

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 240 and 249b

[Release No. 34–90679; File No. S7–24–19]

RIN 3235–AM06

### Disclosure of Payments by Resource Extraction Issuers

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** We are adopting a rule under the Securities Exchange Act of 1934 (“Exchange Act”) and an amendment to Form SD to implement Section 13(q) of the Exchange Act. 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:**

*Effective date:* The final rule and form amendment are effective March 16, 2021.

*Compliance date:* See Section II.O. for further information on transitioning to the final rules.

**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 17 CFR 240.13q–1 and an amendment 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 17 CFR 240.13q–1 and an amendment 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 proposed 17 CFR 240.13q–1 and an amendment to Form

SD under the Exchange Act<sup>1</sup> on December 18, 2019. We are now adopting 17 CFR 240.13q–1 (“Rule 13q–1”) and an amendment to Form SD<sup>2</sup> under the Exchange Act largely as proposed.

### Table of Contents

- I. Background
  - A. Section 13(q) of the Exchange Act
  - B. Prior Section 13(q) Rulemakings and Congress’s Actions Under the Congressional Review Act
  - C. Summary of the Final Rules
- II. Final Rules Under Section 13(q)
  - A. Definition of “Project”
    - 1. Comments and Considerations Regarding the Modified Project Definition
    - 2. Discussion of the Modified Project Definition
  - B. Public Reporting
    - 1. Public Disclosure of the Issuer’s Payment Information, Including the Issuer’s Name
    - 2. Public Compilation
  - C. Definition of a “Not De Minimis” Payment
    - D. Exemptions From Compliance
      - 1. Exemption for Conflicts of Law
      - 2. Exemption for Conflicts With Pre-Existing Contracts
      - 3. Exemption for Smaller Reporting Companies and Emerging Growth Companies
      - 4. Delayed Reporting for Payments Related to Exploratory Activities
      - 5. Transitional Relief for Recently Acquired Companies
      - 6. Transitional Relief for Initial Public Offerings
      - 7. Case-by-Case Exemption
    - E. Definition of “Subsidiary” and “Control”
    - F. Treatment for Purposes of the Exchange Act and Securities Act
    - G. Definitions of “Foreign Government” and “Federal Government”
    - H. Definition of “Resource Extraction Issuer”
    - I. Definition of “Commercial Development of Oil, Natural Gas, or Minerals”
      - 1. “Extraction” and “Processing”
      - 2. “Export”
      - 3. “Minerals”
    - J. Definition of “Payment”
      - 1. Taxes
      - 2. Royalties, Fees, and Bonuses
      - 3. Dividend Payments
      - 4. Infrastructure Payments
      - 5. Community and Social Responsibility Payments
      - 6. In-Kind Payments
      - 7. Accounting Considerations
    - K. Anti-Evasion
    - L. Annual Report Requirement
      - 1. Form SD
      - 2. Annual Deadline for Form SD
    - M. Exhibits and Interactive Data Format Requirements
    - N. Alternative Reporting
      - 1. Alternative Reporting Requirements

- 2. Recognition of EU Directives, U.K.’s Reports on Payments to Governments Regulations, Norway’s Regulations on Country-by-Country Reporting, and Canada’s ESTMA as Alternative Reporting Regimes

- O. Compliance Date
- P. Other Matters

### III. Economic Analysis

- A. Introduction and Baseline
- B. Potential Benefits Resulting From the Payment Reporting Requirement
- C. Potential Costs Resulting From the Payment Reporting Requirement
- D. Discussion of Discretionary Choices
  - 1. Definition of “Project”
  - 2. Exemptions From Disclosure
  - 3. Annual Report Requirement
  - 4. Public Availability of Data
  - 5. Alternative Reporting
  - 6. Definition of Control
  - 7. Definition of “Commercial Development of Oil, Natural Gas, or Minerals”
  - 8. Types of Payments
  - 9. Definition of “Not De Minimis”
  - 10. Exhibit and Interactive Data Requirement
  - 11. Quantitative Estimates of Costs Resulting From the Rulemaking
- IV. Paperwork Reduction Act
  - A. Background
  - B. Estimate of Issuers
  - C. Estimate of Issuer Burdens
- V. Regulatory Flexibility Act Certification
- VI. Statutory Authority

### 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.<sup>3</sup> Congress enacted Section 1504 to increase the transparency of payments made by oil, natural gas, and mining companies<sup>4</sup> to governments for the purpose of the commercial development of oil, natural gas, and minerals.<sup>5</sup>

Section 13(q) directs the Commission to issue final rules that require each resource extraction issuer to include in an annual report information relating to payments 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

<sup>3</sup> Public Law 111–203 (July 21, 2010).

<sup>4</sup> The disclosure requirements mandated by Section 13(q) only apply to oil, natural gas and mining companies that are required to file reports under Section 13 or 15(d) of the Securities Exchange Act of 1934. See 15 U.S.C. 78m(q)(1)(D)(i).

<sup>5</sup> According to Senator Richard Lugar, who co-sponsored the amendment that was the basis for this statutory provision, a goal 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.” See 156 Cong. Rec. S3816 (daily ed. May 17, 2010).

<sup>1</sup> 15 U.S.C. 78a et seq.

<sup>2</sup> 17 CFR 249b.400.

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.<sup>6</sup>

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;<sup>7</sup>
- “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;<sup>8</sup>
- “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;<sup>9</sup> 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”) <sup>10</sup> (to the extent

practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.<sup>11</sup>

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 <sup>12</sup> using an interactive data standard established by the Commission.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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;
- 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.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> The statute does not define the term compilation.

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

natural gas, or minerals.”<sup>19</sup> 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 <sup>20</sup> does not mention the EITI.<sup>21</sup>

#### *B. Prior Section 13(q) Rulemakings and Congress’s Actions Under the Congressional Review Act*

On August 22, 2012, the Commission adopted Rule 13q–1 and amendments to Form SD (the “2012 Rules”).<sup>22</sup> The 2012 Rules were vacated by the U.S. District Court for the District of Columbia on July 2, 2013.<sup>23</sup> On June 27, 2016, the

<sup>19</sup> 15 U.S.C. 78m(q)(2)(E). The rules we are adopting in this release are consistent with this requirement, as explained throughout this adopting release. Although the new rules differ from those of the European Union and Canada in certain respects (including the definition of “project”), neither Section 13(q)(2)(E) nor any other provision of law requires the Commission to adopt identical or significantly similar rules to those adopted by other foreign governments. When the Commission did adopt rules that were significantly similar to those of the European Union and Canada, Congress disapproved those rules.

<sup>20</sup> In 2013, the European Parliament and Council of the European Union (“EU”) adopted two directives that include payment disclosure rules. The EU Accounting Directive and the EU Transparency Directive (the “EU Directives”) established the baseline in each EU member state and European Economic Area (“EEA”) 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. All EU member states have implemented both of the EU Directives. The UK adopted its “Reports on Payments to Governments Regulations 2014” to implement the EU Directives, which remains effective following the UK’s withdrawal from the EU. Norway adopted regulations similar to the EU Directives in 2013. Canada adopted a federal resource extraction disclosure law, the Extractive Sector Transparency Measures Act (“ESTMA”), in 2015. For further information about these international transparency promotion efforts, see Section I.B. of Release No. 34–87783 (Dec. 18, 2019) [85 FR 2522 (Jan. 15, 2020)] (“2019 Rules Proposing Release”).

<sup>21</sup> See 15 U.S.C. 78m(q)(2)(E). Although the United States became an EITI candidate country in 2014, it withdrew as an EITI implementing country in 2017. 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”), which is available at [https://www.doi.gov/sites/doi.gov/files/uploads/eiti\\_withdraw.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/eiti_withdraw.pdf). The United States has, however, maintained its status as a supporting country of the EITI.

<sup>22</sup> 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>.

<sup>23</sup> See *API v. SEC*, 953 F. Supp. 2d 5 (D.D.C. July 2, 2013). The District Court based its decision on

Continued

<sup>6</sup> 15 U.S.C. 78m(q)(2)(A).

<sup>7</sup> 15 U.S.C. 78m(q)(1)(D). Given this definition of “resource extraction issuer,” the use of the Commission’s disclosure rules to achieve the transparency goals of Section 13(q) is inherently limited because the statute only applies to Exchange Act reporting companies. In contrast, the resource extraction reporting regimes of the European Union and Canada include registered companies as well as private companies of a certain specified size that are domiciled in their jurisdictions. See *infra* at Section III.C.

<sup>8</sup> 15 U.S.C. 78m(q)(1)(A).

<sup>9</sup> 15 U.S.C. 78m(q)(1)(B).

<sup>10</sup> 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.

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

<sup>12</sup> 15 U.S.C. 78m(q)(2)(C).

<sup>13</sup> 15 U.S.C. 78m(q)(2)(D).

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

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

<sup>16</sup> 15 U.S.C. 78m(q)(2)(D)(ii).

<sup>17</sup> *Id.*

<sup>18</sup> 15 U.S.C. 78m(q)(3).

Commission adopted a revised version of Rule 13q-1 and amendments to Form SD (the “2016 Rules”) that addressed the concerns raised in the prior litigation.<sup>24</sup>

On February 14, 2017, the 2016 Rules were disapproved by a joint resolution<sup>25</sup> of Congress pursuant to the Congressional Review Act (the “CRA”).<sup>26</sup> 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,<sup>27</sup> undermine job growth and burden the economy,<sup>28</sup> and impose competitive harm<sup>29</sup> to U.S. companies relative to foreign competition.

Some members who voted in favor of the disapproval nonetheless reiterated

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.

<sup>24</sup> 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”).

<sup>25</sup> See H.R.J. Res. 41, 115th Cong. (2017) (enacted).

<sup>26</sup> 5 U.S.C. 801 *et seq.*

<sup>27</sup> 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.”).

<sup>28</sup> 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.”).

<sup>29</sup> 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 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.”).

support for 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.”<sup>30</sup> 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 “American and other SEC-registered companies” at a significant competitive disadvantage.<sup>31</sup>

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.<sup>32</sup> Under the CRA, however, the Commission may not reissue the disapproved rule in “substantially the same form” or issue a new rule that is “substantially the same” as the disapproved rule.<sup>33</sup> The CRA does not define “substantially the same form” or “substantially the same,” and courts have not provided guidance on this issue. We therefore look to the plain meaning of the term “substantially,” which is “to a large degree”<sup>34</sup> or “to a great extent.”<sup>35</sup> While providing general guidance for comparing a new final rule to the rule

<sup>30</sup> See letter from Senator Bob Corker, Senator Susan Collins, Senator Marco Rubio, Senator Johnny Isakson, Senator Lindsey Graham, Senator Todd Young (Feb. 2, 2017) (“Sen. Corker *et al.*”), available at <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resource-extraction-issuers.shtml>.

<sup>31</sup> See *id.*

<sup>32</sup> 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 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.”).

<sup>33</sup> See 5 U.S.C. 801(b)(2). (“A rule that does not take effect (or does not continue) . . . may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”).

<sup>34</sup> See Cambridge Dictionary (Cambridge University Press) (2020).

<sup>35</sup> See Oxford English Dictionary (Oxford University Press) (2020).

that Congress disapproved pursuant to the CRA, this construct does not provide guidance regarding the specific textual revisions or policy adjustments that the Commission should make to the disapproved rule. We also recognize that, in the context of a mandatory rulemaking such as Section 13(q) requires, there generally is not one “correct” approach. As a result of the combination of these factors, we believe that determining the path forward falls to the agency assigned to undertake the mandatory rulemaking and that the agency should exercise its reasoned judgment in shaping new rules, evaluating a reasonable range of potential responses, including by considering the statutory provision that compels the rulemaking, the administrative record, and the CRA’s requirements, among other things.

We received a number of comments on our approach to satisfying the statutory mandate in Section 13(q) in a manner that also adheres to the CRA’s requirements.<sup>36</sup> Some commenters generally supported the Commission’s approach regarding the CRA.<sup>37</sup> Several commenters, however, argued that the Commission interpreted the impact of the CRA resolution too broadly and gave too much emphasis to statements from members of Congress who supported the resolution.<sup>38</sup> Several commenters added that the economic concerns expressed during the CRA floor debates (particularly related to costs and competitiveness) have been ameliorated by international developments, eliminating or at least reducing the need to change the substance of the final rules to address those consequences.<sup>39</sup> According to these commenters, the Commission (1) incorrectly concluded that the CRA resolution restricted its discretion when issuing new rules under Section 13(q) and (2) improperly relied on the CRA resolution to justify proposing rules that do not provide the level of disclosure needed to achieve the objectives of Section 13(q).<sup>40</sup>

<sup>36</sup> See, e.g., letters from Center for Progressive Reform (Mar. 16, 2020); Cary Coglianese (Mar. 16, 2020); Oxfam America and Earthrights International (Mar. 23, 2020); and PWYP-US (Mar. 16, 2020).

<sup>37</sup> See, e.g., letter from National Association of Manufacturers (Mar. 16, 2020) (NAM) (stating that the proposed rule represents a tailored implementation of the statute and includes numerous important reforms from the 2016 proposal that faced disapproval from Congress).

<sup>38</sup> See, e.g., letters from Oxfam America and Earthrights International; PWYP-US (Mar. 16, 2020); and Sierra Club (March 14, 2020).

<sup>39</sup> See *id.*

<sup>40</sup> See, e.g., letters from Center for Progressive Reform; Cary Coglianese; Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020).

The CRA resolution does not modify the Section 13(q) mandate that the Commission issue rules regarding the disclosure of resource extraction payments. It does, however, as set forth above, restrict somewhat our discretion regarding the form that those rules may take.<sup>41</sup> Thus, we believe our task is to exercise our discretion to craft and issue a new rule that reasonably achieves the objectives of Section 13(q) within the narrower range of available approaches imposed by the CRA.

Some commenters expressed the view that we could readopt the 2016 Rules with only minor modifications and still satisfy the CRA.<sup>42</sup> According to these commenters, it would be sufficient for the Commission to readopt most of the 2016 Rules while primarily modifying the rationales for or the economic analysis set forth in the prior rulemaking.<sup>43</sup> This approach, in our view, is inconsistent with the plain language of the CRA, which instructs that the “new rule” itself may not be substantially the same. Based on the plain language of the CRA, the Commission in our view is required to do more than substantially revise the rationales (including the economic analysis) in the adopting release accompanying the disapproved rule.<sup>44</sup>

<sup>41</sup> For example, by the plain terms of the CRA, it seems apparent that the Commission, at a minimum, could not simply readopt the disapproved rule.

<sup>42</sup> The CRA disapproval process is not a routine or perfunctory process. To disapprove a rule under the CRA, the support of a majority of both houses of Congress and the assent of the President is required, which taken together reflects a significant undertaking on the part of two elected branches of the Federal government. Based on the foregoing alone, it seems doubtful that the appropriate response to a CRA disapproval should be mere minor modifications.

<sup>43</sup> See, e.g., letters from Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020).

<sup>44</sup> Revising the economic analysis from the 2016 adopting release would not in our view satisfy the CRA. The economic analysis was not part of the substantive rule because it neither imposed any legally enforceable obligations, nor provided any rights or benefits. Further, the economic analysis did not otherwise purport to offer the Commission's interpretation of any statutory provision or agency rule, nor did it set forth any general statements of agency policy, or establish any rules of agency organization, procedure, or practice. Rather, the economic analysis in the adopting release served to memorialize the Commission's understanding and consideration of the economic implications of the 2016 Rules. Moreover, even if in theory changing the economic analysis to include revised cost estimates might be sufficient in some cases to satisfy the CRA, we nonetheless disagree that a change in the economic analysis would be sufficient in this particular case. The argument put forward by some commenters is that the projected costs and competitive burdens included in the 2016 Rules Adopting Release were too high. See *id.* The costs and competitive burdens were, however, only one component of the considerations on which the Commission based the 2016 Rules. As the 2016

Rather, we believe that a better understanding of the CRA is that it requires us to make sufficient changes to the substantive operation of (including the requirements imposed by) the rule itself to meet the CRA mandate. Based on that general understanding, we believe that an appropriate and reasonable way to assess the CRA's not “substantially the same” requirement in the context of a disclosure-oriented provision such as Section 13(q) is primarily by comparing the extent to which the disclosures under the disapproved rule would differ from the disclosures under the new rule.<sup>45</sup>

Commenters also argued that readopting a new rule that included essentially the same (or similar) core discretionary components of the 2016 rulemaking would satisfy the CRA provided that the Commission made adjustments to a significant number of the ancillary or secondary components of the rule.<sup>46</sup> In the context of the Section 13(q) disclosure provision, however, we are not persuaded that ancillary or secondary adjustments would satisfy the CRA requirement that the new rule cannot be substantially the same as the disapproved rule. Various changes to the ancillary or secondary components of the 2016 Rules, alone and in combination, generally would yield a very similar disclosure model and thus result in payment disclosures

Rules Adopting Release explained, the economic impact of the 2016 Rules was relevant, but not determinative. See 2016 Rules Adopting Release at Sections II.B and C. Thus, merely revising the economic analysis and retaining the myriad other reasons that led the Commission to adopt the granular public disclosure model, and largely reissuing the same rule, would not, in our view, satisfy the CRA requirement. Any such rule, including the underlying analysis, would continue to be in substantially the same form as the disapproved rule.

<sup>45</sup> We recognize, as discussed in Section III.A below, that economic and other considerations relevant to Section 13(q) have continued to evolve since the 2016 Rules were adopted. Specifically, data and other information concerning the subsequent experiences of resource extraction issuers operating under foreign disclosure regimes that are similar to the disapproved 2016 Rules indicate that the potential compliance costs and competitive harm associated with the disclosures may be less than the Commission had projected at the time that it issued the 2016 Rules. Even if these external facts could be considered to have significantly mitigated such concerns, they do not eliminate the CRA mandate that *the new rule* cannot be substantially the same as the disapproved rule. In formulating the final rules, however, we have considered the developments in international payment reporting regimes, including the extent to which they might provide additional insights regarding the potential costs and competitive effects of project-level disclosures.

<sup>46</sup> See, e.g., letters from Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020).

substantially the same as those required by the 2016 Rules.

Rather, we believe that, in the context of Section 13(q), producing a rule that is not “substantially the same” as the disapproved rule is reasonably achieved by changing at least one of the two central discretionary determinations at the heart of the Section 13(q) disclosure system that the Commission made when it issued the 2016 Rules. Based on the administrative record and our understanding of Section 13(q), we believe that the two central determinations over which the Commission has discretionary authority are (1) publication of issuers' payment disclosures versus anonymization and (2) the relative granularity of the definition of “project.” Modifying the other discretionary determinations available in this particular rulemaking, in our view, likely would fail to produce a rule that is not substantially the same as the disapproved rule given the level of similarity that would remain between the disclosures under the new rule and those that would have resulted under the disapproved rule. Moreover, given our obligations under the CRA and based on our review of the administrative record, we believe that the final rules reasonably satisfy the statutory requirements of Section 13(q).

As discussed below, we believe that, of these two core discretionary determinations, the change that more effectively achieves Section 13(q)'s goal of increasing transparency with respect to extractive payments by resource extraction issuers while adhering to the requirements of the CRA, is to modify the project definition so that it requires less granularity in the payment disclosures than in the disapproved rule. In choosing to make this change, we are mindful of Section 13(q)'s goal, which could be significantly limited by anonymization. For reasons discussed in more detail below, we believe the final rules we are adopting appropriately comply with the CRA's not “substantially the same” rule requirement, and do so in a manner that reasonably achieves the objectives of Section 13(q) within the CRA's constraints.

Finally, we believe that the form and manner of the revision to the project definition is not just a reasonable change within our discretion to implement Section 13(q), but also one that alone is sufficient to comply with the CRA's requirements that the disapproved rule not be reissued in “substantially the same form” and a new rule may not be “substantially the same” as the disapproved rule. Accordingly, while we are making

various other changes to more ancillary or secondary matters that could further support our efforts to comply with the CRA’s requirements, these changes are motivated by policy considerations and the administrative record.<sup>47</sup>

C. Summary of the Final Rules

We are adopting rules to implement Section 13(q) largely as proposed, with some modifications in response to comments received. As we previously explained, given the requirements of Section 13(q), certain elements of the final rules remain unchanged from the 2016 Rules.<sup>48</sup> In light of the changes that we have made, as discussed below, the fact that certain elements remain the same does not change our belief that the final rules are not substantially the same as the 2016 Rules and therefore are in compliance with the CRA’s restriction on subsequent rulemaking.

