiguous conclusions about investors' attitudes towards the overall effect of the costs and benefits of the rule as expressed in their valuation of resource extraction issuers on certain event dates.

## **2. Costs**

We received a number of comments on the compliance costs that would be imposed by the proposed rules. We first summarize these comments in the subsection immediately below and then, in the following subsections, we assess these comments as part of our discussion of the final rules' potential direct and indirect compliance costs and their potential effects on competition.

### ***a. Commenters' Views of Compliance Costs***

Many commenters stated that the reporting regime mandated by Section 13(q) would impose significant compliance costs on issuers. During the comment period after the 2010 Proposing Release, several commenters specifically addressed the cost estimates presented in the

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<sup>579</sup> For example, the Dodd-Frank Act is a multipart law, of which Section 13(q) is just one part. Therefore, it is not clear whether the reported results describe the market reaction to the entire Dodd-Frank Act or to Section 13(q) only.

<sup>580</sup> For example, the Healy and Serafeim study does not adjust expected stock return for the change in oil, natural gas, or other commodities prices, and the Cannizzaro and Weiner study does not consider alternative models of market return (e.g., the Fama-French three-factor model).

Paperwork Reduction Act (“PRA”) section of that release.<sup>581</sup> Other commenters discussed the costs and burdens to issuers generally as well as costs that could have an effect on the PRA analysis.<sup>582</sup> In the Proposing Release, in response to comments previously received, we revised our estimates of both initial and ongoing compliance costs. In addition, also in response to comments, we made several changes to our PRA estimates that were designed to better reflect the burdens associated with the new disclosure requirements. In response to the Proposing Release, a number of commenters submitted letters reiterating and emphasizing the potential of the proposed rules to impose substantial costs.<sup>583</sup> Only one commenter suggested an alternative quantitative estimate of the direct compliance costs.<sup>584</sup> We discuss this estimate below, after a brief discussion of the comments on the cost estimates that were provided on the 2010 Proposing Release.

Some commenters on the 2010 Proposing Release disagreed with our industry-wide estimate of the total annual increase in the collection of information burden and argued that it

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<sup>581</sup> See the following pre-proposal letters from American Petroleum Institute (Jan. 28, 2011) (“API 1 (pre-proposal)”); American Petroleum Institute (Aug. 11, 2011) (“API 2 (pre-proposal)”); Barrick Gold Corporation (Feb. 28, 2011) (“Barrick Gold (pre-proposal)”); ERI 2 (pre-proposal); Exxon Mobil (Jan. 31, 2011) (“ExxonMobil 1 (pre-proposal)”); ExxonMobil (Oct. 25, 2011) (“ExxonMobil 3 (pre-proposal)”); National Mining Association (Mar. 2, 2011) (“NMA 2 (pre-proposal)”); Rio Tinto plc (Mar. 2, 2011) (“Rio Tinto (pre-proposal)”); Royal Dutch Shell plc (Jan. 28, 2011) (“RDS 2 (pre-proposal)”); and Royal Dutch Shell (Aug. 1, 2011) (“RDS 4 (pre-proposal)”).

<sup>582</sup> See, e.g., letters from British Petroleum p.l.c. (Feb. 11, 2011) (“BP 1 (pre-proposal)”); Chamber of Commerce Institute for 21<sup>st</sup> Century Energy (Mar. 2, 2011) (“Chamber Energy Institute (pre-proposal)”); Chevron Corporation (Jan. 28, 2011) (“Chevron (pre-proposal)”); Cleary Gottlieb Steen & Hamilton (Mar. 2, 2011) (“Cleary (pre-proposal)”); Hermes Equity Ownership Services Ltd. (Mar. 2, 2011) (“Hermes (pre-proposal)”; and PWYP 1 (pre-proposal).

<sup>583</sup> See, e.g., letters from API 1 and ExxonMobil 1.

<sup>584</sup> See letter from Claigan Environmental (Feb. 16, 2016) (“Claigan”).

underestimated the actual costs that would be associated with the rules.<sup>585</sup> These and other commenters stated that, depending upon the final rules adopted, the compliance burdens and costs arising from implementation and ongoing compliance with the rules would be significantly higher than those estimated by the Commission.<sup>586</sup> However, these commenters generally did not provide quantitative analysis to support their estimates.<sup>587</sup>

Commenters on the 2010 Proposing Release also stated that modifications to issuers' core enterprise resource planning systems and financial reporting systems would be necessary to capture and report payment data at the project level, for each type of payment, government payee, and currency of payment.<sup>588</sup> These commenters estimated that the resulting initial implementation costs would be in the tens of millions of dollars for large issuers and millions of dollars for many small issuers.<sup>589</sup> Two of these commenters provided examples of the modifications that would be necessary, including establishing additional granularity to existing coding structures (e.g., splitting accounts that contain both government and non-government payment amounts), developing a mechanism to appropriately capture data by "project," building new collection tools within financial reporting systems, establishing a trading partner structure to

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<sup>585</sup> See letters from API 1 (pre-proposal), ExxonMobil 1 (pre-proposal).

<sup>586</sup> See letters from API 1 (pre-proposal); API 2 (pre-proposal); American Petroleum Institute (Jan. 19, 2012) ("API 3 (pre-proposal)"); Barrick Gold (pre-proposal); ExxonMobil 1 (pre-proposal); NMA 2 (pre-proposal); Rio Tinto (pre-proposal); and RDS 2 (pre-proposal).

<sup>587</sup> See letters from API 1 (pre-proposal) and ExxonMobil 1 (pre-proposal). ExxonMobil 1 (pre-proposal) did provide estimated implementation costs of \$50 million if the definition of "project" is narrow and the level of disaggregation is high across other reporting parameters. This estimate is used in our analysis below of the expected implementation costs.

<sup>588</sup> See letters from API 1 (pre-proposal); ExxonMobil 1 (pre-proposal); and RDS 2 (pre-proposal).

<sup>589</sup> See letters from API 1 (pre-proposal); ExxonMobil 1 (pre-proposal); and RDS 2 (pre-proposal). These commenters did not describe how they defined small and large issuers.



identify and provide granularity around government entities, establishing transaction types to accommodate types of payment (e.g., royalties, taxes, or bonuses), and developing a systematic approach to handle “in-kind” payments.<sup>590</sup> These two commenters estimated that total industry costs for initial implementation of the final rules could amount to hundreds of millions of dollars.<sup>591</sup>

These commenters added that these estimated costs could be significantly greater depending on the scope of the final rules.<sup>592</sup> They suggested, for example, that costs could increase depending on how the final rules define “project” and whether the final rules require reporting of non-consolidated entities, require “net” and accrual reporting, or require an audit.<sup>593</sup> Another commenter estimated that the initial set up time and costs associated with the rules implementing Section 13(q) would require 500 hours for the issuer to change its internal books and records and \$100,000 in information technology consulting, training, and travel costs.<sup>594</sup> One commenter representing the mining industry estimated that start-up costs, including the burden of establishing new reporting and accounting systems, training local personnel on tracking and reporting, and developing guidance to ensure consistency across reporting units, would be at least 500 hours for a mid-to-large sized multinational issuer.<sup>595</sup>

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<sup>590</sup> See letters from API 1 (pre-proposal) and ExxonMobil 1 (pre-proposal).

<sup>591</sup> See letters from API 1 (pre-proposal) and ExxonMobil 1 (pre-proposal).

<sup>592</sup> See letters from API 1 (pre-proposal); ExxonMobil 1 (pre-proposal); and RDS 2 (pre-proposal).

<sup>593</sup> See letters from API 1 (pre-proposal); ExxonMobil 1 (pre-proposal); and RDS 2 (pre-proposal). As previously discussed, the final rules do not require the payment information to be audited or reported on an accrual basis; therefore, commenters’ concerns about possible costs associated with these items should be alleviated. See Section II.G.5 of the Proposing Release.

<sup>594</sup> See letter from Barrick Gold (pre-proposal).

<sup>595</sup> See letter from NMA 2 (pre-proposal).

Two commenters stated that arriving at a reliable estimate for the ongoing annual costs of complying with the rules would be difficult because the rules were not yet fully defined but suggested that a “more realistic” estimate than the estimate included in the 2010 Proposing Release is hundreds of hours per year for each large issuer that has many foreign locations.<sup>596</sup> Commenters also indicated that costs related to external professional services would be significantly higher than the Commission’s estimate, resulting primarily from XBRL tagging and higher printing costs, although these commenters noted that it is not possible to estimate these costs until the specific requirements of the final rules are determined.<sup>597</sup>

One commenter on the 2010 Proposing Release estimated that ongoing compliance with the rules implementing Section 13(q) would require 100-200 hours of work at the head office, an additional 100-200 hours of work providing support to its business units, and 40-80 hours of work each year by each of its 120 business units, resulting in an approximate yearly total of 4,800-9,600 hours and \$2,000,000-\$4,000,000.<sup>598</sup> One large multinational issuer estimated an additional 500 hours each year, including time spent to review each payment to determine if it is covered by the reporting requirements and ensure it is coded to the appropriate ledger accounts.<sup>599</sup> Another commenter representing the mining industry estimated that, for an issuer with a hundred projects or reporting units, the annual burden could be nearly 10 times the

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<sup>596</sup> See letters from API 1 (pre-proposal) and ExxonMobil 1 (pre-proposal) (each noting that estimates would increase if the final rules contain an audit requirement or if the final rules are such that issuers are not able to automate material parts of the collection and reporting process).

<sup>597</sup> See letters from API 1 (pre-proposal) and ExxonMobil 1 (pre-proposal).

<sup>598</sup> See letter from Rio Tinto (pre-proposal). These estimates exclude initial set-up time required to design and implement the reporting process and develop policies to ensure consistency among business units. They also assume that an audit is not required.

<sup>599</sup> See letter from Barrick Gold (pre-proposal).

estimated PRA burden set out in the 2010 Proposing Release.<sup>600</sup> This commenter stated that its estimate takes into account the task of collecting, cross-checking, and analyzing extensive and detailed data from multiple jurisdictions around the world, as well as the potential for protracted time investments to comply with several aspects of the rules proposed in 2010 that are not included in the current final rules.<sup>601</sup> This commenter also stated that the estimate in the 2010 Proposing Release did not adequately capture the burden to an international company with multiple operations where a wide range of personnel would need to be involved in capturing and reviewing the data for the required disclosures as well as for electronically tagging the information in XBRL format.<sup>602</sup>

In response to the Proposing Release, only one commenter suggested an alternative quantitative estimate of the direct compliance costs.<sup>603</sup> The commenter's suggested approach is different from other approaches suggested by commenters and from the approach presented in the Proposing Release in that it considers aggregate industry costs directly rather than on a per issuer basis. Starting from an estimate of the total number of fields or mines in the world, the commenter first derived an estimate of the number of projects per field or mine that might be reportable under the final rules. The commenter then multiplied the number of reportable

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<sup>600</sup> See letter from NMA 2 (pre-proposal).

<sup>601</sup> See *id.* Most of the time investments outlined by this commenter would not apply to the final rules, such as the cost of seeking information from non-consolidated "controlled" entities, obtaining compliance advice on the application of undefined terms such as "project," and reviews of the disclosure in connection with periodic certifications under the Sarbanes Oxley Act. Certain potential costs outlined by the commenter, however, would apply to the final rules, such as those associated with implementing new systems based on our final definition of "project" and other definitions and costs associated with attempting to secure an exemption from the Commission when foreign law prohibitions on disclosure apply.

<sup>602</sup> See letter from NMA 2 (pre-proposal).

<sup>603</sup> See letter from Claigan.

projects by the estimated cost for an issuer to report its activities for an individual field or mine to calculate total compliance costs to be incurred by all issuers. The quantitative estimates derived from this approach are within our range of estimates (see the numerical comparison in Section III.B.2.b. below). However, we note that some of the commenter's assumptions are not fully explained (e.g., the number of internal and external hours per issuer per field or mine that issuers would spend on compliance with the rules).

Although commenters on the Proposing Release did not address whether compliance costs have been overstated, commenters on the 2010 Proposing Release expressed that view.<sup>604</sup> One commenter stated that most issuers already have internal systems in place for recording payments that would be required to be disclosed under Section 13(q) and that many issuers currently are subject to reporting requirements at a project level.<sup>605</sup> Another commenter anticipated that, while the rules would likely result in additional costs to resource extraction issuers, such costs would be marginal in scale because, in the commenter's experience, many issuers already have extensive systems in place to handle their current reporting requirements and any adjustments needed as a result of Section 13(q) could be done in a timely and cost-effective manner.<sup>606</sup> Another commenter believed that issuers could adapt their current systems in a cost-effective manner because they should be able to adapt a practice undertaken in one

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<sup>604</sup> See letters from ERI 2 (pre-proposal); Oxfam 1 (pre-proposal); PWYP 1 (pre-proposal); and RWI 1 (pre-proposal).

<sup>605</sup> See letter from RWI 1 (pre-proposal) (noting that Indonesia requires reporting at the production sharing agreement level and that companies operating on U.S. federal lands report royalties paid by lease).

<sup>606</sup> See letter from Hermes (pre-proposal).

operating environment to those in other countries without substantial changes to the existing systems and processes of an efficiently-run enterprise.<sup>607</sup>

Another commenter stated that, in addition to issuers already collecting the majority of information required to be made public under Section 13(q) for internal record-keeping and audits, U.S. issuers already report such information to tax authorities at the lease and license level.<sup>608</sup> This commenter added that efficiently-run issuers should not have to make extensive changes to their existing systems and processes to export practices undertaken in one operating environment to another.<sup>609</sup> However, another commenter disagreed that issuers already report the payment information required by Section 13(q) for tax purposes.<sup>610</sup> This commenter also noted that tax reporting and payment periods may differ.

One commenter, while not providing competing estimates, questioned the accuracy of the assertions relating to costs from industry participants,<sup>611</sup> noting that: (i) some issuers already report project-level payments in certain countries in one form or another and under a variety of regimes; (ii) some EITI countries are already moving toward project-level disclosure; and (iii) it is unclear whether issuers can save much time or money by reporting government payments at the material project or country level.<sup>612</sup>

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<sup>607</sup> See letter from RWI 1 (pre-proposal).

<sup>608</sup> See letter from PWYP 1 (pre-proposal).

<sup>609</sup> See id. (citing statement made by Calvert Investments at a June 2010 IASB-sponsored roundtable).

<sup>610</sup> See letter from Rio Tinto (pre-proposal) (“[t]his is a simplistic view, and the problem is that tax payments for a specific year are not necessarily based on the actual accounting results for that year.”).

<sup>611</sup> See letter from ERI 2 (pre-proposal).

<sup>612</sup> This commenter also explained that any costs would be limited because, among other things, issuers are already required to keep records of their subsidiaries’ payments to governments under the Foreign Corrupt Practices Act. Id.

### *b. Quantitative Estimates of Compliance Costs*

In the Proposing Release, we presented a quantitative estimate of the compliance costs associated with the proposed rules. No commenters specifically addressed this quantitative estimate or provided additional data that we could use to update or refine this estimate. Because we have not received quantitative estimates using the same or similar approaches that take into account the differences between the rules proposed in 2010 and those proposed in the Proposing Release, we use the approach presented in the Proposing Release and the quantitative information supplied by commenters in response to the 2010 Proposing Release to assess the initial and ongoing compliance costs of the final rules.<sup>613</sup> We supplement and compare this analysis with the cost estimate supplied by one commenter that used a different approach.<sup>614</sup> Our general approach is to estimate the upper and lower bounds of the compliance costs for each potentially affected issuer and then to sum up these estimates to estimate the aggregate compliance costs.<sup>615</sup> As discussed in Section III.A above, we estimate that, as of the end of 2015, 755 issuers would be potentially affected by the final rules.<sup>616</sup> However, in determining

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<sup>613</sup> See letters from Barrick Gold (pre-proposal), ExxonMobil 1 (pre-proposal), and Rio Tinto (pre-proposal) discussed above in Section III.B.2.a. One commenter also provided estimates of initial compliance hours that are similar to Barrick Gold. See letter from NMA 2 (pre-proposal). We are unaware of reliable data that would allow us to estimate the impact of changed provisions, (e.g., the change in the definition of the term “control”).

<sup>614</sup> See letter from Claigan discussed above. This commenter’s cost estimates are largely consistent with our estimates.

<sup>615</sup> There may be some uncertainty surrounding who will ultimately bear the compliance costs. Depending on market conditions and the degree of competition, issuers may attempt to pass some or all of their costs on to other market participants. This consideration, however, does not change our estimates.

<sup>616</sup> We acknowledge that, as one commenter suggested, some of these issuers are affiliated and thus are likely to share compliance systems and fixed costs of creating such systems. See letter from Publish What You Pay United States (Nov. 12, 2015) (“PWYP-US 2 (pre-proposal)”). Due to difficulties in determining affiliation status, however, we have not attempted to eliminate these issuers from our estimates, and therefore our estimates may overstate the potential costs. Nevertheless, this potential overstatement of costs would not apply

which issuers are likely to bear the full costs of compliance with the final rules, we make two adjustments to the list of affected issuers. First, we exclude those issuers that will be subject to disclosure requirements in foreign jurisdictions that are substantially similar to the final rules and therefore will likely already be bearing compliance costs for such disclosure. Second, we exclude small issuers that likely could not have made any payment above the de minimis amount of \$100,000 to any government entity in 2015.

To address the first consideration, we searched the filed annual forms and forms' metadata for issuers that have a business address, are incorporated, or are listed on markets in the EEA or Canada. For purposes of our analysis, we assume that those issuers will already be subject to similar resource extraction payment disclosure rules in those jurisdictions by the time the final rules become effective and, thus, that the additional costs to comply with the final rules will be much lower than costs for other issuers.<sup>617</sup> We identified 192 such issuers.<sup>618</sup>

Second, among the remaining 563 issuers (i.e., 755 minus 192) we searched for issuers that, in the most recent fiscal year as of the date of their Exchange Act annual report filing, reported that they are shell companies, and, thus, have no or only nominal operations, or have both revenues and absolute value net cash flows from investing activities of less than the de

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in one of the cases we consider below, the case of no fixed costs, because the costs would depend only on the total assets of affected issuers, not on the number of them.

