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Elizabeth Murphy
Secretary
U.S. Securities and Exchange Commission
100 F. Street N.E.
Washington, D.C. 20549-1090

Re: Disclosure of Payments by Resource Extraction Issuers
File No. S7-42-10

The American Petroleum Institute (API) is pleased to provide comments on the Securities and Exchange Commission's proposed rules regarding Disclosure of Payments by Resource Extraction Issuers (the "Proposing Release") pursuant to section 13(q) of the Securities Exchange Act of 1934 ("the Exchange Act"). API is a national trade organization representing over 450 companies involved in all aspects of the domestic and international oil and natural gas industry, including exploration, production, refining, marketing, distribution and marine activities. Our highly competitive industry is essential to the economic health of the United States and the prosperity of our fellow citizens, which depend on the ready access to reliable and affordable energy our members strive to provide. In addition to supporting hundreds of thousands of direct U.S. jobs, millions of U.S. citizens invest in our companies through retirement and pension plans, mutual funds, and individual investments.

Enclosed with this letter are detailed comments and responses to each question raised by the Commission in the Proposing Release. We urge the Commission to consider these comments within the context of an overall approach, outlined below, that we believe is essential in order to meet the Commission's concurrent mandates to implement Section 13(q), protect investors, and promote competition and efficiency. Fulfilling all these mandates is especially critical considering the current economic environment and the vital role played by API member companies in the national and world economy.

We also believe that incorporating API's key recommendations into the final rules is essential in order for the Commission to comply with the spirit of President Obama's January 18, 2011 Executive Order on Improving Regulation and Regulatory Review. Among other things, the Executive Order makes clear that regulatory action should promote economic growth and competitiveness; use the least burdensome means for achieving regulatory ends; and take into account benefits and costs, both quantitative and qualitative.

The Commission's Obligation to Implement Section 13(q) Consistent with Other Mandates

The legislative history of Section 13(q) is sparse, but its fundamental purpose is clear: to enhance international efforts to make governments more transparent and accountable in connection with the commercial development of certain of their nations' natural resources. Section 13(q) seeks to achieve this goal by requiring new payment disclosure from certain companies -- specifically, issuers engaged in commercial development of oil, natural gas, or mineral resources that file annual reports with the Commission -- and by requiring the Commission to make a compilation of that information available to the public.

The core mission of the Commission, as reflected in Section 3(f) of the Exchange Act, is to protect investors and to promote competitive and efficient capital markets. As explained in the letter dated November 5, 2010, to the Commission from Cravath, Swain & Moore LLP and seven other leading law firms, Section 13(q) does not repeal or override Section 3(f), Section 23(a)(2), or any other existing provisions of the Exchange Act. Thus, the Commission remains obligated to implement Section 13(q) in a manner that is both faithful to the statute and consistent with the other provisions of the Exchange Act. As discussed in more detail below and in the detailed responses enclosed with this letter, API believes this can be done.

Potential for Competitive Harm

API member companies fully support government accountability through international transparency efforts such as the Extractive Industries Transparency Initiative ("EITI"). The stated intent of Section 13(q) is to support EITI, which we believe represents a balanced and responsible framework for reporting resource extraction payments. API supports Commission rulemaking consistent with that intent. To the extent the implementing rules under Section 13(q) diverge from the EITI framework, such rules carry great potential to harm investors, reduce competition, and impair market efficiency.

Specifically, if the rules under Section 13(q) require public disclosure of unnecessarily detailed information, such disclosure will provide competitors not covered by section 13(q) with sensitive commercial information and place U.S. filers at a competitive disadvantage. Unless implemented properly, Section 13(q) could also undermine many years of progress on international transparency. No state will support disclosure of information that could harm the state's vital national interest, especially if the harmful disclosure can be avoided by choosing to do business with a firm not subject to the requirements.

The following examples illustrate more specifically these potential harmful effects:

> Example 1. Country A invites investors to develop its natural resources. Officials from Country A use Section 13(q) disclosures for projects in Country B to determine the rates of return that SEC filers are willing to accept. Country A uses this information to negotiate more favorable terms. The shareholders of SEC filers participating in Country A's projects receive a lower investment return than would otherwise be the case.

> Example 2. AmeriCo, a U.S. company and SEC filer, wishes to pursue Project X in Country B. In order to be economically viable, Project X requires favorable tax and royalty terms. Country B is willing to grant appropriate fiscal relief for Project X, but does not wish the terms to be publicly disclosed because the disclosure would create pressure for Country B to grant comparable terms on other projects. Country B awards Project X to a non-U.S. oil company that is not subject to Section 13(q) disclosure.

> Example 3. AmeriCo, a U.S. company and SEC filer, begins acquiring high-potential exploratory acreage on a confidential basis through agents in Country B. The acreage acquisition requires AmeriCo to pay bonuses to the local governments. Because AmeriCo must disclose these bonuses, its identity is revealed. A non-U.S. competitor of AmeriCo not subject to Section 13(q) steps into the market and begins bidding for remaining available acreage, driving up AmeriCo's costs significantly. At the same time, the non-U.S. competitor is able to continue acquiring acreage in another part of Country B on a confidential basis.
>
> Example 4. Country A participates in the Extractive Industries Transparency Initiative and supports country-level disclosure of aggregate payment data. For economic, competitive, and foreign policy reasons, Country A considers the specific commercial terms of its agreements to develop natural resources to be state secrets and has accordingly passed laws prohibiting public disclosure of such terms. If the rules implementing Section 13(q) require disaggregated public disclosure of commercially sensitive terms, AmeriCo, a U.S. company and SEC filer, will be unable to bid on projects in Country A. As a result, Country A's resources are developed by national oil companies that are not subject to Section 13(q).

We also note that overly detailed reporting could harm investors, reduce competition, and impair efficiency by confusing investors with voluminous amounts of immaterial information and causing companies to incur substantial additional compliance costs.

Potential for Harm to Safety and Security

There are situations where the public disclosure of detailed payment information could jeopardize the safety and security of our member companies' operations and employees. Energy companies have already experienced numerous incidents where facilities have been sabotaged, operations disrupted or employees endangered by those who oppose the host country government or energy development. Depending on the definition for "project" that the Commission adopts, precise project-level payment disclosures could allow groups or individuals to target a specific project in order to significantly affect a country's revenues. The rules under Section 13(q) should take these risks into consideration.

Key Areas for Commission Rulemaking Discretion

Fortunately, as reflected in the detailed comments submitted with this letter, we believe the Commission has sufficient rulemaking discretion to implement Section 13(q) in a manner that is both true to the language and purpose of that provision, while also consistent with the Commission's obligations to protect investors and promote competition and efficiency.

Key areas of Commission discretion include:

- ***Aggregation of publicly available information.*** As explained in detail in our response to Question 86, Section 1504 of the Dodd-Frank Act provides the Commission with discretion to maintain the information submitted by individual resource extraction issuers in confidence for the Commission's internal use and to make only a compilation of such information available to the public. The public compilation could aggregate payment information from all SEC filers at the country level. This approach would be consistent with EITI, would promote the transparency goals of Section 13(q), and at the same time allow the Commission to fulfill its mandates to protect investors and promote competition and efficiency by protecting companies from disclosure of competitively sensitive information and from violation of laws prohibiting disclosure of specific commercial terms. This approach is the simplest, least burdensome, and most effective way to implement Section 13(q) consistent with the statutory language.

If the Commission chooses not to adopt the approach outlined above and, instead, to make information submitted by issuers under Section 13(q) directly available to the public, key areas of Commission rulemaking discretion include the following:

- ***Project definition***. By allowing issuers to aggregate data from multiple agreements relating to the same resource, API's proposed definition of "project" -- a term which is not defined in Section 13(q) -- could do much to alleviate industry concerns. We also believe the Commission has discretion to limit disclosure to projects that are "material" to an issuer. See in particular our responses to Questions 39 and 40.

- ***Additional exemption.*** An exemption for commercially sensitive information could be implemented consistent with long-standing practice under the Freedom of Information Act, while an exemption for legally prohibited disclosure could be structured along the lines of Item 1202 of Regulation S-K. See in particular our responses to Questions 54 and 60.

We thank the Commission for the opportunity to provide these comments. We would be pleased to meet with the Commissioners or their staffs to discuss these comments further, as well as to provide such additional information as may be helpful.

Sincerely,

Kyle Isakower
Vice President
Regulatory and Economic Policy

Patrick T. Mulva
Chairman
API Corporate Finance Committee

Attachments

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II. PROPOSED RULES UNDER SECTION 13(q)

B. Definition of "Resource Extraction Issuer"

1 - Should the Commission exempt certain categories of issuers, such as smaller reporting companies or foreign private issuers, from the proposed rules? If so, which ones and why? If not, why not? Would providing an exemption for certain issuers be consistent with the statute? If we do not provide such an exemption when adopting final rules, would foreign private issuers or any other issuers deregister to avoid the disclosure requirement?

In principle, the Commission should not exempt smaller companies or foreign private issuers from these disclosure requirements. Exempting smaller companies or foreign private issuers would be competitively disadvantageous to the resource extraction issuers that are required to disclose payments under Section 13(q) and would create an unlevel playing field unless the Commission addresses these concerns by also following the approach outlined in our response to Question 86.

We do support an exemption as discussed under section *VI Initial Regulatory Flexibility Analysis* for "small business" or "small organization" entities having total assets of $5 million or less on the last day of the most recent fiscal year.

Depending upon the level of detailed information required under the final rules, particularly the information required to be disclosed by project, it is possible that some foreign or small filers could decide to deregister to avoid making such disclosure for competitive reasons or to avoid the cost burden associated with such disclosure. Please refer to our response to Question 3 below for further commentary concerning foreign private issuers.

2 - Would our proposed rules present undue costs to smaller reporting companies? If so, how could we mitigate those costs? Also, if our proposed rules present undue costs to smaller reporting companies, do the benefits of making their resource extraction payment information publicly available justify these costs? Should our rules provide more limited disclosure and reporting obligations for smaller reporting companies? If so, what should these limited requirements entail? Should our rules provide for a delayed implementation date for smaller reporting companies in order to provide them additional time to prepare for the requirement and the benefit of observing how larger companies comply?

The relative cost to comply with the proposed rules will be substantial for all sizes of resource extraction issuers, from small to very large. The cost incurred to track and collect this information for the types of payments across projects, governments, countries, and subsidiaries is dependent upon the number and complexity of modifications that will be needed to existing systems and the personnel time involved in establishing and executing the processes necessary to compile the needed disclosures. The costs to be incurred are highly dependent upon the level of detail ultimately needed to report payments at the project level, which will be substantially higher than the costs associated with reporting on a per country basis under the EITI guidelines. Although the relative level of effort to meet the requirements will be roughly proportional to company size, it is possible that some smaller reporting companies (e.g., those meeting the definition of a "small business" or "small organization" as mentioned in our response to Question 1) would benefit from a delay in implementation. Depending on the scope and level of detail ultimately required in the final rules, larger companies may also require a delay in implementation to provide more time for completion of extensive changes to financial systems required to meet these requirements. In this regard, we believe that the Commission's recent experiences with the implementation of the internal control provisions of the Sarbanes-Oxley Act are emblematic of the kinds of resources that API members believe may be necessary to comply with the proposed rules.

3 - Should the Commission provide an exemption to allow foreign private issuers to follow their home country rules and disclose in their Form 20-F the required home country disclosure?

From a consistency standpoint, the Commission has in the past provided a foreign private issuer exemption from any disclosure requirement that essentially duplicates the reporting requirements of the foreign private issuer's home country. This type of exemption is reasonable in most cases. However, we point out that disclosure requirements for extractive payments are not commonly in place in other countries at this point in time, and whether and when such rules may be adopted in other jurisdictions is not currently known. Moreover, it is not clear that other jurisdictions will include the same disclosures regarding competitively sensitive project level data, or whether they will adopt other rules that help issuers mitigate competitive issues. Should other jurisdictions decide to implement substantially different reporting requirements, allowing a foreign private issuer exemption could contribute to an unlevel playing field from a competitive perspective and contribute to shareholder harm for U.S. registrants (unless the Commission otherwise addresses these concerns by following the approach outlined in our response to Question 86). Given these concerns, we believe the Commission should only permit foreign private issuers to meet their Section 13(q) disclosure obligations through compliance with home country laws or rules if the Commission determines that such home country rules require disclosure of at least as much information, to at least as great a level of detail, as the rules under Section 13(q). Please also refer to our response to Question 59.

4 - Should the rules apply to issuers that are owned or controlled by governments, as proposed? If so, why? If not, why not? Should the disclosure requirements be varied for such entities?

Yes, we strongly believe the rules should apply to companies that fall within the definition of resource extraction issuer even if that entity is owned or controlled by a government. If the ultimate goal is to gain transparency with respect to payments to foreign and Federal governments, this application would adhere to the *universality principle* as discussed in the *EITI Source Book*, page 8 which states *"We believe that payments' disclosure in a given country should involve all extractive* industry companies operating in that *country."* The Commission cannot achieve the transparency objectives of Section 13(q) unless it requires that all companies that conduct operations in a given country make the same disclosures.

Please see our response to Question 60 for example scenarios where companies owned or controlled by governments could gain competitive advantage if exempted from reporting under Section 13(q).

5 - General Instructions I and J to Form 10-K contain special provisions for the omission of certain information by wholly-owned subsidiaries and asset-backed issuers. Should either or both of these types of registrants be permitted to omit the proposed resource extraction payment disclosure in the annual reports on Form 10-K?

General Instructions I. and J. of Form 10-K recognize that, because of the special circumstances of the covered entities, investors may not require the full range of information otherwise called for by Form 10-K.[1] This rationale for reduced disclosure does not apply to disclosure under Section 13(q) since the purpose of that disclosure is to enhance the transparency of payments received by governments for natural

[1] See SEC Rel. No. 34-16226 (September 27, 1979) and SEC Rel. No. 34-49644 (May 3, 2004).

resource extraction. Exempting some resource extraction issuers from the disclosure requirements of Section 13(q) would also be inconsistent with EITI and could give the exempted issuers an unfair competitive advantage. For the foregoing reasons, we do not support exempting entities from Section 13(q) other than for the purpose of avoiding duplicative disclosure as discussed in more detail below.

General Instruction I. applies to an issuer that is a wholly-owned subsidiary of an Exchange Act reporting company. If the wholly-owned subsidiary is a resource extraction issuer, the reporting company parent should also be deemed to be a resource extraction issuer required to disclose payments (including payments made by the subsidiary) in the parent's filings. In this situation we would support a reporting exemption for the wholly-owned subsidiary, but only to the extent the payments made by the subsidiary are disclosed in reports furnished to the SEC by the issuer's parent company.

General Instruction J. applies to special-purpose issuers of asset-backed securities. While it may be unlikely that an asset-backed issuer would also be a resource extraction issuer, to the extent an asset-backed issuer does make payments to governments that would otherwise be reportable under Section 13(q), we do not believe such entities should enjoy an exemption from reporting unless that payment information is already disclosed in reports furnished to the SEC by the issuer's depositor, servicer, or other related entity.

C. Scope – Definition of "Commercial Development…"

6 - Should we, as proposed, define "commercial development of oil, natural gas, or minerals" as the term is described in the statute? Should it be defined differently (e.g. more broadly or more narrowly)? If we should define the term, what definition would be appropriate?

The title of the Section 13(q) statute, "Disclosure of Payments by Resource Extraction Issuers," unambiguously states Congressional intent. We believe the statute is directed toward those issuers who are engaged in extractive activities, or what is commonly referred to as "upstream" activities in the oil and gas business. Furthermore, we note that the clear focus of EITI is these "upstream" activities, and the statute directs the Commission to consider consistency with EITI guidelines in the rules it develops.

Expanding the definition of "commercial development of oil, natural gas…" beyond these upstream activities will result in reporting obligations for issuers that are not involved in "resource extraction" activities. For example, many oil and gas companies operate refineries or plants in countries where they do not have in-country upstream activities supplying crude oil or other feedstocks to these facilities. In addition, many companies having no upstream operations anywhere in the world operate refineries or plants processing crude and natural gas. In both cases, such refineries and other plant operations are more akin to manufacturing activities, which are clearly beyond the intended scope of the statute.