In this regard, the final rules include several changes from the 2016 Rules. Most notably, the final rules will revise the definition of the term “project,” a term that was not statutorily defined, to require disclosure at the national and major subnational political jurisdiction, as opposed to the contract-level disclosure as required by the disapproved rule. Because the definition of “project” plays a central role in Section 13(q)’s disclosure regime, we believe that changing this definition is sufficient for meeting the CRA’s mandate that the new rule not be

substantially the same as the disapproved rule.<sup>49</sup> Some commenters have suggested that changing other aspects of the 2016 Rules, such as the definition of “control,” would equally fulfill the CRA mandate.<sup>50</sup> As discussed above, however, we believe that these suggested changes, some of which we are adopting, constitute relatively minor modifications that, by themselves, would not effect a substantial difference from the disapproved rule.

In addition to changing the project definition, the final rules will:

- Add two new conditional exemptions for situations in which a foreign law or a pre-existing contract prohibits the required disclosure;<sup>51</sup>
- Add an exemption for smaller reporting companies and emerging growth companies;<sup>52</sup>
- Revise the definition of “control” to exclude entities or operations in which an issuer has a proportionate interest;<sup>53</sup>
- Limit the liability for the required disclosure by deeming the payment information to be furnished to, but not filed with, the Commission;<sup>54</sup>
- Add relief for issuers that have recently completed their U.S. initial public offerings;<sup>55</sup> and
- Extend the deadline for furnishing the payment disclosures.<sup>56</sup>

We believe the final rules are reasonably designed to achieve the transparency goals of Section 13(q). For example, the final rules will require the public disclosure of the payment information, including the identity of

the issuer.<sup>57</sup> We considered the alternative approach suggested by some commenters that would enable issuers to submit the payment information non-publicly, which would then be published in an anonymized compilation by the Commission.<sup>58</sup> Although this approach would constitute a significant difference from the 2016 Rules and would be within our discretionary authority, we determined not to adopt this approach because we believe doing so could limit the transparency and related objectives of Section 13(q).<sup>59</sup>

In contrast, although the changed project definition would diminish the granularity of disclosure compared to a contract-based definition, we believe that the final rules, taken as a whole, will achieve the transparency and related goals of Section 13(q) by providing significant and useful payment information regarding resource extraction payment flows from reporting companies to foreign governments. Transparency-enhancing changes from the proposed rules include our adoption of the \$100,000 threshold in the definition of a “not de minimis” payment<sup>60</sup> and the requirement to disclose the amount of payments by payment type for, and identify, each subnational government payee.<sup>61</sup>

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

Issue	2016 Rules (disapproved)	Proposed rules	Final rules
Definition of “project” .....	<ul style="list-style-type: none"><li>• 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.</li></ul>	<ul style="list-style-type: none"><li>• Defined using three factors: (1) Type of resource; (2) type of operation;and (3) major subnational jurisdiction.</li></ul>	<ul style="list-style-type: none"><li>• Same as proposed.</li></ul>

<sup>47</sup> Nevertheless, even if a modified definition of project alone were insufficient to comply with the CRA, given these other changes, we believe that the final rules, when considered as a whole, comply with the CRA’s restriction on subsequent rulemaking. To be clear, however, we did not make these other changes in response to the CRA, but rather on independent policy grounds.

<sup>48</sup> See 2019 Rules Proposing Release at Section I.C.3. For example, we proposed, and are adopting, the same delayed reporting provision for exploratory activities, the same transitional relief for recently acquired companies, and a similar alternative reporting mechanism, all of which were adopted in 2016. See *infra* Sections II.D. and N. We also are adopting, as proposed, the same definitions

as adopted in 2016 for “resource extraction issuer,” “commercial development of oil, natural gas, or minerals,” “payment,” and “foreign government.” See *infra* Sections II.G–J. As further discussed below, most commenters who addressed those definitions in the 2016 rulemaking generally supported them, and most submitting comments on the 2019 Rules Proposing Release either supported the definitions or chose not to address them.

<sup>49</sup> See *infra* Section II.A.

<sup>50</sup> See, e.g., letters from Oxfam America and Earthrights International; and PWYP–US (Mar. 16, 2020).

<sup>51</sup> See *infra* Section II.D.1.–2.

<sup>52</sup> See *infra* Section II.D.3.

<sup>53</sup> See *infra* Section II.E.

<sup>54</sup> See *infra* Section II.F.

<sup>55</sup> See *infra* Section II.D.6.

<sup>56</sup> See *infra* Section II.L.2.

<sup>57</sup> See *infra* Section II.B. Other aspects of the final rules that are reasonably likely to achieve the transparency goals of Section 13(q) include adding infrastructure payments, social or community payments, and certain dividend payments to the statutorily required payment types. See *infra* Section II.J.

<sup>58</sup> See, e.g., letter from API (Mar. 16, 2020).

<sup>59</sup> See *infra* Section II.B.

<sup>60</sup> See *infra* Section II.C.

<sup>61</sup> See *infra* Section II.G.

Issue	2016 Rules (disapproved)	Proposed rules	Final rules
Aggregation of payments .....	<ul style="list-style-type: none"> <li>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.</li> </ul>	<ul style="list-style-type: none"> <li>Aggregation of the same type of payments permitted at major subnational jurisdiction level, which must be identified;</li> </ul>	<ul style="list-style-type: none"> <li>Aggregation at major subnational jurisdiction level (same as proposed).</li> <li>Aggregation of the same type of payments permitted at levels below major subnational level, which may be described generically (<i>e.g.</i>, as county or municipality).</li> <li>Issuer may aggregate payments by payment type, but must disclose aggregated amount for each subnational government payee and identify each subnational government payee.</li> <li>Same as proposed.</li> </ul>
Exemptions from compliance based on conflicts with foreign laws or contract terms.	<ul style="list-style-type: none"> <li>No exemptions for conflicts with foreign laws or contract terms.</li> <li>Case-by-case exemptive process established.</li> </ul>	<ul style="list-style-type: none"> <li>Conditional exemptions for foreign law conflicts and pre-existing (pre-effectiveness) contract terms that prohibit disclosure.</li> </ul>	
Exemption for smaller reporting companies or emerging growth companies.	<ul style="list-style-type: none"> <li>No exemption for smaller reporting companies or emerging growth companies.</li> </ul>	<ul style="list-style-type: none"> <li>Exemption for smaller reporting companies and emerging growth companies.</li> </ul>	<ul style="list-style-type: none"> <li>Same as proposed, but limit exemption to companies not subject to an alternative reporting regime, which has been deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q).</li> <li>Same as proposed.</li> </ul>
Definition of “control” .....	<ul style="list-style-type: none"> <li>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 entity.</li> </ul>	<ul style="list-style-type: none"> <li>Similar to approach under 2016 Rules, except that an issuer is not required to disclose payments made by entities that it only proportionately consolidates.</li> </ul>	<ul style="list-style-type: none"> <li>Same as proposed.</li> </ul>
Filed vs. furnished—application of Exchange Act Section 18 liability. Relief for Initial Public Offerings (IPOs).	<ul style="list-style-type: none"> <li>Reports required to be filed;</li> <li>Potential Section 18 liability.</li> <li>No relief for IPOs.</li> </ul>	<ul style="list-style-type: none"> <li>Reports are furnished;</li> <li>No Section 18 liability.</li> <li>Transitional relief for IPOs;</li> <li>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.</li> </ul>	<ul style="list-style-type: none"> <li>Same as proposed.</li> <li>Same as proposed.</li> </ul>
Deadline for furnishing payment disclosures.	<ul style="list-style-type: none"> <li>For all issuers, no later than 150 days after the end of the issuer’s most recent fiscal year.</li> </ul>	<ul style="list-style-type: none"> <li>For issuers with fiscal years ending on or before June 30, no later than March 31 in the following calendar year;</li> <li>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.</li> </ul>	<ul style="list-style-type: none"> <li>2 year transition period during which no Form SD due.</li> <li>Following transition period, Form SD due no later than 270 days after the end of the issuer’s fiscal year.</li> </ul>

## II. Final Rules Under Section 13(q)

We received over 70 letters on the 2019 Proposed Rules from a range of commenters that included companies; trade associations; not-for-profit, non-governmental organizations (“NGOs”); members of Congress; and investors.<sup>62</sup> When developing these final rules, we have considered these comments while keeping in mind the transparency and related objectives of Section 13(q), the disapproval of the 2016 Rules under the

CRA, and the CRA requirement not to adopt a new rule that is “substantially the same” as the disapproved rule.

In this section, we first discuss the final rule provisions that, based on the large number of comments that addressed them, involve issues that we believe are the most critical in this rulemaking. Those issues include the definition of “project” and the related issue concerning the aggregation of payments, the definition of a “not de minimis” payment, whether to include exemptions (and the nature of any exemptions), whether the Section 13(q)

disclosures must be public and include the identity of the issuer, the definitions of “subsidiary” and “control,” and the treatment of the Section 13(q) disclosures for purposes of liability under the Exchange Act and Securities Act.<sup>63</sup> While, as discussed below, we believe that the revised definition of project is both necessary and sufficient to satisfy the CRA, we note that several of the other provisions also represent changes from the 2016 rules. Thus, even if the revised project definition were not

<sup>62</sup> These comment letters are available at <https://www.sec.gov/comments/s7-24-19/s72419.htm>.

<sup>63</sup> See *infra* Sections II.A. through II.F.

sufficient, this change when considered with the other changes we are making should satisfy the CRA's mandate.

We then discuss final rule provisions that received fewer comments but are nonetheless important to the statutory scheme. These include the definition of "resource extraction issuer,"<sup>64</sup> the definition of "payment,"<sup>65</sup> and the interactive data format requirement for the Section 13(q) disclosure.<sup>66</sup>

Before we discuss the specific components of the new rules, we acknowledge that some commenters suggested that in the Proposing Release the Commission unduly relied on various floor statements made by members of Congress during the CRA votes to disapprove the 2016 Rules. The floor statements in question dealt with the potential high cost and competitive harm that could flow from the 2016 Rules. Commenters have identified a number of reasons why they believe these congressional floor statements are not relevant to the current rulemaking, including: (1) These floor statements are not necessarily consistent with the views of most members of Congress and are not legally binding in any case; (2) the floor statements themselves give no clear indication of how the Commission should modify the rules; and (3) the concerns expressed in these floor statements about costs and competitive effects may be based on estimates and economic analyses in the 2016 Rules Adopting Release that have been called into question by actual cost data and information regarding the potential anti-competitive effects derived from resource extraction issuers' experiences with the disclosure regimes in Europe and Canada.<sup>67</sup>

When the Commission adopted the 2016 Rules, it reasonably relied on the data available to it in the administrative record and that data may have informed the views subsequently expressed by members of Congress regarding the projected potentially high costs and significant risk of competitive harm as a result of the implementation of Section 13(q). Since that time, however, additional data and other information that has become available regarding resource extraction companies' experiences with the European and

Canadian disclosure regimes indicate that the cost and anti-competitive effects of payment disclosure, while still relevant considerations,<sup>68</sup> may well be lower than the Commission projected in 2016.<sup>69</sup>

Thus, in formulating the final rules (and in contrast to our approach in the proposing release), we have not based our discretionary determinations for the final rules on previously expressed concerns, including from various members of Congress, about the economic effects of the 2016 Rules (although we do acknowledge various points where those concerns may align with our discretionary determinations). Instead, we have been informed by the comments received on the Proposing Release and our own evaluation of the potential economic and other effects of the final rules. Having considered the totality of the record before us, and for the reasons set forth below, we believe the final rules represent an appropriate and faithful implementation of the Section 13(q) disclosure provision while, at the same time, complying with the CRA and reflecting a reasoned exercise of our discretionary authority to make sound policy choices based on the administrative record.

#### A. Definition of "Project"

Consistent with Section 13(q), the final rules will 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. We are adopting, as proposed, the definition of "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.<sup>70</sup> This 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, concession, or similar agreement, which form the basis for

payment liabilities with a government ("Contract-Level Project Definition").<sup>71</sup>

#### 1. Comments and Considerations Regarding the Modified Project Definition

Several commenters supported adoption of the proposed Modified Project Definition.<sup>72</sup> For example, one commenter stated that it represented the best method for reducing regulatory costs and unnecessary exposure of issuers' competitively sensitive data while promoting transparency.<sup>73</sup> Another commenter indicated that the proposed project definition would address the concerns some market participants have raised about overly descriptive disclosures revealing competitively sensitive information,<sup>74</sup> and, by allowing for increased aggregation of payments, would also reduce the cost burden of the Section 13(q) disclosure requirement.<sup>75</sup> A third commenter stated that the proposed project definition would achieve an appropriate balance that promotes transparency from extraction payments while reducing the regulatory burden anticipated to result from the 2016 Rules.<sup>76</sup>

Other commenters opposed the Modified Project Definition for several reasons,<sup>77</sup> including the following:

- Some indicated that the Modified Project Definition would fail to produce the transparency necessary to enable citizens to detect corruption and demand accountability from their host governments as Congress intended.<sup>78</sup>

<sup>71</sup> See 2016 Rules Adopting Release at Section II.E.3.

<sup>72</sup> See letters from API (Mar. 16, 2020); Chamber of Commerce (Mar. 16, 2020) (Chamber); NAM; Petrobras (Mar. 16, 2020); and Shareholder Advocacy Forum (Mar. 16, 2020) (SAF).

<sup>73</sup> See letter from API (Mar. 16, 2020). When recommending that the Commission adopt the non-public submission and anonymized compilation approach, however, this commenter stated that reverse engineering was possible even under the Modified Project Definition. See *id.* We address this comment in Section II.B.1. *infra*.

<sup>74</sup> See letter from NAM.

<sup>75</sup> See *id.*

<sup>76</sup> See letter from SAF.

<sup>77</sup> See, e.g., letter from Sens. Benjamin L. Cardin, Sherrod Brown, Richard J. Durbin, Edward J. Markey, Jeffrey A. Merkley, Sheldon Whitehouse, Patrick Leahy, Elizabeth Warren, Christopher A. Coons, and Jeanne Shaheen (Mar. 11, 2020) (Sens. Cardin *et al.*); letter from Oxfam in Kenya (Mar. 16, 2020); letter from PolicyAlert! (Feb. 27, 2020); letter from PWYP-US (Mar. 16, 2020); and letter from Sens. Benjamin L. Cardin and Richard J. Durbin (Dec. 11, 2020) (Sens. Cardin and Durbin).

<sup>78</sup> See, e.g., letter from PWYP-US (Mar. 16, 2020); see also letters from Sens. Cardin *et al.* and Sens. Cardin and Durbin. Several other commenters emphasized the need for disaggregated payment disclosure as an anti-corruption tool in various countries. See, e.g., letter from EG Justice (Mar. 11, 2020) (describing the corruption in Equatorial Guinea); letter from the Carter Center (Mar. 16,

<sup>64</sup> See *infra* Section II.H.

<sup>65</sup> See *infra* Section II.J.

<sup>66</sup> See *infra* Section II.M.

<sup>67</sup> See letter from Oxfam America and Earthrights International (stating that other regulators have conducted reviews of implementation of alternative reporting regimes and found that no material competitive or compliance impacts have thus far been documented); see also European Commission, *Review of country-by-country reporting requirements for extractive and logging industries* (Final report) (2018).

<sup>68</sup> See generally Exchange Act Sections 3(f) and 23(a)(2).

<sup>69</sup> See Section III.D.11 below.

<sup>70</sup> This definition is similar to the definition of "project" previously 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 will 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 or 1300 of Regulation S-K (17 CFR 229.1200 or 229.1300).



- Some pointed to a study that showed that a large amount of payment data would be lost under the Modified Project Definition if the proposed “not de minimis” thresholds were adopted.<sup>79</sup>

- Some believed that because the Modified Project Definition would allow issuers to report payments in the aggregate, at the country and major subnational level, without requiring disclosure of the contract or license that gave rise to the payments, it would limit the utility of the reported payment data for citizens in resource-rich countries with revenue-sharing laws.<sup>80</sup>

- Some opposed the Modified Project Definition because in their opinion it is an arbitrary construction that does not reflect standard industry practice.<sup>81</sup>

- Some stated that the Modified Project Definition deviates from what has become the international norm for a project definition in payments-to-governments reporting, namely, a project definition based on a single contract, license, lease, or concession.<sup>82</sup>

- Some argued that the Modified Project Definition does not satisfy the plain language of Section 13(q).<sup>83</sup>

- Finally, some indicated that investors need contract-based data to assess a resource extraction issuer’s future cash flows and other indices of risk.<sup>84</sup>

2020) (discussing the need for a contract-based definition of project to combat corruption in the Democratic Republic of the Congo); and letters from Daniel Kaufmann (May 1, 2020), One.org (Mar. 24, 2020), and Eric Postel (Mar. 19, 2020) (each generally discussing the importance of disaggregated, granular reporting as an anti-corruption tool).

<sup>79</sup> See, e.g., letter from PWYP-US (Mar. 16, 2020); and Oxfam America and Earthrights International. We discuss these comments and the referenced study in greater detail in Section II.C.

<sup>80</sup> According to these commenters, the Modified Project Definition would particularly impact citizens residing in countries with revenue-sharing laws that require the national government to distribute a portion of the revenues received from extractive activities to subnational governments or local communities. See letter from PWYP-US (Mar. 16, 2020); see also letters from Sens. Cardin *et al.*; and Congr. Waters *et al.* See also letters from Friends of the Nation; Iraqi Transparency Alliance for Extractive Industries (Mar. 10, 2020) (“Iraqi Transparency Alliance”); Kenya Civil Society Platform Oil and Gas and PWYP-Kenya (Mar. 16, 2020) (“KCSPOG”); Oxfam in Kenya; PWYP-Burkina Faso (Apr. 22, 2020); PWYP-Indonesia (Mar. 16, 2020); and PWYP-US (Mar. 16, 2020).

<sup>81</sup> See, e.g., letter from PWYP-US (Mar. 16, 2020); see also letters from Elise J. Bean (Apr. 29, 2020); and Alan Detheridge (Mar. 15, 2020).

<sup>82</sup> See, e.g., letter from PWYP-US (Mar. 16, 2020); see also letters from Oxfam America and Earthrights International; and ONE Campaign (Mar. 16, 2016).

<sup>83</sup> See, e.g., letter from Oxfam America and Earthrights International.

<sup>84</sup> See, e.g., letter from PWYP-US (Mar. 16, 2020); see also letter from Frederic Samama, Steve Waygood, Vicki Bakhshi, Helena Viñes Piestas, John Wilson, Meryam Omi, Christopher P. Conkey, and Katarina Hammar (Mar. 16, 2020) (F. Samama *et al.*).

As discussed below, we believe that the Modified Project Definition that we are adopting will achieve Section 13(q)’s statutory mandate by increasing transparency regarding resource extraction payments while also ensuring that the final rules comply with the requirements of the CRA.<sup>85</sup> A key threshold issue, however, is the application of the CRA in the context of Section 13(q). As discussed above, we believe that there are only two discretionary aspects of the Section 13(q) rules where we can make a change that will likely achieve compliance with the CRA mandate against issuing a rule that is substantially the same as the disapproved rule: The definition of project or changing from a public filing to an anonymized compilation.<sup>86</sup> Without a change to one of these two aspects, we believe it is unlikely that the final rules would satisfy the CRA mandate. Although changing from a public filing to an anonymized compilation would likely satisfy the CRA mandate, for the reasons we discuss in Section II.B.1. below, we believe it is a less effective option for achieving Section 13(q)’s mandated transparency goals.<sup>87</sup> Thus, in light of our decision to require public disclosure of payment information, and not change to an anonymized compilation, we believe that making a significant change to the definition of project is warranted in order for the disclosure regime under the final rules not to be substantially the same as that under the disapproved 2016 Rules.<sup>88</sup>

<sup>85</sup> The Modified Project Definition that we are adopting is an alternative that was available to the Commission in the reasonable exercise of its discretion when it sought to implement the Section 13(q) rules in 2012 and 2016. Although the Commission chose not to use this definition in its prior rulemakings, we view the Modified Project Definition as fully consistent with the structure and purpose of Section 13(q). To the extent that the Commission may have suggested otherwise in 2016, we believe that was incorrect for the reasons explained below.

<sup>86</sup> See *supra* Section I.B.

<sup>87</sup> We do not read Section 13(q) to preclude an anonymized compilation as a legal matter and as such believe that an anonymized compilation would be within our statutory discretion to adopt. Although an anonymized compilation would likely not allow users of the data to know the specific issuer to which any project-payment disclosures might relate, we do not read Section 13(q) to require such disclosure. Thus, for example, the definition of project that we are adopting could be coupled with an anonymized disclosure, with project payments disclosed in the compilation, but not in a manner that would clearly identify the issuer making the payments for the specific project. As discussed below, however, we do not believe that this would advance the transparency goals of Section 13(q) to the same extent as we believe our Modified Project Definition will.

