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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240 and 249b

[Release No. 34-87783; File No. S7-24-19]

RIN 3235-AM06

Disclosure of Payments by Resource Extraction Issuers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing Rule 13q-1 and an amendment to Form SD to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") relating to disclosure of payments by resource extraction issuers. Section 1504 of the Dodd-Frank Act added Section 13(q) to the Securities Exchange Act of 1934. Section 13(q) directs the Commission to issue rules requiring resource extraction issuers to include in an annual report information relating to payments made to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Section 13(q) requires these issuers to provide information about the type and total amount of payments made for each of their projects related to the commercial development of oil, natural gas, or minerals, and the type and total amount of payments made to each government. In addition, Section 13(q) requires a resource extraction issuer to provide information about those payments in an interactive data format.

DATES: Comments should be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment forms (http://www.sec.gov/rules/proposed.shtml); or
- Send an email to rule-comments@sec.gov. Please include File Number S7-24-19 on the subject line.

Paper Comments:

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-24-19. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. We will post all comments on our internet website (http://www.sec.gov/rules/proposed.shtml). Comments also are available for website viewing and printing in our Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

We or the staff may add studies, memoranda or other substantive items to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such

materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Elliot Staffin, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission initially adopted Rule 13q-1 and amendments to Form SD on August 22, 2012. Those rules were vacated by the U.S. District Court for the District of Columbia on July 2, 2013. On June 27, 2016, the Commission adopted a revised version of Rule 13q-1 and amendments to Form SD. On February 14, 2017, the revised rules were disapproved by a joint resolution of Congress pursuant to the Congressional Review Act. Although the joint resolution vacated the 2016 Rules, the statutory mandate under Section 13(q) of the Exchange Act remains in effect. As a result, we are proposing 17 CFR 240.13q-1 ("Rule 13q-1") and an amendment to Form SD[1] under the Securities Exchange Act of 1934 ("Exchange Act").[2]

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[1] 17 CFR 249b.400.

[2] 15 U.S.C. 78a *et seq*.

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I. BACKGROUND

A. Section 13(q) of the Exchange Act

Section 13(q) was added to the Exchange Act in 2010 by Section 1504 of the Dodd-Frank Act.[3] It directs the Commission to issue final rules that require each resource extraction issuer to include in an annual report information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. The information must include: (i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government.[4]

On August 22, 2012, the Commission adopted Rule 13q-1 and amendments to Form SD (the "2012 Rules") as mandated by Section 13(q) of the Exchange Act.[5] The 2012 Rules were vacated by the U.S. District Court for the District of Columbia on July 2, 2013.[6] On June 27, 2016, the Commission adopted a revised version of Rule 13q-1 and amendments to Form SD

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[3] Pub. L. No. 111-203 (July 21, 2010).

[4] 15 U.S.C. 78m(q)(2)(A). As discussed further below, Section 13(q) also specifies that the Commission's rules must require certain information to be provided in an interactive data format.

[5] *See* Release No. 34-67717 (Aug. 22, 2012) [77 FR 56365 (Sept. 12, 2012)] (the "2012 Rules Adopting Release") *available at* http://www.sec.gov/rules/final/2012/34-67717.pdf. *See also* Release No. 34-63549 (Dec. 15, 2010) [75 FR 80978 (Dec. 23, 2010)] (the "2012 Rules Proposing Release") *available at* http://www.sec.gov/rules/proposed/2010/34-63549.pdf.

[6] *See* API v. SEC, 953 F. Supp. 2d 5 (D.D.C. July 2, 2013). The District Court based its decision on two findings: first, that the Commission misread Section 13(q) to compel the public disclosure of the issuers' reports; and second, the Commission's explanation for not granting an exemption for when disclosure is prohibited by foreign governments was arbitrary and capricious. *See* 953 F. Supp. 2d at 17-19 and 21-23.

(the "2016 Rules") that addressed the concerns raised in the prior litigation.[7] On February 14, 2017, the 2016 Rules were disapproved by a joint resolution[8] of Congress pursuant to the Congressional Review Act (the "CRA").[9] We are proposing a new Rule 13q-1 and amendments to Form SD to implement Section 13(q).[10]

Section 13(q) defines several key terms:

- "Resource extraction issuer" means an issuer that is required to file an annual report with the Commission and engages in the commercial development of oil, natural gas, or minerals;[11]
- "Commercial development of oil, natural gas, or minerals" includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the Commission;[12]

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[7] *See* Release No. 34-78167 (June 27, 2016) [81 FR 49359 (July 27, 2016)] *available at* https://www.sec.gov/rules/final/2016/34-78167.pdf (the "2016 Rules Adopting Release"). *See also* Release No. 34-76620 (Dec. 11, 2015) [80 FR 80057 (Dec. 23, 2015)] *available at* https://www.sec.gov/rules/proposed/2015/34-76620.pdf (the "2016 Rules Proposing Release"). Unless otherwise indicated, comment letters referenced in this release were submitted in connection with the 2016 Rules.

[8] *See* H.R.J. Res. 41, 115th Cong. (2017) (enacted).

[9] 5 U.S.C. 801 *et seq*.

[10] Although the joint resolution vacated the 2016 Rules, the statutory mandate under Section 13(q) remains in effect. We discuss the CRA's requirements for subsequent rulemaking in connection with disapproved rules in Section I.C.2. below.

[11] 15 U.S.C. 78m(q)(1)(D).

[12] 15 U.S.C. 78m(q)(1)(A).

- "Foreign government" means a foreign government, a department, agency or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission;[13] and
- "Payment" means a payment that:
  - Is made to further the commercial development of oil, natural gas, or minerals;
  - Is not de minimis; and
  - Includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (the "EITI")[14] (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[15]

Section 13(q) specifies that "[t]o the extent practicable, the rules . . . shall support the commitment of the Federal Government to international transparency promotion efforts relating

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[13] 15 U.S.C. 78m(q)(1)(B).

[14] The EITI is a voluntary coalition of oil, natural gas, and mining companies, foreign governments, investor groups, and other international organizations committed to establishing a global standard (the "EITI Standard") for the good governance of oil, gas, and mineral resources. The coalition was formed with industry participation and describes itself as being dedicated to fostering and improving transparency and accountability in resource-rich countries through the publication and verification of company payments and government revenues from oil, natural gas, and mining. *See* Implementing EITI for Impact—A Handbook for Policymakers and Stakeholders (2012) ("EITI Handbook"), at xii. After volunteering to become an EITI candidate, a country must implement a series of requirements set forth in the EITI Standard and complete an EITI validation process to become a compliant member. Although the United States became an EITI candidate country in March 2014, it withdrew its EITI candidacy in November 2017. *See infra* Section II.B.

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

to the commercial development of oil, natural gas, or minerals."[16] Although the statutory definition of "payment" explicitly refers to the EITI, the provision in Section 13(q) about supporting the Federal Government's commitment to international transparency promotion efforts does not mention the EITI.[17]

Pursuant to Section 13(q), the rules must require a resource extraction issuer to submit the payment information included in an annual report in an interactive data format[18] using an interactive data standard established by the Commission.[19] Section 13(q) defines "interactive data format" to mean an electronic data format in which pieces of information are identified using an interactive data standard.[20] It also defines "interactive data standard" as a standardized list of electronic tags that mark information included in the annual report of a resource extraction issuer.[21] Section 13(q) also requires that the rules include electronic tags that identify, for any payments made by a resource extraction issuer to a foreign government or the Federal Government:

- The total amounts of the payments, by category;
- The currency used to make the payments;
- The financial period in which the payments were made;

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[16] 15 U.S.C. 78m(q)(2)(E).

[17] *See id*.

[18] 15 U.S.C. 78m(q)(2)(C).

[19] 15 U.S.C. 78m(q)(2)(D).

[20] 15 U.S.C. 78m(q)(1)(E).

[21] 15 U.S.C. 78m(q)(1)(F).

- The business segment of the resource extraction issuer that made the payments;
- The government that received the payments and the country in which the government is located; and
- The project of the resource extraction issuer to which the payments relate.[22]

Section 13(q) further authorizes the Commission to require additional electronic tags that it determines are necessary or appropriate in the public interest or for the protection of investors.[23]

In addition, Section 13(q) requires, to the extent practicable, that the Commission make publicly available online a compilation of the information required to be submitted by resource extraction issuers under the rules.[24] The statute does not define the term compilation.

Finally, Section 13(q) provides that the final rules "shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the fiscal year . . . that ends not earlier than one year after the date on which the Commission issues final rules . . ."[25]

Congress enacted Section 1504 of the Dodd-Frank Act to increase the transparency of payments made by oil, natural gas, and mining companies to governments for the purpose of the commercial development of their oil, natural gas, and minerals. According to Senator Richard Lugar, who co-sponsored the amendment that was the basis for this statutory provision, a goal of

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[22] 15 U.S.C. 78m(q)(2)(D)(ii).

[23] *Id.*

[24] 15 U.S.C. 78m(q)(3).

[25] 15 U.S.C. 78m(q)(2)(F).

requiring transparency was to provide more information to the global commodity markets and "help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues."[26]

B. International Transparency Promotion Efforts

In 2013, the European Parliament and Council of the European Union ("EU") adopted two directives that include payment disclosure rules.[27] The EU Accounting Directive and the EU Transparency Directive (the "EU Directives") are very similar in content. Both determine the applicability and scope of the disclosure requirements and set the baseline in each EU member state and European Economic Area ("EEA")[28] country for annual disclosure requirements for oil, gas, mining, and logging companies concerning the payments made to governments on a per country and per project basis.[29] All EU member states have implemented both of the EU Directives.[30] Norway has also adopted regulations similar to the EU Directives.[31]

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[26] *See* 156 CONG. REC. S3816 (daily ed. May 17, 2010).

[27] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings ("EU Accounting Directive"); and Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Directive 2007/14/EC on the implementation of certain provisions of Directive 2004/109/EC ("EU Transparency Directive").

[28] *See* European Commission Memo (June 12, 2013) ("New disclosure requirements for the extractive industry and loggers of primary forests in the Accounting (and Transparency) Directives (Country by Country Reporting) – frequently asked questions"). The EEA is composed of the EU member states plus Iceland, Liechtenstein, and Norway.

[29] The EU Accounting Directive regulates disclosure of financial information by all "large" companies incorporated under the laws of an EU member state or those of an EEA country, even if the company is privately held, and requires covered oil, gas, mining, and logging companies to disclose specified payments to

Canada adopted a Federal resource extraction disclosure law, the Extractive Sector Transparency Measures Act ("ESTMA"), which went into effect on June 1, 2015.[32] In March 2016, Canada finalized its ESTMA Guidance[33] and the ESTMA Technical Reporting Specifications ("ESTMA Specifications"), which provide guidelines for complying with the ESTMA disclosure regime.[34] ESTMA covers entities that are engaged in the commercial development of oil, gas, or minerals or that control another entity that is engaged in those

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governments. *See* Article 3(4) of the EU Accounting Directive, which defines "large undertakings" (*i.e.*, large companies) to mean those which on their balance sheet dates exceed at least two of the three following criteria: (a) balance sheet totaling €20 million; (b) net turnover of €40 million; and (c) average number of employees of 250. The EU Transparency Directive applies these disclosure requirements to all companies listed on EU-regulated markets even if they are not registered in the EEA or are incorporated in other countries. *See* EU Transparency Directive, Art. 2(1)(d) and Art. 6.

[30] Resource extraction issuers commenced filing reports under the EU Directives for 2015 and have since annually filed such reports. According to the National Resource Governance Institute ("NRGI"), approximately 90 U.K.-reporting companies have entered their fourth annual round of public payments to governments disclosures in 2019. *See* NRGI, *U.K. Financial Regulator Confirms Extractive Companies Must Name Government Entities to Which They Make Payments* (April 25, 2019), *available at* https://resourcegovernance.org/blog/uk-financial-regulator-confirms-extractive-companies-must-name-govts-they-pay; *see also* BHP Billiton's Economic Contribution Report 2018, *available at* https://www.bhp.com/investor-centre/-/media/documents/investors/annual-reports/2018/bhpeconomiccontributionreport2018.pdf; BP p.l.c.'s Report on Payments to Governments for the year ended December 31, 2018, *available at* https://www.bp.com/content/dam/bp/business-sites/en/global/corporate/pdfs/sustainability/group-reports/bp-report-on-payments-to-governments-2018.pdf; and Royal Dutch Shell's Payments to Governments Report for the Year 2017, *available at* https://www.shell.com/sustainability/transparency/payments-to-governments/_jcr_content/par/textimage.stream/1554163266774/0354390d1d06f4fe154700810bc50102817feb82/royal-dutch-shell-the-payments-to-governments-report-for-the-year-2018.pdf.

[31] *See* PWYP-Norway, *Norwegian Regulations concerning country-by-country reporting* (Feb. 24, 2014), *available at* http://www.publishwhatyoupay.no/en/node/16414, which provides an English translation of the Norwegian source document, Forskrift om land-for-land rapportering (Dec. 20, 2013), *available at* https://www.regjeringen.no/no/dokumenter/forskrift-om-land-for-land-rapportering/id748525/.

[32] *See* ESTMA, 2014 S.C., ch. 39, s. 376 (Can.).

[33] ESTMA Guidance *available at* https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA%E2%80%93Guidance.pdf.

[34] ESTMA Specifications *available at* https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA%E2%80%93TRS.pdf.

activities, subject to certain limitations.[35] Public reporting under ESTMA was required for fiscal years beginning after June 1, 2015.[36]

On March 19, 2014, the United States became an EITI candidate country,[37] following which the United States Extractive Industries Transparency Initiative (the "USEITI") submitted reports for 2015 and 2016. On November 2, 2017, the United States withdrew as an EITI implementing country.[38] It has, however, maintained its status as a supporting country of the EITI.[39]

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

[36] Links to reports made under ESTMA can be found on Natural Resources Canada's website at https://www.nrcan.gc.ca/mining-materials/estma/18198.

[37] When becoming an EITI candidate, a country must establish a multi-stakeholder group, including representatives of civil society, industry, and government, to oversee implementation of the EITI. The stakeholder group for a particular country agrees to the terms of that country's EITI plan, including the requirements for what information will be provided by the governments and by the companies operating in that country. Generally, under the EITI, companies and the host country's government submit payment information confidentially to an independent administrator selected by the country's multi-stakeholder group, which is frequently an independent auditor. The auditor reconciles the information provided to it by the government and by the companies and produces a report. While the information provided in the reports varies among countries, the reports must adhere to the EITI requirements provided in the EITI Standard. *See* the EITI's website at http://eiti.org.

[38] *See* letter from Gregory Gould, Director of the Office of Natural Resources Revenue, U.S. Department of the Interior, to Fredrik Reinfeldt, Chair of the EITI (Nov. 2, 2017)) (noting "the fact that the U.S. laws prevent us from meeting specific provisions of the EITI Standard"). This letter is available at https://www.doi.gov/sites/doi.gov/files/uploads/eiti_withdraw.pdf.

[39] *See id.* The United States is currently one of 15 supporting countries of the EITI. Supporting governments are committed to promote good governance in the extractive industries across the world. Although the only formal requirement of a supporting country is to make a clear public endorsement, a country can also support the EITI through financial, technical, and political support at the international level and in implementing and other resource-rich countries. *See* https://eiti.org/supporters/countries.

C. The 2016 Rulemaking and Congress's Actions under the CRA

1. Key Aspects of the 2016 Rules

The 2016 Rules provided for issuer-specific, public disclosure of payment information broadly in line with the standards adopted under other international transparency promotion regimes, including the EU Directives, ESTMA and the EITI. The 2016 Rules differed from the 2012 Rules in certain key aspects. These aspects included:

- Defining project to mean "operational activities governed by a single contract, license, lease, concession, or similar legal agreement, which forms the basis for payment liabilities with a government;"[40]
- Adopting a targeted exemption to permit issuers to delay reporting payment information in connection with certain exploratory activities for one year;[41]
- Revising the definition of "control" under the 2012 Rules, which had relied on the definition of control under Exchange Act Rule 12b-2,[42] by basing the definition instead on applicable accounting principles;[43]

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[40] *See* Item 2.01(d)(9) of the 2016 Form SD; *see also* the 2016 Adopting Release, Section II.E.3. This definition also provided that "[a]greements that are both operationally and geographically interconnected may be treated by the resource extraction issuer as a single project." The 2012 Rules did not define the term "project" but provided guidance on the meaning of the term. *See* the 2012 Adopting Release, Section II.D.3.c.

[41] *See* the 2016 Form SD, Item 2.01(b)(1); *see also* the 2016 Rules Adopting Release, Section II.I.3. The 2012 Rules did not provide for any exemptions, targeted or otherwise.

[42] *See* the 2012 Rules Adopting Release, Section II.D.4.c.

[43] *See* the 2016 Form SD, Item 2.01(d)(3); *see also* 2016 Rules Adopting Release, Section II.D.3.

- Adopting an alternative reporting mechanism whereby issuers would be able to meet the requirements of the 2016 Rules by providing disclosure that complies with a foreign jurisdiction's or the USEITI's resource extraction payment disclosure requirements if they are deemed "substantially similar" by the Commission;[44]
- Adopting transitional relief for issuers that had recently acquired companies, where such companies had not previously been subject to the Section 13(q) rules or another "substantially similar" jurisdiction's requirements in its last full fiscal year;[45]
- Expressly permitting the submission of requests for exemptive relief on a case-by-case basis;[46] and
- Including a provision requiring the Commission's staff, to the extent practicable, to periodically make available online a public compilation of the payment information required to be filed by issuers on Form SD.[47]

In other respects, the 2016 Rules were the same or similar to the 2012 Rules. For example, under both sets of rules:

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[44] *See* the 2016 Form SD, Item 2.01(c); *see also* the 2016 Rules Adopting Release, Section II.J.3.

[45] *See* the 2016 Form SD, Item 2.01(b)(2); *see also* the 2016 Rules Adopting Release, Section II.G.3.

[46] *See* the 2016 Rules Adopting Release, Section II.I.3.

[47] *See* the 2016 Release, Section II.H.3. In the 2012 rulemaking, the Commission did not affirmatively adopt such a provision after noting that, by providing an issuer's Form SD filings to the public through the searchable, online EDGAR system, users of the information would be able to produce their own up-to-date compilations in real time. In the 2016 rulemaking, however, after reasserting this position, the Commission acknowledged that, as some commenters maintained, the statute could be read to require the Commission to periodically provide a public compilation separate from the individual compilations.

- There was no broad, rule-based exemption for situations where a foreign law or contract term prohibited the payment disclosure;
- A resource extraction issuer had to provide the payment information, including the issuer's identity, publicly on Form SD;[48]
- Form SD was to be filed with, and not furnished to, the Commission, thereby making the payment disclosure subject to liability under Section 18 of the Exchange Act;[49]
- The definitions for "foreign government" and "federal government" were the same under both sets of rules;[50]
- The definitions for "payment"[51] and "commercial development of oil, natural gas, or minerals"[52] were similar under both sets of rules; and

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[48] *See* the 2016 Rules Adopting Release, Section II.H.3. and the 2012 Rules Adopting Release, Section II.F.1.c. Mindful of the 2013 District Court decision, the Commission acknowledged that Section 13(q) provides the Commission with the discretion to require public disclosure of payments by resource extraction issuers or to permit confidential filings. The Commission, however, explained its continued belief that requiring public disclosure of each issuer's specific filings (including all the payment information) would best accomplish the purpose of the statute.

[49] *See* the 2016 Rules Adopting Release, Section II.L.3. and the 2012 Rules Adopting Release, Section II.F.3.c.

[50] *See* the 2016 Adopting Release, Section II.F.3. and the 2012 Adopting Release, Section II.E.3.

[51] The 2012 Rules' definition of payments added payments for infrastructure improvements to the list of statutorily mandated payment types required to be disclosed. *See* the 2012 Rules Adopting Release, Section II.D.1.c. The 2016 Rules added to the 2012 Rules' list of required payment types community and social responsibility payments that are required by law or contract. The 2016 Rules also added an instruction clarifying the types of royalty payments required to be disclosed. *See* the 2016 Rules Adopting Release, Section II.C.3.

[52] In the 2012 rulemaking, the Commission defined "commercial development of oil, natural gas, or minerals" to include certain statutorily mandated activities. It then provided guidance that the term "commercial development" applied only to activities directly related to the commercial development of oil, natural gas, or minerals, and was not intended to capture ancillary or preparatory activities. *See* 2012 Rules Adopting Release, Section II.C.3. In the 2016 rulemaking, the Commission adopted the same definition of "commercial

- Issuers had to electronically tag the payment information using the eXtensible Business Reporting Language ("XBRL") electronic format.[53]

2. Congressional Disapproval under the CRA

On February 14, 2017, the President signed a joint resolution of Congress disapproving the 2016 Rules pursuant to the CRA. Members of the House and the Senate who supported the joint resolution expressed a number of concerns with the 2016 Rules. The principal concerns focused on the potential adverse economic effects of the rules. Specifically, members expressed the view that the 2016 Rules would impose undue compliance costs on companies,[54] undermine job growth and burden the economy,[55] and impose competitive harm to U.S. companies relative to foreign competition.[56] Members also expressed concern that the rule extended beyond the SEC's core mission.[57]

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development of oil, natural gas, or minerals" as in the earlier rulemaking while expanding upon and codifying the guidance regarding activities pertaining to "processing" and "export." *See* the 2016 Rules Adopting Release, Section II.B.3.

[53] *See* the 2016 Rules Adopting Release, Section II.K.3. and the 2012 Rules Adopting Release, Section II.F.2.c.

[54] *See, e.g.*, 163 CONG. REC. H.848 (February 1, 2017) (Statement of Rep. Hensarling) ("The SEC has estimated that ongoing compliance costs for his rule could reach as high as $591 million annually... Furthermore, this rule still goes far beyond the statute passed by Congress and mandates public specialized disclosures that cost more and more, and is more burdensome than the law requires.").

[55] *See id*. (Statement of Rep. Hensarling) ("That is $591 million every year that could better be used to hire thousands more Americans in an industry where the average pay is 50 percent higher than the U.S. average. Literally we could be talking about 10,000 jobs on the line for this ill-advised rule.").

[56] *See id.* (Statement of Rep. Hensarling) ("The economic opportunities of. . .millions of Americans. . . are not helped by top-down, politically driven regulations that give many foreign companies an advantage over American public companies. That is exactly what this Securities and Exchange Commission regulation that we are talking about today does. It forces American public companies to disclose [expensive] proprietary information that can actually be obtained by their foreign competitors, including state-owned companies in China and Russia. This is just one regulation out of thousands and thousands that are burdening our companies, our job

Some members who voted in favor of the disapproval nonetheless reiterated the rule's transparency and anti-corruption objectives. For instance, a group of senators who voted for the joint resolution expressed their "strong support" for anticorruption policies and stated that they were "committed to efforts to encourage corporate transparency on these matters consistent with the international standards already adopted by European and other governments."[58] They also indicated, however, that they voted in favor of disapproving the 2016 Rules in part due to their concern that those rules would place U.S. and other SEC-registered companies at a significant competitive disadvantage.[59]

Although the joint resolution vacated the 2016 Rules, the statutory mandate under Section 13(q) of the Exchange Act remains in effect. As a result, the Commission is statutorily obligated to issue a new rule.[60] Under the CRA, however, the Commission may not reissue the

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creators, and are costing our households by one estimate, over $14,000 a year…"); *see also* 163 CONG. REC. H.851 (February 1, 2017) (Statement of Rep. Wagner) ("This particular SEC regulation. . .regarding resource extraction disclosures will make it more expensive for our public companies that are involved with energy production to be competitive overseas with foreign state-owned companies.").

[57] *See, e.g.*, 163 CONG. REC. H.850 (February 1, 2017) (Statement of Rep. Huizenga) (observing that the Congressional goals underlying Section 13(q) are outside of the SEC's "core mission" of "protect[ing] investors," "maintain[ing] fair, orderly and efficient markets," and "facilitat[ing] capital formation").

[58] *See* Letter from Senator Bob Corker, Senator Susan Collins, Senator Marco Rubio, Senator Johnny Isakson, Senator Lindsey Graham, Senator Todd Young (Feb. 2, 2017), *available at* https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resource-extraction-issuers.shtml.

[59] *See id*.

[60] A number of members who supported the joint resolution noted that the Commission would be obligated to issue a new rule fulfilling the statutory mandate. *See, e.g.*, 163 CONG. REC. H.848, 849 (February 1, 2017) (Statement of Rep. Hensarling) ("Let's also remember that this joint resolution does not repeal section 1504 of Dodd-Frank. I wish it did, but it doesn't… It simply tells the SEC to go back to the drawing board, comply with the Dodd-Frank Act, and come up with a better rule . . ."); 163 CONG. REC. S.635 (Feb. 2, 2017) (Statement of Sen. Crapo) ("What this resolution does is to cause the current SEC rule to not take effect. As it

same rule in "substantially the same form" or issue a new rule that is "substantially the same" as the disapproved rule.[61] The CRA does not define the phrase "substantially the same," but the legislative history[62] urges Congress to provide direction to agencies regarding the possibility of issuing a new rule when debating the resolution of disapproval.[63] Given this legislative history, and the absence of further general guidance from the CRA or any specific legislative guidance from Congress addressing the form of a new rulemaking, we looked to the concerns raised by members of Congress during the floor debates on the joint resolution to assist us in developing a rule that is not "substantially the same"[64] as the 2016 Rules.[65]

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was characterized yesterday on the House floor and will be characterized further today on the Senate floor, what the SEC will need to do is to go back to the drawing board and come up with a better rule that complies with the law of the land.").

[61] *See* 5 U.S.C. 801(b)(2).

[62] The principal sponsors of the CRA submitted identical joint explanatory statements that were "intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms." *See* Joint Explanatory Statement of House and Senate Sponsors (Senators Nickles, Reid, and Stevens), 142 CONG. REC. S.3683 (April 18, 1996).

[63] 142 CONG. REC. S.3686 ("The authors intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.").

[64] *See* 5 U.S.C. 801(b)(2).

[65] *See supra* n. 54-57. In this regard, we note that many of the concerns raised by members of Congress \were raised by commenters in the previous rulemakings. *See, e.g.,* Letters from the American Petroleum Institute ("API") (Feb. 16, 2016); ExxonMobil Corporation ("ExxonMobil") (Feb. 16, 2016); and Chevron Corporation ("Chevron") (Feb. 16, 2016).

We welcome feedback and encourage interested parties to submit comments on any or all aspects of the proposed amendments. When commenting, it would be most helpful if you include the reasoning behind your position or recommendation.

1. Are there any data since the 2016 Rules concerning actual costs of compliance with mandatory disclosure regimes that relate to or otherwise address the Congressional concerns about the potential adverse economic effects of the rules, and specifically, that the 2016 Rules would impose undue compliance costs on companies? Should we consider, and if so how, the compliance cost data in the UK Government's Department for Business, Energy and Industrial Strategy post-implementation review of the UK regulations,[66] in determining how to address the stated Congressional concerns?
2. Have there been any developments or changes in industry practices since the 2016 Rules related to how companies track and record payment information or how they capture the cost of compliance with mandatory disclosure regimes that could impact or otherwise address the stated Congressional concerns?

3. Proposed Rules in Response to the CRA Disapproval

Similar to the prior rules, the proposed rules, which are described in more detail in Part II below, would require resource extraction issuers to submit on an annual basis a Form SD that includes information about payments related to the commercial development of oil, natural gas,

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[66] *See* Department for Business, Energy and Industrial Strategy (BEIS), *Reports on Payments to Governments Regulations: Final Report*, BEIS Research Paper, Jan. 2018, *available at* http://www.legislation.gov.uk/uksi/2014/3209/pdfs/uksiod_20143209_en_001.pdf. . *See infra* Section III.D.11. for a related discussion of the UK report.

or minerals that are made to governments. Given the requirements of Section 13(q), certain elements of the proposed rules are also in the 2016 Rules.[67] Nevertheless, we believe that the proposed rules, considered as a whole, are not in substantially the same form as the 2016 Rules and therefore in compliance with the CRA's restriction on subsequent rulemaking.[68]

In this regard, the proposed new rules include several significant changes to the core provisions of the 2016 Rules. Specifically, the proposed rules would: (1) revise the definition of the term "project" to require disclosure at the national and major subnational political jurisdiction, as opposed to the contract, level;[69] (2) revise the definition of "not de minimis" to include both a project threshold and an individual payment threshold;[70] (3) add two new

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[67] For example, we are proposing the same targeted exemption for exploratory activities, the same transitional relief for recently acquired companies, and a similar alternative reporting mechanism, all of which were adopted in 2016 primarily to limit compliance costs. *See supra* Section I.C.1. We also are proposing the same definitions as adopted in 2016 for "resource extraction issuer," "commercial development of oil, natural gas, or minerals," "payment," and "foreign government." As further discussed below, most commenters who addressed those definitions in the 2016 rulemaking generally supported them.

[68] The CRA instructs that the "new rule" cannot be "substantially the same" or in "substantially the same form" as the disapproved rule. *See* 5 U.S.C. 801(b)(1). We believe that this language clearly reflects Congress' intent that, in issuing a new rule, an agency must do more than substantially revise the rationales supporting the prior rule or the economic analysis underlying the prior rule. Rather, the CRA instructs that the "new rule" itself must be substantially different. As such, we do not believe that readopting the 2016 Rules with modifications only to the rationales or economic analysis in the release would satisfy the substantially different requirement mandated by the plain language of the CRA. Instead, we concur with the views of two scholars that the CRA requires changes to the rule itself. *See* Adam M. Finkel and Jason W. Sullivan, 63 *Administrative Law Review* 707, 757-58 (2011) (asserting that the view that "anything goes so long as the agency merely asserts that external conditions have changed . . . would contravene all the plain language and explanatory material in the CRA. Even if the agency believes it now has better explanations for an identical reissued rule, the appearance of asking the same question until you get a different answer is offensive enough to bedrock good government principles that the regulation should be required to have different costs and benefits after a veto, not just new rhetoric about them.").

[69] *See infra* Section II.F.

[70] *See infra* Section II.C.9.

conditional exemptions for situations in which a foreign law or a pre-existing contract prohibits the required disclosure;[71] (4) add an exemption for smaller reporting companies and emerging growth companies;[72] (5) revise the definition of "control" to exclude entities or operations in which an issuer has a proportionate interest;[73] (6) limit the liability for the required disclosure by deeming the payment information to be furnished to, but not filed with, the Commission;[74] (7) add an instruction in Form SD that would permit an issuer to aggregate payments by payment type made at a level below the major subnational government level;[75] (8) add relief for issuers that have recently completed their U.S. initial public offerings;[76] and (9) extend the deadline for furnishing the payment disclosures.[77] These changes, which directly impact the amount, granularity, timing, scope of, and liability for, the required disclosures, form the basis for our belief that, when considered as a whole, the proposed rules are not in substantially the same form as the 2016 Rules.

The following chart summarizes the primary changes in the proposed rules compared to the 2016 Rules:

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[71] *See infra* Sections II.J.1. and II.J.2.

[72] *See infra* Sections II.J.3.

[73] *See infra* Section II.E.

[74] *See infra* Section II.M.

[75] *See infra* Section II.G.

[76] *See infra* Section II.J.5.

[77] *See infra* Section II.H.

Issue	2016 Rules (Disapproved)	Proposed Rules
Definition of "project"	• Defined as operational activities governed by a single contract, license, lease, concession, or similar legal agreement, which forms the basis for payment liabilities with a government.	• Defined using three factors: (1) type of resource; (2) type of operation; and (3) major subnational jurisdiction.
Aggregation of payments	• No aggregation of payments beyond contract level, except that payments related to operational activities governed by multiple legal agreements could be aggregated together as long as the multiple agreements were operationally and geographically related.	• Aggregation of payments permitted at major subnational jurisdiction level, which must be identified; • Aggregation of payments permitted at levels below major subnational level, which may be described generically (*e.g.*, as county or municipality).
Definition of "not de minimis" payment	• Defined as a payment that equals or exceeds $100,000.	• Defined as any payment that equals or exceeds $150,000 made in connection with a project that equals or exceeds $750,000 in total payments.
Exemptions from compliance based on conflicts with foreign laws or contract terms	• No exemptions for conflicts with foreign laws or contract terms. • Case-by-case exemptive process established.	• Conditional exemptions for foreign law conflicts and pre-existing (pre-adoption) contract terms that prohibit disclosure.
Exemption for smaller reporting companies or emerging growth companies	• No exemption for smaller reporting companies or emerging growth companies.	• Exemption for smaller reporting companies and emerging growth companies.
Definition of "control"	• Based on established financial reporting principles: Issuer has control over an entity when it is required under GAAP or IFRS to consolidate or proportionately consolidate the financial results of that	• Similar to approach under 2016 Rules, except that an issuer is not required to disclose payments made by entities that it only proportionately consolidates.

	entity.	
Filed vs. Furnished -- Application of Exchange Act Section 18 liability	• Reports required to be filed; • Potential Section 18 liability.	• Reports are furnished; • No Section 18 liability.
Relief for Initial Public Offerings (IPOs)	• No relief for IPOs.	• Transitional relief for IPOs; • Issuer would not have to comply with the Section 13(q) rules until the first fiscal year following the fiscal year in which it completed its initial public offering.
Deadline for Furnishing Payment Disclosures	• For all issuers, no later than 150 days after the end of the issuer's most recent fiscal year.	• For issuers with fiscal years ending on or before June 30, no later than March 31 in the following calendar year; • For issuers with fiscal years ending after June 30, no later than March 31 in the second calendar year following their most recent fiscal year.