We urge the Commission to adopt a definition of "commercial development of oil, natural gas…" that is consistent with the Commission's existing definition of "Oil and Gas Producing Activities" under Rule 4-10 of Regulation S-X. This approach will not only achieve consistency with the EITI, but align with a widely understood and accepted industry definition which includes acquisition of mineral interests, exploration, development, production and certain processing activities such as upgrading of bitumen and heavy oil.

7 - Should the definition of "commercial development of oil, natural gas, or minerals" include the activities of exploration, extraction, processing, and export, as proposed? Should we exclude any of

these activities? If so, which activities and why? If not, why not? Would excluding certain activities be consistent with the statute? In this regard, we note that, as discussed above, disclosing payments beyond those related to exploration and production is not required by the EITI criteria, and other countries have focused on identifying, reporting and verifying revenue streams related to those activities only. Should the definition only include the activities of exploration and extraction, consistent with the EITI, and not include processing, export, and other significant actions? Should the definition include the activities of exploration, extraction, and only some processing activities, such as those related to the upgrading of bitumen and heavy oil? Should the definition explicitly include production, consistent with the use of that term by the EITI? Does "production" in the oil, natural gas, and mining industries include activities that are different than those covered by "extraction" so that if we do not include production in the definition of commercial development, some payments may go unreported?

As noted in our response to Question 6, a definition of "commercial development of oil, natural gas…" that is consistent with Rule 4-10 of Regulation S-X would include exploration, extraction, field processing and gathering/transportation activities to the first marketable location. It would not include "export" activities. We agree with the Commission's observation that including export activities goes beyond those required by the EITI criteria. "Export" activities are not always directly associated with oil and gas producing activities, and can often be undertaken by issuers that are not engaged in "resource extraction" at all. Requiring the reporting of payments by such issuers goes beyond the intended scope of the statute.

Also as noted in our response to Question 6, alignment with Rule 4-10 of Regulation S-X would provide a definition of "commercial development of oil, natural gas…" that includes processing activities such as upgrading of bitumen and heavy oil. Rule 4-10 clearly includes "production" activities, and furthermore we do not believe there exists a significant difference between the terms "production" and "extraction" in the oil and natural gas industries.

8 - Are there other significant activities that we should include in the definition? Should we provide further guidance regarding activities that may not be covered by the list of activities, but could constitute a "significant action?" If so, what activities should be covered?

As noted in our responses to Questions 6 and 7, we believe modeling the definition of "commercial development of oil, natural gas…" based on Rule 4-10 of Regulation S-X provides appropriate guidance to Resource Extraction Issuers, and no further guidance would be necessary.

9 - As noted, we do not believe the proposed definition of "commercial development of oil natural gas, or minerals" would include transportation to the extent that the oil, natural gas, or minerals are transported for purposes other than export, and we note that payments related to transportation activities generally are not included in EITI programs. Should the definition include transportation of oil, natural gas, or minerals? Should compression of natural gas be treated as processing, and therefore subject to the proposed rules, or transportation, and therefore not subject to the proposed rules?

The definition should not include such transportation activities. We agree with the Commission's observation that payments related to transportation activities are generally not included in EITI programs. Transportation activities are not included in the definition of "Oil and Gas Producing Activities" and therefore would not be included in the definition of "commercial development of oil, natural gas…" if the Commission uses Rule 4-10 of Regulation S-X as the model. In contrast, certain field natural gas compression activities would be subject to the proposed rules, as those activities are part of the scope defined by Rule 4-10.

10 - Should the definition of "commercial development of oil, natural gas, or minerals" explicitly exclude any other oil, natural gas, or mining activities? If so, please tell us what types of activities should be excluded and why.

As noted in our responses to Questions 6 and 7, we believe modeling the definition of "commercial development of oil, natural gas…" based on Rule 4-10 of Regulation S-X provides appropriate guidance to Resource Extraction Issuers, and no further guidance or specific exclusions would be necessary.

11 - Should we provide any additional guidance regarding the types of activities that may be within or outside of the scope of the definition?

As noted in our responses to Questions 6 and 7, we believe modeling the definition of "commercial development of oil, natural gas…" based on Rule 4-10 of Regulation S-X provides appropriate guidance to Resource Extraction Issuers, and no additional guidance would be necessary.

D. Definition of "Payment"

D.1 - Types of Payments

12 - Should the definition of "payment" include the list of the types of payments from Section 13(q), as proposed? Are there additional types of payments that we should include in the definition of "payment?" Should the definition exclude certain types of payments? Are there certain payments, for example, specific types of taxes, fees, or benefits that we should include in, or exclude from, the list? Alternatively, should we provide guidance in our rules in the form of examples of payments that we believe resource extraction issuers would be required to disclose?

The list of types of payments included on page 88 of the proposed rules (i.e., taxes, royalties, fees, production entitlements and bonuses) is largely consistent with the benefit streams listed on pages 27-28 in the *EITI Source Book*. We agree these types of payments represent the "commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals." We do not believe that further specific guidance is required in the rules on types of payments beyond those included in Section 13(q). We also agree with the Commission's preliminary view that there is no need at this time to further define "other material benefits" to include any specific other types of payments.

Although we agree that these types of payments are appropriate to include in the total amounts paid to governments related to commercial development of oil and gas, we continue to have concerns with the potential level of disaggregation that might be required in the rules. As described in more detail in our responses to the questions under *Section D.3, The "Project" Requirement,* required disclosure of these types of payments by issuers at a detailed level will provide confidential details of fiscal terms that are competitively sensitive. For example, payments of signature bonuses or entry fees related to original lease concessions or lease extensions are particularly sensitive in that they may provide information to competitors in bidding on surrounding blocks in a basin or province. We believe that the Commission has the discretion and capacity to regulate that payments disclosed by issuers be aggregated at a reasonable level to avoid competitive harm to registrants due to commercial sensitivity of individual amounts. First and foremost, we believe the Commission can address the issue of competitive sensitivity of such payments through making public only a compilation of total industry payments by country, as outlined in our response to Question 86. Should the Commission choose not to follow fully the approach outlined in our response to Question 86, we continue to recommend issuers be permitted to aggregate payments into categories, as discussed in our response to Question 85. We also continue to believe the rules allow issuers flexibility to discuss with the Commission the redaction for public availability of certain payments for a period of time when deemed competitively sensitive. We believe these solutions would best balance the objectives of transparency and shareholder protection.

13 - As noted above, the definition of payment includes "taxes," which is consistent with Section 13(q) and the EITI. In order to clarify the meaning of this term in a manner consistent with the EITI, we have included an instruction in our proposal noting that resource extraction issuers would be required to disclose taxes on corporate profits, corporate income, and production and would not be required to disclose taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes. Consistent with the EITI, we are not proposing to require disclosure of consumption taxes because we do not believe such taxes are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, and minerals. Is our proposal regarding disclosure of taxes appropriate? Should the types of taxes listed as requiring disclosure, or not requiring disclosure, be revised? If so, how should they be revised? Are there other taxes that we should include in or exclude from the disclosure requirements?

We agree with the Commission's proposal regarding the types of taxes that should be included in the total amount of taxes reported. We agree that the proposed definition is consistent with the EITI. Taxes on corporate profit, corporate income and production are commonly considered part of the government's share of benefits from commercial oil and gas developments. We fully support the Commission's reasoning that value added taxes, personal income taxes and sales taxes should not be included in the reported totals. We should also indicate that applicable statutes may deem income tax payments information to be confidential or commercially sensitive data in some jurisdiction s.[2] In such situation, public disclosure of such information should be limited to a compilation of total industry tax payments as more fully discussed in our response to Question 86.[3]

We also note that there are substantial issues for registrants in being able to apply this definition below a country or legal entity level. As explained in our October 12, 2010 comment letter, income tax payments are typically made at the legal entity level within a jurisdiction, which may comprise numerous projects, even when the term "project" is defined as we propose in our response to Question 40. We note also that the total amount of income taxes reported for a jurisdiction should be net of any tax credits or other tax deductions included under the commercial arrangements agreed with the host government. These tax credits and deductions may result from one set of projects and be utilized against the earnings from other

[2] Section 6103 of the Internal Revenue Code provides that tax returns and tax return information are confidential and not subject to disclosure, except in limited and specifically delineated situations where disclosure is warranted. Disclosure of detailed US federal income tax payments under Section 13(q) could be seen as conflicting with section 6103. While the information may be being disclosed by the taxpayer rather than a government agency, the policy of confidentiality and protection is undermined because another statute is being interpreted to essentially force the disclosure of such information. This could potentially arise in other countries as well.

[3] Our response to Question 86 would allow the S.E.C. to collect and report data consistent with tax information collected and published by other governmental agencies in a manner consistent with section 6103.

projects within the same fiscal regime, making reporting and interpretation of income tax payments by individual project very difficult. As a result, reporting of taxes at the project level will require issuers to develop new methods, processes, and allocations of certain costs between projects in order to determine and report the income tax payment information. These new provisions would be extensive and would place an additional burden on both the Commission and the issuers, since this information requirement is at a level below which such costs and taxes are actually recorded in the books. This will also result in the need to implement new and potentially expensive systems changes. Defining "project" as proposed in our response to Question 40 (i.e. at the geologic basin or province level or on some other reasonable and higher basis) or as proposed in Question 45 (i.e., at the "reporting unit" level) will greatly reduce the burden of these efforts and calculations for issuers and potentially result in more consistent reporting. Also see our response to Question 83.

In addition, as the Commission stated in footnote 103, in some situations an issuer may make payments for taxes to a third party (e.g., the operator of a venture) to be remitted to the government on its behalf. We recommend that the Commission allow issuers to report payments based upon the amount actually remitted by the issuer to the government entity (as opposed to the issuer's net share of the payment). This approach will considerably ease the implementation burden of the disclosure rules for issuers, and eliminate the need for operators to develop systems to calculate and transmit detailed net payments information to their partners, who each would then be required to disclose their respective net share of an operator's remittances.

14 - While the definition of "payment" in Section 13(q) does not address the means by which a payment may be made, we believe it would cover payments made in cash or in kind. Should a resource extraction issuer be required to disclose payments regardless of how the payment is made (e.g. in cash or in kind)? Should the rule be revised to make clear that "payment" would include payments made in cash or in kind?

We agree with the concept that both cash and in-kind payments related to host government or national oil company (NOC) production entitlements or profit barrels should be reported by issuers. Such payments are a common aspect of production sharing contracts. As the Commission has noted, including in-kind payments is consistent with the guidance on pages 27-28 in the *EITI Source Book.*

As noted in our prior comment letter, and in the EITI guidance, valuing and reporting in-kind production entitlement payments pursuant to the regulations will require special attention. In-kind payments are not currently recorded in the issuer's financial systems and methods would need to be developed for the valuing and recording of these payments to facilitate reporting. As a point of important consideration, we also note that total payments to governments reported by the industry will be over-stated if downstream activities such as refineries or chemical plants are included in the scope of reporting. In situations where the operators of such facilities purchase these "in kind" oil or gas volumes from the government, both the "upstream" registrant and the "downstream" registrant would report payments to the government. We believe that in-kind payments provide a good illustration of problems that will arise should reporting of payments associated with downstream operations be included in the final rules.

It is also important to note that issuers' financial systems are currently designed to provide correct accounting of the issuer's net share of the various benefit streams on an accrual basis. While the net share of accrual basis amounts are recorded in the general ledger modules of financial systems, detailed payment information is recorded separately in the accounts payable modules. Payments are recorded in the accounts payable modules on either a "net" share basis or on a "gross" basis, depending on the type of the payment and the specific terms of the venture arrangements. Reconfiguring business systems to accommodate this mix of situations will take considerable resources. Accordingly, we recommend that the Commission require issuers to report payments based upon the amount actually paid by the issuer to the government entity (as opposed to the issuer's net share of the payment), consistent with EITI practices. This approach will considerably ease the implementation burden of the disclosure rules for issuers, and eliminate the need for operators to develop systems to calculate and transmit detailed net payments information to their partners, who each would then be required to disclose their respective net share of an operator's payments. Please also see our response to Questions 52 and 53.

15 - The definition includes "fees (including license fees)," which is consistent with Section 13(q) and the EITI. As noted above, the EITI gives examples of the fees that should be disclosed, including concession fees, entry fees, and leasing and rental fees, which would likewise be covered under our proposal. In addition to license fees, should the rules specifically list other types of fees that would be subject to disclosure?

We support the description of relevant fees in Section 13(q) and on page 28 of the *EITI Source Book* and do not believe it is necessary for the rules to specifically list other types of fees that would be subject to disclosure. We note that fees related to entry into, or retention of, licenses or concessions can be competitively sensitive information. First and foremost, we believe the Commission can address the issue of competitive sensitivity of such payments through making public only a compilation of total industry payments by country, as outlined in our response to Question 86. Even if the Commission chooses not to follow fully the approach outlined in our response to Question 86, the aggregation of payments into fewer categories can also help address concerns about competitive sensitivity of individual payments, as discussed in our responses to Question 85. Further, as described in our response to Question 12 above, we continue to believe the rules should allow issuers flexibility to discuss with the Commission the redaction for public availability of such payments for a period of time when deemed competitively sensitive.

16 - Are there other fees that we should identify in the rules or in guidance? For example, should we specify that disclosure would be required for fees paid for environmental permits, water and surface use permits, and other land use permits; fees for construction and infrastructure planning permits, air quality and fire permits, additional environmental permits, customs duties, and trade levies? Would these types of fees be considered to fall within the categories of fees that we have identified as being subject to disclosure?

We do not believe there are other fees that should be included in the rules or in guidance. The permitting fees, customs duties and trade levies noted in your example are not considered part of the commonly recognized commercial terms for oil and gas projects and are typically not material.

17 - Are there some types of fees that we should explicitly exclude from the definition?

We support the inclusion of fees described on page 28 of the *EITI Source Book*. Additional types of fees, such as those described in Question 16, should be excluded since they are not part of the commonly recognized revenue stream for resource extraction activities and are typically not material.

18 - The definition includes "bonuses," which is consistent with Section 13(q) and the EITI. "Bonuses" would include the examples of bonuses identified by the EITI as noted in the table above. Should we provide further guidance about the meaning of the term "bonus" for purposes of this disclosure?

We support inclusion of the bonuses described on page 28 of the *EITI Source Book*. We do not believe that further guidance is required in the rules regarding the meaning of the term "bonus."

19 - Are there types of bonuses that we should exclude from the definition of "payment?"

While we support inclusion of the types of bonuses described on page 28 of the *EITI Source Book*, we are concerned that bonuses related to the original entry into, or retention of, licenses or concessions can be competitively sensitive information. As described in our response in our response to Question 86, we believe the Commission can address the issue of competitive sensitivity of such payments through making public only a compilation of total industry payments by country. Even if the Commission chooses not to follow fully the approach outlined in our response to Question 86, allowing aggregation of bonuses with "other payments" as described under Question 85 can also mitigate the competitive sensitivity of the information. Finally, as explained in Question 12 above, we continue to believe the rules should allow issuers flexibility to discuss with the Commission the redaction for public availability of such payments for a period of time when deemed competitively sensitive.

20 - Are there "other material benefits" that we should specify as being included within the definition of "payment?" In that regard, how should we determine what benefits "are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals?" Should we include a broad, non-exclusive definition of "other material benefits," such as benefits that are material to and directly result from or directly relate to the exploration, extraction, processing, or export of oil, natural gas, or minerals? Or would including a broad definition be inconsistent with the statutory language directing us to identify other material benefits that "are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals?"

The industry believes it is not necessary for the Commission to specify types of payments that would fall under "other material benefits." The types of payments already specified in the proposed rules and the statutory list in Section 13(q), specifically taxes on income, royalties, fees, production entitlements and bonuses, make up the vast majority of material benefits associated with commercial development of oil and gas resources.

21 - As noted, dividends are not included in the list of payments required to be disclosed under the proposed rules. Should we determine that dividends are "other material benefits" and require disclosure of dividends? Are dividends part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals?