<sup>88</sup> By adopting the Modified Project Definition, we are establishing the minimum level of disclosure that a resource extraction issuer must provide

Although we believe that a significant change to the definition of project is warranted, we acknowledge that the CRA does not compel us to adopt any particular definition of project within the range of definitions that would lead to rules that are not “substantially the same” as the disapproved 2016 Rules. Thus, we have based our determination to adopt the Modified Project Definition on various policy considerations that are tied to Section 13(q) and its goals.<sup>89</sup>

As a starting point, we believe that the motivating purpose of the Section 13(q) mandated disclosure of resource extraction payments is to provide transparency around the source and recipients of these payments; specifically, to identify a country’s share of the resource extraction revenue generated by each project of an issuer<sup>90</sup> and the governmental level and governmental entity within the country receiving the money from each project of an issuer (hereinafter “Project-to-Government Payment Disclosure”).<sup>91</sup> Further, we believe that the principal goal of this Project-to-Government Payment Disclosure is to provide an informational tool that may help users

concerning its projects. We recognize that some resource extraction issuers have expressed a commitment to following the more granular model of reporting adopted by the EU countries, Norway, and Canada. See, e.g., letters from BHP (Mar. 16, 2020); BP America, Inc. (Mar. 13, 2020); Eni (Mar. 25, 2020); Equinor ASA (Mar. 13, 2020); Kosmos Energy (Feb. 19, 2020); Orintiv (Mar. 16, 2020); Rio Tinto (Mar. 16, 2020); and Total (Feb. 10, 2020). As discussed below, issuers may elect to furnish reports prepared under these foreign transparency regimes to satisfy their Section 13(q) reporting obligations pursuant to the alternative reporting provision we are adopting. In addition, there is nothing in the approach that we are taking that would preclude such issuers from providing additional disclosure concerning their projects, e.g., by disclosing payments at a level below the major subnational government level, outside of the Form SD. For example, such issuers could provide the disclosure on their website, in annual or periodic reports, or in a Form 8-K or Form 6-K.

<sup>89</sup> We are not aware of, and commenters have not identified, any uniform or generally accepted definition of “project.” We have sought to provide a definition that both complies with the requirements imposed by the CRA and reasonably achieves the goals of Section 13(q), taking into account the views of resource extraction issuers who are making the disclosures and third parties who are seeking to use the information. We acknowledge that there may be alternatives to the Modified Project Definition that could potentially achieve the same objectives. The administrative record that has developed through the various rounds of rulemaking, however, reflects that the vast majority of commenters supported one of two competing definitions—i.e., the contract-level definition that the Commission adopted in the disapproved 2016 Rules, and the Modified Project Definition we are adopting. Thus, given the administrative record before us, we considered the Modified Project Definition to be the principal alternative to the Contract Level Definition included in the 2016 Rules.

<sup>90</sup> See 15 U.S.C. 78m(q)(2)(A)(i).

<sup>91</sup> See 15 U.S.C. 78m(q)(2)(A)(ii).



of the information to hold various governments accountable for how those governments spend money received. This understanding is consistent with the text of Section 13(q) and the congressional concerns leading to its adoption.<sup>92</sup>

We believe that the Modified Project definition is reasonably tailored to achieve this goal, providing transparency to users of the information and doing so with a consistent and understandable frame of reference. Moreover, as we explain in Section II.B.1. below, we believe it is a better choice than the anonymized compilation for achieving this goal because it permits the users of the information to see, by identified issuers, the payments from specified activities in a defined area of the country to the various governmental authorities within the country.

Further, we anticipate the Modified Project Definition should provide resource extraction issuers with a practical and relatively straightforward definition of “project” that they can utilize in tracking and reporting payments wherever they may have ongoing operations around the globe. We also note that it appears that the Modified Project Definition may reduce the compliance burden of the Section 13(q) rules compared to the 2016 Rules. Specifically, the Modified Project Definition will allow an issuer to make the payment disclosure at a greater level of aggregation than under the Contract-Level Project Definition. As such, there should be fewer individual data points that have to be tracked, electronically tagged and reported, which may make it less burdensome to disclose the

payment information on an ongoing basis. For similar reasons, the revised definition may also help limit any adverse competitive effects associated with project-based disclosures.

We acknowledged in the 2019 Rules Proposing Release that the Modified Project Definition, in contrast to the more granular Contract-Level Project Definition, might narrow the scope of the transparency benefits under Section 13(q). We stated that by providing transparency about the revenues generated from each contract, license, and concession, the Contract-Level Project Definition could serve to reduce further the potential for corruption in connection with the negotiation and implementation of a resource extraction contract as compared to the Modified Project Definition. As such, it could reduce instances of corruption that may occur *before* resource-extraction revenue is paid to the government.<sup>93</sup> As discussed below, however, we view this potential for incremental deterrence as a discretionary goal rather than the primary objective of Section 13(q).

Some commenters asserted that only a granular (*e.g.*, contract-level) definition of project will fully achieve the transparency and anti-corruption purposes that Congress sought to achieve with Section 13(q).<sup>94</sup> In advancing this argument, these commenters point to five considerations that the Commission identified in the 2016 Adopting Release to support the conclusion that a granular “definition of project . . . is necessary and appropriate to achieve a level of transparency that will help advance the important anti-corruption and accountability objectives of Section 13(q).” Specifically, these commenters noted, the 2016 Adopting Release stated that a granular definition would: (1) Help reduce instances where government officials are depriving subnational and local communities of revenue allocations to which they are entitled; (2) potentially permit “comparisons of revenue flows among different projects” to identify “payment discrepancies that [may] reflect potential corruption and other financial discounts”; (3) help citizens and others ensure that firms are meeting their payment obligations; (4) help local communities and civil society groups possibly weigh the costs and benefits of a project; and (5) possibly deter

companies from underpaying royalties or other monies owed.<sup>95</sup>

As a threshold matter, we observe that any effort to achieve the foregoing objectives would appear to depend on other factors beyond the scope of Section 13(q) and the Commission’s rulemaking authority.<sup>96</sup> For example, item (1) assumes that there are statutory obligations for the national government to provide revenue allocations to other governmental levels within a country. In any event, as explained below, to the extent that a country has enacted a revenue-sharing law, we believe that the Modified Project Definition will provide significant information about payments to the national government that would help determine whether that government has met its statutory revenue-sharing obligations. Additionally, items (2) and (3) would appear to require *at a minimum* the disclosure of the underlying contracts, licenses, or leases to determine whether the payment obligations are similar among them; without that information, there would be no obvious way to make cross-project comparisons or ensure that resource extraction issuers are meeting their payment obligations. And with respect to items (4) and (5), without public awareness of the payment obligations (as well as the gross revenues earned annually by the project), it would appear doubtful that there could be any reasonably complete (or accurate) cost-benefit determination of the project or any form of oversight resulting in meaningful deterrence.

Based on the foregoing, as well as our consideration of the text of Section 13(q) and the history leading to its adoption in 2010, we do not find any persuasive support for the 2016 Adopting Release’s conclusion that Section 13(q) requires payment disclosures that could advance the five purposes enumerated in that release. Thus, even assuming that the granular disclosure required by the 2016 Rules *might* facilitate in some fashion one or more of those goals, this result is not compelled, either directly or indirectly, by Section 13(q); and to the extent that the 2016 Adopting Release suggests otherwise, we disavow that determination.<sup>97</sup> Instead, those goals are

<sup>92</sup> See 15 U.S.C. 78m(q)(2)(A). As discussed below, we do not find persuasive support for any conclusion that Congress intended Section 13(q) to provide material information to investors. Although some commenters have asserted that granular disclosure through a contract-level project definition might provide certain investors with useful information, we believe that other disclosures already required by the Commission operate to provide the relevant information that is material to an investment decision. Accordingly, we decline in the exercise of our discretion to provide granular information that is not required by Section 13(q) and, in our view, generally is not material to or necessary for investors. In reaching this conclusion, we recognize that Section 13(q)(2)(D)(VII) affords us discretionary authority to require resource extraction issuers to submit additional payment-related data in an interactive data format including electronic tags beyond that data identified in the statute if the Commission determines that such data could benefit investors. We have determined not to use this authority, however, because as discussed above, we do not believe the data collected under Section 13(q) is material to investors, nor have we determined that electronically tagging additional data is necessary or appropriate in the public interest or for the benefit of investors.

<sup>93</sup> See 2019 Rules Proposing Release at Section II.F.1.

<sup>94</sup> See, *e.g.*, letters from PWYP-US (Mar. 16, 2020); and Oxfam America and Earthrights International.

<sup>95</sup> See 2016 Rules Adopting Release at Section II.E.3.

<sup>96</sup> This stands in contrast to what we believe is the primary congressional concern underlying Section 13(q), which (as we discuss below) can be fully addressed within available authority, and it is a factor in leading us to believe that these five potential collateral uses for the payment disclosures are neither statutorily compelled nor necessary to the transparency goals that Congress intended to advance.

<sup>97</sup> In this regard, we find it telling that Congress did not provide a definition of project or even direct

better understood as (at most) secondary or ancillary objectives that the agency in its discretion sought to further by requiring granular payment disclosure through the project definition. Consistent with that interpretation, we decline to exercise our discretion to follow the 2016 approach by utilizing a project definition that is focused on furthering these secondary objectives of the payment information.

We now turn to explain various aspects of the final rules. First, the final rules include changes from the proposal that we believe will help limit the potential loss of payment information compared to a contract-based definition. Specifically, the rules that we adopt in this release will include the reinstatement of the \$100,000 threshold in the definition of a “not de minimis” payment<sup>98</sup> as well as a requirement to disclose the amounts paid to, and to identify, each subnational government payee.<sup>99</sup>

Second, issuers will be required to disclose payments at the major subnational government level. As such, users of this information would be able to see the payments made directly to a province or state, and could use this data to assess a province’s or state’s use of the funds received, such as whether the province is employing the funds to benefit its citizens.<sup>100</sup>

us to define the term. Nor, when Section 13(q) was enacted, was there a definition of project under EITI or any foreign transparency regimes (as none then existed). The Commission chose to define the term project in the exercise of its discretionary authority. This indicates that the Commission could have declined to adopt a uniform definition of project, let alone a granular definition, and instead allowed resource extraction issuers the ability to define the contours of their projects on a case-by-case basis. Accordingly, we do not read Section 13(q) as necessarily requiring the Commission to adopt granular disclosure through a definition of the term project.

<sup>98</sup> See *infra* Section II.C.

<sup>99</sup> See *infra* Section II.G.

<sup>100</sup> Although not a goal of Section 13(q) (see the discussion above concerning the ultimate goal of the Project-to-Government Payment Disclosure of Section 13(q)), the final rules may provide information that would be useful for determining whether national governments in countries that have revenue-sharing laws have allocated funds to provinces or other subnational governments if and as required by law. For example, users of the information would be able to see all the reported payments made by resource extraction issuers from their projects that are paid to a particular national government in a particular year. They could then apply the relevant percentage under the country’s revenue-sharing law to the aggregated amount of payments from all issuers to determine the portion of funds that should be allocated to a given province or other subnational government. Such persons could then use that data to hold the national government accountable for what they believe to be the lawful allocation of revenues required to be paid to a given subnational government from the extractive operations in that country. Similarly, the final rules will identify the

We also note that there is no single generally accepted definition of project in the mining industry and the definitions that exist are typically very broad and do not define project based on an individual contract level.<sup>101</sup> The definitions of project in the oil and gas industry (and related definitions in the Commission’s oil and gas disclosure requirements) similarly do not focus on contractual arrangements that generate payment obligations but rather on whether operations will result in the development and production of reserves.<sup>102</sup> In light of this, we believe the Modified Project Definition, based on the resource (and how and where it is extracted, as well as the company’s identity) is a reasonable approach.

Some commenters opposed the Modified Project Definition because it deviates from the contract-based definition of project adopted under the EU Directives, Canada’s ESTMA, and, most recently, the EITI, which they describe as the international norm for a project definition in payments-to-governments reporting.<sup>103</sup> They maintain that the Modified Project Definition would (1) produce differences in the granularity of the payment disclosure reported under the Section 13(q) rules and that reported under the EU Directives, Canada’s

specific government payees, which will help users of the information assess whether the payees allocated any funds to the specific communities where project activities are being conducted. The usefulness, however, of the Section 13(q) payment data for purposes of determining the lawful allocation from the national government to a subnational government will depend on the complexity of the particular revenue-sharing law. For allocations under complex revenue-sharing laws, which rely on factors other than a percentage-based formula, *see, e.g.*, letter from Iraqi Transparency Alliance, it is likely that neither a contract-based project definition nor the Modified Project Definition would be useful for this purpose.

<sup>101</sup> For example, the Canadian disclosure regime for companies with mining operations defines a mineral project as “any exploration, development or production activity” regarding “base and precious metals, coal, and industrial minerals.” *See* National Instrument (NI) 43–101, Part 1.1 (2016).

<sup>102</sup> *See, e.g.*, Society of Petroleum Engineers, *Petroleum Resources Management System*, Section 1.2 (June 2018) (stating that a project may, for example, “constitute the development of a well, a single reservoir, or a small field; an incremental development in a producing field; or the integrated development of a field or several fields together with the associated processing facilities (*e.g.*, compression.”); *see also* 17 CFR 210.4–10(a)(8) (Rule 4–10(a)(8) of Regulation S–X), which defines a “development project” as “the means by which petroleum resources are brought to the status of economically producible” and provides as examples “the development of a single reservoir or field, an incremental development in a producing field, or the integrated development of a group of several fields and associated facilities with a common ownership.”

<sup>103</sup> *See, e.g.*, letters from BHP; BP; Oxfam and Earthrights International; and PWYP–US (Mar. 16, 2020).

ESTMA, UK’s and Norway’s transparency regimes, and the voluntary reporting program of the EITI, and (2) result in issuers with multi-jurisdictional operations collecting and reporting two different sets of payment data to accommodate the different project definitions, thereby unnecessarily increasing compliance costs and potentially confusing users of the payment data.<sup>104</sup> Commenters therefore recommended adoption of a contract-based definition to maintain a level playing field among industry competitors<sup>105</sup> and to increase the comparability of the payment data.

One commenter stated that, instead of permitting the aggregation of contracts under the Modified Project Definition, the Commission should adopt the approach for aggregating contracts used in the foreign reporting regimes, which permits agreements with substantially similar terms that are both operationally and geographically integrated to be treated by the issuer as a single project. According to this commenter, the recommended approach would constitute a change from the 2016 Rules that better aligns with international practice.<sup>106</sup>

We acknowledge that adoption of the Modified Project Definition may in many instances produce differences in the granularity of the payment disclosure reported under the Section 13(q) rules and that reported under the EU Directives, Canada’s ESTMA, UK’s and Norway’s transparency regimes, and the voluntary reporting program of the EITI. We are not statutorily required, however, to harmonize our disclosure obligations with other reporting regimes. We also believe that other aspects and considerations regarding the final rules should significantly diminish these concerns about differences with other payment reporting regimes.

For example, as proposed, we are adopting an alternative reporting provision that will allow issuers to meet the requirements of the Section 13(q) rules by providing disclosures that comply with a foreign jurisdiction’s reporting regime if the Commission has determined that the foreign reporting regime requires disclosure that satisfies the transparency objectives of Section 13(q).<sup>107</sup> Concurrent with adoption of these final rules, we are issuing an order recognizing that the resource extraction

<sup>104</sup> *See* letters from BHP and PWYP–U.S. (Mar. 16, 2020).

<sup>105</sup> *See* letters from BP and Total (Feb. 10, 2020).

<sup>106</sup> *See* letter from Oxfam America and Earthrights International.

<sup>107</sup> *See infra* Section II.N. Issuers will have to meet certain conditions in order to avail themselves of the alternative reporting provision.

payment disclosure requirements of the European Union, United Kingdom, Norway,<sup>108</sup> and Canada satisfy the transparency objectives of the Section 13(q) rules. Consequently, a resource extraction issuer will be able to submit a report complying with the reporting requirements of either the EU Accounting Directive or the EU Transparency Directive, in each case as implemented in an EU or European Economic Area (EEA) member country, the UK Reports on Payments to Governments Regulations, Norway's Regulations on Country-by-Country Reporting, and Canada's ESTMA, to satisfy its disclosure obligations under the Section 13(q) rules.

A resource extraction issuer that avails itself of the alternative reporting provision will only have one set of data to collect and report—that pertaining to the alternative reporting regime—and will largely not incur costs related to the need to collect and report two different sets of payment data in order to comply with our Section 13(q) rules.<sup>109</sup>

In addition, to the extent that some issuers only file under the Section 13(q) rules, we understand that the Modified Project Definition could produce differences in the granularity of the payment disclosure reported under the Section 13(q) rules and other regimes. While the extent of such differences will vary depending upon the particular issuer and the location of its resource extraction operations, given that the other reporting regimes permit some aggregation of payments for multiple agreements that are substantially interconnected operationally and geographically,<sup>110</sup> in some instances the differences in granularity could be small. In this regard, although one commenter recommended that we adopt the foreign reporting regimes' approach to the aggregation of payments for related contracts as a change to the 2016 Rules,<sup>111</sup> such an approach would not constitute a change from the 2016 Rules. The 2016 Rules included a largely similar provision that allowed agreements that are both operationally and geographically interconnected to be

treated by the resource extraction issuer as a single project.<sup>112</sup>

Similarly, the deviation from the standards adopted in other regimes could result in a lower compliance burden for resource extraction issuers subject solely to the Section 13(q) rules. Unlike resource extraction issuers who are also subject to the EU Directives (or one of the other foreign reporting regimes), issuers subject solely to the Section 13(q) rules will only have to track and disclose payments at the more aggregated level required by the Modified Project Definition.<sup>113</sup> This differential in burden, however, is not due to our rules' selectively imposing substantively different requirements. Rather, it is due to the fact that some issuers are also obligated to comply with the EU Directives (or another foreign reporting regime).

Some commenters maintained that a contract-based definition of project is superior to the Modified Project Definition because the latter is an artificial construct that deviates from industry practice.<sup>114</sup> As a threshold matter, we reiterate that there is no single generally accepted definition of project in the mining industry. In addition, as we discuss below in Section III.D., there is no indication that issuers that are not already subject to a foreign reporting regime have systems in place to track payments at the contract level.<sup>115</sup> Thus, it is likely that these issuers will incur compliance costs to implement systems to track, verify, and record payments under either a contract-based project definition or the Modified Project Definition.<sup>116</sup>

Other commenters have argued that the Modified Project definition fails to satisfy the plain language of Section 13(q).<sup>117</sup> These commenters argued that the language in the statute calling for "payments made for each project" and the language calling for "the type and total amount of such payments made to each government." when read together, indicate that Congress intended to require disaggregated reporting by project.<sup>118</sup> Congress, however, did not define the term "project" in Section 13(q), leaving the Commission

discretion to adopt a definition that encompasses all payments as that term is defined by the Commission. Commenters did not explain how this plain language argument compels a particular definition of "project," such as the contract-based definition.

Commenters also argued that the requirement in Section 13(q) to disclose "royalties, license fees, production entitlements and bonuses" suggests that Congress intended that the Commission adopt a contract-based definition because such items are typically levied according to the terms of specific contracts and licenses." Again, however, we do not view this language as compelling a particular "project" definition, as companies could aggregate or disaggregate these items according to the "project" definition adopted by the Commission.

Finally, some commenters opposed the Modified Project Definition because of their belief that a Contract-Level Project Definition is necessary to enable investors to assess the financial, political, and market risks regarding a particular issuer's projects.<sup>119</sup> As we explained in the 2019 Rules Proposing Release,<sup>120</sup> we do not believe that the purpose of the required disclosures is to provide material information to investors.<sup>121</sup> First, we believe that the Commission's existing rules should elicit all material risk-related disclosure. For example, issuers are required to disclose the most significant risks affecting an issuer or the securities being offered<sup>122</sup> as well as any 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.<sup>123</sup> Moreover, we continue to believe that the direct incremental benefit to investors from the payment information may be limited because investors would typically require additional information to calculate cash flows and other indices of risk, which may be lacking.<sup>124</sup> Further, it is likely that the vast majority of the individual contract-level project payment

<sup>108</sup> Norway is a member of the EEA, not the EU. While the EU Directives apply to EEA members, Norway adopted its Regulations on Country-by-Country Reporting in 2013 prior to the adoption of the EU Directives. See FOR-2013-12-20-1682, which is available at <https://lovdata.no/dokument/SF/forskrift/2013-12-20-1682>.

<sup>109</sup> See *infra* Section III.D.5.