In proposing these provisions and other aspects of this rulemaking, we have striven to achieve an appropriate balance between implementing the statute as required by Congress and addressing the concerns expressed by commenters and members of Congress.[78] Specifically, we expect that the proposal would meaningfully reduce the compliance burden for issuers compared to the compliance burden estimated for the 2016 Rules, for example, by permitting greater aggregation of payments at the major subnational level and at lower government levels. We also

[78] As noted above, the estimated cost of compliance of the 2016 Rules and the potential for competitive harm were specifically noted by the members of Congress who voted to disapprove the rules. *See, e.g.*, 163 CONG. REC. H.848 (daily ed. Feb. 1, 2017) (statement of Rep. Hensarling); 163 CONG. REC. at H.852 (statement of Rep. Barr).

believe that, for the same reason, the proposal would address the concerns about potential competitive harm that the 2016 Rules would have caused as a result of the public disclosure of contract level payment information.

On the other hand, we have not provided for the confidential submission of payment information, as suggested by some commenters.[79] In addition, we have not provided for the release of information only through an anonymized, aggregated compilation produced by the Commission, as suggested by some commenters.[80] As explained below, we believe that public disclosure of company-specific, project-level payment information provides an appropriate balance between the stated concerns with the 2016 Rules and the mandate of Section 13(q) to increase transparency of payments to governments in resource-rich nations.[81] However, we are requesting comment on an alternative approach that would allow for confidential filing and would release information only through an anonymized, aggregated compilation.[82]

II. PROPOSED RULES UNDER SECTION 13(q)

A. Definition of "Resource Extraction Issuer"

Section 13(q) defines a resource extraction issuer in part as an issuer that is "required to file an annual report with the Commission." We believe this language could reasonably be read

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[79] *See, e.g.*, Letters from API (Nov. 7, 2013) (submitted prior to the 2016 Proposing Release) and (Feb. 16, 2016); Letter from Chevron (Feb. 16, 2016); and Letter from Royal Dutch Shell plc ("RDS") (Feb. 5, 2016).

[80] *See id.*

[81] *See infra* Sections II.F. and II.I.

[82] *See infra* Section II.I.

to include or to exclude issuers that file annual reports on forms other than Forms 10-K, 20-F, or 40-F. We are therefore using our discretion and proposing to cover only issuers filing annual reports on Forms 10-K, 20-F, or 40-F. Specifically, the proposed rules would define the term "resource extraction issuer" to mean an issuer that is required to file with the Commission an annual report on one of those forms pursuant to Section 13 or 15(d) of the Exchange Act and that engages in the commercial development of oil, natural gas, or minerals.[83] As with the 2016 Rules, we believe that covering issuers that provide disclosure outside of the Exchange Act reporting framework would do little to further the transparency objectives of Section 13(q) but would add costs and burdens to the existing disclosure regime governing those categories of issuers. The proposed definition would therefore exclude issuers subject to Tier 2 reporting obligations under Regulation A and issuers filing annual reports pursuant to Regulation Crowdfunding.[84] In addition, investment companies registered under the Investment Company Act of 1940 ("Investment Company Act") would not be subject to the proposed rules.[85]

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[83] *See* proposed Rule 13q-1(a) and proposed Item 2.01(d)(11) of Form SD. We interpret "engages" as used in Section 13(q) and proposed Rule 13q-1 to include indirectly engaging in the specified commercial development activities through an entity under a company's control. *See infra* Section II.E. for our discussion of "control."

[84] In prior releases, the Commission noted that, in the staff's experience, resource extraction issuers rarely use Regulation A. This continues to be the case. Between June 2015 through September 2017, only one of the Regulation A issuers with a qualified offering statement appears to have been a resource extraction issuer at the time of filing based on a review of assigned Standard Industrial Classification (SIC) codes. Similarly, between May 2016 and December 2016, only one of the Regulation Crowdfunding issuers appears to have been a resource extraction issuer.

[85] It seems unlikely that an entity that fits within the definition of "investment company" would be one that is "engag[ing] in the commercial development of oil, natural gas, or minerals." *See* Section 3(a)(1) of the Investment Company Act (15 U.S.C. 80a-3(a)(1)).

Almost all of the commenters on the 2016 Rules Proposing Release supported a definition similar to the one we are proposing today[86] Consistent with the 2016 Rules, we are not proposing exemptions to our definition of "resource extraction issuer" based on foreign private issuer status[87] or the extent of business operations constituting commercial development of oil, natural gas, or minerals.

We are, however, proposing to exempt smaller reporting companies[88] and emerging growth companies[89] from the scope of Rule 13q-1. As explained below,[90] we believe that this proposed change from the 2016 Rules would reduce the overall cost of the proposed rules[91] and address the related Congressional concerns.[92]

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[86] *See* 2016 Rules Adopting Release, Section II.A.2.

[87] *See* the definition of "foreign private issuer" in Securities Act Rule 405 [17 CFR 230.405] and Exchange Act Rule 3b-4 [17 CFR 240.3b-4]. We are, however, proposing to exclude from the proposed rules foreign private issuers that are exempt from Exchange Act registration and reporting obligations pursuant to Exchange Act Rule 12g3-2(b) (17 CFR 240.12g3-2(b). As discussed in prior releases, we believe that expanding the statutory definition of "resource extraction issuer" to include foreign private issuers that are relying on Rule 12g3-2(b) would discourage reliance on the exemption and would be inconsistent with the effect and purpose of that rule. *See* the 2016 Rules Adopting Release, Section II.A.3; and the 2016 Rules Proposing Release, Section II.A.

[88] *See* the definition of smaller reporting company in Securities Act Rule 405 (17 CFR 230.405) and Exchange Act Rule 12b-2 (17 CFR 240.12b-2).

[89] *See* the definition of emerging growth company in Securities Act Rule 405 and Exchange Act Rule 12b-2; *see also* Securities Act Section 2(a)(19) (15 U.S.C. 77b(a)(19)) and Exchange Act Section 3(a)(80) (15 U.S.C. 78c(a)(80)).

[90] *See infra* Section II.J.3.

[91] We solicit comment on our proposed exemption for smaller reporting companies and emerging growth companies in Section II.J.3. below.

[92] *See supra* n. 54 and accompanying text.

3. Should we define "resource extraction issuer" to mean an issuer that is required to file with the Commission an annual report on Form 10-K, Form 20-F, or Form 40-F pursuant to Section 13 or 15(d) of the Exchange Act and that engages in the commercial development of oil, natural gas, or minerals, as proposed? Should we alter our approach to the definition of "resource extraction issuer" based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?

4. Should we exclude other categories of issuers, such as foreign private issuers, from the definition of "resource extraction issuer"?

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

Consistent with the statutory definition, the proposed rules would define "commercial development of oil, natural gas, or minerals" as exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any such activity.[93] Although we have discretionary authority to include other significant activities relating to oil, natural gas, or minerals,[94] we are not proposing to expand the list of covered activities beyond the explicit terms of Section 13(q). We adopted the same approach when defining "commercial development of oil, natural gas, or minerals" in the 2016 rulemaking, and most commenters that addressed this aspect of the prior rules supported this approach.[95] As was the case with the 2016 Rules, we have not sought to impose disclosure obligations that extend beyond Congress' required

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[93] *See* 15 U.S.C. 78m(q)(1)(A).

[94] *See id.*

[95] *See* the 2016 Rules Adopting Release, Section II.B.2.a.

disclosures in Section 13(q) and the disclosure standards developed in connection with international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals. This approach should limit the compliance costs of the Section 13(q) rules.

The proposed definition of "commercial development" would capture only those activities that are directly related to the commercial development of oil, natural gas, or minerals, and not activities ancillary or preparatory to such commercial development. Accordingly, a company that is only providing products or services that support the exploration, extraction, processing, or export of such resources would not be a "resource extraction issuer" under the proposed rules.[96] For example, a company that manufactures drill bits or provides hardware to help companies explore and extract would not be considered a resource extraction issuer. Similarly, a company engaged by an operator to provide hydraulic fracturing or drilling services, to enable the operator to extract resources, would not be a resource extraction issuer.[97] We believe this approach is consistent with Section 13(q) and the approach adopted in the 2016 rulemaking, which most commenters who addressed the issue supported.[98]

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[96] Marketing activities would also not be included. Section 13(q) does not include marketing in the list of activities covered by the definition of "commercial development." In addition, including marketing activities within the final rules under Section 13(q) would go beyond what is covered by the EITI and other international regimes. *See, e.g.*, the EITI Handbook, at 35. For similar reasons, the definition of "commercial development" does not include activities relating to security support. *See* 2012 Rules Adopting Release at n.146 and Section II.D. for a related discussion of payments for security support.

[97] A resource extraction issuer would be required, under the proposed rules, to disclose payments when such a service provider makes a payment to a government on its behalf that meets the definition of "payment." *See* proposed Instruction 7 to Item 2.01 of Form SD. We discuss the definition of "payment" in Section II.C below.

[98] *See* the 2016 Rules Adopting Release, Section II.B.2.a.

In the past, commenters have requested clarification of the activities covered by the definition of "commercial development."[99] We discuss our proposals to define or provide guidance on several terms contained within the definition in the subsections that follow.

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5. Should we define "commercial development of oil, natural gas, or minerals" using the list of activities described in the statute, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?

1. "Extraction" and "Processing"

As proposed, and consistent with the definitions adopted in the 2016 rulemaking,[100] "extraction" would be defined as the production of oil and natural gas as well as the extraction of minerals.[101] "Processing" would include, but would not be limited to, midstream activities such as removing liquid hydrocarbons from gas, removing impurities from natural gas prior to its transport through a pipeline and the upgrading of bitumen and heavy oil, through the earlier of the point at which oil, gas, or gas liquids (natural or synthetic) are either sold to an unrelated third party or delivered to a main pipeline, a common carrier, or a marine terminal. "Processing"

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[99] *See* 2016 Rules Adopting Release, Section II.B.2; 2012 Rules Adopting Release, Section II.C.2.

[100] Several commenters specifically supported the definitions of "extraction" and "processing" proposed in the 2016 rulemaking while other commenters sought additional guidance regarding the types of activities covered by the term "processing." *See* 2016 Rules Adopting Release, Section II.B.3.

[101] *See* proposed Item 2.01(d)(5) of Form SD.

would also include the crushing or preparing of raw ore prior to the smelting or refining phase.[102] "Processing" would not include downstream activities, such as refining or smelting. As noted above,[103] the focus of Section 13(q) is on transparency in connection with the payments that resource extraction issuers make to governments. Those payments are primarily generated by "upstream" activities like exploration and extraction and not in connection with refining or smelting.[104] Accordingly, we do not believe that, for purposes of the proposed rules, the term "processing" should cover downstream activities. We also note that including refining or smelting within the rules under Section 13(q) would go beyond what is contemplated by the statute.

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6. Should we define "extraction" as the production of oil and natural gas as well as the extraction of minerals, as proposed?
7. Are the types of activities covered by the term "processing" appropriate?

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[102] *See* proposed Instruction 8 to Item 2.01 of Form SD. Although substantively the same as the instruction found in the 2016 Rules, we are proposing revisions for additional clarity.

[103] *See supra* Section I.A.

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

8. Should we alter our approach to the definition of "extraction" or the instruction on "processing" based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?

2. "Export"

The proposed definition of "commercial development of oil, natural gas, or minerals" would not cover transportation made for a purpose other than export. Instead, "export" would be defined as the transportation of a resource from its country of origin to another country by an issuer with an ownership interest in the resource, with certain exceptions described below.[105] This definition would reflect the significance of the relationship between upstream activities, such as exploration and extraction, and the categories of payments to governments identified in the statute. In contrast, we do not believe that Section 13(q) was intended to capture payments related to transportation on a fee-for-service basis across an international border by a service provider with no ownership interest in the resource.[106] Nor do we believe that "export" was intended to capture activities with little relationship to upstream or midstream activities, such as commodity trading-related activities.

Accordingly, the proposed definition of "export" would not cover the movement of a resource across an international border by a company that (a) is not engaged in the exploration,

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[105] *See* proposed Item 2.01(d)(4) of Form SD.

[106] It is noteworthy that Section 13(q) includes export, but not transportation, in the list of covered activities. In contrast, SADA specifically includes "transporting" in the definition of "oil and gas activities" and "mineral extraction activities." The inclusion of "transporting" in SADA, in contrast to the language of Section 13(q), suggests that the term export means something different than transportation.

extraction, or processing of oil, natural gas, or minerals and (b) acquired its ownership interest in the resource directly or indirectly from a foreign government or the Federal Government.[107] The definition would cover, however, the purchase of such government-owned resources by a company otherwise engaged in resource extraction due to the stronger nexus between the movement of the resource across an international border and the upstream development activities. This nexus would be particularly strong in instances where the company is repurchasing government production entitlements that were originally extracted by that issuer.[108]

The proposed definition of export is consistent with the approach regarding "export" adopted by the Commission in the 2016 rulemaking. The Commission articulated this approach in specific response to one commenter who sought additional guidance on the scope of the term "export" under the Section 13(q) rules.[109]

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9. Should we adopt the definition of "export," as proposed? If we should provide a different definition, what should it be? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?

3. "Minerals"

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[107] *See* proposed Item 2.01(d)(4) of Form SD.

[108] *See infra* Section II.C.6 (discussing when and how payments must be reported in instances where an issuer is repurchasing government production entitlements that were originally extracted by that issuer).

[109] *See* Letter from Pietro Poretti (Feb. 15, 2016). Except for this commenter, the Commission's proposed definition of "export" was largely unaddressed by commenters in the 2016 rulemaking.

The proposed rules would include an instruction on the meaning of the term "minerals" but would not provide a defined term. We believe that the term is commonly understood and includes, at a minimum, any material for which an issuer with mining operations would provide disclosure under the Commission's existing disclosure requirements for mining properties.[110] In support of this approach, which is consistent with the Commission's approach in the 2016 rulemaking, we note that no industry commenter suggested that we define the term in connection with the 2016 Rules.[111] We also believe that a flexible approach to this term would preserve consistency between the term's use under Rule 13q-1 and its use in our other disclosure requirements and policies.[112]

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[110] The Commission recently revised its disclosure requirements for mining properties to provide investors with a more comprehensive understanding of a registrant's mining properties and to align those disclosure requirements and policies more closely with current industry and global regulatory practices and standards. *See* Release No. 33-10570 (October 31, 2018) [83 FR 66344 (December 26, 2018)]. The new mining property disclosure rules, which are codified in subpart 1300 of Regulation S-K (17 CFR 229.1300), will replace the mining property disclosure guidance in Industry Guide 7 [17 CFR 229.801(g) and 802(g)] and requirements in Item 102 of Regulation S-K (17 CFR 229.102). Registrants engaged in mining operations must comply with the new rules for the first fiscal year beginning on or after January 1, 2021. Industry Guide 7 will remain effective until all registrants are required to comply with the final rules, at which time Industry Guide 7 will be rescinded. *See* Release No. 33-10570, Section I.

[111] *See* 2016 Rules Adopting Release, n.149 and accompanying text.

[112] For example, new subpart 1300 of Regulation S-K defines "mineral resource" to mean a concentration or occurrence of material of economic interest in or on the Earth's crust in such form, grade or quality, and quantity that there are reasonable prospects for economic extraction. "Material of economic interest" is then defined to include "mineralization, including dumps and tailings, mineral brines, and other resources extracted on or within the earth's crust" while excluding oil and gas resources resulting from oil and gas producing activities, gases (*e.g.*, helium and carbon dioxide), geothermal fields, and water. *See* 17 CFR 229.1300. Industry Guide 7 similarly does not explicitly define the term "minerals," but does provide a definition of, and guidance regarding the disclosure of, "reserves," which includes references to "minerals" and "mineralization."

The proposed instruction to Form SD would refer issuers to the use of the term "minerals" in our other disclosure rules.[113] As such, the guidance would encompass any changes to that term that may be reflected in our disclosure requirements for mining registrants.

Request for Comment

10. Should we adopt the instruction on the meaning of the term "mineral," as proposed? Is the proposed instruction sufficiently clear for issuers to identify when they are engaged in the commercial development of a mineral?
11. Have there been developments since the 2016 Rules that should lead us to provide a defined term for "mineral" or different guidance? If so, what should be the definition or guidance?

C. Definition of "Payment"

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

- Is made to further the commercial development of oil, natural gas, or minerals;
- Is not de minimis; and
- Includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the EITI's

[113] *See* proposed Instruction 13 to Item 2.01 of Form SD. The Commission's staff has previously provided similar guidance. *See* Disclosure of Payments by Resource Extraction Issuers FAQ 3 (May 30, 2013) *available at* https://www.sec.gov/divisions/corpfin/guidance/resourceextraction-faq.htm.

guidelines (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[114]

As with the 2016 Rules, the proposed rules would define payments to include the specific types of payments identified in the statute, as well as community and social responsibility ("CSR") payments that are required by law or contract, payments of certain dividends, and payments for infrastructure. The proposed rules would also provide additional guidance on the statutory payment categories of royalties, fees, and bonuses. Finally, the proposed rules would address in-kind payments.

In addition to the types of payments expressly included in the definition of "payment" in the statute, Section 13(q) provides that the Commission include within the definition "other material benefits" that it determines are "part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals."[115] According to Section 13(q), these "other material benefits" must be consistent with the EITI's guidelines "to the extent practicable."[116] Some commenters on the 2012 Rules Proposing Release suggested that we include a broad, non-exhaustive list of payment types or category of "other material benefits."[117] Commenters on the 2016 Rules Proposing Release, however, did not make a similar suggestion. We continue to believe that Section 13(q) directs us to make an affirmative determination that

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[114] 15 U.S.C. 78m(q)(1)(C).

[115] 15 U.S.C. 78m(q)(1)(C)(ii).

[116] *Id.*

[117] *See* 2012 Rules Adopting Release, n.175 and accompanying text.

the other "material benefits" are part of the commonly recognized revenue stream. Accordingly, the other material benefits specified in the proposed rules would be limited to CSR payments required by law or contract, dividends, and infrastructure payments. As was the case with the 2016 Rules, and as discussed in more detail below, we have determined that these payment types represent material benefits that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, and minerals and that otherwise meet the definition of payment.

1. Taxes

Consistent with Section 13(q), the proposed rules would require a resource extraction issuer to disclose tax payments. The proposed rules also include an instruction to clarify that a resource extraction issuer would be required to disclose payments for taxes levied on corporate profits, corporate income, and production, but would not be required to disclose payments for taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes.[118] In response to earlier concerns expressed by commenters about the difficulty of allocating payments that are made for obligations levied at the entity level, such as corporate taxes, to the project level,[119] the proposed rules would provide that issuers may disclose those payments at the entity level rather than the project level.[120]

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[118] *See* proposed Instruction 9 to Item 2.01 of Form SD.

[119] *See* 2012 Rules Adopting Release, n.155 and accompanying text.

[120] *See* proposed Instruction 4 to Item 2.01 of Form SD.

Request for Comment

12. Is the proposed approach to disclosure of tax payments appropriate? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release? Would allowing disclosure of tax payments at the entity level improperly inflate reported payments?
13. Should we provide additional guidance on how to isolate the corporate income tax payments made on income generated from the commercial development of oil, natural gas, or minerals given that income may be earned from other business activities in the same jurisdiction as well? If so, what guidance should we provide?

2. Royalties, Fees, and Bonuses

The definition of "payment" in Section 13(q) includes royalties, fees, and bonuses. The statute provides "license fees" as an example of the types of fees covered by that term but does not provide examples of royalties and bonuses.[121] As under the 2016 Rules, the proposed rules would provide further clarification of these terms by including an instruction setting forth a non-exclusive list of fees (rental fees, entry fees, and concession fees), bonuses (signature, discovery, and production bonuses), and royalties (unit-based, value-based, and profit-based royalties) that would be considered payments under the proposed rules. The types of fees and bonuses we are proposing to include are specifically mentioned in the EITI's guidance as payments that should

[121] 15 U.S.C. 78m(q)(1)(C)(ii).

be disclosed by EITI participants,[122] which supports our view that they are part of the commonly recognized revenue stream. The types of royalties we are proposing to include are not mentioned in the EITI's guidance but, based on the experience of the Commission staff's mining engineers, we believe they are also part of the commonly recognized revenue stream and that including them would provide additional clarity for issuers.[123] These examples would be provided as guidance, and resource extraction issuers could be required to disclose other types of fees, bonuses, and royalties depending on the facts and circumstances.

Request for Comment

14. Should we adopt an instruction providing examples of fees, bonuses, and royalties that would be considered "payments," as proposed? Is our interpretation of royalties overly broad? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?

3. Dividend Payments

As under the 2016 Rules, the proposed rules would include dividends in the list of payment types required to be disclosed. None of the commenters on the 2016 Rules Proposing Release objected to the inclusion of dividend payments.

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[122] *See* EITI Standard, at 23.

[123] *See* proposed Instruction 10 to Item 2.01 of Form SD. For a discussion of these types of royalties, *see* World Bank, *Mining Royalties: Their Impact on Investors, Government and Civil Society* (2006), pp.50-54 *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/09/11/000090341_20060911105823/Rendered/PDF/372580Mining0r101OFFICIAL0USE0ONLY1.pdf.

The proposed rules would clarify in an instruction that a resource extraction issuer generally would not need to disclose dividends paid to a government as a common or ordinary shareholder of the issuer as long as the dividend is paid to the government under the same terms as other shareholders.[124] The issuer would, however, be required to disclose any dividends paid to a government in lieu of production entitlements or royalties. Under this approach, ordinary dividend payments would not be part of the commonly recognized revenue stream because they are not made to further the commercial development of oil, natural gas, or minerals. This approach is consistent with the approach taken towards dividend payments in both the 2012 Rules and 2016 Rules. Most of the commenters who discussed the definition of payments in the earlier rulemakings either supported or did not object to this approach towards dividends.[125]

Request for Comment

15. Should we require disclosure of dividend payments, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?

4. Infrastructure Payments

The proposed rules would require the disclosure of payments for infrastructure, such as building a road or railway to further the development of oil, natural gas, or minerals.[126] We

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[124] *See* proposed Instruction 11 to Item 2.01 of Form SD.

[125] *See* 2012 Adopting Release, Section II.D.1.b. and 2016 Adopting Release, Section II.C.2.a.

[126] We note that payments for infrastructure often are in-kind payments rather than direct monetary payments. For additional discussion of our proposed approach to in-kind payments, *see infra* Section II.C.6.

believe such payments are "other material benefits" that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.[127] Like dividend payments, none of the commenters on the 2016 Rules Proposing Release objected to the inclusion of infrastructure payments.

Request for Comment

16. Should we require the disclosure of infrastructure payments, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?

5. Community and Social Responsibility Payments

The proposed rules would require disclosure of CSR payments that are required by law or contract.[128] For the reasons discussed below, we believe that such CSR payments are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.

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[127] *See* Letters from AngloGold Ashanti (Jan. 31, 2011) ("AngloGold"); Barrick Gold Corporation (Feb. 28, 2011) ("Barrick Gold"); EarthRights International (Jan. 26, 2011) ("ERI 1"); Earthworks (Mar. 2, 2011) ("Earthworks"); Global Witness (Feb. 25, 2011) ; ONE (Mar. 2, 2011) ("ONE"); and Publish What You Pay U.S. (Feb. 25, 2011). Disclosure of payments for infrastructure improvements is also required under the EITI. *See, e.g.*, EITI Standard at 24.

[128] CSR payments could include, for example, funds to build or operate a training facility for oil and gas workers, funds to build housing, payments for tuition or other educational purposes, and in general payments to support the social or economic well-being of communities within the country where the expenditures are made.

Most commenters on the 2016 Rules Proposing Release that addressed the issue supported the inclusion of CSR payments.[129] We find the evidence cited by those commenters to be persuasive. For example, one commenter noted prevalent discussion of CSR payments in industry conferences, studies, guidance, and compliance manuals.[130] This view was supported by a broad range of commenters and not limited to academia or civil society organizations. One industry commenter also stated that CSR payments are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals, at least when required by law or contract.[131]

In addition to the views of commenters, there is other evidence supporting the significant role that CSR payments have in the extractive industries. For example, several issuers already report their required or voluntary CSR payments.[132] Furthermore, disclosure of CSR payments that are required by law or contract has been required under the EITI since 2013.[133] Accordingly, we find that the evidence on balance supports the conclusion that such payments

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[129] *See* 2016 Rules Adopting Release, Section II.C.2.a. The one commenter that opposed including CSR payments stated that those payments were not part of the commonly recognized revenue stream due to their philanthropic or voluntary nature. *See* Letter from Encana Corporation (Jan. 25, 2016) ("Encana").

[130] *See* Letter from Prof. Harry G. Broadman and Bruce H. Searby (Jan. 25, 2016).

[131] *See* Letter from ExxonMobil (Feb. 16, 2016).

[132] *See, e.g.*, Statoil ASA, *2017 Sustainability Report*, p. 36 (disclosing that in 2017 Statoil made $4.6 million in social investments); Newmont Goldcorp, *Beyond the Mine: 2017 Sustainability Report*, p. 87 (reporting a total of over $13.9 million in community investments); and BHP Billiton Ltd., 2018 Sustainability Report, pp. 7 and 37 (reporting that BHP's voluntary community investment totaled $77.1 million in 2018).

[133] As is currently the case under the 2016 EITI Standard, the 2013 version of the EITI Standard required social contribution payments to be disclosed if the company was legally or contractually required to make those payments. *See* EITI Standard, at 28.

are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.

Request for Comment

17. Should we require disclosure of CSR payments, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release? For example, is there evidence to suggest that CSR payments are not part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals?
18. If we exclude CSR payments from the list of covered payment types, should we provide additional guidance concerning how an issuer would distinguish CSR payments from infrastructure payments?

6. In-Kind Payments

The proposed rules would require disclosure of payments that fall within the specified payment types that are made in-kind rather than through a monetary payment to the host country government.[134] Examples include production entitlement payments and infrastructure payments. None of the commenters on the 2016 Rules Proposing Release objected to the inclusion of in-kind payments in the 2016 Rules.

Section 13(q) specifies that the rules require the disclosure of the type and total amount of payments made for each project and to each government. Accordingly, issuers would need to

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[134] *See* proposed Instruction 12 to Item 2.01 of Form SD.

determine the monetary value of in-kind payments.[135] Similar to the 2016 Rules, the proposed rules specify that issuers must report in-kind payments at historical cost, or if historical costs are not reasonably determinable, fair market value, and provide a brief description of how the monetary value was calculated.[136] We continue to believe that the required disclosure would be more consistent and comparable if issuers are required to report in-kind payments at cost and only permitted to report using fair market value if historical costs are not reasonably available or determinable.[137]

As under the 2016 Rules, the proposed rules would also include an instruction clarifying how to report payments made to a foreign government or the Federal Government to purchase the resources associated with production entitlements that are reported in-kind.[138] An issuer's purchase of production entitlements affects the ultimate cost of such entitlements. Accordingly, if the issuer would be required to report an in-kind production entitlement payment under the rules and then repurchases the resources associated with the production entitlement within the same fiscal year, the issuer would be required to use the purchase price (rather than using the valuation methods described above) when reporting the in-kind value of the production entitlement.

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[135] In addition, in light of the requirement in Section 13(q) to tag the information to identify the currency in which the payments were made, the proposed rules would instruct issuers providing a monetary value for in-kind payments to tag the information as "in-kind" for purposes of the currency tag. *See* proposed Instruction 12 to Item 2.01 of Form SD.

[136] *See id*.

[137] This approach is consistent with the recommendation of some commenters in the 2012 rulemaking. *See* 2012 Adopting Release, Section II.D.1.c.

[138] *See* proposed Instruction 12 to Item 2.01 of Form SD.

If the in-kind production entitlement payment and the subsequent purchase are made in different fiscal years and the purchase price is greater than the previously reported value of the in-kind payment, the issuer would be required to report the difference in values in the latter fiscal year if that amount exceeds the de minimis threshold. In other situations, such as when the purchase price in a subsequent fiscal year is less than the in-kind value already reported, no disclosure relating to the purchase price would be required.

We also considered whether to require issuers to report the volume of in-kind payments. Commenters on the 2016 Rules Proposing Release were divided on whether to require the reporting of volume.[139] We generally agree with the commenter that stated such information was unnecessary.[140] In this regard, we note that issuers would be required to provide a brief description of how the monetary value was calculated, which will provide additional context for assessing the reasonableness of the disclosure. Based on these considerations, we are not proposing disclosure related to volume.

Request for Comment

19. Should we require an issuer to report in-kind payments at cost, or if cost is not reasonably available or determinable, at fair market value, and provide a brief description of how the monetary value was calculated, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules, in light of our other proposals in this release or for any other reason? Specifically,

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[139] *See* 2016 Rules Adopting Release, Section II.C.2.a.

[140] *See* Letter from ExxonMobil (Mar. 8, 2016).

should we require an issuer to report in-kind payments at fair market value, or at cost only if fair market value is not reasonably available or determinable? Should we instead permit resource extraction issuers to choose whether to report in-kind payments at cost or fair market value?

20. Should we include an instruction regarding how to calculate the in-kind value of a production entitlement, as proposed? Is the proposed instruction sufficiently clear for resource extraction issuers to determine how to calculate the in-kind value?

7. Other Payment Types

Some commenters on the 2016 Rules Proposing Release suggested that we add other payment types such as commodity trading related payments, payments for government expenses, providing jobs or tuition to persons related to government officials, investing in companies created by officials or related persons, or other similar payments.[141] We are not proposing to require disclosure for such payment types because we do not believe that they represent material benefits that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.

With respect to commodity trading-related payments, we believe that the proposed definition of "export" and the categories of payments in the proposed rules, particularly in-kind payments, accurately reflect the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. We acknowledge that significant payments may be

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[141] *See* 2016 Rules Adopting Release, Section II.C.2.a.

made by buying/trading companies or similar companies to purchase natural resources. Nevertheless, we do not believe that purchasing or trading oil, natural gas, or minerals, even at a level above the de minimis threshold, is on its own sufficiently related to the "commercial development" of those resources to warrant being covered by the proposed rules, particularly when the proposed rules already would require disclosure of in-kind payments of production entitlements. As discussed above, the proposed rules would, however, address how such production entitlement payments must be valued when initially made by an issuer in-kind but the associated resources are subsequently purchased by the same issuer from the recipient government.

We are also not specifically proposing requirements to disclose payments for government expenses, providing jobs or tuition to persons related to government officials, investing in companies created by officials or related persons, or other similar payments that could reasonably raise corruption concerns. We find it unnecessary to do so because, when these payments are made to further the commercial development of oil, natural gas or minerals (in connection with or in lieu of the identified payments), they would be covered by the proposed anti-evasion provision discussed below.[142]

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[142] *See infra* Section II.D. *See also generally* U.S. Senate Permanent Subcommittee on Investigations, Committee on Government Affairs, Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act, Case Study Involving Riggs Bank Report, at 98-111 (July 14, 2004) (providing examples of the roles that resource extraction companies can play in facilitating the suspect or corrupt practices of foreign officials seeking to divert resource extraction payments that belong to the government).

In addition, the proposed rules would not require issuers to disclose payments for fines and penalties. We do not believe that such payments relate sufficiently to the commercial development of natural resources to warrant inclusion.

Request for Comment

21. In light of developments since the 2016 Rules or other aspects of the proposed rules, should we add other payment types or eliminate certain payment types from the proposed list of covered payment types? If so, please explain which payment types should or should not be considered part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals. If you recommend adding other payment types, please also explain how they are consistent with the EITI's guidelines and how their inclusion would support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas or minerals.

8. Accounting Considerations

Under the proposed rules, Form SD would expressly state that the payment disclosure must be made on a cash basis instead of an accrual basis and need not be audited.[143] We believe that requiring reporting to be made on a cash basis is the best approach because: (1) these payment disclosures are largely cash-based, so reporting them on a cash basis would limit the associated compliance burden, and (2) requiring a consistent approach to reporting would

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[143] *See* proposed Item 2.01(a)(2) of Form SD.

improve comparability and therefore result in greater transparency. This is consistent with the approach that the Commission proposed and adopted in the 2016 rulemaking.[144]

With respect to whether to require the payment information to be audited, we note that the EITI approach is different from Section 13(q). Under the EITI, companies and the host country's government generally each submit payment information confidentially to an independent administrator selected by the country's multi-stakeholder group, frequently an independent auditor, who reconciles the information provided by the companies and the government and then produces a report.[145] In contrast, Section 13(q) does not contemplate that an administrator would audit and reconcile the information or produce a report as a result of the audit and reconciliation. Moreover, while Section 13(q) refers to "payments," it does not require the information to be included in the financial statements. In addition, we recognize the concerns raised by some previous commenters that an auditing requirement for the payment information would significantly increase implementation and ongoing reporting costs.[146]

Request for Comment

22. Should we require issuers to disclose payment information on a cash basis rather than an accrual basis, as proposed? Should we alter our approach based on any

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[144] *See* the 2016 Adopting Release, Section II.C.3.

[145] *See* EITI Standard, at 15, 25-26.

[146] *See, e.g.*, Letters from Anadarko Petroleum Corporation (Mar. 2, 2011), AngloGold, API (Jan. 28, 2011), British Petroleum p.l.c. (Feb. 11, 2011), Chevron Corporation (Jan. 28, 2011), Ernst & Young (Jan. 31, 2011), New York State Bar Association, Securities Regulation Committee (Mar. 1, 2011), Petroleo Brasileiro S.A. (Feb. 21, 2011), and PricewaterhouseCoopers LLP (Mar. 2, 2011).

developments since the adoption of the 2016 Rules or in light of our other proposals in this release?

9. The "Not De Minimis" Threshold

The 2016 Rules defined a "not de minimis" payment as one that equals or exceeds $100,000, or its equivalent in the issuer's reporting currency, whether made as a single payment or series of related payments.[147] In light of the previously expressed concerns that the threshold was unreasonably low and costly to calculate[148] and the likely impact of the revised definition of project that we are proposing,[149] we no longer believe that the $100,000 threshold is the best method for determining whether a payment is "not de minimis" under Section 13(q).[150] Rather, we believe that an appropriate threshold for determining what is a "not de minimis payment" must consider the value of individual payments as well as the value of the total company payments per project.[151]

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[147] *See* 2016 Adopting Release, Section II.C.3.c. The 2012 Rules also defined a "not de minimis" payment using the $100,000 threshold. *See* 2012 Adopting Release, Section II.D.2.c.