Consistent with the definition on page 28 of the *EITI Source Book*, the industry agrees that dividends would be a material benefit and part of the commonly recognized revenue stream from the commercial development of oil and gas. Such dividend distributions occur in situations where the host government or NOC owns shares in a joint company formed to develop and produce the resources. Such joint companies can be consolidated entities, or can be non-consolidated subsidiaries accounted for under the equity method. Issuers do not have "control" over non-consolidated entities. As a result, dividend distributions related to consolidated subsidiaries would be reported under the statute and rules, but such distributions related to non-consolidated subsidiaries would not be. Please see our responses to Questions 50 and 52 for more discussion of such non-consolidated entities.

22 - We do not believe the proposed definition of payment should include payments resource extraction issuers make for infrastructure improvements, even if they are a direct cost of engaging in the commercial development of oil, natural gas, or minerals because it is not clear that such payments would be covered by the specific list of items in the statute or otherwise would be a part of the

commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. Should our definition cover such payments? Would such payments be considered part of the commonly recognized revenue stream? Would these types of payments distort the disclosure of payments for extractive activities?

We agree with the Commission that payments made by issuers for infrastructure improvements should not be included in the reporting required under these rules. This determination is also consistent with the definition of benefit stream on page 46 of the *EITI Source Book*. While such improvements are often funded by issuers as part of commercial development of oil and gas resources, they are typically not material relative to the primary types of payments covered under the rules.

23 - "Social or community" payments generally include payments that relate to improvements of a host country's schools or hospitals, or to contributions to a host country's universities or funds to further resource research and development. As proposed, our rules would not expressly include social or community payments within the definition of "payment." Some EITI programs include social or community payments while others do not. Are such payments part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals? Should we require disclosure of only certain "social or community" payments under the "other material benefits" provision, such as if those payments directly fulfill a condition to engaging in resource extraction activities in the host country? Would such payments be considered part of the commonly recognized revenue stream?

Social and community programs are considered indirect benefits under EITI guidelines, and not part of the commonly recognized revenue stream for commercial development of oil and natural gas. The industry believes that adequate reporting mechanisms already exist regarding social or community programs through corporate responsibility reporting. While these types of investments are important for the companies and for the communities in which they operate, we do not believe they are part of the commonly recognized revenue stream for commercial development of oil and gas. Social and community programs are typically not material relative to the primary types of payments covered under the rules. For these same reasons, we do not believe it should be required to report such payments in situations where they directly fulfill a condition for engaging in resource extraction activities.

24 - Are there other types of payments that we should include as "other material benefits?" For example, should we, as requested by one commentator, require disclosure of "ancillary payments made pursuant to the investment contract (including personnel training programs, local content, technology transfer and local supply requirements)" and payments "related to any liabilities incurred (including penalties for violations of law or regulation, environmental and remediation liabilities, and bond guarantees entered into with the central banks or similar national or multi-national entities, as well as costs arising in connection with any such bond guarantees)"?

The industry believes that specific inclusion of these other types of indirect benefit streams goes significantly beyond the scope of the statute. As with social and community investments and infrastructure development, ancillary payments made for personnel training programs, local content, technology transfer and similar programs are typically not part of the commonly recognized revenue stream for resource extraction activities. Such programs are already covered in social responsibility reporting for many issuers. Reporting such ancillary payments or benefits would significantly increase the cost of compliance with the rules while providing little benefit to users.

Disclosures related to guarantees or liabilities incurred, such as related to violations of laws and regulations or for environmental remediation are already covered in other parts of the financial reports required by the Commission and such payments are not considered part of the commonly recognized revenue stream for commercial development of oil and gas. In the event that material amounts are paid directly to the government related to environmental liabilities, including fines and penalties, such amounts would be reportable.

25 - Should we provide additional guidance regarding the types of payments that resource extraction issuers should disclose? If additional guidance is appropriate, should we provide clarification in the rules or as interpretive guidance?

The industry recommends that additional guidance be provided as interpretive guidance rather than as part of the rules. It is probably not possible to create a comprehensive set of rules that would cover every situation that may arise for a complex area such as this. Industry practice will evolve over time through the comment letter process and periodic issuance by the Commission of interpretative guidance.

D.2 - The "Not De Minimis" Requirement

26 - Section 13(q) establishes the threshold for payment disclosure as "not de minimis," which we preliminarily believe is a standard different from a materiality standard. Is our interpretation that "not de minimis" is not the same as "material" correct?

We respectfully submit that the "not de minimis" standard established in Section 13 is consistent with and should be interpreted in accordance with well-established interpretations of materiality. We believe this to be the case for two principal reasons: first, Section 13 uses materiality to define other terms included in that section of the statute, and second, interpreting "not de minimis" in a way that is consistent with materiality concepts is consistent with a disclosure regime that has worked well for the past 80 years.

Regarding the first point, we note that Section 13(q)(1)(C)(ii) also defines the term "payment" as including "taxes, royalties, fees (including license fees), production entitlements, bonuses, and other <u>material</u> benefits," suggesting that materiality should be a consideration in determining the threshold for any amounts reported under each of these types of payments or benefit streams. The statute goes on to say that the Commission should consider consistency with the EITI guidelines in the rules it develops regarding the definition of "payment." We note that page 48 of the *EITI Source Book* defines the term "payment" as "all <u>material</u> oil, gas and mining payments made by companies to governments." Moreover, accepted materiality guidance articulated in the Commission's Rule 12b-2 and SAB 99 and under Financial Accounting Standards Board (FASB) Concept 2 relies on the exercise of reasonable judgment by issuers to avoid excessive and potentially confusing disclosure. We continue to believe the use of the term "material" in the statute itself, the statute's reference to consistency with EITI guidelines, and the concepts articulated in current materiality guidance all provide the Commission the discretion to base its rules on commonly accepted concepts of materiality in financial reporting.

Regarding the second point, we believe that it is critical that the proposed rules be applied in a way that makes use of existing materiality guidance. Existing materiality guidance has been in use for many years and is well understood by both issuers and users of financial reports. Further, existing materiality guidance has resulted in reasonable consistency in the disclosure of material facts in other areas of financial reporting. In many ways, materiality guidance and the consistency with which such guidance is employed has become the bedrock of our current financial markets. Investors that look to an issuer's

Commission filings in making an investment decision do so because such information is presumptively material. The comment process and periodic issuance of interpretive guidance, when necessary, encourages consistency in disclosure. Requiring disclosure of immaterial payments would undermine this important benefit of the current securities disclosure regime. In addition, such a requirement likely would place undue emphasis on immaterial information.

In this regard we believe that a fact that is material also is "not de minimis." Under current case law, information is material if there is a substantial likelihood that the disclosure of such information would be viewed by a reasonable investor as having significantly altered the ''total mix'' of information made available. *See generally* TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976), rev'g 512 F.2d 324 (1975). In comparison, according to *Black's Law Dictionary*, de minimis refers to a fact that is "so insignificant that a court may overlook it in deciding an issue." In fact, the definition of "de minimis" in the *Merriam-Webster Dictionary* contains antonyms for "de minimis" that include "material" and "significant."

27 - Should we define "not de minimis" for purposes of the proposed rules? Why or why not? What would be the advantages or disadvantages of not defining that term? If the final rules do not provide a definition, should an issuer be required to disclose the basis and methodology it used in assessing whether a payment amount was "not de minimis?"

We do not believe that it is necessary or useful to define "not de minimis" in the rules. As noted in our response to Question 29, specific definitions of thresholds are not necessarily superior in determining what facts are relevant for decisions by investors. In addition, as explained in our response to Question 35, any definition for "not de minimis" or "material" would need to vary by size of issuer. If a definition is not provided in the rules, we do not believe it is necessary to disclose the basis and methodology for assessing whether a payment amount is "not de minimis." Specific definitions of materiality are seldom used in determining disclosure of other financial information and, in general, there is no requirement to provide a description of the basis and methodology for those disclosures. Existing materiality guidance has been in use for many years and is well understood by both issuers and users of financial reports. We do not view it as necessary to make an exception for this type of reporting.

28 - If we should define "not de minimis," what should that definition be? Provide data to support your definition if you are able to do so.

If the Commission decides to define the term "not de minimis," we believe it can simply be defined as synonymous with "material" as described in detail in our response to Question 29. As described in our response to Question 26, we believe such a definition is consistent with the statutory definition of "payment" and with commonly available definitions of the term "de minimis."

29 - What would be the advantages or disadvantages of defining "not de minimis" as "material?" Would such a reading be consistent with the language and intent of the statute? Would such a standard be a reasonable means of encouraging consistent disclosure? Would it be necessary for the Commission to provide additional guidance on how to determine materiality if a materiality standard governed this disclosure? If so, what guidance would be appropriate in the context of this information?

We believe that defining the term "not de minimis" as "material" is fully consistent with the language and intent of the statute. As noted in our response to Question 26, the statute makes reference to both terms in the definition of the term "payment" and commonly available definitions suggest the same meaning for both terms. We believe that such a straightforward definition would be a reasonable means of encouraging consistent disclosure. Existing materiality guidance has evolved over time and has resulted in reasonable consistency in the disclosure of material facts in other areas of financial reporting. The comment process and periodic issuance of interpretive guidance, when necessary, encourages consistency in disclosure.

We do not believe it is necessary for the Commission to provide additional guidance on how to determine materiality for this disclosure. As suggested in our October 12, 2010 comment letter, we believe sufficient guidance already exists under the Commission's Rule 12b-2 and SAB 99 and FASB Concept 2. This collective guidance relies on the exercise of reasonable judgment by issuers to avoid excessive and potentially confusing disclosure. In Concept 2, the FASB notes that "the predominant view is that materiality judgments can properly be made only by those who have all the facts" and that "no general standards of materiality could be formulated to take into account all the considerations that enter into an experienced human judgment." The FASB goes on to say that "whenever the Board or any other authoritative body imposes materiality rules, it is substituting generalized collective judgments for specific individual judgments, and there is no reason to suppose that the collective judgments are always superior." We strongly believe that these statements support our view that issuers should use commonly accepted, principles-based methods of judging materiality for the purposes of these payment disclosures.

We also note that the reporting requirement in the proposed rules is for the "type and total amount paid" in an annual period for each business segment, project, type of payment and payee. The reporting requirement makes no mention of disclosure of individual payments, as suggested by some commentators. With the exception of certain bonuses or entry fees, it will be rare that individual payments would be disclosed under the statute and rules. For most issuers, the total amounts for each type of payment would be material at the country level, which is what is most relevant for the objectives of transparency reporting and would be an appropriate level of aggregation for publicly available information as outlined in more detail in our response to Question 86.

Given all of this, we believe that defining "not de minimis" as "material" will result in reasonable consistency of disclosures across all issuers and, should the Commission choose not to follow fully the approach outlined in our response to Question 86, in the disclosure of all material facts necessary for investors. It would not be necessary for the Commission to provide further guidance on how to determine materiality.

30 - Should we adopt a definition of "not de minimis" that uses an absolute dollar amount as the threshold? If so, what would be the appropriate dollar amount? Should the "not de minimis" payment threshold be $100,000, an amount less than $100,000, such as $1,000, $10,000, $15,000, or $50,000, or an amount greater than $100,000, such as $200,000, $500,000, $1,000,000, or $10,000,000? Should some other dollar amount be used?

We strongly advise against adoption of a definition of "not de minimis" that uses an absolute dollar threshold since setting such a fixed threshold is inconsistent with existing and accepted materiality guidance. Such an absolute dollar threshold would not be appropriate given the wide range in size of issuers. While some commentators have suggested absolute dollar threshold amounts as low as $1,000, we believe that this is completely unnecessary for achieving the stated goals of transparency reporting. The statute and proposed rules require disclosure of the <u>total amounts</u> paid in an annual period, not the amounts of individual payments. Most of the types of payments (i.e., taxes, royalties, etc.) covered under the statutory list and proposed rules are paid monthly, and the disclosed totals will therefore include multiple individual amounts. Given the recurring nature of most of these types of payments and the large scale of resource activities, the total amounts for an annual period will typically far exceed $1,000.

Should the Commission decide to adopt a dollar amount threshold, care must be taken in selecting a threshold that best fits the specific reporting dimension. The statute and proposed rules require reporting of the total amount of payments by several dimensions, including business segment, project, type of payment and payee. The interplay of each of these reporting dimensions will make it difficult to establish thresholds that will cover every conceivable situation and not force the reporting of very large amounts of meaningless data. Unless the Commission otherwise addresses such concerns by following the approach outlined in our response to Question 86, it will also be difficult to establish thresholds that do not force the disclosure of data that is competitively sensitive.

31 - The type and amount of payments made by resource extraction issuers may vary greatly, depending on the size of the issuer and the nature and size of a particular project. Should the rules account for variations in size of issuers and projects? Would doing so be consistent with Section 13(q)?

We agree that the types of payments made by issuers or by project can vary significantly, depending on the nature of the commercial arrangements or the regulations of the country of operation. We also agree that the total amounts of payments may vary greatly depending on the size of the issuer or project. If the rules rely on commonly accepted guidance with respect to determination of materiality, there is no need for the rules to include other specific requirements based on the size of either the issuer or project. We believe that this recommendation is consistent with Section 13(q) in that it will still result in the reporting of the annual total amounts of the material benefits paid.

32 - Should a payment be considered "not de minimis" if it meets or exceeds a percentage of expenses incurred per project for the year that is the subject of the annual report? Is a per project basis appropriate because Section 13(q) requires an issuer to disclose payment information for each project as well as for each government? Instead of a per project basis, should we base a definition of "not de minimis" on a threshold that uses a percentage of an issuer's total expenses for the year or its total expenses incurred for all projects undertaken in a particular country for the year? Should the percentage threshold be based on something else, such as revenues, profits or income? Would using a percentage threshold further the intent of the statute and help minimize the costs associated with providing the disclosure?

We do not support defining a percentage threshold for payments at the level of individual project or country since it would significantly increase the cost of compliance. We do not believe that using percentage thresholds would further the intent of the statute, help to minimize the costs of compliance, or result in more meaningful levels of overall disclosure. We believe that principles-based materiality guidance would naturally take into account a variety of quantitative measures and qualitative facts in determining whether the total amounts paid should be considered "not de minimis" or "material" for the purposes of disaggregation of reported amounts. The resulting overall disclosure would meet the intent of the statute and the goals of transparency without overburdening issuers or users with unnecessary detail.

In the event that the Commission decides to base a definition of "not de minimis" on a percentage threshold, we believe it can only be appropriately measured at the issuer level. Investors typically make risk decisions on the basis of the impact that a particular set of facts have on overall company value. We believe that this points toward a measurement basis at the issuer level, rather than at a country or project level.

If this approach is taken, a number of issuer level measurement bases would be appropriate. We believe a percentage threshold based on total global government payments would be more appropriate than one based on global revenues, profits or net income. Use of revenues can result in inconsistent disclosure because some issuers have a greater level of activity accounted for in non-consolidated equity companies which are not reflected in revenues. Revenues, profits and net income in the oil and gas industry are highly dependent on commodity prices and therefore can be volatile. Total global government payments will provide a more comparable basis for comparison across issuers. While still dependent on commodity prices, it would also provide the most stable measurement point between periods.

33 - If a percentage threshold should be used to define "not de minimis," should the percentage be 1%, 2%, 3%, 4%, 5%, or a higher percentage? Should the definition use a percentage lower than 1%, such as 0.1%, 0.2%, 0.3%, 0.4%, or 0.5%?

As noted in the previous response, we do not believe it is necessary or useful to establish a percentage threshold to define "not de minimis" or "material." Should the Commission decide to establish a percentage threshold, the appropriateness of the fixed percentage will depend on the measurement basis selected. For example, if total global government payments made by the issuer represent about 10% of the issuer's total revenues, a 5% threshold applied to both measurement bases (revenues or total government payments) would result in a difference in the total amount disclosed by a factor of ten. Given this relationship, the decision on percentage threshold cannot be independent of the selection of the measurement basis itself.

34 - Should we adopt a definition of "not de minimis" that uses the same dollar amount or the same percentage threshold for all resource extraction issuers, regardless of size?