<sup>110</sup> See, e.g., EU Accounting Directive, Art. 41(4). We discussed the non-U.S. payments-to-governments reporting regimes in some detail in the 2016 Rules Adopting Release at Section I.C.

<sup>111</sup> See letter from Oxfam America and Earthrights International.

<sup>112</sup> See 2016 Rules Adopting Release at Section II.E.

<sup>113</sup> See letter from Total (Feb. 10, 2020).

<sup>114</sup> See, e.g., letter from PWYP-US (Mar. 16, 2020).

<sup>115</sup> See *infra* Section III.D.1.

<sup>116</sup> One industry commenter expressly noted that using the Modified Project Definition would "lower issuer compliance costs in collecting and furnishing the information." Letter from API (Mar. 16, 2020) at 6-7.

<sup>117</sup> See, e.g., letter from Oxfam America and Earthrights International.

<sup>118</sup> *Id.*

<sup>119</sup> See, e.g., letter from PWYP-US (Mar. 16, 2020); and F. Samama *et al.*

<sup>120</sup> See 2019 Rules Proposing Release at Section II.F.1.

<sup>121</sup> 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").

<sup>122</sup> See 17 CFR 229.503(c).

<sup>123</sup> See 17 CFR 229.303.

<sup>124</sup> See *infra* Section III.D.1.

amounts<sup>125</sup> would not be material to the financial condition of the issuers that are subject to the Section 13(q) reporting requirements.<sup>126</sup> As such, we do not believe that such information is likely to be material to an investment decision.<sup>127</sup>

After consideration of all of these issues, we continue to believe that adopting the Modified Project Definition is the appropriate choice to produce a rule that is not substantially the same,<sup>128</sup> yet one that continues to provide a level of transparency sufficient to meet Section 13(q)'s goals.

## 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 Modified Project Definition in greater detail. Except for comments that either generally supported or opposed the Modified Project Definition, we received no comments directly addressing the specific prongs of the project definition. Accordingly, except as indicated, we are

<sup>125</sup> Based on publicly available data, the average payment for projects under the contract level definition was \$29 million and 95% of the payments were at or below \$61 million.

<sup>126</sup> In this regard, we note that most smaller reporting companies and emerging growth companies will be exempt from the Section 13(q) reporting requirements.

<sup>127</sup> This was acknowledged by the then Chairman of the Senate Banking Committee, Senator Christopher Dodd, one of the bill's co-sponsors. (The required payment information "appears not to rise to the level of materiality for investors that currently governs the disclosure requirements of public companies under Federal securities laws.") 156 Cong. Rec. 3801, 3818 (May 17, 2010). In further support of our view that Section 13(q) disclosures were not intended for investor use, we observe that Section 13(q) itself makes no reference to investor interests or protection (unlike many other provisions of the securities laws) and instead states that, to the extent practicable, any rules under Section 13(q) should support the "commitment of the Federal Government to international transparency promotion efforts." Those efforts, which involve the EITI as well as European and Canadian law, are also generally not considered to be investor disclosure measures. While we acknowledge that the placement of Section 13(q) in the Exchange Act could be understood to support a contrary congressional intention here, we think that it is more likely that the placement of the resource extraction payment disclosures in the Exchange Act is primarily because the Commission has a deep history involving issuer disclosures and Congress sought to leverage that experience. In that regard, we note that Section 1504 of the Dodd-Frank Act, which amended the Exchange Act to add Section 13(q), was not incorporated into any of the Dodd-Frank's titles that principally deal with financial regulatory matters, but rather near the end of the Act in a title labeled "Miscellaneous Provisions."

<sup>128</sup> See *infra* Section II.B., for a discussion of why we do not believe that a non-public submission followed by an anonymized compilation is the appropriate choice for complying with the CRA and meeting the overarching disclosure objectives of Section 13(q).

adopting the Modified Project Definition largely as proposed.<sup>129</sup>

### 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. A resource extraction issuer will be required to disclose whether the project relates to the commercial development of oil, natural gas, or a specified type of mineral. As we explained in the 2019 Rules Proposing Release, this prong will not require an issuer to describe the specific type or quality of oil or natural gas or distinguish between subcategories of the same mineral type.<sup>130</sup> For example, an issuer disclosing payments relating to an oil project will not be required to describe whether it is extracting light or heavy crude oil. Similarly, an issuer disclosing payments relating to a mining project will 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.<sup>131</sup>

We continue to believe that a requirement to provide greater detail regarding the type of resource that is the subject of extractive activities is not necessary for persons to determine whether those activities have given rise

<sup>129</sup> In Section II.P, the Commission explains its preference for how the final rule under Section 13(q) should be applied if the definition of "project" should be held invalid by a Federal court or otherwise deemed ineffective for any reason. If this should occur, it is the Commission's preference that the final rule should be enforced and resource extraction issuers should disclose resource extraction payments to the fullest extent practicable, including the per-project payment disclosures as required by Section 13(q)(2)(A)(i). Further, issuers should determine based on their own business structure and other relevant considerations how to identify and describe their various projects until such time as the Commission completes any further rulemaking that seeks to define the term. In reaching this recommendation, we note that Section 13(q) does not define project nor does it compel the Commission to do so. Accordingly, we believe that it is appropriate to allow issuers to identify their projects in a reasonable manner just as they would be permitted to do by the statute in the absence of the Commission's exercise of discretion to adopt a definition. In specifying the preference above, the Commission is mindful that Congress enacted Section 13(q) over a decade ago and that to date no disclosures have been made under that provision. Finally, issuers are reminded that the anti-evasion provision in the final rule would continue to apply to their payment disclosures in these circumstances.

<sup>130</sup> See 2019 Rules Proposing Release at Section II.F.2.

<sup>131</sup> For clarity and consistency, we are adopting an instruction to Form SD, as proposed, that will require synthetic oil or gas obtained through the processing of coal to be classified as "coal." See Instruction 5 to Item 2.01 of Form SD.

to government payments in which they may have an interest. The presence of the activities combined with the disclosure of the method of extraction (well, open pit, etc.) and the identification of the resource as oil, gas or, e.g., gold, copper, or coal, will provide transparency to the users of the information to assess whether and to what extent there are payments being made for extraction activities in a particular area. We believe that requiring greater detail about the type of resource could reveal proprietary information that could cause competitive harm, a concern that members of Congress expressed when disapproving the 2016 Rules. Such an approach could make the final rules less likely to satisfy the CRA's restriction on reissuing the disapproved rule in substantially the same form or adopting a new rule that is substantially the same.

### b. Method of Extraction

The second prong for determining the parameters of a project is the method of extraction. This prong will 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 will 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 believe that such a level of specificity regarding the particular method of extraction would not provide any additional meaningful information to end users, and that the required disclosure about method of extraction will provide transparency to users of the information to assess whether and to what extent there are payments being made for extraction activities in a particular area. On the other hand, such disclosure could result in the disclosure of proprietary information, which could potentially result in competitive harm and thus make it less likely that the final rules satisfy the CRA requirements.

### 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 will require an issuer to disclose only to the level of major subnational jurisdiction (e.g., state, province, district, region, territory) in which the resource

extraction activities are occurring. As discussed below, we are also adopting the proposed requirement that an issuer must 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.<sup>132</sup> We believe that the required use of ISO codes to identify major subnational jurisdictions will provide a standardized data format that may be more easily analyzed than the data produced under the Contract-Level Project Definition.

For example, a project for extractive activities in the city of Timika in the province of Papua, Indonesia would be identified as occurring in Papua, without identifying Timika, as Papua would be the major subnational political jurisdiction. Similarly, an issuer would identify the project for activities in the counties of Elko, Nevada and White Pine, Nevada, as occurring in Nevada because Nevada would be the major subnational political jurisdiction.

If the extractive activity is offshore, we proposed requiring an issuer to include in its project identification that its operations are offshore as well as the nearest major subnational political jurisdiction. One commenter stated that labeling projects in national waters according to the nearest major subnational political jurisdiction could create an incorrect impression that the identified subnational jurisdiction has a greater practical or legal relationship to the project than other subnational jurisdictions in the area, which may well not be the case. This could in turn create "undesirable or wasteful political dynamics between states or provinces in the host country."<sup>133</sup> For offshore resource extraction, that commenter recommended identifying the project by the body of water in which the project is located (*e.g.*, Gulf of Mexico) instead of the nearest major subnational jurisdiction.<sup>134</sup>

We agree with this commenter that in certain circumstances labeling an offshore project by the nearest major subnational jurisdiction could be confusing, for example, a particular

offshore project may be equidistant from multiple coastal states or provinces. Accordingly, we have revised the proposed third prong of the Modified Project Definition to provide that, for offshore projects, the identification of the major subnational political jurisdiction where the commercial development of the resource is taking place should include the body of water in which the project is located, using the smallest body of water applicable (*e.g.*, gulf, bay, sea), as well as the nearest major subnational jurisdiction. In addition, if the project is equidistant from two major subnational jurisdictions, the issuer may disclose both such jurisdictions.<sup>135</sup>

#### d. Special Situation

Under the final rules, commercial development activities using multiple resource types or extraction methods can be treated as a single project if such activities are located in the same major subnational political jurisdiction.<sup>136</sup> The issuer will 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 "ER/Zinc/Open Pit/Underground" and a drilling project off the shore of Veracruz, Mexico that produced both oil and natural gas would be described as "Offshore-Gulf of Mexico/Veracruz/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, as we explained in the Proposing Release, we believe that this approach is 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. Although we solicited comment on the proposed approach to development activities using multiple resource types or extraction methods, no commenters specifically objected or suggested alternative approaches.

In some situations, the site where a resource is being commercially developed could cross the borders between, and generate payment obligations in, multiple major subnational political jurisdictions. In such a case, the final rules will require the issuer to treat the activities in each major subnational political jurisdiction as separate projects, as proposed.<sup>137</sup> This approach reflects the fact that, although the cross-border extractive activities are related, the disaggregated payment information would be of interest to different users of the information.

#### B. Public Reporting

##### 1. Public Disclosure of the Issuer's Payment Information, Including the Issuer's 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.<sup>138</sup> When proposing the 2019 Rules, the Commission expressed its belief that exercising its discretion to require public disclosure, including the issuer's name, might better accomplish the objectives of Section 13(q).<sup>139</sup> The Commission stated, however, in the 2019 Rules Proposing Release that it would also consider an alternative approach supported by some commenters on the 2016 Rules that would permit issuers to submit their Section 13(q) 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.<sup>140</sup> After reviewing the numerous comments received on the public reporting issue,

<sup>137</sup> See Instruction (5)(iv) to Item 2.01 of Form SD.

<sup>138</sup> See *API v. SEC*, 953 F. Supp. 2d at 11 (finding that the Commission "misread the statute to mandate public disclosure of the reports" when adopting the 2012 Rules).

<sup>139</sup> See 2019 Rules Proposing Release at Section II.I.1; see also 2016 Rules Adopting Release at II.H.3.

<sup>140</sup> See 2019 Rules Proposing Release at Section II.I.1 (citing 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.

<sup>132</sup> See *infra* Section II.M. In a change from the proposed rules, in response to commenters' concerns that the proposed treatment of payments to subnational governments (below the level of major subnational political jurisdiction) was not sufficiently transparent, issuers will also be required to provide an electronic tag identifying each subnational government payee rather than referring to such payees generically (*i.e.*, as "county" or "municipality"). See *infra* Section II.G.

<sup>133</sup> Letter from API (Mar. 16, 2020).

<sup>134</sup> See *id.*

<sup>135</sup> See Instruction (5)(iii) to Item 2.01 of Form SD.

<sup>136</sup> See Instruction (5)(iv) to Item 2.01 of Form SD.

we are adopting the proposed requirement that resource extraction issuers provide the Section 13(q) disclosure publicly, including their names, through the searchable, online EDGAR system.<sup>141</sup>

Many commenters supported the proposed public submission of the Section 13(q) reports and expressly opposed the alternative, non-public submission and anonymized compilation approach.<sup>142</sup> Commenters indicated that public reporting of issuer-specific payment information is essential to carry out Section 13(q)'s transparency, accountability, and anti-corruption objectives.<sup>143</sup> Commenters stated that, to achieve these objectives, public reporting is necessary to hold both government actors and commercial actors accountable in resource-rich countries so as to achieve meaningful oversight of government revenue collection and management and deter corruption.<sup>144</sup> Commenters maintained that, in contrast, the non-public submission and anonymized compilation approach would not be conducive to building trust between issuers, governments, and local citizens, would not prevent mismanagement of funds obtained from resource payments, and would negate the transparency and anti-corruption benefits for citizens that Section 13(q) was intended to achieve.<sup>145</sup> Some commenters also noted that the non-public submission and anonymized compilation approach would nullify Section 13(q)'s benefits to investors by preventing them from obtaining issuer-specific payment data to help them assess risk in investing in resource extraction issuers.<sup>146</sup> Finally, commenters stated that adoption of the non-public submission and anonymized compilation approach would result in a decrease in comparability with the non-U.S. payments-to-governments reporting

regimes, each of which requires public, issuer-specific reporting of payments.<sup>147</sup>

A few commenters supported the non-public submission and anonymized compilation approach.<sup>148</sup> One commenter stated that Congress's goal of enabling people to hold their governments accountable for the revenues generated from resource development would be achieved as long as citizens know the amount of money the government receives, and not the companies that make each individual payment.<sup>149</sup> This commenter further expressed its concern that public disclosure of issuer-specific extractive payments may result in harm by allowing competitors to reverse-engineer the value a particular issuer places on a specific resource area. Moreover, the commenter stated that the threat of reverse-engineering could occur even under the proposed Modified Project Definition by allowing a competitor to compare changes in reported payments for the same area year after year, which could provide competitive insights especially where a particular country effectively possesses a single major area of resource development.<sup>150</sup> For those reasons, this commenter believed that the non-public submission and anonymized compilation approach would best balance the goals of achieving the objectives of Section 13(q) and preventing unnecessary harm to resource extraction issuers.

We acknowledge the concerns raised about potential competitive harm, but do not believe that adoption of the non-public submission and anonymized compilation is necessary to avoid any such potential competitive harm. Rather, as discussed above, we believe that adopting the Modified Project Definition, under which issuers will not be required to disclose overly descriptive disclosures potentially revealing competitively sensitive information, is sufficient to address any such risks.

Moreover, we do not believe that adoption of the non-public submission and anonymized compilation would achieve the same level of transparency as our approach in the final rules. We acknowledge that the anonymized compilation would reveal the payments to foreign governments at all levels, including the specific agency and department within the government. As

such, it would provide some level of transparency in foreign nations that currently do not disclose such information, or do not do so accurately. Importantly, however, the reduced transparency provided by an anonymized compilation would significantly limit the usefulness of the disclosure because all similar activities in the same subnational jurisdiction, regardless of issuer, would be indistinguishable. Thus, we believe that this would be much less effective in achieving Section 13(q)'s transparency goals as compared to our approach.

In this regard, we note that if Congress had simply been focused on the disclosure of revenues into foreign governments, it would have been sufficient to require only the disclosure of payments to foreign governments required by Section 13(q)(2)(A)(ii), which requires information about the payments to each government. Yet Congress also included Section 13(q)(2)(A)(i), which mandates that the Commission's rules must require the disclosure of the type and total amount of such payments made "for each project of the resource extraction issuer." Thus, we believe that the Modified Project Definition, which provides for public disclosure of the issuer, is the more effective choice for satisfying the CRA mandate and achieving the transparency goals of Section 13(q).

We also do not believe that it is necessary to adopt the non-public submission and anonymized compilation approach to fulfill the CRA's mandate that the new rule not be substantially the same as the disapproved rule. Rather, as discussed above, we believe that adoption of the Modified Project Definition will largely accomplish this objective. We also believe that the other changes to the 2016 Rules that we are adopting will further distinguish the final rules from the disapproved rules and, in addition, help address concerns about the rules' burdens. In addition to the Modified Project Definition,<sup>151</sup> these changes include the rule-based exemptions for conflicts with foreign law and pre-existing contracts;<sup>152</sup> the exemptions for smaller reporting companies and emerging growth companies;<sup>153</sup> transitional relief for a resource extraction issuer that has completed its initial public offering in its last full fiscal year;<sup>154</sup> and an extended

<sup>141</sup> As we did in the 2012 and 2016 rulemakings, we are requiring that a resource extraction issuer provide the required Section 13(q) disclosures on Form SD (17 CFR 249b.400).

<sup>142</sup> See, e.g., letters from Congr. Waters *et al.*; Equinor; Oxfam and Earthrights International; Project On Government Oversight (Mar. 13, 2020) (POGO); PWYP-US; Sens. Cardin *et al.*; and Transparencia por Colombia (Mar. 19, 2020).

<sup>143</sup> See, e.g., letters from Oxfam America and Earthrights International; PWYP-US (Mar. 16, 2020); and Sens. Cardin *et al.*

<sup>144</sup> See, e.g., letters from Oxfam American and Earthrights International; and PWYP-US (Mar. 16, 2020); see also letter from POGO.

<sup>145</sup> See letters from Equinor; Oxfam American and Earthrights International; and Congr. Waters *et al.*

<sup>146</sup> See letters from Congr. Waters *et al.*; Oxfam American and Earthrights International; and PWYP-US (Mar. 16, 2020).

<sup>147</sup> See, e.g., letters from Oxfam American and Earthrights International; and PWYP-US (Mar. 16, 2020).

<sup>148</sup> See letters from API (Mar. 16, 2020); Chamber; and NAM.

<sup>149</sup> See letter from API (Mar. 16, 2020).

<sup>150</sup> See *id.*

<sup>151</sup> See *supra* Section II.A.

<sup>152</sup> See *infra* Sections II.D.1. and 2.

<sup>153</sup> See *infra* Section II.D.3.

<sup>154</sup> See *infra* Section II.D.6.

submission deadline.<sup>155</sup> Adoption of the proposed delayed reporting for exploratory activities, which we first adopted in 2016, should also help to mitigate the potential for competitive harm.<sup>156</sup>

Moreover, like the 2016 Rules, the final rules will include contractually required social and community payments among the required disclosures,<sup>157</sup> and issuers will be required to disclose those payments made to subnational governments while identifying each subnational government payee.<sup>158</sup> As such, the users of the information may be able to assess whether the local communities are in fact receiving the promised payments and whether those payments are being used by the governments for their intended purpose.<sup>159</sup>

Finally, although not a primary goal of Section 13(q), we note that adoption of the requirement for issuer-specific, public disclosure may nevertheless help to further Section 13(q)'s 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.<sup>160</sup> As commenters noted, all other existing reporting regimes require public disclosure of the payment information, including the identity of the issuer.<sup>161</sup> Adoption of a similar requirement under Section 13(q) would be consistent with the statutory directive to support the commitment of the Federal Government to international transparency efforts by increasing the total number of companies that provide public, issuer-specific disclosure.

## 2. Public Compilation

Consistent with Section 13(q),<sup>162</sup> and as proposed, the final rules provide that, to the extent practicable, the staff will periodically make a compilation of the information that issuers are required to submit under Section 13(q) publicly available online.<sup>163</sup> The staff may determine the form, manner, and timing of the compilation,<sup>164</sup> except that no information included in the compilation may be anonymized, whether by redacting the names of the resource extraction issuers or otherwise. Since we are requiring the public disclosure of the payment information on Form SD, we do not believe it would be appropriate or useful to anonymize any of the information in the compilation.<sup>165</sup>

### C. Definition of a “Not De Minimis” Payment

Section 13(q) defines “payment” in part to mean a payment that is made to further the commercial development of oil, natural gas, or minerals and that is not de minimis.<sup>166</sup> Section 13(q), however, does not define “not de minimis.”<sup>167</sup> We proposed to 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, 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.<sup>168</sup> This proposed definition differed from the definition of “not de minimis” in the 2016 Rules, which defined a “not de minimis” payment in relevant part as one that equals or exceeds \$100,000, whether made as a single payment or series of related payments.<sup>169</sup> We proposed this change in light of previously expressed concerns from

commenters that the threshold was unreasonably low and costly to calculate<sup>170</sup> and the likely impact of the proposed revised definition of project, which would allow aggregation of payments at a higher level and likely increase the value of the individual types of payments.<sup>171</sup>

Several commenters supported the proposed definition of “not de minimis” as any payment that equals or exceeds \$150,000 made in connection with a project that equals or exceeds \$750,000 in total payments. For example, one commenter stated that the proposed definition would reduce compliance costs by allowing companies to forgo reporting on payments that are insignificant to the project and to their investors.<sup>172</sup> Another commenter stated that the proposed not de minimis thresholds would help preserve shareholder resources and enable long-term growth within the resource extraction industry.<sup>173</sup>

Numerous commenters opposed the proposed definition of a “not de minimis” payment.<sup>174</sup> Several commenters stated that the proposed definition would undermine Congressional intent underlying Section 13(q) by eliminating a significant amount of project and payment disclosures.<sup>175</sup> In support of this statement, some commenters referred to a study of 4,018 projects conducted by 731 companies that have published reports pursuant to the payments-to-governments laws of the EU, United Kingdom, Canada, and Norway.<sup>176</sup>

<sup>170</sup> See 2019 Rules Proposing Release at Section II.C.9 (citing 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)).