[148] *See, e.g.*, letter from Nouveau Inc. (Feb. 16, 2016) (stating that the $100,000 reporting threshold would be unreasonably low for companies working on massive scale projects and would require parties to engage in the costly collection, compilation, and standardization of potentially thousands of different data points); *see also* 2012 Adopting Release, Section II.D.2.b (discussing a variety of approaches suggested by commenters to the "not de minimis" payment requirement).

[149] *See infra* Section II.F.2.

[150] Section 13(q) does not define "not de minimis." Consistent with the 2012 and 2016 rules, and for the reasons stated therein, we continue to believe that it is appropriate to adopt a definition of "not de minimis" to provide clear guidance regarding when a resource extraction issuer must disclose a payment.

[151] *See* proposed Item 2.01(d)(8) of Form SD.

Under the proposed rules, an issuer would not be required to provide disclosure if the aggregate project payments for all types of payments for an individual project are below $750,000. Where the aggregate payments for an individual project equal or exceed $750,000, only payments made to each foreign government in a host country or the Federal Government that equal or exceed $150,000, or its equivalent in the issuer's reporting currency, whether made as a single payment or a series of related payments, will need to be reported.[152] Thus, if no single payment or series of related payments of the same type equals or exceeds $150,000 for an individual project, even if the aggregate payments for that project are equal to or greater than $750,000, no payments disclosure would be required for that project.

We believe that this change is necessary to take into account the proposed definition of project, which aggregates payments at a higher level, which would likely increase the value of the individual types of payments. As such, we believe that using the 2016 threshold of $100,000 would likely require more payment disclosure, thus increasing rather than decreasing the cost and disclosure burden on issuers, contrary to the guidance provided by Congress in its disapproval of the 2016 Rules. We further believe that, in light of the larger aggregations permitted under the revised definition of project, a quantitative standard based upon project level and individual payment information establishes a more appropriate threshold for determining "not de minimis." In addition, we believe that $750,000 in total payments is the appropriate project threshold and $150,000 is the appropriate threshold for individual payments because we

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[152] *See id*.

are proposing to exempt smaller reporting companies and emerging growth companies from the Section 13(q) disclosure requirements,[153] thereby resulting in larger companies, with larger projects and larger individual payments, being primarily affected by the proposed rules. We also believe that this "not de minimis" threshold would further the statutory objectives of Section 13(q) by requiring disclosure of those payments that are of a significant enough size such that they would likely benefit the host country and its local communities.

When adopting the 2016 Rules, we observed that Section 13(q) uses a "not de minimis" standard instead of a materiality standard, which is used elsewhere in the Federal securities laws and in the EITI. This suggests that Congress did not intend "not de minimis" to equate to a materiality standard.[154] We continue to believe that this is the better approach to take when defining "not de minimis."

An instruction to the 2016 Rules allowed an issuer to choose several methods to calculate currency conversions for payments not made in U.S. dollars or the issuer's reporting currency. That instruction also provided that the same methods are available to issuers when calculating whether a payment not made in U.S. dollars exceeds the de minimis threshold.[155] We are proposing the same instruction[156] as we continue to believe that providing alternative methods

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[153] *See supra* Section II.J.3.

[154] *See* 2012 Rules Adopting Release, Section II.D.2.c. Some commenters suggested that we adopt a materiality-based definition of "not de minimis" in the 2012 rulemaking. *See id.*, n. 224 and accompanying text.

[155] *See* Instruction 2 to Item 2.01 of Form SD under the 2016 Rules.

[156] *See* proposed Instruction 2 to Item 2.01 of Form SD, which states: "A resource extraction issuer must report the amount of payments made for each payment type, and the total amount of payments made for each project and

for calculating currency conversions would help limit compliance costs under Section 13(q). Like the 2016 Rules, an issuer would be required to use a consistent method for its payment currency conversions, including when determining if a payment is not de minimis, and would be required to disclose which method it used.[157]

Request for Comment

23. The definition of "not de minimis" requires issuers to disclose payments for an individual project if the payments in the aggregate equal or exceed $750,000, unless no individual payments per that project equal or exceed $150,000. Is this approach appropriate in light of our proposed definition of "project," which would allow for greater aggregation of payments? Should we instead continue to use the same quantitative threshold of $100,000 that we used in the 2016 and 2012 Rules without regard to the proposed definition of project? If it is appropriate to take into account the proposed definition of project, are there any data or have there been any developments since the

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to each government, during the reporting period in either U.S. dollars or the resource extraction issuer's reporting currency. If a resource extraction issuer has made payments in currencies other than U.S. dollars or its reporting currency, it may choose to calculate the currency conversion between the currency in which the payment was made and U.S. dollars or the resource extraction issuer's reporting currency, as applicable, in one of three ways: (a) by translating the expenses at the exchange rate existing at the time the payment is made; (b) using a weighted average of the exchange rates during the period; or (c) based on the exchange rate as of the resource extraction issuer's fiscal year end. When calculating whether the de minimis threshold has been exceeded, a resource extraction issuer may be required to convert the payment to U.S. dollars, even though it is not required to disclose those payments in U.S. dollars. For example, this may occur when the resource extraction issuer is using a non-U.S. dollar reporting currency. In these instances, the resource extraction issuer may use any of the three methods described above for calculating the currency conversion."

[157] *See id*. (stating that "[i]n all cases, a resource extraction issuer must disclose the method used to calculate the currency conversion and must choose a consistent method for all such currency conversions within a particular Form SD submission").

2016 Rules that suggest a quantitative threshold lower or higher than $750,000 is the more appropriate project threshold, or that an individual payment threshold lower or higher than $150,000 is the more appropriate threshold?

24. The statute does not define "not de minimis" or explain how that term should be applied. Should we base the "not de minimis" threshold on an amount that is not de minimis relative to (i) a particular resource extraction issuer, (ii) a particular country, or (iii) a particular project?

25. Should the focal point for determining whether a payment is "not de minimis" be the relationship between individual and total company payments per payment type? If not, what should the focal point be? Should we consider the relation of the payment to the government recipient and/or the local community when adopting the "not de minimis" payment threshold?

26. As an alternative to setting a bright line threshold based on dollar amount of payment, should we not define "not de minimis" and allow resource extraction issuers to make the determination of what qualifies as a payment that is not de minimis, based on the particular facts and circumstances?

27. If we should adopt an absolute quantitative threshold, should we include a mechanism to adjust periodically the de minimis threshold to reflect the effects of inflation? If so, what is an appropriate interval for such adjustments? What should the basis be for making any such adjustments if the appropriate focal point for determining whether a payment is "not de minimis" is in relation to the host country recipient?

28. Should we adopt a definition of "not de minimis" using a standard based on the materiality of the payment to the issuer? If so, would this be consistent with the language of the statute, which uses the term "not de minimis" rather than "material"?

D. Anti-Evasion

As under the 2016 Rules, the proposed rules would require disclosure with respect to an activity or payment that, although not within the categories included in the proposed rules, is part of a plan or scheme to evade the disclosure required under Section 13(q).[158] This provision is designed to emphasize substance over the form or characterization of payments. We believe that it covers most of the situations that have concerned commenters in past releases. For example, the provision would cover payments that were substituted for otherwise reportable payments in an attempt to evade the disclosure rules,[159] as well as activities and payments that were structured, split, or aggregated in an attempt to avoid application of the rules.[160] Similarly, a resource extraction issuer could not avoid disclosure by re-characterizing an activity as transportation that would otherwise be covered under the rules, or by making a payment to the government via a third party in order to avoid disclosure under the proposed rules.

Request for Comment

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[158] *See* proposed Rule 13q-1(b). Several commenters supported this provision in the 2016 rulemaking although a few commenters recommended revising the provision to address specific concerns. *See* 2016 Adopting Release, Section II.C.2.c.

[159] *See, e.g.*, Letter from Elise J. Bean (Feb. 16, 2016). *See also* Section II.F below (discussing application of the anti-evasion provision in the context of the definition of "project" under the proposed rules).

[160] *See, e.g.*, Letter from PWYP – US (Feb. 16, 2016).

29. Should we adopt an anti-evasion provision, as proposed? Should we provide additional guidance about when the anti-evasion provision would apply?

30. Have there been any developments since the 2016 Rules that suggest that a different approach to the anti-evasion provision would be appropriate?

E. Definition of "Subsidiary" and "Control"

Section 13(q) requires a resource extraction issuer to disclose payments by a subsidiary or an entity under the control of the issuer. Similar to the 2016 Rules, the proposed rules would define the terms "subsidiary" and "control" based on accounting principles rather than using the definitions of those terms provided in Rule 12b-2,[161] which was the case under the 2012 Rules.[162] All of the commenters on the 2016 Rules Proposing Release that addressed this aspect of the proposed rules generally supported using accounting principles to define "control."[163]

Under the proposed approach, a resource extraction issuer would have "control" of another entity when the issuer consolidates that entity under the accounting principles applicable to its financial statements included in the periodic reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act. Thus, for purposes of determining control, the resource extraction issuer

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

[162] *See* 2012 Adopting Release, Section II.D.4.c.

[163] *See, e.g.*, Letters from the API (Feb. 16, 2016); British Petroleum p.l.c. (Feb. 16, 2016); Chevron Corporation (Feb. 16, 2016); Encana; ExxonMobil (Feb. 16, 2016); Global Witness (Mar. 8, 2016); and PWYP-US (Feb. 16, 2016).

would follow the consolidation requirements under generally accepted accounting principles in the United States ("U.S. GAAP") or under the International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board, as applicable.[164]

We believe that the proposed definition, compared to the use of the definition of "control" in Rule 12b-2, would better balance transparency for users of the payment disclosure and the burden on issuers. Issuers already apply the concept of control for financial reporting purposes, which should facilitate compliance. Assuming a reporting issuer consolidates the entity making the eligible payment, this approach also should have the benefit of limiting the potential overlap of the disclosed payments because generally, under applicable financial reporting principles, only one party can control, and therefore consolidate, that entity. Further, this approach could enhance the quality of the reported data since each resource extraction issuer is required to provide audited financial statement disclosure of its significant consolidation accounting policies in the notes to the audited financial statements included in its existing Exchange Act annual reports.[165] The disclosure of these accounting policies should provide greater transparency about how the issuer determined which entities and payments should be included within the scope of the required disclosures. Finally, a resource extraction issuer's determination of control under the proposed rules would be subject to the audit process as well as

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[164] *See* Accounting Standards Codification ("ASC") 810, Consolidation; and IFRS 10, Consolidated Financial Statements. A foreign private issuer that prepares financial statements according to a comprehensive set of accounting principles, other than U.S. GAAP or IFRS, and files with the Commission a reconciliation to U.S. GAAP would be required to determine whether or not an entity is under its control using U.S. GAAP.

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

to the internal accounting controls that issuers are required to have in place with respect to reporting audited financial statements filed with the Commission.[166]

The proposed rules would not require disclosure of the proportionate amount of the payments made by a resource extraction issuer's proportionately consolidated entities or operations.[167] After reconsidering the comments raising concern about the definition of control and the potential compliance costs associated with using a broader definition of control, the definition we are proposing would exclude entities or operations in which an issuer has only a proportionate interest.[168] Compared to an issuer that consolidates an entity, an issuer with a proportionate interest in an entity or operations may not have the same level of ability to direct the entity or operations making the payments. For example, as commenters have noted, an issuer that holds a proportionate interest in a joint venture typically does not have ready access to detailed payment information when it is not the operator of that venture.[169] Requiring such a non-operator issuer to provide the payment disclosure based on its proportionate interest in the venture could compel that issuer to renegotiate its joint venture agreement or make other arrangements to obtain sufficiently detailed payment information to comply with the Section

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

[167] Proportionately consolidated entities or operations include those entities or operations that are proportionately consolidated in accordance with ASC 810-10-45-14 and "joint operations" as defined in IFRS 11, Joint Arrangements.

[168] *See, e.g.*, Letters from API (Feb. 16, 2016); BP (Feb. 16, 2016); Chevron (Feb. 16, 2016); ExxonMobil (Feb. 16, 2016); Petro1eo Brasileiro S.A-Petrobras ("Petrobras") (Feb. 16, 2016); and RDS (Feb. 5, 2016).

[169] *See, e.g.*, Letters from API (Feb. 16, 2016); and ExxonMobil (Feb. 16, 2016).

13(q) rules, which could significantly increase its compliance burden. Excluding proportionate interest entities or operations from the proposed definition of control would result in less payment information about joint ventures becoming public,[170] as compared to the 2016 Rules; however, we believe that this potential reduction in transparency is an appropriate tradeoff to help reduce the compliance burden of the proposed rules.

We also reconsidered the recommendation of commenters on the 2016 Rules Proposing Release to include a "significant influence" test for determining control in addition to the accounting consolidation principles we are proposing.[171] We do not believe, however, that we should define control such that significant influence by itself would constitute control.[172] The concept of significant influence does not reflect the same level of ability to direct or control the actions of an entity that is generally reflected in the concept of consolidation. As such, we believe that the consolidation principles are better aligned with the purposes underlying Section 13(q) than a significant influence test. Moreover, unlike a potential significant influence test, the consolidation principles used to define control for the purposes of Section 13(q) more closely capture the situations where the resource extraction issuer has access to the information that is required to be reported.

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[170] *See, e.g.*, Letters from PWYP-US (Feb. 16, 2016); and Global Witness (Mar. 8, 2016).

[171] *See, e.g.*, Letter from PWYP-US (Feb. 16, 2016).

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

Request for Comment

31. Should we define the term "control" based on applicable accounting principles, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?
32. Should we exclude from the definition of control entities or operations in which an issuer has only a proportionate interest, as proposed? Should we instead require an issuer to disclose its proportionate share of the payments made by a joint venture based on its proportionate interest in the venture even when it is not the operator of the venture? Should we require such a non-operator joint venture participant to disclose its proportionate share of the joint venture payments if it knows or is able to obtain the information necessary to comply with the proposed rules without undue difficulty or expense?
33. Are there alternatives to the proposed definition of control that would better balance transparency for users of the payment information and the compliance burden on issuers? For example, should we require only the operator of a joint venture to disclose all of the payments it makes to governments, including those made on behalf of non-operator joint venture participants? Should we require the operator of a joint venture to disclose its proportionate share of the payments made? When the operator is not an Exchange Act reporting company, and therefore not subject to the Section 13(q) rules, should each non-operator participant that is subject to the Section 13(q) rules be required to disclose the payments made by itself and entities or operations that it fully or proportionately consolidates or accounts for as a joint operation? In the event that none of the joint

venture participants is a consolidated entity, should we require a registrant that owns a proportionate interest in the operator of the venture to disclose the payments made either on behalf of all the participants or based on the registrant's proportionate share of the venture? In these circumstances, should we require a registrant that owns a proportionate interest in a non-operator venture participant to disclose its proportionate share of the payments if it is able to obtain the necessary payment information without undue burden or expense?

34. Alternatively, should we adopt a definition of control that includes more than just consolidated entities (*e.g.*, entities over which an issuer has significant influence)?

F. Definition of "Project"

Consistent with Section 13(q), the proposed rules would require a resource extraction issuer to disclose payments made to governments relating to the commercial development of oil, natural gas, or minerals by type and total amount per project. The proposed rules would define "project" using the following three criteria: (1) the type of resource being commercially developed; (2) the method of extraction; and (3) the major subnational political jurisdiction where the commercial development of the resource is taking place.[173] The proposed definition ("Modified Project Definition") differs from the definition included in the 2016 Rules, which defined "project" as the operational activities governed by a single contract, license, lease,

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[173] This proposed definition is similar to the definition of "project" suggested by one industry commenter. *See* Letters from the API (Nov. 7, 2013) and (Feb. 16, 2016). The term "project" as used in this release would only apply to disclosure provided pursuant to Rule 13q-1 and not, for example, the disclosure required by Article 4-10 of Regulation S-X (17 CFR 210.4-10) or subpart 1200 of Regulation S-K (17 CFR 229.1200).

concession, or similar agreement, which form the basis for payment liabilities with a government ("Contract-Level Project Definition").[174]

1. Considerations for Modified "Project" Definition

In adopting the 2016 Rules, the Commission expressly considered the Modified Project Definition as an alternative to the Contract-Level Project Definition that it ultimately adopted. In considering the Modified Project Definition, the Commission acknowledged that such a definition "could lower the potential for competitive harm when compared to [the Contract-Level Project Definition]."[175] However, the Commission stated that, in its view, the Contract-Level Project Definition was "on balance, necessary and appropriate notwithstanding the potential competitive concerns that may result in some instances."[176] In doing so, the Commission acknowledged that both approaches would provide the public with information concerning "the overall revenue that national governments receive from natural resources, so that the public can seek to hold the government accountable for how much it is receiving and how it spends that money."[177] Nevertheless, the Commission determined that the more granular transparency provided by the Contract-Level Project Definition could potentially go further in combating corruption. Specifically, the Commission found that the Contract-Level Project Definition, by providing transparency about the revenues generated from each contract, license, and concession,

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[174] 2016 Rules Adopting Release, Section II.E.3.

[175] *Id.*

[176] *Id.*

[177] *Id.*

could serve to reduce the potential for corruption in connection with the negotiation and implementation of a resource-extraction contract.[178] In this way, the Contract-Level Project Definition could minimize instances of corruption that may occur *before* resource-extraction revenue is paid to the government.

In advancing a contract-level definition of "project," the Commission acknowledged that such an approach increases the potential that resource-extraction issuers might be required to disclose sensitive competitive information about the underlying contracts, licenses, or concessions.[179] The Commission nevertheless concluded that the additional benefits of this more granular disclosure justified any attendant competitive effects.[180]

In light of the concerns expressed by prior commenters and members of Congress that the 2016 Rules imposed undue competitive harm, we have reconsidered the balance that the Commission previously struck. In proposing the Modified Project Definition, we acknowledge that we may be narrowing the scope of the transparency benefits that the disclosures under Section 13(q) were intended to produce. Although we believe that the proposed definition would continue to provide substantial transparency about the overall revenue flows to foreign

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[178] Among other things, the Commission found that the Contract-Level Project Definition had the advantage that, in some instances, it could combat corruption by: (1) "help[ing] assist citizens, civil society groups, and others to monitor individual companies' contributions to the public finances and ensur[ing] firms are meeting their payment obligations," at least "[t]o the extent that a company's contractual or legal obligations are known"; (2) deterring "companies from either entering into agreements that contain suspect payment provisions or following government officials' suspect payment instructions"; (3) "help[ing] local communities and civil society groups to weigh the costs and benefits of an individual project"; and (4) "allow[ing] for comparisons of revenue flow among different projects … to identify payment discrepancies[.]" *Id.*

[179] *See* 2016 Rules Adopting Release, Section II.E.3.

[180] *See id*.

governments and the U.S. Federal Government, under the Modified Project Definition, these disclosures would no longer provide the additional transparency benefits associated with contract-level information. For the reasons discussed below, we believe that forgoing these additional transparency benefits is an appropriate trade-off to address commenters' and Congress's concerns about the potentially adverse impacts on resource extraction issuers arising from the 2016 Rules.

The proposed change to the definition of "project" directly addresses the primary concerns expressed about the 2016 Rules. Those concerns included the costs, burdens, and risks of competitive harm related to tracking, recording, and disclosing the payment information on a per contract basis using the contract-based definition of "project" in the 2016 Rules.[181] The Modified Project Definition should alleviate those concerns by reducing the likelihood of competitively harmful information being released. As one industry commenter noted in connection with the 2016 Rules Proposing Release, disclosure that is less detailed and not as closely linked to individual contracts would assuage concerns that competitors could reverse-engineer proprietary commercial information.[182]

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[181] *See supra* n. 54 through 56. In addition, one congressman noted that extractive companies "are already publicly disclosing the work they do in foreign countries and will continue to do so" but "at a level that does not cause competitive harms." 163 CONG. REC. at H854 (statement of Rep. Williams). *See also* Letters from API (Nov. 7, 2013) and (Feb. 16, 2016); Letter from ExxonMobil (Feb. 16, 2016); and Letter from Chevron (Feb. 16, 2016).

[182] *See* letter from ExxonMobil (Feb. 16, 2016).

A broader project definition should also reduce the compliance burden of the proposed rules compared to the 2016 Rules. Because the Modified Project Definition would allow an issuer to make the payment disclosure at a greater level of aggregation than under the Contract-Level Project Definition, there would be fewer individual data points that have to be electronically tagged and reported, which should make it easier to disclose the payment information on an ongoing basis. An issuer's costs could be further reduced to the extent that it has already aggregated the payment information for its own internal accounting or financial reporting purposes. In that event, it may be less costly for an issuer to modify its internal accounting/financial reporting system to collect the required payment information than it would be to build from scratch a system to collect the payment information on a contract-by-contract basis.[183]

Moreover, we believe that this change is consistent with the CRA's instruction that an agency may not reissue "a new rule that is substantially the same as" the rule that Congress disapproved.[184] As is evident from the discussions in the Commission's previous releases and the comments received in response, the definition of "project" is a critical element of the

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[183] *See infra* Section III.C.2.

[184] 5 U.S.C. 801(b)(1). The CRA instructs that the "new rule" cannot be "substantially the same" or in "substantially the same form" as the disapproved rule. *Id.* (emphasis added). We believe that this language clearly reflects Congress' intent that, in issuing a new rule, an agency must do more than substantially revise the rationales supporting the prior rule or the economic analysis underlying the prior rule. Rather, the CRA instructs that the "new rule" itself must be substantially different. As such, we do not believe that readopting the 2016 rule with modifications only to the rationales or economic analysis in the release will satisfy the substantially different requirement mandated by the plain language of the CRA.

disclosure regime contemplated by Section 13(q).[185] We therefore believe that the Modified Project Definition would help to satisfy the CRA's requirement that the new rule that we are proposing not be substantially the same as the 2016 Rules.[186]

Finally, we note that some prior commenters maintained that a Contract-Level Project Definition would provide material benefits to investors by, for example, assisting in the assessment of financial, political, social, and market risks regarding a particular issuer's projects,[187] or helping to mitigate systemic financial market risk generally in the extractive industries sector.[188] However, we believe that Commission rules requiring disclosure of the most significant risks affecting a company or the securities being offered[189] and disclosure of known trends or uncertainties that have had or are reasonably likely to have a material impact on the registrant's liquidity, capital resources, or results of operations,[190] should elicit all appropriate risk-related disclosure.

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[185] *See* 2012 Rules Adopting Release, Section III.D.3; 2016 Rules Adopting Release, Section III.E.3.

[186] In the 2016 Rules Adopting Release, the Commission expressed the view that the Contract-Level Project Definition embodied a more natural understanding of what constitutes a "project." *See* 2016 Rules Adopting Release, Section III.E.3. However, the Commission did not foreclose the Modified Project Definition as a plausible alternative. In light of Congress's disapproval of the 2016 Rules, we believe that it is appropriate to utilize the Modified Project Definition.

[187] *See, e.g.*, Letter from Calvert Investments and Social Investment Forum (Nov. 15, 2010); Letter from Calvert Investments (Feb. 16, 2016); and Columbia Center on Sustainable Investment (Oct. 30, 2015).

[188] *See, e.g.*, Letter from ACTIAM NV et al. (Mar. 8, 2016); Allianz Global Investors et al. (April 28, 2014); and the First Swedish National Pension Fund et al. (May 9, 2014).

[189] *See* Item 503(c) of Regulation S-K (17 CFR 229.503(c)).

[190] *See* Item 303 of Regulation S-K (17 CFR 229.303).

2. Discussion of the Modified "Project" Definition

In the following three subsections, we discuss the disclosure required by each of the three prongs of the proposed Modified Project Definition in greater detail. In each instance, we have striven to achieve an appropriate balance between the policy goal of promoting transparency about a resource extraction issuer's payments to governments and the concerns expressed by commenters and members of Congress about the compliance costs and burdens of the proposed rules, including the risk of competitive harm by requiring the disclosure of proprietary commercial information.

a. Type of Resource

Under the Modified Project Definition, the first prong for determining the parameters of a project is the type of resource that is being commercially developed. As proposed, a resource extraction issuer would have to disclose whether the project relates to the commercial development of oil, natural gas, or a specified type of mineral. Thus, an issuer would not be required to describe the specific type or quality of oil or natural gas or distinguish between subcategories of the same mineral type. For example, an issuer disclosing payments relating to an oil project would not be required to describe whether it is extracting light or heavy crude oil. Similarly, an issuer disclosing payments relating to a mining project would be required to disclose whether the mineral is gold, copper, coal, sand, gravel, or some other generic mineral class, but not whether it is, for example, bituminous coal or anthracite coal. For clarity and

consistency, a proposed instruction to Form SD would require synthetic oil or gas obtained through processing of coal to be classified as "coal."[191]

We believe that a requirement to provide greater detail regarding the type of resource that is the subject of extractive activities, although perhaps useful in some instances for tracking specific payments, is not necessary for citizens of resource rich countries to determine whether those activities have given rise to government revenues in which they may have an interest. On the other hand, such a requirement could unnecessarily increase an issuer's compliance costs and burdens, including the risk that such additional detail may reveal proprietary information that could cause competitive harm.

b. Method of Extraction

The second prong for determining the parameters of a project is the method of extraction. This prong would require a resource extraction issuer to identify whether the resource is being extracted through the use of a well, an open pit, or underground mining. Additional detail about the method of extraction would not be required. For example, a resource extraction issuer would not be required to disclose whether it is using horizontal or vertical drilling, hydraulic fracturing, or strip, sublevel stope, or block cave mining. Similar to the type of resource prong, we preliminarily believe that such a level of specificity regarding the particular method of extraction is not necessary for citizens of resource rich countries to determine generally if extractive activities in their region have given rise to government revenues in which they may have an

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[191] *See* proposed Instruction 5 to Item 2.01 of Form SD.

interest. Thus, a requirement to provide more specificity regarding the particular method of extraction could unnecessarily increase an issuer's regulatory costs and burdens, including the risk of having to disclose proprietary information that could potentially result in competitive harm.

c. Major Subnational Political Jurisdiction

The third prong for determining the parameters of a project is the major subnational political jurisdiction where the commercial development of the resource is taking place. This prong would require an issuer to disclose only two levels of jurisdiction: (1) the country; and (2) the state, province, territory or other major subnational jurisdiction in which the resource extraction activities are occurring.[192] For example, extractive activities in the city of Timika in the province of Papua, Indonesia could be disclosed as occurring in Papua, Indonesia without identifying Timika. In addition, an issuer could treat its activities in the counties of Elko, Nevada and White Pine, Nevada, as part one project because Nevada would be the major subnational political jurisdiction. If the extractive activity is offshore, the proposed rules would require an issuer to disclose that it is offshore and the nearest major subnational political jurisdiction.

We believe that defining project with regard to the major subnational jurisdiction in which a project is located would alleviate one of the most significant concerns (and related

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[192] As proposed, an issuer would have to provide an electronic tag for both the country and the major subnational political jurisdiction in which the extractive activities are occurring that is consistent with the International Organization for Standardization ("ISO") code pertaining to countries and their major subdivisions. *See infra* Section II.K.

harms) expressed by commenters in the 2016 rulemaking about the Contract-Level Project Definition, including that contract-level disclosure would:

- Allow competitors to derive important information about new areas under exploration for potential resource development, the value the company places on such resources, and the costs associated with acquiring the right to develop these new resources;
- Enable competitors to evaluate the new resources more precisely, and as a result, structure their bids for additional opportunities in the areas with new resources more effectively; and
- Allow competitors to reverse-engineer proprietary commercial information: for example, to determine the commercial and fiscal terms of the agreements, get a better understanding of an issuer's strategic approach to bidding and contracting, and identify rate of return criteria.[193]

We also note that the proposed use of ISO codes[194] to identify subnational jurisdictions would provide a standardized data format that may be more easily analyzed than the data produced under the Contract-Level Project Definition.

d. Special Situations

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[193] *See, e.g.*, Letters from the API (Feb. 16, 2016) and ExxonMobil (Feb. 16, 2016). In particular, we understand that exploratory activities, particularly in a subnational jurisdiction that is small, may pose a significant risk of competitive harm to a resource extraction issuer. We discuss that risk and our proposed targeted exemption to mitigate that risk in Section II.J.4 below.

[194] The International Organization for Standardization (ISO) created and maintains codes for the representation of names of countries and their subdivisions. *See infra* Section II.L (discussing the proposed requirement to use ISO codes to describe the country in which the project is located and the subnational geographic location of a project).

The proposed definition of project would include commercial development activities using multiple resource types or extraction methods if such activities are located in the same major subnational political jurisdiction. The issuer would be required to describe each type of resource that is being commercially developed and each method of extraction used for that project. For example, an open pit and underground zinc mining project in Erongo, Namibia would be described as "NA-ER/Zinc/Open Pit/Underground" and a drilling project off the shore of Nigeria that produced oil and natural gas would be described as "NG-BY/Offshore/Oil/Natural Gas/Well."

We recognize that such an approach could result in broad aggregation of projects within a major subnational political jurisdiction, which could make it more difficult for end-users of the disclosure to identify the specific commercial development activities associated with the disclosed payments. Nevertheless, we believe this approach to be appropriate because issuers often develop more than one type of resource at a particular location and use more than one method of extraction. Limiting the definition of project to only commercial development activities comprising the same type of resource, method of extraction, and major subnational political jurisdiction may result in artificial distinctions. For example, an issuer would be required to treat oil and natural gas extraction from the same well as separate projects, and similarly, open pit and underground mining in the same location as separate projects. Requiring that these types of related activities be treated as separate projects could also lead to confusion about how reportable payments should be allocated between such projects. In addition, we note that greater aggregation could result in additional payments being disclosed on a per project basis

because it would be less likely that such a payment would be de minimis than if project was defined more granularly.

In some situations the site where a resource is being commercially developed could cross the borders between multiple major subnational political jurisdictions. In such a case, the proposed rules would require the issuer to treat the activities in each major subnational political jurisdiction as separate projects. This approach reflects the fact that, although the cross-border extractive activities are related, they likely would give rise to a separate set of payments to different subnational payees in each jurisdiction.

Request for Comment

35. Should we define "project" by the type of resource being commercially developed, the method of extraction, and the major subnational political jurisdiction where the commercial development of the resource is taking place, as proposed?
36. Would the Modified Project Definition achieve an appropriate balance between promoting transparency regarding a resource extraction issuer's payments to governments and reducing regulatory costs and burdens, including the risk of harming the issuer's competitive position by requiring disclosure of proprietary commercial information? Are there any specific changes that we could make to the Modified Project Definition that would improve transparency and/or help limit compliance costs and burdens consistent with the Section 13(q) mandate and the CRA's restrictions on subsequent rulemaking?
37. Have companies experienced compliance problems or burdens with reporting contract-based payments under the EU Directives and Canada's ESTMA? Does that experience

confirm that our proposed approach to the definition of "project" is appropriate, or does it suggest that we should adopt a different approach? If the latter, describe that approach and whether it would also help limit compliance costs and burdens for resource extraction issuers.

38. Is there an alternative to using either the Modified Project Definition or the Contract-level Project Definition that would support the commitment of the Federal Government to promote international transparency promotion efforts relating to the commercial development of oil, natural gas or minerals while limiting compliance costs and mitigating competitive concerns for resource extraction issuers? To what extent is comparability among Section 13(q) disclosures important for transparency purposes? To the extent it is important, would requiring more or less granular project information impact comparability?
39. Are the proposed requirements for describing the type of resource appropriate? If not, please explain how the type of resource should be described and why.
40. Should we require issuers to provide greater detail on the type of resource than proposed? If so, what level of detail should we require? What benefits would such additional detail provide to end-users? What costs would an issuer incur to provide such additional detail?
41. Are the proposed requirements for describing the method of extraction appropriate? If not, please explain how the method of extraction should be described and why.
42. Should we require issuers to provide greater detail on the method of extraction being used? If so, what level of detail should we require? What benefits would such additional

detail provide to end-users? What costs would an issuer incur to provide such additional detail?

43. Does the proposed requirement to describe the major subnational political jurisdiction where the commercial development of the resource is taking place provide the appropriate balance between promoting payment transparency and limiting an issuer's compliance costs and burdens? If not, how should we alter the requirement and why? Does the reference to "the state, province, territory or other major subnational jurisdiction" provide adequate guidance concerning how to identify the political jurisdiction where the commercial development of the resource is taking place?
44. The proposed rules would permit an issuer to combine separate resources and different extraction methods into one project if they occur in the same major subnational political jurisdiction. Would this result in too much aggregation even if, as proposed, issuers would be required to describe each resource and each method of extraction?
45. If we do not allow for multiple resource types or methods of extraction to be aggregated, would it result in confusion for issuers or end-users? Would requiring issuers to treat each resource type or method of extraction as a separate project result in more payments being considered de minimis and thus reduce the overall amount of disclosure?
46. Is our proposed approach to disclosing activities that cross the borders of major subnational political jurisdictions appropriate? Are there specific cross-border situations that we should address? Should we instead allow issuers to include all the major subnational political jurisdictions in the description of the project in such a cross-border

situation? Would such an approach make it more difficult to identify the location of the project?

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

As with the 2016 Rules, we are proposing definitions of "foreign government" and "Federal Government" that are consistent with Section 13(q).[195] Under the proposed rules, a "foreign government" would be defined as a foreign government, a department, agency, or instrumentality of a foreign government, or a company at least majority owned by a foreign government. The term "foreign government" would include a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.[196] "Federal Government" would be defined as the Federal Government of the United States and would not include subnational governments within the United States.

For purposes of identifying the foreign governments that received payments at a level below the major subnational government level, the proposed rules would permit an issuer to aggregate all of its payments of a particular payment type without having to identify the particular subnational government payee. The issuer would only be required to identify the type of administrative or political level of subnational government that received the payments. For example, an issuer could aggregate payments by payment type made to multiple counties and

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[195] *See* 2016 Adopting Release, Section II.F.3. We also adopted the same definitions in the 2012 rulemaking. *See* 2012 Adopting Release, Section II.E.3.