We do not support adopting a definition of "not de minimis" that uses the same dollar amount for all resource extraction issuers, given that issuers vary significantly in size (or, indeed, any dollar amount as a threshold, as described in our response to Question 30 above). However, if a percentage threshold is adopted, we believe that a single threshold should apply to all resource extraction issuers. Please also refer to our response to Question 33.

35 - Should we adopt a definition of "not de minimis" that depends on the size of a resource extraction issuer so that the dollar amount or percentage threshold would vary depending on the size of the issuer? For example, should the threshold be $1,000 for non-accelerated filers, $10,000 for accelerated filers, and $100,000 for large accelerated filers? Should some other dollar amount be used for each filer category? If so, what amount? If we use a percentage threshold, should the threshold be 1% for non-accelerated filers, 2% for accelerated filers, and 3% for large accelerated filers? Should some other percentage be used for each filer category? If so, what percentage?

As mentioned in the response to Question 34, we do not believe there is any merit in adopting a definition of "not de minimis" based on dollar amount. In the event the Commission decides to establish a dollar amount threshold, we believe that the threshold should vary by the size of the issuer, consistent with commonly accepted materiality guidance and EITI. The statute and the proposed rules do not require disclosure of individual payment amounts, but rather reporting of total amounts by the dimensions of business segment, project, category of payment, currency and payee. Care must be taken in defining the specific reporting dimension the threshold should be applied to. We strongly recommend that no threshold be set for total amounts paid by project since setting a dollar threshold on the project dimension could result in reporting of an impractical number of projects.

As mentioned in our response to Question 34, we believe a percentage threshold has more merit than a dollar amount threshold provided that it is properly matched with the reporting dimension. In the event a percentage threshold is used, there should be no need to vary the threshold by size of issuer or by filer category. As discussed in our response to Questions 32 and 33, the most appropriate percentage threshold depends on the measurement basis ultimately adopted.

36 - Should we define "not de minimis" to be an amount that meets or exceeds the lesser of two measures, for example, a dollar amount, such as $100,000, or a percentage, such as 1%, of an issuer's expenses, revenues or some other amount for the year? Would such an approach be appropriate to address variations in the size of resource extraction issuers?

As noted above, we believe the Commission should define "not de minimis" as being synonymous with "material" as used in other contexts in the Commission's disclosure regime. We believe that adoption of an approach that relies on multiple measures for the definition of "not de minimis" is unnecessarily complicated, would add additional burdens and costs, and is not needed to address variations in the size of issuers.

37 - Should we define payments that are "not de minimis" to mean payments that are significant compared to the total expenses incurred by an issuer for a particular project, or with regard to a particular government for the year?

We believe that a definition of "not de minimis" that relies on the <u>relative</u> significance of the total payment amounts paid to a government for the calendar year is the best approach and is most consistent with the Commission's and the FASB's existing materiality guidance as discussed in the responses to Questions 26 and 29. However, we believe the Commission should not specify in the rules any specific thresholds amounts or percentages, or any specific measurement bases, for the determination of significance, such as total expenses for a particular project or to a particular government or such as worldwide revenues or expenses. Materiality decisions are multi-factor and often quite complex, and should best be made by the issuer based on consideration of all appropriate qualitative and quantitative factors.

38 – We note that the phrase "not de minimis" is used only in the definition of the term "payment." Would it be consistent with the statute to require disclosure of payments that are "not de minimis" only if they are related to material projects of a resource extraction issuer?

We agree that the statute uses the phrase "not de minimis" only in the definition of the term "payment." We also believe it would be consistent with the statute to require disclosure of payments that are "not de minimis" only if they are related to material projects of the issuer. We believe this interpretation of the statute would reduce the costs of implementation and the ongoing costs associated with this annual reporting requirement, while meeting the transparency objectives of the statute.

D.3 - The "Project" Requirement

39 - Should we define "project" for purposes of this new disclosure requirement? If so, why? If not, why not?

Under the EITI, many countries report payments received from companies on an aggregate basis, and we strongly support this model as outlined in more detail in our response to Question 86. This approach has been recognized by governments around the world and by other regulators and exchanges as advancing the objective of revenue transparency (i.e., being able to hold governments accountable for the handling of the revenues they receive from resource extraction) while also protecting individual companies and shareholders from disclosure of commercially sensitive information and from the competitive disadvantages suffered when only some, but not all, of the companies doing business in a country provide disclosure. However, the Commission may feel constrained in its rulemaking discretion by the terms of the statute, which specify reporting at the project level.

Defining what constitutes a project is a key area for Commission discretion. Leaving the term "project" undefined would create significant uncertainty for issuers and result in disclosures that are not comparable from issuer to issuer. It is critical that principles of shareholder protection and materiality (please see our response to Question 47) be considered in such a definition, to support the Commission's overarching mission to protect investors and to promote competition and market efficiency. Unless the Commission follows the approach to public disclosure outlined in our response to Question 86, it will be essential for the definition of "project" in the final rules to be constructed to minimize the harm to companies and their shareholders from the disclosure of commercially sensitive information, violation of local laws, and breach of contracts with foreign governments.

40 - If we should define "project," what definition would be appropriate? Please be as specific as possible and discuss the basis for your recommendation.

We believe the most reasonable and workable way to define "project" for resource extraction issuers is by reference to a particular geologic resource. Specifically, we propose the following:

> **"Project"** means technical and commercial activities carried out within a particular geologic basin or province to explore for, develop and produce oil, natural gas or minerals. These activities include, but are not limited to, acreage acquisition, exploration studies, seismic data acquisition, exploration drilling, reservoir engineering studies, facilities engineering design studies, commercial evaluation studies, development drilling, facilities construction, production operations, and abandonment. A project may consist of multiple phases or stages.

We believe this definition comprehensively captures the various separate activities involved in Upstream projects as commonly understood, and can be applied with reasonable certainty by both oil and gas companies and other kinds of extractive enterprises. Because this definition allows aggregation of payments under individual contracts to the extent those contracts appropriately relate to a single resource extraction objective, the proposed definition might also help reduce the harm to companies and their shareholders from the disclosure of commercially sensitive information, violation of local laws, or breach of contract unless the Commission otherwise addresses these concerns by following the approach outlined in our response to Question 86.

We also support a definition of "project" that is consistent with the concept of "reporting unit" as noted in our response to Question 45. We believe either of these definitions allows the Commission to reconcile the legislative constraints of Section 13(q) with the Commission's mission to protect investors and to promote competition and market efficiency.

41 - Should we define "project" to mean a project as that term is used by a resource extraction issuer in the ordinary course of business? What are the advantages and disadvantages of such an approach? If the final rules were to use such an approach, should an issuer be required to disclose the basis and methodology it used in defining what constitutes a project?

We do not support defining "project" to mean a project as that term is used by a resource extraction issuer in the ordinary course of business. The term "project" is used by companies to describe a variety of different activities, depending on the context, and there is no standard, agreed-upon definition in industry. While leaving the definition of "project" to individual issuers will allow an issuer to use its judgment in arriving at the appropriate level of aggregation, the result could be inconsistent and confusing reporting across the range of registrants. Even if registrants were required to disclose their respective bases and methodologies for what constitutes a project, we expect that the Commission will have to issue additional interpretative guidance to achieve reasonable consistency among registrants.

42 - Should we define "project" to mean a field, mining property, refinery or other processing plant, or pipeline or other mode of transport? Should we define "project" to permit the inclusion of more than one field, mining property, refinery or other processing plant, or pipeline or other mode of transport?

We do not agree that "project" should be defined to mean a field, mining property, refinery or other processing plant, or pipeline or other mode of transport. Such a definition is much too limiting for the wide range of activities and approaches undertaken in the modern oil and natural gas industry. For example, exploration activities are typically not defined at the field level, but instead at the license, concession, or geologic basin level. In addition, the term "field" can connote different concepts within companies and across companies, and across regulatory bodies. A single large concession might contain several "fields," which are eventually all developed using a common plan. Conversely, a single large "field" might be developed in multiple phases over time, and could have different fiscal terms for each phase. Lastly, as noted in our response to Question 6, we do not support inclusion of refineries or transportation in the scope of the rules.

Consistent with the proposed definitions in our responses to Questions 40 and 45, we do support defining "project" in a way that permits the inclusion of more than one "field" and the broad range of activities that are required to develop and produce the resource.

43 - Should we adopt a definition of "project" that is substantially similar to the definition of "development project" under Rule 4-10(a)(8) of Regulation S-X? Would reliance on that existing definition, with which oil and natural gas companies are already familiar, help to elicit appropriate payment disclosure under Section 13(q) without over-burdening issuers? Or is that definition unsuitable for purposes of Section 13(q) because it does not explicitly encompass other types of projects, such as exploration projects, and does not relate to mining activities? What modifications to the Regulation S-X definition of "development project," if any, would be appropriate to provide a definition for "project" for it to be suitable for purposes of the disclosure required by Section 13(q)?

- ***In particular, similar to Rule 4-10(a)(8) and staff guidance regarding the rule, should we define project as:***
    - ***the means by which oil, natural gas, or mineral resources are brought to the status of being economically producible or commercially developed;***
    - ***typically involving a single engineering activity with a distinct beginning and end;***
    - ***having a definite cost estimate, time schedule, or investment decision, and approved for funding by management;***
    - ***one that, when completed, results in the exploration, extraction or production, processing, transportation or export of oil, natural gas, or minerals; and***
    - ***one that may involve a single reservoir, field or mine, the incremental development of a producing field or mine, or the integrated development of a group of several fields or mines and associated facilities with a common ownership?***
- ***Would it be appropriate to include or exclude any of the aspects listed above? Why or why not?***

- ***Should the definition of project include one that involves more than one engineering activity or an engineering activity that is open-ended? Would a definition that focuses on the level of engineering activity fail to elicit the disclosure of payments in connection with some projects, for example, an exploration project?***
- ***Would a project always have a definite cost estimate, time schedule, or investment decision, or be approved by management? Should any of these characteristics be excluded from any definition of project? Are there any additional characteristics that we should include in any definition of project?***
- ***Should any definition of project encompass only a single reservoir, field or mine? Why or why not?***

We believe there are serious flaws associated with adopting a definition of "project" that is substantially similar to the definition of "development project" as stated in Rule 4-10(a)(8) of Regulation S-X. The rule too narrowly defines the term "project" as contemplated by Section 13(q) because the definition of "development project" refers to only one aspect of the commercial development of oil and natural gas: bringing oil and gas to the status of being economically producible and commercially developed. Using this definition would exclude payments related to "projects" in the acreage acquisition, exploration, production, enhanced recovery and abandonment phases of the life cycle. Reliance on this definition would therefore not result in appropriate payment reporting by issuers, and would not materially decrease the extensive burden the disclosures otherwise entail.

Rather than modifying the existing definition of "development project" which is not fit-for-purpose in the context of Section 13(q), we strongly suggest the Commission adopt the definition proposed in our response to Question 40, or the alternative discussed in our response to Question 45. The existing definition of "development project" in Rule 4-10 could introduce significant confusion regarding the appropriate level of disaggregation. For example, an oil or gas "project" might enter a secondary or tertiary recovery phase, which involves distinct engineering activities well after initial drilling and production. Because the resulting incremental production and incremental payments to governments are almost never separately tracked, issuers must be allowed to treat the entire life cycle of the operation, from inception to abandonment, as a single "project" for disclosure purposes. Not allowing for this treatment as a single "project" would add significant costs to the initial implementation and ongoing preparation of these disclosures, as well as raise significant commercial concerns, unless the Commission otherwise addresses these concerns by following the approach to public disclosure outlined in our response to Question 86.

In response to the other specific questions the Commission raises in Question 43, we do not believe that whether or not a "project" has a definite cost estimate, time schedule, investment decision, management approval, or common ownership is relevant to the definition of "project". None of these aspects, individually or in concert with the others, are a necessary characteristic of "project" that would have meaning within the broader context of enhancing extractives industry transparency. Furthermore, including an element in the definition of "project" that refers to "engineering activities" does not add clarity to assist issuers or promote disclosure consistency, as noted in our comments above related to secondary or tertiary projects.

Consistent with the definitions discussed in our responses to Questions 40 and 45, and further explained in our response to Question 42, we support defining "project" in a way that permits the inclusion of more than one "field," and do not support defining "project" to encompass only a single reservoir or field.

44 - Should we permit issuers to treat operations in a country as a "project?" Would doing so be

consistent with the statute?

We believe that circumstances exist where issuers should be permitted to treat operations in a country as a "project." As we note in our response to Question 39, under the EITI, many countries report payments received from companies on an aggregate basis. We strongly support this model, which has been recognized by governments around the world and others as advancing the objective of revenue transparency while also protecting individual companies and shareholders from disclosure of commercially sensitive information and from the competitive disadvantages suffered when only some, but not all, of the companies doing business in a country provide disclosure. We believe this is consistent with the statute, which directs the Commission to consider consistency with EITI guidelines in the rules it develops.

As an example, to the extent that all of an issuer's activities in a given country relate to a single geologic basin or province, all operations in the country could be considered a "project" under the definition we propose in our response to Question 40.

45 - We note that issuers currently use the concept of "reporting unit" for financial reporting purposes (e.g. an operating segment or one level below an operating segment). Should the definition of "project" be consistent with the "reporting unit" concept? Is that definition consistent with the statute? Would using such a definition ease implementation of the disclosure requirements for resource extraction issuers given that payments currently may be tracked on that basis? What concerns, if any, are raised by using such a concept as the basis for defining "project?" Are there other concepts, such as an "asset group" or "cash generating unit," that would provide a more appropriate basis for the definition of "project?"

We believe defining "project" consistent with the "reporting unit" concept (as defined in ASC 350) is a reasonable alternative. While a reporting unit can comprise diverse oil and natural gas operations, in some cases across multiple countries, the statute's requirement to disclose payments by country would make such a definition practicable for issuers, meaningful for users, and consistent with EITI principles. Such an approach would significantly ease registrants' implementation burdens versus any more disaggregated definition of "project," as well as reduce commercial sensitivity concerns that will arise unless the Commission otherwise addresses such concerns by following the approach outlined in our response to Question 86.

If this alternative definition for "project" were adopted by the Commission, we would continue to support limiting reporting to those oil and gas activities described in our response to Question 6. We believe the "reporting unit" concept is more widely understood than the concepts of "asset group" or "cash generating unit," and thus would provide a superior basis for defining "project." The "asset group" or "cash generating unit" concepts would also raise commercial sensitivity concerns, increase implementation burdens for issuers, and result in thousands of lines of data.

46 - Are there any other factors that we should include in the definition of "project?"

We believe defining "project" as described in our response to Question 40, or as suggested by the Commission in Question 45, strikes the appropriate balance among the requirements under the statute, consistency with the EITI, meaningfulness to users, and practicability for issuers. However, as noted in our October 12, 2010 comment letter, there may be circumstances where an issuer has only a single project in a country, and disclosure of that project alone would reveal competitively sensitive information. Depending on the facts and circumstances, unless the Commission otherwise addresses such concerns by following the approach outlined in our response to Question 86, the issuer must be permitted to redact all or portions of that data for a period of time. Assuming other issuers have activity in the country, the Commission could include the issuer's payments in the high-level compilation of payments for that country.

47 - Should we define "project" to mean a material project? If so, what should be the basis for determining whether a project is material for purposes of the resource extraction payment disclosure rules? Would defining project to mean a material project be consistent with Section 13(q)?

We believe the Commission could define "project" to mean a material project, and such a definition would provide disclosures similar to those that would be provided if project is defined according to our response to Question 40. Disclosure of project-level or country-level information should be based on existing materiality guidance as defined in Exchange Act Rule 12b-2, FASB Concept 2 and SAB 99. Materiality should be determined with reference to the issuer's total worldwide government payments and other qualitative factors. Existing materiality guidance is well understood by registrants and forms the basis for most financial disclosures. This approach would allow for exercise of reasonable judgment by registrants to avoid excessive and potentially confusing reporting.

Specifically, issuers should not be required to separately report payments for a country, or project, unless such payments, in total, are material with reference to the company's total worldwide government payments or other qualitative factors. Total payments for a country, or project, that are not individually material can be aggregated under headings such as "other countries" or "other projects."