<sup>617</sup> We assume that an issuer will be subject to the EEA or Canadian rules if it is listed on a stock exchange located in one of these jurisdictions or if it has a business address or is incorporated in the EEA or Canada and its total assets are greater than \$50 million. The latter criteria is a proxy for multipronged eligibility criteria underlying both EEA and Canadian rules that include issuer assets, revenues, and the number of employees.

<sup>618</sup> We are adopting an alternative reporting option as part of the final rules and recognizing the disclosure requirements of these jurisdictions to be substantially similar to our rules. Thus, for these issuers, the additional cost will be negligible compared to the compliance costs we consider in this section. See also Section III.C.2 below.

minimis payment threshold of \$100,000. Under those financial constraints, such issuers are unlikely to have made any non-de minimis and otherwise reportable payments to governments and therefore are unlikely to be subject to the adopted reporting requirements. We identified 138 such issuers.

Taking these estimates of the number of excluded issuers together, we estimate that approximately 425 issuers (i.e., 755 minus 192 minus 138) would bear the full costs of compliance with the final rules.<sup>619</sup>

To establish an upper and lower bound for the initial compliance costs estimates, we use the initial compliance cost estimates from Barrick Gold and ExxonMobil referenced above. We note, however, that these cost estimates were provided by the commenters during the comment period after the 2010 Proposing Release and were based on policy choices made in that proposal and reflected the other international regulatory regimes in place at that time.<sup>620</sup> Since then we have changed our approach (e.g., the final rules define the term “control” based on accounting principles, which we believe will be easier and less costly for issuers to apply)<sup>621</sup> and international reporting regimes have undergone considerable development.<sup>622</sup> These

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<sup>619</sup> Because it may be uncertain at the beginning of a financial period as to whether payments from an issuer will exceed the de minimis threshold by the end of such period, an excluded issuer may incur costs to collect the information to be reported under the final rules even if that issuer is not subsequently required to file an annual report on Form SD. To the extent that excluded issuers incur such costs, our estimate may understate the aggregate compliance costs associated with the final rules.

<sup>620</sup> We note, in particular, that Barrick Gold is incorporated in Canada and listed on the Toronto Stock Exchange and thus is subject to substantially similar foreign disclosure requirements under existing international transparency regimes.

<sup>621</sup> See Section II.D of the Proposing Release.

<sup>622</sup> In this regard, we note that some affected issuers, even if they are not subject to foreign disclosure requirements, might have subsidiaries or other entities under their control that are subject to such requirements.



developments are likely to significantly lower the compliance costs associated with the final rules. However, as noted above, we have not received comment letters with reliable quantitative assessments of the extent to which these changes would reduce commenters' cost estimates and, thus, we use the original commenters' estimates without adjustment.

Our methodology to estimate initial compliance costs applies the specific issuer cost estimates from Barrick Gold and ExxonMobil, \$500,000 and \$50,000,000, respectively,<sup>623</sup> to the average issuer and then multiplies the costs by the number of affected issuers. However, because Barrick Gold and ExxonMobil are very large issuers and their compliance costs may not be representative of significantly smaller issuers, we apply these costs to all potentially affected issuers as a percentage of total assets. This allows for the compliance cost estimate for each potentially affected issuer to vary by their size, consistent with our expectation that larger issuers will face higher compliance costs. For example, we expect larger, multinational issuers to need more complex payment tracking systems compared to smaller, single country based issuers. This approach is consistent with the method used in the 2012 Adopting Release, where we estimated the initial compliance costs to be between 0.002% and 0.021% of total assets.<sup>624</sup>

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These issuers will thus face lower compliance costs because they will already have incurred some of these costs through such subsidiaries and other controlled entities.

<sup>623</sup> Barrick Gold estimated that it would require 500 hours for initial changes to internal books and records and processes and 500 hours for ongoing compliance costs. At an hourly rate of \$400, this amounts to \$400,000 (1,000 hours \* \$400) for hourly compliance costs. Barrick Gold also estimated that it would cost \$100,000 for initial IT/consulting and travel costs, for a total initial compliance cost of \$500,000. A similar analysis by ExxonMobil estimated their initial compliance costs to be \$50 million. See 2012 Adopting Release, Section III.D for details.

<sup>624</sup> See 2012 Adopting Release at Section III.D for details (the approach we use here is referred to as Method 1 in that release). In the 2012 Adopting Release, we also used another method (referred to as Method 2) to estimate compliance costs. With Method 2, we first estimated the compliance costs for small and large issuers (as determined by market capitalization) using the same assumptions as in Method 1 that compliance costs are a constant fraction of issuer's total assets (i.e., that all costs are variable and there is no fixed component to the

We calculate the average total assets of the 425 potentially affected issuers to be approximately \$6.4 billion.<sup>625</sup> Applying the ratio of initial compliance costs to total assets (0.002%) from Barrick Gold, we estimate the lower bound of total initial compliance costs for all issuers to be \$54.73 million ( $0.002\% * \$6,439,369,000 * 425$ ). Applying the ratio of initial compliance costs to total assets (0.021%) from ExxonMobil, we estimate the upper bound of total initial compliance costs for all issuers to be \$574.7 million ( $0.021\% * \$6,439,369,000 * 425$ ). The table below summarizes the upper and lower bound of total initial compliance costs under the assumption that compliance costs vary according to the issuer's size.

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costs) and then aggregated the compliance costs for all issuers. Although this approach was intended to provide limited insight into any differential cost impacts on small versus large issuers, it did not separate fixed and variable cost components of the total compliance costs. Therefore, it did not allow us to apply a differential cost structure to small and large issuers. In addition, because of poor data availability and data quality on market capitalization for small and foreign issuers, the Method 2 approach may yield less accurate estimates than the approach we use in this release (on the other hand, Method 1 could be properly applied because we collected total assets data for all affected issuers). As a consequence, we now believe that the disaggregation and subsequent aggregation of small and large issuer cost estimates does not provide additional insights into the difference in cost structure for small versus large issuers and any effects of this difference on the aggregate costs. Consequently, we have used only one estimation approach in this analysis. As discussed below, however, we do believe that there is a fixed component to the compliance costs which could potentially have a differential impact on small issuers, and we have expanded the Method 1 approach to allow for a fixed costs component in the cost structure. We requested comments about the breakdown of the compliance costs into the fixed and variable components to enable us to estimate such impact better, but we have not received any comments quantifying such breakdown.

<sup>625</sup> For the 425 potentially affected issuers, we collected their total assets for the fiscal year that corresponds to their Exchange Act annual reports for 2015 from XBRL exhibits that accompany issuers' annual reports on EDGAR and from Compustat. If these two data sources varied on an issuer's total assets, we used the higher of the two values. For the remaining issuers that do not have total assets data from either of these two data sources, we manually collected the data on total assets from their filings. We then calculated the average of those total assets across all issuers that have the data.

<b>Average issuer initial compliance costs assuming no fixed costs</b>		<b>Calculation</b>
Average 2015 total assets of all affected issuers	\$6,439,369,000	
Average initial compliance costs per issuer using Barrick Gold percentage of total assets (lower bound)	\$128,787	$\$6,439,369,000 \times 0.002\%$
<b>Total initial compliance costs using Barrick Gold (lower bound)</b>	<b>\$54,734,640</b>	$\$128,787 \times 425$
Average initial compliance costs per issuer using ExxonMobil's percentage of total assets (upper bound)	\$1,352,268	$\$6,439,369,000 \times 0.021\%$
<b>Total initial compliance costs using ExxonMobil (upper bound)</b>	<b>\$574,713,700</b>	$\$1,352,268 \times 425$

We also recognize that it is possible that some compliance costs may not scale by issuer size and as a result smaller issuers may be subject to certain fixed costs that do not vary with the size of the issuers' operations. While commenters did not provide any information on what fraction of the initial compliance costs would be fixed versus variable, we assume that fixed costs are equal to \$500,000—the lower of the two compliance cost estimates provided by commenters.<sup>626</sup> To find the lower and upper bound estimates of compliance costs in this case, we assume that each issuer's costs are the maximum between the fixed costs of \$500,000 and, respectively, the lower bound (0.002% of total assets) or the upper bound (0.021% of total

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<sup>626</sup> Assuming that both estimates are accurate, the fixed costs cannot be higher than the lower of the two estimates. We have chosen to use the highest possible value of fixed costs satisfying this restriction to encompass the widest range of cost estimates. We have not received any comment letters with estimates of the fixed cost component of the initial compliance costs or addressing the estimates presented in the Proposing Release.

assets) of the variable costs. Applying these lower and upper bounds to each issuer and summing across all issuers, we find that the lower bound estimate is \$239 million (or, on average, \$0.56 million per issuer) and the upper bound estimate is \$700 million (or, on average, \$1.65 million per issuer).

The table below summarizes the upper and lower bound of total initial compliance costs under two fixed costs assumptions.<sup>627</sup> We note that our upper bound estimates are consistent with two commenters' qualitative estimates of initial implementation costs<sup>628</sup> and the initial costs estimate from another commenter<sup>629</sup> is within our range for the no-fixed costs case. We also note that, if the actual fixed costs component is between \$0 and \$500,000, the lower and upper bounds of compliance costs estimates would be between our estimates for the two opposite cases.

	Initial compliance costs assuming no fixed costs		Initial compliance costs assuming fixed costs of \$500,000	
	Costs for an average issuer	Total costs	Costs for an average issuer	Total costs
<b>Lower bound</b>	\$128,787	\$54,734,640	\$561,932	\$238,820,900

<sup>627</sup> The total estimated compliance cost for PRA purposes is \$79,302,480. See Section IV below. The compliance costs for PRA purposes are encompassed in the total estimated compliance costs for issuers. As discussed in detail below, our PRA estimate includes costs related to tracking and collecting information about different types of payments across projects, governments, countries, subsidiaries, and other controlled entities. The estimated costs for PRA purposes are calculated by treating compliance costs as fixed costs and by only monetizing costs associated with outside professional services. Therefore, despite using similar inputs for calculating these costs, the PRA estimate differs from the lower and upper bounds calculated above.

<sup>628</sup> See letters from API 1 (pre-proposal) ("Total industry costs just for the initial implementation could amount to hundreds of millions of dollars even assuming a favorable final decision on audit requirements and reasonable application of accepted materiality concepts.") and ExxonMobil 1 (pre-proposal).

<sup>629</sup> See letter from Claigan (estimating of the total initial compliance costs as \$181,347,000).

<b>Upper bound</b>	\$1,352,268	\$574,713,700	\$1,547,437	\$700,160,800
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We acknowledge significant limitations on our analysis that may result in the actual costs being significantly lower. First, the analysis is limited to two large issuers' estimates from two different industries, mining and oil and gas, and the estimates may not accurately reflect the initial compliance costs of all affected issuers. Second, the commenters' estimates were generated based on our initial proposal and they do not reflect the final rules or the international transparency regimes that subsequently have been adopted by other jurisdictions.<sup>630</sup>

We also acknowledge certain limitations on our analysis that could potentially cause the cost to be higher than our estimates. First, we assume that the variable part of the compliance costs is a constant fraction of total assets, but the dependence of costs on issuer size might not be linear (e.g., costs could grow disproportionately faster than issuer assets). Second, commenters mentioned other potential compliance costs not necessarily captured in this discussion of compliance costs.<sup>631</sup>

In spite of these limitations, we consider our quantitative approach to estimate compliance costs to be appropriate and supported by the limited data we have. During the comment period after the Proposing Release, no commenters specifically critiqued this method or the derived quantitative estimates or provided additional data that we could use to update or

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<sup>630</sup> See, e.g., Section II.D and note 622 and accompanying text.

<sup>631</sup> Those could include, for example, costs associated with the termination of existing agreements in countries with laws that prohibit the type of disclosure mandated by the final rules, costs of decreased ability to bid for projects in such countries in the future, or costs of decreased competitiveness with respect to non-reporting entities. Commenters generally did not provide estimates of such costs. As discussed further below, we have attempted to estimate the costs associated with potential foreign law prohibitions on providing the required disclosure.

refine these estimates. Only one commenter supplied an alternative approach and its point estimates are within the range of our estimates for both initial and ongoing direct compliance costs.<sup>632</sup>

We estimate ongoing compliance costs using the same method under the assumptions of no fixed costs and fixed costs of \$200,000 per year (as explained below). In response to the 2010 Proposing Release, we received quantitative information from three commenters—Rio Tinto, National Mining Association, and Barrick Gold—that we used in the analysis.<sup>633</sup> As in the 2012 Adopting Release, we use these three comments to estimate the ongoing compliance costs as a percentage of total assets to be 0.003%, 0.02%, and 0.0008%, respectively, and the average ongoing compliance costs to be 0.0079% of total assets.<sup>634</sup> For the no fixed costs case, we take

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<sup>632</sup> See letter from Claigan and notes 629 above and 636 below. This commenter's approach was not critiqued or refined by other commenters during the extended comment rebuttal period.

<sup>633</sup> See letters from Barrick Gold (pre-proposal); Rio Tinto (pre-proposal); and NMA 2 (pre-proposal). We apply the same caveat as in the initial compliance cost estimates above, namely, that these cost estimates were provided by the commenters during the comment period after the 2010 Proposing Release and were based on policy choices made in that proposal. Discretionary choices reflected in the final rules and recent international developments could significantly lower the cost estimates. We also note that both Barrick Gold (incorporated in Canada and listed on the Toronto Stock Exchange) and Rio Tinto (incorporated in the United Kingdom and listed on the London Stock Exchange) are subject to substantially similar disclosure requirements under existing international transparency regimes.

<sup>634</sup> We estimate the cost percentages as follows: Rio Tinto estimated that it would take between 5,000 and 10,000 hours per year to comply with the requirements, for a total ongoing compliance cost of between \$2 million (5,000\*\$400) and \$4 million (10,000\*\$400). We use the midpoint of their estimate, \$3 million, as their expected ongoing compliance cost. The National Mining Association (NMA), which represents the mining industry, estimated that ongoing compliance costs would be 10 times our initial estimate from the 2010 Proposing Release, although it did not state specifically the number to which it referred. We believe NMA was referring to our proposed estimate of \$30,000. Although this is the dollar figure for total costs, NMA referred to it when providing an estimate of ongoing costs, so we do the same here, which would result in \$300,000 (10\*\$30,000). Finally, Barrick Gold estimated that it would take 500 hours per year to comply with the requirements, or \$200,000 (500\*\$400) per year. As with the initial compliance costs, we calculate the ongoing compliance cost as a percentage of total assets. Rio Tinto's total assets as of the end of fiscal year 2009 were approximately \$97 billion and their estimated ongoing compliance costs as a percentage of assets is 0.003% (\$3,000,000/\$97,236,000,000). We calculated the average total assets of the mining industry to be \$1.5 billion, and using NMA's estimated ongoing compliance costs, we estimate ongoing compliance costs as a percentage of assets to be 0.02% (\$300,000/\$1,515,000,000). Barrick Gold's total assets as of the end of fiscal year 2009

the average total assets for all affected issuers, \$6,439,369,000, and multiply it by a constant fraction (either the lower bound of 0.0008%, the average of 0.0079%, or the upper bound of 0.02%) of total assets and the number of affected companies (425) to get the total lower bound, the average, and the upper bound of the annual ongoing compliance costs estimates.

Similar to our estimates of the initial costs, we then consider fixed costs equal to the lowest of three estimates given by the commenters, the Barrick Gold estimate of \$200,000 per year.<sup>635</sup> To find the lower and upper bound estimates, we assume that each issuer's costs are the maximum between the fixed costs of \$200,000 and either the lower bound (0.0008% of total assets) or the upper bound (0.02% of total assets) of the variable costs, respectively. Applying these lower and upper bounds to each issuer and summing across all issuers, we find that the lower bound estimate is \$96 million per year (or, on average, \$0.22 million per issuer per year) and the upper bound estimate is \$591 million per year (or, on average, \$1.39 million per issuer per year). Our estimates are summarized in the following table. We note that the ongoing costs estimate from one commenter<sup>636</sup> is within our range of the no-fixed costs case. We also note that, if the actual fixed costs component is between \$0 and \$200,000, the lower and upper bounds of compliance costs estimates would be between our lower and upper bounds estimates for the two opposite fixed costs cases.

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were approximately \$25 billion and their estimated ongoing compliance costs as a percentage of assets is 0.0008% (\$200,000/\$25,075,000,000). See 2012 Adopting Release at Section III.D for details.

<sup>635</sup> Similarly to the initial compliance costs, assuming that both estimates are accurate, the fixed costs cannot be higher than the lowest of the estimates. We have chosen to use the highest possible value of fixed costs satisfying this restriction to encompass the widest range of cost estimates. We have not received any comment letters with estimates of the fixed cost component of the ongoing compliance costs or addressing the estimates presented in the Proposing Release.

<sup>636</sup> See letter from Claigan (estimating the total ongoing compliance costs as \$73,747,875).

	Annual ongoing compliance costs under the assumption of no fixed costs		Annual ongoing compliance costs under the assumption of fixed costs of \$200,000	
	Costs for an average issuer	Total costs	Costs for an average issuer	Total costs
<b>Lower bound</b>	\$51,515	\$21,893,860	\$224,773	\$95,528,370
<b>Average</b>	\$508,710	\$216,201,800	\$628,380	\$267,061,300
<b>Upper bound</b>	\$1,287,874	\$547,346,400	\$1,389,882	\$590,699,900

As noted above, we expect that the initial and ongoing compliance costs associated with the final rules are likely to be greater for larger, multinational issuers as compared to smaller, single country based issuers, as larger issuers would likely need more complex systems to track and report the required information. However, to the extent there is a significant fixed component to the final rules' overall compliance costs, such costs could be disproportionately burdensome for smaller reporting companies. In this case, the final rules could give rise to competitive disadvantages for these smaller issuers and could provide incentive for these issuers to consider exiting public capital markets to avoid reporting requirements (possibly incurring a higher cost of capital and potentially limited access to capital in the future). We estimate that approximately 43% of affected issuers are smaller reporting companies.<sup>637</sup> Nevertheless, given the fact that smaller issuers constitute a significant portion of the public reporting companies

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<sup>637</sup> As discussed in this section above, our estimate of the number of affected issuers already excludes 138 issuers that are shell companies or whose reported revenues and net cash flows from investing activities suggest that they are unlikely to make payments above the de minimis threshold. If we apply a significantly higher threshold (\$250,000, \$500,000, \$750,000, or \$1,000,000) to revenues and cash flows from investing to estimate the number of such issuers, we would exclude a slightly higher number of issuers from our cost estimates (162, 176, 191, or 203, respectively). Nonetheless, for the reasons described above, we believe that we have set the de minimis threshold at an appropriate level. See also Section II.C above and Section II.C.2 of the Proposing Release.



making resource extraction payments, exempting these issuers from the final rules could significantly diminish the expected benefits of the required disclosure.