[196] To the extent that aboriginal, indigenous, or tribal governments are subnational governments in foreign countries, payments to those government entities would be covered by the proposed rules.

municipalities (the level below major subnational government level) and disclose the aggregate amount without having to identify the particular subnational government payee. The issuer would instead generically identify the subnational government payee (*e.g.*, as "county," "municipality" or some combination of subnational governments).[197]

In contrast, for payments made at the major subnational government level, the issuer would have to disclose the particular major subnational payee. Under the proposed Modified Project Definition, however, the issuer could aggregate payments of a particular payment type made to that particular payee.[198] For example, an issuer with extractive operations in the three oil sands regions of Alberta, Canada[199] would be able to aggregate all of its fees paid for environmental and other permits to the Regional Municipality of Wood Buffalo, Northern Sunrise County and the Municipality of Cold Lake, but would not have to identify any of those subnational governments. Instead, when disclosing the aggregate amount, the issuer would identify the payment type as "fees" and the government as "county and municipality."

For royalties paid to the Alberta Department of Energy, at the major subnational government level, however, the issuer would have to identify the payee as "Alberta Department of Energy." It could aggregate all of the royalties arising from its operations in the three oil

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[197] *See* proposed Instruction (14) to Item 2.01 of Form SD.

[198] *See supra* Section II.F.

[199] The three major oil sands regions in Alberta are the Athabasca, Peace River, and Cold Lake regions. *See, e.g.*, Regional Aquatics Monitoring Program, "The Oil Sands Described," *available at* http://www.ramp-alberta.org/resources/development/distribution.aspx.

sands areas, when disclosing the aggregate amount and identifying the payment type as "royalties."

We are proposing this option for aggregated disclosure of subnational government payments to reduce the potential for competitive harm that could result from implementation of the Section 13(q) rules. Some prior commenters stated that overly granular disclosure requirements could permit the reverse-engineering of an issuer's proprietary commercial information or otherwise cause the issuer competitive harm.[200] Moreover, in disapproving the 2016 Rules, members of Congress were particularly concerned about the rules' potential for causing competitive harm.[201] In light of these concerns, we are proposing to permit an issuer to aggregate payments made to entities below the major subnational level without having to identify the particular subnational government payee to mitigate the risk that an issuer could be exposed to potential competitive harm from the disclosure.

Separately, under the proposed rules, a company owned by a foreign government would be defined as a company that is at least majority-owned by a foreign government.[202] Although we acknowledge the concerns of the commenters on the 2016 Rules Proposing Release that argued for a more expansive definition,[203] we believe it would be difficult for issuers to determine when the government has control over a particular entity outside of a majority-

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[200] *See, e.g.*, Letter from ExxonMobil (Feb. 16, 2016); and Letter from API (Feb. 16, 2016).

[201] *See supra* Section I.C.2.

[202] *See* proposed Item 2.01(d)(7) of Form SD.

[203] *See, e.g.*, Letters from Global Witness (Mar. 8, 2016) and PWYP-US (Feb. 16, 2016).

ownership context. In this regard, we note that the statute refers to a company "owned" by a foreign government, not "controlled" by a foreign government. Moreover, the "control" concept is explicitly included in Section 13(q) in other contexts.[204]

With respect to the definition of "Federal Government," we believe that Section 13(q) is clear in only requiring disclosure of payments made to the Federal Government in the United States and not to state and local governments. In this regard, we believe that typically the term "Federal Government" refers only to the U.S. national government and not the states or other subnational governments in the United States.

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[204] *Compare* Section 13(q)(1)(B) *with* Section 13(q)(2(A).

Request for Comment

47. 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?
48. Should we permit an issuer to aggregate payments made to subnational governments below the major subnational level without having to identify any particular subnational government payee, as proposed? If we should instead require the disclosure of each subnational government payee, please explain why that approach would be more appropriate and address whether such a requirement could increase the potential for competitive harm.
49. Should we 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, as proposed? Should we instead provide that a company owned by a foreign government is a company in which the foreign government is the controlling shareholder?
50. Should the definition of "foreign government" include federally recognized American Indian or Alaska Native tribal entities?
51. Should we alter our approach to the terms "foreign government" or "Federal Government" based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?

H. Annual Report Requirement

Section 13(q) mandates that a resource extraction issuer provide the payment disclosure required by that section in an annual report but otherwise does not specify the location of the disclosure, either in terms of a specific form or in terms of location within a form. We believe that resource extraction issuers should provide the required disclosure about payments on Form SD.

Form SD is already used for specialized disclosure not included within an issuer's periodic or current reports, specifically, the disclosure required by the rule implementing Section 1502 of the Act.[205] As such, we believe that using Form SD would facilitate interested parties' ability to locate the disclosure. We also believe that using Form SD would address issuers' concerns about providing the disclosure in their Exchange Act annual reports on Forms 10-K, 20-F or 40-F.[206] For example, it should alleviate the concern that the disclosure will be subject to the officer certifications required by Exchange Act Rules 13a-14 and 15d-14. It would also allow the Commission, as discussed below, to adjust the timing of the submission without directly affecting the broader Exchange Act disclosure framework.[207] As proposed, Form SD would require an issuer to include a brief statement in the body of the form in an item entitled,

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

[206] *See* 2012 Rules Adopting Release, n.366-370 and accompanying text. Under the rules proposed in the 2012 Rules Proposing Release, a resource extraction issuer would have been required to furnish the payment information in its annual report on Form 10-K, Form 20-F, or Form 40-F. One commenter continued to support this approach after the 2012 Rules Adopting Release. *See* Letter from Susan Rose-Ackerman (Mar. 28, 2014) ("[t]here is no need for the cost of a separate report.").

[207] In this regard, we considered permitting the resource extraction payment disclosure to be submitted as an amendment to Form 10-K, 20-F, or 40-F, as applicable, but we are concerned that this might give the false impression that a correction had been made to a previous filing. *See also* 2012 Rules Adopting Release, n.379 and accompanying text.

"Disclosure of Payments by Resource Extraction Issuers," directing readers to the detailed payment information provided in the exhibits to the form.[208]

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

The 2016 Rules required resource extraction issuers to submit Form SD on EDGAR no later than 150 days after the end of the issuer's most recent fiscal year. We based this deadline in part on the need to avoid a conflict with the deadline for an issuer's annual report on Form 10-K, 20-F, or 40-F under the Exchange Act.[209] While we continue to believe that it is reasonable to provide a deadline that would be later than an issuer's Exchange Act annual report deadline, in light of the concerns about excessive compliance costs and burdens and potential competitive harm under the 2016 Rules,[210] we are proposing a submission deadline for Form SD that is longer than the 150 day deadline. The proposed rules would require an issuer with a fiscal year ending on or before June 30 to submit Form SD no later than March 31 in the calendar year following its most recent fiscal year. For an issuer with a fiscal year ending after June 30, the

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[208] *See* proposed Item 2.01(a)(3).

[209] *See* 2016 Adopting Release, Section II.G.3.

[210] *See, e.g.*, *supra* note 54 and accompanying text.

Form SD submission deadline would be no later than March 31 in the second calendar year following its most recent fiscal year.[211]

We believe that the proposed submission deadlines would be sufficient to enable all resource extraction issuers to prepare timely disclosure regarding payments to governments made in their most recent fiscal year, no matter when their fiscal year-end may be, and therefore mitigate the compliance burdens under Section 13(q). We also believe that the lengthened submission deadlines would also address the concerns that the public disclosure of the payment information could cause competitive harm.

We also considered the possibility that certain resource extraction issuers may be required to submit two reports on Form SD every year if we use a reporting period based on the fiscal year and they are subject to the May 31st conflict minerals disclosure deadline.[212] Nevertheless, we continue to believe that the fiscal year is the more appropriate reporting period for the payment disclosure. We believe it would reduce resource extraction issuers' compliance costs when compared to a fixed, annual reporting requirement by allowing them to use their existing tracking and reporting systems for their public reports to also track and report payments under Section 13(q). In addition, although minimizing the number of Forms SD an issuer would need to submit if it was also subject to the conflict minerals disclosure rules could have benefits,

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[211] *See* proposed General Instruction B.2. of Form SD.

[212] General Instruction B.1 of Form SD. *See also* Exchange Act Rule 13p-1.

we do not believe that those benefits outweigh those arising from a reporting regime tailored to a resource extraction issuer's fiscal year.[213]

Request for Comment

52. Should we require resource extraction issuers to provide the payment disclosure mandated under Section 13(q) on Form SD, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release? Would extending the submission deadline in this way help to mitigate potential competitive harm from the payment disclosures?
53. What would be a suitable submission deadline? Should we base the furnishing deadline on an issuer's calendar year-end rather than fiscal year-end?

I. Public Reporting

1. Public Disclosure of the Issuer's Payment Information, Including the Company Name

Section 13(q) provides the Commission with the discretion to require public disclosure of payments by resource extraction issuers, including their names, or to permit nonpublic filings.[214] For the reasons set forth below, we preliminarily believe that exercising our discretion to require public disclosure, including the issuer's name, might better accomplish the objectives of Section

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[213] Of the 236 companies that we estimate would be subject to the proposed rules, only 39 filed a Form SD pursuant to Rule 13p-1 in 2018. In addition, we note that the conflict minerals reporting regime adopted a uniform reporting period, in part, because such a period allows component suppliers that are part of a manufacturer's supply chain to provide reports to their upstream purchasers only once a year. *See* Conflict Minerals Release, n.352 and accompanying text. The same reasoning does not apply to the issuer-driven disclosure under the proposed rules.

[214] *See* API v. SEC, 953 F. Supp. 2d at 11 (finding that the Commission "misread the statute to mandate public disclosure of the reports").

13(q). We are therefore proposing that resource extraction issuers provide the required payment disclosure publicly through the searchable, online EDGAR system.

Section 13(q) requires us to adopt rules that, to the extent practicable, support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas or minerals.[215] We understand that existing transparency regimes require public disclosure of each reporting company's annual report, including the identity of the company.[216] A public disclosure requirement of the payment information under Section 13(q), including the resource extraction issuer's name, would further the statutory directive to support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas or minerals by increasing the total number of companies that provide public, project-level disclosure. In addition, companies that could be subject to the proposed rules may already be publicly reporting under the Canadian or EU regimes, using a more granular contract-level definition of project. For these companies, there would likely be only minimal burden or harm due to public reporting under the proposed rules.

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[215] Section 13(q)(2)(E).

[216] *See, e.g.*, ESTMA Specifications, Section 2.4 ("Reporting Entities are required to publish their reports on the Internet so they are available to the public"); EITI Standard (2013) at 6 (requiring all EITI reports to show payments by individual company rather than aggregated data) and EITI Standard (2016) at Section 2.5(c) (in addition to individual company disclosure, requiring disclosure of the company's beneficial owners in EITI reports by 2020); and EU Accounting Directive Arts. 42(1) and 45(1) (requiring disclosure of payments to governments in a report made public on an annual basis and published pursuant to the laws of each member state.) We are not aware of any existing transparency regimes that do not require public disclosure.

We recognize that some previous commenters suggested that we permit issuers to submit their annual reports to the Commission non-publicly and have the Commission use those nonpublic submissions to produce an aggregated, anonymized compilation that would be made available to the public.[217] Rather than follow this approach, the proposed rules seek to preserve the public disclosure of payment information while incorporating other changes that we believe would significantly alleviate, and in some cases eliminate, the concerns of commenters and certain members of Congress about the rules' potential adverse competitive effects. These changes from the 2016 Rules include (1) the Modified Project Definition - which would permit aggregation of project data at the major subnational level,[218] (2) the proposal to permit aggregation of subnational government payments,[219] (3) the proposed exemptions for conflicts with foreign law and pre-existing contracts,[220] (4) the proposed targeted exemption allowing delayed reporting for exploratory activities,[221] and (5) the extended filing deadline.[222]

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[217] *See, e.g.*, Letters from API (Feb. 16, 2016) and (Jan. 28, 2011); BP (Feb. 16, 2016); Chevron (Feb. 16, 2016); and Royal Dutch Shell (Feb. 5, 2016); *see also* 2016 Rules Proposing Release, Section II.G.2 and 2016 Adopting Release, n.345.

[218] *See supra* Section II.F. Disclosure that is less granular and not as closely linked to individual contracts should also assuage concerns that competitors could reverse-engineer proprietary commercial information.

[219] *See supra* Section II.G. In this regard, one industry commenter on the 2016 Rules Proposing Release stated that its concerns about company-specific public disclosure causing competitive harm would be "substantially mitigated" if the Commission adopted a definition of "project" similar to the one we have proposed. *See* Letter from ExxonMobil (Feb. 16, 2016).

[220] *See infra* Sections II.J.1. and 2.

[221] *See infra* Section II.J.4.

[222] *See infra* Section II.H.

While we preliminarily believe that the proposed rules strike an appropriate balance, we are also considering the alternative approach of permitting resource extraction issuers to submit their annual reports on Form SD to the Commission non-publicly and the Commission using those nonpublic submissions to produce an aggregated, anonymized public compilation. In this regard, we note that some commenters have indicated that public disclosure of each issuer's specific payments would increase the risk of competitive harm and that such public disclosure would force issuers to reveal highly confidential, commercially-sensitive information, which could also endanger the safety of an issuer's employees.[223] Similarly, as discussed above, several members of Congress who voted to disapprove the 2016 Rules expressed anti-competitive concerns.[224] We also note the view expressed by commenters that the disclosure of issuer-specific information is not necessary to achieve the statutory goal of transparency.[225] These commenters have expressed the view that the information that is necessary to achieve the statute's purposes is the type and amount of payments to governments, which would be provided in an anonymized compilation. We acknowledge our statutory duty in a public rulemaking to

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[223] One of these commenters also stated that these harms would not be mitigated by the European Union or Canadian disclosure regimes because 46 of the top 100 oil and gas companies are listed only in the United States, with many having no reportable operations in Europe or Canada, or only limited operations in those jurisdictions conducted through subsidiaries. *See* Letter from API (Feb. 16, 2016).

[224] *See supra* n.56.

[225] *See, e.g.*, Letter from API (Feb. 16, 2016).

consider whether a proposed action would promote competition in addition to protect investors.[226]

We are interested in commenters' views on whether the rules, as proposed, would sufficiently alleviate concerns about adverse competitive effects or whether we should go further and permit nonpublic submission of the required payment information. If commenters feel that nonpublic submission is necessary or appropriate, it would be helpful if commenters could provide specific explanations for why nonpublic submission is warranted (*i.e.*, what incremental benefits would it provide as compared to the proposed rules) and how aggregated, anonymized payment information would impact the statute's transparency goals. We welcome feedback from all interested parties on these points.

2. Public Compilation

Consistent with Section 13(q), the proposed rules would provide that the Commission's staff will periodically make a separate public compilation of the payment information submitted on Forms SD available online, to the extent practicable.[227] The staff may determine the form,

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[226] *See* Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)], which requires that, whenever the Commission is engaged in rulemaking under the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

[227] *See* proposed Rule 13q-1(e).

manner, and timing of each compilation.[228] As proposed, the staff would not anonymize or change the information included in the compilation.[229]

However, as discussed above, the Commission is also considering the alternative of making available a public aggregated, anonymized compilation instead of making public individual Forms SD. If we choose this alternative, we are considering including information relating to the aggregate payments that flowed to a particular jurisdiction by resource and extraction method.

Request for Comment

54. Should the rules require public disclosure of payment information, as proposed? Would the proposed definition of "project" together with the proposed exemptions (discussed in Section II.J. below) and other provisions of the proposed rules sufficiently mitigate the risk of competitive harm that may arise from public disclosure?
55. Should we instead permit issuers to submit the required payment information non-publicly and then provide an anonymized compilation? What are the incremental benefits and costs of permitting non-public submission and providing an anonymized compilation as compared to the proposed rules? Please be as specific as possible in your response.

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[228] *See id.* We do not anticipate that the staff would produce such a compilation more frequently than once a year.

[229] As noted above, we also are considering an alternative approach whereby resource extraction issuers would submit their annual reports on Form SD to the Commission non-publicly. Under this alternative approach, the Commission would use those nonpublic submissions to produce an aggregated, anonymized public compilation of the required payment information.

56. If we permit non-public submission of Form SD information and provide an anonymized compilation, what information should we include in the compilation? Should it include all information other than the identity of the issuer and identify payments by specific project, or should other information be omitted? Would the disclosure of the project raise similar competitive concerns as providing the issuer's identity? When and how often should the compilation be provided? Please be as specific as possible in your response.

J. Exemptions from Compliance

The proposed rules include two new exemptions from reporting under Section 13(q) where disclosure is prohibited by foreign law or pre-existing contracts. As the 2013 District Court opinion found, the Commission has the authority to grant exemptions with respect to Section 13(q).[230] Several industry commenters specifically recommended these two exemptions in connection with prior rulemakings in order to reduce the risk of competitive harm that could result from the required Section 13(q) payment disclosure.[231] According to these commenters, without these exemptions, a resource extraction issuer that faced a legal or contractual conflict would have to choose between complying with Section 13(q) or the host country law or contract.

For example, if an issuer chose to provide the payment disclosure in violation of the host country law, the issuer could face the shut down and, in the extreme case, expropriation of its

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[230] *See* API v. SEC, 953 F. Supp. 2d at 21-23.

[231] *See*, *e.g.*, Letters from the API (Feb. 16, 2016) and (Nov. 7, 2013); Letter from Chevron (Feb. 16, 2016); and Letter from ExxonMobil (Feb. 16, 2016); *see also* Letter from Nouveau (Feb. 16, 2016).

facilities in the host country, the imposition of fines or the withholding of permits.[232] Similarly, an issuer whose contract prohibits the disclosure of payment information without the host government's permission, and who fails to obtain such permission, could also face adverse financial consequences. For example, the issuer would have to incur costs associated with having to renegotiate its contract with the host government in order to provide the payment disclosure required under Section 13(q).[233]

These two new exemptions would be in addition to the targeted exemption for exploratory activities and transitional relief for recently acquired companies that were included in the 2016 Rules[234] and that are being retained in the proposed rules.[235] We are also proposing similar transitional relief for a resource extraction issuer that has recently conducted its initial

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[232] *See, e.g.*, Letter from API (Feb. 16, 2016).

[233] *See id.* (stating that "many companies' contracts with host governments contain clauses requiring the government's permission before a company publicly reveals payment information" and noting that "[a]lthough some of these contracts allow an issuer to disclose payment information to comply with securities laws, many do not, particularly older contracts.").

[234] *See* 2016 Adopting Release, Section II.G.3. Some commenters on the 2016 rulemaking also sought an exemption for disclosure that could jeopardize the safety of an issuer's personnel. *See* the 2016 Adopting Release, Section II.I.3. The Commission decided not to adopt such an exemption primarily because of its belief that issues involving safety concerns are inherently fact specific and require an analysis of the underlying facts and circumstances. Accordingly, the Commission reasoned that, rather than adopting an exemption regarding safety concerns that issuers might apply in an overly broad way, the better approach would be to permit issuers to raise such concerns by applying for exemptive relief on a case-by-case basis. *See id.* We continue to believe that a case-by-case exemptive process, which would be available under the proposed rules, is the more appropriate approach for addressing issuers' safety concerns. *See* proposed Rule 13q-1(d)(4). We also believe that other proposed provisions, such as the proposed exemptions for conflicts with foreign law or pre-existing contracts as well as the proposed definition of project, should help to alleviate concerns about employee safety that could potentially result from the proposed payment disclosure.

[235] *See infra* Sections II.J.3. and II.J.4.

public offering.[236] Together, we believe that these provisions, as well as our continued willingness to consider additional exemptive relief on a case-by-case basis, would significantly mitigate the concerns of commenters and members of Congress about the burdens of Section 13(q) disclosure and the potential for competitive harm. As a result, we believe these provisions, when considered together with the other proposed changes to the 2016 Rules discussed in this release, should serve to satisfy the CRA's restriction on adopting rules that are in substantially the same form as the disapproved rules. We discuss each of these provisions in more detail below.

1. Exemption for Conflicts of Law

We are proposing an exemption for when an issuer is unable to provide the required disclosure without violating the laws of the jurisdiction where the project is located.[237] Unlike the exemption provided in the 2016 Rules, the proposed exemption would not require issuers to apply to the Commission for exemptive relief. Although the Commission stated in the 2016 rulemaking that a case-by-case exemptive approach for handling situations involving conflicts of law or contract prohibitions was preferable, after reconsidering the comments and with a view to limiting compliance costs and burdens, we are proposing to permit issuers to avail themselves of the exemptions without seeking individual relief on a case-by-case basis.

We believe that the proposed approach would facilitate an issuer's timely submission of Form SD and the timely resolution of any conflict of laws situations with the host government.

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[236] *See infra* Section II.J.5.

[237] *See* proposed Rule 13q-1(d)(1).

It also would alleviate some of the uncertainties of handling conflict of laws situations and the potential competitive harm that could result. In this respect, we note that one commenter in the 2016 rulemaking stated that, with a case-by-case approach, "there would be substantial practical and administrative difficulties associated with obtaining timely exemptive relief" from the Section 13(q) rules.[238] Another commenter expressed concern about a case-by-case approach for handling conflicts of law situations for a company threatened with the potential total loss of its operations in the host country.[239] We anticipate that the proposed rule-based exemption for foreign law conflicts would substantially address these administrative difficulties and concerns about potential losses.

Further, to the extent that the requirement to obtain a case-by-case exemption (and the attendant uncertainties surrounding whether such relief might be granted) could inhibit companies from bidding on or initiating resource extraction projects in particular countries or otherwise impair the ability of companies to compete effectively for such projects, we anticipate that our revised approach would substantially eliminate these potential barriers.

Although issuers could avail themselves of the exemption without further Commission action, an issuer seeking to rely on the exemption would be required to take certain steps to

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[238] *See* Letter from API (Feb. 16, 2016).

[239] *See* Letter from ExxonMobil (Feb. 16, 2016).(stating that "we do not believe the mere possibility of an exemption – which may or may not be granted and even if granted could be revoked or challenged at any time – provides adequate comfort to companies and investors against the potential for being forced to halt operations in a country because of a conflict of laws situation, especially given that any such action by a company would likely represent a breach of the company's contractual obligation to the country and force the company potentially to suffer a total loss of its local operations – operations which could be worth tens of billions of dollars as previously indicated…")

qualify for the exemption, including providing specified disclosures about its eligibility for relief. We believe that these proposed conditions would help ensure that issuers forgo disclosure only when there is a legitimate conflict of law, so that the exemption does not unreasonably frustrate the statutory goal of increasing transparency regarding resource extraction payments. Moreover, as is the case with all filings, the issuer's disclosure and reliance on this exemption would be subject to Commission staff review, which should discourage potentially inappropriate uses of the exemption.

As proposed, the issuer would first have to take reasonable steps to seek and use exemptions or other relief under the applicable law of the foreign jurisdiction. After taking such steps and failing to obtain an exemption or other relief, the issuer would have to disclose the foreign jurisdiction for which it has excluded disclosure, the law preventing disclosure, its efforts to seek and use exemptions or other relief under such law, and the results of those efforts. This disclosure would be required in the body of Form SD. The issuer would also be required to furnish as an exhibit to Form SD a legal opinion from counsel that opines on the inability of the issuer to provide the required disclosure without violating the foreign jurisdiction's law.

The proposed exemption would not be limited to pre-existing foreign laws. We acknowledge that this may provide an incentive for foreign jurisdictions to enact such laws. Although not eliminating this incentive, the absence of a similar exemption under the EU Directives or ESTMA, which generally require disclosure at a more granular level, should serve to limit the likelihood that jurisdictions will pass such laws. In this regard, one previous

commenter observed that no country has adopted a rule or law prohibiting payment disclosures since the initial adoption of Section 13(q) in July 2010. [240]

Request for Comment

57. Should we provide an exemption from disclosing payments when an issuer is unable to provide such disclosure without violating the laws of the jurisdiction where the project is located, as proposed? If we should adopt such an exemption, should issuers be permitted to rely on it without first seeking relief from the Commission, as proposed?
58. Should we include qualifying conditions to the exemption, as proposed? Would these proposed conditions provide adequate protection against potentially inappropriate uses of the exemption? Are the proposed required disclosures appropriate? For example, should we require an issuer to disclose the steps taken to seek and use exemptions or other relief under foreign law as a condition to claiming the conflicts of law exemption? Would requiring such disclosure exacerbate any conflict the issuer may have with foreign law? Should we include additional or different disclosures?
59. Should we require a legal opinion to be furnished in support of the exemption, as proposed? If so, are the requirements for the legal opinion appropriate?

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[240] Letter from API (Nov. 7, 2013) ("Despite their broad potential application, these exemptions are only invoked in limited cases and have not led to a notable spread of non-disclosure laws" [referring to other Commission provisions that similarly permit a registrant to limit its disclosure, and in particular, mentioning Rule 1202 of Regulation S-K, which allows registrants to omit disclosure of proved reserves if that country's government prohibits such disclosure, and General Instruction E to Form 10-K, which allows registrants to omit any item or other requirement of Form 10-K with respect to any foreign subsidiary to the extent that the required disclosure would be detrimental to the registrant.] *See also* Letter from API (Feb. 16, 2016) (noting that currently "two countries-Qatar and China-continue to prohibit the required disclosures.").

60. An issuer would be required to take reasonable steps to seek and use exemptions or other relief under the applicable law of the foreign jurisdiction in which there is a conflict in order to qualify for the proposed exemption. Should we provide guidance about what would constitute reasonable steps to satisfy this condition of the exemption? If so, what should we include in the guidance?

61. Are there other conditions to the proposed exemption that we should adopt instead of, or in addition to, the proposed conditions? For example, should we limit the exemption to foreign laws that pre-date the effective date of the new rules or some earlier date, such as the date of this release? Should we limit the exemption to situations involving a conflict with a foreign national law and preclude its availability when the conflict arises with the law of a foreign subnational jurisdiction, such as a province? If so, please explain why any additional limitation would be appropriate.

2. Exemption for Conflicts with Pre-Existing Contracts

We are proposing an exemption from disclosing payments when the terms of an existing contract prohibit disclosure.[241] The exemption would only apply to contracts in which such terms are expressly included in writing prior to the effective date of the Section 13(q) rules. Similar to the exemption for conflicts of law, and for the same reasons, issuers would not need to seek the exemption on an individual, case-by-case basis. The issuer would, however, have to meet certain conditions to qualify for relief, and its disclosure and reliance on the exemption

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[241] *See* proposed Rule 13q-1(d)(2).

would be subject to staff review, which should help to discourage potentially inappropriate uses of the exemption.

As proposed, an issuer would first have to take reasonable steps to seek and use any contractual exceptions or other contractual relief (*e.g.*, attempting to obtain the consent of the relevant contractual parties) to disclose the payment information. This obligation to take reasonable steps would not include an obligation to renegotiate an existing contract or to compensate the other contractual parties in exchange for their consent to disclose the payments. If the issuer fails to obtain consent, the issuer would have to disclose the jurisdiction where it has excluded such disclosure, the particular contract terms preventing the issuer from providing disclosure, its efforts to seek consent or other contractual relief, and the results of those efforts. This disclosure would be required in the body of Form SD. The issuer would also be required to furnish as an exhibit to Form SD a legal opinion from counsel that opines on the inability of the issuer to provide the required disclosure without violating the applicable contractual terms.

This exemption would differ from the conflicts of law exemption in that it would only apply to written terms of contracts that were entered into prior to the date the Section 13(q) rules take effect. We believe that this limitation is justified because issuers have control over the terms of their contracts and would be in a position to modify future contract terms accordingly. By contrast, issuers would not have similar control over the laws of the jurisdiction where they are engaged in the commercial development of natural resources.

Request for Comment

62. Should we provide an exemption from disclosing payments when the written terms of a pre-existing contract restrict such disclosure, as proposed?
63. Should we include qualifying conditions to the exemption, as proposed? Would these proposed conditions provide adequate protection against potentially inappropriate uses of the exemption? In particular, should we require an issuer to disclose the reasonable steps taken to seek and use any contractual exceptions or other contractual relief to disclose the payment information? Would requiring such disclosure exacerbate any conflict the issuer may have with a pre-existing contract term?
64. Should we require a legal opinion to be furnished in support of the exemption, as proposed? If so, are the proposed requirements for the legal opinion appropriate?
65. As proposed, the exemption would apply only to contracts that were entered into prior to the effective date of the Section 13(q) rules. Should it instead apply to contracts entered into by an earlier or later date? If so, please identify the different date and explain why it would be more appropriate.
66. Should we provide further guidance on the scope of the proposed exemption for pre-existing contracts? For example, how should we treat amendments or extensions of pre-existing contracts that occur after the effective date of the Section 13(q) rules? Should the proposed exemption apply to such amendments or extensions?

3. Exemption for Smaller Reporting Companies and Emerging Growth Companies

We propose to exempt smaller reporting companies[242] and emerging growth companies[243] from the scope of Rule 13q-1.[244] As proposed, neither a smaller reporting company nor an emerging growth company would be required to provide any of the payment disclosure mandated by Section 13(q) and proposed Rule 13q-1. Given the potentially significant fixed cost component of the proposed rules,[245] we believe that this proposed change from the 2016 Rules, eliminating the compliance burden for those companies that are less able to afford it, would reduce the overall cost of the proposed rules and address the related Congressional concerns.[246]

This proposed exemption is consistent with our statutory duty in a public rulemaking to consider, in addition to investor protection concerns, whether an action will promote efficiency, competition, and capital formation.[247] It also is consistent with our treatment of smaller

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[242] The Commission recently amended the definition of "smaller reporting company" to expand the number of registrants that qualify as smaller reporting companies, and to reduce compliance costs for these registrants and promote capital formation, while maintaining appropriate investor protections. The amended definition of "smaller reporting company" includes registrants with a public float of less than $250 million (compared to $75 million in the earlier rule), as well as registrants with annual revenues of less than $100 million for the previous year and either no public float or a public float of less than $700 million. *See* Release No. 33-10513 (Jun. 28, 2018) [83 FR 31992 (Jul. 10, 2018)].

[243] The term "emerging growth company" means an issuer that had total annual gross revenues of less than $1,070,000,000 during its most recently completed fiscal year. *See* the definition of emerging growth company in Securities Act Rule 405 and Exchange Act Rule 12b-2.

[244] *See* proposed Rule 13q-1(d)(3).

[245] *See infra* Section III.C.

[246] *See supra* n. 54 and accompanying text. This change would also help to fulfill Congress' mandate that the proposed rules are not substantially the same as the 2016 Rules.

[247] *See supra* n. 226.

reporting companies and emerging growth companies in other rulemakings[248] undertaken since the enactment of the Jumpstart Our Business Startups Act ("JOBS Act").[249]

Request for Comment

67. Should we exempt smaller reporting companies or emerging growth companies from the scope of Rule 13q-1, as proposed?
68. Should we instead provide a longer transition period for smaller reporting companies or emerging growth companies to comply with Rule 13q-1? If so, what should be the compliance date for those companies?
69. Should we instead adopt scaled disclosure requirements for smaller reporting companies or emerging growth companies under Rule 13q-1? If so, what should those scaled disclosure requirements entail?

4. Targeted Exemption for Payments Related to Exploratory Activities

We are proposing a targeted exemption for payments related to exploratory activities. We adopted such an exemption in the 2016 Rules after considering the concerns raised by industry commenters that the disclosure of payment information regarding exploratory activities could result in competitive harm to a resource extraction issuer.[250] We have considered whether

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[248] *See, e.g.*, *Pay Ratio Disclosure*, Release No. 33-9877 (Aug. 5, 2015) [80 FR 50103 (Aug. 18, 2015)] (exempting smaller reporting companies and emerging growth companies, among others, from the scope of the required pay ratio disclosure).

[249] Pub. L. No. 112-106, 126 Stat. 306 (2012).

[250] *See* 2016 Adopting Release, Section II.I.3. (citing Letter from API (Feb. 16, 2016), which explained the competitive harm that could result from the disclosure of bonus and other payments to the host government regarding high-potential exploratory territory and stating that a case-by-case exemptive approach would be

such an exemption would continue to be necessary in light of the proposed Modified Project Definition, which would provide the geographic location of a project at the national and major subnational political jurisdiction—rather than contract—level. We believe the exemption is necessary, given the inherently commercially sensitive nature of exploratory activities. We also have considered whether this targeted exemption is necessary in light of the proposed extended deadline for furnishing the payment information. Again, we believe it is, because of the difficulty of determining the precise point at which exploratory activities cease being commercially sensitive.

Although the Modified Project Definition should help alleviate competitive harm, we remain concerned that such harm could still occur. For example, harm could occur if the major subnational political jurisdiction is small or if other indicators, such as disclosure of a particular payment type that is associated with the commencement of exploratory activities, would provide enough information to reveal an issuer's exploratory activities. Thus, we continue to believe that a targeted exemption for disclosure of payments related to exploratory activities would mitigate the potential competitive harm that issuers might experience in these circumstances. Importantly, we do not believe it would substantially reduce the overall benefits of the disclosure to its users.[251]

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insufficient to protect against competitive harm in those situations). *See also* Letter from ExxonMobil (Feb. 16, 2016) (discussing the competitive harm from the forced disclosure of payments that may allow competitors to identify new areas of potential resource development an issuer has identified, and to determine the value the issuer places on such resources).

[251] *See* 2016 Rules Adopting Release, Section II.I.3.

Under this proposed targeted exemption, issuers would not be required to report payments related to exploratory activities in the Form SD for the fiscal year in which payments are made. Instead, an issuer could delay reporting such payments until it submits a Form SD for the fiscal year following the fiscal year in which the payments were made.[252] We are proposing a limited, delayed approach because we believe that the likelihood of competitive harm from the disclosure of payment information related to exploratory activities diminishes over time.