We believe this approach is consistent with Section 13(q), as further noted in our response to Question 29.

48 - Should we permit issuers to aggregate payments by country rather than project? Would that be consistent with Section 13(q)?

The Commission should permit issuers to aggregate payments by country, as further discussed in our responses to Questions 44, 45 and 86. Such an approach would indeed be consistent with Section 13(q) and EITI principles.

D.4 - Payments by "a Subsidiary…or an Entity under the control of…"

49 - As noted above, our rules currently include definitions of "subsidiary" and "control," which would apply in this context as well. Should we include a different definition for "subsidiary" or "entity under the control of" a resource extraction issuer? If so, why? How should the definitions vary?

Nothing about the industries in which resource extraction issuers operate suggests that the Commission should include different definitions of "control" and "subsidiary" for purposes of the rules under Section 13(q). Accordingly, we believe the Commission should align the definitions of "subsidiary" and "control" with the principles of existing securities law, specifically Exchange Act Rule 12b-2. As the Commission points out, Rule 12b-2 defines "control" as "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." In addition, Rule 12b-2 also defines the term "subsidiary." These existing definitions provide a framework for reporting under Section 13(q) that would be well understood by both extractive issuers and investors.

50 - Under the definition of control, a resource extraction issuer may be determined to control entities that are not consolidated subsidiaries. Is the requirement to disclose payments by an entity under the control of the issuer even though the issuer does not consolidate the entity appropriate?

We believe resource extraction and other issuers are required to consolidate subsidiaries which are controlled by the issuer, as the term "control" is defined under existing rule 12b-2. Majority ownership is normally the indicator of control that is the basis on which subsidiaries are consolidated. However, certain other factors must be examined to determine whether or not a subsidiary is consolidated, such as substantive participating rights granted to non-controlling shareholders. We agree with the Commission's proposal to require reporting of payments for only those entities under the control of the issuer. However, we believe this approach is consistent, in all material respects, with requiring reporting of payments only for entities the issuer consolidates for financial statement purposes. Therefore, no reporting obligation would exist for entities that an issuer does not consolidate.

51 - Under the proposed rules, a resource extraction issuer would be required to provide disclosure for an entity if it is consolidated in the financial statements of the resource extraction issuer presented under U.S. GAAP (or other jurisdictional GAAP that requires a U.S. GAAP reconciliation) and IFRS as issued by the IASB because entities meeting the consolidation requirement generally also meet the definition of control. Are there circumstances under U.S. GAAP and IFRS that would render different consolidation results, such as proportionate consolidation, that we should consider? If so, please describe the circumstances and indicate how the different circumstances should be addressed in the new rules. We understand that entities and operations that are proportionately consolidated are viewed as consolidated entities or operations of an extractive issuer, while investments presented on the equity method are not viewed as consolidated entities or operations. Should our rules specifically include these concepts? For instance, should our rules treat equity investees differently even if they are controlled by the resource extraction issuer? Should our rules, as proposed, include equity investees that the issuer controls but does not consolidate?

We agree with the Commission's observation that consolidation requirements meet the definition of "control" under U.S. GAAP. We do not believe there are enough material differences between U.S. GAAP and IFRS consolidation principles to require the Commission to address the differences as part of the rule-making for Section 13(q). Specifically, both U.S. GAAP and IFRS allow proportionate consolidation of undivided joint interest arrangements, a very common vehicle in the oil and natural gas industry. Therefore, no specific inclusion of those concepts is necessary if the concepts of "control" are aligned with Exchange Rule 12b-2 as noted in our response to Questions 49 and 50.

We do not believe situations exist under U.S. GAAP in which equity investees are controlled by a resource extraction issuer (as the term "control" is defined under Rule 12b-2) but not consolidated for financial statement purposes. As noted in our response to Question 50, we believe the rules should include only consolidated entities, and reporting obligations should not extend to entities that the issuer does not consolidate. This approach will align with the statute's intent which specifically requires reporting of payments by "…the resource extractions issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer…"

52 - Are there instances, other than control in which a resource extraction issuer should have to disclose payments made by a subsidiary or other entity? If so, should we revise our proposal to mandate disclosure in those circumstances? Would resource extraction issuers have access to payment information in those circumstances? Should our rules specify that an issuer would have to disclose

payments made by a non-controlled entity only if the issuer is the operator of the joint venture or other project? Would it be appropriate to require an issuer to disclose payments that correspond to its proportional interest in the joint venture rather than all of the payments made by or for the joint venture?

As noted in our responses to Questions 49, 50, and 51, we believe requiring disclosure for a resource extraction issuer's consolidated subsidiaries clearly meets the intent of the Section 13(q) statute. Accordingly, we do not support revision of the Commission's preliminary proposal in a way that deviates from the concept of "control" as defined in Exchange Act Rule 12b-2, or that otherwise mandates disclosure for non-consolidated subsidiaries. Resource extraction issuers generally do not have access to detailed payment information in situations where they are not the operator of the particular extractive activity. Nor do they have access to such information in situations where their interests in the underlying operations are held by an entity accounted for as an equity company. We do not support requiring issuers to report payments in such circumstances, nor do we support requiring issuers to disclose payments that correspond to their proportional interest in equity companies or joint ventures unless such payments are made directly to the government by the issuer. Such information is not readily available to non-operators, and will result in under-reporting of payments to governments when a non-operating partner is not an SEC registrant. Instead, as we further explain in our response to Question 14 and consistent with EITI practices, resource extraction issuers should be required to report the cash or in-kind payments made directly to governments by the registrant or entities under its control, including the amounts that may represent the interest of other partners or interest owners. Accordingly, such other partners or interest owners should be required to report only cash or in-kind payments made to governments directly, but not any payments made to an operator. See also our response to Question 63.

53 - Are there factors or concepts different than the ones discussed above that should determine whether a resource extraction issuer must disclose payments made for a subsidiary or other entity under the issuer's control for the purpose of commercial development of oil, natural gas, or minerals? For example, should the rules require disclosure only of information that the issuer knows or has reason to know?

We are aware of no other factors or concepts other than those described in our responses to Questions 49 – 52 that should determine whether a resource extraction issuer must disclose payments made for a subsidiary or other entity under the issuer's control.

In summary, to ensure alignment with the principles of the Section 13(q) statute, and to strike an appropriate balance between completeness and practicality, we believe that issuers should be required to report only those payments made in cash or in-kind directly to governments by entities controlled by the issuer, as "control" is defined in existing Rule 12b-2.

D.5 - Other Matters

54 - Would the disclosure requirement in Section 13(q) and the proposed rules potentially cause a resource extraction issuer to violate any host country's laws? Are there laws that currently prohibit such disclosure? Would the answer depend on the type of payment or the level of aggregation of the payment information required to be disclosed? If there are laws that currently prohibit the type of disclosure required by Section 13(q) and the proposed rules, please identify the specific law and the corresponding country.

As discussed in comment letters submitted by the API dated October 12, 2010, Royal Dutch Shell (RDS) dated October 25, 2010, and the eight law firms dated November 5, 2010, Section 13(q) and the proposed rules would cause resource extraction issuers to violate host country laws and existing contracts in some situations. Accordingly, it is essential for the Commission to provide an exemption for disclosure that is prohibited by foreign governments or existing contracts in order to avoid irreparable harm to investors, efficiency, competition and capital formation. In this regard, API member companies can confirm to the Commission that disclosure of revenue payments made to foreign governments or companies owned by foreign governments are prohibited for the following countries: Cameroon, China, Qatar, and Angola. If the Commission does not provide an exemption from disclosure when prohibited by foreign law, the Commission will force these companies to either withdraw from these projects or violate foreign law with the potential of incurring penalties and being prohibited from further activity in these countries. Either outcome will have a substantial adverse effect on investors, efficiency, competition and capital formation.

Additionally, while many member companies' contracts permit the disclosure of information to comply with home country laws, regulations or stock exchange rules, some of those contracts only permit the contracting party, not affiliates or parent companies, to make such disclosures. Other issuers' subsidiaries' contracts do not provide rights to disclose information to meet such home country reporting requirements. In this regard it is important for the Commission to recognize that it is not unusual in the oil and gas industry for contracts to run for 20 years or more.

Some API member companies can confirm to the Commission that they have existing contracts with government-owned companies that would prohibit disclosure of revenue payments made under those agreements and that no contractual rights exist to make disclosure pursuant to either government or stock exchange regulation. Issuers can negotiate home country disclosure rights for future contracts but have little ability to change existing contracts without compensation to the other party, potentially resulting in further harm to the issuer's shareholders. Accordingly, if the Commission adopted rules without an exemption for existing contracts that prohibit such disclosure, those rules would adversely affect those companies and their shareholders.

As noted above, there are four countries, where API member companies currently operate that prevent them from disclosing revenue payments. This list may grow. Whether in response to these new rules, or in response to other developments, companies have no ability to prevent other foreign governments from prohibiting such disclosure in the future. We believe there are at least four strong reasons why foreign governments could prohibit such disclosure going forward:

1. Payment information at a project level is likely to be competitively sensitive to the foreign government. For example, it is unlikely that a foreign government would want one international oil company to know the amount of a signature bonus and other remuneration elements paid by another international oil company when negotiating a similar project;
2. A country where security is an issue may have significant safety concerns regarding such disclosure. For example, precise project level payment disclosure could allow terrorists or insurgents to target a specific project in order to significantly affect a country's revenue, and thereby destabilize that country's economy;
3. Disclosure of precise payment information concerning projects where the underlying oil or gas field crosses a country's borders could be viewed as a security risk or state secret;
4. Some countries are unlikely to appreciate the extraterritorial effects of the US legislation.

API's recommendations (i) that only the Commission's compilation of information be available to the public (as discussed in more detail in the introduction to this letter and in response to Question 86) and (ii) defining the term "project" broadly to allow extractive issuers to aggregate information from individual leases or other agreements would significantly reduce the potential for conflicts with foreign law. However, these recommendations alone would not necessarily address every case in which a foreign country may prohibit disclosure of specific information such as, for example, when a particular project is governed by a single lease with a single SEC filer. (To the extent the Commission determines to make the information furnished by individual companies available to the public, or adopts a more granular definition of "project," the concerns of foreign governments (especially reasons 1 through 3 above) and the potential for violations of foreign law would be increased.) Accordingly, we believe the conflict of laws issue should be addressed through an additional separate exemption.

The Commission under *Section II.D.5: Other Matters*, states that it has not proposed any exception for disclosure prohibited by foreign governments or existing contract provisions; it is important to note, however, that such an exemption already exists for domestic issuers filing Form 10-K with respect to information regarding their foreign subsidiaries. While we applaud the Commission's wisdom in not repealing instruction E to Form 10-K, we are concerned that a similar instruction was not included in Form 20-F or 40-F. Instruction E to Form 10-K provides:

> *Disclosure With Respect to Foreign Subsidiaries.*
> *Information required by any item or other requirement of this form with respect to any foreign subsidiary may be omitted to the extent that the required disclosure would be detrimental to the registrant. However, financial statements and financial statement schedules, otherwise required, shall not be omitted pursuant to this Instruction. Where information is omitted pursuant to this Instruction, a statement shall be made that such information has been omitted and the names of the subsidiaries involved shall be separately furnished to the Commission. The Commission may, in its discretion, call for justification that the required disclosure would be detrimental.*

We believe instruction E to Form 10-K would provide sufficient relief to companies so that they would not be forced to violate a foreign government prohibition, abandon projects, renegotiate existing contracts or pay damages under those contracts that prohibit disclosure, or disclose competitively sensitive information to their detriment. However, if instruction E or a similar exemption were not added to Form 20-F or 40-F, the proposed amendments implementing Section 13(q) of the Exchange Act would be highly anticompetitive and potentially violate a number of U.S. foreign treaties, including the World Trade Organization treaty. We urge the Commission to treat foreign private issuers comparably and provide such an instruction to Form 20-F and 40-F in order to avoid harm to investors and adversely affect efficiency, competition and capital formation.

If the Commission follows API's recommendation to allow disclosure under Section 13(q) to be furnished on Form 8-K (or Form 6-K for foreign issuers), or on a new annual reporting form developed specifically for the purpose, an instruction corresponding to existing instruction E to Form 10-K (which, as noted, the Commission has not proposed to amend) should be added to Forms 8-K and 6-K or to such new form. See also our response to Question 68.

55 - Should the Commission include an exception to the requirement to disclose the payment information if the laws of a host country prohibit the resource extraction issuer from disclosing the information? Would such an exception be consistent with the statutory provision and the protection of investors? If we provide such an exception, should it be similar to the exception provided in Instruction 4 to Item 1202 of Regulation S-K? Should we require the registrant to disclose the project and the

country and to state why the payment information is not disclosed? If so, should we revise Item 1202 to require the same disclosure of the country and reason for non-disclosure?

As discussed in our response to Question 54, we believe it is absolutely essential for the Commission to provide an exemption for disclosure that is prohibited by foreign governments or existing contracts in order to avoid irreparable harm to investors, efficiency, competition and capital formation.

As noted in RDS' letter of October 25, 2010, and the letter from the eight law firms dated November 5, 2010, the Commission has both definitional and exemptive authority under the Exchange Act necessary to implement the requirements of Section 13(q) in a cost effective manner in order to avoid harming investors or adversely affecting efficiency, competition or capital formation. If Congress did not want the Commission to use its expertise and judgment in issuing rules, it could have made that clear by making Section 13(q) self-enacting or eliminating the Commission obligations under 3(f) and 23(a) of the Exchange Act for this rulemaking. Congress did neither, nor did it instruct the Commission not to use its exemptive or definitional authority. Moreover, there is no indication from the legislative history that Congress considered the effects on investors and companies as a result of foreign law and contract prohibitions.

We strongly disagree with requiring an issuer to disclose publicly the project, country, and reason for non-disclosure, since such disclosure would in and of itself violate confidentiality and highlight the activity for which the host government has prohibited disclosure due to commercial or other sensitivities. This is especially true and applicable to those countries where governments prohibit disclosure of reserves which represent 15% or more of the registrant's proved reserves. Additionally, as referenced in the Commission's exception noted in Instruction 4 to Item 1202 of Regulation S-K, registrants are not required to provide disclosures of the reserves in a country containing 15% or more of the registrant's proved reserves if that country's government prohibits disclosure in a particular field and disclosure of reserves in that country would have the effect of disclosing reserves in particular fields. This information provides significant information regarding that foreign country's reserves, since one would know a minimum amount of proved reserves associated with that country. Accordingly, no revision is needed to Item 1202 of Regulation S-K as companies are still required to provide material reserves information by continent.

56 - Should the rules provide an exception only if a host country's statutes or administrative code prohibits disclosure of the required payment information? Should we provide an exception if a judicial or administrative order or executive decree prohibits disclosing the required payment information as long as the order or decree is in written form? Should we limit any exception provided to circumstances in which such a prohibition on disclosure was in place prior to the enactment of the Act?

See our responses to Questions 54-55.

We propose that an exception from disclosure be provided if a judicial or administrative order or executive decree prohibits disclosing the required payment information as long as the order or decree is in written form. Exceptions under these rules should not be limited to those in place prior to the enactment of the Act. Sovereign laws are dynamic and, therefore, the final rules should provide for an exception based on foreign laws and decrees in place at the time of the issuer's filing with the Commission. Moreover, companies do not have any ability to prevent countries from prohibiting such disclosure in the future, especially if they find it to be harmful. Incorporation of an exception that is tied to prohibitions that were in place prior to enactment of the Act could also result in uneven harm, with some issuers impacted and others not.

57 - Should the rules provide an exception for existing or future agreements that contain confidentiality provisions? Would an exception be consistent with the statute and the protection of investors?

See our responses to Questions 54-56.

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

There are times when the disclosure of detailed payment information would jeopardize the safety and security of a resource extraction issuer's operations or employees and the rules should provide an exception in those circumstances. Depending on the definition for "project" that the Commission adopts, precise project level payment disclosures could allow groups or individuals to target a specific project in order to significantly affect a country's revenues, thereby destabilizing that country's economy and placing the people that work at these projects at personal risk. As a result of these risks, unless the Commission otherwise addresses these concerns by following the approach outlined in our response to Question 86, an exception must be provided in the final rules that permits redaction for a period of time of any information that might cause safety or security concerns. A broad definition of "project", as proposed in our response to Question 40, or limiting public disclosure to a country-level compilation as outlined in our response to Question 86, would also help mitigate these risks.