*c. Indirect Costs and Competitive Effects*

In addition to direct compliance costs, we anticipate that the statutory reporting requirements could result in significant indirect effects. Issuers that have a reporting obligation under Section 13(q) could be at a competitive disadvantage compared to private companies and foreign companies that are not subject to the reporting requirements of the U.S. federal securities laws and therefore do not have such an obligation. For example, such competitive disadvantage could result from, among other things, any preference by the government of the host country to avoid disclosure of covered payment information, or any ability of market participants to use the information disclosed by reporting issuers to derive contract terms, reserve data, or other confidential information. The Commission lacks sufficient data or a sufficiently reliable methodology to compare quantitatively total benefits against total costs, and no commenter has provided us with data regarding competitive effects or suggested a methodology that would allow us to engage in an empirical evaluation.

Industry commenters on the 2010 Proposing Release stated that confidential production and reserve data can be derived by competitors or other interested persons with industry knowledge by extrapolating from the payment information required to be disclosed.<sup>638</sup> Other commenters asserted, however, that such extrapolation is not possible or that such information is readily available from certain commercial databases. These commenters stated that information

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<sup>638</sup> See letters from API 1 (pre-proposal); ExxonMobil 1 (pre-proposal); and RDS 2 (pre-proposal).

of the type required to be disclosed by Section 13(q) therefore would not confer a competitive advantage on industry participants not subject to such disclosure requirements.<sup>639</sup> Another commenter prior to the Proposing Release expressed the view that project level reporting will not disclose confidential information of affected issuers or result in competitive disadvantage for such issuers relative to either owners of natural resources or to competitive resource producers, including state enterprises, who would be otherwise unencumbered by such reporting requirements.<sup>640</sup> Commenters on the Proposing Release were also split in their opinion on the competitive effect of payment information disclosure, asserting views similar to those described above.<sup>641</sup> Whatever the effect, any competitive impact arising from Section 13(q)'s mandated disclosures should be minimal in those jurisdictions in which payment information of the types covered by Section 13(q) is already publicly available.<sup>642</sup> In addition, any competitive impact should be substantially reduced to the extent that other jurisdictions, such as the European Union and Canada, have adopted laws that require disclosure similar to the disclosure required by Section 13(q) and the final rules.<sup>643</sup> We note, however, that if commenters are accurate in their assessment of the competitive effects arising from such disclosure requirements, some U.S. issuers that are not subject to the EU Directives or other international disclosure regimes might

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<sup>639</sup> See letters from PWYP 1 (pre-proposal) and Oxfam 1 (pre-proposal).

<sup>640</sup> See letter from Conrad (pre-proposal).

<sup>641</sup> See letters from API 1, ExxonMobil 1, PWYP-US 1, Oxfam 1.

<sup>642</sup> In this regard, we note that one commenter provided several examples of countries in which payments are publicly disclosed on a lease or concession level. See letter from PWYP 3.

<sup>643</sup> One commenter suggested that if both the United States and European Union implement disclosure requirements regarding payments to governments "around 90% of the world's extractive companies will be covered by the rules." See letter from Arlene McCarthy (Aug. 10, 2012) (Ms. McCarthy is a member of the European Parliament and the parliamentary draftsman on the EU transparency rules for the extractive sector).

lose some of the competitive advantage they otherwise would enjoy from not being obligated to disclose their resource extraction payments.

To the extent that the requirement to disclose payment information does impose a competitive disadvantage on an issuer, the issuer could be motivated to sell assets affected by such competitive disadvantage at a price that does not fully reflect the value of such assets absent such competitive impact.<sup>644</sup> One commenter on the 2010 Proposing Release stated that tens of billions of dollars of capital investments could potentially be put at risk if issuers were required to disclose, pursuant to the final rules, information prohibited by a host country's laws or regulations.<sup>645</sup> Additionally, according to commenters, resource extraction issuers operating in countries that prohibit, or could in the future prohibit, the disclosure required under the proposed rules could bear substantial costs.<sup>646</sup> As discussed below, commenters have presented conflicting positions and representations concerning the prevalence and scope of such foreign law prohibitions, with some commenters on the Proposing Release observing that issuers filing in certain foreign jurisdictions are providing payment disclosure in respect of countries that allegedly prohibit disclosure.<sup>647</sup> In the event that such foreign law prohibitions exist, or are adopted in the future, pursuant to our existing Exchange Act authority, we will consider requests

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<sup>644</sup> For example, a study on divestitures of assets find that issuers that undertake voluntary divestitures have positive stock price reactions, but also finds that issuers forced to divest assets due to action undertaken by the antitrust authorities suffer a decrease in shareholder value. See Kenneth J. Boudreaux, "Divestiture and Share Price," *Journal of Financial and Quantitative Analysis* 10 (Sept. 1975), 619–26. See also, G. Hite and J. Owers, "Security Price Reactions around Corporate Spin-Off Announcements," *Journal of Financial Economics* 12 (Dec. 1983), 409–36 (finding that issuers spinning off assets because of legal/regulatory difficulties experience negative stock returns).

<sup>645</sup> See letter from RDS 4 (pre-proposal).

<sup>646</sup> See Section II.I.2 above.

<sup>647</sup> See notes 379 and 402 above.

for exemptive relief on a case-by-case basis and may grant such relief, if and when warranted. The economic implications of providing or not providing such relief are discussed below in Section III.C.1.

Addressing other potential costs, one commenter on the 2010 Proposing Release referred to a potential economic loss borne by shareholders, without quantifying such loss, which the commenter believed could result from highly disaggregated public disclosure of competitively sensitive information causing competitive harm.<sup>648</sup> The commenter also noted resource extraction issuers could suffer competitive harm because they could be excluded from many future projects altogether. The same commenter also noted that because energy underlies every aspect of the economy, these negative impacts could potentially have repercussions well beyond resource extraction issuers.<sup>649</sup>

Some commenters on the 2010 Proposing Release suggested that we permit issuers to submit payment data confidentially to the Commission and make public only an aggregated compilation of the information.<sup>650</sup> The commenters suggesting that the Commission make public only a compilation of information stated that such an approach would address many of their concerns about the disclosure of commercially sensitive or legally prohibited information and would significantly mitigate the costs of the mandatory disclosure under Section 13(q). One commenter on the Proposing Release made a similar suggestion.<sup>651</sup> As noted above, we did not

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<sup>648</sup> See letter from API 1 (pre-proposal).

<sup>649</sup> See *id.*

<sup>650</sup> See Section II.G.2 of the Proposing Release.

<sup>651</sup> See letter from API 1.

permit confidential submissions in the 2012 Rules, and the current final rules are generally consistent with that approach. As a result, the final rules require public disclosure of the payment information. We note that in situations involving more than one payment, the information would be aggregated by payment type, government, and/or project, which may limit the ability of competitors to use the publicly disclosed information to their advantage. Also, a company can combine more than one contract into a project, which may further limit the ability of competitors to use the information. Further, we are providing a limited exemption for payments in connection with exploratory activities, which should further reduce the potential competitive effects that might result from disclosure of payment information.<sup>652</sup> For other situations of potential substantial competitive harm, we will consider applications for exemptive relief from the proposed disclosure requirements on a case-by-case basis and may grant such relief, if and when warranted (similar to our approach with potential foreign law prohibitions).<sup>653</sup> In opting to provide a categorical exemption for new exploratory operations but to rely on case-by-case exemptive relief for potential competitive harms associated with ongoing projects, we credit the position advanced by the API that the payment terms of older contracts are generally publicly known (even if not technically disclosed).<sup>654</sup> Consequently, the disclosure of payment information relating to these projects is less likely to produce competitive harm than payments relating to, for example, exploratory activities.

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<sup>652</sup> This exemption would not significantly frustrate the transparency goals of the final rules. An issuer that would rely on the exemption for its payments made in connection with exploratory activities would have to disclose such payment information in its Form SD filing for the fiscal year following the fiscal year in which the payment was made. See Section II.I.3 for details.

<sup>653</sup> See Section II.I above.

<sup>654</sup> See API 1.

As noted above, the cost of compliance with this provision would be primarily borne by the issuer thus potentially diverting capital away from other productive opportunities and resulting in a loss of allocative efficiency.<sup>655</sup> Such effects may be partially offset over time if increased transparency of resource extraction payments reduces corrupt practices by governments of resource-rich countries and in turn helps promote improved economic development and higher economic growth in those countries. In this regard, as discussed above in Section III.B.1, a number of economic studies have shown that reducing corruption can help promote higher economic growth through more private investments, better deployment of human capital, and political stability.<sup>656</sup>

### **C. Potential Effects Resulting from Specific Implementation Choices**

As discussed in detail in Section II, the Proposing Release specifically addressed matters identified in the U.S. District Court for the District of Columbia's decision in the API Lawsuit. In developing the final rules, in addition to those matters, we have also considered relevant international developments, input from staff consultations with other U.S. Government agencies, and the public comments that we have received. We discuss below the significant choices that we are making to implement the statute and the associated benefits and costs of those choices. We are unable to quantify the impact of each of the choices discussed below with precision

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<sup>655</sup> See letter from Chevron. See also letter from Chairman Bachus and Chairman Miller. As discussed above in note 615, there is some uncertainty regarding who would bear the ultimate costs of compliance. Regardless of who bears the majority of the compliance costs, we believe that the effects on allocative efficiency and capital flows would likely be similar.

<sup>656</sup> See note 561 above and accompanying text.

because reliable, empirical evidence about the effects is not readily available to the Commission and commenters have not provided us with empirical evidence relating to these various choices.

## **1. Exemption from Compliance**

Absent potential exemptive relief, resource extraction issuers operating in countries that prohibit, or may in the future prohibit, the disclosure required under Section 13(q) could bear substantial costs.<sup>657</sup> Such costs could arise if issuers have to choose between ceasing operations in certain countries or violating local law, or if the country's laws have the effect of preventing them from participating in future projects. Some commenters on the 2010 Proposing Release asserted that four countries have such laws.<sup>658</sup> Other commenters disputed the assertion that there are foreign laws that specifically prohibit disclosure of payment information.<sup>659</sup> After reviewing the comment letters on the Proposing Release, we note that some commenters continue to assert that at least two countries—Qatar and China—prohibit the required disclosures whereas commenters no longer assert that two other countries mentioned in earlier comment letters—Angola and Cameroon—prohibit the disclosure.<sup>660</sup> Although we are not making any final determinations at this stage, as discussed above, we anticipate obtaining more information about companies' experiences with the disclosures under the EU Directives and ESTMA in the near term, which should assist the Commission in deciding whether any type of case-by-case exemptive relief is appropriate before the first reports are due under the final rules in two years.

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<sup>657</sup> See Section II.I.2 above.

<sup>658</sup> See letters from API 1 (pre-proposal) and ExxonMobil 1 (pre-proposal) (mentioning Angola, Cameroon, China, and Qatar). See also letter from RDS 2 (pre-proposal) (mentioning Cameroon, China, and Qatar).

<sup>659</sup> See notes 379 and 402 above.

<sup>660</sup> See letter from API 1.

To the extent that such prohibitions exist and are enforced without any type of waiver, affected issuers could suffer substantial losses if they have to terminate their operations and redeploy or dispose of their assets in the particular foreign jurisdiction. These losses would be magnified if an issuer cannot redeploy the assets in question easily, or if it has to sell them at a steep discount (a fire sale). Even if the assets could be easily redeployed, an issuer could suffer opportunity costs if they are redeployed to projects with inferior rates of return. In the 2012 Adopting Release we estimated that such losses could amount to billions of dollars. One commenter on the Proposing Release also asserted that such losses could be in the tens of billions of dollars.<sup>661</sup>

In addition to the costs described above, a foreign private issuer with operations in a country that prohibits disclosure of covered payments, or a foreign issuer that is domiciled in such country, might face different types of costs. For example, in these circumstances, an issuer might decide it is necessary to delist from an exchange in the United States, deregister, and cease reporting with the Commission,<sup>662</sup> thus incurring a higher cost of capital and potentially limited access to capital in the future. Based on our experience with issuers and the securities markets, we believe this is highly unlikely given that, at least for larger resource extraction issuers, they generally seek access to capital through publicly-traded securities markets and many of the major foreign securities exchanges on which a resource extraction issuer might seek to trade its securities are now subject to laws that are substantially similar to the final rules. Nonetheless, we acknowledge that should this occur, shareholders, including U.S. shareholders, might suffer

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<sup>661</sup> See letters from ExxonMobil 1 and ExxonMobil 2.

<sup>662</sup> See letters from Branden Carl Berns (Dec. 7, 2011) (“Berns (pre-proposal)”) and API 1.



an economic and informational loss if an issuer decides it is necessary to deregister and cease reporting under the Exchange Act in the United States as a result of the final rules.

We believe that there are a number of factors that may serve to diminish the likelihood that, to the extent that there are or will be foreign laws that prohibit the required disclosures, such laws would be retained or adopted or, if retained or adopted, may serve to mitigate the costs and competitive burdens arising from their impact. For example, the widening global influence of the EITI and the recent trend of other jurisdictions to promote transparency, including listing requirements adopted by the Hong Kong Stock Exchange<sup>663</sup> and the requirements adopted pursuant to the EU Directives and ESTMA, may discourage governments in resource-rich countries from retaining or adopting prohibitions on payment disclosure. Resource extraction issuers concerned that disclosure required by Section 13(q) may be prohibited in a given host country may also be able to seek authorization from the host country to disclose such information.<sup>664</sup> Commenters did not provide estimates of the cost that might be incurred to seek such an authorization, and we are unaware of any probative data.

In addition, these potential costs could be substantially mitigated under the final rules. We intend to consider using our existing authority under the Exchange Act to provide exemptive relief on a case-by-case basis, if and when warranted, upon the request of a resource extraction

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<sup>663</sup> See Proposing Release, n.70.

<sup>664</sup> See letter from Oxfam-ERI (stating that “Qatar government’s Model Production Sharing Agreement (PSA) contains a carveout clause allowing a party to disclose any information that might otherwise be deemed confidential, when required by applicable laws and regulations. In the absence of express prohibitions on disclosure, the terms of this contract control confidentiality of information related to each project”). The legal opinions submitted by Royal Dutch Shell with its pre-proposal comment letter also indicate that disclosure of otherwise restricted information may be authorized by government authorities in Cameroon and China, respectively. See letter from RDS 2 (pre-proposal).

issuer.<sup>665</sup> As mentioned above, we believe that a case-by-case approach to exemptive relief is preferable to either including within the final rules a blanket exemption where foreign law prohibits disclosure (or for any other reason) or providing no exemptions and no avenue for exemptive relief under this or other circumstances. This is particularly so given the increasing uncertainty about the existence and scope of such laws and the likelihood that the Commission will have a more informed basis to assess the need for exemptive relief as more companies begin to report under the EU Directives and ESTMA. The final approach should significantly decrease compliance and economic costs to the extent that issuers are able to demonstrate that an exemption where host country laws prohibit disclosure is warranted. Indeed, assuming such laws exist and that the Commission determines to grant an exemption from the final rules, this approach could potentially save affected issuers billions of dollars in compliance and economic costs.<sup>666</sup>

An alternative to using our exemptive authority on a case-by-case basis would be to provide an exemption where specific countries have a law prohibiting the required disclosure. Although a blanket exemption could reduce potential economic costs (e.g., costs of relocating assets) and compliance costs (e.g., costs associated with applying for the exemption) for issuers if they are subject to foreign law prohibitions on disclosure, it could create a stronger incentive for host countries that want to prevent transparency to pass laws that prohibit such disclosure, potentially undermining the purpose of Section 13(q) to compel disclosure in foreign countries

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<sup>665</sup> See discussion in Section II.I above.

<sup>666</sup> We note, however, that in addition to reducing costs, granting an exemption might diminish some of the benefits of enhanced transparency as well.

that have failed to voluntarily do so.<sup>667</sup> It also would remove any incentive for issuers to diligently negotiate with host countries for permission to make the required disclosures. Furthermore, it would make it more difficult to address any material changes over time in the laws of the relevant foreign countries, thereby resulting in an outdated blanket exemption. By contrast, the tailored case-by-case consideration of exemptions we intend to pursue will provide a more flexible and targeted mechanism for the Commission to address potential cost concerns while minimizing incentives for host countries to enact laws prohibiting disclosure.<sup>668</sup>

As discussed above, host country laws that prohibit the type of disclosure required under the final rules could lead to significant additional economic costs that are not captured by the compliance cost estimates in Section III.B.2.b. We believe that considering exemptive relief from the disclosure requirements on a case-by-case basis, as circumstances warrant, may substantially mitigate such costs. However, we acknowledge that, if this relief is not provided,

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<sup>667</sup> See, e.g., 156 CONG. REC. S3815 (May 17, 2010) (Statement of Senator Cardin) (“We currently have a voluntary international standard for promoting transparency. . . . But too many countries and too many companies remain outside this voluntary system.”). A blanket exemption would incentivize host countries that want to prevent transparency to enact laws prohibiting the disclosure without suffering the cost of decreasing the number of potential bidders on – and competition for – projects within their jurisdictions, and thus without the cost of decreasing the potential value realized to the host country from awarding a contract. We note that one commenter on the Proposing Release stated that we had failed to explain why a case-by-case exemptive approach would not create the very same incentives. See letter from API 1. We think this is unlikely, and the incentives to adopt such laws would be mitigated for the following reasons: a host country government would realize that there is greater uncertainty in exemption application approval; any exemptive relief granted under a case-by-case approach may be time limited or otherwise tailored, unlike a blanket exemption; and countries may realize that by adopting such a law, they are reducing the pool of potential competitors for in-country projects, as issuers may be reluctant to bid for contracts in countries that prohibit disclosure, if they do not know upfront that they will be granted an exemption. Thus, enacting laws prohibiting disclosure could reduce the number of potential bidders on resource extraction projects within host countries jurisdictions and, due to possible costs and uncertainty of the exemption application, the bids on such projects would be lower.