<sup>171</sup> See *id.*

<sup>172</sup> See letter from NAM.

<sup>173</sup> See letter from SAF.

<sup>174</sup> See letters from Africa Center for Energy Policy (Mar. 16, 2020); Elise J. Bean; Better Markets (Mar. 16, 2020); Sens. Cardin *et al.*; the Carter Center; Derecho Ambiente y Recursos Naturales (Mar. 15, 2020) (DAR); Financial Accountability and Corporate Transparency Coalition (Mar. 18, 2020) (FACT Coalition); Shannon Gough (Mar. 16, 2020); KCSPOG; S. Kaimal, CEO of Natural Resource Governance Institute (Mar. 16, 2020) (S. Kaimal, CEO of NRG); Daniel Kaufmann; ONE.org; Oxfam America and Earthrights International; Eric Postel; Public Citizen (Mar. 16, 2020); PWYP-US (Mar. 16, 2020); F. Samama *et al.*, Sierra Club (Mar. 14, 2020); Forum for Sustainable and Responsible Investment (Jun. 17, 2020) (SIF), Total (Feb. 10, 2020); and Congr. Waters *et al.*

<sup>175</sup> See, e.g., letters from Elise J. Bean; Shannon Gough; ONE.org; Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020).

<sup>176</sup> See, e.g., letters from Elise J. Bean; Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020). The study was conducted by the Natural Resource Governance Institute and is

<sup>155</sup> See *infra* Section II.L.2.

<sup>156</sup> See *infra* Section II.D.4.

<sup>157</sup> See *infra* Section II.J.5.

<sup>158</sup> See *infra* Section II.G.

<sup>159</sup> Social or community payments are frequently made as accommodations by resource extraction issuers to local communities impacted by extractive activities. For example, when filing its Exchange Act annual report, a mining registrant is required to attach a technical report summary prepared by its mining expert (its “qualified person”), which must include a description of “accommodations the registrant commits or plans to provide to local individuals or groups in connection with its mine plans.” See 17 CFR 229.601(b)(96)(iii)(B)(17)[Item 601(b)(96)(iii)(B)(17) of Regulation S-K.

<sup>160</sup> 15 U.S.C. 78m(q)(2)(E).

<sup>161</sup> See *supra* note 147. See also ESTMA Specifications, Section 2.4 (“Reporting Entities are required to publish their reports on the internet so they are available to the public”); 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.

<sup>162</sup> See 15 U.S.C. 78m(q)(3).

<sup>163</sup> See 17 CFR 240.13q-1(e).

<sup>164</sup> See *id.* We do not anticipate that the staff would produce such a compilation more frequently than once a year.

<sup>165</sup> Except for comments that addressed the anonymized compilation approach, see *supra* Section II.B.1., we did not receive any comments that addressed the proposed compilation provision.

<sup>166</sup> See 15 U.S.C. 78m(q)(1)(C).

<sup>167</sup> Consistent with the 2012 and 2016 Rules, 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.

<sup>168</sup> See 2019 Rules Proposing Release at Section II.C.9.

<sup>169</sup> 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.



Utilizing the most recent payments-to-governments reports submitted by these companies, the study indicated that 49% of the reported projects, when using the Modified Project Definition, would fall below the \$750,000 threshold and, therefore, go unreported. This study led commenters to assert that the proposed definition would severely undermine the utility of the rule in carrying out Section 13(q)'s pro-transparency mandate.<sup>177</sup>

One commenter opposing the proposed “not de minimis” payment definition stated that the proposed \$750,000 threshold would operate as a de facto “materiality” requirement for the definition of project, which the commenter argued has no support in the statutory language.<sup>178</sup> Several commenters contended that both the \$750,000 and \$150,000 thresholds appear to be arbitrary and unsupported by anything in the record.<sup>179</sup> Some commenters also stated that the proposed definition is inconsistent with the payment threshold adopted in over 30 countries under the laws of the other payments-to-governments reporting regimes, each of which approximates \$100,000.<sup>180</sup> Other commenters maintained that the proposed “not de minimis” payment definition would lessen the comparability of the payment data for users interested in analyzing the data on a global basis<sup>181</sup> and could result in a competitive disadvantage to companies operating and reporting in the other non-U.S. jurisdictions.<sup>182</sup> Finally, some commenters believed that the proposed “not de minimis” payment definition could encourage corruption, or at least be inconsistent with the anti-corruption objective of Section 13(q), by facilitating the manipulation of payments to below one or both thresholds and thereby keeping them non-reportable.<sup>183</sup> For the above reasons, many commenters requested

that, consistent with the 2016 Rules, we define “not de minimis” as a payment that equals or exceeds \$100,000, whether made as a single payment or series of related payments.<sup>184</sup>

We believe that these commenters have raised a number of valid concerns, the most significant of which is that the proposed definition could result in a high percentage of projects going unreported, thereby unduly reducing transparency. We also believe that adopting the \$100,000 threshold will mitigate against the potential loss of information that may arise as a result of our adoption of the Modified Project Definition, which, as we have discussed, we believe is the most appropriate way to comply with the CRA.

Under the adopted definition, a “not de minimis” payment means any payment, whether made as a single payment or a series of related payments, that equals or exceeds \$100,000, or its equivalent in the resource extraction issuer's reporting currency.<sup>185</sup> We are adopting the remainder of the proposed definition, which provides that, 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. We did not receive any comments on this part of the definition, which is similar to the definition adopted under the 2016 Rules.

We are also adopting the proposed instruction that allows an issuer to choose several methods to calculate currency conversions for payments not made in U.S. dollars or the issuer's reporting currency. That instruction also provides that the same methods are available to issuers when calculating whether a payment not made in U.S. dollars meets or exceeds the “not de minimis” threshold.<sup>186</sup> We did not receive any comments on this instruction. We continue to believe that providing alternative methods for calculating currency conversions would help limit compliance costs under Section 13(q). As under 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.<sup>187</sup>

#### D. Exemptions From Compliance

The 2013 District Court opinion found that the Commission has the authority to grant exemptions with respect to Section 13(q).<sup>188</sup> We proposed three new exemptions from reporting under Section 13(q),<sup>189</sup> as follows:

- If the Section 13(q) disclosure is prohibited by foreign law;
- If the required disclosure would violate one or more pre-existing contract terms; and
- If the resource extraction issuer is a smaller reporting company<sup>190</sup> or an emerging growth company.<sup>191</sup>

We also proposed delayed reporting for exploratory activities and transitional relief for recently acquired companies, both of which were included in the 2016 Rules.<sup>192</sup> In addition, we proposed similar transitional relief for a resource extraction issuer that has recently conducted its initial public offering.<sup>193</sup> Finally, we proposed to retain the 2016 Rules' provision allowing an issuer to file an application for exemptive relief on a case-by-case basis.<sup>194</sup>

When proposing the exemptions for situations involving conflicts with foreign laws or pre-existing contract terms, we noted that several industry commenters had specifically recommended these two exemptions in connection with prior rulemakings to reduce the risk of competitive harm that

<sup>187</sup> 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”).

<sup>188</sup> See *API v. SEC*, 953 F. Supp. 2d at 21–23.

<sup>189</sup> See 2019 Rules Proposing Release at Section II.J.

<sup>190</sup> 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)].

<sup>191</sup> 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.

<sup>192</sup> See 2016 Adopting Release, Section II.G.3.

<sup>193</sup> See 2019 Rules Proposing Release at Section II.J.6.

<sup>194</sup> See 2019 Rules Proposing Release at Section II.J.7.

described in the letter from S. Kaimal, CEO of NRCI (Mar. 16, 2020).

<sup>177</sup> See letters from Elise J. Bean; Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020); see also letter from Kaufmann.

<sup>178</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>179</sup> See *id.*; see also letters from Elise J. Bean; Oxfam America and Earthrights International; Eric Postel; Sierra Club; and Congr. Waters *et al.*

<sup>180</sup> See letters from Elise J. Bean; Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020).

<sup>181</sup> See, e.g., letters from Sens. Cardin *et al.*; FACT Coalition; and F. Samama *et al.*

<sup>182</sup> See letter from Total (stating that, together with the proposed project definition, the different “not de minimis” threshold may result in a competitive disadvantage detrimental to EU issuers).

<sup>183</sup> See, e.g., letters from Better Markets; Oxfam America and Earthrights International; and Public Citizen.

<sup>184</sup> See *supra* note 174.

<sup>185</sup> See Item 2.01(d)(8) of Form SD.

<sup>186</sup> See Instruction 2 to Item 2.01 of Form SD.

could result from the required Section 13(q) payment disclosure. 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.<sup>195</sup> We believe that these exemptions and the proposed transitional relief would address the previously expressed concerns about the burdens and potential risks of Section 13(q) disclosure.

We also believe that the proposed exemptions are consistent with the CRA's prohibition on adopting rules that are in substantially the same form as the disapproved rules. Accordingly, we are adopting these provisions largely as proposed, except that we have added a condition to the exemption for emerging growth companies and smaller reporting companies to address specific concerns raised by commenters. We discuss each of these provisions in more detail below.

#### 1. Exemption for Conflicts of Law

We are adopting, as proposed, a conditional exemption for when an issuer is unable to provide the required disclosure without violating the laws of the jurisdiction where the project is located.<sup>196</sup> We proposed this exemption after reconsidering comments in the 2016 rulemaking concerning the potential harm that could occur from a situation involving a conflict with foreign law.<sup>197</sup> Congressional members who voted to disapprove the 2016 Rules also expressed concern about the lack of exemptions under the 2016 Rules.<sup>198</sup>

Several commenters in the current rulemaking continued to express concerns about a conflict of law situation in the host country and

supported an exemption to address the potential competitive harm and administrative difficulties resulting from such a situation.<sup>199</sup> Some industry commenters also stated their belief that a case-by-case exemptive approach for handling situations involving conflicts of law (or contract prohibitions) is problematic. These commenters stated that the substantial practical and administrative difficulties associated with obtaining timely exemptive relief, particularly for an issuer threatened with the potential total loss of its operations in the host country, render this option unworkable.<sup>200</sup>

Other commenters objected to any exemption to the Section 13(q) rules, including one for conflicts of law situations.<sup>201</sup> These objections were largely based on (1) the absence of exemptions under the EU and Canadian transparency regimes and the comparative gap in coverage that would occur;<sup>202</sup> (2) a concern that the Section 13(q) exemptions, particularly the conflicts of law exemption, could create an incentive for countries to enact similar provisions that would undermine international transparency promotion efforts;<sup>203</sup> and (3) the lack of demonstrated need for the exemptions, which some commenters viewed as overly broad.<sup>204</sup>

After considering the comments, and with a view to limiting delay and burdens, the final rules will permit issuers, as proposed, to avail themselves of the exemptions for situations involving conflicts with foreign laws (or pre-existing contract terms) without seeking individual relief on a case-by-case basis. This approach will help facilitate an issuer's timely submission of Form SD and alleviate some of the uncertainties of handling conflicts of law situations. 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 will substantially eliminate these potential barriers.

Although commenters differed regarding whether there is a demonstrated need for a conflicts of law exemption, in order to address concerns about the potentially significant consequences of such a conflict, on balance we think it is appropriate to provide such an exemption. One commenter has identified at least two countries—China and Qatar—that have laws that may prohibit the Section 13(q) disclosure.<sup>205</sup> Although publicly available information reveals that some resource extraction issuers have disclosed payments to governments in those countries,<sup>206</sup> the possibility remains that those countries, or others, could elect in the future to enforce or enact laws that conflict with the Section 13(q) requirements. We agree with those commenters who indicated that, to the extent that such a conflict exists, resource extraction issuers should not have to choose between complying with the Section 13(q) rules and violating host country laws.<sup>207</sup>

We also do not believe that the conflicts of law exemption is overly broad. The mere existence of a foreign law that may prohibit the Section 13(q) disclosure will not be sufficient to justify use of the exemption. We proposed, and are now adopting, several conditions that limit the availability of the exemption. These conditions are expressly designed to 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. Specifically, an issuer seeking to rely on the exemption will be required to take certain steps to qualify for the exemption, including providing specified disclosures about its eligibility for relief. Although issuers can avail themselves of the exemption

<sup>195</sup> See 2019 Rules Proposing Release at Section II.J. (citing letters from API (Feb. 16, 2016) and (Nov. 7, 2013); Chevron (Feb. 16, 2016); ExxonMobil (Feb. 16, 2016); and Nouveau (Feb. 16, 2016)).

<sup>196</sup> See 17 CFR 240.13q-1(d)(1).

<sup>197</sup> See, e.g., 2019 Rules Proposing Release at Section II.J.; see also letters from API (Feb. 16, 2016); and ExxonMobil (Feb. 16, 2016). (Indicating that 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 facilities in the host country, the imposition of fines, or the withholding of permits.)

<sup>198</sup> See, e.g., 163 Cong. Rec. H. 848, 853 (February 1, 2017) (Statement of Rep. Rothfus) ("I am also concerned that this rule could force companies to withdraw from certain countries. Among other things, some foreign countries have laws to prohibit the sort of disclosures called for in this rule. Since the rule provides no exemptions, American firms may be forced to abandon business ventures that provide jobs and opportunities for Americans."); see also letter from Sen. Corker *et al.*

<sup>199</sup> See letters from API (Mar. 16, 2020); Chamber; Davis Polk & Wardwell (Mar. 6, 2020) (Davis Polk); NAM; Petrobras (Mar. 16, 2020); and SAF.

<sup>200</sup> See letters from API (Mar. 16, 2020); NAM; and SAF. Some commenters articulated this concern about a case-by-case exemptive approach for handling conflict of laws situations in the 2016 rulemaking. See letters from API (Feb. 16, 2016); and ExxonMobil (Feb. 16, 2016).

<sup>201</sup> See, e.g., letters from Africa Center for Energy Policy; Elise J. Bean; Sens. Cardin *et al.*; DAR; EG Justice (Mar. 11, 2020); FACT Coalition; Friends of the Nation (Mar. 16, 2020); Shannon Gough; KCSPOG; Eric Postel; Robert Rutkowski (Mar. 16, 2020); Transparency International (U.S.) (Mar. 13, 2020); and Congr. Waters *et al.*

<sup>202</sup> See, e.g., letters from Elise J. Bean; and Congr. Waters *et al.* In this regard, we acknowledge that the conflicts of law exemption may lessen comparability with the EU and Canadian transparency regimes to a certain extent.

<sup>203</sup> See, e.g., letters from Elise J. Bean; FACT Coalition; and Robert Rutkowski.

<sup>204</sup> See, e.g., letters from Elise J. Bean; Eric Postel; and Congr. Waters *et al.*

<sup>205</sup> See, e.g., letter from API (Mar. 16, 2020). In addition, commenters on the 2016 Rules discussed how such conflicts could ultimately force a resource extraction issuer to abandon or sell its assets in the host country. See, e.g., letter from API (Feb. 16, 2016).

<sup>206</sup> See, e.g., the data cited in letter from PWYP-US (Mar. 16, 2020).

<sup>207</sup> See, e.g., letters from NAM; and API (Feb. 16, 2016).

without further Commission action, they can only do so in the prescribed manner and under the prescribed circumstances. Moreover, as is the case with all filings, the issuer's disclosure and reliance on this exemption will be subject to Commission staff review, which should discourage potentially inappropriate uses of the exemption.

To be eligible to claim the conflicts of law exemption, an issuer will first have to take reasonable steps to seek and use exemptions or other relief under the applicable law of the foreign jurisdiction.<sup>208</sup> After taking such steps and failing to obtain an exemption or other relief, the issuer will 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.<sup>209</sup> This disclosure will be required in the body of Form SD. The issuer will 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.<sup>210</sup>

These conditions are similar to some of the suggested conditions recommended by some commenters. Those commenters indicated that, although they did not believe a conflicts of law exemption was necessary, they acknowledged that such an exemption would address specific concerns of some members of Congress who disapproved the 2016 Rules, would significantly contribute to the final rules' being not substantially the same as the disapproved rules, as required by the CRA, and would be a permissible change as long as accompanied by sufficient safeguards.<sup>211</sup>

Several commenters recommended that we include an additional condition that limits the exemption to foreign laws in existence before the enactment of Section 13(q) in July 2010, or at least before adoption of the final rules.<sup>212</sup> After considering all of the comments, we have determined not to limit the conflicts of law exemption to pre-existing foreign laws. Unlike the situation involving a conflict with pre-existing contract terms, where an issuer has control over the contract terms and would be in a position to negotiate or modify terms so that they do not conflict with the Section 13(q)

requirements following adoption of the final rules, a resource extraction issuer has no control over a foreign government's enactment of laws, including those that may prohibit the Section 13(q) disclosure.

We acknowledge that adoption of the conflicts of law exemption could incentivize a foreign government to adopt a law that prohibits the Section 13(q) disclosure. We further note that commenters on both sides of this issue indicated in support of their respective positions that no government has adopted a law or rule prohibiting the payment disclosures since the adoption of Section 13(q).<sup>213</sup> While this may be correct, it is not determinative of what countries may do in the future. In light of the potential harm that could result to a resource extraction issuer from a future conflicts of law situation, we are not limiting this exemption to pre-existing foreign laws.

## 2. Exemption for Conflicts With Pre-Existing Contracts

We are adopting a conditional exemption, as proposed, from Section 13(q)'s disclosure requirements when the terms of an existing contract prohibit the disclosure.<sup>214</sup> The exemption will only apply to contracts in which such terms are expressly included in writing prior to the effective date of the final rules. As previously noted, we believe this limitation is justified because issuers have control over the terms of their contracts and have the ability to modify future contract terms. Similar to the exemption for conflicts of law, and for the same reasons, issuers will not need to seek the exemption on an individual, case-by-case basis. The issuer will, however, be required to meet certain conditions to qualify for relief,<sup>215</sup> and its disclosure and reliance on the exemption will be subject to staff review, which should help to discourage potentially inappropriate uses of the exemption. In addition, since multiple contracts may constitute a project under the Modified Project Definition, the exemption would only be available to exempt the specific payment information in the applicable contract that the issuer is expressly prohibited from disclosing by the relevant contract provision.

Several commenters supported the proposed exemption for conflicts with pre-existing contract terms for reasons similar to those expressed in support of

the exemption for conflicts of law.<sup>216</sup> For example, one commenter stated that the proposed exemption would allow companies to avoid being forced into a choice between complying with the new disclosure requirements and complying with agreements entered into with foreign governmental partners.<sup>217</sup> Other commenters indicated that the proposed exemption would minimize the harm and ease the administrative difficulties caused by conflicts with pre-existing contract terms.<sup>218</sup>

Other commenters opposed the proposed exemption for conflicts with pre-existing contract terms for reasons similar to those expressed in opposition to the exemption for conflicts with foreign law. These commenters stated that the proposed exemption was overly broad, was not needed, would reduce comparability with the non-U.S. payments-to-governments reporting regimes, which lack such an exemption, and would not further international transparency promotion efforts.<sup>219</sup> Other commenters that did not believe the proposed exemption for conflicts with pre-existing contracts was warranted nevertheless stated that such an exemption would be a permissible change to help make the new rule not substantially the same as the disapproved 2016 Rules as long as there are sufficient safeguards to protect against abuse.<sup>220</sup>

After reviewing all of the comments, we are adopting the proposed exemption for conflicts with pre-existing contract terms. As one commenter noted, without such an exemption, an issuer whose contract prohibits the disclosure of payment information without the host government's permission, and who fails to obtain such permission, could face adverse financial consequences.<sup>221</sup> The adopted exemption for conflicts with pre-existing contract terms will help to mitigate the potential burdens of the Section 13(q) rules in this regard. We also believe that the exemption is not overly broad or susceptible to misuse

<sup>216</sup> See letters from API (Mar. 16, 2020); Chamber; Davis Polk; NAM; and Petrobras.

<sup>217</sup> See letter from NAM.

<sup>218</sup> See letters from API (Mar. 16, 2020); and Chamber.

<sup>219</sup> See, e.g., letters from Elise J. Bean; Eric Postel; and Congr. Waters *et al.*

<sup>220</sup> See letters from PWYP-US (Mar. 16, 2020); and Oxfam America and Earthrights International.

<sup>221</sup> See letter from API (Feb. 16, 2016) (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.").