59 - Should we permit a foreign private issuer that is already subject to resource payment disclosure obligations under its home country laws or the rules of its home country stock exchange to follow those home country laws or rules instead of the resource extraction disclosure rules mandated under Section 13(q)?

As the Commission is aware, disclosure of foreign government payments by extractive industry participants is being considered throughout the world. Already the Hong Kong Stock Exchange and the London Stock Exchange AIM market have adopted limited country level disclosure requirements. The EU and IASB are also considering possible disclosure requirements at the country level. Accordingly, foreign private issuers could be required to provide multiple payment disclosures in Form 20-F and 40-F in order to satisfy multiple exchange requirements, thereby overwhelming investors and increasing cost of compliance.

From a consistency standpoint, the Commission has in the past provided a foreign private issuer exemption from any disclosure requirement that essentially duplicates the reporting requirements of the foreign private issuer's home country. This type of exemption is reasonable in most cases. However, we point out that disclosure requirements for extractive payments are not commonly in place in other countries at this point in time, and whether and when such rules may be adopted in other jurisdictions is not currently known. Moreover, it is not clear that other jurisdictions will include the same disclosures regarding competitively sensitive disaggregated data, or whether they will adopt other rules that help issuers mitigate competitive issues. Should other jurisdictions decide to implement substantially different reporting requirements, it could contribute to an unlevel playing field from a competitive perspective and contribute to shareholder harm for other U.S. registrants unless the Commission otherwise addresses these concerns by following the approach outlined in our response to Question 86. Given these concerns, we believe the Commission should only permit foreign private issuers to meet their Section 13(q) disclosure obligations through compliance with home country laws or rules if the Commission determines that such home country rules require disclosure of at least as much information, to at least as great a level of detail, as the rules under Section 13(q).

60 - Are there any other circumstances in which an exception to the disclosure requirement would be appropriate? For instance, would it be appropriate to provide an exception for commercially or competitively sensitive information, or when disclosure would cause a resource extraction issuer to breach a contractual obligation?

We believe there are other circumstances in which an exception to the disclosure requirements would be appropriate. This would include those situations where commercially or competitively sensitive information would be jeopardized and/or a breach in a contractual obligation would arise.

Examples might include the following scenarios:

- Example 1. Country A invites investors to develop its natural resources. Officials from Country A use Section 13(q) disclosures for projects in Country B to determine the rates of return that SEC filers are willing to accept. Country A uses this information to negotiate more favorable terms. The shareholders of SEC filers participating in Country A's projects receive a lower investment return than would otherwise be the case.

- Example 2. AmeriCo, a U.S. company and SEC filer, wishes to pursue Project X in Country B. In order to be economically viable, Project X requires favorable tax and royalty terms. Country B is willing to grant appropriate fiscal relief for Project X, but does not wish the terms to be publicly disclosed because the disclosure would create pressure for Country B to grant comparable terms on other projects. Country B awards Project X to a non-U.S. oil company that is not subject to Section 13(q) disclosure.

- Example 3. AmeriCo, a U.S. company and SEC filer, begins acquiring high-potential exploratory acreage on a confidential basis through agents in Country B. The acreage acquisition requires AmeriCo to pay bonuses to the local governments. Because AmeriCo must disclose these bonuses, its identity is revealed. A non-U.S. competitor of AmeriCo not subject to Section 13(q) steps into the market and begins bidding for the remaining available acreage, driving up AmeriCo's costs significantly. At the same time, the non-U.S. competitor is able to continue acquiring acreage in another part of Country B on a confidential basis.

- Example 4. Country A participates in the Extractive Industries Transparency Initiative and supports country-level disclosure of aggregate payment data. For economic, competitive, and foreign policy reasons, Country A considers the specific commercial terms of its agreements to develop natural resources to be state secrets and has accordingly passed laws prohibiting public disclosure of such terms. If the rules implementing Section 13(q) require disaggregated public disclosure of commercially sensitive terms, AmeriCo, a U.S. company and SEC filer, will be unable to bid on projects in Country A. As a result, Country A's resources are developed by national oil companies that are not subject to Section 13(q).

These examples specifically address scenarios 1 and 3 below:

1. Host governments could select business partners on future projects that do not have similar reporting requirements; or

2. Host governments could remove U.S.-listed companies as operator of existing projects; or
3. Both U.S.-listed and non-listed competitors could utilize the project level information to aid in future bidding and contract negotiations.

If the Commission chooses not to follow fully the approach outlined in our response to Question 86, then Instruction E to Form 10-K would provide sufficient protection against disclosure of competitively sensitive information. If the Commission follows API's recommendation to allow disclosure under Section 13(q) to be furnished on Form 8-K (or Form 6-K for foreign issuers) or on a new annual reporting form developed for the purpose,, as discussed in our response to Question 68, an instruction corresponding to existing instruction E to Form 10-K (which, as noted, the Commission has not proposed to amend) should be added to Forms 8-K and 6-K or to such new form.

E. Definition of "Foreign Government"

61 - Should the definition of foreign government include a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as proposed?

We concur with the Commission as to the definition of foreign government and the various foreign government entities noted in the question. We also support the clarification provided in the proposed rules regarding subnational government that may be separate from the foreign national government. We acknowledge that this clarification is consistent with EITI guidelines, as noted in footnote 104 of the proposed rules. EITI guidelines support disclosure of payments to subnational governments where they are material.

Please refer to our responses to Questions 62 and 63 for additional commentary with respect to the role of the foreign government as either a sovereign/regulator or an investor/shareholder. The need to disclose cash and in-kind payments to the various entities noted in the proposed definition will be determined by individual facts and circumstances regarding the nature of the payment and the nature of the foreign government entity.

62 - We note that the definition of foreign government would include a company owned by a foreign government. We understand that in the case of certain state owned companies, the government would be a shareholder. Thus, certain transactions may occur as transactions between the company and the government and as transactions between company and shareholder. Should we adopt specific rules or provide guidance regarding payments made by state owned companies that distinguish between such types of transactions?

We defer to the Commission to determine whether specific guidelines are required for these situations. However, we believe that, to the extent a state owned company, such as a national oil company (NOC), is a U.S. registrant, the NOC would need to comply with the disclosure requirements of Section 13(q) and these proposed rules. Because these state-owned companies directly compete with U.S. listed companies for capital and resource extraction opportunities, we believe that the same disclosure rules should be applied to such companies. In the event the NOC is a U.S. registrant, we believe most transactions between the NOC and the foreign government would closely parallel the transactions that other resource extraction issuers would have with the foreign government, with the possible exception of dividends on shares owned by the foreign government. We defer to the Commission to determine whether specific guidelines are required for these situations.

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

We generally support including an instruction in the rules clarifying that a company owned by the foreign government should be at least majority-owned before reporting of payments made to it should be required under these rules. However, we note that the level of ownership by the foreign government in such companies is not necessarily the sole essential fact, but rather disclosure should also be determined based on 1) the capacity in which the state-owned company is acting, and 2) nature of the cash or in-kind payments made by resource extraction issuers to the state-owned company.

A company that is wholly or partially owned by a foreign government (e.g., may be considered as a national oil company or "NOC") will generally function in one of two capacities: 1) as an agent or regulator acting on behalf of the foreign government, or 2) in a commercial capacity as a joint venture partner/shareholder. In the first situation, the NOC could be acting on behalf of the foreign government as the agent or regulator for the purpose of collecting the payment amounts due to the government arising from the contracted rights that enable the commercial development of oil, natural gas or minerals. When the NOC is acting in this agent or regulator capacity, the resource extraction issuer would need to disclose the total amounts for the types of payments covered under Section 13(q) and related to the commercialization of oil and gas properties.

In the second scenario, the NOC could be acting in the capacity of a commercial partner with other oil companies. In such a capacity, the NOC would be a risk-sharing partner engaged in a joint venture involved in the commercialization of oil or gas properties. In this case, the NOC could be either a non-operating partner or serve as the operator for the venture. In the event the NOC is the operator of the venture, payments made by the resource extraction issuer to the NOC for capital or operating cash calls would not be subject to disclosure.

64 - Should the definition of foreign government include a foreign subnational government, such as a state, province, county, district, municipality or territory of a non-U.S. government, in addition to a non-U.S. national government, as proposed?

We believe the Commission's clarification to include foreign subnational governments in the definition of foreign government is reasonable, and acknowledge that doing so is consistent with EITI guidelines. We believe this proposal fairly recognizes that subnational governments may have a role in the collection of payments from resource extraction issuers by jurisdiction. However, reporting of payments to such subnational governments should be determined based on materiality considerations, as noted under EITI guidelines.

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

We do not believe that specific subnational government entities should be excluded, provided that they serve in a capacity that is part of the commercial development of oil and gas resources. As noted in our response to Question 64, and consistent with EITI guidelines, payments made to subnational governments should only be reported when material.

66 - Should we also require a resource extraction issuer to disclose amounts paid to the states and other subnational governments in the United States in addition to payments to the Federal Government?

Based on the specific language in Section 13(q), cash payments made by resource extraction issuers are reportable if made to the Federal Government (i.e. the United States Federal Government, as proposed). We believe that expanding the scope of the proposed rules beyond that specified in the statute would create an unnecessary reporting burden with little benefit to investors or to the objectives of transparency.

67 - Is there additional guidance that we should provide regarding the definition of foreign government?

We do not believe that additional clarification is needed at this time. Additional clarification can be provided in interpretive guidance or via the comment letter process.

F. Disclosure Required and Form of Disclosure

F.1 – Annual Report Requirement

68 - Section 13(q) requires disclosure of the payment information in an annual report but does not specify the type of annual report. Should we require resource extraction issuers to provide the payment disclosure mandated under Section 13(q) in its Exchange Act annual report, as proposed? Should we require, or permit, resource extraction issuers to provide the payment information in an annual report other than an annual report on Form 10-K, Form 20-F, of Form 40F? For example, should we require the disclosure in a new form filed annually on the Commission's Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR")? Would requiring resource extraction issuers to disclose the information in a separate annual report be consistent with Section 13(q)? Should we require an oil, natural gas, or mining company to file a separate annual report containing all of the specialized disclosures mandated by the Dodd-Frank Act? What would be the benefits or burdens of such a form for investors or resource extraction issuers? If we should require, or permit, a separate annual report, what should be the due date of the report (e.g. 30, 60, 90, 120, or 150 days after the end of the fiscal year covered by the report)?

As proposed, the Section 13(q) disclosures would be submitted outside the audited financials as an exhibit to Form 10-K, Form 20-F, or Form 40-F. We fully support keeping these disclosures outside the audited financial statements, but recommend the disclosures be kept separate from these existing annual fiscal year report forms. Factors influencing this recommendation include:

- Already time-constrained annual and interim reporting cycles. Depending on final reporting requirements, particularly those related to the definitions of the terms "payment," "not de minimis" and "project," these extractive payments disclosures could run to tens of thousands of line items. This large amount of information will need to be assembled, validated and XBRL tagged.

- Different nature of the extractive payment disclosures, specifically detailed cash payment information versus accrual basis financial statement information.
- Lack of relevance of this extractive payment information to most financial statement users.
- Lack of alignment of the relevant time period of this information for issuers with fiscal years not aligned with the calendar year (also see response to Question 70).

We believe these factors far outweigh the minimal administrative burden associated with submitting a separate annual report outside of Form 10-K, Form 20-F, or Form 40F.

As discussed in more detail in the introduction to this letter and in the response to Question 86, we also believe that the data submissions of each individual resource extraction issuer should be confidential and solely for the use of the Commission in preparing its public compilation. We defer to the Commission to determine whether such confidential treatment of individual issuer submissions can best be accommodated within existing reporting forms, or is better addressed with a new annual reporting form developed specifically for the purpose.

We support the Commission's proposal that Form 10-K, Form 20-F, or Form 40-F, as applicable, include a brief statement that the information required by Section 13(q) will be furnished on Form 8-K, or Form 6-K for foreign filers, or on a new annual report form developed for the purpose, no earlier than 150 days following the end of the most recently completed calendar year. We believe this approach would be fully consistent with Section 13(q). Such disclosure should make clear, however, that individual issuer data submissions are solely for the use of the Commission in preparing its public compilation.

Some of our member companies will also need to file reports for Sections 1502 (conflict minerals) and 1503 (mine health and safety) of the Dodd-Frank Act in addition to the Section 13(q) extractive payment disclosures. We expect that each of these specialized disclosures will be of limited interest to most financial statement users and would, therefore, support the concept of combining them in a separate annual report furnished on Form 8-K, or Form 6-K for foreign filers, or on a new annual report form developed for the purpose, no earlier than 150 days following the end of the most recently completed calendar year. Please also refer to our responses to Questions 73 to 75 and 86 and 87.

69 - If we require resource extraction issuers to provide the disclosure of payment information in their Exchange Act annual reports, should we permit resource extraction issuers to file an amendment to the annual report within a specified period of time subsequent to the due date of the report, similar to Article 12 schedules or financial statements provided in accordance with Regulation S-X Rule 3-09, to provide the payment information? If so, what would be the appropriate time period (e.g. 30, 60 or 90 days after the due date of the report)?

See the response to Question 68. We strongly recommend against this approach, which could re-open the filing for review for issuers in registration and could raise negative market concerns in reaction to amendment of the report

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

We believe the rules should require disclosure of payments made during the most recent calendar year. This approach will facilitate review and compilation by the Commission and analysis by users.

71 - Should we also require an issuer to provide the resource extraction payment disclosure in a registration statement under the Securities Act of 1933 or under the Exchange Act? If so, what time period should the disclosure cover?

The statute requires disclosure in an annual report. We do not believe expansion of the reporting requirements beyond those required by statute is justified or appropriate. Moreover, we believe this information will be of limited interest to most investors and should only be made available to the public by means of the Commission's compilation as discussed in more detail in our response to Question 86. Finally, requiring such disclosure in a registration statement would place an undue burden on preparers and hamper capital formation.

72 - Should we require an issuer that has a class of securities exempt from Exchange Act registration pursuant to Exchange Act Rule 12g3-2(b) to provide the resource extraction payment disclosure in its home country annual report or in a report on EDGAR? Would such an approach be consistent with the Exchange Act?

Requiring all registrants with securities exempt from registration pursuant to Exchange Act Rule 12g3-2(b) to comply with Section 13(q)'s disclosure requirements would help ameliorate competitive disadvantage concerns.

F.2 – Exhibits and Interactive Data Format Requirements

73 - Should we require that information concerning the type and total amount of payments made for each project and to each government relating to the commercial development of oil, natural gas, or minerals be provided in the exhibits to Form 10-K, Form 20-F, or Form 40-F, as proposed?

See our responses to Questions 68 and 87. We recommend that these disclosures be kept separate from the indicated annual report forms, and be furnished on Form 8-K, or Form 6-K for foreign filers, or on a new annual report form developed for the purpose, no earlier than 150 days following the end of the most recent calendar year.

74 - Should we require, as proposed, a resource extraction issuer to provide a statement, under an appropriate heading in the issuer's annual report, referring to the payment information provided in the exhibits to the report, as proposed?

As noted in our response to Question 68, we concur with the Commission's proposal to include a brief statement in the Form 10-K, Form 20-F or Form 40-F that the information required by Section 13(q) will be furnished on Form 8-K, or Form 6-K for foreign filers, or on a new annual report form developed for the purpose, no earlier than 150 days following the end of the most recently completed calendar year. However, consistent with API's other recommendations, such disclosure should make clear that the information furnished by individual resource extraction issuers is solely for the use of the Commission in preparing its compilation as discussed in more detail in our response to Question 86.

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

We believe that any disclosure within Form 10-K, Form 20-F, or Form 40-F should be limited to a brief statement that the information required by Section 13(q) will be furnished on Form 8-K, or Form 6-K for foreign filers, or on a new annual report form developed for the purpose, no earlier than 150 days following the end of the most recent calendar year. We refer the Commission to our responses to Questions 68 and 87 for additional discussion.