<sup>668</sup> Although not providing a blanket exemption could potentially discourage some companies from listing on U.S. exchanges, the advantage to these companies from being outside of the final rules may be limited by the lack of exemptions under the EU Directives and ESTMA and the possibility that other jurisdictions in the future will adopt similar initiatives as the global focus on reducing corruption associated with resource extraction activities continues.

issuers could potentially incur costs associated with the conflict between our requirements and those foreign law prohibitions. Below, we have attempted, to the extent possible, to assess the magnitude of the potential costs if such laws exist and if exemptive relief is not granted.

Although we discuss the potential costs below for completeness, it is not clear that these costs, in fact, will be incurred by issuers in light of the present uncertainty regarding the existence and scope of such foreign laws and the fact that we intend to consider the use of our exemptive authority where investor interests would be jeopardized with little accompanying benefit from the specific disclosure.<sup>669</sup> Accordingly, the magnitude of the potential costs outlined below should not be viewed as necessarily indicative of the likely or expected costs of this aspect of the final rules.

We base our analysis on the two countries that some commenters continue to assert have versions of such laws.<sup>670</sup> We searched (through a text search in the EDGAR system) the Forms 10-K, 40-F, and 20-F of affected issuers for calendar year 2015 for any mention of China or Qatar. We found that, out of 425 potentially affected issuers, 150 mentioned one of these two countries. However, only 53 of them described any activity in one of these two countries and 97 mentioned these countries for other, unrelated reasons. An examination of these 53 filings indicates that most filings did not provide detailed information on the extent of issuers'

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<sup>669</sup> No commenters provided us with data or analysis to assist in assessing the potential costs that could arise from foreign law prohibitions on disclosure. We note that we anticipate considering the specific potential costs that an issuer would experience if a foreign law prohibition exists when we consider the issuer's exemptive application, provided the issuer produces documentation to credibly support those potential costs.

<sup>670</sup> See notes 658, 659, and 660 at the beginning of this section.

operations in these countries.<sup>671</sup> Thus, we are unable to determine the total amount of capital that could be lost in these countries if the information required to be disclosed under the final rules is, in fact, prohibited by laws or regulations and exemptive relief is not provided.

We can, however, assess if the costs of withdrawing from these two countries are in line with some commenters' estimates of tens of billions of dollars provided on the Proposing Release.<sup>672</sup> To do this, we first estimate the market value of assets that an issuer currently owns in a country with such laws. We then discuss how the presence of various opportunities for the use of those assets by the issuer or another entity would affect the size of the issuer's potential losses. We also discuss how these losses would be affected if an issuer cannot redeploy the assets in question easily, or if it has to sell them at a steep discount (a fire sale). In order to estimate the market value of assets located in one of these countries, we use Compustat geographic segments data extracted from Exchange Act annual reports to find the fraction of book value of such assets in the issuer's total assets and assume that the market value of such assets is the same fraction of the issuer's total market value.<sup>673</sup>

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<sup>671</sup> We note that some resource extraction issuers do not operate in these two countries and thus would not have any such information to disclose. Other issuers may have determined that they were not required to provide detailed information in their filings regarding their operations in these countries.

<sup>672</sup> See letters from ExxonMobil 1, ExxonMobil 2, and RDS 4 (pre-proposal). We note, however, that the Royal Dutch Shell estimate was submitted in response to the 2010 Proposing Release. In addition, Royal Dutch Shell is incorporated in the United Kingdom and listed on the London Stock Exchange and Euronext Amsterdam and thus is subject to substantially similar disclosure requirements under existing international transparency regimes.

<sup>673</sup> This approach assumes that valuation of assets of a firm is the same regardless of where these assets are geographically located. Not all of the assets located in these host countries might be related to resource extraction payments, which disclosure can trigger their sale or loss; however, we choose the conservative approach and err on the side of overestimating the losses.

One commenter suggested that our valuation analysis is flawed because it is based on a book value metric instead of a market value metric.<sup>674</sup> The commenter, however, erroneously states that we use book values to measure the value of an issuer's assets in these two countries. As stated above, we use book values only to determine what *fraction* an issuer's assets in China or Qatar are of that issuer's total assets. We then apply this fraction to an issuer's *market* value to determine the market value of such assets.

As we discuss above, we were able to identify a total of 53 issuers that indicated they are active in these countries (some operate in more than one country). The table below provides information from the 16 issuers, out of the 53 described above, that provide geographic segment data at the country level and that specifically identify the value of assets in one of these two countries.<sup>675</sup> We expect that the actions taken in response to any foreign law prohibition and the nature of costs that issuers might face would be different for issuers domiciled in the United States and in foreign jurisdictions; therefore, we consider these two types of filers separately.

<b>Issuer</b>	<b>Form Type</b>	<b>Domicile (Business Address)</b>	<b>Host Country</b>	<b>Country Assets (\$ mil)</b>	<b>Total Assets (\$ mil)</b>	<b>Country Assets Fraction in Total Assets</b>	<b>Market Value Estimate of Country Assets</b>
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<sup>674</sup> See letter from API 1 (Attachment B).

<sup>675</sup> As noted above, we identified 53 issuers that discussed their activities in at least one of the two countries, but only 16 of the issuers provided country-level geographic segment information for those countries that was specific enough to use in our analysis (some issuers may have determined that they were not required to provide detailed information in their filings and others might not have any assets in these countries). In the table, Country Assets are defined as either Long-lived Assets, Identifiable Total Assets, or Property, Plant & Equipment, whichever was disclosed; Country Assets Fraction in Total Assets is Country Assets/Total Assets; and Market Value Estimate of Country Assets is Country Assets Fraction in Total Assets \* Company Market Value, where Company Market Value is calculated as Consolidated Company-Level Market Value of Common Equity + Total Debt + Preferred Stock Liquidating Value – Deferred Taxes and Investment Tax Credits if all these values were available. We were not able to identify the company-level market values for some issuers, and, thus, we were not able to determine their Market Value Estimate of Country Assets. All Compustat data is the latest annual data disclosed on or before the date of the issuer's 2015 Form 10-K or 20-F filing.

							(\$ mil)
1	10-K	Foreign	China	23.4	23.4	100.0%	2.6
2	10-K	Foreign	China	193.6	193.6	100.0%	86.4
3	10-K	Foreign	China	22.1	22.1	100.0%	8.1
4	10-K	Foreign	China	9.6	9.6	100.0%	7.2
5	20-F	Foreign	China	12.9	12.9	100.0%	58.8
6	20-F	Foreign	China	8,967.0	21,451.5	41.8%	
7	20-F	Foreign	China	280,177.4	387,691.9	72.3%	
8	20-F	Foreign	China	19,225.9	31,046.6	61.9%	
9	10-K	U.S.	China	389.0	37,399.0	1.0%	288.5
10	10-K	U.S.	China	311.0	3,075.0	10.1%	294.3
11	10-K	U.S.	China	728.0	9,598.0	7.6%	389.3
12	10-K	U.S.	China	1,913.0	116,539.0	1.6%	1,518.9
13	10-K	U.S.	China	0.1	2.0	6.0%	1.7
14	10-K	U.S.	China	13.3	829.4	1.6%	21.8
15	10-K	U.S.	China	49.9	2,576.0	1.9%	33.7
16	10-K	U.S.	Qatar	2,605.0	56,259.0	4.6%	3,053.3

The magnitude of potential total loss of assets in the host countries is represented in the last column of the table, the estimated market value of country assets. For the eight issuers domiciled in the United States that have assets in one of these two host countries, the estimated total loss range is between \$1.7 million and \$3.1 billion, with a median loss of \$291.4 million. The aggregate fraction of total assets that might be affected is 2.7%.<sup>676</sup> We note that these estimates apply only to issuers that have assets in one of the host countries.

As shown in the table above, eight issuers have a foreign address associated with their Form 10-K or 20-F filing. As we discussed above, issuers that are domiciled in foreign countries might face different types of costs than U.S.-based issuers. For example, they are more likely to decide it is necessary to delist from an exchange in the United States, deregister, and cease

<sup>676</sup> Total assets of all U.S.-based firms located in these host countries divided by total worldwide assets of the same firms.

reporting with the Commission, thus incurring a higher cost of capital and potentially limited access to capital in the future, rather than to sell their assets abroad. Due to limited data availability, we cannot reliably quantify these costs.

Even though our analysis was limited to less than half of issuers that are active in these two countries, these estimates suggest that commenters' concerns about such host country laws potentially imposing billions of dollars of costs on affected issuers could be warranted, if such prohibitions exist, are not waived by the host country, and no exemptive relief from our rules is provided. Additional costs at that scale could have a significant impact on resource extraction issuers' profitability and competitive position. The analysis above assumes that a total loss of assets located in the host countries would occur. In a similar vein, one commenter suggested that any action by an issuer to obtain an exemption would likely represent a breach of the issuer's contractual obligation to the country and force the issuer potentially to suffer a total loss of its local operations.<sup>677</sup> In a more likely scenario, however, these issuers would be forced to sell their assets in the above-mentioned host countries at fire sale prices. Additionally, an issuer could redeploy these assets to other projects that would generate cash flows.

While we do not have data on fire sale prices for the industries of the affected issuers, economic studies on fire sales of real assets in other industries provide some estimates that may allow us to quantify the potential costs to affected issuers from having to sell assets at fire sale prices. For example, a study on the airline industry finds that planes sold by financially

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<sup>677</sup> See letter from ExxonMobil 1.



distressed airlines bring 10 to 20 percent lower prices than those sold by undistressed airlines.<sup>678</sup> Another study on aerospace plant closings finds that all groups of equipment sold for significant discounts relative to estimated replacement cost.<sup>679</sup> The discounts on machine tools, instruments, and miscellaneous equipment were estimated to be between 63 and 69 percent. The analysis also suggests that the most specialized equipment appears to have suffered substantially higher discounts than the least specialized equipment, which may be relevant to the extractive industry to the extent that a project would not have many potential alternative suitors should it need to be disposed of due to a conflict between the final rules and host country laws. Other studies provide estimates of fire sale discounts for forced house sales (about 3–7 percent for forced sales due to death or bankruptcy and about 27 percent for foreclosures)<sup>680</sup> and sales of stand-alone private firms and subsidiaries (15–30 percent relative to comparable public acquisition targets).<sup>681</sup> These estimates suggest a possible range for the fire sale discount from 3 to 69 percent.

Commenters did not provide any numerical estimates of the fire sale discounts that resource extraction issuers could potentially face. One commenter asserted that the range of fire sale discounts that the Commission presented in the Proposing Release was incorrect because it

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<sup>678</sup> See Todd Pulvino 1998. “Do Fire-Sales Exist? An Empirical Study of Commercial Aircraft Transactions.” *Journal of Finance*, 53(3): 939–78.

<sup>679</sup> See Ramey, V.A., Shapiro, M.D. 2001. “Displaced Capital: A Study of Aerospace Plant Closings.” *Journal of Political Economy*, 109: 958–92.

<sup>680</sup> See Campbell, John Y., Stefano Giglio, and Parag Pathak 2011. “Forced Sales and House Prices.” *American Economic Review*, 101: 2108–31.

<sup>681</sup> See Officer, M.S. 2007. “The Price of Corporate Liquidity: Acquisition Discounts for Unlisted Targets.” *Journal of Financial Economics*, 83: 571–98.

was based on industries that were very different from the resource extraction industry.<sup>682</sup>

According to the commenter, the appropriate fire sale discount should be 100 percent because of the significant sunk-cost investments in the resource extraction industry that the commenter asserted are relationship-specific and transaction-specific and thus have little to no value outside such relationships or transactions. While we agree with the commenter that our numerical examples are based on industries that are different from the resource extraction industry, as we acknowledged in the Proposing Release, we do provide an estimate of a 100 percent fire sale discount as well, as reflected in the total loss estimate from above. Additionally, our understanding is that, in most production sharing contracts, the exploration and production company receives reimbursement via the cost recovery mechanism during the period of the contract, and ownership of the field equipment reverts to the host country upon termination of the contract.<sup>683</sup> Thus, even if the contract is terminated prematurely, an issuer may receive certain reimbursement for its sunk cost investments in the field equipment. Also, equipment installed in the field by one issuer can usually be reused by another issuer without removing it from the field. Given that the resource extraction industry is a competitive industry not only in the United States but also globally, it is likely that if an issuer has to dispose of its assets in one of these two countries there may be local or international buyers that are not subject to the rule that find these assets valuable and are able to use them for the same purpose (e.g., to extract

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<sup>682</sup> See letter from API 1 (Attachment B).

<sup>683</sup> See, e.g., Brady, John, Charles Chang, Dennis R. Jennings, and Rich Shappard. Petroleum Accounting- Principles, Procedures, & Issues. PDI, 7th Edition, 2011, Chapter 25.

oil) and hence are willing to bid up their price, which will result in fire sale discounts of less than 100 percent.

Despite the assertion by the same commenter that in the event of disclosure the issuers' assets are likely to be seized by locally-owned or government-owned enterprises, we believe such asset seizures may be unlikely given the negative effect on the country's reputation as a place to do business that they could generate as well as the fact that locally-owned or government-owned enterprises may not have the expertise and the technological know-how to efficiently manage these assets. Another commenter suggested that some resource extraction issuers sell whole or partial stakes in their ventures as a matter of course without violating a host country law or contractual provision.<sup>684</sup> According to this commenter, a sale under such circumstances could lead to a fire sale discount, but it is highly unlikely to bring about a total loss. The commenter also stated that issuers would likely be protected under bilateral investment treaties or covered by political risk insurance that could lower the size of the loss. Another commenter also stated that resource extraction issuers may have public or private insurance, or treaty-based or commercial arbitration mechanisms, which would allow them to recover some or all of their losses in the case of government interference with their assets.<sup>685</sup>

To understand how relevant these discounts are to the resource extraction issuers affected by the final rules, we examine the ease with which real assets could be disposed of in different industries. If the forced disposal of real assets is more easily facilitated in the resource extraction industries compared to other industries (i.e., there is a more liquid market for those assets), then

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<sup>684</sup> See letter from Oxfam 1.

<sup>685</sup> See letter from PWYP-US 1.

the lower range of the fire sale discounts will be more appropriate to estimate potential losses due to the foreign law prohibitions. We measure the ease with which issuers in a given industry could sell their assets by a liquidity index.<sup>686</sup> The index is defined as the ratio of the value of corporate control transactions<sup>687</sup> in a given year to the total book value of assets of firms in the industry for that year. We believe that this ratio captures the general liquidity of assets in an industry because it measures the volume of the type of transactions that companies rely on when divesting real assets. Additionally, one economic study finds that the liquidity of the market for corporate assets, as measured by the liquidity index, plays an important role in explaining assets disposals by companies.<sup>688</sup>

We note, however, that the index, as constructed, will also reflect the industry's typical financial leverage, not just the liquidity of its assets. To the extent that different industries have different leverages, these differences in leverage could explain some of the cross-industry variation of the index. Additionally, the index measures the ease with which ownership of assets is changed over the time period under consideration. Hence, the index is expected to adjust to intertemporal changes in the ease with which assets in a certain industry can be disposed of,

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<sup>686</sup> See Frederic Schlingemann, Rene Stulz, and Ralph Walkling 2002. "Divestitures and the Liquidity of the Market for Corporate Assets." *Journal of Financial Economics*, 64: 117–144. The index value is between 0 and 1. A higher value of the index for an industry indicates that this is an industry with a more liquid market for corporate assets and a firm in that industry would be able to sell its real assets easier and at smaller loss than a firm in an industry with a lower liquidity index.

<sup>687</sup> As corporate control transactions, we consider all completed or pending leveraged buyouts, tender offers, spinoffs, exchange offers, minority stake purchases, acquisitions of remaining interest, privatizations, and equity carve-outs of U.S. targets. We exclude buybacks (e.g., repurchases and self-tenders) from the sample. Data on these transactions comes from Thomson Financial's Mergers & Acquisitions and New Issues databases. Data on the book value of total assets is taken from Compustat.

<sup>688</sup> See Frederic Schlingemann, Rene Stulz, and Ralph Walkling 2002. "Divestitures and the Liquidity of the Market for Corporate Assets." *Journal of Financial Economics*, 64: 117–144.

which is important because it is well-established that control transactions tend to be cyclical in nature.<sup>689</sup>

We construct the index for all industries, identified by three-digit SIC codes. For each industry, after estimating the value of the index in each year during the period 2010–2014, we calculate the average over the five-year period. Several industries have a liquidity index greater than 1; in those cases we cap the index level at 1.

The table below presents summary statistics for the liquidity index for all industries and the resource extraction industries during the period 2010–2014.

	Index value
<u><i>All other industries</i></u>	
Mean	0.11
Median	0.03
Top quartile	0.09
Bottom quartile	0.01
<u><i>Industries with similar financial leverage</i></u>	
Mean	0.08
Median	0.02
Top quartile	0.10
Bottom quartile	0.01
<u><i>Resource extraction issuers</i></u>	
Mean	0.02
Median	0.01

The results in the table show that the liquidity of real assets in the resource extraction industries is low (an average liquidity index of 0.02) compared with the liquidity in other

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<sup>689</sup> Gregor Andrade, and Erik Stafford, 2004. “Investigating the economic role of mergers.” *Journal of Corporate Finance* 10: 1–36.

industries (an average liquidity index of 0.11). That is, it is harder to dispose of assets in the extractive industries relative to other industries. In fact, the liquidity index of resource extraction industries is in the lowest quartile of the distribution of the index for all industries. As mentioned above, this could reflect the fact that resource extraction issuers have higher financial leverage than other industries. All other things being equal, higher financial leverage will result in a lower liquidity index. To control for the effects of financial leverage, we compare the liquidity index of resource extraction industries to that of industries with similar leverage.<sup>690</sup> As the results of this comparison show, resource extraction industries have lower liquidity index values even when compared to industries with similar levels of financial leverage: a median of 0.01 for the resource extraction industries compared to a median of 0.02 for industries with similar financial leverage.<sup>691</sup> This suggests that affected issuers may still experience difficulty in disposing of some of their real assets relative to other industries with similar leverage levels when a need arises. It should be noted, however, that the liquidity index estimates the liquidity of the real assets at the industry level, not at the level of a country with laws prohibiting disclosure. It is possible that in some of these countries the ability of an affected issuer to dispose of assets could be more or less constrained than that at the industry level.