For purposes of this proposed exemption, we would consider payments to be related to exploratory activities if they are made as part of the process of identifying areas that may warrant examination or examining specific areas that are considered to have prospects of containing oil and gas reserves, or as part of a mineral exploration program. In all cases, exploratory activities would be limited to activities conducted prior to the commercial development (other than exploration) of the oil, natural gas, or minerals that are the subject of the exploratory activities.[253]

In proposing this exemption, we considered the fact that the total payment streams from the first year of exploration that would be covered by the exemption should often be relatively small compared to, for example, the annual payment streams that would likely occur once an issuer commences development and production. Given this likelihood, we believe that any diminished transparency as a result of the one-year delay in reporting of such payments is

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[252] In the Form SD for the fiscal year following the fiscal year in which the exploratory payments were made, the issuer would be required to report those exploratory payments as well as all applicable non-exploratory payments, if any, made during the fiscal year following the fiscal year in which the issuer made the exploratory payments.

[253] *See* proposed Item 2.01(b)(1) of Form SD.

justified by the potential competitive harms that we anticipate may be avoided as a result of this exemptive relief. Nevertheless, we are proposing to limit the exemption to one year because we believe that the likelihood of competitive harm from disclosing the payment information diminishes over time once exploratory activities have begun.[254]

Request for Comment

70. Should we provide a targeted exemption for payments related to exploratory activities, as proposed? If so, should it be for longer or shorter than the proposed one-year delay in reporting? For example, should an issuer be permitted to wait until the second fiscal year following the fiscal year in which the exploratory activities occurred before having to provide the Section 13(q) disclosure?
71. Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release? For example, does the proposed definition of project, which is non-contract based, mitigate the need for, or support a modification to, the targeted exemption regarding exploratory activities?

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[254] We appreciate that the exploratory phase may vary from project to project, and that this variance can depend on such considerations as the geographic area in which the exploration is being undertaken and the type of resource being sought. In proposing to provide a one-year reporting delay, we looked to considerations in the oil and gas industry in particular as oil and gas industry commenters asserted a specific need for the exemptive relief. We understand that the exploratory period for oil and gas generally involves a seismic survey/analysis phase followed by an exploratory drilling phase. We further understand that, while the time periods for those activities can vary considerably, conducting seismic surveys and analyzing the data can take six months or more, while (at least for conventional onshore hydrocarbons) exploratory drilling and site clearance can potentially take a similar length of time. These considerations lead us to believe that one year is an appropriate period for the proposed delay in reporting exploratory payments, although we solicit comment below on other potential timeframes for relief. We further note that an issuer would be able to apply for an exemption on a case-by-case basis, as discussed below in Section II.J.6., if it believes that its individual circumstances warranted a longer exemptive period than the proposed one-year exemption.

5. Transitional Relief for Recently Acquired Companies

We are proposing transitional relief with respect to recently acquired companies where such companies were not previously subject to Section 13(q) or an alternative reporting regime deemed by the Commission to satisfy the transparency objectives of Section 13(q).[255] The Commission provided this relief under the 2016 Rules based on the recommendations of commenters who asserted that such relief was necessary to reduce the compliance costs associated with recently acquired companies that may experience difficulty timely complying with the payment disclosure requirements.[256] As noted by those commenters, the Commission adopted a similar provision under Rule 13p-1,[257] which also requires disclosure on Form SD.[258]

Under proposed Rule 13q-1 and Form SD, an issuer would be required to disclose resource extraction payment information for every entity it controls. Therefore, absent an exemption, an issuer would be required to include the acquired company's resource extraction payment information in its first annual submission after obtaining control. We are concerned

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[255] *See* proposed Item 2.01(b)(2) of Form SD. For purposes of this provision, an issuer that has recently acquired a company that has not been subject to an alternative reporting regime pursuant to proposed Item 2.01(c) of Form SD would be eligible for the transitional relief. Under that provision, a resource extraction issuer that is subject to the resource extraction payment disclosure requirements of an alternative reporting regime that has been deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q) may satisfy its Section 13(q) disclosure obligations by including, as an exhibit to the Form SD, a report complying with the reporting requirements of the alternative jurisdiction. *See infra* Section K.

[256] *See* 2016 Adopting Release, Section II.G.3. (citing Letter from Cleary, Gottlieb, Steen and Hamilton ("Cleary") (Feb. 17, 2016) and Letter from Ropes & Gray (Feb. 16, 2016)).

[257] 17 CFR 240.13p-1.

[258] *See* Instruction (3) to Item 1.01 of Form SD. The proposed rules differ, however, from what is provided for under Rule 13p-1 because disclosure under Rule 13p-1 occurs on a calendar year basis rather than a fiscal year basis.

that implementing the appropriate reporting mechanisms in a timely manner for a company that was not previously subject to reporting under Section 13(q) or an alternative reporting regime might remain a significant undertaking, notwithstanding our belief that the Modified Project Definition would reduce compliance costs and burdens compared to the 2016 Rules. As such, we are providing transitional relief with respect to such companies.[259]

Under the proposed rules, issuers would not need to report payment information for a company that it acquired or over which it otherwise obtained control, if the acquired company, in its last full fiscal year, was not obligated to disclose resource extraction payment information pursuant to Rule 13q-1 or an alternative reporting regime's requirements deemed by the Commission to satisfy Section 13(q)'s transparency objectives. In these circumstances, the resource extraction issuer would begin reporting payment information for the acquired company starting with the Form SD submission for the first full fiscal year immediately following the effective date of the acquisition. As under the 2016 Rules, and in contrast to the targeted exemption for exploratory activities, an issuer would not be required to provide the (excluded) payment disclosure for the year in which it acquired the company in a future Form SD.[260]

Request for Comment

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[259] As explained in the 2016 rulemaking, the proposed transitional relief would not apply to companies that have been subject to Section 13(q)'s disclosure requirements or to those of an alternative reporting regime prior to their acquisition because such companies should already be generally familiar with the Section 13(q) requirements or have sufficient notice of them to establish reporting systems and prepare the appropriate disclosure during the fiscal year of their acquisition. *See* 2016 Adopting Release, Section II.G.3.

[260] *See id*.

72. Should we provide transitional relief for an issuer that has acquired or obtained control over a company whose resource extraction payments are required to be disclosed and was not previously obligated to provide such disclosure, as proposed? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?

73. Should the transitional relief be for a longer or shorter period than as proposed? For example, should an issuer that has acquired a recently acquired company, which is eligible for the proposed transitional relief, be permitted to wait until its second fiscal year following the fiscal year in which the acquisition occurred before having to comply with the Section 13(q) rules?

6. Transitional Relief for Initial Public Offerings

We are proposing similar transitional relief for a resource extraction issuer that has completed its initial public offering in the United States in its last full fiscal year. Such an issuer would not have to comply with the Section 13(q) rules until the first fiscal year following the fiscal year in which it completed its initial public offering.[261]

This proposed transitional relief for companies that have recently completed their U.S. initial public offerings is a change from the 2016 Rules. At that time, the Commission stated its belief that such companies would have sufficient notice of the payment reporting requirements to

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[261] *See* proposed Item 2.01(b)(3) of Form SD.

establish reporting systems and prepare the appropriate disclosure prior to undertaking the initial public offering.[262]

An issuer that is preparing to conduct its U.S. initial public offering would have notice of the Section 13(q) rules. Thus, such an issuer would likely need to incur costs to establish a payment reporting system to comply with the Section 13(q) rules in advance of the public offering despite not knowing whether it will successfully conduct that initial public offering. The company would then incur these costs unnecessarily if it chose not to move forward with a planned initial public offering. We believe that the proposed transitional relief would prevent the situation where an issuer contemplating a U.S. initial public offering would need to postpone or, in the extreme case, refrain from conducting its U.S. initial public offering to avoid the Section 13(q) compliance costs. These outcomes would be contrary to the stated goals of Section 13(q) as they would delay or reduce the disclosure provided under that section.

Request for Comment

74. Should we provide transitional relief for an issuer that has completed its U.S. initial public offering in its last full fiscal year, as proposed?
75. Should we limit the transitional relief only to those issuers that, prior to completion of their initial public offering, have not been subject to an alternative reporting regime deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q)?

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[262] *See* 2016 Adopting Release, Section II.G.

76. Should the transitional relief be for a longer or shorter period than as proposed? For example, should an issuer that has recently completed its U.S. initial public offering be permitted to wait until its second fiscal year following the fiscal year in which the initial public offering occurred before having to comply with the Section 13(q) rules?

7. Case-by-Case Exemption

To address any other potential bases for exemptive relief, beyond the rule-based exemptions and transitional relief described above, the proposed rules would provide that issuers may apply for exemptions on a case-by-case basis using the procedures set forth in 17 CFR 240.0-12 (Rule 0-12 of the Exchange Act).[263] Issuers seeking an exemption would be required to submit a written request for exemptive relief to the Commission. The request should describe the particular payment disclosures it seeks to omit (*e.g.*, signature bonuses in Country X or production entitlement payments in Country Y) and the specific facts and circumstances that warrant an exemption, including the particular costs and burdens it faces if it discloses the information. The Commission would be able to consider all appropriate factors in making a determination whether to grant requests, including whether the disclosure is already publicly available and whether (and how frequently) similar information has been disclosed by other companies, under the same or similar circumstances. If the proposed rules are adopted, we would anticipate relying on Section 36(a) of the Exchange Act to provide exemptive relief under this framework. In situations where exigent circumstances exist, the Commission staff, acting

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[263] *See* proposed Rule 13q-1(d)(4).

pursuant to delegated authority from the Commission, could rely on Exchange Act Section 12(h)[264] for the limited purpose of providing interim relief while the Commission considered the Section 36(a) exemptive application.[265]

This approach would allow the Commission to determine if and when exemptive relief may be warranted and how broadly it should apply, based on the specific facts and circumstances presented in the application. For example, an issuer could apply for an exemption in situations where disclosure would have a substantial likelihood of jeopardizing the safety of an issuer's personnel, or in other situations posing a significant threat of commercial harm that fall outside the scope of the proposed rule-based exemptions and transitional relief described above. The Commission could then determine the best approach to take based on the facts and circumstances, including denying an exemption, providing an individual exemption, providing a broader exemption for all issuers operating in a particular country, or providing some other appropriately tailored exemption.

Request for Comment

77. In light of the other proposed exemptions and transitional relief, should the Section 13(q) rules provide that issuers may apply for exemptions on a case-by-case basis using the procedures set forth in Rule 0-12 of the Exchange Act, as proposed?

K. Exhibits and Interactive Data Format Requirements

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[264] 15 U.S.C. 78l(h).

[265] *See* Section 36(a) of the Exchange Act [15 U.S.C. 78mm(a)] (providing the Commission with broad authority to provide exemptions when it is necessary or appropriate in the public interest, and it is consistent with the protection of investors).

As required by Section 13(q), the proposed rules would require a resource extraction issuer to submit the required disclosure on EDGAR in an XBRL exhibit to Form SD.[266] Providing the required disclosure elements in a machine readable (electronically tagged) format would enable users easily to extract, aggregate, and analyze the information in a manner that is most useful to them. For example, it would allow the information received from the issuers to be converted by EDGAR and other commonly used software and services into an easily readable tabular format.

In proposing to require the use of XBRL as the interactive data format, we note that most commenters on the 2016 Rules Proposing Release who addressed the issue supported the use of XBRL.[267] Commenters, however, did not similarly support the use of Inline XBRL, which is a particular form of XBRL that allows filers to embed XBRL data directly into an HTML document, eliminating the need to tag a copy of the information in a separate XBRL exhibit.

The Commission recently proposed to require the use of the Inline XBRL format for the submission of operating company financial statement information and mutual fund risk/return summaries.[268] We are not proposing to require a resource extraction issuer to use Inline XBRL when submitting the Section 13(q) payment information. Given the nature of the disclosure

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[266] 15 U.S.C. 78m(q)(2)(C) and 15 U.S.C. 78m(q)(2)(D)(ii). The Commission has defined an "interactive data file" to be the interactive data submitted in a machine-readable format. See 17 CFR 232.11; Release No. 33-9002 (Jan. 14, 2009) [74 FR 6776 (Feb. 10, 2009)], 6778, n.50.

[267] *See* 2016 Rules Adopting Release, Section II.K.3.

[268] *See* Release No. 33-10323 (Mar. 1, 2017) [82 FR 13928 (Mar. 15, 2017)].

required by the proposed rules, which is primarily an exhibit with tabular data, we do not believe that Inline XBRL would improve the usefulness or presentation of the required disclosure.

Under the proposed rules, and consistent with the statute, a resource extraction issuer would be required to submit the payment information in XBRL using electronic tags—a taxonomy of defined reporting elements—that identify, for any payment required to be disclosed:

- The total amounts of the payments, by category;[269]
- The currency used to make the payments;
- The financial period in which the payments were made;
- The business segment of the resource extraction issuer that made the payments;
- The government that received the payments, and the country in which the government is located; and
- The project of the resource extraction issuer to which the payments relate.[270]

In addition to the electronic tags specifically required by the statute, a resource extraction issuer would also be required to provide and tag the type and total amount of payments, by payment type, made for each project and the type and total amount of payments, by payment type, for all projects made to each government.[271] These additional tags relate to information

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[269] For example, categories of payments could be royalties, bonuses, taxes, fees, or production entitlements.

[270] *See* proposed Item 2.01(a)(5) of Form SD.

[271] *See* proposed Item 2.01(a)(5)(i) through (ii).

that is specifically required to be included in the resource extraction issuer's annual report by Section 13(q).[272]

The proposed rules would also require resource extraction issuers to tag the particular resource that is the subject of commercial development, the method of extraction, and the country and major subnational political jurisdiction of the project. While these three items of information also would be included in the project description, we believe that having separate tags for these items would further enhance the usefulness of the data with an insignificant corresponding increase in compliance costs.

For the country in which the government and project is located and the major subnational geographic location of a project, we are proposing that the issuer use a tag that is consistent with the appropriate ISO code.[273] As some previous commenters pointed out, such use would standardize references to those geographic locations and thereby help to reduce confusion caused by a particular project description.[274]

Consistent with the statute, the proposed rules would require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. The statute also requires a resource extraction issuer to present the type and total amount of payments made for each project and to each government, but does not specify how the issuer should report the total amounts. We believe that the statutory requirement to provide a tag identifying the

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[272] *See* Section 13(q)(2)(A)(i) through (ii).

[273] ISO 3166-1 pertains to countries whereas ISO 3166-2 pertains to major subdivisions in the listed countries.

[274] *See* 2016 Rules Adopting Release, Section II.K.3.

currency used to make the payment, coupled with the requirement to disclose the total amount of payments by payment type for each project and to each government, requires issuers to perform currency conversions when payments are made in multiple currencies.

We are proposing an instruction to Form SD clarifying that issuers would have to report the amount of payments made for each payment type, and the total amount of payments made for each project and to each government, in U.S. dollars or in the issuer's reporting currency if not U.S. dollars.[275] We understand that issuers may have concerns regarding the compliance costs related to making payments in multiple currencies and being required to report the information in another currency.[276] As we did in the 2016 Rules,[277] in order to address those concerns, we are proposing that a resource extraction issuer would be able to choose to calculate the currency conversion between the currency in which the payment was made and U.S. dollars or the issuer's reporting currency, as applicable, in one of three ways:

- By translating the expenses at the exchange rate existing at the time the payment is made;
- By using a weighted average of the exchange rates during the period; or

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[275] *See* proposed Instruction 2 to Item 2.01 of Form SD. Foreign private issuers may currently present their financial statements in a currency other than U.S. dollars for purposes of Securities Act registration and Exchange Act registration and reporting. See Rule 3-20 of Regulation S-X [17 CFR 210.3-20].

[276] *See* 2012 Rules Adopting Release, n.485 and accompanying text.

[277] *See* 2016 Adopting Release, Section II.K.1. Only one commenter addressed the Commission's currency conversion approach in the 2016 rulemaking. That commenter stated that "the three proposed methods for calculating the currency conversion when payments are made in multiple currencies provide issuers with sufficient options to address any possible concerns about compliance costs and comparability of the disclosure among issuers." Letter from Petrobras (Feb. 16, 2016).

- Based on the exchange rate as of the issuer's fiscal year end.[278]

Under the proposed rules, a resource extraction issuer would have to disclose the method used to calculate the currency conversion. In addition, in order to avoid confusion, we are proposing to require that an issuer choose a consistent method for all such currency conversions within a particular Form SD.[279]

Consistent with the statute, the proposed rules would require a resource extraction issuer to include an electronic tag that identifies the business segment of the resource extraction issuer that made the payments. We are proposing to define "business segment" as a business segment consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting.[280] Defining "business segment" in this way would enable issuers to report the information according to how they currently report their business operations, which should help to limit compliance costs.

Finally, to the extent that payments, such as corporate income taxes and dividends, are made for obligations levied at the entity level, issuers could omit certain tags that may be inapplicable (*e.g.*, project tag, business segment tag) for those payment types. Issuers would, however, have to provide all other electronic tags, including the tag identifying the recipient government.[281]

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[278] *See* proposed Instruction 2 to Item 2.01 of Form SD.

[279] *See id*.

[280] *See* proposed Item 2.01(d)(1) of Form SD. The term "reportable segment" is defined in FASB ASC Topic 280, Segment Reporting, and IFRS 8, Operating Segments.

[281] *See* proposed Instruction 4 to Item 2.01 of Form SD.

Request for Comment

78. Should we require the resource extraction payment disclosure to be electronically formatted in XBRL and provided in a new exhibit, as proposed? We are mindful of concerns about mandating technology that may one day become outdated. Is there anything we can do to address this problem in these rules?
79. Should we alter our approach to the exhibit and interactive data format requirements described above based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?
80. In addition to the statutorily required tags, should we require electronic tagging to identify the type of resource, the method of extraction and the country and major subnational jurisdiction in which the project is located, as proposed? Would separate tags for these items be useful even if the information is required to be disclosed in the project description tag?

L. Alternative Reporting

As noted above, several countries have implemented resource extraction payment disclosure laws.[282] In light of these developments, and with a view towards limiting compliance costs, we are proposing a provision that would allow issuers to meet the requirements of the proposed rules, in certain circumstances, by providing disclosures that comply with a foreign jurisdiction's reporting regime. Specifically, this provision would apply if the Commission has

[282] *See supra* Section I.B.

determined that the alternate reporting regime requires disclosure that satisfies the transparency objectives of Section 13(q).[283] The Commission proposed a similar approach to alternative reporting in connection with the 2016 Rules and all of the commenters who addressed the issue supported this approach.[284]

The proposed provision would allow an issuer subject to resource extraction payment disclosure requirements in a foreign jurisdiction to submit the report it prepared under those foreign requirements in lieu of the report that would otherwise be required by our disclosure rules, subject to certain conditions. The proposed rules would permit compliance under this framework only after the Commission has determined that the foreign reporting regime requires disclosure that satisfies the transparency objectives of Section 13(q). This framework for alternative reporting would, at least in part, allow a resource extraction issuer to avoid the costs of having to prepare a separate report meeting the requirements of our proposed disclosure rules when it already submits a report pursuant to another jurisdiction's requirements deemed by the Commission to satisfy Section 13(q)'s transparency objectives.

An issuer would only be permitted to use an alternative report for an approved foreign jurisdiction or regime if the issuer was subject to the resource extraction payment disclosure requirements of that jurisdiction or regime and had made the report prepared in accordance with

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[283] *See* Proposed Item 2.01(c) of Form SD.

[284] *See, e.g.*, Letter from Africa Centre for Energy Policy (Feb. 16, 2016); Letter from API (Feb. 16, 2016); Letter from BHP Billiton (Jan. 25, 2016); Letter from BP (Feb. 16, 2016); Letter from Calvert Investments (Feb. 16, 2016); Letter from Cleary (Feb. 17, 2016); Letter from Encana Corporation (Jan. 25, 2016); Letter from Global Witness (Feb. 16, 2016); Letter from PWYP-US (Feb. 16, 2016); Letter from RDS (Feb. 5, 2016); Letter from Ropes & Gray (Feb. 16, 2017); and Letter from Total (Jan. 13, 2016).

that jurisdiction's requirements publicly available prior to submitting it to the Commission.[285] An issuer choosing to avail itself of this accommodation must submit as an exhibit to Form SD the same report that it previously made publicly available in accordance with the approved alternative jurisdiction's requirements.[286] The issuer also would be required to state in the body of its Form SD that it is relying on this accommodation and identify the alternative reporting regime for which the report was prepared.[287]

In addition, under the proposed rules, the alternative reports must be tagged using XBRL.[288] We believe that requiring a consistent data format for all reports submitted to the Commission would enhance the ability of users to access the data and create their own compilations in a manner most useful to them. We also believe that requiring a consistent data format would better enable the Commission's staff to provide any additional compilations of Section 13(q) information.[289]

An issuer relying on the proposed alternative reporting accommodation must also provide a fair and accurate English translation of the entire report if prepared in a foreign language.[290]

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[285] *See* proposed Item 2.01(c)(1) through (2) of Form SD.

[286] *See* proposed Item 2.01(c)(2) of Form SD. The format of the report could differ to the extent necessary to comply with the conditions placed by the Commission on the alternative reporting accommodation. *See id.* For example, the report may not have been originally submitted in the home jurisdiction in XBRL or may not have been in English.

[287] *See* proposed Item 2.01(c)(3) of Form SD.

[288] *See* proposed Item 2.01(c)(4) of Form SD.

[289] We believe that these considerations justify not following the recommendation of a commenter on the 2016 Rules Proposing Release that we not require issuers to convert data into a different interactive data format to qualify for alternative reporting. *See* letter from BHP Billiton (Jan. 25, 2016).

[290] *See* proposed Item 2.01(c)(5) of Form SD.

Given the specificity of the disclosure and the electronic tagging required under Rule 13q-1 and Form SD, we do not believe it would be appropriate to permit an English summary of a foreign language document that is being provided as an alternative report.[291]

Other than the XBRL and English translation requirements, an issuer that elects to use the alternative reporting option would not be required to meet a requirement under the proposed rules to the extent that the alternative reporting regime imposes a different requirement.

Similar to the 2016 Rules, a resource extraction issuer would be able to follow the submission deadline of an approved alternative jurisdiction if it submits a notice on or before the due date of its Form SD indicating its intent to submit the alternative report using the alternative jurisdiction's deadline.[292] If a resource extraction issuer fails to submit such notice on a timely basis, or submits such a notice but fails to submit the alternative report within four business days of the alternative jurisdiction's deadline, as proposed, it would not be able to rely on the alternative reporting accommodation for the following fiscal year.[293]

We anticipate making determinations about whether a foreign jurisdiction's disclosure requirements satisfy Section 13(q)'s transparency objectives either on our own initiative or

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[291] Rule 306 of Regulation S-T (17 CFR 232.306) requires that all electronic filings and submissions be in the English language. If a filing or submission requires the inclusion of a foreign language document, Rule 306 requires that the document be translated into English in accordance with Securities Act Rule 403(c) (17 CFR 230.403(c)) or Exchange Act Rule 12b-12(d) (17 CFR 240.12b-12(d)). Both of these rules require the submission of a fair and accurate English translation of an entire foreign language document that is being submitted as an exhibit or attachment if the document consists of certain specified material. If the foreign language document does not consist of such material, and the form permits it, a fair and accurate English language summary could be provided in lieu of an English translation.

[292] *See* proposed Item 2.01(c)(6) of Form SD.

[293] *See id.*

pursuant to an application submitted by an issuer or a jurisdiction. We would then publish the determinations in the form of a Commission order.[294]

We anticipate considering, among others, the following criteria in determining whether a foreign jurisdiction's reporting regime requires disclosure that satisfies Section 13(q)'s transparency objectives: (1) the types of activities that trigger disclosure; (2) the types of payments that are required to be disclosed; and (3) whether project-level disclosure is required and how "project" is defined. We also anticipate considering other factors as appropriate or necessary under the circumstances.

Applications could be submitted by issuers, governments, industry groups, and trade associations.[295] Applicants would follow the procedures set forth in Rule 0-13 of the Exchange Act to request recognition of other jurisdictions' reporting regimes as satisfying Section 13(q)'s transparency objectives.[296] Under the proposed rules, the application would have to include supporting documents, and it would be referred to the Commission's staff for review.[297] The Commission would publish a notice in the Federal Register that a complete application has been

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[294] Concurrently with the 2016 Rules Adopting Release, the Commission issued an order stating that a resource extraction issuer that files a report complying with the reporting requirements of the EU Directives, ESTMA, and the USEITI would satisfy its disclosure obligations under Rule 13q-1. *See* Release No. 34-78169 (Jun. 16, 2016) [81 FR 49163 (July 27, 2016) (placing certain additional conditions on the use of USEITI reports because they are limited to disclosure of payments to the Federal Government and follow a different reporting schedule). *See also* 2016 Rules Adopting Release, Section II.J.3.b.

[295] *See* proposed Rule 13q-1(c).

[296] Rule 0-13 (17 CFR 240.0-13) permits an application to be filed with the Commission to request a "substituted compliance order" under the Exchange Act.

[297] *Id.*

submitted and allow for public comment. The Commission could also, in its sole discretion, schedule a hearing before the Commission on the matter addressed by the application.

Request for Comment

81. Should we include a provision in the rules that would allow for issuers subject to reporting requirements in certain foreign jurisdictions to submit those reports in satisfaction of our requirements, as proposed? Are the conditions we have proposed for the use of the alternative reports, such as providing a fair and accurate English translation and requiring the information to be tagged using XBRL, appropriate? For example, should a resource extraction issuer be precluded from relying on the alternative reporting accommodation for the following fiscal year if it fails to submit notice on a timely basis that it intends to submit an alternative report using the alternative jurisdiction's deadline, as proposed? Should it be precluded from relying on the alternative reporting accommodation for the following fiscal year if it submits such notice but fails to submit the alternative report within four business days of the alternative jurisdiction's deadline, as proposed? Should we provide more than four days after the submission deadline of the approved alternative jurisdiction for a resource extraction issuer to submit the alternative report? If so, what should that time period be? Should we alter our approach based on any developments since the adoption of the 2016 Rules or in light of our other proposals in this release?
82. Are the criteria that we have proposed to determine whether another foreign jurisdiction's reporting regime requires disclosure that satisfies the transparency objectives of Section

13(q) appropriate? Are there certain criteria that we should eliminate or substitute for any of the criteria discussed in this proposing release? If so, which criteria and why?

83. Given the development of resource extraction payment disclosure rules in various jurisdictions, is there any reason why, when a final rule is adopted, we should not make a determination regarding whether certain foreign reporting regimes satisfy Section 13(q)'s transparency objectives? If we should decide to make such a determination, which jurisdictions should we consider? Would the proposed, broader definition of "project" allow for jurisdictions other than the European Union and Canada to be deemed alternative reporting regimes that satisfy the transparency objectives of Section 13(q)?

M. Treatment for Purposes of the Exchange Act and Securities Act

The proposed rules would consider the disclosure provided pursuant to Section 13q-1 on Form SD as furnished to, but not filed with, with the Commission.[298] The Commission originally proposed a similar approach in the 2012 Rules Proposing Release, but chose to require the disclosure to be filed in both of the subsequent adopting releases.[299] In previously determining that the information should be "filed," the Commission noted that the statute defines "resource extraction issuer" in part to mean an issuer that is required to file an annual report with

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[298] The proposed rules would use the term "furnished" when referring to the requirement to submit Form SD to provide Section 13(q) payment information to the Commission. *See also* proposed General Instruction B.3 to Form SD (stating that, for purposes of Rule 13q-1, the information and documents furnished on Form SD shall not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, unless a registrant specifically incorporates it by reference into such filing).

[299] *See* 2012 Rules Proposing Release, Section II.F.3; 2012 Rules Adopting Release, Section II.F.3; and 2016 Rules Adopting Release, Section II.L.3.

the Commission.[300] This could suggest that the annual report that includes the required payment information should be filed.[301] On the other hand, and as the Commission noted in the 2012 Rules Proposing Release, Section 13(q) does not specifically state how the information should be submitted, nor does it state that the disclosure be included in the annual reports that are customarily filed with the Commission, such as Form 10-K, Form 20-F, or Form 40-F.[302]

In previous releases the Commission also looked at the nature of the disclosure and its likely materiality to investors to determine whether it should be filed. In the 2012 Rules Proposing Release, the Commission explained its proposal that the information be deemed furnished by noting that the nature and purpose of the disclosure required by Section 13(q) is qualitatively different from the nature and purpose of existing disclosure that has historically been required under Section 13 of the Exchange Act. In subsequent releases, however, the Commission stated that because materiality is a fact specific inquiry, it was not persuaded that the nature of this disclosure should be determinative that the information should not be deemed filed.[303]

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[300] 15 U.S.C. 78m(q)(1)(D)(i).

[301] *See* Letters from Global Witness (Feb. 25, 2011); Publish What You Pay U.S. (Feb. 25, 2011); and Senator Benjamin Cardin, Senator John Kerry, Senator Patrick Leahy, Senator Charles Schumer, and Representative Barney Frank (Mar. 1, 2011).

[302] *See* 2012 Proposing Release, Section II.F.3.

[303] *See, e.g.*, 2016 Rules Adopting Release, Section II.L.

We recognize that compelling arguments can be made on both sides of this policy choice.[304] Given the concerns expressed by commenters and members of Congress regarding the burdens and costs of the required disclosure, and the CRA's restriction on issuing rules in substantially the same form as the 2016 Rules, we are proposing to treat the disclosure provided on Form SD pursuant to Rule 13q-1 as furnished to, but not filed with, the Commission. This approach would eliminate the possibility of Section 18 liability for the disclosure. It would also eliminate the possibility that the disclosure would be incorporated by reference into a filing under the Securities Act of 1933 (the "Securities Act") and be potentially subject to strict liability under Section 11 of the Securities Act, unless the issuer expressly incorporated such information.[305]

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[304] For example, commenters who believed that the Section 13(q) information should be deemed "filed" maintained that investors would benefit from the payment information being subject to Exchange Act Section 18 liability. Other commenters asserted that allowing the information to be furnished would diminish the importance of the information while requiring it to be filed would enhance the quality of the disclosure and ensure that it could be used reliably for investment analysis and other purposes. Commenters who favored treating the Section 13(q) disclosure as "furnished" emphasized that, in contrast to disclosure that is typically required to be filed under Section 13, the nature and purpose of the Section 13(q) disclosure requirements are not primarily for the protection of investors but, rather, to increase the accountability of governments for the proceeds they receive from their natural resources and to support international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals, and that users of the payment information did not need the level of protection associated with Section 18 liability. *See* 2012 Adopting Release, Section II.F.3.b.; and 2016 Adopting Release, Section II.L.2.

[305] For example, Form S-3 requires reports "filed" pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act prior to the termination of the offering to be incorporated by reference into the prospectus. Although Form SD would be the form used for disclosures under Section 13(q), Section 15(d) of the Exchange Act refers generally to periodic information, documents, and reports required by Section 13 reports with respect to securities registered under Section 12, not simply Section 13(a) reports. Thus, if Form SD were deemed "filed," it could raise concerns that the payment disclosure would be incorporated by reference into a Securities Act filing.

Accordingly, we believe that deeming payment information provided on Form SD as not "filed," along with the other proposed changes to the 2016 Rules, would serve to address the concerns expressed by commenters and members of Congress about the costs and burdens of disclosure under the disapproved rules. At the same time, we believe that this change would not significantly undermine the transparency objectives of Section 13(q), as it would limit the liability associated with the required disclosures but not the content of those disclosures. Moreover, we note that, under the proposed rules, Section 13(q) disclosures would continue to be subject to the Exchange Act's general antifraud provisions.[306]

Request for Comment

84. Should we deem the resource extraction payment disclosure as furnished to, but not filed with, the Commission, as proposed?

N. Compliance Date

Section 13(q) provides that, with respect to each resource extraction issuer, the final rules issued under that section shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the issuer's fiscal year that ends not earlier than one year after the date on which the Commission issues the final rules under Section 13(q).[307] The proposed rules would require a resource extraction issuer to comply with Rule 13q-1 and Form SD for fiscal years ending no earlier than two years after the effective date of the final rules.

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[306] *See, e.g.*, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

[307] 15 U.S.C. 78m(q)(2)(F).

The proposed two-year transition period is the same as the transition period in the 2016 Rules. While we believe that the proposed rules would meaningfully reduce the compliance costs and burdens for issuers compared to the 2016 Rules, issuers that have not previously been subject to an alternative reporting regime would likely have to modify their internal systems to track, record and report the required payment information. The proposed two-year transition period should provide all issuers with sufficient time to establish the necessary systems and procedures to capture and track all the required payment information before the fiscal year covered by their first Form SD. It also should afford issuers an opportunity to make any other necessary arrangements to comply with Section 13(q) and the proposed rules, such as consulting with counsel on conflicts with foreign law or contractual terms, or seeking exemptive relief in other situations.

We are also proposing to select a specific compliance date that corresponds to the end of the nearest calendar quarter following the effective date. For example, if the rules were adopted on December 18, 2019, the compliance date for an issuer with a December 31, 2019, fiscal year end would be Tuesday, May 31, 2022 (*i.e.*, 150 days after its fiscal year end of December 31, 2021, which falls on Monday, May 30, 2022, and taking account of the Memorial Day holiday).

Request for Comment

85. Is the proposed transition period and compliance date appropriate? Should we instead adopt a shorter or longer transition period? If so, what should that transition period be and why?
86. Should the rules provide for a longer transition period for certain categories of resource extraction issuers, such as foreign private issuers, so as to provide them additional time to

prepare for the disclosure requirements and the benefit of observing how other companies comply?

O. General Request for Comment

We request and encourage any interested person to submit comments regarding:

- The proposed rules and amendments that are the subject of this release;
- Potential additions or changes to these proposals; or
- Other matters that may have an effect on the proposals, particularly any developments since Congress disapproved the 2016 Rules pursuant to the CRA.

We request comment from the points of view of all interested parties. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

III. ECONOMIC ANALYSIS

A. Introduction and Baseline

As discussed above, Section 13(q) mandates a new disclosure provision under the Exchange Act that requires resource extraction issuers to identify and report payments they make to foreign governments or the U.S. Federal Government relating to the commercial development of oil, natural gas, or minerals. It does so to help promote accountability and combat corruption within resource-rich countries.