<sup>208</sup> See 17 CFR 240.13q-1(d)(1)(i).

<sup>209</sup> See 17 CFR 240.13q-1(d)(1)(ii).

<sup>210</sup> See 17 CFR 240.13q-1(d)(1)(iii).

<sup>211</sup> See letters from PWYP-US (Mar. 16, 2020); and Oxfam America and Earthrights International.

<sup>212</sup> See letters from PWYP-US (Mar. 16, 2020); and Oxfam America and Earthrights International.

<sup>213</sup> Compare letter from PWYP-US (Mar. 16, 2020) with letter from API (Mar. 16, 2020).

<sup>214</sup> See 17 CFR 240.13q-1(d)(2).

<sup>215</sup> *Id.*

because of the several conditions proposed for use of the exemption, which we are now adopting.

An issuer will first be required 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.<sup>222</sup> 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 will 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.<sup>223</sup> This disclosure will be required in the body of Form SD. The issuer will 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.<sup>224</sup> The opinion should confirm that counsel has reviewed all of the contracts underlying or related to a project under the Modified Project Definition, that the applicable contractual provision prohibits the disclosure of the payment information that the issuer would otherwise be required to provide under Section 13(q), and that the exemption is only being applied to exempt that specific disclosure.

Some commenters recommended adding other conditions in order to prevent abuse of the exemption. For example, commenters recommended limiting the exemption to contracts that existed prior to the enactment of Section 13(q) in July 2010 in order to exclude issuers that have engaged in “10 years of gamesmanship and sub-standard contracting practice meant to avoid transparency.”<sup>225</sup> We do not believe such a limitation is appropriate as we are not aware of any evidence demonstrating that issuers have drafted contract terms during the last decade to preclude reporting of payments to governments in this context.

Some commenters also indicated that it is common practice to include a non-confidentiality provision in oil, gas, and mining contracts that allows for the disclosure of information when required

by an issuer’s home government or its securities exchange.<sup>226</sup> These commenters stated that we should prohibit an issuer from using the exemption if such a standard confidentiality exclusion provision exists. We do not believe that adding such a provision is necessary because an issuer will be required to submit a legal opinion that explains why it is contractually precluded from providing the Section 13(q) disclosure. In such situations, the opinion would necessarily have to address why the issuer is contractually precluded from providing the Section 13(q) disclosure in light of the presence of a contractual provision that expressly permits such disclosure when required by home government laws or securities exchange regulations.

One commenter requested that we modify the exemption for conflicts with pre-existing contracts by providing that the exemption applies to contracts signed prior to an issuer’s initial public offering, but after the effective date of the final rules.<sup>227</sup> We decline to make this modification because we believe that such an issuer will have received ample notice of the Section 13(q) rules and will have the opportunity to negotiate or modify the contract terms to remedy any conflict. Moreover, as discussed below, we are providing transitional relief for issuers that have recently completed their initial public offering, which should mitigate any resulting hardship.<sup>228</sup>

### 3. Exemption for Smaller Reporting Companies and Emerging Growth Companies

When proposing to exempt smaller reporting companies<sup>229</sup> and emerging growth companies<sup>230</sup> from the scope of Rule 13q-1,<sup>231</sup> we explained that the proposed exemption would be 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.<sup>232</sup> The proposed exemption also would be consistent

with our treatment of smaller reporting companies and emerging growth companies in other rulemakings<sup>233</sup> undertaken since the enactment of the Jumpstart Our Business Startups Act (“JOBS Act”).<sup>234</sup>

Some commenters supported the proposed exemption for smaller reporting companies and emerging growth companies.<sup>235</sup> For example, one commenter stated that the proposed exemption would provide important cost savings for growing companies.<sup>236</sup> Another commenter indicated that the proposed exemption aligned with the streamlined disclosure requirements typically afforded to smaller and newer reporting issuers.<sup>237</sup>

Several other commenters opposed the proposed exemption for smaller reporting companies and emerging growth companies.<sup>238</sup> Most of those commenters opposed the proposed exemption primarily because it would exclude a significant percentage of the issuers that currently report under the EU Directives and Canada’s ESTMA and that would have been included under the 2016 Rules.<sup>239</sup> Some commenters also asserted that smaller reporting companies and emerging growth companies are equally susceptible to corruption as larger issuers while posing a greater risk.<sup>240</sup>

We continue to be concerned that the fixed cost component of the Section 13(q) rules would have a greater relative impact on smaller reporting companies

<sup>223</sup> 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). Prior to the JOBS Act, the Commission provided a number of accommodations to smaller reporting companies, such as not requiring risk factor disclosure from smaller reporting companies in their Exchange Act registration statements and annual and periodic reports, which continue today. See, e.g., Release No. 33-10825 (Aug. 26, 2020) [85 FR 63726 (Oct. 8, 2020)], note 197.

<sup>224</sup> Public Law 112-106, 126 Stat. 306 (2012).

<sup>225</sup> See letters from Chambers and NAM.

<sup>226</sup> See letter from NAM.

<sup>227</sup> See letter from Chamber.

<sup>228</sup> See, e.g., letters from Africa Center for Energy Policy; Sens. Cardin *et al.*; the Carter Center; DAR; Shannon Gough; KCSPOG; Oxfam America and Earthrights International; Eric Postel; Public Citizen; PWYP-US (Mar. 16, 2020); F. Samama *et al.*; and Congr. Waters *et al.*

<sup>229</sup> See, e.g., letters from Sens. Cardin *et al.*; Oxfam America and Earthrights International; PWYP-US (Mar. 16, 2020); F. Samama *et al.*; and Eric Postel.

<sup>230</sup> See, e.g., letters from Public Citizen (stating that smaller reporting companies and emerging growth companies have been involved in the same industry practices that have enabled corruption and misappropriation in the past, and indicating that smaller issuers are generally more susceptible to equity risks than larger issuers because they take more operational risks); see also letter from PWYP-US (Mar. 16, 2020).

<sup>222</sup> See 17 CFR 240.13q-1(d)(2)(i).

<sup>223</sup> See 17 CFR 240.13q-1(d)(2)(ii).

<sup>224</sup> See 17 CFR 240.13q-1(d)(2)(iii).

<sup>225</sup> See letters from PWYP-US (Mar. 16, 2020); and Oxfam American and Earthrights International.

<sup>226</sup> See letters from PWYP-US (Mar. 16, 2020); and Oxfam American and Earthrights International.

<sup>227</sup> See letter from Davis Polk.

<sup>228</sup> See *infra* Section II.D.6.

<sup>229</sup> See *supra* note 190 for the definition of “smaller reporting company,” as amended.

<sup>230</sup> See *supra* note 191 for the definition of “emerging growth company.”

<sup>231</sup> See 2019 Rules Proposing Release at Section II.J.3. In particular, we expressed concern about the impact of the fixed cost component of the proposed rules on smaller reporting companies and emerging growth companies.

<sup>232</sup> See Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)].

and emerging growth companies and thus could impede their growth and access to capital markets.<sup>241</sup> We also understand commenters' concerns about the potentially large number of resource extraction issuers that would be excluded under the proposed exemption and the gap in coverage that would result. Therefore, while we are adopting an exemption for smaller reporting companies and emerging growth companies, we are removing from the scope of the exemption any company 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).<sup>242</sup> There will be only limited additional costs as such issuers will be able to submit a report complying with the reporting requirements of the alternative jurisdiction to satisfy its Section 13(q) disclosure obligations.<sup>243</sup>

Those companies eligible for alternative reporting will have a significantly reduced compliance burden under Section 13(q) and therefore will not need the exemption from Section 13(q) reporting as much as those smaller reporting companies and emerging growth companies that are not subject to an alternative reporting regime. We believe that this added limitation will reduce the scope of the exemption while retaining the exemption for companies that otherwise would bear the full burden of the Section 13(q) rules. For these latter companies, neither a smaller reporting company nor an emerging growth company will be required to provide any of the payment disclosure mandated by Section 13(q) and Rule 13q-1.

By tailoring the exemption in this way, we believe that the exemption for smaller reporting companies and emerging growth companies is consistent with the Commission's authority under Section 36(a) of the Exchange Act to adopt an exemption that is necessary or appropriate in the public interest, and consistent with the protection of investors.<sup>244</sup> The added limitation is in the public interest because it promotes the transparency objective of Section 13(q) while permitting smaller reporting companies and emerging growth companies not subject to foreign reporting regimes to

reduce their regulatory burdens to the ultimate benefit of their investors.<sup>245</sup>

#### 4. Delayed Reporting for Payments Related to Exploratory Activities

We are adopting a provision permitting delayed reporting of payments related to exploratory activities, as proposed.<sup>246</sup> Pursuant to this provision, issuers will not be required to report payments related to exploratory activities in the Form SD for the fiscal year in which payments are made. Instead, an issuer may delay reporting such payments until it submits a Form SD for the fiscal year following the fiscal year in which the payments were made.<sup>247</sup> 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 example, once exploratory activities end and development activities begin, the likelihood of competitive harm from payments terms related to the exploratory activities (e.g., payment information that might reveal the scope or significance of the project) is greatly diminished.

We adopted a similar delayed reporting provision 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.<sup>248</sup> Industry commenters have continued to support a delayed reporting provision for payments related to exploratory activities. For example, one commenter stated that exploration activity represents some of the most commercially sensitive investments by issuers and that reporting needs should be balanced to protect such

information.<sup>249</sup> Another commenter described the proposed delayed reporting provision as critical to protecting commercially sensitive information about resource extraction issuers' exploratory activities.<sup>250</sup>

Other commenters, however, opposed the proposed delayed reporting of payments related to exploratory activities. One commenter stated that exploratory activities can pose a high risk of corruption.<sup>251</sup> Another commenter indicated that, in the EU and Canadian transparency regimes, no issuer appears to have raised concerns about disclosures during the exploratory phase.<sup>252</sup>

We continue to believe that a provision permitting delayed reporting for payments related to exploratory activities is appropriate because of the commercially sensitive nature of exploratory activities. In reaching this conclusion, we have considered whether such a provision continues to be appropriate in light of the Modified Project Definition, which will provide the geographic location of a project at the national and major subnational political jurisdiction and therefore should mitigate the potential competitive harm that could result from disclosing a project at the contract level.

Although the Modified Project Definition should help alleviate competitive harm, and despite the absence of a similar exemption under the foreign reporting regimes,<sup>253</sup> we remain concerned that such harm could still occur. For example, harm could occur to the extent that the disclosure of a particular type or amount of a payment associated with the issuer's exploratory activities could reveal competitively sensitive information about the nature, significance, or specific details of such activities.<sup>254</sup> Thus, we continue to believe that a delayed reporting provision 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. Although one commenter

<sup>245</sup> See *supra* note 241.

<sup>246</sup> See Item 2.01(b)(1) of Form SD.

<sup>247</sup> 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.

<sup>248</sup> 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 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).

<sup>249</sup> See letter from API (Mar. 16, 2020).

<sup>250</sup> See letter from NAM.

<sup>251</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>252</sup> See letter from Oxfam America and Earthrights International.

<sup>253</sup> We reject the commenter's suggestion that the absence of a similar exemption under the foreign reporting regimes means that the concern for potential competitive harm resulting from the premature disclosure of payments related to exploratory activities does not exist or does not need to be addressed.

<sup>254</sup> See *supra* note 248.

<sup>241</sup> See *infra* Section III.D.2.

<sup>242</sup> See 17 CFR 240.13q-1(c).

<sup>243</sup> See 17 CFR 240.13q-1(d)(3). We discuss the alternative reporting provision in Section II.N and its associated costs in Section III.D.1.

<sup>244</sup> See 15 U.S.C. 78mm(a).

indicated that exploratory activities can pose a high risk of corruption, we believe that any such risk is mitigated because the exemption is of limited duration. Specifically, the payments related to the exploratory activities must be reported in the fiscal year following the fiscal year in which the issuer made the payments.

We also have considered whether this delayed reporting provision is appropriate in light of the extended deadline for furnishing the payment information compared to the deadline under the 2016 Rules. Again, we believe it is appropriate because of the difficulty of determining the precise point at which exploratory activities cease being commercially sensitive.

For purposes of this provision, we will consider payments to be related to exploratory activities if they are made as part of the process of: (1) Identifying areas that may warrant examination; (2) examining specific areas that are considered to have prospects of containing oil and gas reserves; or (3) conducting a mineral exploration program. In all cases, exploratory activities will be limited to activities conducted prior to the commercial development of the oil, natural gas, or minerals that are the subject of the exploratory activities.<sup>255</sup>

When proposing this provision, we also considered that the total payment streams from the first year of exploration that would be covered by the exemption would typically be relatively small compared to, for example, the annual payment streams that would likely occur once an issuer commences development and production. Given this, we continue to believe that any diminished transparency as a result of the one-year delay in reporting of such payments is justified by the potential competitive harm that we anticipate may be avoided as a result of this exemptive relief. Nevertheless, we are limiting the delay 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.<sup>256</sup>

#### 5. Transitional Relief for Recently Acquired Companies

We are adopting, as proposed, 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).<sup>257</sup> 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.<sup>258</sup> As noted by those commenters, the Commission adopted a similar provision under Rule 13p–1,<sup>259</sup> which also requires disclosure on Form SD.<sup>260</sup>

We received little comment on the proposed transitional relief for recently acquired companies. One commenter did not believe that the proposed relief was necessary and noted that this issue never arose during adoption of the EU and Canadian transparency regimes.<sup>261</sup> This commenter also stated that since the relief is temporary, and of short duration, the commenter would not object if the Commission finds that this transitional relief for recently acquired companies provides necessary compliance cost reductions.

Under Section 13(q) and the final rules, an issuer is 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 issuer's resource extraction payment information in its first annual

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 delay in reporting exploratory payments. Although we solicited comment on other potential timeframes for relief, no commenters suggested other timeframes. 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.D.6., if it believes that its individual circumstances warranted a longer exemptive period than the proposed one-year exemption.

<sup>257</sup> See Item 2.01(b)(2) of Form SD.

<sup>258</sup> See 2016 Adopting Release, Section II.G.3. (citing letters from Cleary, Gottlieb, Steen and Hamilton (Feb. 17, 2016); and Ropes & Gray (Feb. 16, 2016)).

<sup>259</sup> 17 CFR 240.13p–1.

<sup>260</sup> See Instruction (3) to Item 1.01 of Form SD. The final rules differ, however, from what is provided for under Rule 13p–1 because disclosure under Rule 13p–1 occurs on a calendar year basis rather than a fiscal year basis.

<sup>261</sup> See letter from PWYP–US (Mar. 16, 2020).

submission after obtaining control. We continue to be concerned that implementing the appropriate reporting mechanisms in a timely manner for an issuer that was not previously subject to reporting under Section 13(q) or an alternative reporting regime might remain a significant undertaking. As such, we are adopting the proposed transitional relief with respect to such issuers.

Under the final rules, issuers will not need to report payment information for an issuer that it acquired or over which it otherwise obtained control, if the acquired issuer, 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 will begin reporting payment information for the acquired issuer 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 delayed reporting provision for exploratory activities, an issuer will not be required to provide the (excluded) payment disclosure for the year in which it acquired the issuer in a future Form SD.<sup>262</sup>

As explained in the 2016 rulemaking, the transitional relief will not apply to companies that have been subject to Section 13(q)'s disclosure requirements or to those of an alternative reporting regime in their last full fiscal year prior to their acquisition.<sup>263</sup> Those 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.

#### 6. Transitional Relief for Initial Public Offerings

We are adopting, as proposed, 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.<sup>264</sup> Such an issuer will 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.

We received a small number of comments on the proposed transitional relief for initial public offerings. Those

<sup>262</sup> See 2016 Adopting Release at Section II.G.3.

<sup>263</sup> See *id.*

<sup>264</sup> See Item 2.01(b)(3) of Form SD.

<sup>255</sup> See Item 2.01(b)(1) of Form SD.

<sup>256</sup> We appreciate that the exploratory phase may vary from project to project, and that this variance can depend on such considerations as the geographic area in which the exploration is being undertaken and the type of resource being sought. In adopting a one-year reporting delay, we note that commenters in the oil and gas industry 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,

commenters stated that, although the proposed measure would result in some loss of transparency, because the relief would be temporary, it was an appropriate modification of the 2016 Rules that would help meet the CRA mandate that the new rule not be substantially the same as the disapproved rule.<sup>265</sup>

This 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 establish reporting systems and prepare the appropriate disclosure prior to undertaking the initial public offering.<sup>266</sup>

In reconsidering the 2016 Rules, however, we believe that the Section 13(q) rules could impose a compliance burden on a non-reporting resource extraction issuer that could impede its ability to become a public company and fully gain access to U.S. capital markets. We further believe that providing transitional relief for issuers conducting initial public offerings is consistent with our statutory duty in a public rulemaking to consider whether an action will promote efficiency, competition, and capital formation.<sup>267</sup> Reducing regulatory burdens in connection with initial public offerings not only helps issuers conducting those offerings but provides investors with expanded investment opportunities.<sup>268</sup> For the foregoing reasons, we believe that providing transitional relief to resource extraction issuers conducting initial public offerings is also consistent with our authority under Section 36(a) of the Exchange Act to provide an exemption to the extent that such exemption is appropriate in the public interest and is consistent with the protection of investors.<sup>269</sup>

As we explained when proposing this transitional relief for initial public offerings, 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 issuer would then incur these costs unnecessarily if it chose not to move forward with a planned initial public offering.<sup>270</sup> We also continue to believe that the adopted transitional relief is an appropriate measure to 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 inconsistent with our statutory duty to adopt rules that promote capital formation and would result in lost investment opportunities to the detriment of investors. They also would be contrary to the stated goals of Section 13(q) as they would delay the disclosure provided under that section.

#### 7. Case-by-Case Exemption

We are adopting the proposed rule provision that will permit issuers to 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).<sup>271</sup> This provision will enable issuers to address any other potential bases for exemptive relief, beyond the rule-based exemptions and transitional relief described above. We adopted a similar provision in the 2016 Rules.<sup>272</sup>

We received a limited number of comments on the proposed case-by-case exemption.<sup>273</sup> One commenter opposed the proposed exemption because it did not believe that any other exemptions are warranted, and noted that no such exemptions exist in the other markets where companies are already regularly reporting their payments to governments.<sup>274</sup> Other commenters suggested that the case-by-case exemptive approach in the 2016 Rules was preferable to the proposed exemptions for conflicts of law and pre-existing contracts and the proposed exemption for smaller reporting companies and emerging growth companies, which they believed to be overly broad.<sup>275</sup>

Under the final rules, issuers seeking a case-by-case exemption will be required to submit a written request for exemptive relief to the Commission.<sup>276</sup>

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 will be able to consider all appropriate factors in deciding 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. We anticipate relying on Section 36(a) of the Exchange Act<sup>277</sup> to provide exemptive relief under this framework. In situations where exigent circumstances exist, the Commission staff, acting pursuant to delegated authority from the Commission, could rely on 15 U.S.C. 78l(h) (Exchange Act Section 12(h)) for the limited purpose of providing interim relief while the Commission considered the Section 36(a) exemptive application.

This approach will allow the Commission to determine if and when exemptive relief may be warranted and how broadly it should apply, based on the specific facts and circumstances presented in the application. 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.

#### 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.<sup>278</sup> We are adopting

exemption to follow the procedures of 17 CFR 240.0–12, which, pursuant to 17 CFR 240.0–12(a), requires the request for exemptive relief to be in writing).

<sup>277</sup> See 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).

<sup>278</sup> See 15 U.S.C. 78m(q)(2)(A).

<sup>265</sup> See letters from PWYP–US (Mar. 16, 2020); and Oxfam America and Earthrights International.

<sup>266</sup> See 2016 Adopting Release, Section II.G.

<sup>267</sup> See *supra* note 232.

<sup>268</sup> See, e.g., Remarks of Chairman Jay Clayton on Capital Formation at the 36/86 Entrepreneurship Festival (Aug. 29, 2018), which is available at <https://www.sec.gov/news/speech/speech-clayton-082918>.

<sup>269</sup> See 15 U.S.C. 78mm(a).

<sup>270</sup> See 2019 Rules Proposing Release at II.J.6.

<sup>271</sup> See 17 CFR 240.13q–1(d)(4).

<sup>272</sup> See 2016 Rules Adopting Release at Section II.I.3.

<sup>273</sup> See, e.g., letters from Elise J. Bean; and PWYP–US (Mar. 16, 2020).

<sup>274</sup> See letter from PWYP–US (Mar. 16, 2020).

<sup>275</sup> See, e.g., letter from Elise J. Bean.