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<sup>690</sup> We first estimate the median market leverage of the resource extraction industries during the period 2010–2014. Market leverage is defined as the ratio Total debt / (Total debt + Market value of equity). We then classify as similar those industries whose median market leverage is within  $\pm 10\%$  of the median market leverage of the resource industries for the same time period. There are six industries that are similar to the resource extraction industries based on this criterion. Data on total debt and market value of equity comes from Compustat.

<sup>691</sup> We note that many factors may drive the choice of leverage within a given industry, and some of these factors may also affect the industry's liquidity index. Thus, the industries that have leverage that is similar to that of the resource extraction industries may be very different in some other aspects (e.g., growth opportunities or intensity of competition) and that could explain the differences in their liquidity indices and the liquidity index of the resource extraction industries.

One commenter criticized our use of the liquidity index based on the argument that it is constructed using U.S. data, with the U.S. being one of the most liquid markets in the world.<sup>692</sup> Our purpose, however, in using the index is to do a relative comparison: that is, to get a sense of whether the resource extraction industry is more or less liquid than other industries. We do not use the liquidity index to develop an absolute measure of liquidity in the resource extraction industry. Furthermore, our results from the analysis using the liquidity index are in line with the commenter's suggestions that this industry is relatively illiquid compared to other industries.

Because we lack data to construct the liquidity index at the country level, we cannot quantify the liquidity of the single-country market for real assets. The table below lists the number of corporate control transactions in each of the two countries under consideration from the period 2010-2014, broken down by type of industry.<sup>693</sup> As seen from the table, China is by far the more active market for corporate control transactions among the two countries. Although the number of relevant transactions gives some indication of how liquid the market in each country is, without knowing the size of the discounts and the types of companies involved in these deals (e.g., small or large), we cannot conclusively say in which country the cost associated with fire sale prices would be lower. These costs would likely depend on country-level factors such as a country's regulatory framework governing such transactions (e.g., how quickly a transaction can get approved), the degree of competition in the resource extraction industry, availability of capital (e.g., availability and cost of debt and stock market valuations), and

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<sup>692</sup> See letter from API 1 (Attachment B).

<sup>693</sup> Corporate control transactions are defined as in footnote 687. Data on the transactions comes from Thomson Financial's Mergers & Acquisitions.

changes in currency exchange rates. For example, a recent study documents that companies from countries whose stock market has increased in value and whose currency has recently appreciated are more likely to be purchasers of corporate assets.<sup>694</sup> In a certain country, a more competitive resource extraction industry is likely to be associated with lower fire sale discounts.

<b>Country</b>	<b>Number of transactions (% of all transactions)</b>
<u><i>China</i></u>	
Resource extraction industries	885 (6%)
All other industries	14,304 (94%)
<u><i>Qatar</i></u>	
Resource extraction industries	5 (8%)
All other industries	54 (92%)

Given the lower liquidity of the market for the real assets of resource extraction issuers, we believe that the upper limit of the fire sale discount range would be more appropriate when estimating the fire sale prices at which affected issuers could dispose of their assets in countries with laws prohibiting disclosure, should such need arise. If we apply those discount percentages to the market value of the issuers' assets in these host countries, this would reduce our estimates of their potential losses. For U.S.-based issuers, if we apply the highest discount of 69 percent, the range of losses would be between \$1.2 million and \$2.1 billion, with a median loss of \$201.1 million. If the true fire sale discounts in the countries with disclosure prohibition laws are lower than our highest estimate, the losses of affected issuers would be lower. In addition to the dollar costs, the process of disposing of assets could involve substantial time, which could further

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<sup>694</sup> See Isil Erel, Rose Liao, and Michael Weisbach 2012. "Determinants of Cross-Border Mergers and Acquisitions," *Journal of Finance* 67: 1045–82.



increase the total cost of the restructuring. We acknowledge, however, that the fire sale discount estimates are based on data from other industries that are very different from the industries of affected issuers. Thus, our estimates may not accurately reflect the true fire sale discounts that affected issuers could face.

Alternatively, an issuer could redeploy these assets to other projects that would generate cash flows. If an issuer could redeploy these assets relatively quickly and without a significant cost to projects that generate similar rates of returns as those in the above-mentioned countries, then the issuer's loss from the presence of such host country laws would be minimal. The more difficult and costly it is for an issuer to do so, and the more difficult it is to find other projects with similar rates of return, the larger the issuer's losses would be. However, we do not have sufficient data to quantify more precisely the potential losses of issuers under those various circumstances. Likewise, if there are multiple potential buyers (e.g., companies not subject to the final rules, the EU Directives, or ESTMA), and if the issuer could sell those assets to one such buyer, then the buyer might pay the fair market value for those assets, resulting in minimal to no loss for the issuer.

Overall, the results of our analysis are consistent with commenters' assertions that the presence of host country laws that prohibit the type of disclosure required under the final rules could be costly, although, as mentioned in the preceding paragraph, in some instances there may be mitigating factors that could decrease those costs. It is also possible that under certain circumstances affected issuers could lose 100 percent of their assets in a given country. The size of the potential loss to issuers would depend on the presence of other similar opportunities, third parties willing to buy the assets at fair-market values in the above-mentioned host countries, and

the ability of issuers to avoid fire sales of these assets. Finally, as discussed at the beginning of this section, it is not clear that these costs, in fact, will be incurred by issuers in light of the present uncertainty over the existence and scope of such foreign law prohibitions and our intent to consider exemptive relief on a case-by-case basis.

## **2. Alternative Reporting**

The final rules allow resource extraction issuers subject to a foreign jurisdiction's resource extraction payment disclosure requirements that we have determined are substantially similar to our own requirements to satisfy their submitting obligations by filing the report required by that foreign jurisdiction with the Commission. At the same time, we are recognizing the EU Directives, ESTMA, and the USEITI as "substantially similar" reporting regimes for purposes of this alternative reporting provision. This approach will significantly decrease compliance costs for issuers that are cross-listed or incorporated in these foreign jurisdictions. We estimated above that approximately 192 issuers will be subject to other regulatory regimes that may allow them to utilize this provision.<sup>695</sup> For these issuers, the costs associated with preparing and filing a Form SD should be negligible, although they will be required to format the data in interactive (XBRL) format before filing it with the Commission.

As an alternative, we could have decided not to adopt such a provision. Such an alternative would have increased the compliance costs for issuers that are subject to substantially similar foreign disclosure requirements. These issuers would have to comply with multiple disclosure regimes and bear compliance costs for each regime, although it is possible that the

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<sup>695</sup> These are issuers that have a business address, are incorporated, or are listed on exchanges in the EEA or Canada and that have to provide substantially similar disclosure to the European Union or Canadian authorities.

marginal costs for complying with an additional disclosure regime would not be high given the potential similarities that may exist between these reporting regimes and the final rules.

### **3. Definition of Control**

Section 13(q) requires resource extraction issuers to disclose payments made by a subsidiary or entity under the control of the issuer. As discussed in Section II.D above, we are adopting rules that define the term “control” based on accounting principles. Alternatively, we could have used a definition based on Exchange Act Rule 12b-2 as in the 2012 Rules.<sup>696</sup> We believe that the approach we are adopting will be less costly for issuers to comply with because issuers are currently required to apply the definition on at least an annual basis for financial reporting purposes. While some commenters were concerned about the ability of an issuer to obtain sufficiently detailed payment information from proportionately consolidated entities or operations when it is not the operator of that venture, we note that the issuer would be able to rely on Exchange Act Rule 12b-21 to omit the information if, under existing contracts, the necessary payment information is unknown and not reasonably available.<sup>697</sup>

Using a definition based on Rule 12b-2 would require issuers to undertake additional steps beyond those currently required for financial reporting purposes.<sup>698</sup> Specifically, a resource extraction issuer would be required to make a factual determination as to whether it has control of an entity based on a consideration of all relevant facts and circumstances. Thus, this alternative would have required issuers to engage in a separate analysis of which entities are

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<sup>696</sup> See Section II.D of the Proposing Release.

<sup>697</sup> See letters from API 1; BP; Chevron; Encana; ExxonMobil 1; Petrobras; and RDS.

<sup>698</sup> Id.

included within the scope of the required disclosures (apart from the consolidation determinations made for financial reporting purposes) and could have increased the compliance costs for issuers compared to the approach we are adopting.

In addition, there are several other benefits from using a definition based on accounting principles. There will be audited financial statement disclosure of an issuer's significant consolidation accounting policies in the footnotes to its audited financial statements contained in its Exchange Act annual reports, and an issuer's determination of control under the final rules will be subject to the audit process as well as subject to the internal accounting controls that issuers are required to have in place with respect to audited financial statements filed with the Commission.<sup>699</sup> All of these benefits may lead to more accurate, reliable, and consistent reporting of subsidiary payments, thereby enhancing the quality of the reported data.

#### **4. Definition of “Commercial Development of Oil, Natural Gas, or Minerals”**

As in the Proposing Release, the final rules define “commercial development of oil, natural gas, or minerals” to include exploration, extraction, processing, and export, or the acquisition of a license for any such activity. As described above, the rules that we are adopting generally track the language in the statute. We are sensitive to the fact that a broader definition of “commercial development of oil, natural gas, or minerals” could increase issuers' costs. We are also sensitive to the fact that expanding the definition in a way that is broader than other reporting regimes could potentially lead to a competitive disadvantage for those issuers covered only by our rules. Further, we recognize that limiting the definition to these specified activities

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<sup>699</sup> See Section II.D above.

could adversely affect those using the payment information if disclosure about payments made for activities not included in the list of specified activities, such as refining, smelting, marketing, or stand-alone transportation services (i.e., transportation that is not otherwise related to export), would be useful to users of the information.

As noted above, the final rules include an anti-evasion provision that requires disclosure with respect to an activity or payment that, although not in form or characterization one of the categories specified under the final rules, is part of a plan or scheme to evade the disclosure required under Section 13(q).<sup>700</sup> We recognize that adding this requirement may increase the compliance costs for some issuers; however, we believe this provision is appropriate in order to minimize evasion and improve the effectiveness of the disclosure.

## **5. Types of Payments**

As in the Proposing Release, the final rules add two categories of payments to the list of payment types identified in the statute that must be disclosed: dividends and payments for infrastructure improvements. We include these payment types in the final rules because, based on the comments we have received, we believe they are part of the commonly recognized revenue stream. For example, payments for infrastructure improvements have been required under the EITI since 2011. Additionally, we note that the EU Directives and ESTMA also require these payment types to be disclosed. Thus, including dividends and payments for infrastructure improvements (e.g., building a road) in the list of payment types required to be disclosed under the final rules will promote consistency with the EU Directives and ESTMA and

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<sup>700</sup> See proposed Rule 13q-1(b).

should improve the effectiveness of the disclosure, thereby furthering international transparency promotion efforts.

In a change from the Proposing Release, we are adding CSR payments that are required by law or contract to the list of covered payment types. Some commenters argued that these payments are of material benefit in resource-dependent countries to both governments and local communities.<sup>701</sup> One commenter suggested that some resource extraction issuers already disclose such payments voluntarily and presented survey data indicating that such payments could be quite large.<sup>702</sup> Thus, the addition of CSR payments to the list of types of payments that must be disclosed should improve the quality of the disclosure required by the statute. Additionally, to the extent that it is difficult for certain resource extracting issuers to distinguish between CSR payments and infrastructure payments, requiring both types of payments when required by contract with the host government may lead to lower compliance costs for those issuers.<sup>703</sup>

As discussed earlier, under the final rules resource extraction issuers would incur costs to provide the payment disclosure for the required payment types. For example, there will be costs to modify the issuers' core enterprise resource planning systems and financial reporting systems so that they can capture and report payment data at the project level, for each type of payment, government payee, and currency of payment.<sup>704</sup> Since some of the payments are required to be

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<sup>701</sup> See letters from ACEP; Broadman & Searby; ExxonMobil 1; Falik; Global Witness 1; Oxfam 1; PWYP-US 1; and USAID.

<sup>702</sup> See letter from PWYP-US 1.

<sup>703</sup> See letter from ExxonMobil 1.

<sup>704</sup> See note 588 and accompanying text.

disclosed only if they are required by law or contract (e.g., CSR payments), resource extraction issuers would presumably track such payments and hence the costs of disclosing these payments may not be large. Nevertheless, the addition of dividends, payments for infrastructure improvements, and CSR payments to the list of payment types for which disclosure is required may marginally increase some issuers' costs of complying with the final rules. For example, issuers may need to add these types of payments to their tracking and reporting systems. We understand that these types of payments are more typical for mineral extraction issuers than for oil issuers,<sup>705</sup> and therefore only a subset of the issuers subject to the final rules might be affected.

Under the final rules, issuers may disclose payments that are made for obligations levied at the entity level, such as corporate income taxes, at the entity level rather than the project level. This accommodation also should help reduce compliance costs for issuers without significantly interfering with the goal of achieving increased payment transparency.

Under the final rules, issuers must disclose payments made in-kind. The EU Directives and ESTMA also require disclosure of in-kind payments, as does the EITI. Consequently, this requirement should help further the goal of supporting international transparency promotion efforts and enhance the effectiveness of the payment disclosure. At the same time, this requirement could impose costs if issuers have not previously had to value their in-kind payments. To minimize the potential additional costs, the final rules provide issuers with the flexibility of reporting in-kind payments at cost, or if cost is not determinable, at fair market

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<sup>705</sup> See, e.g., letters from PWYP-US 1 and Global Witness 1. See also Chapter 19 “Advancing the EITI in the Mining Sector: Implementation Issues” by Sefton Darby and Kristian Lempa, in Advancing the EITI in the Mining Sector: A Consultation with Stakeholders (EITI 2009).

value. We believe this approach should lower the overall compliance costs associated with our decision to include the disclosure of in-kind payments.

## **6. Definition of “Not De Minimis”**

Section 13(q) requires the disclosure of payments that are “not de minimis,” leaving that term undefined. Consistent with the proposed rules, the final rules define “not de minimis” to mean any payment, whether made as a single payment or a series of related payments, that equals or exceeds \$100,000, or its equivalent in the issuer’s reporting currency.

We considered adopting a definition of “not de minimis” that was based on a qualitative principle or a relative quantitative measure rather than an absolute quantitative standard. We chose the absolute quantitative approach for several reasons. An absolute quantitative approach should promote consistency of disclosure and, in addition, would be easier for issuers to apply than a definition based on either a qualitative principle or relative quantitative measure. Moreover, using an absolute dollar amount threshold for disclosure purposes should reduce compliance costs by reducing the work necessary to determine what payments must be disclosed.

In choosing the \$100,000 “de minimis” threshold, we selected an amount that we believe strikes an appropriate balance in light of varied commenters’ concerns and the purpose of the statute. Although commenters on the 2010 Proposing Release suggested various thresholds, no commenter provided data to assist us in determining an appropriate threshold amount.<sup>706</sup> In addition, one commenter on the Proposing Release criticized the proposed \$100,000 threshold as too low, although the commenter did not suggest an alternative amount or provide data to

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<sup>706</sup> See 2012 Adopting Release, n.235 and n.243 and accompanying text.



support why the threshold was too low.<sup>707</sup> Our proposed threshold is very similar to the payment thresholds of other resource extraction disclosure regimes.<sup>708</sup> For issuers (or their subsidiaries) that are already providing payment information under those resource extraction disclosure regimes, our definition of “not de minimis” will likely decrease compliance costs (compared to other threshold choices) associated with determining which payments should be reported because these issuers will already have systems tailored to this threshold. We considered other absolute amounts but chose \$100,000 as the quantitative threshold in the definition of “not de minimis.” We decided not to adopt a lower threshold because we are concerned that such an amount could result in undue compliance burdens and raise competitive concerns for many issuers. We also considered defining “not de minimis” either in terms of a materiality standard or by using a larger number, such as \$1,000,000. Both of these alternatives might have resulted in lower compliance costs and might have lessened competitive concerns. In determining not to adopt these thresholds, however, we were mindful that they could leave important payment streams undisclosed, reducing the potential benefits to be derived from the final rules. In short, we believe the \$100,000 threshold strikes an appropriate balance between concerns about the potential compliance burdens of a lower threshold and the need to fulfill the statutory directive for resource extraction issuers to disclose payments that are “not de minimis.”

## **7. Definition of “Project”**

Section 13(q) requires a resource extraction issuer to disclose information about the type and total amount of payments made to a foreign government or the Federal Government for each

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<sup>707</sup> See letter from Nouveau.

<sup>708</sup> See discussion in Section II.C.2 of the Proposing Release.

project relating to the commercial development of oil, natural gas, or minerals, but it does not define the term “project.” The final rules define “project” as operational activities governed by a single contract license, lease, concession, or similar legal agreement, which forms the basis for payment liabilities with a government. This definition is based on the definition in the EU Directives and the ESTMA Specifications, but allows for greater flexibility when operational activities governed by multiple legal agreements may be deemed a project.

The definition of “project” that we are adopting should have the benefit of providing a granular transparency that citizens, civil society groups, and others can use to assess revenue flows from projects in their local communities. As we discuss above in Section II.E, this should have a number of potential benefits for information users seeking to prevent corruption and promote accountability. The definition of project may also reduce costs for issuers that are subject to both the final rules and either the EU Directives or ESTMA by not requiring different disaggregation of project-related costs due to different definitions of the term. It also likely will reduce the competitive disadvantage for issuers that could be required to make more granular disclosure of information than their competitors under a narrower definition. The definition also will provide more flexibility in, and reduce the burdens associated with, disaggregating payments made for activities that relate to multiple agreements that are both operationally and geographically interconnected.