76 - Section 13(q) does not require the resource extraction payment information to be audited or provided on an accrual basis. Accordingly, the proposed rules do not include such requirements. Should we require resource extraction issuers to have the payment information audited or provide the payment information on an accrual basis? Why or why not? What would be the likely benefits and burdens? Would including such requirements be consistent with the statute?

We do not support an audit requirement for the payment information disclosure. Audit reports for financial statements are designed to obtain reasonable assurance as to whether the financial statements are free of material misstatement. Requiring the information provided pursuant to Section 13(q) to be audited would potentially subject this data to a level of scrutiny beyond other individual disclosures within a registrant's annual report, and to materiality levels that would be much lower than for a traditional financial statement depending on the final definition in the rules regarding a "de minimis" threshold. Additionally, if the information is required to be audited, we are assuming that such audit report would be required to be filed with the registrant's annual report. We believe the inclusion of such additional report from independent registered public accountants would be confusing to investors. An audit requirement is not specified in the statute and would significantly increase the upfront implementation costs and ongoing annual costs and burdens associated with Section 13(q). Therefore, we do not believe that an audit of this disclosure is necessary, nor would it enhance the reliability of the financial statements.

As also noted in our October 12, 2010 comment letter, a requirement to audit these payment disclosures to a level consistent with other financial disclosures would be a significant difference from existing EITI guidelines. An audit requirement would also create practicality issues for public accounting firms, who have already articulated concerns about the potential auditing requirements for extractive payments proposed in the IASB's *Extractive Industries* discussion paper.

We further believe that requiring the registrants to provide payment information on an accrual basis, in addition to the proposed cash basis, is not necessary and would not provide any benefit to the investor when making investment decisions. It would however, unnecessarily drive up the cost and burden on registrants of implementing additional procedures and system requirements to capture accrual-based payments at the project level.

77 - Should we require two new exhibits for the resource extraction disclosure, as proposed?

Because the XBRL exhibit will require the preparation of the information in a separate HTML or ASCII document, we do not believe that the requirement of two exhibits adds a significant amount of administrative burden to issuers.

As discussed in more detail in response to Question 86, we believe the information furnished by individual resource extraction issuers should be solely for the use of the Commission in preparing its compilation. We believe that two exhibits would provide the Commission with the ability to extract, analyze and accumulate XBRL information, while also having the ability to directly view the information in an HTML or ASCII version.

78 - Should we require that the resource extraction payment disclosure be provided in a new exhibit in HTML or ASCII, as proposed? Why or why not?

As noted in Question 77 above, we believe that disclosure of the information in either ASCII or HTML would be appropriate.

79 - Should we require the resource extraction payment disclosure to be electronically formatted in XBRL and provided in a new exhibit, as proposed? Is XBRL the most suitable interactive data standard for purposes of this rule? If not, why not? Should the information be provided in XML format? If so, why? Are there characteristics of XML, such as ease of entering information into a form, which makes it a better interactive data standard for the payment information than XBRL? Would the use of the XBRL taxonomy based on U.S. GAAP cause confusion in light of the fact that the information required under Section 13(q) is information about cash or in kind payments (that are not computed in accordance with GAAP) made by resource extraction issuers? Should we require an interactive data standard for the payment information other than XML or XBRL?

We believe that XBRL is the most suitable interactive data standard for the reporting of payment information provided under this rule to allow the Commission to prepare its public compilation. XBRL is currently used by registrants to tag financial statements included in filings with the Commission and most registrants have either staff who are trained in XBRL tagging or third party service providers who are performing XBRL tagging under their direction. However, we also emphasize that XBRL also requires consistent taxonomy to be used across all registrants for all levels and categories of information provided in order for the information compiled by the Commission to be comparable across registrants and industry. We believe that the use of XML is not well understood at this point, nor is it widely utilized. As such, we would recommend the exhibit be prepared in XBRL and not in XML.

While we acknowledge that electronic tagging of this payments data is required under the statute, we believe the Commission should delay implementation of electronic tagging until such time as the taxonomy and reporting capability for this disclosure are available. The usefulness of data tagging will also depend on the procedures and systems developed by the Commission for purposes of compiling individual issuer data into public reports. This should be factored into the determination of the final effective date adopted by the Commission.

80 - Section 13(q) and our proposed rules require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. If the currency in which the payment was made differs from the issuer's reporting currency, should the rules require issuers to convert the payments to the issuer's reporting currency at the applicable rate? If the rules should, as proposed, require disclosure of in kind payments, should the rules require in kind payments to be converted to the host country currency? Should the rules require in kind payments to be converted to the issuer's reporting currency at the applicable rate? Should the rules require disclosure of the in kind payments in the form in which the payments were made and also require the payments to be converted to the

issuer's reporting currency? Should we require issuers to provide a conversion to U.S. dollars for payments made in cash and in kind, and to electronically tag that information?

As noted in our October 12, 2010 comment letter, we believe that the Commission should allow registrants to present cash and in-kind payments converted into their consolidated reporting currency, typically U.S. dollars, for the disclosure required by this proposed rule. We believe the reporting of actual currency of payment is of limited relevance and unnecessarily complicates data gathering and reporting. Nonetheless, we acknowledge that the currency of payment is part of the statutory requirements. We expect that this will require presentation of at least one additional row of information for each project that has material local currency payments. In order for the payment information to be summarized by country, we recommend that the total of amounts paid under local currency be converted to the consolidated reporting currency, typically U.S. dollars. We recommend a simple approach: performing the conversion for total payments once at the country level. We do not support presenting all payment amounts in dual currencies, since that would lead to further growth in the volume of information disclosed and to potential confusion among users.

Finally, we do not believe that additional electronic tagging of information should be required beyond the XBRL tagging of disclosure tables, which are capable of being tagged to indicate the currency in which the data is presented.

81 - Section 13(q) and our proposed rules require an issuer to include an electronic tag that identifies the financial period in which the payments were made. Should we require an issuer to identify in the tag the particular fiscal year, quarter, or other period, such as a particular half-year, in which the payments were made?

The statutory requirement is for annual reporting only. We believe that the Commission should require a registrant to identify the calendar year in which the payments are made. We believe identifying the particular quarter or other period less than a calendar year, would add a level of precision to the disclosure that is neither required, nor necessary anywhere else in a registrant's annual report.

82 - Section 13(q) and our proposed rules require an issuer to include an electronic tag that identifies the issuer's business segment that made the payments. Should we define "business segment" for purpose of disclosing and tagging the payment information required by Section 13(q)? If so, what definition should we use? Should we instead allow resource extraction issuers to disclose and identify the business segment in accordance with how it operates its business? What are the advantages and disadvantages of allowing an issuer to rely on its definition of business segment?

We believe that the Commission should not require a registrant to provide an electronic tag that identifies the issuer's business segment that made the payments on any basis other than as defined in accordance with Generally Accepted Accounting Principles (GAAP). Such a definition would lessen the burden on registrants as they are currently reporting financial information in this manner. A definition that differs from GAAP would require companies to gather information in a manner that is not consistent with how the business is structured or how its accounting systems are designed.

83 - Section 13(q) and our proposed rules require an issuer to include an electronic tag that identifies the project to which the payments relate. Are there some payments that would not relate to a particular project? If so, should we nevertheless require that each payment be allocated to a particular project? Should we instead permit an issuer to use only the electronic tag that identifies the government

receiving the payments if those payments do not relate to, or cannot be allocated to, a particular project?

As the Commission notes, there are certain payments, such as tax payments, that are typically based on the company's legal entity for an area. Depending on the definition of "project" adopted by the Commission, such payments may relate to numerous projects or no current project. Tax credits resulting from one project may be utilized against the earnings from another project, making the reporting and interpretation of project-level data very difficult. In addition, there may be cross-field allowances or benefits that are captured at a legal entity level, which would likely require an arbitrary allocation down to the project level. Processes for such allocations are not currently in place and would have to be developed. Finally, certain information, such as production entitlement, is not captured at all in the registrant's ledger and would have to be analytically derived from volumetric and price information.

In addition, if the Commission adopts a narrow, granular definition of "project," it would be misleading to require the issuer to allocate payments that do not relate to a specific project across other existing projects for the purpose of completeness.

Permitting the issuer to use electronic tagging to identify the government receiving those payments, as opposed to allocating to a project level (potentially in an arbitrary manner) would be a more fair representation of this information.

84 - Section 13(q) requires an issuer to electronically tag "such other information as the Commission may determine is necessary or appropriate in the public interest or for the protection of investors." Would it be useful to have additional information about the payments electronically tagged? If so, what additional tags should we require? Are there any other items of information that should be electronically tagged?

We do not recommend the extension of electronic tagging to any additional information about payments beyond the information already required in the statute and proposed rules. If the Commission should choose to require such additional tags, the Commission should provide registrants with the ability to review and provide comments on any proposed additional electronic tagging requirements.

85 - Should we permit issuers to aggregate their payments into three categories: "taxes and royalties," "production entitlements," and "other payments"? Would that approach be consistent with Section 13(q)?

We believe that the Commission should define specific categories to be disclosed by all resource extraction issuers to ensure consistency of categories. Consistent with our October 12, 2010 comment letter, we agree with the categories proposed by the Commission ("taxes and royalties," "production entitlements" and "other payments"). We believe this method is consistent with Section 13 (q) and would help the Commission satisfy its obligations to protect investors covered under Exchange Act Section 3(f) and Section 23(a)(2).

86 - Section 13(q)(3) requires the Commission to provide a compilation of the disclosure made by resource extraction issuers. Should the Commission provide the compilation on an annual basis? Should the compilation be provided on a calendar year basis, or would some other time period be more appropriate? Should the compilation provide information as to the type and total amount of payments made on a country basis? What other information should be provided in the compilation?

The Commission is required by Section 13(q) to decide how it will make information that is submitted to it under the statute available to the public. In order to best serve the objectives of the legislation, while also safeguarding its mission of protecting investors, the Commission should fashion a rule that allows for transparency while balancing the concerns of American businesses, foreign governments, and U.S. investors.

Section 13(q) consists primarily of two operative provisions. First, Section 13(q)(2) requires that "resource extraction issuers" report certain payments made to foreign governments "in an annual report" to the Commission. 15 U.S.C. § 78m(q)(2). Second, "*to the extent practicable*," Section 13(q)(3) requires the Commission to make "*a compilation*"[4] of that information available to the public. *Id.* § 78m(q)(3)(A) (emphases added). The plain statutory text thus requires the Commission to determine what information provided to it will be made publicly available in the compilation, and in what form.

Importantly, the statute does not require that the submitted reports themselves be publicly available. *See* 15 U.S.C. § 78m(q)(2). The reporting obligation is to the SEC, which is then required to make a "compilation" available. The overall organization of the statute reflects this understanding of the statutory obligations. While Section (2) deals with "Disclosure" and specifies the information that must be reported by issuers to the Commission, Section (3) of the statute separately addresses "Public Availability of Information." Thus, Congress did not contemplate that the information reported to the Commission would be directly disclosed to the public. The statute instead requires the Commission to make available an appropriately edited and arranged compilation.[5]

Congress is entirely capable of requiring issuers to make thorough disclosures directly to the public, when it intends to do so. As discussed below, the federal securities laws and regulations require issuers to post certain information directly on the Internet, or they require the Commission to make such disclosures. The fact that Congress chose to require "a compilation," "as practicable," should not be taken lightly. "Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another." *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[A] legislature says in a statute what it means and means in a statute what it says there."). The specific choice of words in Section 1504 should guide the Commission in fashioning a rule. Thus, Commission has the flexibility to aggregate the reported payment information on a per-country basis, taking into account the practicability provision of the statute.[6]

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4 A "compilation" is defined as "the act or action of gathering together . . . materials esp[ecially] from various sources," or alternatively, "something that is the product of the putting together of two or more items." WEBSTER'S THIRD INT'L DICTIONARY 464 (1976). The ordinary meaning of "compilation" also includes a collection of materials "arranged in an original way," such that "the resulting product constitutes an original work of authorship." BLACK'S LAW DICTIONARY 323 (9th ed. 2009).

5 Following the statutory provision on public availability (15 U.S.C. § 78m(q)(3)(A)), clause (B) addresses "Other Information" and makes clear that the Commission cannot disclose information from outside of the issuers' reports to the general public. *Id.* § 78m(q)(3)(B) (specifying that the Commission need not "make available online information other than the information required to be submitted"). Thus, clause (B) limits the pool of information from which the Commission can draw when putting together its compilation for the public.

6 Exemption 4 of the Freedom of Information Act, along with the criminal penalties imposed by the Trade Secrets Act, reinforces the notion that an agency must consider competitive harms when making disclosures. Both of these statutes limit the ability of government agencies to make commercial information publicly available. For example, Exemption 4 of the FOIA protects "trade secrets and commercial or financial information obtained from a

By way of contrast, Section 1502 of Dodd-Frank (the "conflict minerals" provision) requires certain reporting and disclosure by companies that make products that require "conflict minerals" for production. 15 U.S.C. § 78m(p). This provision, which neighbors Section 1504 in the United States Code and bears similar transparency objectives, specifies a clear method for public disclosure. Under the conflict minerals provision, affected issuers must make an annual report to the Commission, but such persons must also "make available to the public on the Internet website of [the issuer]" the information required under the statute. *Id.* § 78m(p)(1)(E). By contrast, in Section 1504, Congress has given the Commission the responsibility of weighing the concerns of issuers and other stakeholders when fashioning an appropriate method for publicly disclosing *compiled* information.

Similarly, Section 13(1) of the Exchange Act requires certain issuers to directly "disclose to the public on a rapid and current basis" information concerning material changes in the finances of certain covered issuers. 15 U.S.C. § 78m(l)(as amended by Section 409 of the Sarbanes-Oxley Act). The statutory language specifies that the disclosure must be "in plain English" and "may include trend and qualitative information and graphic presentations." *Id.* While yet another disclosure provision, Section 13(f) of the Exchange Act, requires the Commission to "tabulate" information and make it available to the public so as to "maximize the usefulness of the information." *Id.* § 78m(g)(5). These variations in disclosure mechanisms should not be ignored. Congress clearly is capable of specifying different forms of public disclosure for different situations, and in the case of Section 1504, it has not specified that filers' reports be public, or that they be disclosed in full by the Commission.

As discussed elsewhere in this letter and in the comments that have been submitted, the Commission should enact a rule that only discloses payments on an aggregated, per-country or similarly high-level basis to the general public.[7] Such a compilation would be consistent with current EITI practice, and would eliminate many of the competitive harms that issuers face under the current proposal (with public disclosure on a disaggregated basis). In fact, the statute itself requires that any rules issued under it support "international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals," namely, EITI. 15 U.S.C. § 78m(q)(2)(E); *see also id.* § 78m(q)(1)(C)(ii) (requiring a definition of "payment" "consistent with the guidelines of the Extractive Industries Transparency Initiative"). The legislative history of Section 1504 also makes clear that the statute was intended to "complement multilateral transparency efforts such as [EITI]." 74 CONG. REC. S3815-16 (daily ed. May 17, 2010) (statement of Sen. Richard Lugar). Although specific EITI standards are developed by the participating countries and companies, EITI principles strongly urge "respect for existing contracts and laws," and require weighing "the concerns of companies regarding commercial

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person," so long as that information is considered confidential and disclosure is not expressly authorized by statute. 5 U.S.C. § 552(b)(4). Further, the Trade Secrets Act imposes criminal penalties on employees or officers of agencies that disclose "to any extent not authorized by law" any information received in the course of business (including information received in reports filed with the agency) that "relates to [] trade secrets" or other commercially sensitive information. 18 U.S.C. § 1905. Section 1504 should be interpreted in conformance with the specific requirements and underlying concerns of the Trade Secrets Act and Exemption 4 of the Freedom of Information Act.