We are sensitive to the costs and benefits of the rules we are proposing, and Exchange Act Section 23(a)(2) requires us to consider the impact that any new rule would have on competition. In addition, Section 3(f) of the Exchange Act directs us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or

appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

We have considered the costs and benefits that would result from the proposed rules, as well as the potential effects on efficiency, competition, and capital formation. Many of the potential economic effects of the proposed rules would stem from the statutory mandate, while others would stem from the discretion we are exercising in implementing the statutory mandate. As noted above, our discretionary choices have been informed, in part, by the disapproval of the 2016 Rules under the CRA, and in particular, the concerns expressed by members of Congress about the compliance costs and burdens of the 2016 Rules and the CRA's restriction on promulgating a substantially similar rule.[308] The discussion below addresses the costs and benefits that might result from both the statute and our discretionary choices, as well as the comments the Commission received about these matters in the 2016 rulemaking.[309]

The baseline the Commission uses to analyze the potential effects of the proposed rules is the current set of legal requirements and market practices.[310] To the extent not already encompassed by existing regulations and current market practices, the proposed rules likely would have a significant impact on the disclosure practices of, and compliance costs faced by,

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[308] Members of Congress who supported the resolution of disapproval expressed the view that the 2016 Rules would impose undue compliance costs on companies, undermine job growth and burden the economy, and impose competitive harm to U.S. companies relative to foreign competition. *See* supra Section I.C.

[309] Because our discretionary choices are informed by the statutory mandate, our discussion of the benefits and costs of those choices necessarily involves the benefits and costs of the underlying statute.

[310] *See supra* Sections I.A. through C. for a discussion of the current legal requirements and significant international transparency promotion regimes that affect market practices.

resource extraction issuers. The overall magnitude of the potential costs of the proposed disclosure requirements will depend on the number of affected issuers and individual issuers' costs of compliance. In addition, the proposed rules could impose burdens on competition, although as discussed elsewhere in this release, the changes we are making from the 2016 Rules are intended to mitigate those burdens. We expect that the proposed rules would affect both U.S. issuers and foreign issuers that meet the definition of "resource extraction issuer" in much the same way, except for those issuers already subject to requirements adopted in the EEA member countries or Canada, as discussed above in Section I.B. The discussion below describes the Commission's understanding of the markets and issuers that would be affected by the proposed rules.[311]

To estimate the number of potentially affected issuers, we use data from Exchange Act annual reports for the period January 1, 2018, through September 30, 2019. We consider all Forms 10-K, 20-F, and 40-F filed during this period by issuers with oil, natural gas, and mining Standard Industrial Classification ("SIC") codes[312] and thus are most likely to be resource extraction issuers. We also consider filings by issuers that do not have the above-mentioned oil, natural gas, and mining SIC codes and add them to the list of potentially affected issuers if we

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[311] In addition to our analysis against the baseline, we have noted where the proposed rules differ in their economic effects from the 2016 Rules to illustrate why we think those choices address the concerns expressed by members of Congress about the 2016 Rules' costs and potential competitive harm. To be clear, however, our assessment of the proposed rules' economic effects is measured against the current state of the world in which issuers are not required by U.S. law to disclose resource extraction payments.

[312] Specifically, the oil, natural gas, and mining SIC codes considered are 1000, 1011, 1021, 1031, 1040, 1041, 1044, 1061, 1081, 1090, 1094, 1099, 1220, 1221, 1222, 1231, 1311, 1321, 1381, 1382, 1389, 1400, 2911, 3330, 3331, 3334, and 3339.

determine that they might be affected by the proposed rules.[313] In addition, we attempt to remove issuers that use oil, natural gas, and mining SIC codes but appear to be more accurately classified under other SIC codes based on the disclosed nature of their business. Finally, we exclude royalty trusts from our analysis because we believe it is uncommon for such companies to make the types of payments that would be covered by the proposed rules.

From these filings, we estimate that the number of potentially affected issuers is 677. We note that this number does not reflect the number of issuers that actually made resource extraction payments to governments in the period under consideration but rather represents the estimated number of issuers that might make such payments. It is possible that some potentially affected issuers, as a response to the Section 13(q) rules, may decide it is necessary to delist from an exchange in the United States, deregister, and cease reporting with the Commission to avoid the potential compliance costs. We believe, however, that such a scenario is unlikely given the higher cost of capital and potentially limited access to capital in the future that issuers who deregister would incur.

In determining which issuers are likely to bear the full costs of compliance with the proposed rules, we make three adjustments to the list of affected issuers. First, we exclude issuers that are smaller reporting companies and emerging growth companies since the proposed rules provide an exemption for those issuers. Second, we exclude issuers that are subject to disclosure requirements in foreign jurisdictions that generally require more granular disclosure

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[313] These are issuers whose primary business is not necessarily resource extraction but which have some resource extraction operations, such as ownership of mines.

than the proposed rules and therefore likely already are bearing compliance costs for such disclosure. Third, we exclude small issuers that likely could not have made any payment above the de minimis amount of $750,000 to any government entity in the period January 1, 2018 through September 30, 2019.

First, among the 677 issuers that we estimate would be affected by the proposed rules, 211 reported being smaller reporting companies (SRCs) and 191 reported being emerging growth companies (EGCs) in the period January 1, 2018, through September 30, 2019. There are 84 issuers that reported both SRC and EGC status during this period. Subtracting the SRCs and EGCs (total of 318) from the sample of 677 potentially affected issuers results in 359 issuers that would be subject to the requirements of the proposed rules.

To address the second consideration, we searched the filed annual forms for issuers that have a business address, are incorporated, or are listed on markets in the EEA or Canada.[314] For purposes of our analysis, we assume that issuers in these jurisdictions already are providing more granular resource extraction payment disclosure than the disclosure that would be required by the proposed rules and thus that the additional costs to comply with the proposed rules would be much lower than costs for other issuers.[315] We identified 109 such issuers.

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[314] We assume that an issuer is subject to the EEA or Canadian rules if it is listed on a stock exchange located in one of these jurisdictions or if it has a business address or is incorporated in the EEA or Canada and its total assets are greater than $50 million. The latter criterion is a proxy for multipronged eligibility criteria underlying both EEA and Canadian rules that include issuer assets, revenues, and the number of employees.

[315] We are proposing an alternative reporting option for resource extraction issuers that are subject to foreign disclosure requirements that the Commission determines satisfy the transparency objectives of Section 13(q). *See infra* Section III.C.4. for a discussion concerning how this alternative reporting option could potentially reduce compliance costs to a negligible amount for eligible issuers.

Third, among the remaining 250 issuers (*i.e.*, 359 minus 109) we searched for issuers that, in the most recent fiscal year as of the date of their Exchange Act annual report filing, reported that they are shell companies and thus have no or only nominal operations, or have both revenues and absolute value net cash flows from investing activities of less than the de minimis payment threshold of $750,000. Under these financial constraints, such issuers are unlikely to have made any non-de minimis and otherwise reportable payments to governments and therefore are unlikely to be subject to the proposed reporting requirements. We identified 14 such issuers.

Taking these estimates of the number of excluded issuers together, we estimate that approximately 236 issuers (*i.e.*, 677 minus 318 minus 109 minus 14) would bear the full costs of compliance with the proposed rules.[316]

In the following economic analysis, we discuss the potential benefits and costs and likely effects on efficiency, competition, and capital formation that might result from both the new reporting requirement mandated by Congress and from the specific implementation choices that we have made in formulating the proposed rules.[317] We analyze these potential economic effects through a qualitative discussion of the potential costs and benefits that might result from the payment reporting requirement (Sections III. B and III.C) and our specific implementation choices (Section III.D), respectively.

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[316] Because it may be uncertain at the beginning of a financial period as to whether payments from an issuer will exceed the de minimis threshold by the end of such period, an excluded issuer may incur costs to collect the information to be reported under the proposed rules even if that issuer is not subsequently required to file an annual report on Form SD. To the extent that excluded issuers incur such costs, our estimate may understate the aggregate compliance costs associated with the proposed rules.

[317] Our consideration of potential benefits and costs and likely effects on efficiency, competition, and capital formation also is reflected throughout the discussion in Section II above.

Although aspects of the proposed rules are similar to the 2016 Rules, we have proposed several changes that we believe would have a significant effect on the resulting compliance costs and burden. These proposed changes include: (1) the Modified Project Definition, which requires disclosure at the national and major subnational political jurisdiction, as opposed to the contract, level; (2) the addition of two new conditional exemptions for situations in which a foreign law or a pre-existing contract prohibits the required disclosure; (3) revisions to the definition of "control" to exclude entities or operations in which an issuer has a proportionate interest; (4) limitations on liability for the required disclosure by deeming the payment information to be furnished to, but not filed with, the Commission; (5) the addition of an instruction in Form SD that would permit an issuer to aggregate payments by payment type made at a level below the major subnational government level; (6) revisions to the filing deadline; and (7) the addition of transitional relief for issuers that have recently completed their U.S. initial public offerings. As explained below, we preliminarily believe that these proposed changes would meaningfully reduce the compliance costs and burden for issuers compared to the compliance costs and burden estimated for the 2016 Rules.[318]

B. Potential Benefits Resulting from the Payment Reporting Requirement

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[318] We also are proposing two additional changes to the 2016 Rules, which should further help to reduce the proposed rules' compliance costs or their potential for competitive harm. One change would provide transitional relief for issuers that have recently completed their U.S. initial public offerings. The other change would define "not de minimis" to mean any payment made to each foreign government in a host country or the Federal Government that equals or exceeds $150,000, subject to the condition that payment disclosure for a project is only required if the total project payments equal or exceed $750,000.

Section 13(q) seeks to combat global corruption by improving transparency about the payments that companies in the extractive industries make to foreign governments and the Federal Government. While these statutory goals and intended benefits are of potential global significance, the potential positive economic effects that may result cannot be readily quantified with any precision. The current empirical evidence on the direct causal effect of increased transparency in the resource extraction sector on societal outcomes is inconclusive,[319] and several academic papers have noted the inherent difficulty in empirically validating a causal link

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[319] For positive findings, *see* Caitlin C. Corrigan, "Breaking the resource curse: Transparency in the natural resource sector and the extractive industries transparency initiative," *Resources Policy*, 40 (2014), 17–30 (finding that the negative effect of resource abundance on GDP per capita, the capacity of the government to formulate and implement sound policies and the level of rule of law is mitigated in EITI countries but noting that the EITI has little effect on the level of democracy, political stability and corruption (the author also submitted a comment letter in the 2016 rulemaking attaching an updated version of the study*; see* Letter from Caitlin C. Corrigan (Feb. 16, 2016))); Liz David-Barrett and Ken Okamura, "The Transparency Paradox: Why Do Corrupt Countries Join EITI?", Working Paper No. 38, European Research Centre for Anti-Corruption and State-Building (Nov. 2013) (finding that EITI compliant countries gain access to increased aid the further they progress through the EITI implementation process and that EITI achieves results in terms of reducing corruption), *available at* https://eiti.org/document/transparency-paradox-why-do-corrupt-countries-join-eiti, Maya Schmaljohann, "Enhancing Foreign Direct Investment via Transparency? Evaluating the Effects of the EITI on FDI," University of Heidelberg Discussion Paper Series No. 538 (Jan. 2013) (finding that joining the EITI increases the ratio of the net foreign direct investment inflow to GDP by two percentage points); Paul F. Villar and Elissaios Papyrakis, "Evaluating the Impact of the Extractive Industries Transparency Initiative (EITI) on Corruption in Zambia. *The Extractive Industries and Society*, (2017), forthcoming (finding that EITI implementation reduced corruption in Zambia); Elissaios Papyrakis, Matthias Rieger, and Emma Gilberthorpe, "Corruption and the Extractive Industries Transparency Initiative," Journal of Development Studies, 53 (2017), 295-309 (finding that EITI reduces corruption). For negative findings, *see* Ölcer, Dilan (2009): Extracting the Maximum from the EITI (Development Centre Working Papers No. 276): Organisation for Economic Cooperation and Development (finding that the EITI has not been able to significantly lower corruption levels); Benjamin J. Sovacool, Goetz Walter, Thijs Van De Graaf, and Nathan Andrews, "Energy Governance, Transnational Rules, and the Resource Curse: Exploring the Effectiveness of the Extractive Industries Transparency Initiative (EITI)," *World Development*, 83 (2017), 179-192 (finding that the first 16 countries that attained EITI compliance do not perform better than other countries or their own past performance in terms of accountability, political stability, government effectiveness, regulatory quality, rule of law, corruption, foreign direct investment, and GDP growth); Kerem Oge, "Which transparency matters? Compliance with anti-corruption efforts in extractive industries," *Resources Policy*, 49 (2016), 41–50 (finding that EITI disclosure had no significant effect on corruption in EITI countries).

between transparency interventions and governance improvements.[320] Additionally, some countries may change their behavior as a result of the adoption of the proposed rules in a way that diminishes the potential benefits of the rules. For example, some foreign jurisdictions may prefer to deal with companies that are not subject to the Section 13(q) disclosure requirements, or take steps to prohibit such disclosure.

In response to the 2016 Rules Proposing Release, we received several comments on quantifying the potential economic benefits of the rules that we discuss in detail below.[321] Although these comments presented studies that attempt to quantify those benefits, as discussed below, all have certain limitations that we believe prevent us from relying on them to quantify the proposed rules' potential to improve accountability and governance in resource-rich countries. Furthermore, no other commenters included reliable data that would allow us to quantify the potential economic benefits of the proposed rules or suggested a source of data or a methodology that we could readily look to in doing so.

It is important to note, however, that Congress has directed us to promulgate a rule requiring disclosure of resource extraction payments. Thus, in assessing the potential benefits resulting from the rule, we believe it reasonable to rely on Congress' determination that such a

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[320] *See* Andrés Mejía Acosta, "The Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources," *Development Policy Review*, 31-S1 (2013), s89–s105; Alexandra Gillies and Antoine Heuty, "Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries," *Yale Journal of International Affairs*, Spring/Summer 2011, 25–42.

[321] *See* Letter from Profs. Anthony Cannizzaro & Robert Weiner (Feb. 11, 2016) ("Cannizzaro & Weiner"). *See also* Letter from API (Feb. 16, 2016) and Letter from Publish What You Pay – US (third of three letters on Mar. 8, 2016) (both referring to a study by P. Healy and G. Serafeim). These letters and studies primarily focus on benefits to issuers and investors.

rule will produce the foreign policy and other benefits discussed above that Congress sought in imposing this mandate.[322] In that regard, we note that Congress did not repeal the mandate under Section 13(q), and in fact, some members of Congress who supported the joint resolution to disapprove the 2016 Rules also expressed their "strong support" for the transparency and anti-corruption objectives of the rules.

We further note that none of the industry commenters in the 2016 rulemaking expressed the view that the disclosures required by Section 13(q) would fail to help produce anti-corruption and accountability benefits. Indeed, several commenters expressly acknowledged that transparency produces such benefits (notwithstanding the inability to quantify those benefits reliably). For example, one industry commenter stated that "[t]ransparency by governments and companies alike regarding revenue flows from the extraction of natural resources in a manner which is meaningful, practical and easily understood by stakeholders reduces the opportunity for corruption."[323] Another industry commenter expressed its view "that the disclosure of revenues received by governments and payments made by the extractive-industry companies to governments could lead to improved governance in resource-rich countries."[324] Yet another industry commenter stated that resource-revenue transparency efforts "are fundamental building

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[322] We note that these intended benefits differ from the investor protection benefits that our disclosure rules typically strive to achieve.

[323] *See* Letter from BHP Billiton (Jan. 25, 2016).

[324] *See* Letter from Chevron (Feb. 16, 2016).

blocks of good resource governance and are key to fostering better decision-making over public revenues."[325]

To the extent that the Section 13(q) disclosures increase transparency and reduce corruption, they could increase efficiency and capital formation either directly abroad or indirectly in the United States. While the objectives of Section 13(q) may not appear to be ones that would necessarily generate measurable, direct economic benefits to investors or issuers, investors and issuers might benefit from the proposed rules' indirect effects. In the following paragraphs, we discuss existing theoretical arguments and empirical evidence that reduced corruption and better governance could have longer term positive impacts on economic growth and investment in certain countries where the affected issuers operate, which could in turn benefit issuers and their shareholders.

Although the research and data available at this time do not allow us to draw any firm conclusions, we have considered several theoretical causal explanations for why reductions in corruption may increase economic growth and political stability, which in turn may reduce investor risk.[326] High levels of corruption could introduce inefficiencies in market prices as a result of increased political risks and the potential awarding of projects to companies for reasons other than the merit of their bids. This, in turn, could prop up inefficient companies and limit investment opportunities for others. These potential distortions could have a negative impact on

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[325] *See* Letter from Eni SpA (Jan. 31, 2016).

[326] *See, e.g.*, reviews by P. Bardhan, "Corruption and Development: A Review of Issues," *Journal of Economic Literature*, 35, no. 3, 1320–1346 (1997); J. Svensson, "Eight Questions about Corruption," *Journal of Economic Perspectives*, 19, no. 3, 19–42 (2005)("Svensson Study").

the economies of countries with high corruption, particularly to the extent that potential revenue streams are diminished or diverted. Additionally, the cost of corrupt expenditures, direct or indirect, impacts profitability, and, if the cost is sufficiently high, some potentially economically efficient or productive investments may not be made. Thus, reducing corruption could increase the number of productive investments and the level of profitability of each investment and could lead to improved efficiency in the allocation of talent, technology, and capital. Insofar as these effects are realized, each of them could benefit issuers operating in countries with reduced corruption levels. These and other considerations form a basis for several dynamic general equilibrium models predicting a negative relationship between corruption and economic development.[327]

A number of empirical studies have also shown that reducing corruption might result in an increase in the level of GDP and a higher rate of economic growth through more private investments, better deployment of human capital, and political stability.[328] Other studies find that corruption reduces economic growth both directly and indirectly, through lower

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[327] *See, e.g.*, I. Ehrlich and F. Lui "Bureaucratic Corruption and Endogenous Economic Growth," *Journal of Political Economy*, 107 (6), 270–293 (1999); K. Blackburn, N. Bose, and E.M. Haque, "The Incidence and Persistence of Corruption in Economic Development," *Journal of Economic Dynamics and Control* 30, 2447–2467 (2006); C. Leite and J. Weidmann, "Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth," International Monetary Fund Working Paper No. 99/85 (July 1999).

[328] *See, e.g.*, P. Mauro, "The effects of corruption on growth, investment and government expenditure: A cross country analysis," in K.A. Elliot (ed.) *Corruption and the Global Economy*, Washington D.C.: Institute for International Economics, 83–107 (1997); H. Poirson, "Economic Security, Private Investment, and Growth in Developing Countries," International Monetary Fund Working Paper No. 98/4 (Jan. 1998); Institute for Economics and Peace, Peace and Corruption Report (2015).

investments.[329] To the extent that increased transparency could lead to a reduction in corruption and, in turn, improved political stability and investment climate, some investors may consider such factors in their investment decisions, including when pricing resource extraction assets of affected issuers operating in these countries.[330] A commenter on the 2016 Rules cited its own study suggesting that high levels of corruption (measured by bribery) correspond to lower levels of economic development.[331] The study found that higher levels of bribery were associated with higher maternal mortality, lower youth literacy rate, and lower access to basic sanitation. The same commenter cited another study that suggested that even small improvements in a country's governance resulted in higher income and lower infant mortality rates in the long run.[332]

There also could be positive externalities from increased investor confidence to the extent that improved economic growth and investment climate could benefit other issuers working in those countries. Although we believe the evidence is presently too inconclusive to allow us to predict the likelihood that such a result would occur, we note that there is some empirical

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329 *See* Pak Hung Mo, "Corruption and Economic Growth," *Journal of Comparative Economics* 29, 66–79 (2001); K. Gyimah-Brempong, "Corruption, economic growth, and income inequality in Africa," *Economics of Governance* 3, 183–209 (2002); Pierre-Guillaume Méon and Khalid Sekkat, "Does corruption grease or sand the wheels of growth?" *Public Choice* 122, 69–97 (2005).

330 Several studies present evidence that reduction in corruption increases foreign direct investments. *See, e.g.*, S.-J. Wei, "How Taxing is Corruption on International Investors?" *NBER Working Paper* 6030 (1997); G. Abed and H. Davoodi, "Corruption, Structural Reforms, and Economic Performance in the Transition Economies," International Monetary Fund Working Paper No. 00/132 (July 2000).

331 *See* Letter from Transparency International-USA (Feb. 16, 2016).

332 *See id.*, referring to Daniel Kaufmann, "Governance Matters 2010: Worldwide Governance Indicators Highlight Governance Successes, Reversals and Failures," *available at* http://www.brookings.edu/research/opinions/2010/09/24-wgi-kaufmann.

evidence suggesting that lower levels of corruption might reduce the cost of capital and improve valuations for some issuers.[333]

One prior commenter asserted that the studies cited above discuss primarily a single form of corruption – bribery – that in the commenter's view is not subject to the disclosures required under Section 13(q) and hence the commenter contended that these studies do not support our view that the required disclosures might achieve economic benefits resulting from reduced corruption.[334] We acknowledge that the specific studies that the commenter mentions do focus on bribery as a form of corruption. All the other studies that we cite, however, do discuss corruption in general and its effect on economic growth. In fact, some specifically discuss the type of corruption addressed by the statute and proposed rules.[335] Furthermore, to the extent that Section 13(q) disclosures are successful in reducing corruption in the form of misuse of funds, they could also reduce quid pro quo corruption. For example, if Section 13(q) and the related rules enable citizens and society to monitor the government and issuers more strictly, they may become less likely to engage in quid pro quo corruption. It is also possible that some of the payments that are reportable under Section 13(q) are an implicit form of bribery: for example,

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[333] *See* D. Kaufmann and S. J. Wei "Does 'Grease Money' Speed Up the Wheels of Commerce?" NBER Working Paper 7093 (1999) (finding, based on survey evidence, that firms that pay fewer bribes have lower, not higher, cost of capital); C. Lee and D. Ng, "Corruption and International Valuation: Does Virtue Pay?" *Journal of Investing*, 18, no. 4, 23–41 (2009) (finding that firms from more corrupt countries trade at significantly lower market multiples).

[334] *See* Letter from API (Feb. 16, 2016).

[335] *See, e.g.*, Svensson Study at n.326 above, which defines corruption as misuse of public office for private gain. This study cites examples of corruption that are similar to the types of corruption the proposed rules seek to address.

government officials could agree, instead of a bribe, to receive another type of payment from an issuer later, after the payment is made.

We also note that global transparency efforts such as the EITI and others are relatively new, which makes it difficult at this time to draw any firm empirical conclusions about the potential long-term benefits that such transparency regimes may produce for resource-rich countries. Many studies suggest a possible link between improvements in transparency, which they measure as a resource-rich country joining the EITI, and increases in GDP and net foreign direct investments, reduction in conflict and unrest, and effects on economic development.[336] The causal mechanisms involved, however, are complex (impacted by myriad factors) and it may take several decades before those mechanisms yield empirically verifiable social gains. While some of these studies provide useful insight into the potential benefits to be derived from resource payment transparency regimes, we believe that there are limitations associated with each of these studies that make it difficult for us to draw firm conclusions based on their findings. Additionally, other factors could affect both corruption and economic development (*e.g.*, a country's institutions), making it difficult to detect a causal relationship between the former and the latter.

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[336] *See* Letter from C. Corrigan (Feb. 16, 2016) (referring to her earlier study: Corrigan, C. C. (2014), "Breaking the Resource Curse: Transparency in the Natural Resource Sector and the Extractive Industries Transparency Initiative," *Resources Policy*, *41*(1), 17–30); Letter from PWYP-US (Feb. 16, 2016) (referring to Fernando Londoño, "Does Joining the Extractive Industries Transparency Initiative Have an Impact on Extractive and Non-Extractive FDI Inflows?" (2014), *available at* http://gppreview.com/wp-content/uploads/2014/02/Londono-F.pdf) ("Londoño Study") and Maya Schmaljohann, "Enhancing Foreign Direct Investment via Transparency? Evaluating the Effects of the EITI on FDI" (Jan. 2013), *available at* http://archiv.ub.uni-heidelberg.de/volltextserver/14368/1/Schmaljohann_2013_dp538.pdf ("Schmaljohann Study")); Letter from ONE Campaign (Mar. 16, 2016).

Notwithstanding the foregoing views, we believe the direct incremental benefit to investors from the Section 13(q) disclosures may be limited. Most impacted issuers, other than smaller reporting companies, are already required to disclose their most significant operational and financial risks[337] as well as certain financial information related to the geographic areas in which they operate, in their Exchange Act annual reports.[338]

C. Potential Costs Resulting from the Payment Reporting Requirement

The disclosures required by Section 13(q) could result in direct and indirect compliance costs and competitive effects for affected issuers. The direct compliance costs would stem from the anticipated need to modify issuers' core enterprise resource planning systems and financial reporting systems to capture and report payment data at the project level, for each type of payment, government payee, and currency of payment, to the extent that such payments are not currently tracked by the issuers' reporting systems. Examples of modifications that may be necessary include establishing additional granularity in existing coding structures (*e.g.*, splitting accounts that contain both government and non-government payment amounts), developing a mechanism to appropriately capture data by "project," building new collection tools within financial reporting systems, establishing a trading partner structure to identify and provide granularity around government entities, establishing transaction types to accommodate different

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[337] *See* Items 305 and 503 of Regulation S-K, (17 CFR 229.305 and 229.503).

[338] *See* Item 101(d) of Regulation S-K (17 CFR 229.101(d)).

types of payment (*e.g.*, royalties, taxes, or bonuses), and developing a systematic approach to handle "in-kind" payments.

In addition, we anticipate that the statutory reporting requirements could result in indirect costs and competitive effects. Issuers that have a reporting obligation under Section 13(q) could be at a competitive disadvantage compared to private companies and foreign companies that are not subject to payment reporting requirements under the U.S. Federal securities laws or analogous foreign disclosure regimes. For example, such competitive disadvantage could result from, among other things, any preference by the government of the host country to avoid disclosure of covered payment information, or any ability of market participants to use the information disclosed by reporting issuers to derive contract terms, reserve data, or other confidential information. Governments of host countries could try to avoid Section 13(q) payment disclosure by either prohibiting it outright, or by changing their preferences in favor of dealing with private and foreign companies that do not have such reporting obligations. We are unable to estimate how many governments of resource-rich host countries would try to avoid Section 13(q) payment disclosure, and by what means.

Commenters in the 2016 rulemaking were split in their opinion on the competitive effect of payment information disclosure. Some commenters argued that confidential production and reserve data could be derived by competitors or other interested persons with industry knowledge by extrapolating from the payment information required to be disclosed.[339] Other commenters

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[339] *See* Letters from API (Feb. 16, 2016) and ExxonMobil (Feb. 16, 2016).

asserted, however, that such extrapolation is not possible or that such information is readily available from certain commercial databases. These commenters stated that information of the type required to be disclosed by Section 13(q) therefore would not confer a competitive advantage on industry participants not subject to such disclosure requirements.[340]

Whatever the effect, any competitive impact arising from Section 13(q)'s mandated disclosures should be substantially reduced to the extent that companies are required to disclose payment information in other jurisdictions, such as the European Union and Canada, which have adopted laws that require more granular disclosure than that required by Section 13(q) and the proposed rules.[341] In that regard, the proposed rules may provide competitive advantages to U.S. issuers that are subject to the proposed rules but not subject to the European Union and Canadian regimes. This is because companies are required to disclose more granular payment information under the European Union and Canadian disclosure regimes and those regimes cover a wider pool of affected issuers (i.e., both registered issuers and large private issuers are subject to payment disclosure in these regimes). We note, however, that if industry commenters are accurate in their assessment of the competitive effects arising from such disclosure requirements, U.S. issuers that are subject to the proposed rules but not subject to the EU Directives or other

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[340] *See* Letters from PWYP-US (Feb. 16, 2016) and Oxfam America (Feb. 16, 2016).

[341] One commenter suggested that if both the United States and European Union implement disclosure requirements regarding payments to governments "around 90% of the world's extractive companies will be covered by the rules." *See* Letter from Arlene McCarthy (Aug. 10, 2012) (Ms. McCarthy is a member of the European Parliament and the parliamentary draftsperson on the EU transparency rules for the extractive sector).

international disclosure regimes might lose some of the competitive advantage they might enjoy but for the proposed rules.

Some commenters on the 2016 Rules suggested that we permit issuers to submit payment data confidentially to the Commission and make public only an aggregated compilation of the information.[342] These commenters stated that such an approach would address many of their concerns about the disclosure of commercially sensitive information or information that companies were legally or contractually prohibited from disclosing and would significantly mitigate the costs of the mandatory disclosure under Section 13(q). Although we are not proposing this approach, we consider the costs and benefits of this alternative means of implementation in Section III.D.4 below.

The proposed rules differ from the 2016 Rules in that they include a definition of project that is not contract-based and that would allow for greater aggregation of payment information than under the 2016 Rules. The proposed rules also include two new exemptions for conflicts with foreign law and contract prohibitions, in addition to the targeted exemption for payments made in connection with exploratory activities that was included in the 2016 Rules.[343] Furthermore, the proposed rules would permit an issuer to aggregate payments by payment type made at a level below the major subnational level (*e.g.*, at the county or municipality level) and disclose such payments without having to identify the particular subnational government payee.

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[342] *See, e.g.*, Letter from API (Feb. 16, 2016); Chevron (February 16, 2016); Exxon (February 16, 2018).

[343] As discussed below, the proposed rules also include transitional relief for newly acquired companies and newly public companies that should further limit the compliance burdens associated with the rules.

Together, we believe that these provisions would significantly alleviate, and in some cases could eliminate, the potential for competitive harm under the Section 13(q) rules. We also note that in situations involving more than one payment, the information would be aggregated by payment type, government, and/or project, which may further limit the ability of a company's competitors to use the publicly disclosed information to their advantage.

We discuss below the significant choices we have made to implement the statutory requirements that are the main drivers of the direct and indirect compliance costs and of the proposed rules' competitive effects. We then discuss the associated benefits and costs of those choices. In that regard, we are unable to quantify the impact of each of the choices discussed below with precision because reliable, empirical evidence about the effects is not readily available to the Commission. We are asking commenters to provide us with empirical evidence that will allow us to evaluate these various choices.

D. Discussion of Discretionary Choices

1. Definition of "Project"

Section 13(q) requires a resource extraction issuer to disclose information about the type and total amount of payments made to a foreign government or the Federal Government for each project relating to the commercial development of oil, natural gas, or minerals, but it does not define the term "project." The proposed rules define "project" using a three-pronged definition: (1) the type of resource being commercially developed; (2) the method of extraction; and (3) the major subnational political jurisdiction where the commercial development of the resource is taking place.

The definition of "project" appears to be a major determinant of issuers' costs resulting from the Section 13(q) rules. First, the definition can affect the extent of direct compliance costs imposed on affected issuers. The extent of this effect depends on the degree to which issuers' financial and reporting systems use a different definition of project (or no definition at all) compared to the one included in the proposed rules. A number of commenters pointed out that the more granular contract-based definition of "project" that was proposed in the 2016 Rules would require modifications to issuers' core enterprise resource planning systems and financial reporting systems to capture and report payment data for each type of payment, government payee, and currency of payment.[344] We also note that some commenters on the 2016 rulemaking questioned the assertion that the definition of "project" would increase compliance costs. They argued that most issuers already have internal systems in place for recording payments that would be required to be disclosed under Section 13(q), or that any adjustments to issuers existing reporting systems needed because of Section 13(q) could be done in a timely and cost-effective manner.[345]

Second, the definition of "project" could potentially create indirect costs in the form of competitive harm for affected issuers. Such competitive harm could occur if the definition of "project" reveals sensitive and proprietary commercial information to competitors. For example, several commenters in the 2016 rulemaking suggested that a contract-based definition of

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[344] *See* 2016 Rules Adopting Release, Section III.B.2., citing Letters from API (Jan. 28, 2011); ExxonMobil (Jan. 31, 2011); and RDS (Jan. 28, 2011).

[345] *See id.*,, citing Letters from EarthRights International (Sept. 20, 2011); Global Witness (Feb. 25, 2011); and Publish What You Pay U.S. (Feb. 25, 2011).

"project" would result in the loss of trade secrets and intellectual property more generally.[346] One commenter stated that trade secrets and intellectual property were especially valuable in the resource extraction industry because of the large sunk costs investments and uncertain, long-term payoffs.[347] According to some industry commenters, a contract-based definition of "project" would allow competitors to derive important information about the new areas under exploration for potential resource development, the value the company places on such resources, and the costs associated with acquiring the right to develop these new resources. This would in turn enable competitors to evaluate the new resources more precisely, and as a result, structure their bids for additional opportunities in the areas with new resources more effectively. Commenters on the 2016 rulemaking also stated that a contract-based definition of "project" would allow competitors to reverse-engineer proprietary commercial information: for example, to determine the commercial and fiscal terms of the agreements, get a better understanding of an issuer's strategic approach to bidding and contracting, and identify rate of return criteria.[348] In contrast with these views, we note that several commenters in the 2016 rulemaking disputed the assertion that the contract-based definition of "project" would create any competitive disadvantages to affected issuers.[349]

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[346] *See* Letters from API (Feb. 16, 2016) and ExxonMobil (Feb. 16, 2016).

[347] *See* Letter from API (Feb. 16, 2016).

[348] *See* Letters from API (Feb. 16, 2016) and ExxonMobil (Feb. 16, 2016).