The definition may, however, increase the compliance costs for issuers that will be required to implement systems to track payments at a different level of granularity than what they currently track. In a similar vein, it may increase the risk of sensitive contract information being released, thus increasing the likelihood of competitive harm for some affected issuers. At

the same time, this risk could be mitigated by the ability of issuers to treat operationally and geographically interconnected agreements as a single “project” notwithstanding that they do not have substantially similar terms.

Several commenters on the Proposing Release suggested that the contract-based definition of “project” would result in the loss of trade secrets and intellectual property more generally.<sup>709</sup> One commenter stated that trade secrets and intellectual property were especially valuable in the resource extraction industry because of its large sunk costs investments and uncertain, long-term payoffs. According to this commenter, the project-level disclosures required by the rule would amount to loss of trade secrets.<sup>710</sup> The commenter did not, however, explain how the project-level disclosure of certain payments to foreign governments would result in the revelation of trade secrets and intellectual property.

Commenters on the Proposing Release also asserted that the definition of “project” would reveal sensitive and proprietary commercial information to competitors, thus resulting in competitive harm for resource extraction issuers.<sup>711</sup> In considering the potential competitive consequences that may result from a contract-based definition of project, we think it is useful to break the analysis into three phases—the exploratory phase, the actual discovery, the development and early production period, and the mature stage of production.<sup>712</sup>

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<sup>709</sup> See letters from API 1 and ExxonMobil 1.

<sup>710</sup> See letter from API 1.

<sup>711</sup> See letters from API 1 and ExxonMobil 1.

<sup>712</sup> See generally OPEN OIL, OIL CONTRACTS: HOW TO READ AND UNDERSTAND THEM, at 15, available at <http://openoil.net/?wpdmact=process&did=NS5ob3RsaW5r> (describing the “key stages of a [petroleum] project’s life” as exploration, development, production, and decommission).

According to industry commenters, the contract-based definition of “project” would allow competitors to derive important information about the new areas under exploration for potential resource development, the value the company places on such resources, and the costs associated with acquiring the right to develop these new resources. This would in turn enable competitors to evaluate the new resources more precisely, and as a result, structure their bids for additional opportunities in the areas with new resources more effectively. We are mindful of these concerns and believe that the targeted exemption for payments related to exploratory activities included in the final rules, which permits registrants to delay the disclosure of these payments for an additional year, should help to mitigate these potential competitive harms. In this regard, we view the disclosure of payment information from the exploratory period as perhaps the most likely to reveal competitively sensitive information regarding a company’s activities and expectations about the location of resources. Further, because many larger scale resource extraction issuers are engaged in a continuous and competitive quest to locate new finds, we think a targeted exemption is appropriate to preserve their respective competitive advantages.

We do not think the same potential for competitive harm exists after a resource find occurs. To the extent that exploratory activities lead to a new discovery, we note that industry commenters have not explained why a contract-based definition of “project” will lead to the public disclosure of more information about new areas of development and their value than would otherwise be publicly disclosed by analysts, industry consultants, media, and the issuers themselves. In this regard, we note that issuers have an incentive to disclose new developments and their value because this can often have a positive effect on their stock price. Additionally,

the issuer's presence in a new area, irrespective of any other disclosure, will often provide information to its competitors that the area may have favorable prospects. Thus, regardless of any disclosures made pursuant to these rules, it is likely that an issuer's new resource discovery would eventually be disclosed by any of several methods, which should attract potential competitors and over time erode the first mover's advantage.

To the extent that the contract-based definition of "project" provides detailed information on the costs of newer projects, it could be advantageous to potential competitors at the expense of the affected issuer. We note, however, that the payments required by the final rules will be only part of the costs of a new project. Unless competitors are able to observe the total costs of a new project, which we are skeptical they could do based just on the required disclosures, they may be unlikely to gain important competitive advantages. Additionally, a commenter's contention that requiring payment disclosure from an issuer in one country will help another country demand more from that same issuer and thus affect the issuer's competitive position does not take into account the fact that differences in geology, risk factors, and various other project characteristics will likely complicate such a strategy.<sup>713</sup>

With respect to those projects that are older or more established, we think it is particularly unlikely that our contract-based definition of "project" will result in the public disclosure of competitively sensitive information. According to the API, the general terms of

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<sup>713</sup> See letter from API 1. We also note that the contracting environment varies from country to country and therefore variables beyond the specific contractual provisions relating to revenue for the government may govern an issuer's strategic ability to obtain a license or concession. See generally, KEN SILVERSTEIN, THE SECRET WORLD OF OIL 14-54, 145-166 (2014) (describing the role that intermediaries and personal contacts can play in obtaining resource extraction contracts in many foreign countries, particularly those countries that lack fully democratic regimes).

older projects are typically already available irrespective of whether the contracts have technically been made public.<sup>714</sup> Thus, for resource extraction issuers that have a larger fraction of older or more well-established projects in their portfolio, the competitive harm described by the commenters is likely to be insignificant. Additionally, given that resource extraction projects are generally long-term projects, it is likely that at any point in time older projects will be prevalent in an issuer's portfolio, which again suggests that potential competitive harm from the payment disclosures required by the final rules may not be significant.

Commenters also stated that the contract-based definition of "project" would allow competitors to reverse-engineer proprietary commercial information: for example, to determine the commercial and fiscal terms of the agreements, get a better understanding of an issuer's strategic approach to bidding and contracting, and identify rate of return criteria.<sup>715</sup> Since Section 13(q), like the EU Directives and ESTMA, requires all reporting issuers to disclose such payment information, the playing field among U.S. issuers and resource extraction companies subject to the European and Canadian disclosure regimes should be level since any reporting company could benefit from disclosures of all its reporting competitors.

We note that several commenters on the Proposing Release disputed the assertion that the contract-based definition of "project" would create any competitive disadvantages to affected issuers.<sup>716</sup> One commenter argued that a significant number (84) of the world's largest 100 oil and gas companies and a large number (58) of the world's largest mining companies would be

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<sup>714</sup> See id.

<sup>715</sup> See letters from API 1 and ExxonMobil 1.

<sup>716</sup> See letters from PWYP-US 1 and Oxfam 1.

required to disclose their payments under U.S., EU, Canadian, and Norwegian rules, or are doing so voluntarily already, thus diminishing the potential anti-competitive effects of the contract-based definition of “project.”<sup>717</sup> We note, however, that the pool of largest oil companies that the commenter was referring to was determined based on market capitalization, which is unavailable for national oil companies and private oil and gas companies. If national and other private oil and gas companies were included in this pool, then the percentage of the largest companies required to disclose their payments under U.S., EU, Canadian, and Norwegian rules could be much smaller.

Relatedly, we acknowledge the potential that our definition of “project” could provide competitive advantages to state-owned oil companies, which are not covered by the final rules. We note that such companies could enjoy an advantage to the extent that they do business in countries other than their own. In this regard, however, it is important to clarify that state-owned oil and gas companies across the globe “differ on a number of very important variables, including the level of competition in the market in which they operate” and “their degree of commercial orientation and internationalization.”<sup>718</sup> Moreover, the extent to which state-owned companies compete in the market place against issuers covered by our rules varies. We understand that many state-owned companies operate primarily as gate-keepers for their home countries resource reserves, contracting with non-state-owned companies, such as the large

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<sup>717</sup> See letter from PWYP-US 1.

<sup>718</sup> See World BANK, WORKING PAPER NO. 218: NATIONAL OIL COMPANIES AND VALUE CREATION (2011), available at <http://siteresources.worldbank.org/INTOGMC/Resources/9780821388310.pdf>, at xii.

publicly traded U.S. oil and gas companies, to extract the country’s natural resources.<sup>719</sup> Other state-owned companies are primarily engaged in directly undertaking the extractive activities themselves for their home country.<sup>720</sup> To the extent a state-owned oil or gas company is operating exclusively or predominantly in either of these two capacities, we anticipate that the issuers covered by our rules would not experience a substantial competitive disadvantage (from these state-owned companies) as a result of project-level payment disclosure. Nevertheless, we acknowledge that some state-owned companies are responsible for competing in the global marketplace to extract oil and gas abroad for import back to their home country (an activity their home country may have them undertake either to ensure a secure supply of natural resources or to balance the power of exporting countries and large non-state-owned oil companies).<sup>721</sup> To the extent any state-owned company acts in this way, it could compete with issuers covered by our rule and might potentially obtain some competitive advantage from the disclosure of sensitive commercial information.<sup>722</sup> That said, we note that any potential competitive harm to U.S. issuers from the final rules could be limited by the fact that, as one commenter observed, national

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<sup>719</sup> Id. at xi.

<sup>720</sup> Id.

<sup>721</sup> Id. at 23.

<sup>722</sup> We note that some import-based state-owned companies that potentially compete globally with U.S. issuers for extraction resources may be subject to our rules (or the EU Directives or ESTMA) to some extent and, thus, will be required to disclose information that could potentially be used by competitors. See, e.g., Zhang Tao & Wang Xiacong, China Big Oil Firms on Edge Over U.S. Disclosure, MARKET WATCH (April 22, 2012), available at <http://www.marketwatch.com/story/china-big-oil-firms-on-edge-over-us-disclosure-2012-04-22> (explaining that “China’s state-owned, Big Three oil concerns” — China National Petroleum Corp. (CNPC), China Petroleum & Chemical Corp. (Sinopec) SNP, and China National Offshore Oil Corp. (CNOOC) – have subsidiaries that “are listed on the New York Stock Exchange” and thus may be required to release some revenue resource extraction payment information under Section 13(q)). See also, id. (explaining that the U.S.-listed CNOOC subsidiary engages in “oversees exploration and development projects in China and the rest of the world” and that “Sinopec’s listed company described overseas projects in its 2010 annual report in Canada, Kazakhstan, Brazil and Angola”).



oil companies may already have access to similar commercial information from the numerous business intelligence services that provide real time, contract-level and lease-level information.<sup>723</sup>

One commenter also suggested that foreign issuers may decide to delist from U.S. exchanges because of the competitive advantage they would gain over reporting issuers.<sup>724</sup> We are skeptical as to whether the gains from the potential cost savings and competitive advantages that could result from delisting from U.S. exchanges will be large enough to offset the likely large costs associated with it: higher cost of capital, limited access to financing, and lower liquidity. Given that most of the major capital markets (e.g., United States, Europe, and Canada) require substantially similar disclosures, it is not obvious to what comparable listing venues issuers could migrate. Another option for issuers will be to delist and become private companies, but this would only magnify the costs of delisting described above and, thus, we think is an unlikely outcome.<sup>725</sup>

One commenter argued that the direct compliance costs associated with the definition of “project” that we are adopting are not justified because we have no data to show any benefits of requiring the disclosure at such a granular level.<sup>726</sup> We note that most of the compliance costs

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<sup>723</sup> See letter from Oxfam-ERI.

<sup>724</sup> See letter from API 1.

<sup>725</sup> The commenter also argued that the potential delisting may actually decrease transparency, contrary to Section 13(q)’s intent. According to the commenter, fewer issuers will be reporting (due to the potential delistings) and those reporting would lose market share (due to competitive effects) and hence would have fewer payments to report. As discussed above, we do not think potential delistings will be likely. By the same token, our analysis above suggests that the competition effects of the final rules may not be large enough to lead to losses in market share for extraction issuers. Thus, the commenter’s argument that transparency will decrease may be based on an overly pessimistic scenario.

<sup>726</sup> See letter from API 1.

would remain even if we adopted the commenter’s preferred approach of identifying payments by subnational political jurisdiction. Even were we to adopt a less granular disclosure requirement (such as, for example, the API Proposal) issuers would still be required to track each payment that they make to foreign governments and the Federal Government in furtherance of resource extraction activities. Issuers would thus still need to modify their systems in substantially similar ways to collect data on each payment, and this would include tagging a significant amount of information about each payment. The principal difference is that issuers would be able to aggregate that data in various ways before submitting it to the Commission at the end of their fiscal year, but the underlying collection systems and tagging would still need to occur for each payment to ensure accurate reporting. Thus, complying with this approach would entail many of the same costs as the definition of “project” we are adopting: issuers would still need to track every resource extraction payment to foreign governments and the Federal Government, including the type of payment it is and which business unit paid it. Under the broader project definition advocated by the commenter, issuers will themselves have to aggregate the various payment flows in their Section 13(q) disclosures, while under the definition we are adopting they could not do so and would also have to include an additional data tag for each payment specifying the project in connection with which it was made.

Although we lack sufficient data to quantify the potential economic losses that could result from our choice of a contract-based definition of “project,” based on the qualitative analysis above, we find that the Section 13(q) disclosure requirements and the definition of “project” that we are adopting are not likely to cause significant competitive harms or result in significant losses.

As an alternative, we could have not defined the term “project.” Taking this approach could have provided issuers more flexibility in applying the term to different business contexts depending on factors such as the particular industry or business in which the issuer operates or the issuer’s size. Under such an approach, however, resource extraction issuers could have incurred costs in determining their “projects.” Moreover, not defining “project” could result in higher costs for some resource extraction issuers than others if an issuer’s determination of what constitutes a “project” would result in more granular information being disclosed than another issuer’s determination of what constitutes a “project.” In addition, not defining “project” may not be as effective in achieving the anticorruption objectives contemplated by the statute because resource extraction issuers’ determinations of what constitutes a “project” may differ, which could reduce the comparability of disclosure across issuers.

Finally, we could have adopted the API Proposal, which would allow issuers to combine as one “project” all of the similar extraction activities within a major subnational political jurisdiction. We acknowledge that this aggregated disclosure could potentially impose fewer competitive burdens on resource extraction issuers—particularly those issuers with many similar resource extraction activities occurring within a subnational jurisdiction—as the API suggested definition would not require issuers to expend the time and resources necessary to achieve the type of granular reporting that our proposed rules would require. As discussed above in Section II.E, however, we believe that such a high-level definition, as opposed to the definition we are adopting, would not appropriately serve the anticorruption objectives that Congress intended when it enacted Section 13(q).

## **8. Annual Report Requirement**

Section 13(q) provides that the resource extraction payment disclosure must be “include[d] in an annual report.” The final rules require an issuer to file the payment disclosure in an annual report on new Form SD. Form SD will be due no later than 150 days after the end of the issuer’s most recent fiscal year. This should lessen the burden of compliance with Section 13(q) and the related rules because issuers generally will not have to incur the burden and cost of providing the payment disclosure at the same time that they must fulfill their disclosure obligations with respect to Exchange Act annual reports.<sup>727</sup> An additional benefit is that this requirement will provide information to users in a standardized manner for all issuers rather than in different annual report forms depending on whether a resource extraction issuer is a domestic or foreign filer. Moreover, requiring the disclosure in new Form SD, rather than in issuers’ Exchange Act annual reports, should alleviate any concerns and costs associated with the disclosure being subject to the officer certifications required by Exchange Act Rules 13a-14 and 15d-14.

In a change from the proposed rules, the final rules will allow for a longer transition period for newly acquired companies that were not previously subject to reporting under the final rules.<sup>728</sup> Thus, the final rules will allow issuers that have acquired or otherwise obtain control over an issuer whose resource extraction payments are required to be disclosed under the final rules, and that has not previously been obligated to provide such disclosure pursuant to Rule 13q-

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<sup>727</sup> For example, a resource extraction issuer may potentially be able to save resources to the extent that the timing of its obligations with respect to its Exchange Act annual report and its obligations to provide payment disclosure allow for it to allocate its resources, in particular personnel, more efficiently.

<sup>728</sup> See Section II.G.3 above.

1 or another “substantially similar” jurisdiction’s requirements, to not commence reporting payment information for the acquired company until the second Form SD filing due after the effective date of the acquisition. This should lessen the burden of compliance with Section 13(q) for such issuers. Additionally, the longer transition period should help ensure that the final rules do not inadvertently discourage efficient business combinations.

In another change from the proposed rules, the final rules will require a resource extraction issuer to comply with Rule 13q-1 and Form SD for fiscal years ending no earlier than two years, rather than one year, after the effective date of the adopted rules. This longer phase-in period should provide issuers with sufficient time to establish the necessary systems and procedures to capture and track all the required payment information before the fiscal year covered by their first Form SD filing starts. The extended compliance date will also provide issuers with additional time to address potential legal barriers to making the required disclosure, such as by amending existing contracts to permit disclosure or, when warranted, seeking appropriate exemptive relief from the Commission.

Resource extraction issuers will incur costs associated with preparing and filing each Form SD. We do not believe, however, that the costs associated with filing each Form SD instead of providing the disclosure in an existing form would be significant. We also acknowledge that requiring covered issuers to file, rather than furnish, the payment information in Form SD may create an incremental risk of liability in litigation under Section 18 of the Exchange Act. This incremental risk of legal liability could be a benefit to users of the information to the extent that issuers will be more attentive to the information they file, thereby

increasing the quality of the reported information. We note however that Section 18 does not create strict liability for “filed” information.<sup>729</sup>

Finally, the final rules do not require the resource extraction payment information to be audited or provided on an accrual basis. Not requiring the payment information to be audited or provided on an accrual basis may result in lower compliance costs than otherwise would be the case.<sup>730</sup> At the same time, the lack of independent audit may affect the quality of the payment information. As an alternative, we could have chosen to provide, as one commenter suggested,<sup>731</sup> an aggregated and anonymized compilation of company-provided resource extraction payment information. According to the commenter, such an approach would yield the benefits intended by Congress and at the same time reduce issuer compliance costs. We note that, contrary to the commenter’s assertion, such an alternative would likely limit the benefits of disclosure. As discussed more fully in Section II.H, requiring project level disclosure by identified registrants provides important benefits in terms of combating corruption and promoting accountability in resource-rich countries, consistent with the purpose of Section 13(q).