7 Although the Release only addresses this critical issue in two footnotes, the widespread public disclosure of payments on a per-project basis poses a significant competitive threat to issuers. The Release makes the unfounded assumption that the "compilation of information" that must be made available online "includes the type and total amount of payments made . . . on a per project and per government basis." Release, at 54 & n.133; *see also id.* at 58 n.141. Yet such disclosure would impose a costly, detrimental, and potentially dangerous requirement on issuers with no basis in the statutory text.

confidentiality." EITI SOURCE BOOK 34 (2005). The publication of an aggregated, per-country compilation would not only satisfy the specific text of the statute, it would fulfill the underlying goal of promoting the international transparency regime of EITI.

In sum, the text of Section 1504, the overall statutory scheme, and the congressional objectives which drove the passage of the statute, all suggest that the Commission should enact a rule which only makes public disclosure of reported issuer information through an appropriate compilation. In developing a process for such a compilation, the competitive concerns of affected companies and the principles behind the EITI strongly counsel in favor of public disclosure of payments on an aggregated, per-country or similar basis.[8]

By adopting the approach outlined above, the Commission could address most of industry's concerns in a single, effective step. The reporting rules applicable to individual resource extraction issuers under Section 13(q) could then be designed simply for the purpose of allowing issuers to provide the Commission with the information required to produce the Commission's compilation in the most efficient and least burdensome manner.

F.3 – Treatment for Purposes of Securities Act and Exchange Act

87 - Should we, as proposed, require the resource extraction payment disclosure to be furnished as exhibits to the annual report? If not, why not? How should it be provided?

In addition to our response to Question 68, we fully support that the disclosure by resource extraction issuers be "furnished" to the Commission and not "filed." The purpose of the disclosure under Section 13(q) is to enhance the accountability of governments for the proceeds they receive from their national resources. We do not believe this disclosure will be material from the standpoint of the resource extraction issuer's investors, and in fact as discussed in response to Question 86, should not be directly available to the public at all. Therefore the disclosure should not be filed as part of the issuer's Exchange Act reports or incorporated into the issuer's Securities Act registration statements.

We also believe that this disclosure should be completely separate from the annual reporting requirements under Form 10-K, Form 20-F and Form 40-F, and instead should be furnished on Form 8-K, or Form 6-K for foreign filers, or on a new annual reporting form developed for the purpose. We also continue to believe that the timeframe for this disclosure be established as no earlier than 150 days following the end of the most recent calendar year, for the reasons indicated in Question 68. Because the disclosures are likely to be voluminous, and the process to develop them manually-intensive, we urge the Commission to adopt the "150 day" deadline to avoid conflicts with 10-K and 10-Q filing processes for registrants.

88 - Should we require the resource extraction payment disclosure to be filed as exhibits, rather than furnished, which would affect issuers' liability under the Exchange Act or under the Securities Act (if any such issuer incorporates by reference its annual report into a Securities Act registration statement)?

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[8] The Commission may also consider enacting exceptions, based on its statutory mandate to make disclosure "practicable," for situations in which even a per-country disclosure would reveal information of a sensitive nature.

No, the Section 13(q) disclosure should not be "filed" with the Commission but rather "furnished" as discussed in our response to Question 87.

89 - Under Exchange Act section 18, "Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to [the Exchange Act] or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15, 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." Is it appropriate not to have the disclosures subject to Section 18 liability even if the elements of Section 18 could otherwise be established? Should we require the resource extraction payment disclosure to be filed for purposes of Section 18 of the Exchange Act, but permit an issuer to elect not to incorporate the disclosure into Securities Act filings?

As discussed in our response to Question 87, the resource extraction payment disclosure should be deemed furnished rather than filed with the SEC and should not be subject to liability under Section 18 of the Exchange Act. This disclosure should not be deemed to be incorporated by reference into any filing under the Exchange Act or Securities Act, except to the extent that the issuer specifically incorporates it by reference. Issuers that failed to comply with the resource extraction payment-disclosure would be subject to violation of Securities Exchange Act Section 13(a) or 15(d), as applicable.

90 - Should the resource extraction payment disclosure be furnished annually on Form 8-K? Would that approach be consistent with the statute? If so, should foreign private issuers, which do not file Forms 8-K, be permitted to submit the resource extraction payment disclosure either in their Form 20-F or Form 40-F, as applicable, or annually on Form 6-K, at their election?

We would support the Commission's decision to have the resource extraction payment disclosure furnished annually on Form 8-K, as also stated in our response to Question 68. This approach would be consistent with the statute since Section 13(q) did not specify the location of the annual report requirement. Foreign private issuers should be permitted to submit this disclosure on Form 6-K. Alternatively, the information could be furnished on a new annual report form developed specifically for the purpose. Consistent with API's other recommendation, such report furnished by individual resource extraction issuers should be solely for the use of the Commission in preparing its compilation as discussed in more detail in our response to Question 86.

G. Effective Date

91 - Should we provide a delayed effective date for the final rules, either for all issuers subject to the rules or for certain types of issuers (e.g. smaller reporting companies or foreign private issuers)? Would doing so be consistent with the statute? Why or why not? If we should provide for a delayed effective date, should issuers be required to provide disclosure in an annual report for the fiscal year ending on or after June 30, 2012, September 30, 2012, December 31, 2012, or some other date?

We propose that for consistency and comparability all issuers would be subject to the same effective date.

The level of disclosures proposed in the rule release will necessitate significant enterprise resource planning system (ERP) changes. With final rules to be issued in April 2011, only 8 months will remain in 2011 to complete certain needed ERP system modifications to enable updated transaction capture to begin by January 1, 2012 for a calendar year 2012 effective date. We believe that a 2012 effective date is feasible only if the disclosures remain unaudited, scope is limited to upstream activities, "project" is defined at the country or reporting unit level, and reporting is on a "gross" basis (i.e., as paid to the government) and in U.S. dollars. If the final rules require the information to be audited, include downstream activities, define "project" at a granular level, require "net" reporting and reporting of payments in multiple currencies, the first feasible calendar year is 2014, with required reporting in mid-2015. If the Commission ultimately defines the disclosure requirements in this manner, consideration could be given to requiring more limited disclosures for a two year (2012 and 2013) transition period before the more onerous requirements become effective. In addition to the complexities of Section 13(q) itself, the recommended timeline above is influenced by existing systems initiatives, limited information technology resources, and resource competition due to extensive system changes that may be required to address FASB and IASB convergence initiatives.

III. PAPERWORK REDUCTION ACT

We request comment on the accuracy of our estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (iv) evaluate whether there are ways to minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and (v) evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

In particular, we request comment and supporting empirical data for purposes of the PRA on whether the proposed rule and form amendments:

- ***will affect the burden hours and costs required to produce the annual reports on Forms 10-K, 20-F and 40-F; and***
- ***if so, whether the resulting change in the burden hours and costs required to produce those Exchange Act annual reports is the same as or different than the estimated incremental burden hours and costs proposed by the Commission.***

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090, with reference to File No. S7-42-10.

The compliance burdens and costs that will be incurred in total by the approximately 1,100 issuers covered by Section 13(q) and these proposed rules are significantly greater than the estimated amounts provided by the Commission. We have divided our comments into two areas: 1) the costs associated with initial implementation of the systems changes and development of disclosures controls and procedures to record, process, summarize and report this information, and 2) the ongoing annual costs to prepare the required disclosure.

While the Commission has acknowledged that issuers will incur some costs for the initial implementation effort, we believe these costs will be much greater than envisioned by the Commission or the writers of the statute. As noted in our October 12, 2010 comment letter and throughout our responses on the proposed rules, significant systems modifications will be necessary to capture and report payment data at the project level, for each type of payment, government payee and currency of payment. In addition, our general ledger systems generally do not capture "in-kind" oil or natural gas payments at all. These complex changes will be required to our core enterprise resource planning (ERP) systems, requiring significant internal and external resources. ERP and financial reporting system changes that would drive implementation costs include 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 data mapping rules from ERP systems to financial reporting systems; building new collection tools within financial reporting systems; establishing a trading partner structure to identify and provide granularity around government entities; establishing transaction types to accommodate types of payment (e.g., royalties, taxes, bonuses etc.); and developing a systematic approach to handle take-in-kind situations. In addition, for some companies, custom databases will need to be developed to consolidate this information from multiple ERP instances for final reporting. Screening level estimates for this work suggest implementation costs will run in the tens of millions of dollars for large filers and millions of dollars for many smaller filers. 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. Less favorable outcomes in the final rules, particularly regarding auditing, project definition, reporting of non-consolidated entities, inclusion of "downstream" operations, and "net" and accrual reporting, would further increase total costs by a substantial amount. These costs exclude the economic loss borne by shareholders that could result from highly disaggregated disclosures of competitively sensitive information, which will eventually be orders of magnitude higher.

As noted in our October 12, 2010 comment letter, we estimate that this implementation work will take a significant amount of calendar time. With final rules to be issued in April 2011, only 8 months will remain in 2011 to complete certain needed systems modifications to enable updated transaction capture to begin by January 1, 2012 for a calendar year 2012 effective date. We believe that a 2012 effective date is feasible only if the disclosures remain unaudited, scope is limited to upstream activities, "project" is defined at the country or reporting unit level, and reporting is on a "gross" basis (i.e., as paid to the government) and in U.S. dollars. If the final rules require the information to be audited, include downstream activities, define "project" at a granular level, require "net" reporting and reporting of payments in multiple currencies, the first feasible calendar year is 2014, with required reporting in mid-2015. If the Commission ultimately defines the disclosure requirements in this manner, consideration could be given to requiring more limited disclosures for a two year (2012 and 2013) transition period before the more onerous requirements become effective. In addition to the complexities of Section 13(q) itself, the recommended timeline above is influenced by existing systems initiatives, limited information technology resources, and resource competition due to extensive system changes that may be required to address FASB and IASB convergence initiatives.

We also believe that the industry's ongoing annual costs of complying with these rules will far exceed the estimates developed by the Commission of 52,932 hours of internal company personnel time (an average of about 50 hours per issuer) and $11,857,200 (an average of about $10,000 per issuer) for outside professional services. Per footnote 166 in the proposed rules, the internal burden estimate assumed an incremental 75 hours for completing this annual work, which is less than the 100-150 hours assumed per issuer for Commission's estimates related to the 2008 oil and gas rules. We believe that complying with these new rules will be far more complex and time consuming than the oil and gas disclosures, whose burden we also believe was underestimated by the Commission. The oil and gas disclosures are summarized at the continent level, not at the project level. Moreover, the oil and gas disclosures rely on existing reserve databases and accrual-basis accounting records, which are by nature summarized in our consolidation systems. Manual adjustments are limited. While it is difficult to reliably estimate incremental burden for rules not yet fully defined, we believe that a more realistic estimate is hundreds of hours per year for each large issuer with many foreign locations, assuming unaudited reporting, and significantly more if audited, or if the final rules are such that issuers are not able to automate material parts of the collection and reporting process.

Incremental costs for external professional services will also be significantly higher than the Commission's estimate. Incremental external costs will primarily be from XBRL tagging and higher printing costs. It is not possible to estimate these costs until the final rules clarify the definition of "project," inclusion of non-consolidated entities or "downstream" operations, and "net" and accrual reporting.

Finally, we also believe that incorporating API's key recommendations into the final rules is essential in order for the Commission to comply with the spirit of President Obama's January 18, 2011 Executive Order on Improving Regulation and Regulatory Review. Among other things, the Executive Order makes clear that regulatory action should promote economic growth and competitiveness; use the least burdensome means for achieving regulatory ends; and take into account benefits and costs, both quantitative and qualitative.

IV. COST BENEFIT ANALYSIS

No comments requested.

V. CONSIDERATION OF BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

We request comment on whether the proposals, if adopted, would promote efficiency, competition and capital formation or have an impact or burden on competition. In particular, we request comment on the potential effect on efficiency, competition and capital formation should the Commission not adopt certain exceptions or accommodations. Commentators are requested to provide empirical data and other factual support for their views, if possible.

As stated in our letter to the Commission dated October 12, 2010, the over-arching issue for the industry with respect to Section 13(q) of the Dodd-Frank Act is shareholder protection and how project level disclosures could harm shareholder value while offering no benefit to most investors. We continue to fully support that comment and also fully support the comments provided in the letter from the eight law firms dated November 5, 2010, which also indicated that the authority provided to the Commission by Section 23(a)(1) allows the Commission to grant allowances for compliance with conflicting foreign laws, rules and orders at its discretion.

In addition, we discussed in our October 12th letter our views with respect to the requirements of Section 3(f) of the Exchange Act that impact the rulemaking process and strongly stress the importance of both of these Sections as well as the implications impacting shareholder protection.

Specifically, to avoid significant harm to shareholder value, the rules must accommodate situations where disclosure of project level information would:

1. Put the registrant in breach of contracts or local laws and regulations,
2. Be commercially harmful, or
3. Introduce security or safety risks.

These safeguards would protect capital formation and help ensure the disclosures do not undermine competition through the release of commercially sensitive information. We did not reiterate herein our specific comments with respect to shareholder protection, but refer the Commission back to our responses to Questions 55 – 60.

The industry strongly believes that disclosure of commercially sensitive information, on a disaggregated basis, could disadvantage U.S.-listed companies relative to non-listed companies because the following could occur:

1. Host governments could select business partners on future opportunities that do not have similar reporting requirements; or
2. Host governments could remove U.S.-listed companies as operators of existing operations; or
3. Competitors could utilize the disaggregated information to gain an advantage in future bidding and contract negotiations.

As indicated by the Commission in the proposed rule, Section 23(a) (2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purpose of the Exchange Act. We believe the following examples help demonstrate how the requirement to disclose commercially sensitive payment information, on a highly disaggregated basis, could result in our inability as an industry to compete fairly, which is in conflict with the Exchange Act and would cause significant harm to our companies and our shareholders:

- Example 1. Country A invites investors to develop its natural resources. Officials from Country A use Section 13(q) disclosures for projects in Country B to determine the rates of return that SEC filers are willing to accept. Country A uses this information to negotiate more favorable terms. The shareholders of SEC filers participating in Country A's projects receive a lower investment return than would otherwise be the case.

- Example 2. AmeriCo, a U.S. company and SEC filer, wishes to pursue Project X in Country B. In order to be economically viable, Project X requires favorable tax and royalty terms. Country B is willing to grant appropriate fiscal relief for Project X, but does not wish the terms to be publicly disclosed because the disclosure would create pressure for Country B to grant comparable terms on other projects. Country B awards Project X to a non-U.S. oil company that is not subject to Section 13(q) disclosure.

- Example 3. AmeriCo, a U.S. company and SEC filer, begins acquiring high-potential exploratory acreage on a confidential basis through agents in Country B. The acreage acquisition requires AmeriCo to pay bonuses to the local governments. Because AmeriCo must disclose these bonuses, its identity is revealed. A non-U.S. competitor of AmeriCo not subject to Section 13(q) steps into the market and begins bidding for the remaining available acreage, driving up AmeriCo's costs significantly. At the same time, the non-U.S. competitor is able to continue acquiring acreage in another part of Country B on a confidential basis.

- Example 4. Country A participates in the Extractive Industries Transparency Initiative and supports country-level disclosure of aggregate payment data. For economic, competitive, and foreign policy reasons, Country A considers the specific commercial terms of its agreements to develop natural resources to be state secrets and has accordingly passed laws prohibiting public disclosure of such terms. If the rules implementing Section 13(q) require disaggregated public disclosure of commercially sensitive terms, AmeriCo, a U.S. company and SEC filer, will be unable to bid on projects in Country A. As a result, Country A's resources are developed by national oil companies that are not subject to Section 13(q).

In addition, if the Commission does not exercise its discretion to limit publicly-available information to a compilation of aggregate data across all filers, this requirement, as written, will lead to the disclosure of significant amounts of immaterial information that is not likely to have any bearing whatsoever on a reasonable investor's investment decision.

The proposed rules are also not consistent with the Commission's obligations under Section 3(f) and Section 23(a) (2) or its stated mission to protect investors. These impacts could be mitigated by restricting publicly available information to a compilation of aggregate data, as described in our response to Question 86 and as permitted by the statute, and by establishing an appropriate definition for 'project' that avoids disclosure of commercially sensitive information. Please reference the suggested definitions for project in our response to Questions 40 and 45. Another mitigation action would be to allow for redaction of competitively sensitive project-level information for a period of time.