[349] *See, e.g.,* letters from PWYP-US (Feb. 16, 2016) (stating that the required payment information would not disclose competitively sensitive information because such information would not include contractual relationships with downstream processors, the contribution of the project to the overall profitability of the reporting issuer, trade secrets, and techniques related to intellectual property; and denying both that payment

The Modified Project Definition represents a major change from the definition adopted by the 2016 Rules. We believe that it should significantly alleviate direct and indirect compliance costs, including potential competitive harm, for affected issuers. With respect to direct compliance costs, the proposed definition of "project" would allow an issuer to make the payment disclosure at a higher level of aggregation than under the 2016 Rules' contract-based definition. Instead of tracking, recording, and disclosing payment information at the single contract, license, or lease level, under the proposed definition, affected issuers would have to report this information at the resource type, extraction method, and the major subnational political jurisdiction level. This higher level of information aggregation should lower the cost of providing the required payment disclosure because there would be fewer individual data points to be electronically tagged and reported.[350] It should also make it easier for the issuer to report the payment information.

In addition, because as proposed the required payment information is at a higher level of aggregation than under the 2016 Rules, it is likely that an issuer already aggregates some of the required payment information for its own internal accounting or financial reporting purposes. In that event, requiring payment information at a higher level of aggregation may be less costly

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transparency is a decisive factor in competitive bidding processes with host states to access resources, and that project payment disclosure can be used by competitors to reverse-engineer commercial terms and succeed in future bids); *see also* Global Witness (Mar. 8, 2016). *See also* letter from Global Witness (Mar. 8, 2016) (asserting that "there is no merit to the claim that US companies would lose out to unlisted state companies as a result of this rule. In fact, most of the largest state-owned companies are listed on US and/or European stock exchanges and would therefore be subject to the same rules as other US and European issuers.")

[350] *See* the letter from API (Nov. 7, 2013) (noting that "an additional benefit of API's project recommendation is clarity and ease of use for all stakeholders," including "for reporting companies in submitting data").

because the issuer may be able to modify its existing internal accounting systems to collect the required payment information rather than having to build a new system to collect the payment information on a contract-by-contract basis.

Additionally, the proposed definition of "project" lacks the granularity of a contract-based definition, making it less likely that competitors would be able to reverse-engineer contract terms or glean sensitive contract information from the disclosure. In this regard, we note that many of the concerns expressed in the 2016 rulemaking about revealing sensitive and proprietary commercial information to competitors derived from the fact that the required disclosure was at the contract, license or lease level. Thus, the proposed definition of "project" should also alleviate potential competitive harm concerns that affected issuers might have regarding the latter.

At the same time, the proposed definition of "project" would continue to provide a level of transparency that people could use to assess revenue flows from projects in their local communities. As we discuss above in Section III.B, this should have a number of potential benefits for information users seeking to prevent corruption and promote accountability.

We note that, even with the proposed modifications to the definition of "project," affected issuers would incur significant compliance costs. Issuers would still be required to track each payment that they make to foreign governments and the Federal Government in furtherance of resource extraction activities and thus would likely need to modify their systems to some degree to collect data on each payment. In addition, they would be required to electronically tag a significant amount of information about each payment. Additional compliance costs could

result from training local personnel on tracking and reporting, and developing guidance to ensure consistency across reporting units.

Finally, we acknowledge that the proposed definition of "project" may narrow the scope of the transparency benefits compared to the previous definition proposed in 2016. We believe, however, that the revised definition, because it considers the type of resource, the method of extraction, and the location, will provide substantial transparency about the overall revenue flows to national and subnational governments.

2. Exemptions from Disclosure

Absent potential exemptive relief, resource extraction issuers operating in countries that prohibit, or may in the future prohibit, the disclosure required under Section 13(q) could bear substantial costs. Such costs could arise if issuers are forced to cease operations in certain countries or otherwise violate local law. In addition, the country's laws could have the effect of preventing them from participating in future projects. Alternatively, the host country may prefer to engage in deals with companies that are not required to provide disclosure required under Section 13(q). If an issuer violates local law, it could suffer expropriation of its facilities in the host country, the imposition of fines or the withholding of permits. In connection with the 2016 Rules, some commenters asserted that at least two countries—Qatar and China—prohibit the required disclosures.[351]

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[351] *See* Letters from API (Feb. 16, 2016) and ExxonMobil (Feb. 16, 2016).

To the extent that such prohibitions exist and are enforced without any type of waiver, affected issuers could be motivated to sell assets affected by such competitive disadvantage at a price that does not fully reflect the value of such assets absent such competitive impact. Thus, affected issuers could suffer substantial losses if they have to terminate their operations and redeploy or dispose of their assets in the particular foreign jurisdiction. These losses would be magnified if an issuer could not easily redeploy the assets in question or if it had to sell them at a steep discount (a fire sale). Even if the assets could be easily redeployed, an issuer could suffer opportunity costs if they were redeployed to projects with inferior rates of return. In the 2016 Rules, we estimated that such losses could amount to billions of dollars.[352]

These potentially large indirect costs should be generally eliminated under the proposed rules. We are proposing an exemption for situations in which an issuer is unable to provide the required disclosure without violating the laws of the jurisdiction where the project is located. The exemption would apply not only to pre-existing but also to future prohibitions on disclosure, in recognition of the fact that issuers do not have control over the laws of the jurisdiction where they are engaged in the commercial development of natural resources.

Some commenters in the 2016 rulemaking also suggested that issuers with existing contracts that prohibit the disclosure required under Section 13(q) may find themselves in breach of contract if they make the required disclosure. This, in turn, could result in termination of

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[352] *See* 2016 Rules Adopting Release, Section III.C.

ongoing contracts and inability to participate in future projects.[353] While we do not have data on how often existing contracts contain such prohibitions, to address the concerns raised by commenters, we are proposing an exemption for situations in which a pre-existing contract prohibits the required disclosure. This exemption would differ from the conflict of law exemption in that, if adopted as proposed, it would only apply to written terms of contracts that were entered into prior to the date the Section 13(q) rules are effective. As explained above, we believe that this limitation is justified because issuers have control over the terms of their contracts and would be in a position to modify future contract terms accordingly.[354]

Neither of these proposed exemptions would require an issuer to apply to the Commission for exemptive relief. This approach should significantly decrease compliance and indirect costs for issuers that qualify for either exemption, potentially saving affected issuers millions of dollars. Compared to the approach taken in the 2016 Rules, in which affected issuers were required to seek individual relief on a case-by-case basis, the proposed exemptions would give such issuers more certainty about the availability of the exemptions. In addition, the corresponding relief would be available in a timelier manner.

We note, however, that in addition to reducing costs, the exemptions might have the unintended consequence of diminishing some of the benefits of enhanced transparency. For example, it could create a stronger incentive for host countries that want to prevent transparency

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[353] *See* Letters from API (Feb. 16, 2016) and Chevron (Feb. 16, 2016).

[354] *See supra* Section II.J.2.

to pass laws that prohibit such disclosure, potentially undermining the purpose of Section 13(q) to compel disclosure in jurisdictions that have failed to do so voluntarily. As mentioned above, we believe that the likelihood that jurisdictions will pass such laws is limited by the absence of a similar exemption under the EU Directives or Canada's ESTMA, which generally require disclosure at a more granular level, and by the growing global influence of the EITI.[355]

In addition to the exemptions for conflicts with foreign law and pre-existing contracts, similar to the 2016 Rules, the proposed rules would allow for delayed reporting for explorative activities and transitional relief for recently acquired companies not previously obliged to disclose resource extraction payment information. In a change from the 2016 Rules, the proposed rules would also provide transitional relief for companies that have completed their U.S. initial public offering in the last full fiscal year. These additional forms of exemptive relief should alleviate compliance costs for affected issuers. Finally, as in the 2016 Rules, the proposed rules would allow issuers to apply for exemptive relief on a case-by-case basis using the procedures set forth in Rule 0-12 of the Exchange Act for situations posing a significant threat of commercial harm that fall outside the scope of the other proposed exemptions. We cannot reliably estimate how frequently potential issuers would apply for exemptive relief on a case-by-case basis.

We believe that the exemptions provided under the proposed rules, subject to issuers meeting specified conditions, would substantially decrease any indirect costs and competitive

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[355] *See* discussion in Section II.J.1.

effects that may result from conflicts with foreign law and pre-existing contracts, or from other situations where the required payment disclosure would pose a significant threat of commercial harm. However, we acknowledge that, if issuers cannot meet the conditions for the proposed exemptions, issuers could potentially incur costs associated with the conflict between the proposed requirements and those foreign law or pre-existing contract prohibitions. Similarly, issuers could potentially incur costs in situations where the Commission denies an issuer's claim for exemptive relief on a case-by-case basis. Due to lack of data, we cannot reliably estimate the number of affected issuers that may be unable to meet the conditions for the proposed exemptions.

We are also proposing to provide an exemption from the disclosure requirements for smaller reporting companies and/or emerging growth companies, or to provide for different disclosure requirements for these entities. Because the proposed rules could result in significant fixed compliance costs for resource extraction issuers, smaller entities that are required to provide the payment disclosure mandated by Section 13(q) may face particular difficulties meeting those costs. As noted above, 211 issuers reported being SRCs, 191 issuers reported being EGCs and 84 issuers reported being both SRCs and EGCs in the period January 1, 2018, through September 30, 2019. This results in 318 issuers that would not bear compliance costs under the proposed rules because they reported being SRCs and/or EGCs. The proposed exemption for smaller reporting companies and emerging growth companies would avoid adding to the costs of being a public reporting company for these companies.

3. Annual Report Requirement

Section 13(q) provides that the resource extraction payment disclosure must be "include[d] in an annual report." In a change from the 2016 Rules, the proposed rules require an issuer to furnish the payment disclosure in an annual report on Form SD instead of filing it. Requiring covered issuers to furnish, rather than file, the payment information in Form SD may limit the incremental risk of liability under Section 18 of the Exchange Act. This limit to the incremental risk of liability could decrease the quality of payment information reported to the extent that issuers are less attentive to collecting and submitting the information. We note, however, that Section 18 does not create strict liability for "filed" information.[356] In addition, issuers would still be subject to antifraud liability under the U.S. Federal securities laws for material misstatements, which should mitigate the risk of decreased quality of the reported payment information.

As under the 2016 Rules, the required payment information would be reported under the cover of Form SD. The Form SD would be due no later than March 31 in the calendar year following its most recent fiscal year for issuers with a fiscal year ending on or before June 30 and no later than March 31 in the second calendar year following its most recent fiscal year for issuers with a fiscal year ending after June 30. This should lessen the burden of compliance with Section 13(q) and the related rules because issuers generally would not have to incur the burden and cost of providing the payment disclosure at the same time that they must fulfill their

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[356] *See* Exchange Act Section 18 (15 U.S.C. 78r). A plaintiff asserting a claim under Section 18 would need to meet the elements of the statute to establish a claim, including purchasing or selling a security in reliance on the misstatement and incurring damages caused by that reliance.

disclosure obligations with respect to Exchange Act annual reports.[357] An additional benefit is that this requirement would provide payment information to users in a standardized manner for all issuers rather than in different annual report forms depending on whether a resource extraction issuer is a domestic or foreign filer. Moreover, requiring the disclosure in Form SD, rather than in issuers' Exchange Act annual reports, should alleviate any concerns and costs associated with the disclosure being subject to the officer certifications required by Exchange Act Rules 13a-14 and 15d-14. Finally, we also believe that the lengthened submission deadlines would also address the concerns that the public disclosure of the payment information could cause competitive harm.

Resource extraction issuers would incur costs associated with preparing and furnishing the required information on Form SD. We do not believe, however, that the costs associated with furnishing the information on Form SD instead of providing it in an existing Exchange Act form would be significant given that the existing form would have to be modified to accommodate the requirements of Section 13(q) disclosure.

4. Public Availability of Data

The proposed rules would require a resource extraction issuer to provide the required payment disclosure publicly, including the name of the issuer. As an alternative to requiring payment disclosure by individual issuers, we could have proposed implementing Section 13(q) by permitting resource extraction issuers to provide the information non-publicly and having the

[357] For example, a resource extraction issuer may potentially be able to save resources to the extent that the timing of its obligations with respect to its Exchange Act annual report and its obligations to provide payment disclosure allow for it to allocate its resources, in particular personnel, more efficiently.

Commission publish, an aggregated and anonymized compilation of company-provided resource extraction payment information. Such an approach would mitigate concerns regarding the disclosure of potentially sensitive information that could create competitive harm. Additionally, such an alternative would still result in the disclosure of the type and amount of payments to governments, albeit on an aggregated basis. According to a commenter in the 2016 rulemaking, such an approach would yield the benefits intended by Congress and at the same time reduce potential competitive harm.[358]

Such anonymized public compilation, however, may not further transparency efforts to the same degree as company-specific disclosure. Public individual issuer information may help people monitor individual issuer's contributions to the public finances and ensure that firms are meeting their payment obligations and that governments are properly collecting and accounting for payments. Additionally, the public disclosure of company-specific, project-level data may help to reduce corruption to the extent that resource extraction issuers are unwilling to participate in deals where they believe the revenues may be corruptly diverted from the government coffers. Requiring issuers to disclose their payment information publicly would also provide users with more current and immediately available information than a separate compilation produced by the Commission. In contrast, under an approach that depends upon the Commission publishing a separate public compilation of previously submitted non-public information, users of the information would have to wait to access the information in an issuer's Form SD until the

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[358] *See* Letter from API (Feb. 16, 2016).

Commission publishes its periodic compilation. We do not believe that the proposed requirement for issuers to disclose the payment information publicly would increase an issuer's compliance burden compared to the alternative of issuers submitting the payment information non-publicly (and the Commission using the nonpublic submissions to produce a publicly available compilation). The compliance costs would be similar under each alternative because the issuer would have to provide the same payment information to the Commission. Regarding the potential increase in the risk of competitive harm that may result from public disclosure, we believe that such increase would be marginal because of the Modified Project Definition, which, as mentioned above, should significantly alleviate the likelihood of competitive harm from the disclosure, and because of the extended filing deadline.

We are considering, however, the alternative of publishing only an aggregated, anonymous compilation based on confidentially furnished Forms SD. This approach would both ensure the public availability of information about payments made in particular jurisdictions—which may be sufficient to meet the statute's objectives—without potentially subjecting affected issuers to competitive harm.

5. Alternative Reporting

The proposed rules would allow resource extraction issuers subject to a foreign jurisdiction's resource extraction payment disclosure requirements to meet their reporting obligations by submitting the report required by that foreign jurisdiction with the Commission subject to the condition that the Commission has determined that the foreign jurisdiction's reporting obligations satisfy the transparency objectives of Section 13(q). Concurrently with the 2016 Rules Adopting Release, the Commission issued an order designating the EU Directives

and ESTMA as eligible substitute reporting regimes for purposes of the alternative reporting provision in those rules. To the extent that the Commission makes a similar determination upon or following adoption of the proposed rules, this approach would significantly decrease compliance costs for issuers that are cross-listed or incorporated in these jurisdictions. As noted above, we estimated that approximately 109 issuers are subject to other regulatory regimes that may allow them to utilize this provision.[359] For these issuers, the costs associated with preparing and furnishing a Form SD should be negligible, although they would be required to format the data in interactive (XBRL) format and potentially translate it into English before submitting it with the Commission.

As an alternative, we could have proposed not to include such a provision. Such an alternative may increase the compliance costs for issuers that are subject to foreign disclosure requirements that satisfy the transparency objectives of Section 13(q). These issuers would have to comply with multiple disclosure regimes and bear compliance costs for each regime, although it is possible that the marginal costs for complying with an additional disclosure regime would not be significant given the potential overlap that may exist between these reporting regimes and the proposed rules.

6. Definition of "Control"

Section 13(q) requires resource extraction issuers to disclose payments made by a subsidiary or entity under the control of the issuer. As discussed in Section II.E above, we are

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[359] These are issuers that have a business address, are incorporated, or are listed on exchanges in the EEA or Canada.

proposing rules that define the term "control" based on accounting principles. Alternatively, we could have proposed a definition based on Exchange Act Rule 12b-2, as in the 2012 Rules.[360] We believe that the approach we are proposing would be less costly for issuers to comply with than such an alternative because issuers are currently required to apply the accounting concept of "control" on at least an annual basis for financial reporting purposes.

Using a definition based on Rule 12b-2 would require issuers to undertake additional steps beyond those currently required for financial reporting purposes. Specifically, a resource extraction issuer would be required to make a factual determination as to whether it has control of an entity based on a consideration of all relevant facts and circumstances. Thus, this alternative would require issuers to engage in a separate analysis of which entities are included within the scope of the required disclosures (apart from the consolidation determinations made for financial reporting purposes) and could increase the compliance costs for issuers compared to the approach we are proposing.

In addition, there are several other advantages of using a definition based on accounting principles. There will be audited financial statement disclosure of an issuer's significant consolidation of accounting policies in the footnotes to its audited financial statements contained in its Exchange Act annual reports. Also, an issuer's determination of control under the proposed rules would be subject to the audit process as well as subject to the internal accounting controls that issuers are required to have in place with respect to audited financial statements

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[360] *See* 2012 Rules Proposing Release, Section II.D.4.

filed with the Commission.[361] All of these advantages may lead to more accurate, reliable, and consistent reporting of subsidiary payments, thereby enhancing the quality of the reported data.

In a change from the 2016 Rules, the proposed rules do not require disclosure of the proportionate amount of the payments made by a resource extraction issuer's proportionately consolidated entities or operations. Excluding proportionate interest entities or operations from the proposed definition of control would ameliorate concerns about the ability of an issuer to obtain sufficiently detailed payment information from proportionately consolidated entities or operations when it is not the operator of that venture, thereby limiting compliance costs for affected issuers. At the same time, this approach would exclude some joint ventures from the scope of the proposed rules, thereby limiting the transparency benefits of the Section 13(q) disclosures. It also could potentially provide an incentive for affected parties to structure their resource extraction operations in a manner to avoid disclosure. We note, however, that many other factors, other than Section 13(q) disclosure, likely would influence how parties structure their operations and agreements, and some of these factors may outweigh the disclosure consideration.

As an alternative, we could have proposed to require disclosure of payments made by a resource extraction issuer's proportionately consolidated entities or operations. This alternative would result in disclosure of payments made by some joint ventures that would not be covered by the scope of the proposed rules, which would increase the transparency benefits of the Section

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[361] *See supra* Section II.E.

13(q) disclosures compared to the proposed approach. However, it also would increase compliance costs for issuers by potentially compelling them to renegotiate their joint venture agreements or make other arrangements to obtain sufficiently detailed payment information to comply with the Section 13(q) rules. In this regard, we note that several commenters in the 2016 rulemaking expressed concern about the ability of an issuer to obtain sufficiently detailed payment information from proportionately consolidated entities or operations when it is not the operator of that venture.[362] Similar considerations would apply with respect to a definition of control that includes a "significant influence" test.

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

The proposed rules define "commercial development of oil, natural gas, or minerals" to include exploration, extraction, processing, and export, or the acquisition of a license for any such activity. As described above, the proposed rules generally track the language in the statute. We are sensitive to the fact that a broader definition of "commercial development of oil, natural gas, or minerals" could increase issuers' costs. We are also sensitive to the fact that expanding the definition in a way that is broader than other reporting regimes could potentially lead to a competitive disadvantage for those issuers covered only by our rules, provided that issuers subject to other disclosure regimes are exempt from the proposed rules under the alternative reporting provision. Further, we recognize that limiting the definition to these specified

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[362] *See* Letters from API (Feb. 16, 2016); BP (Feb. 16, 2016); Chevron (Feb. 16, 2016) ; Encana (Jan. 25, 2016); ExxonMobil (Feb. 16, 2016); Petrobras (Feb. 16, 2016); and Royal Dutch Shell (Feb. 5, 2016).

activities could adversely affect those using the payment information if disclosure about payments made for activities not included in the list of specified activities, such as refining, smelting, marketing, or stand-alone transportation services (i.e., transportation that is not otherwise related to export), would be useful to users of the information.

8. Types of Payments

As under the 2016 Rules, the proposed rules include the specific types of payments identified in the statute, as well as CSR payments that are required by law or contract, payments of certain dividends, and payments for infrastructure. We propose to include payments of certain dividends and payments for infrastructure because, based on comments received in prior rulemakings, we believe they are part of the commonly recognized revenue stream for the commercial development of oil, natural gas and minerals. For example, payments for infrastructure improvements have been required under the EITI since 2011. Additionally, the EU Directives and ESTMA require these payment types to be disclosed. Thus, including dividends and payments for infrastructure improvements (e.g., building a road) in the list of payment types required to be disclosed under the proposed rules would further the statutory objective of supporting the commitment of the Federal Government to international transparency promotion efforts.

As under the 2016 Rules, the proposed rules would include CSR payments that are required by law or contract in the list of covered payment types. Some commenters in the 2016 rulemaking argued that these payments are of material benefit in resource-dependent countries to

both governments and local communities.[363] One commenter suggested that some resource extraction issuers already disclose such payments voluntarily and presented survey data indicating that such payments could be quite large.[364] We also note that the EITI requires the disclosure of CSR payments if required by law or contract.[365] Thus, the addition of CSR payments to the list of types of payments that must be disclosed should improve the quality of the disclosure required by the statute and would further the statutory objective of supporting the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas or minerals. Additionally, to the extent that it is difficult for certain resource extraction issuers to distinguish between CSR payments and infrastructure payments, requiring both types of payments when required by law or contract may lead to lower compliance costs for those issuers.[366]

As discussed earlier, under the proposed rules, resource extraction issuers would incur costs to provide the payment disclosure for the required payment types. For example, there would be costs to modify the issuers' core enterprise resource planning systems and financial reporting systems so that they can track and report payment data at the project level, for each type of payment, government payee, and currency of payment. Since some of the payments would be required to be disclosed only if they are required by law or contract (*e.g.*, CSR

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[363] *See* Letters from Africa Centre for Energy Policy (Feb. 16, 2016); Prof. Harry G. Broadman and Bruce H. Searby (Jan. 25, 2016); ExxonMobil (Feb. 16, 2016); Eugen Falik (Mar. 7, 2016); and PWYP-US (Feb. 16, 2016).

[364] *See* Letter from PWYP-US (Feb. 16, 2016).

[365] *See supra* Section II.C.5.

[366] *See* Letter from ExxonMobil (Feb. 16, 2016).

payments), resource extraction issuers presumably already track such payments and hence the costs of disclosing these payments may not be large. Nevertheless, the addition of dividends, payments for infrastructure improvements, and CSR payments to the list of payment types for which disclosure is required may marginally increase some issuers' costs of complying with the proposed rules. For example, issuers may need to add these types of payments to their tracking and reporting systems. We understand that these types of payments are more typical for mineral extraction issuers than for oil issuers,[367] and therefore only a subset of the issuers subject to the proposed rules might be affected.

To address previously expressed concerns about the difficulty of allocating payments that are made for obligations levied at the entity level, such as corporate income taxes, to the project level, the proposed rules would permit issuers to disclose those payments at the entity level rather than the project level. This accommodation also should help limit compliance costs for issuers without significantly interfering with the goal of achieving increased payment transparency.

Under the proposed rules, issuers must disclose payments made in-kind. The EU Directives and ESTMA also require disclosure of in-kind payments, as does the EITI. Consequently, this requirement should help further the goal of supporting international transparency promotion efforts relating to the commercial development of oil, natural gas or minerals and enhance the effectiveness of the payment disclosure. At the same time, this

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[367] *See, e.g.*, Letters from PWYP-US (Feb. 16, 2016) and Global Witness (Feb. 16, 2016). *See also* Chapter 19 "Advancing the EITI in the Mining Sector: Implementation Issues" by Sefton Darby and Kristian Lempa, in Advancing the EITI in the Mining Sector: A Consultation with Stakeholders (EITI 2009).

requirement could impose costs if issuers have not previously had to value their in-kind payments. To minimize the potential additional costs, the proposed rules provide issuers with the flexibility of reporting in-kind payments at cost, or if cost is not determinable, at fair market value. We believe this approach should help limit the overall compliance costs associated with our proposal to require the disclosure of in-kind payments.

9. Definition of "Not De Minimis"

Section 13(q) requires the disclosure of payments that are "not de minimis," leaving that term undefined. Under the proposed rule's definition of "not de minimis," resource extraction issuers would be required to disclose payments made to each foreign government in a host country or the Federal Government that equal or exceed $150,000, or its equivalent in the issuer's reporting currency, whether made as a single payment or series of related payments, when the total of the individual payments related to that project equal or exceed $750,000. Thus, no payment disclosure is required for projects where the total of the individual payments related to that project is less than $750,000.[368] Even if the aggregate payments for a project are equal to or greater than $750,000, if no single payment or series of related payments of the same type exceeds $150,000, no payments disclosure would be required for that project.

We considered proposing a definition of "not de minimis" based on a qualitative standard or a relative quantitative standard rather than an absolute quantitative standard. We are proposing an absolute quantitative approach because an absolute quantitative approach would be

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[368] In crafting this proposal, we also have relied on the Commission's general definitional and exemptive authority. See Exchange Act Sections 3(b) and 36.

easier for issuers to apply than a definition based on either a qualitative standard or relative quantitative standard. Thus, using an absolute dollar amount threshold for disclosure purposes should help limit compliance costs by reducing the work necessary to determine what payments must be disclosed.

We believe that this higher "not de minimis" threshold is necessary to take into account the proposed definition of project, which aggregates payments at a higher level, which would likely increase the value of the individual types of payments. As such, we believe that using the 2016 threshold of $100,000 would likely require more payment disclosure, thus increasing rather than decreasing the cost and disclosure burden on issuers, contrary to the guidance provided by Congress in its disapproval of the 2016 Rules. We further believe that, in light of the larger aggregations permitted under the revised definition of project, a quantitative standard based upon project level and individual payment information establishes a more appropriate threshold for determining "not de minimis." In addition, we believe that $750,000 in total payments is the appropriate project threshold and $150,000 is the appropriate individual payment threshold because we are proposing to exempt smaller reporting companies and emerging growth companies from the Section 13(q) disclosure requirements,[369] thereby resulting in larger companies, with larger projects and larger individual payments, being primarily affected by the proposed rules.

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[369] See supra Section II.J.3.

We believe that this approach, presents a more accurate definition of "not de minimis" from both an issuer's and the host country's perspective. Although commenters in the previous rulemakings suggested various thresholds, no commenter provided data to assist us in determining an appropriate threshold amount.[370] One commenter criticized the proposed $100,000 threshold as too low, although the commenter did not suggest an alternative amount or provide data to support why the threshold was too low.[371] For issuers (or their subsidiaries) that are already providing payment information under other resource extraction disclosure regimes, our definition of "not de minimis" would likely help minimize compliance costs associated with determining which payments should be reported because these issuers could report under the proposed rule using the payment thresholds under their respective jurisdiction and be in compliance.

We also considered defining "not de minimis" either in terms of a materiality standard or by using a larger dollar threshold for individual payment disclosure, such as $1,000,000. Both of these alternatives might result in lower compliance costs and might lessen competitive concerns relative to the proposal. They also would result in less payment transparency, thereby reducing the intended benefits of the Section 13(q) disclosures.

10. Exhibit and Interactive Data Requirement

Section 13(q) requires the payment disclosure to be electronically formatted using an interactive data format. The proposed rules would require a resource extraction issuer to provide

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[370] *See, e.g.*, 2012 Rules Adopting Release, n.235 and n.243 and accompanying text.

[371] *See* Letter from Nouveau (Feb. 16, 2016).

the required payment disclosure in an XBRL exhibit to Form SD that includes all of the electronic tags required by Section 13(q) and the proposed rules.[372] We believe that requiring the specified information to be presented in XBRL format would offer advantages to issuers and users of the information by promoting consistency and standardization of the information and increasing the usability of the payment disclosure. Providing the required disclosure elements in a machine-readable (electronically tagged) format would allow users to quickly examine, extract, aggregate, compare, and analyze the information in a manner that is most useful to them. This includes searching for specific information within a particular submission as well as performing large-scale statistical analysis using the disclosures of multiple issuers and across date ranges. The proposed rules also require issuers to tag the subnational geographic location of a project using ISO codes. Using ISO codes would standardize references to those subnational geographic locations and would benefit the users of this information by making it easier for them to sort and compare the data. It also would increase compliance costs for issuers to the extent that they do not currently use such codes in their reporting systems.

Specifying XBRL as the required interactive data format may increase compliance costs for some issuers. The electronic formatting costs would vary depending upon a variety of factors, including the amount of payment data disclosed and an issuer's prior experience with XBRL. We expect that most issuers are already familiar with XBRL as they use it to tag financial information in their annual and quarterly reports filed with the Commission. Thus, we

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[372] Users of this information should be able to render the information by using software available on the Commission's website at no cost.

do not expect most affected issuers to incur start-up costs associated with the format. Additionally, we do not believe that the ongoing costs associated with this formatting requirement would be significantly greater than filing the data in XML.[373]

Consistent with the statute, the proposed rules require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. Under the proposed rules, if multiple currencies are used to make payments for a specific project or to a government, a resource extraction issuer may choose to provide the amount of payments made for each payment type and the total amount per project or per government in either U.S. dollars or the issuer's reporting currency.[374] We recognize that a resource extraction issuer could incur costs associated with converting payments made in multiple currencies to U.S. dollars or its reporting currency. Nevertheless, given the statute's tagging requirements and the requirement to disclose total amounts, we believe reporting in one currency is necessary.[375] The proposed rules provide flexibility to issuers in how to perform the currency conversion, which may help to limit compliance costs by allowing issuers to choose the option that works best for them.

11. Quantitative Estimates of Costs Resulting from the Proposed Rulemaking

In the 2016 Rules Adopting Release, the Commission quantified the direct compliance costs of the 2016 Rules based on information provided by commenters. The Commission estimated initial compliance costs to be in the range of $54.7 to $574.4 million assuming no

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[373] *See* 2016 Rules Adopting Release, Section II.C.9.

[374] *See* Instruction 2 to Item 2.01 of Form SD.

[375] *See supra* Section II.K.

fixed costs and in the range of $238.8 to $700.2 million assuming the rule requirements would generate fixed costs for affected issuers. The Commission estimated the ongoing compliance costs to be in the range of $21.9 to $547.3 million assuming no fixed costs and in the range of $95.5 to $590.7 million assuming fixed costs.

In the 2016 Rules Adopting Release, the Commission also attempted to quantify some of the indirect costs resulting from the rule and specifically quantified the costs arising from a foreign law prohibition against Section 13(q) disclosure. For eight potentially affected issuers domiciled in the United States that had assets in China or Qatar, the estimated total loss range was between $1.7 million and $3.1 billion, with a median loss of $291.4 million. The aggregate fraction of total assets that might be affected was 2.7 percent. We note that these estimates applied only to issuers that had assets in one of the host countries. The Commission also estimated the fire sale prices at which affected issuers could dispose of their assets in countries with laws prohibiting disclosure, should such need arise. The analysis suggested that a discount of 69 percent was warranted. For U.S.-based issuers, applying the highest discount of 69 percent to the market value of the issuers' assets in these host countries suggested a range of losses between $1.2 million and $2.1 billion, with a median loss of $201.1 million.

Given the substantial changes introduced into the proposed rules compared to the 2016 Rules, we believe that the estimates from the 2016 Rules are no longer accurate. At present, we do not have data that will allow us to quantify reliably the costs (either direct compliance costs or indirect competitive harm) resulting from the proposed rules. For example, we lack data on the main components of initial and ongoing compliance costs, the fraction of compliance costs that are fixed, and how the various statutory and similar foreign law requirements affect compliance

costs. Since issuers currently are not required to disclose such costs in their SEC filings, and since such costs generally are not otherwise made publicly available, we do not have information about them.

A 2018 study by the UK Department for Business, Energy & Industrial Strategy (the "UK study") is another source of potential cost estimates.[376] We reviewed that data but found it is of limited use for the following reasons. First, we are unable to use the data to determine the cost estimates for the rules we are proposing in this release because the Modified Project Definition in the proposed rules is different from the definition in the UK rules. Specifically, the payment disclosure would be provided at a greater level of aggregation under the proposed rules than under the UK contract-level definition.

Second, the small sample size in the UK study makes it difficult for us to assess with any confidence the actual costs of the UK's regime (which, broadly speaking, is very similar to the 2016 Rules that were rejected by Congress under the Congressional Review Act). The majority of companies (84%) surveyed in the UK study indicated that they do not track compliance costs. As such, the study relied on actual or estimated compliance cost data from 15 companies that may or may not be representative of the broader population. In any event, the estimates of total compliance costs (initial and ongoing) in the UK report are broadly consistent with the range we estimated in the 2016 Rules, which like the UK regime had a contract-level definition of project. Based on the data provided by the 15 companies that responded, the total compliance costs under

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[376] *See supra* n. 67 and accompanying text.

the UK rules ranged from approximately $24,547 per company for small companies to approximately $2,260,263 per company for large companies. The range that we estimated in connection with the 2016 rules was $180,302 per company to $2,937,319 per company.

Request for Comments

We request comment on the potential costs and benefits of the proposed rules and whether the rules, if adopted, would promote efficiency, competition, and capital formation or have an impact or burden on competition. In particular, we request comments on the potential effect on efficiency, competition, and capital formation should the Commission not adopt certain exceptions or accommodations. Commenters are requested to provide empirical data, estimation methodologies, and other factual support for their views, in particular, on costs and benefits estimates. Our specific questions follow.

87. Are there any additional benefits from the proposed rules than the ones mentioned discussed above? Is there information that could help us quantify any benefits of the proposed rules?

88. What are the lessons about the benefits from the resource extraction payment disclosure regimes that already exist in other jurisdictions? Is there empirical evidence on benefits from the disclosure regimes that are already in place?

89. We seek information that would help us quantify compliance costs (both initial and ongoing) more precisely. In particular, we invite issuers and other commenters that have experience with the costs associated with reporting under the EU Directives or ESTMA to provide us with information about those costs. What are the actual compliance costs

for issuers that have started to comply with the disclosure requirements imposed under the EU Directives or ESTMA?

90. What is the breakdown of various compliance costs, such as legal fees, direct administrative costs, information technology/consulting costs, training costs, and travel costs? What are the main drivers of compliance costs?

91. What is the proportion of fixed costs in the direct compliance costs structure of potentially affected resource extraction issuers? Would smaller resource extraction issuers incur proportionally lower compliance costs than larger resource extraction issuers? Would affiliated issuers be able to save on fixed costs of developing compliance systems through sharing such costs? If so, what is the estimate of such savings?