## **9. Exhibit and Interactive Data Requirement**

Section 13(q) requires the payment disclosure to be electronically formatted using an interactive data format. Consistent with the proposed rules, the final rules will require a resource extraction issuer to provide the required payment disclosure in an XBRL exhibit to Form SD that

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<sup>729</sup> See Exchange Act Section 18 [15 U.S.C. 78r]. A plaintiff asserting a claim under Section 18 would need to meet the elements of the statute to establish a claim, including purchasing or selling a security in reliance on the misstatement and incurring damages caused by that reliance.

<sup>730</sup> See note 297 of the Proposing Release and accompanying text.

<sup>731</sup> See letter from API 1.

includes all of the electronic tags required by Section 13(q) and the final rules.<sup>732</sup> We believe that requiring the specified information to be presented in XBRL format will benefit issuers and users of the information by promoting consistency and standardization of the information and increasing the usability of the payment disclosure. Providing the required disclosure elements in a human-readable and machine-readable (electronically-tagged) format will allow users to quickly examine, extract, aggregate, compare, and analyze the information in a manner that is most useful to them. This includes searching for specific information within a particular submission as well as performing large-scale statistical analysis using the disclosures of multiple issuers and across date ranges. In a change from the Proposing Release, and as suggested by certain commenters, we are requiring issuers to tag the subnational geographic location using ISO codes. Using ISO codes will standardize references to those subnational geographic locations and will benefit the users of this information by making it easier to sort and compare the data. It may also increase compliance costs for issuers that do not currently use such codes in their reporting systems.

Our choice of XBRL as the required interactive data format may increase compliance costs for some issuers. The electronic formatting costs will vary depending upon a variety of factors, including the amount of payment data disclosed and an issuer's prior experience with XBRL. While most issuers are already familiar with XBRL because they use it to tag financial information in their annual and quarterly reports filed with the Commission, issuers that are not

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<sup>732</sup> Users of this information should be able to render the information by using software available on our website at no cost.

already filing reports using XBRL (i.e., foreign private issuers that report using IFRS)<sup>733</sup> would incur some start-up costs associated with the format. We do not believe, however, that the ongoing costs associated with this formatting requirement will be significantly greater than filing the data in XML.<sup>734</sup>

Consistent with the statute, the final rules require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. Under the final rules, if multiple currencies are used to make payments for a specific project or to a government, a resource extraction issuer may choose to provide the amount of payments made for each payment type and the total amount per project or per government in either U.S. dollars or the issuer's reporting currency.<sup>735</sup> We recognize that a resource extraction issuer could incur costs associated with converting payments made in multiple currencies to U.S. dollars or its reporting currency. Nevertheless, given the statute's tagging requirements and the requirement to disclose total amounts, we believe reporting in one currency is necessary.<sup>736</sup> The final rules provide flexibility to issuers in how to perform the currency conversion, which may result in lower compliance costs because it enables issuers to choose the option that works best for them. To the extent issuers choose different options to perform the conversion, it may result in less comparability of the payment information and, in turn, could result in costs to users of the information.

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<sup>733</sup> We estimate that 16 of the 425 affected issuers fall into this category.

<sup>734</sup> See Section II.G.5 of the Proposing Release.

<sup>735</sup> See Instruction 2 to Item 2.01 of Form SD.

<sup>736</sup> See discussion in Section II.G.5 of the Proposing Release.



## **IV. PAPERWORK REDUCTION ACT**

### **A. Background**

Certain provisions of the final rules contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>737</sup> The Commission published a notice requesting comment on the collection of information requirements in the Proposing Release, and submitted the proposed requirements to the Office of Management and Budget (“OMB”) for review in accordance with the PRA and its implementing regulations.<sup>738</sup> Several commenters provided qualitative comments on the possible costs of the proposed rule and form amendment, but only one commenter addressed our PRA analysis.<sup>739</sup> This comment is discussed below. Where appropriate, we have revised our burden estimates to reflect differences between the proposed rules and the rules we are adopting today.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The title for the collection of information is:

- “Form SD” (OMB Control No. 3235-0697).

Form SD is currently used to file Conflict Minerals Reports pursuant to Rule 13p-1 of the Exchange Act. We are adopting amendments to Form SD to accommodate disclosures required by Rule 13q-1, which requires resource extraction issuers to disclose information about payments made by the issuer, a subsidiary of the issuer, or an entity under the control of the

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<sup>737</sup> 44 U.S.C. 3501 *et seq.*

<sup>738</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

<sup>739</sup> See letter from Claigan.

issuer to foreign governments or the U.S. Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Form SD is filed on EDGAR with the Commission.

The final rules and amendment to the form implement Section 13(q) of the Exchange Act, which was added by Section 1504 of the Act. Section 13(q) requires the Commission to “issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including – (i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government.”<sup>740</sup> Section 13(q) also mandates the submission of the payment information in an interactive data format, and provides the Commission with the discretion to determine the applicable interactive data standard.<sup>741</sup> The final rules require the mandated payment information to be provided in an XBRL exhibit to Form SD. The disclosure requirements apply equally to U.S. issuers and foreign issuers meeting the definition of “resource extraction issuer.”

Compliance with the rules by affected issuers is mandatory. Responses to the information collections are generally not kept confidential and there would be no mandatory retention period for the collection of information.

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<sup>740</sup> 15 U.S.C. 78m(q)(2)(A).

<sup>741</sup> 15 U.S.C. 78m(q)(2)(C) and (D).

## **B. Estimate of Issuers**

The number, type, and size of the issuers that are required to file the payment information required in Form SD, as amended, is uncertain, but, as discussed in the economic analysis above, we estimate that the number of potentially affected issuers is 755.<sup>742</sup> Of these issuers, we have identified 192 that may be subject to similar resource extraction payment disclosure rules in other jurisdictions by the time the final rules are adopted and 138 shell companies and other smaller issuers that are unlikely to make any payments that would be subject to the disclosure requirements.<sup>743</sup> For the issuers subject to similar disclosure rules in other jurisdictions, the additional costs to comply with our rules will be much lower than costs for other issuers.<sup>744</sup> For the smaller issuers that are unlikely to be subject to the rules, we believe there would be no additional costs associated with our rules. Accordingly, we estimate that 425 issuers will bear the full costs of compliance with the final rules, with 192 bearing significantly lower costs.

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<sup>742</sup> See Section III.A above. As discussed in Section III.A above, we derived the number of potentially affected issuers using data from 2015 to estimate the number of issuers that might make payments covered by the final rules. This number does not reflect the number of issuers that actually made resource extraction payments to governments.

<sup>743</sup> See Section III.B.2 above (describing in more detail how we identified issuers that may be subject to foreign reporting requirements and how we used revenues and net cash flows from investing activities and shell company status to identify issuers that would be unlikely to make payments exceeding the proposed de minimis threshold).

<sup>744</sup> Under the final rules, a determination by the Commission that another jurisdiction's reporting requirements are substantially similar to ours would lower an issuer's compliance burden. The Commission has made this determination with respect to the EU Directives, ESTMA, and the USEITI. If the issuer is subject to the EU Directives or ESTMA it would already have gathered, or have systems in place to gather, resource extraction payment data by the time it must comply with the final rules. If the issuer is subject to the USEITI it would already have gathered, or have systems in place to gather, resource extraction payment data with respect to payments made to the U.S. Federal Government from federal lands or waters. Although for purposes of our economic analysis the costs to the 192 issuers that may already be subject to similar resource extraction payment disclosure rules would be negligible, we have included them in our estimate of issuers for PRA purposes because under the final rules they would continue to have an obligation to file a report on Form SD in XBRL, although with a significantly lower associated burden. See Section II.J above.

### C. Estimate of Issuer Burdens

After considering the comments and international developments,<sup>745</sup> we continue to derive our burden estimates by estimating the average number of hours it would take an issuer to prepare and file the required disclosure.<sup>746</sup> In deriving our estimates, we recognize that the burdens would likely vary among individual issuers based on a number of factors, including the size and complexity of their operations and whether they are subject to similar disclosure requirements in other jurisdictions.

When determining the estimates described below, we have assumed that 75% of the burden of preparation is carried by the issuer internally and 25% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of \$400 per hour.<sup>747</sup> One commenter questioned the basis for using \$400 per hour. This commenter used \$150 per hour in its analysis of the costs associated with the proposed rules. This commenter stated that \$150 per hour was a “conservative estimate” based on a rounded multiple of the hourly mean wage for accountants and auditors in the field of Management, Scientific, and Technical

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<sup>745</sup> Although most of the comments we received with respect to our PRA estimates related to the 2010 Proposing Release, which required the disclosure in Forms 10-K, 20-F, and 40-F, among other differences, we have considered these estimates in arriving at our PRA estimate for Form SD because, although the disclosures would be provided pursuant to a new rule and on Form SD, the disclosure requirements themselves are similar. We also believe that this is the more conservative approach given that changes from the 2010 Proposing Release should generally reduce the burdens that were considered by those commenters.

<sup>746</sup> As discussed above, Rule 13q-1 requires resource extraction issuers to file the payment information required in Form SD. The collection of information requirements are reflected in the burden hours estimated for Form SD. Therefore, Rule 13q-1 does not impose any separate burden.

<sup>747</sup> We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis we estimate that such costs would be an average of \$400 per hour. This is the rate we typically estimate for outside legal services used in connection with public company reporting. We note that no commenters provided us with an alternative rate estimate for these purposes in connection with the 2010 Proposing Release.

Consulting Services ( $\$37.27 \times 3 = 111.81$ , rounded up to \$150).<sup>748</sup> We disagree with this estimate, however, because that rate does not factor in the outside professional costs associated with preparing a document subject to potential liability under applicable securities laws. Resource extraction issuers likely will seek the advice of attorneys to mitigate the risks associated with such liability, as well as to help them comply with the rule and form requirements. Thus, consistent with our conservative approach when considering the applicable costs and burdens, we continue to use the \$400 per hour estimate.

The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours. In connection with the 2010 Proposing Release, we received estimates from some commenters expressed in burden hours and estimates from other commenters expressed in dollar costs.<sup>749</sup> We expect that the rules' effect would be greatest during the first year of their effectiveness and diminish in subsequent years. To account for this expected diminishing burden, we believe that a three-year average of the expected implementation burden during the first year and the expected ongoing compliance burden during the next two years is a reasonable estimate.

In connection with the 2010 Proposing Release, some commenters estimated implementation costs of tens of millions of dollars for large filers and millions of dollars for smaller filers.<sup>750</sup> These commenters did not describe how they defined "small" and "large" filers. One commenter provided an estimate of \$50 million in implementation costs if the

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<sup>748</sup> See letter from Claigan.

<sup>749</sup> See 2012 Adopting Release at Section IV.B.

<sup>750</sup> See letters from API 1 (pre-proposal) and ExxonMobil 1 (pre-proposal).

definition of “project” is narrow and the level of disaggregation is high across other reporting parameters, though it did not provide alternate estimates for different definitions of “project” or different levels of disaggregation.<sup>751</sup> We note that the commenter that provided this estimate was among the largest 20 oil and gas companies in the world,<sup>752</sup> and we believe that the estimate it provided may be representative of the costs to companies of similar large size rather than smaller companies.

Generally, we note that some of the estimates we received may reflect the burden to a particular commenter, and may not represent the burden for other resource extraction issuers.<sup>753</sup> Also, while we received estimates for smaller companies and an estimate for one of the largest companies, we did not receive data on companies of varying sizes in between the two extremes.<sup>754</sup> Finally, commenters’ estimates on the burdens associated with initial implementation and ongoing compliance varied widely.

As discussed above, we estimate that 425 issuers would bear the full costs of compliance and 192 issuers are subject to similar resource extraction payment disclosure rules, such that the additional costs to comply with our rules will be much lower than costs for other issuers. We also estimate that 138 smaller issuers, including shell companies, will bear no compliance costs because it is likely that any payments they make for the purpose of the commercial development

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<sup>751</sup> See letter from ExxonMobil 1 (pre-proposal).

<sup>752</sup> See letter from API (Oct. 12, 2010) (ranking the 75 largest oil and gas companies by reserves and production).

<sup>753</sup> For example, one commenter’s letter indicated that it had approximately 120 operating entities. See letter from Rio Tinto (pre-proposal).

<sup>754</sup> See letter from API 1 (pre-proposal) (estimating implementation costs in the tens of millions of dollars for large filers and millions of dollars for many smaller filers). This commenter did not explain how it defined small and large filers.

of oil, natural gas, or minerals will be considered de minimis under the proposed rules. We have used the cost estimates provided by commenters to estimate the compliance burden for affected issuers for PRA purposes. To distinguish between the burden faced by the two groups of affected issuers described above, we have assumed that the issuers who may already be complying with a similar foreign disclosure regime would have compliance costs of approximately five percent of the issuers that bear the full costs of compliance.<sup>755</sup> For issuers bearing the full costs, we note that Barrick Gold estimated an initial compliance burden of 1,000 hours (500 hours for initial changes to internal books and records and 500 hours for initial compliance).<sup>756</sup> Although we believe that initial implementation costs would increase with the size of the issuer, as discussed in our economic analysis above,<sup>757</sup> commenters did not provide estimates on the fraction of compliance costs that would be fixed versus variable. Also, since commenters' cost estimates were based on policy choices made in the 2010 Proposing Release, they might not reflect these commenters' views on the final rules. Unfortunately, we are unable to reliably quantify the reduction in these cost estimates based on the policy changes reflected in the final rules. Thus, despite Barrick Gold being a large accelerated filer and commenting on proposed rules that we believe would have been more onerous than the final rules, we use its estimate of 1,000 hours as a conservative estimate.

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<sup>755</sup> We are using the proposed five percent estimate even though it was developed prior to the Commission granting alternative reporting status to the EU Directives and ESTMA. We believe this approach conservatively estimates the burden alternative report filers will face (e.g., when converting the alternative report to XBRL format or possibly translating the report to English).

<sup>756</sup> We use Barrick Gold's estimate because it is the only commenter that provided a number of hours and dollar value estimates for initial and ongoing compliance costs. Although in the economic analysis above we used ExxonMobil's dollar value estimate to calculate an upper bound of compliance costs, we are unable to calculate the number of burden hours for purposes of the PRA analysis using ExxonMobil's dollar value inputs.

<sup>757</sup> See Section III.B.2 above.

We believe that the burden associated with this collection of information will be greatest during the implementation period to account for initial set up costs, but that ongoing compliance costs would be less because companies would have already made any necessary modifications to their systems to capture and report the information required by the final rules. In connection with the 2010 Proposing Release, two commenters provided estimates of ongoing compliance costs: Rio Tinto provided an estimate of 5,000 – 10,000 burden hours for ongoing compliance,<sup>758</sup> while Barrick Gold provided an estimate of 500 burden hours for ongoing compliance. Based on total assets, Rio Tinto is one of the largest resource extraction issuers. We believe that, because of Rio Tinto's size, the estimate it provided may be representative of the burden for resource extraction issuers of a similar size, but may not be a representative estimate for smaller resource extraction issuers. Although in terms of total assets Barrick Gold is among the largest resource extraction issuers that are Exchange Act reporting companies, it is closer in size to the average issuer than is Rio Tinto. As such, we believe that Barrick Gold's estimate is a better estimate of the ongoing compliance burden hours. We acknowledge, however, that using Barrick Gold's estimate is a conservative approach. For example, the average total assets of issuers that we believe would be bearing the full costs of the rules is 19% of Barrick Gold's total assets for 2015 (\$6.4 billion / \$33.9 billion).<sup>759</sup>

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<sup>758</sup> See letter from Rio Tinto (pre-proposal). This commenter estimated 100-200 hours of work at the head office, an additional 100-200 hours of work providing support to its business units, and a total of 4,800 – 9,600 hours by its business units. We arrived at the estimated range of 5,000 – 10,000 hours by adding the estimates provided by this commenter (100+100+4,800=5,000 and 200+200+9,600=10,000).

<sup>759</sup> The average estimated resource extraction issuer's total assets compared to Rio Tinto's total assets (\$108.0 billion for 2015) is 6%.



Thus, using the three-year average of the expected burden during the first year and the expected ongoing burden during the next two years, we estimate that the incremental collection of information burden associated with the rules would be 667 burden hours per fully affected respondent  $(1000 + 500 + 500) / 3$  years). We estimate that the rules would result in an internal burden of approximately 212,606.25 hours  $(425 \text{ responses} \times 667 \text{ hours/response} \times .75)$  for issuers bearing the full costs and 4,802.4 hours  $(192 \text{ responses} \times 33.35 \text{ hours/response} \times .75)$  for issuers that are subject to similar resource extraction payment disclosure rules in other jurisdictions, amounting to a total incremental company burden of 217,408.65 hours  $(212,606.25 + 4,802.4)$ .

Outside professional costs would be \$28,347,500  $(425 \text{ responses} \times 667 \text{ hours/response} \times .25 \times \$400)$  for issuers bearing the full costs and \$640,320  $(192 \text{ responses} \times 33.35 \text{ hours/response} \times .25 \times \$400)$  for issuers that are subject to similar resource extraction payment disclosure rules in other jurisdictions, amounting to total outside professional costs of \$28,987,820  $(\$28,347,500 + \$640,320)$ . Barrick Gold also indicated that its initial compliance costs would include \$100,000 for IT consulting, training, and travel costs. Again, we believe this to be a conservative estimate given the size of Barrick Gold compared to our estimate of the average resource extraction issuer's size. We do not, however, believe that these initial IT costs would apply to the issuers that are already subject to similar resource extraction payment disclosure rules, since those issuers should already have such IT systems in place to comply with a foreign regime. Thus, we estimate total IT compliance costs to be \$42,500,000  $(425 \text{ issuers} \times \$100,000)$ . We have added the estimated IT compliance costs to the cost estimates for other professional costs discussed above to derive total professional costs for PRA purposes of \$71,487,820

(\$28,987,820 + \$42,500,000) for all issuers.<sup>760</sup> The total burden hours and total professional costs discussed above are in addition to the existing estimated hour and cost burdens applicable to Form SD as a result of compliance with Exchange Act Rule 13p-1.