<sup>276</sup> See 17 CFR 240.13q–1(d)(4) (requiring an issuer that files an application for a case-by-case



the proposed definition of “subsidiary” to mean an entity controlled directly or indirectly through one or more intermediaries.”<sup>279</sup> We also are adopting the proposed definition of “control” based on accounting principles rather than using the definition of that term provided in 17 CFR 240.12b–2 (“Exchange Act Rule 12b–2”),<sup>280</sup> which was the case under the 2012 Rules.<sup>281</sup>

Under the final rules, a resource extraction issuer will 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 should 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.<sup>282</sup> 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 should consider determining control using U.S. GAAP.<sup>283</sup>

We continue to believe that this definition of control, compared to 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 this 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.<sup>284</sup> The disclosure of these accounting policies should provide greater transparency about how the issuer determined which entities and payments should be included within the scope of the required disclosures. Finally, a resource extraction issuer’s determination of control under the Section 13(q) rules will be subject to the audit process as well as to the internal accounting controls that issuers are required to have in place with respect to reporting audited financial statements filed with the Commission.<sup>285</sup>

The 2016 Rules included the same definition of “subsidiary” and a similar definition of “control.”<sup>286</sup> Unlike the 2016 Rules, the definition of control we are adopting excludes entities or operations in which an issuer has only a proportionate interest, so that a resource extraction issuer will not be required to disclose the proportionate amount of the payments made by its proportionately consolidated entities or operations.<sup>287</sup> We proposed to exclude such entities after reconsidering some of the comments in the 2016 rulemaking that raised concern about the definition of control and the potential compliance burden and impracticalities associated with using a broader definition of control.<sup>288</sup> 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 in the 2016 rulemaking 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.<sup>289</sup> 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 13(q) rules, which could significantly increase its compliance burden.

Most commenters that addressed the issue supported the proposed definition of control based on applicable accounting principles.<sup>290</sup> For example, one commenter stated that the proposed approach will reduce compliance costs for issuers since the definition of control is consistent with the entities that are included in financial filings, will align with internal controls, and lead to greater consistency in interpretation of Section 13(q) obligations across resource extraction issuers.<sup>291</sup>

A number of commenters also supported the proposed treatment of proportionate interests.<sup>292</sup> One commenter stated that proportionate reporting would require a significant number of issuers subject to Section 13(q) to modify their internal accounting/financial reporting systems and processes.<sup>293</sup> Several commenters also reiterated their concern that requiring the reporting of payments by proportionate interests would conflict with the typical operating model in the oil and natural gas industry for joint ventures or similar arrangements. In those arrangements, a single company typically explores, develops, and operates a field, including making the necessary disbursements to governments for the entire joint venture or arrangement. The other (non-operator) members then reimburse the operator for their respective share of the payments. The non-operator members typically do not have access to the level of information required to report the payments and may be forced to renegotiate the joint venture agreement or make other arrangements to obtain sufficiently detailed payment information, or may not be able to obtain that information from the operator. In addition, the resource extraction issuer that is the operator of the joint venture or arrangement would

<sup>284</sup> See ASC 235–10–50; IFRS 8. See also 17 CFR 210.1–01, 2–01 and 4–01 (Rules 1–01, 3–01, and 4–01 of Regulation S–X).

<sup>285</sup> See Exchange Act Section 13(b)(2)(B) [15 U.S.C. 78m(b)(2)(B)]. See also 17 CFR 240.13a–15 and 17 CFR 240.15d–15. We note, however, that the final rules will not create a new auditing requirement.

<sup>286</sup> See 2016 Rules Adopting Release at Section II.D.3.

<sup>287</sup> See Item 2.01(d)(3) of Form SD. 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.

<sup>288</sup> See 2019 Rules Proposing Release at Section II.E (citing letters from API (Feb. 16, 2016); BP (Feb. 16, 2016); Chevron (Feb. 16, 2016); ExxonMobil (Feb. 16, 2016); Petrobras (Feb. 16, 2016); and Royal Dutch Shell (Feb. 5, 2016)).

<sup>289</sup> See, e.g., letters from API (Feb. 16, 2016); and ExxonMobil (Feb. 16, 2016).

<sup>290</sup> See letters from API (Mar. 16, 2020); Ovinity; Petrobras; and SAF.

<sup>291</sup> See letter from API (Mar. 16, 2020).

<sup>292</sup> See letters from API (Mar. 16, 2020); Ovinity; Petrobras; and SAF.

<sup>293</sup> See letter from API (Mar. 16, 2020).

<sup>279</sup> See Item 2.01(d)(12) of Form SD.

<sup>280</sup> Under Exchange Act Rule 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.

<sup>281</sup> See 2012 Adopting Release at Section II.D.4.c.

<sup>282</sup> See Item 2.01(d)(3) of Form SD.; see also Accounting Standards Codification (“ASC”) 810, Consolidation; and IFRS 10, Consolidated Financial Statements.

<sup>283</sup> See Item 2.01(d)(3) of Form SD.

then be required to provide its non-operating partners with the amount and type of each payments remitted to each governmental entity, the timing of the remittance and their corresponding share of the remittance.<sup>294</sup> Thus, not requiring proportionate reporting should reduce the compliance burden on all members of the joint venture or arrangement.<sup>295</sup>

In addition, according to one commenter, not requiring proportionate reporting would reduce the risks of double counting payments, uncertainties relating to the proportionate amount that should be included in each member's report and inconsistent approaches being taken between different joint ventures.<sup>296</sup>

Other commenters stated that, while they were not in favor of eliminating the requirement to report the payments of proportionate interests because of the significant loss of data that would result, this change would be an acceptable way to cause the new rule to be not substantially the same as the 2016 Rules, because it would reduce compliance costs without undermining consistency with the non-U.S. payment-to-governments reporting regimes. According to these commenters, the question of joint venture reporting is neither squarely addressed in Section 13(q) nor has it been settled globally, as the reporting of joint venture payments has been inconsistent.<sup>297</sup> A small number of commenters opposed the proposed definition of control because of its potential detrimental effect on the reporting of payments by joint ventures.<sup>298</sup>

We recognize that excluding proportionate interest entities or operations from the proposed definition of control could potentially result in less payment information about joint ventures or arrangements becoming public, as compared to the 2016 Rules. The most recent comments on this issue, which are mostly in favor of excluding such entities, have nevertheless reinforced our belief that this potential reduction in transparency is justified as a means to help reduce the compliance burden of the Section 13(q) rules.

Some commenters requested that we clarify the payment disclosure obligations of members in a joint

venture or other joint arrangement where no one party has control.<sup>299</sup> We agree that additional clarification would be useful and have added an appropriate instruction. That instruction provides that in a joint venture or arrangement, where no single party has control, a resource extraction issuer that is the operator of the venture or arrangement and makes payments to governments for the entire venture or arrangement, on behalf of its non-operator members, must report all of the payments. The non-operator members are not required to report payments that they make to reimburse the operator for their share of the payments to governments. Such non-operator members are only required to report payments that, as resource extraction issuers, they make directly to governments.<sup>300</sup>

#### *F. Treatment for Purposes of the Exchange Act and Securities Act*

We are adopting the proposed treatment of the disclosure provided pursuant to Section 13q-1 on Form SD as being furnished to, but not filed with, the Commission.<sup>301</sup> The Commission originally proposed a similar approach in the 2012 Rules Proposing Release,<sup>302</sup> but chose to require the disclosure to be filed in both the 2012 and the 2016 Rules.<sup>303</sup> When most recently proposing the Section 13(q) rules, after reviewing the various reasons articulated for treating the Section 13(q) disclosure as filed or furnished,<sup>304</sup> the Commission

stated that compelling arguments could be made on both sides of this policy choice.<sup>305</sup>

Several commenters supported the proposed treatment of the Section 13(q) disclosure on Form SD as furnished.<sup>306</sup> One commenter favored the proposed treatment because it viewed the purpose of the Section 13(q) disclosure as different from the type of information normally filed with the Commission by issuers. This commenter also indicated that, in its view, the proposed treatment strikes an appropriate balance between addressing the need for transparency with the costs and liabilities associated with filing it with the Commission.<sup>307</sup> Other commenters supported treating the payment disclosure as furnished because, in addition to not resulting in Section 18 liability, such treatment would not subject the disclosure to incorporation by reference in a Securities Act filing.<sup>308</sup>

Some commenters, however, opposed the proposed treatment of the Section 13(q) reports as being furnished.<sup>309</sup> For example, one commenter stated that the objectives of Section 13(q) are identical in nature and purpose to other disclosures required under the Exchange Act that are designed to benefit investors.<sup>310</sup> Another commenter stated that subjecting the payment disclosure to Section 18 liability would be appropriate because Section 18 imposes liability on any person who makes false and misleading statements of material fact on any report filed under the Exchange Act.<sup>311</sup> Other commenters stated that the proposed treatment would diminish the rules' effectiveness and ease the level of accountability to which resource

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 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 at Section II.F.3.b.; and 2016 Adopting Release at Section II.L.2.

<sup>305</sup> See 2019 Rules Proposing Release at Section II.M.

<sup>306</sup> See letters from API (Mar. 16, 2020); Chamber; Equinor; Ovintiv; and Royal Dutch Shell (Mar. 30, 2020).

<sup>307</sup> See letter from API (Mar. 16, 2020).

<sup>308</sup> See letters from Chamber; and Equinor.

<sup>309</sup> See letters from Chris Barnard (Mar. 19, 2020); KCSPG; Public Citizen; and PWYP-US (Mar. 16, 2020).

<sup>310</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>311</sup> See letter from Chris Barnard.

<sup>294</sup> See letter from API (Mar. 16, 2020).

<sup>295</sup> See, e.g., letters from API (Mar. 16, 2020); and Ovintiv.

<sup>296</sup> See letter from Ovintiv.

<sup>297</sup> See letter from PWYP-US (Mar. 16, 2020); see also letter from Oxfam America and Earthrights International.

<sup>298</sup> See letter from Public Citizen; see also letter from KCSPG.

<sup>299</sup> See letters from API (Mar. 16, 2020); and Ovintiv.

<sup>300</sup> See Instruction 6 to Item 2.01 of Form SD.

<sup>301</sup> The final rules use the term "furnished" when referring to the requirement to submit Form SD to provide Section 13(q) payment information to the Commission. See, e.g., 17 CFR 240.13q-1(a); see also General Instruction B.4 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 them by reference into such filing).

<sup>302</sup> See 2012 Rules Proposing Release at Section II.F.3 (noting that Section 13(q) neither specifically states how the information should be submitted nor states 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.)

<sup>303</sup> See 2012 Rules Adopting Release at Section II.F.3; and 2016 Rules Adopting Release at Section II.L.3.

<sup>304</sup> For example, in the prior rulemakings, commenters that indicated 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.

extraction issuers are held when reporting payments.<sup>312</sup>

After reviewing all of the comments, we are persuaded to treat the Section 13(q) reports as furnished to, and not filed with, the Commission. We believe this is a reasonable and appropriate policy choice because of the different nature and purpose of the Section 13(q) disclosures compared to other disclosures required under Section 13. Specifically, in contrast to disclosure that is typically required to be filed under Section 13, the Section 13(q) disclosure requirements are not for the protection of investors. Rather, they are to increase the accountability of governments for the proceeds they receive from their natural resources and to support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.<sup>313</sup> While such disclosures may be considered by some investors, as noted above, the disclosure is not for investor protection purposes. Since Section 18 is designed to protect investors, we do not believe it is necessary or appropriate to apply it to the Section 13(q) disclosures. Additionally, we believe that this treatment will not significantly undermine the transparency objectives of Section 13(q), as it will limit the Section 18 liability for the required disclosures but will not affect the content of those disclosures. Moreover, we note that the Section 13(q) disclosures will continue to be subject to the Exchange Act's general antifraud provisions.<sup>314</sup>

This treatment will eliminate the possibility of Section 18 liability for the Section 13(q) disclosure. It will also eliminate the risk 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 incorporates such information.<sup>315</sup>

#### *G. Definitions of "Foreign Government" and "Federal Government"*

We are adopting the proposed definitions of "foreign government" and "Federal Government" with a slight modification. Consistent with Section 13(q),<sup>316</sup> we proposed to define "foreign government" to mean a foreign government, a department, agency, or instrumentality of a foreign government, or a company at least majority-owned by a foreign government. In order to eliminate the circularity of the first part of the proposed definition, we are clarifying that, under the final rules, a "foreign government" means the national government of a foreign country, as well as any department, agency, or instrumentality of the national government, or a company at least majority owned by the national government of a foreign country.<sup>317</sup> Similar to the proposed definition, the adopted definition also provides that the term "foreign government" also includes any subnational governments of a foreign country, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.<sup>318</sup> As proposed, "Federal Government" is defined as the Federal government of the United States and does not include subnational governments within the United States.<sup>319</sup>

These definitions are essentially the same definitions of "foreign government" and "Federal Government" adopted in the 2016 and 2012 rulemakings.<sup>320</sup> We included all subnational governments within the definition of "foreign government" in both the 2012 and 2016 rulemakings.<sup>321</sup> We believe this is a reasonable and appropriate way to define the term "foreign government." For example, we note that this approach is consistent with the inclusion of subnational governments under the foreign reporting regimes and the EITI.<sup>322</sup> Although we

received little comment on the proposed definitions in the current rulemaking, many prior commenters supported the inclusion of subnational governments in the definition of foreign government because resource extraction issuers frequently make payments to subnational governments.<sup>323</sup>

In the current rulemaking, one commenter supported both of the proposed definitions but recommended that we include under the definition of "foreign government" a company that is controlled by a foreign government.<sup>324</sup> We decline to follow this recommendation because, as we explained when proposing the definition of "foreign government" to include a company that is at least majority-owned by a foreign government,<sup>325</sup> we believe it would be difficult for issuers to determine when the government has control over a particular entity outside of a majority-ownership context. In this regard, we note that Section 13(q) 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.<sup>326</sup>

For purposes of identifying the foreign governments that received payments at a level below the major subnational government level, we proposed to permit an issuer to aggregate all of its payments of a particular payment type without having to identify the particular subnational government payee. The proposed instruction to Form SD would have permitted an issuer to aggregate payments by payment type made to multiple counties and municipalities (the level below major subnational government level), disclose the aggregate amount without having to identify the particular subnational government payee, and instead generically identify the subnational government payee (e.g., as "county," "municipality" or some combination of

governments; (c) any trust, board, commission, corporation or body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government . . . or (d) any other prescribed payee;" and Requirement 4.6 of the EITI Standard (2019), which requires the multi-stakeholder group to ensure that company payments to subnational government entities and the receipt of these payments are disclosed, if material.

<sup>323</sup> See 2012 Rules Adopting Release at Section II.E.2., note 341 and accompanying text.

<sup>324</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>325</sup> See 2019 Rules Proposing Release at Section II.G.

<sup>326</sup> Compare Section 13(q)(1)(B) with Section 13(q)(2)(A).

<sup>316</sup> See 15 U.S.C. 78m(q)(1)(B).

<sup>317</sup> See Item 2.01(d)(7) of Form SD.

<sup>318</sup> See *id.* To the extent that aboriginal, indigenous, or tribal governments are subnational governments in foreign countries, payments to those government entities will be covered by the Section 13(q) rules.

<sup>319</sup> See Item 2.01(d)(6) of Form SD.

<sup>320</sup> See 2016 Rules Adopting Release at Section II.F.3; and 2012 Rules Adopting Release at Section II.E.3.

<sup>321</sup> See *id.*

<sup>322</sup> See, e.g., Article 41(3) of the EU Accounting Directive, which defines "government" to mean "any national, regional or local authority of a Member State or of a third country" and which "includes a department, agency or undertaking controlled by that authority. . ."; see also Article 2 of Canada's ESTMA, which defines "payee" to mean "(a) any government in Canada or in a foreign state; (b) a body that is established by two or more

<sup>312</sup> See letters from KCSPOG; and Public Citizen.

<sup>313</sup> See, e.g., letter from API (Mar. 16, 2020).

<sup>314</sup> See, e.g., Section 10(b) of the Exchange Act [15 U.S.C. 78j(b)] and 17 CFR 240.10b-5.

<sup>315</sup> See General Instruction B.4 of Form SD. 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 will 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.

subnational governments).<sup>327</sup> We proposed 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.<sup>328</sup>

A few commenters supported the proposed approach permitting the generic description and aggregated disclosure of subnational government payments.<sup>329</sup> One commenter indicated that because payments below the major subnational jurisdictional level tend to be relatively minimal, it did not believe that more granular reporting below that level would provide meaningful transparency benefits.<sup>330</sup> Another commenter stated that the proposed approach would reduce compliance costs.<sup>331</sup>

In contrast, several commenters opposed the proposed approach regarding the aggregated and generic disclosure of subnational government payments.<sup>332</sup> For example, several of these commenters stated that the disclosure of each subnational payee is critical to fulfill the transparency and anti-corruption objectives of Section 13(q).<sup>333</sup> One commenter indicated that the proposed approach would equate to anonymity for local government entities, which would deprive citizens of the information needed to hold local government entities accountable for receipt and management of payments to them and which, in the absence of such information, could fuel suspicion that payments were not made in accordance with fiscal obligations.<sup>334</sup> This commenter further maintained that transparent disclosure of payments made at the subnational government level would not increase the potential for competitive harm because many issuers are already disclosing such payments and identifying the subnational government payee pursuant to the requirements of non-U.S. reporting regimes.<sup>335</sup>

Another commenter stated that the proposed generic approach to subnational government payments is inconsistent with the statutory language, which dictates that the payment disclosure include electronic tags that *identify* the government that received the payment, in addition to the country in which the government is located.<sup>336</sup> This commenter, along with others, also indicated that the proposed generic approach would undermine the anti-corruption objective of Section 13(q).<sup>337</sup>

After considering all of the comments, we have reconsidered our proposed generic approach to the disclosure of payments to subnational governments. Under the final rules, an issuer will still be able to aggregate payments by payment type when disclosing payments made at a level below the major subnational government level. It will, however, now be required to disclose the aggregated amount paid to, and identify, each subnational political jurisdiction. For example, an issuer with extractive operations in the three oil sands regions of Alberta, Canada<sup>338</sup> (the Regional Municipality of Wood Buffalo, Northern Sunrise County, and the Municipality of Cold Lake), would be required to identify each such subnational government entity, as well as aggregate and report all of its fees paid for environmental and other permits to each such entity.

In this regard, an issuer's reporting obligations at the level below major subnational government will be the same as its reporting obligations at the major subnational government level. For example, an issuer could aggregate all of the royalties arising from its operations in the three oil sands areas paid at the provincial level but will be required to disclose the particular agency payee, *e.g.*, the Alberta Department of Energy.

We find persuasive commenters' concerns that Section 13(q)'s transparency objective will be better served by this approach. Further, we believe that adoption of the Modified Project Definition is sufficient to render the final rules not substantially the same as the 2016 Rules for the purpose of

satisfying the CRA. Thus, while the proposed approach could help distinguish the final rules from the disapproved rules, we do not believe it is necessary or appropriate in light of the changes described above and its likely adverse impact on Section 13(q)'s transparency objective.

Moreover, as one industry commenter indicated in the 2016 rulemaking, the disclosure of payments at the subnational government level and the identification of the subnational government payee would work in tandem with a definition of "project" that permits the aggregation of payments at the major subnational jurisdiction level. According to this commenter, this information would provide citizens with the payment data necessary to hold their leaders accountable at all levels of government.<sup>339</sup> We note that this industry commenter, who consistently argued that a less granular project definition was necessary to minimize the potential for competitive harm, also supported the required identification of subnational government payees. Upon reconsideration, we similarly believe that the proposed generic approach to subnational government payments is a discretionary choice that is not necessary to minimize the potential for competitive harm.

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, local, or tribal 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.

#### H. Definition of "Resource Extraction Issuer"

We are adopting the proposed definition of "resource extraction

<sup>327</sup> See 2019 Rules Proposing Release at Section II.G (discussing proposed Instruction (14) to Item 2.01 of Form SD).

<sup>328</sup> See *id.*

<sup>329</sup> See letters of API (Mar. 16, 2020); Chamber; and NAM.

<sup>330</sup> See letter from API (Mar. 16, 2020).

<sup>331</sup> See letter from NAM.

<sup>332</sup> See letters from Oxfam America and Earthrights International; POGO; PWYP-US (Mar. 16, 2020); and Congr. Waters *et al.*

<sup>333</sup> See letters from PWYP-US (Mar. 16, 2020); and Congr. Waters *et al.* (stating that full public reporting—including of the company making the payment and the entity receiving it—is a basic requirement of an effective transparency regime).