92. Are there additional costs and benefits from the proposed definition of "project"? How do issuers typically define "project" in their reporting systems? How costly would it be for issuers to switch from the definition of "project" that they currently use to the one being proposed in these rules? Would our proposed definition of project reduce compliance costs for issuers compared to a contract-based definition of project?

93. Are there any additional effects on efficiency, competition, and capital formation that we have not considered? Are there any additional indirect costs or competitive harm that we have not considered?

94. Is our approach to identify small issuers that likely do not make any payments above the proposed de minimis amount reasonable? Are annual revenues and net cash flows from investing activities taken together an appropriate measure for such purpose?

95. What are the costs of converting a resource extraction payment report in the format required by the EU Directives or ESTMA (*e.g.*, XLS or PDF) to the report format required by the proposed rules (*i.e.*, XBRL)?

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

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

98. What are the benefits and costs of an alternative reporting option for issuers that are subject to a foreign jurisdiction's resource extraction payment disclosure requirements that are determined to satisfy the transparency objectives of Section 13(q)? How much would such issuers save in compliance costs if they have the option to satisfy their filing obligations by filing the report required by that foreign jurisdiction with the Commission?

IV. PAPERWORK REDUCTION ACT

A. Background

Certain provisions of the proposed rules contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[377] The Commission is submitting the proposal to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[378] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The title for the collection of information is:

- "Form SD" (OMB Control No. 3235-0697).[379]

Form SD is currently used to file Conflict Minerals Reports pursuant to Rule 13p-1 of the Exchange Act. We are proposing amendments to Form SD to accommodate disclosures required by proposed Rule 13q-1. It would require resource extraction issuers to disclose information about payments made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer to foreign governments or the U.S. Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Form SD would be submitted to the Commission on EDGAR.

The proposed rules and amendment to the form would implement Section 13(q) of the Exchange Act, which was added to the Exchange Act by Section 1504 of the Dodd-Frank Act.

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[377] 44 U.S.C. 3501 *et seq.*

[378] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[379] As discussed above, proposed Rule 13q-1 requires a resource extraction issuer to submit the payment information specified in Form SD. The collection of information requirements associated with the proposed rules would be reflected in the burden hours estimated for Form SD. Therefore, there is no separate burden estimate for Rule 13q-1.

As described in detail above,[380] Section 13(q) directs the Commission to issue rules requiring resource extraction issuers to include in an annual report certain specified information relating to payments made to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. In addition, Section 13(q) requires a resource extraction issuer to provide information about those payments in an interactive data format. We are proposing to require that the mandated payment information be provided in an XBRL exhibit to Form SD. The disclosure requirements would apply equally to U.S. issuers and foreign issuers meeting the definition of "resource extraction issuer."

Compliance with the rules by affected issuers would be mandatory. Responses to the information collections would not be kept confidential and there would be no mandatory retention period for the collection of information.

B. Estimate of Issuers

The number, type, and size of the issuers that would be required to file the payment information required in Form SD, as proposed to be amended, is uncertain, but, as discussed in the economic analysis above, we estimate that the number of potentially affected issuers is 677.[381] Of these issuers, we excluded 318 issuers that reported being either smaller reporting companies, emerging growth companies, or both, because the proposed rules would exempt both

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[380] *See supra* Section I.A.

[381] *See supra* Section III.A. (explaining how we use data from Exchange Act annual reports for the period January 1, 2018 through September 30, 2019 to estimate the number of issuers that might make payments covered by the proposed rules). As noted in that section, this number does not reflect the number of issuers that actually made resource extraction payments to governments.

types of issuers from the Section 13(q) requirements. In addition, we excluded 109 issuers that are subject to resource extraction payment disclosure rules in other jurisdictions that require more granular payment disclosure than would be required by the proposed rules, and 14 issuers with no or only nominal operations, or that are unlikely to make any payments that would be subject to the proposed disclosure requirements.[382] For the 109 issuers subject to those alternative reporting regimes, the additional costs to comply with the proposed rules would likely be much lower than costs for other issuers.[383] For the 14 issuers that are unlikely to make payments subject to the proposed rules, we believe there would be no additional costs associated with the proposed rules.[384] Accordingly, we estimate that 236 issuers would bear the full costs of compliance with the proposed rules[385] and 109 would bear significantly lower costs.

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[382] *See id.* (describing how we identify issuers that may be subject to those alternative reporting regimes and how we use shell company status and revenues and net cash flows from investing activities to identify issuers that would be unlikely to make payments exceeding the proposed "not de minimis" threshold).

[383] Issuers subject to the alternative reporting regimes described above would already be gathering, or have systems in place to gather, resource extraction payment data, which should reduce their compliance burden. In addition, under the proposed rules, a resource extraction issuer that is subject to the resource extraction payment disclosure requirements of an alternative reporting regime, deemed by the Commission to require disclosure that satisfies Section 13(q)'s transparency objectives, may satisfy its payment disclosure obligations by including, as an exhibit to Form SD, a report complying with the reporting requirements of the alternative jurisdiction. *See* proposed Item 2.01(c) of Form SD. When adopting its Section 13(q) rules in 2016, in a concurrent order, the Commission determined that an issuer could substitute a report prepared pursuant to the EU Directives or Canada's ESTMA to satisfy its disclosure obligations under the 2016 Rules. If the Commission were to make a similar determination in respect of the proposed rules, the 109 issuers subject to those foreign laws would incur relatively small compliance burdens and costs associated with the proposed rules. We have nevertheless included them in our estimate of affected issuers for PRA purposes because under the proposed rules they would still have an obligation to furnish a report on Form SD in XBRL, although with a significantly lower associated burden.

[384] *See supra* Section III.A.

[385] 677 minus 318 minus 109 minus 14 = 236.

C. Estimate of Issuer Burdens

We derive our burden estimates by estimating the average number of hours it would take an issuer to prepare and furnish the required disclosure. In deriving our estimates, we recognize that the burdens would likely vary among individual issuers based on a number of factors, including the size and complexity of their operations and whether they are subject to similar disclosure requirements in other jurisdictions.

When determining the estimates described below, we have assumed that 75 percent of the burden of preparation is carried by the issuer internally and 25 percent of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour.[386]

The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours. We expect that the proposed rules' burden would be greatest during the first year of their effectiveness and diminish in subsequent years. To account for this expected diminishing burden, we use a three-year

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[386] We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour. This is the rate we typically estimate for outside legal services used in connection with public company reporting. We note that in the 2016 rulemaking, one commenter used $150 per hour in its analysis of the costs associated with the proposed rules. *See* letter from Claigan Environmental (Feb. 16, 2016). The Commission disagreed with that estimate, however, because the rate did not factor in the outside professional costs associated with preparing a document under applicable securities laws. We believe a resource extraction issuer would likely seek the advice of an attorney to help it comply with the rule and form requirements under U.S. Federal securities laws. Accordingly, we continue to use the $400 per hour estimate when considering the applicable costs and burdens of this collection of information.

average of the expected implementation burden during the first year and the expected ongoing compliance burden during the next two years.

We believe that the burden associated with this collection of information would be greatest during the initial compliance period in order to account for initial set up costs, including initial adjustments to an issuer's internal books and records, plus costs associated with the collection, verification and review of the payment information for the first year. We believe that ongoing compliance costs would be less because an issuer would have already made any necessary modifications to its internal systems to capture and report the information required by the proposed rules.

When conducting the PRA analysis in connection with the 2016 Rules, the Commission used an estimate for compliance costs and burden provided by a commenter on the 2012 Rules Proposing Release.[387] That commenter estimated that, for an issuer bearing the full costs and burden, compliance with those rules would require 500 hours to make initial changes to the issuer's internal books and records and another 500 hours a year on an ongoing basis to review and verify the payment information.[388] Based on the commenter's estimates, the Commission

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[387] *See* the 2016 Rules Adopting Release, Section IV.C., citing the letter from Barrick Gold (Feb. 28, 2011). When presenting its own cost estimates for the 2016 Rules, one commenter stated that "the Barrick costing model seems to be the most valid and accurate costing model submitted to SEC and should be attributed more weight by the SEC when calculating expected industry costs." Letter from Claigan Environmental (Feb. 16, 2016).

[388] Barrick Gold also estimated that its initial compliance with the rules would require $100,000 for IT consulting, training and travel costs. *See id.*

estimated that the 2016 Rules would result in 217,408.65 total incremental company burden hours and $71,487,820 total outside professional costs.[389]

The Commission's PRA burden estimates for the 2016 Rules were based on a version of Section 13(q) rules that would have been more onerous than the proposed rules.[390] As discussed more fully in Section III above, we believe that the proposed changes to the 2016 Rules, in particular the proposed definition of project and the proposed exemptions for conflicts with foreign law and pre-existing contracts, would meaningfully reduce the compliance burden and costs for issuers compared to the 2016 Rules. Because of these proposed changes, we believe that it would be appropriate to adjust the 2016 PRA burden estimates to account for this reduction in burden and costs.

For PRA purposes, we estimate that the incremental burden of the proposed rules would be at least 25 percent less than the incremental burden of the 2016 Rules. We believe that this reduction in the burden estimate is reasonable because of the proposed changes to the definition of project, which should generally simplify and reduce the collection and reporting of payment

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[389] These total burden and cost estimates were based on the Commission's estimates that 425 issuers would bear the full burden and costs of the 2016 Rules and 192 issuers would bear a significantly reduced burden and costs because they were already subject to similar payment disclosure requirements in foreign jurisdictions. *See id.*

[390] For example, neither the 2012 Rules nor the 2016 Rules provided for exemptions for conflicts with foreign law or pre-existing contracts, which we are proposing in this rulemaking. *See supra* Section II.J. Moreover, the Commission adopted a contract-based definition of "project" in 2016 and, although the Commission left "project" undefined in 2012, it provided guidance in that rulemaking suggesting that project was to be determined based on the underlying contract. *See* 2012 Rules Adopting Release, Section II.D.3. In contrast, among other changes, the proposed rules include a broader definition of project and would permit greater aggregation of payment information at the major subnational jurisdiction level. *See supra* Sections II.F. and II.G.

information for a resource extraction issuer.[391] We note that this reduction in the burden estimate does not take into account the two new proposed exemptions for conflicts with foreign law and pre-existing contracts.[392] While we expect these proposed exemptions would result in a reduced PRA burden compared to the 2016 Rules,[393] because it is more difficult to estimate the effects of the proposed exemptions, and to avoid underestimating the proposed rules' burden and costs, we have not factored them into the current PRA estimates. We have relied on a prior commenter's estimates for the limited purpose of this PRA analysis, and, as indicated above, we request commenters to provide us with more accurate estimates of the compliance costs and burden of the proposed rules.[394]

Thus, for an issuer bearing the full costs and burden of the proposed rules, we estimate that compliance with the proposed rules would require 375 hours to make initial changes to the issuer's internal books and records and another 375 hours a year on an ongoing basis to review and verify the payment information,[395] resulting in 750 hours per respondent for the initial incremental PRA burden. Using the three-year average of the expected burden during the first year and the expected ongoing burden during the next two years, we estimate that the

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[391] *See supra* Section II.F.2.

[392] *See supra* Section III.C.

[393] For example, issuers may spend fewer internal hours and/or incur fewer professional costs to prepare case-specific exemptive relief requests in connection with the required disclosures.

[394] *See* discussion of quantitative estimate of costs in Section III.C.11., above.

[395] 500 hours x .25 = 125 hours. 500 hours – 125 = 375 hours.

incremental PRA burden would be 500 hours per fully affected respondent (750 + 375 + 375 hours/3 years).

The following table shows the estimated internal burden hours and professional and other external costs for the 236 issuers bearing the full costs and burden of the proposed rules and for the 109 issuers subject to more granular resource extraction payment disclosure requirements in foreign jurisdictions when preparing and submitting Form SD. These total burden hours and total external costs would be in addition to the existing estimated hour and cost burdens applicable to Form SD because of compliance with Exchange Act Rule 13p-1.

Whether Issuer Is Subject to Similar Foreign Disclosure Regime	Number of Estimated Affected Responses	Burden Hours per Current Affected Response	Total Burden Hours for Current Affected Responses	Internal Burden Hours for Current Affected Responses	Professional (External) Hours for Current Affected Responses	Professional (External) Costs for Current Affected Responses	Additional (External) IT Costs[2] per Current Affected Response	Total Additional IT Costs	Total External Costs
	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)
			= (A) x (B)	= (C) x .75	= (C) x .25	= (E) x $400		= (A) x (G)	= (F) + (H)
No	236	500	118,000	88,500	29,500	$11,800,000	$75,000	$17,700,000	$29,772,500
Yes	109	25	2,725[1]	2,044	681.25	$272,500	$0	$0	$272,500
Total	345			90,544		$12,072,500		$17,700,000	$30,045,000

[1] As we did in the 2016 rulemaking, we estimate that an issuer that is already subject to a qualifying alternative reporting regime would incur an internal burden that is five percent of the burden incurred by a fully affected issuer. 500 hours x .05 = 25 hours. 25 hours x 109 = 2,725 hours.

[2] We estimate that an issuer bearing the full costs of the proposed rules would incur additional initial compliance costs for IT consulting, training and travel of $75,000. We do not, however, believe that these initial IT costs would apply to the issuers that are already subject to a qualifying alternative reporting regime since those issuers should already have IT systems in place to comply with the foreign regime. Similar to our estimate of the incremental PRA burden of the proposed rules, we estimate that the additional initial compliance costs for IT consulting, training and travel would be at least 25 percent less than the estimate for those costs ($100,000 per respondent) that was factored into the PRA estimate of total professional costs for the 2016 Rules. $100,000 x .25 = $25,000. $100,000 – 25,000 = $75,000.

D. Request for Comment

We request comment in order to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility;
- Evaluate the accuracy of our estimate of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collections of information not previously identified in this section.[396]

Any member of the public may direct to us any comments about 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, Washington, DC 20503, and should send a copy to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE,

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[396] We request comment pursuant to 44 U.S.C. 3506(c)(2)(B).

Washington, DC 20549-1090, with reference to File No. S7-24-19. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-24-19, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549-2736. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

V. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996,[397] a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the U.S. economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposal would be a "major rule" for purposes of the Small Business Regulatory Enforcement Fairness Act. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

VI. REGULATORY FLEXIBILITY ACT CERTIFICATION

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[397] 5 U.S.C. 801 et seq.

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act ("RFA")[398] requires the agency to prepare and make available for public comment an Initial Regulatory Flexibility Analysis ("IRFA") that will describe the impact of the proposed rule on small entities.[399] Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.[400]

The proposed rules would exempt smaller reporting companies and emerging growth companies from the requirements of Section 13(q) and proposed Rule 13q-1. Most small entities[401] would fall within the scope of this exemption and, therefore, would not be subject to the proposed rules. Accordingly, the Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed rules, including proposed Rule 13q-1 and the amendments to Form SD, if adopted, would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

Request for Comment

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398 5 U.S.C. 601 *et seq.*

399 5 U.S.C. 603(a).

400 5 U.S.C. 605(b).

401 For purposes of the RFA, Exchange Act Rule 0-10(a) [17 CFR 240.0-10(a)] defines an issuer (other than an investment company) to be a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. Because Exchange Act Rule 12b-2 defines a smaller reporting company as an issuer (that is not an investment company) with either a public float of less than $250 million, or annual revenues of less than $100 million for the previous year and either no public float or a public float of less than $700 million, most small entities would likely fall within the definition of smaller reporting company and, therefore, would be exempt from the proposed rules.

We request comment on this certification. In particular, we solicit comment on the following: Do commenters agree with the certification? If not, please describe the nature of any impact of the proposed amendments on small entities and provide empirical data to illustrate the extent of the impact. Such comments will be considered in the preparation of the final rules (and in a Final Regulatory Flexibility Analysis if one is needed) and, if the proposed rules are adopted, will be placed in the same public file as comments on the proposed rules themselves.

VII. STATUTORY AUTHORITY AND TEXT OF PROPOSED RULE AND FORM AMENDMENTS

We are proposing the rule and form amendments contained in this document under the authority set forth in Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act.

List of Subjects in 17 CFR Parts 240 and 249b

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, we propose to amend title 17, chapter II of the Code of Federal Regulations as follows:

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78*o*, 78*o*-4, 78*o*-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, secs. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

2. Section 240.13q-1 is revised to read as follows:

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

(a) *Resource extraction issuers.* Every issuer that is required to file an annual report with the Commission on Form 10-K (17 CFR 249.310), Form 20-F (17 CFR 249.220f), or Form 40-F (17 CFR 249.240f) pursuant to Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78*o*(d)) and engages in the commercial development of oil, natural gas, or minerals must furnish a report on Form SD (17 CFR 249b.400) within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form.

(b) *Anti-evasion.* Disclosure is required under this section in circumstances in which an activity related to the commercial development of oil, natural gas, or minerals, or a payment or series of payments made by a resource extraction issuer to a foreign government or the Federal Government for the purpose of commercial development of oil, natural gas, or minerals, is not, in form or characterization, within one of the categories of activities or payments specified in Form SD, but is part of a plan or scheme to evade the disclosure required under this section.

(c) *Alternative reporting.* An application for recognition by the Commission that an alternative reporting regime requires disclosure that satisfies the transparency objectives of Section 13(q) (15 U.S.C. 78m(q)), for purposes of alternative reporting pursuant to Item 2.01(c) of Form SD, must be filed in accordance with the procedures set forth in § 240.0-13, except that, for purposes of this paragraph (c), applications may be submitted by resource extraction issuers, governments, industry groups, or trade associations.

(d) *Exemptions*--(1) *Conflicts of law.* A resource extraction issuer that is prohibited by the law of the jurisdiction where the project is located from providing the payment information required by Form SD may exclude such disclosure, subject to the following conditions:

(i) The issuer has taken all reasonable steps to seek and use any exemptions or other relief under the applicable law of the foreign jurisdiction, and has been unable to obtain or use such an exemption or other relief;

(ii) The issuer must disclose on Form SD:

(A) The foreign jurisdiction for which it is omitting the disclosure pursuant to this paragraph (d)(1);

(B) The particular law of that jurisdiction that prevents the issuer from providing such disclosure; and

(C) The efforts the issuer has undertaken to seek and use exemptions or other relief under the applicable law of that jurisdiction, and the results of those efforts; and

(iii) The issuer must furnish as an exhibit to Form SD a legal opinion from counsel that opines on the issuer's inability to provide such disclosure without violating the foreign jurisdiction's law.

(2) *Conflicts with pre-existing contracts.* A resource extraction issuer that is unable to provide the payment information required by Form SD without violating one or more contract terms that were in effect prior to the effective date of this section may exclude such disclosure, subject to the following conditions:

(i) The issuer has taken all reasonable steps to obtain the consent of the relevant contractual parties, or to seek and use another contractual exception or relief, to disclose the payment information, and has been unable to obtain such consent or other contractual exception or relief;

(ii) The issuer must disclose on Form SD:

(A) The jurisdiction for which it is omitting the disclosure pursuant to this paragraph (d)(2);

(B) The particular contract terms that prohibit the issuer from providing such disclosure; and

(C) The efforts the issuer has undertaken to obtain the consent of the contracting parties, or to seek and use another contractual exception or relief, to disclose the payment information, and the results of those efforts; and

(iii) The issuer must furnish as an exhibit to Form SD a legal opinion from counsel that opines on the issuer's inability to provide such disclosure without violating the contractual terms.

(3) *Exemption for emerging growth companies and smaller reporting companies*. An issuer that is an emerging growth company or a smaller reporting company, each as defined under § 240.12b-2, is exempt from, and need not comply with, the requirements of this section.

(4) *Case-by-case exemption.* A resource extraction issuer may file an application for exemptive relief under this section in accordance with the procedures set forth in §240.0-12.

(e) *Compilation.* To the extent practicable, the staff will periodically make a compilation of the information required to be submitted under this section publicly available

online. The staff may determine the form, manner and timing of the compilation, except that no information included therein may be anonymized (whether by redacting the names of the resource extraction issuers or otherwise).

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

3. The authority citation for part 249b continues to read, in part, as follows:

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

* * * * *

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

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

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

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

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

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

The addition and revision read as follows:

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

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM SD
SPECIALIZED DISCLOSURE REPORT

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

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

(Full mailing address of principal executive offices)

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

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

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

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

GENERAL INSTRUCTIONS

A. Rule as to Use of Form SD.

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

B. Information to be Reported and Time for Furnishing Reports.

1. * * *

2. *Form furnished under Rule 13q-1*. If your fiscal year ends on or before June 30, furnish the information required by Section 2 of this form on EDGAR no later than March 31 in the calendar year following your most recent fiscal year. If your fiscal year ends after June 30, furnish this required information no later than March 31 in the second calendar year following your most recent fiscal year.

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

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

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INFORMATION TO BE INCLUDED IN THE REPORT

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Section 2 – Resource Extraction Issuer Disclosure

Item 2.01 Resource Extraction Issuer Disclosure and Report

(a) *Required Disclosure*. (1) A resource extraction issuer must furnish an annual report on Form SD with the Commission, and include as an exhibit to this Form SD, the information specified in Item 2.01(a)(5) of this Form, relating to any payment made during the fiscal year covered by the annual report by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer, to a foreign government or the Federal Government, for the purpose of the commercial development of oil, natural gas, or minerals.

(2) The resource extraction issuer is not required to have the information audited. The payment information must be provided on a cash basis and not an accrual basis.

(3) The resource extraction issuer must provide a statement in the body of the Form SD, under the caption "Disclosure of Payments by Resource Extraction Issuers," that the specified payment disclosure required by this Form is included in an exhibit to the Form SD.

(4) A resource extraction issuer that is claiming an exemption under Rule 13q-1(d)(1) or (2) (17 CFR 240.13q-1(d)(1) or (2)) must provide the disclosure required by those rules, as applicable, in the body of the Form SD. If applicable, a resource extraction issuer must disclose in the body of Form SD that it has filed an application for exemptive relief pursuant to Rule 13q-1(d)(4) (17 CFR 240.13q-1(d)(4)).

(5) The resource extraction issuer must include the following information in the exhibit to Form SD, which must present the information in the eXtensible Business Reporting Language (XBRL) electronic format:

(i) The type and total amount of such payments, by payment type listed in paragraph (d)(9)(iii) of this Item, made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals;

(ii) The type and total amount of such payments, by payment type listed in paragraph (d)(9)(iii) of this Item, for all projects made to each government;

(iii) The total amounts of the payments, by payment type listed in paragraph (d)(9)(iii) of this Item;

(iv) The currency used to make the payments;

(v) The fiscal year in which the payments were made;

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

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

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

(ix) The particular resource that is the subject of commercial development;

(x) The method of extraction used in the project; and

(xi) The major subnational political jurisdiction of the project.

(b) *Delayed Reporting*. (1) A resource extraction issuer may delay disclosing payment information related to exploratory activities until the Form SD submitted for the fiscal year immediately following the fiscal year in which the payment was made. For purposes of this paragraph, payment information related to exploratory activities includes all payments made as part of the process of (i) identifying areas that may warrant examination, (ii) examining specific areas that are considered to have prospects of containing oil and gas reserves, or (iii) as part of a mineral exploration program, in each case limited to exploratory activities that were commenced prior to the commercial development (other than exploration) of the oil, natural gas, or minerals on the property, any adjacent property, or any property that is part of the same project.

(2) A resource extraction issuer that has acquired (or otherwise obtains control over) an entity that has not been obligated to provide disclosure pursuant to Rule 13q-1, or pursuant to another alternative reporting regime deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q) (15 U.S.C. 78m(q)), in such entity's last full fiscal year is not required to commence reporting payment information for such acquired entity until the Form SD submitted for the fiscal year immediately following the effective date of the acquisition. A resource extraction issuer must disclose that it is relying on this accommodation in the body of its Form SD submission.

(3) A resource extraction issuer that has completed its initial public offering in the United States in its last full fiscal year is not required to commence reporting payment information pursuant to Rule 13q-1 until the Form SD submitted for the fiscal year immediately following the fiscal year in which the registration statement for its U.S. initial public offering became effective.

(c) *Alternative Reporting*. (1) A resource extraction issuer that is subject to the resource extraction payment disclosure requirements of an alternative reporting regime, which has been deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q) (15 U.S.C. 78m(q)), may satisfy its disclosure obligations under paragraph (a) of this Item 2.01 by including, as an exhibit to this Form SD, a report complying with the reporting requirements of the alternative jurisdiction.

(2) The alternative report must be the same as the one prepared and made publicly available pursuant to the requirements of the approved alternative reporting regime, subject to changes necessary to comply with any conditions to alternative reporting set forth by the Commission.

(3) The resource extraction issuer must: (i) state in the body of the Form SD that it is relying on the alternative reporting provision; (ii) identify the alternative reporting regime for which the report was prepared; (iii) describe how to access the publicly submitted report in the alternative jurisdiction; and (iv) specify that the payment disclosure required by this Form is included in an exhibit to this Form SD.

(4) The alternative report must be provided in XBRL format.

(5) A fair and accurate English translation of the entire report must be submitted if the report is in a foreign language. Project names may be presented in their original language, in addition to the English translation of the project name, if the resource extraction issuer believes that such an approach would facilitate identification of the project by users of the disclosure.

(6) A resource extraction issuer may follow the submission deadline of an approved alternative jurisdiction if it submits a notice on Form SD-N on or before the due date of its Form SD indicating its intent to submit the alternative report using the alternative jurisdiction's deadline. If a resource extraction issuer fails to submit such notice on a timely basis, or submits such a notice but fails to submit the alternative report within four business days of the alternative jurisdiction's deadline, it may not rely on this Item 2.01(c) for the following fiscal year.

(7) Resource extraction issuers must also comply with any additional requirements that are provided by the Commission upon granting an alternative reporting accommodation, as well as subsequent changes in such requirements.

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

(1) Business segment means a business segment consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting.

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

(3) Control means that the resource extraction issuer consolidates the entity under the accounting principles applicable to the financial statements included in the resource extraction issuer's periodic reports filed pursuant to the Exchange Act (i.e., under generally accepted accounting principles in the United States (U.S. GAAP) or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS)). A foreign private issuer that prepares financial statements according to a comprehensive set of accounting principles, other than U.S. GAAP, and files with the Commission a reconciliation to U.S. GAAP must determine control using U.S. GAAP.

(4) Export means the movement of a resource across an international border from the host country to another country by a company with an ownership interest in the resource. Export does not include the movement of a resource across an international border by a company that (i) is not engaged in the exploration, extraction, or processing of oil, natural gas, or minerals and (ii) acquired its ownership interest in the resource directly or indirectly from a foreign government or the Federal Government. Export also does not include cross-border transportation activities by

an entity that is functioning solely as a service provider, with no ownership interest in the resource being transported.

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

(6) Federal Government means the Federal Government of the United States.

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

(8) Not de minimis means any Payment made to each Foreign Government in a host country or the Federal Government that equals or exceeds $150,000, or its equivalent in the issuer's reporting currency, whether made as a single payment or series of related payments, subject to the condition that single payment (or a series of related payments) disclosure for a Project is only required if the total Payments for a Project equal or exceed $750,000**.** In the case of any arrangement providing for periodic payments or installments, a resource extraction issuer must use the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that series of payments, and accordingly, whether disclosure is required.

(9) Payment means an amount paid that:

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

(ii) Is not de minimis; and

(iii) Is one or more of the following:

(A) Taxes;

(B) Royalties;

(C) Fees;

(D) Production entitlements;

(E) Bonuses;

(F) Dividends;

(G) Payments for infrastructure improvements; and

(H) Community and social responsibility payments that are required by law or contract.

(10) Project is defined by using the following three criteria:

(i) The type of resource being commercially developed;

(ii) The method of extraction; and

(iii) The major subnational political jurisdiction where the commercial development of the resource is taking place.

(11) Resource extraction issuer means an issuer that:

(i) Is required to file an annual report with the Commission on Form 10-K (17 CFR 249.310), Form 20-F (18 CFR 249.220f), or Form 40-F (17 CFR 249.240f) pursuant to Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)); and

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

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

Instructions to Item 2.01

Disclosure by Subsidiaries and other Controlled Entities

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

Currency Disclosure and Conversion

(2) A resource extraction issuer must report the amount of payments made for each payment type, and the total amount of payments made for each project and to each government, during the reporting period in either U.S. dollars or the resource extraction issuer's reporting currency. If a resource extraction issuer has made payments in currencies other than U.S. dollars or its reporting currency, it may choose to calculate the currency conversion between the currency in which the payment was made and U.S. dollars or the resource extraction issuer's reporting currency, as applicable, in one of three ways: (a) by translating the expenses at the exchange rate existing at the time the payment is made; (b) using a weighted average of the exchange rates during the period; or (c) based on the exchange rate as of the resource extraction issuer's fiscal year end. When calculating whether the de minimis threshold has been exceeded, a resource extraction issuer may be required to convert the payment to U.S. dollars, even though it is not required to disclose those payments in U.S. dollars. For example, this may occur when the resource extraction issuer is using a non-U.S. dollar reporting currency. In these instances, the resource extraction issuer may use any of the three methods described above for calculating the currency conversion. In all cases a resource extraction issuer must disclose the method used to calculate the currency conversion and must choose a consistent method for all such currency conversions within a particular Form SD submission.

Location Tagging

(3) When identifying the country and major subnational political jurisdiction where the commercial development of the resource is taking place, a resource extraction issuer must use the combined country and subdivision code provided in ISO 3166, if available. When identifying the country in which a government is located, a resource extraction issuer must use the two letter country code provided in ISO 3166, if available.

Entity Level Disclosure and Tagging

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

Project Disclosure

(5)(i) When identifying the type of resource that is being commercially developed for purposes of identifying a project, the resource extraction issuer must identify whether the resource is oil, natural gas, or a type of mineral. A resource extraction issuer should identify

synthetic oil obtained through processing tar sands, bitumen, or oil shales as "oil" and should identify gas obtained from methane hydrates as "natural gas." Synthetic oil or gas obtained through processing of coal should be identified as "coal." Minerals must be identified by type, such as gold, copper, coal, sand, or gravel, but additional detail is not required. For information on which materials are covered by the term "minerals," refer to Instruction 13 below.

(ii) When identifying the method of extraction for purposes of identifying a project, the resource extraction issuer must choose from the following three parameters: well, open pit, or underground mining.

(iii) When identifying the national and major subnational political jurisdiction for purposes of identifying a project, refer to Instruction 3 to Item 2.01. Onshore and offshore development of resources may not be treated as a single project. A resource extraction issuer must identify when a project is offshore and identify the nearest major subnational political jurisdiction pursuant to Instruction 3 of Item 2.01.

(iv) A resource extraction issuer may treat all the activities within a major subnational political jurisdiction as a single project, but must describe each type of resource being commercially developed and each method of extraction used in the description of the project. A resource extraction issuer may not combine as one project activities that cross the borders of a major subnational political jurisdiction.

Payment Disclosure

(6) When a resource extraction issuer proportionately consolidates an entity or operation under U.S. GAAP or IFRS, as applicable, the resource extraction issuer must disclose its proportionate amount of the payments made by such entity or operation pursuant to this Item and must indicate the proportionate interest.

(7) Although an entity providing only services to a resource extraction issuer to assist with exploration, extraction, processing or export would generally not be considered a resource extraction issuer, where such a service provider makes a payment that falls within the definition of "payment" to a government on behalf of a resource extraction issuer, the resource extraction issuer must disclose such payment.

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

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

(10) Royalties include unit-based, value-based, and profit-based royalties. Fees include license fees, rental fees, entry fees, and other considerations for licenses or concessions. Bonuses include signature, discovery, and production bonuses.

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

(12) If a resource extraction issuer makes an in-kind payment of the types of payments required to be disclosed, the resource extraction issuer must disclose the payment. When reporting an in-kind payment, a resource extraction issuer must determine the monetary value of the in-kind payment and tag the information as "in-kind" for purposes of the currency. For purposes of the disclosure, a resource extraction issuer must report the payment at cost, or if cost is not determinable, fair market value and must provide a brief description of how the monetary value was calculated. If a resource extraction issuer makes an in-kind production entitlement payment under the rules and then repurchases the resources associated with the production entitlement within the same fiscal year, the resource extraction issuer must report the payment using the purchase price (rather than at cost, or if cost is not determinable, fair market value). If the in-kind production entitlement payment and the subsequent repurchase are made in different fiscal years and the purchase price is greater than the previously reported value of the in-kind payment, the resource extraction issuer must report the difference in values in the latter fiscal year (assuming the amount of that difference exceeds the de minimis threshold). In other situations, such as when the purchase price in a subsequent fiscal year is less than the in-kind value already reported, no disclosure relating to the purchase price is required.

(13) "Minerals," as used in Item 2.01, includes any material for which an issuer with mining operations would provide disclosure under the Commission's existing disclosure requirements and policies, including Industry Guide 7 or any successor requirements or policies (*see* subpart 1300 of Regulation S-K (17 CFR 229.1300). It does not include oil and gas resources (as defined in 17 CFR 210.4-10(a)(16)(D) or any successor provision).

(14) For payments made at a level below the major subnational government level, such as a county, district, or municipality, an issuer may aggregate all of its payments of a particular payment type made to such subnational governments and disclose the aggregate amount without having to identify the particular subnational government payee. The issuer should instead generically identify the subnational government payee (*e.g.*, as "county," "municipality," or some combination of subnational governments).

Section 3 – Exhibits

Item 3.01 Exhibits

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

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

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

Exhibit 3.01 – Opinion of Counsel as required by Rule 13q-1(d)(1) or (2) (17 CFR 240.13q-1(d)(1) or (2))

SIGNATURES

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

_____
(Registrant)

_____ _____
By (Signature and Title)* (Date)

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

* * * * *

By the Commission.

Dated: December 18, 2019.

Vanessa A. Countryman,
Secretary.
[FR Doc. 2019-28407 Filed: 1/14/2020 8:45 am; Publication Date: 1/15/2020]