## **V. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS**

This Final Regulatory Flexibility Act Analysis (“FRFA”) has been prepared in accordance with the Regulatory Flexibility Act.<sup>761</sup> It relates to rule and form amendments that we are adopting today to implement Section 13(q) of the Exchange Act, which concerns certain disclosure obligations of resource extraction issuers. As defined by Section 13(q), a resource extraction issuer is an issuer that is required to file an annual report with the Commission and engages in the commercial development of oil, natural gas, or minerals. An Initial Regulatory Flexibility Analysis (IRFA) was prepared in accordance with the Regulatory Flexibility Act and included in the Proposing Release.

### **A. Need for the Rules**

The rule and form amendments are designed to implement the requirements of Section 13(q), which was added by Section 1504 of the Act. Specifically, the rule and form amendments will require a resource extraction issuer to disclose in an annual report certain information relating to any payment made by the issuer, a subsidiary of the issuer, or an entity under the issuer’s control to a foreign government or the U.S. Federal Government for the

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<sup>760</sup> We note that this PRA cost estimate serves a different purpose than the economic analysis and, accordingly, estimates costs differently. See Section III above. One of these differences is that the economic analysis estimates average total compliance costs for affected issuers without dividing such costs between internal burden hours and external cost burdens. See Section III.B.2.b above.

<sup>761</sup> 5 U.S.C. 603.

purpose of the commercial development of oil, natural gas, or minerals. An issuer will be required to include that information in an exhibit to Form SD. The exhibit must be formatted in XBRL.

## **B. Significant Issues Raised by Public Comments**

In the Proposing Release, we requested comment on every aspect of the IRFA, including the number of small entities that would be affected by the proposed rule and form amendments, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis, and how to quantify the impact of the proposed rules. We did not receive any comments specifically addressing the IRFA. We did, however, receive one comment recommending that smaller reporting companies be given more time before being required to comply with the final rules.<sup>762</sup> This commenter believed that, in the aggregate, smaller reporting companies represent a small percentage of the total payments made to governments by resource extraction issuers and therefore a longer transition period should not impair the effectiveness of the final rules. As discussed above, other commenters disagreed with that approach.<sup>763</sup> Although not limited to small entities, the final rules take into account the suggestion for a longer transition period by providing a two-year transition period for all issuers rather than the one-year transition period that was proposed.<sup>764</sup>

## **C. Small Entities Subject to the Rules**

The final rules will affect small entities that are required to file an annual report with the Commission under Section 13(a) or Section 15(d) of the Exchange Act and are engaged in the

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<sup>762</sup> See letter from Ropes & Gray. In connection with the 2010 Proposing Release we received comments requesting an exemption for a “small entity” or “small business” having \$5 million or less in assets on the last day of its more recently completed fiscal year; however, these comments were not raised again by those commenters after the Proposing Release. See 2012 Adopting Release, at n.662 and accompanying text.

<sup>763</sup> See Section II.I above.

<sup>764</sup> See Section II.M.3 above for additional details.

commercial development of oil, natural gas, or minerals. Exchange Act Rule 0-10(a)<sup>765</sup> defines an issuer (other than an investment company) to be a “small business” or “small organization” for purposes of the Regulatory Flexibility Act if it had total assets of \$5 million or less on the last day of its most recent fiscal year. Based on a review of total assets for Exchange Act registrants filing under certain SICs,<sup>766</sup> we estimate that there are approximately 229 companies that will be considered resource extraction issuers under the final rules and that may be considered small entities.

#### **D. Reporting, Recordkeeping, and Other Compliance Requirements**

The final rule and form amendments add to the annual disclosure requirements of companies meeting the definition of resource extraction issuer, including small entities, by requiring them to provide the payment disclosure mandated by Section 13(q) in Form SD. That information must include:

- the type and total amount of payments made for each project of the issuer relating to the commercial development of oil, natural gas, or minerals; and
- the type and total amount of those payments made to each government.

A resource extraction issuer must provide the required disclosure in an exhibit to Form SD formatted in XBRL. Consistent with the statute, the final rules require an issuer to submit the payment information using electronic tags that identify, for any not de minimis

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<sup>765</sup> 17 CFR 240.0-10(a).

<sup>766</sup> See Section III.B above for a discussion of how we estimated the number of “resource extraction issuers” under the final rules.

payment made by a resource extraction issuer to a foreign government or the U.S. Federal Government:

- The type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;
- The type and total amount of such payments for all projects made to each government;
- The total amounts of the payments, by payment type;
- The currency used to make the payments;
- The fiscal year in which the payments were made;
- The business segment of the resource extraction issuer that made the payments;
- The governments (including any foreign government or the Federal Government) that received the payments and the country in which each such government is located;
- The project of the resource extraction issuer to which the payments relate;
- The particular resource that is the subject of commercial development; and
- The subnational geographic location of the project.

The same payment disclosure requirements will apply to U.S. and foreign resource extraction issuers.

#### **E. Agency Action to Minimize Effect on Small Entities**

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with adopting the final rule and form amendments, we considered, as

alternatives, establishing different compliance or reporting requirements which take into account the resources available to smaller entities; exempting smaller entities from coverage of the disclosure requirements, or any part thereof; clarifying, consolidating, or simplifying the disclosure for small entities; and using performance standards rather than design standards.

Section 13(q) is designed to enhance the transparency of payments by resource extraction issuers to governments and providing different disclosure requirements for small entities or exempting them from the coverage of the requirements may undermine the intended benefits of the disclosure mandated by Section 13(q). As discussed above, we estimate that a significant number (43%) of affected issuers are smaller reporting companies; therefore, exempting such issuers from the final rules could create a significant gap in the intended transparency. Furthermore, no commenters supported an exemption or different reporting requirements for small entities in response to the Proposing Release. Only one commenter specifically called for an extended transition period for such entities. In response to that comment and other concerns, we have provided a longer transition period prior to the application of the rules to all resource extraction issuers, rather than only small entities.

We have used design rather than performance standards in connection with the final rule and form amendments because the statutory language, which requires electronic tagging of specific items, contemplates specific disclosure requirements and no commenters objected to this approach. We also believe that the rules would be more useful to users of the information if there are specific disclosure requirements that promote transparent and consistent disclosure among all resource extraction issuers. Such requirements should help further the statutory goal

of supporting international transparency promotion efforts. For this reason, we have not used consolidated or simplified disclosure requirements for small entities.

## **VI. STATUTORY AUTHORITY AND TEXT OF FINAL RULE AND FORM AMENDMENTS**

We are adopting the rule and form amendments contained in this document under the authority set forth in Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act.

### **List of Subjects in 17 CFR Parts 240 and 249b**

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, we are amending Title 17, Chapter II of the Code of Federal Regulations as follows:

### **PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

1. The authority citation for part 240 continues to read in part as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010), unless otherwise noted.

\* \* \* \* \*

2. Section 240.13q-1 is revised to read as follows:



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

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

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

(c) Alternative Reporting. An application for recognition of a regime as substantially similar for purposes of alternative reporting must be filed in accordance with the procedures set forth in Rule 0-13 (§240.0-13 of this chapter), except that, for purposes of this paragraph (c), applications may be submitted by resource extraction issuers, governments, industry groups, or trade associations.

(d) Exemptive Relief. An application for exemptive relief under this section 240.13q-1 may be filed in accordance with the procedures set forth in Rule 0-12 (§240.0-12 of this chapter).

(e) Public Compilation. To the extent practicable, the staff will periodically make a compilation of the information required to be filed under this section publicly available online. The staff may determine the form, manner and timing of the compilation, except that no

information included therein may be anonymized (whether by redacting the names of the resource extraction issuer or otherwise).

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

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

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

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

\* \* \* \* \*

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

\* \* \* \* \*

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

- a. Adding a check box for Rule 13q-1;
- b. Revising instruction A. under “General Instructions”;
- c. Redesignating instruction B.2. as B.3 and adding new instructions B.2. and B.4. under the “General Instructions”; and
- d. Redesignating Section 2 as Section 3, adding new Section 2, and revising newly redesignated Section 3 under the “Information to be Included in the Report”.

The addition and revision read as follows:

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

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM SD  
SPECIALIZED DISCLOSURE REPORT**

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

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(State or other jurisdiction of  
incorporation or organization)

(Commission  
File Number)

(I.R.S. Employer  
Identification No.)

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(Full mailing address of principal executive offices)

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

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

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

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

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**GENERAL INSTRUCTIONS**

**A. Rule as to Use of Form SD.**

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

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

1. \* \* \*

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

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

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

\* \* \* \* \*

**INFORMATION TO BE INCLUDED IN THE REPORT**

\* \* \* \* \*

**Section 2 – Resource Extraction Issuer Disclosure**

**Item 2.01 Resource Extraction Issuer Disclosure and Report**

(a) *Required Disclosure.* A resource extraction issuer must file an annual report on Form SD with the Commission, and include as an exhibit to this Form SD, information relating to any payment made during the fiscal year covered by the annual report by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer, to a foreign government or the Federal Government, for the purpose of the

commercial development of oil, natural gas, or minerals. The resource extraction issuer is not required to have the information audited. The payment information must be provided on a cash basis. The resource extraction issuer must provide a statement in the body of the Form SD that the specified payment disclosure required by this Form is included in such exhibit. The resource extraction issuer must include the following information in the exhibit, which must present the information in the eXtensible Business Reporting Language (XBRL) electronic format:

(1) The type and total amount of such payments, by payment type listed in paragraph (d)(8)(iii) of this Item, made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(2) The type and total amount of such payments, by payment type listed in paragraph (d)(8)(iii) of this Item, for all projects made to each government;

(3) The total amounts of the payments, by payment type listed in paragraph (d)(8)(iii) of this Item;

(4) The currency used to make the payments;

(5) The fiscal year in which the payments were made;

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

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

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

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

(10) The subnational geographic location of the project.

(b) *Delayed Reporting.* (1) A resource extraction issuer may delay disclosing payment information related to exploratory activities until the Form SD filed for the fiscal year immediately following the fiscal year in which the payment was made. For purposes of this paragraph, payment information related to exploratory activities includes all payments made as part of the process of (i) identifying areas that may warrant examination, (ii) examining specific areas that are considered to have prospects of containing oil and gas reserves, or (iii) as part of a mineral exploration program, in each case limited to exploratory activities that were commenced prior to any development or extraction activities on the property, any adjacent property, or any property that is part of the same project.

(2) A resource extraction issuer that has acquired (or otherwise obtains control over) an entity that has not been obligated to provide disclosure pursuant to Rule 13q-1 or another “substantially similar” jurisdiction’s requirements in such entity’s last full fiscal year is not required to commence reporting payment information for such acquired entity until the Form SD filed for the fiscal year immediately following the effective date of the acquisition. A resource extraction issuer must disclose that it is relying on this accommodation in the body of its Form SD filing.

(c) *Alternative Reporting.* (1) A resource extraction issuer that is subject to the resource extraction payment disclosure requirements of an alternative reporting regime that has been deemed by the Commission to be substantially similar to the requirements of Rule 13q-1 (17 CFR 240.13q-1) may satisfy its disclosure obligations under paragraph (a) of this Item 2.01 by including, as an exhibit to this Form SD, a report complying with the reporting requirements of the alternative jurisdiction.

(2) The alternative report must be the same as the one prepared and made publicly available pursuant to the requirements of the approved alternative reporting regime, subject to changes necessary to comply with any conditions to alternative reporting set forth by the Commission.

(3) The resource extraction issuer must: (i) state in the body of the Form SD that it is relying on the alternative reporting provision; (ii) identify the alternative reporting regime for which the report was prepared; (iii) describe how to access the publicly filed report in the alternative jurisdiction; and (iv) specify that the payment disclosure required by this Form is included in an exhibit to this Form SD.

(4) The alternative report must be provided in XBRL format.

(5) A fair and accurate English translation of the entire report must be filed if the report is in a foreign language. Project names may be presented in their original language, in addition to the English translation of the project name, if the resource extraction issuer believes that such an approach would facilitate identification of the project by users of the disclosure.

(6) Unless the Commission provides otherwise in an exemptive order, a resource extraction issuer may follow the submission deadline of an approved alternative jurisdiction if it files a notice on Form SD-N on or before the due date of its Form SD indicating its intent to file the alternative report using the alternative jurisdiction’s deadline. If a resource extraction issuer fails to file such notice on a timely basis, or files such a notice but fails to file the alternative report within two business days of the alternative jurisdiction’s deadline, it may not rely on this Item 2.01(c) for the following fiscal year.

(7) Resource extraction issuers must also comply with any additional requirements that are provided by the Commission upon granting an alternative reporting accommodation, as well as subsequent changes in such requirements.

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

(1) Business segment means a business segment consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting.

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

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

(4) Export means the movement of a resource across an international border from the host country to another country by a company with an ownership interest in the resource. Export does not include the movement of a resource across an international border by a company that (i) is not engaged in the exploration, extraction, or processing of oil, natural gas, or minerals and (ii) acquired its ownership interest in the resource directly or indirectly from a foreign government or the Federal Government. Export also does not include cross-border transportation activities by an entity that is functioning solely as a service provider, with no ownership interest in the resource being transported.

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

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

(7) Not de minimis means any payment, whether made as a single payment or a series of related payments, which equals or exceeds \$100,000, or its equivalent in the resource extraction

issuer's reporting currency, during the fiscal year covered by this Form SD. In the case of any arrangement providing for periodic payments or installments, a resource extraction issuer must use the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that series of payments, and accordingly, whether disclosure is required.

(8) Payment means an amount paid that:

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

(ii) Is not de minimis; and

(iii) Is one or more of the following:

(A) Taxes;

(B) Royalties;

(C) Fees;

(D) Production entitlements;

(E) Bonuses;

(F) Dividends;

(G) Payments for infrastructure improvements; and

(H) Community and social responsibility payments that are required by law or contract.

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

(10) Resource extraction issuer means an issuer that:

(i) Is required to file an annual report with the Commission pursuant to Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)); and

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



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

## **Instructions to Item 2.01**

### *Disclosure by Subsidiaries and other Controlled Entities*

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

### *Currency Disclosure and Conversion*

(2) A resource extraction issuer must report the amount of payments made for each payment type, and the total amount of payments made for each project and to each government, during the reporting period in either U.S. dollars or the resource extraction issuer's reporting currency. If a resource extraction issuer has made payments in currencies other than U.S. dollars or its reporting currency, it may choose to calculate the currency conversion between the currency in which the payment was made and U.S. dollars or the resource extraction issuer's reporting currency, as applicable, in one of three ways: (a) by translating the expenses at the exchange rate existing at the time the payment is made; (b) using a weighted average of the exchange rates during the period; or (c) based on the exchange rate as of the resource extraction issuer's fiscal year end. When calculating whether the de minimis threshold has been exceeded, a resource extraction issuer may be required to convert the payment to U.S. dollars, even though it is not required to disclose those payments in U.S. dollars. For example, this may occur when the resource extraction issuer is using a non-U.S. dollar reporting currency. In these instances, the resource extraction issuer may use any of the three methods described above for calculating the currency conversion. In all cases a resource extraction issuer must disclose the method used to calculate the currency conversion and must choose a consistent method for all such currency conversions within a particular Form SD filing.

### *Geographic Location Tagging*

(3) When identifying the country in which a government is located, a resource extraction issuer must use the code provided in ISO 3166 if available. When identifying the "subnational geographic location of the project," as used in Item 2.01(a)(10), a resource extraction issuer must include the subdivision code provided in ISO 3166 if available and must also include sufficiently detailed additional information to permit a reasonable user of the information to identify the

project's specific, subnational, geographic location. In identifying the project's specific location, resource extraction issuers may use subnational jurisdiction(s) (e.g., a state, province, county, district, municipality, territory, etc.) and/or a commonly recognized, subnational, geographic or geological description (e.g., oil field, basin, canyon, delta, desert, mountain, etc.). More than one descriptive term may be necessary when there are multiple projects in close proximity to each other or when a project does not reasonably fit within a commonly recognized, subnational geographic location. In considering the appropriate level of detail, resource extraction issuers may need to consider how the relevant contract identifies the location of the project.

#### *Entity Level Disclosure and Tagging*

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

#### *Payment Disclosure*

(5) When a resource extraction issuer proportionately consolidates an entity or operation under U.S. GAAP or IFRS, as applicable, the resource extraction issuer must disclose its proportionate amount of the payments made by such entity or operation pursuant to this Item and must indicate the proportionate interest.

(6) Although an entity providing only services to a resource extraction issuer to assist with exploration, extraction, processing or export would generally not be considered a resource extraction issuer, where such a service provider makes a payment that falls within the definition of "payment" to a government on behalf of a resource extraction issuer, the resource extraction issuer must disclose such payment.

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

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

(9) Royalties include unit-based, value-based, and profit-based royalties. Fees include license fees, rental fees, entry fees, and other considerations for licenses or concessions. Bonuses include signature, discovery, and production bonuses.

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

(11) If a resource extraction issuer makes an in-kind payment of the types of payments required to be disclosed, the resource extraction issuer must disclose the payment. When reporting an in-kind payment, a resource extraction issuer must determine the monetary value of the in-kind payment and tag the information as “in-kind” for purposes of the currency. For purposes of the disclosure, a resource extraction issuer must report the payment at cost, or if cost is not determinable, fair market value and must provide a brief description of how the monetary value was calculated. If a resource extraction issuer makes an in-kind production entitlement payment under the rules and then repurchases the resources associated with the production entitlement within the same fiscal year, the resource extraction issuer must report the payment using the purchase price (rather than at cost, or if cost is not determinable, fair market value). If the in-kind production entitlement payment and the subsequent repurchase are made in different fiscal years and the purchase price is greater than the previously reported value of the in-kind payment, the resource extraction issuer must report the difference in values in the latter fiscal year (assuming the amount of that difference exceeds the de minimis threshold). In other situations, such as when the purchase price in a subsequent fiscal year is less than the in-kind value already reported, no disclosure relating to the purchase price is required.

### *Interconnected Agreements*

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

## **Section 3 – Exhibits**

### **Item 3.01 Exhibits**

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

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

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

### **SIGNATURES**

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

\_\_\_\_\_  
(Registrant)

\_\_\_\_\_  
By (Signature and Title)\*

\_\_\_\_\_  
(Date)

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

\* \* \* \* \*

\* \* \* \* \*

By the Commission.

Brent J. Fields

Secretary

Dated: June 27, 2016