<sup>334</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>335</sup> See *id.* (stating that, under Canada's ESTMA, issuers must disclose payments to governments at any level, including national, regional, state,

provincial, territorial, or local/municipal levels; under UK payments-to-governments regulations, "government" is defined as any national, regional, or local authority of a country; and under the EITI Standard, payment data must be disaggregated by each government entity).

<sup>336</sup> See Oxfam America and Earthrights International (citing 15 U.S.C. 78m(q)(2)(D)(ii)(V)).

<sup>337</sup> See *id.*; see also letter from POGO.

<sup>338</sup> 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>.

<sup>339</sup> See letter from ExxonMobil (Feb. 16, 2016) ("... some commenters appear to overlook the fact that project tagging is only one aspect of the multiple data points to be included in 1504 reports. In addition to tagging payments by project, companies would also report each payment outside the U.S. by specific government payee, including national, sub-national, and local and community-level government payees. Thus, the API project definition combined with reporting of payments at all levels of government will enable host country citizens easily to determine the amounts received by their local, state and federal government agencies from resource extraction activities occurring in their state or province. Citizens would know how much money is coming directly from the industry at each level of government and be able to lobby the applicable level of government for greater accountability for the use of such revenues, such as by advocating for changes in revenue sharing or allocations to local needs.")

issuer” to mean an issuer that is required to file an annual report with the Commission on Form 10-K,<sup>340</sup> Form 20-F,<sup>341</sup> or Form 40-F<sup>342</sup> pursuant to Section 13 or 15(d) of the Exchange Act<sup>343</sup> and engages in the commercial development of oil, natural gas, or minerals.<sup>344</sup> Section 13(q) defines a resource extraction issuer in part as an issuer that is “required to file an annual report with the Commission.”<sup>345</sup> As we explained when proposing this definition, we believe this language could reasonably be read to include or to exclude issuers that file annual reports on forms other than Forms 10-K, 20-F, or 40-F.<sup>346</sup> We are therefore exercising our discretion and covering only issuers that file annual reports on Forms 10-K, 20-F, or 40-F. As with the 2016 Rules, we believe that covering issuers that provide disclosure outside of the Exchange Act reporting framework would do little to reasonably likely achieve the transparency objectives of Section 13(q) but would add costs and burdens to the existing disclosure regime governing those categories of issuers. The adopted definition therefore excludes issuers subject to Tier 2 reporting obligations under Regulation A and issuers filing annual reports pursuant to Regulation Crowdfunding.<sup>347</sup> In addition, investment companies registered under the Investment Company Act of 1940 (“Investment Company Act”)<sup>348</sup> will not be subject to the final rules.<sup>349</sup>

Although almost all of the commenters on the 2016 Rules Proposing Release supported a definition similar to the one we are adopting in this release,<sup>350</sup> we received

little comment on the more recently proposed definition of “resource extraction issuer.”<sup>351</sup> One commenter supported the proposed definition because, in the commenter’s view, it aligns with the statutory definition of resource extraction issuer.<sup>352</sup> This commenter also agreed that foreign private issuers<sup>353</sup> that file annual reports on Forms 20-F or 40-F should be included within the scope of the definition. The commenter stated that to exclude such foreign private issuers would be inconsistent with Congressional intent underlying Section 13(q) and the international transparency promotion laws, none of which exclude foreign companies.<sup>354</sup>

Although the final rules will apply to reporting foreign private issuers, as proposed, consistent with the 2016 Rules, the final rules will not apply to foreign private issuers that are exempt from Exchange Act registration and reporting obligations pursuant to 17 CFR 240.12g3-2(b) (“Rule 12g3-2(b)”). As discussed in prior releases, we continue to 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 Rule 12g3-2(b) exemption and would be inconsistent with the effect and purpose of that rule.<sup>355</sup>

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

We are adopting the proposed definition of “commercial development of oil, natural gas, or minerals” to mean exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any such activity.<sup>356</sup> This definition is consistent with the statutory definition.<sup>357</sup> Although we have discretionary authority to include other significant

activities relating to oil, natural gas, or minerals,<sup>358</sup> we have elected not to expand the list of covered activities beyond the explicit terms of Section 13(q). As we noted when proposing this definition, 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.<sup>359</sup> As was the case with the 2016 Rules, we have not sought to impose disclosure obligations that extend beyond Congress’ required 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 of oil, natural gas, or minerals” received little comment. One commenter supported the proposed definition because it is consistent with the statutory language of Section 13(q) and is in line with established international transparency standards.<sup>360</sup>

As proposed, the adopted definition of “commercial development” will 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, an issuer that is only providing products or services that support the exploration, extraction, processing, or export of such resources will not be a “resource extraction issuer” under the final rules.<sup>361</sup> For example, an issuer that manufactures drill bits or provides hardware to help issuers explore and extract will not be considered a resource extraction issuer. Similarly, an issuer engaged by an operator to provide hydraulic fracturing or drilling services, to enable the operator to extract resources, will not be a resource

<sup>340</sup> 17 CFR 249.310.

<sup>341</sup> 17 CFR 249.220f.

<sup>342</sup> 17 CFR 249.240f.

<sup>343</sup> 15 U.S.C. 78m or 78o(d).

<sup>344</sup> See 17 CFR 240.13q-1(d)(11).

<sup>345</sup> 15 U.S.C. 78m(q)(1)(D).

<sup>346</sup> See 2019 Rules Proposing Release at Section II.A.

<sup>347</sup> 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 December 2019, we estimate that only 5 of the 343 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 listed in Part 1 of Form 1-A. Similarly, between May 2016 through December 2019, we estimate that only 1 of the 1,975 Regulation Crowdfunding issuers appears to have been a resource extraction issuer.

<sup>348</sup> 15 U.S.C. 80a-1 *et seq.*

<sup>349</sup> 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)).

<sup>350</sup> See 2016 Rules Adopting Release at Section II.A.2.

<sup>351</sup> We did receive related comments objecting to broad exemptions from the scope of the Section 13(q) rules for classes of companies, such as emerging growth companies and smaller reporting companies, which would have been covered resource extraction issuers under the 2016 Rules. See, e.g., letters from KCSPG; PWYP-US (Mar. 16, 2020); and Oxfam America and Earthrights International. As previously explained, we are exempting emerging growth companies and smaller reporting companies from the scope of Rule 13q-1 because we believe that this change from the 2016 Rules will reduce the overall cost of the Section 13(q) rules. See *supra* Section II.D.3.

<sup>352</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>353</sup> See the definition of “foreign private issuer” in 17 CFR 230.405 and 17 CFR 240.3b-4.

<sup>354</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>355</sup> See 2016 Rules Adopting Release at Section II.A.3; and 2016 Rules Proposing Release at Section II.A.

<sup>356</sup> See Item 2.01(d)(2) of Form SD.

<sup>357</sup> See 15 U.S.C. 78m(q)(1)(A).

<sup>358</sup> See *id.*

<sup>359</sup> See 2019 Rules Proposing Release at Section II.B; and 2016 Rules Adopting Release at Section II.B.2.a.

<sup>360</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>361</sup> Marketing and security-related activities are not included within the final rules because those activities are not specifically included in the list of activities covered by the definition of “commercial development” under Section 13(q). In addition, including marketing and security-related activities within the final rules under Section 13(q) would go beyond what is covered by the non-U.S. payments-to-governments reporting regimes. See 2019 Rules Proposing Release at note 96.

extraction issuer.<sup>362</sup> We believe this approach is consistent with Section 13(q) and the approach adopted in the 2016 rulemaking, which most commenters that addressed the issue supported.<sup>363</sup> We also note that no commenter opposed this approach when commenting on the 2019 Rules Proposing Release.

Because, in response to commenters' requests, we provided guidance to clarify certain activities covered by the definition of "commercial development" in prior rulemakings,<sup>364</sup> we proposed to define or provide similar guidance on several terms contained within the definition.<sup>365</sup> We discuss these definitions and guidance and our reasons for adopting them in the subsections that follow.

#### 1. "Extraction" and "Processing"

The final rules define "extraction" to mean the production of oil or natural gas or the extraction of minerals.<sup>366</sup> This definition largely tracks the proposed definition<sup>367</sup> and is consistent with the definition adopted in the 2016 rulemaking.<sup>368</sup>

We received few comments on the proposed definition of extraction. One commenter supported the proposed definition because it is consistent with the statutory language of Section 13(q) and is in line with the established international transparency standards.<sup>369</sup> No commenter opposed the proposed definition on substantive grounds.

We are also adopting the proposed instruction regarding "processing."<sup>370</sup>

<sup>362</sup> As under the 2016 Rules, and as proposed, a resource extraction issuer will be required to disclose payments when a service provider makes a payment to a government on its behalf that meets the definition of "payment." See 2019 Rules Proposing Release at note 97. However, at the request of commenters, and consistent with our treatment of proportionate interests, see *supra* Section II.E., we have clarified that this disclosure obligation does not apply to a non-operator partner of a joint venture or arrangement that reimburses the operator for its share of the payments to governments made by the operator. See Instruction 7 to Item 2.01 of Form SD.

<sup>363</sup> See the 2016 Rules Adopting Release at Section II.B.2.a.

<sup>364</sup> See 2016 Rules Adopting Release at Section II.B.2; and 2012 Rules Adopting Release at Section II.C.2.

<sup>365</sup> See 2019 Rules Proposing Release at Section II.B.1–3.

<sup>366</sup> See Item 2.01(d)(5) of Form SD.

<sup>367</sup> We proposed to define "extraction" to mean the production of oil and natural gas as well as the extraction of minerals. See 2019 Rules Proposing Release at Section II.B.1. In response to a suggestion by one commenter, the final rules use the disjunctive "or" in the definition of extraction. See letter from Keith P. Bishop (Jan. 1, 2020).

<sup>368</sup> See 2016 Rules Adopting Release at Section II.B.3.

<sup>369</sup> See letter from PWYP–US (Mar. 16, 2020).

<sup>370</sup> The proposed rules included an instruction on the meaning of the term "processing" but did not

Like the definition of extraction, the instruction regarding processing largely tracks the one adopted in the 2016 rulemaking. Pursuant to that instruction, "processing" 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 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" also includes the crushing or preparing of raw ore prior to the smelting or refining phase.

The instruction regarding "processing" also provides, as proposed, that "processing" does not include downstream activities, such as refining or smelting. 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.<sup>371</sup> Accordingly, we do not believe that, for purposes of the Section 13(q) rules, the term "processing" should cover downstream activities. We also note that including refining or smelting within the final rules under Section 13(q) would go beyond what is contemplated by the statute.

We received a limited number of comments on the proposed instruction regarding "processing." One commenter agreed with the list of activities proposed to be included under the term "processing" because it is consistent with the statutory language of Section 13(q) and in line with established international transparency standards.<sup>372</sup>

provide a defined term. See Instruction (8) to Item 2.01 of Form SD.

<sup>371</sup> 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 Public Law 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 issuer and the upgrading of natural resources extracted by the issuer other than oil or gas into synthetic oil or gas). See 17 CFR 210.4–10(a)(16)(ii) (Rule 4–10(a)(16)(ii) of Regulation S–X).

<sup>372</sup> See letter from PWYP–US (Mar. 16, 2020).

Another commenter stated that it was unclear whether certain midstream activities that it engaged in would be included within the definition of "processing," but then did not identify the activities for which it sought further guidance.<sup>373</sup>

#### 2. "Export"

We are adopting the proposed definition of "export" to mean the movement of a resource across an international border from the host country to another country by an issuer with an ownership interest in the resource.<sup>374</sup> Pursuant to this definition, "export" will not include the movement of a resource across an international border by an issuer 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 will 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.<sup>375</sup> This definition is the same definition of export adopted under the 2016 Rules.

As in the 2016 rulemaking, we received a small number of comments that recommended defining "export" to include trading-related activities when an issuer makes a payment for the purchase of oil, natural gas, or minerals sold by a government, including a nationally owned company ("NOC").<sup>376</sup> These commenters indicated that commodity-trading related payments to governments for the purchase of oil, natural gas, or minerals has become an important source of revenue for many resource-rich countries across the globe, and is a commonly recognized revenue stream in relation to the commercial development of oil, natural gas, and minerals.<sup>377</sup>

We decline to follow this recommendation for similar reasons expressed when we elected not to include commodity-trading activities in connection with the purchase of oil, natural gas, or minerals from a government, including a NOC, in the 2016 rulemaking.<sup>378</sup> The adopted

<sup>373</sup> See letter from Petrobras.

<sup>374</sup> See Item 2.01(d)(4) of Form SD.

<sup>375</sup> See *id.*

<sup>376</sup> See letters from PWYP–US (Mar. 16, 2020); and Joseph Williams, Advocacy Manager, NRG (Mar. 16, 2020) (J. Williams, NRG); see also letter from Pietro Poretti (Feb. 15, 2016).

<sup>377</sup> See letters from PWYP–US (Mar. 16, 2020); and J. Williams, NRG.

<sup>378</sup> See 2016 Rules Adopting Release at Section II.B.3.

definition of export reflects the significance of the relationship between upstream activities, such as exploration and extraction, and the categories of payments to governments identified in the statute. We do not believe that Section 13(q) was intended to capture payments related to transportation on a fee-for-service basis across an international border by a service provider with no ownership interest in the resource.<sup>379</sup> We also do not believe that “export” was intended to capture activities with little direct relationship to upstream or midstream activities, such as commodity trading-related activities. We also note that, although commenters have stated that payments in connection with commodity trading-related activities have become a commonly recognized revenue stream in relation to the commercial development of oil, gas and minerals,<sup>380</sup> it does not appear that any of the other non-U.S. payments-to-governments reporting regimes (other than the EITI) have included such payments within their scope.

The adopted definition of export will 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. We believe this nexus would be particularly strong in instances where the company is repurchasing government production entitlements that were originally extracted by that issuer.<sup>381</sup>

### 3. “Minerals”

The proposed rules included an instruction on the meaning of the term “minerals” but did not define the term.<sup>382</sup> The proposed instruction to Form SD referred issuers to the use of the term “minerals” in our other disclosure rules.<sup>383</sup> We used this

approach based on our belief that the term “minerals” is commonly understood<sup>384</sup> and includes, at a minimum, any material for which an issuer with mining operations would provide disclosure under the Commission’s existing or successor disclosure requirements and policies for mining properties.<sup>385</sup> We also believed that a flexible approach to this term would preserve consistency between the term’s use under the Section 13(q) rules and its use in our other disclosure requirements and policies.<sup>386</sup> As such, the Form SD guidance on the term “minerals” would encompass any changes to that term that may be reflected in our disclosure requirements for mining registrants. In support of this approach, which is consistent with the Commission’s approach in the 2016 rulemaking, we noted that no industry commenter suggested that we define the term in connection with the 2016 Rules.<sup>387</sup>

provide disclosure under the Commission’s existing disclosure requirements and policies, including Industry Guide 7 or any successor requirements or policies (see 17 CFR 229.1300 *et seq.* (subpart 1300 of Regulation S-K)). The proposed instruction further stated that “minerals” does not include oil and gas resources (as defined in 17 CFR 210.4–10(a)(16)(D) or any successor provision).

<sup>384</sup> The Commission’s staff has previously provided similar guidance. See Disclosure of Payments by Resource Extraction Issuers FAQ 3 (May 30, 2013) available at <https://www.sec.gov/divisions/corpfin/guidance/resourceextraction-faq.htm>.

<sup>385</sup> In 2018, the Commission 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, will replace the mining property disclosure guidance in 17 CFR 229.801(g) and 802(g) (Industry Guide 7) and requirements in 17 CFR 229.102 (Item 102 of Regulation S-K). Registrants engaged in mining operations must comply with the new rules for the first fiscal year beginning on or after January 1, 2021. See Release No. 33–10570 at Section I.

<sup>386</sup> 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.”

<sup>387</sup> See 2019 Rules Proposing Release at Section II.B.3 (citing 2016 Rules Adopting Release, note 149 and accompanying text).

We received limited comment on our approach to the term “minerals.” One commenter supported the proposed instruction regarding “minerals” and did not believe that further defining the term was necessary.<sup>388</sup> Another commenter, however, did not believe that there was a commonly understood meaning of “minerals” and recommended that we provide a definition for the term.<sup>389</sup>

We decline to follow the recommendation of the commenter who suggested that we define the term “mineral.” In this regard, we note that, in response to the 2019 proposed rulemaking, as well as to the 2016 rulemaking, no industry commenter has requested that we provide a definition of “minerals.” This reinforces our belief that the term “minerals” is commonly understood. We also continue to believe that our flexible approach will preserve consistency with the use of that term in our other disclosure requirements and policies, and in particular, with the use of that term under the Commission’s new disclosure rules for mining registrants.<sup>390</sup>

We are therefore not adopting a separate definition for “minerals” and, instead, are adopting the proposed instruction with one minor revision. Because the new disclosure rules for mining registrants will be effective, and will supersede the older guidance in Industry Guide 7, when issuers will be required to comply with the Section 13(q) rules, the adopted instruction refers solely to the new mining disclosure rules, and omits the reference to Industry Guide 7.<sup>391</sup>

### J. 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 guidelines (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.<sup>392</sup>

As with the 2016 Rules, we proposed to define “payment” to include the specific types of payments identified in

<sup>379</sup> It is noteworthy that Section 13(q) includes export, but not transportation, in the list of covered activities. In contrast, SADA specifically includes “transporting” in the definition of “oil and gas activities” and “mineral extraction activities.” The inclusion of “transporting” in SADA, in contrast to the language of Section 13(q), suggests that the term export means something different than transportation.

<sup>380</sup> See *supra* note 377.

<sup>381</sup> See *infra* Section II.J.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).

<sup>382</sup> See 2019 Rules Proposing Release at Section II.B.3.

<sup>383</sup> See proposed Instruction (13) to Item 2.01 of Form SD, which stated that “minerals,” as used in Item 2.01 of Form SD, includes any material for which an issuer with mining operations would

<sup>388</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>389</sup> See letter from Keith P. Bishop.

<sup>390</sup> See subpart 1300 of Regulation S-K.

<sup>391</sup> See Instruction (13) to Item 2.01 of Form SD.

<sup>392</sup> 15 U.S.C. 78m(q)(1)(C).



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. We also proposed guidance on the statutory payment categories of royalties, fees, and bonuses, and addressed in-kind payments.<sup>393</sup>

We received only a limited number of comments on the proposed definition of “payment” and the proposed guidance regarding the payment types. We discuss these comments below along with our reasons for adopting the proposed definition of “payment” and related guidance.

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.”<sup>394</sup> According to Section 13(q), these “other material benefits” must be consistent with the EITI’s guidelines “to the extent practicable.”<sup>395</sup>

Some commenters recommended that we include commodity trading-related payments for the purchase of oil, natural gas, or minerals from a government, including a NOC, within the definition of “payment” because, according to those commenters, those payments have become a commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.<sup>396</sup> We decline to follow this recommendation for the same reasons that we rejected the suggestion to include activities related to such commodity trading within the definition of export.<sup>397</sup> We acknowledge that significant payments may be 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 “not de minimis threshold,” is on its own sufficiently related to the “commercial development” of those resources to warrant being covered by the final rules, particularly when the rules will require disclosure of in-kind payments of production entitlements.<sup>398</sup>

We continue to believe that Section 13(q) directs us to make an affirmative

determination that the other “material benefits” are part of the commonly recognized revenue stream. Accordingly, the other material benefits specified in the final rules are 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 final rules require a resource extraction issuer to disclose payments made in the form of taxes.<sup>399</sup> The final rules also include an instruction, as proposed, to clarify that a resource extraction issuer will be required to disclose payments for taxes levied on corporate profits, corporate income, and production, but will not be required to disclose payments for taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes.<sup>400</sup> We are also adopting the proposed instruction stating that, if a government levies a payment obligation, such as a tax or dividend, at the entity level rather than on a per project basis, a resource extraction issuer may disclose that payment at the entity level.<sup>401</sup> Both instructions were also included in the 2016 Rules.

We received a small number of comments on the tax payment reporting requirement. Some commenters supported the proposed requirement, including the treatment of taxes levied at the entity level.<sup>402</sup> One commenter stated that it is often impossible to identify, on a project basis, the relevant portion of a given payment obligation that is imposed at the entity level.<sup>403</sup> Another commenter indicated that it is impractical to isolate the corporate income tax payments made on income generated from the commercial

development of oil, natural gas, or minerals.<sup>404</sup>

A third commenter supported the proposed approach to tax payments because it is consistent with the approach afforded to tax payments under the EITI and the other non-U.S. payments-to-governments reporting regimes.<sup>405</sup> This commenter, however, recommended that we include a provision requiring that, if a government requires a corporate tax to be ring-fenced to a particular project, an issuer must report such payments at the project level. By way of example, this commenter stated that the UK imposes such a requirement.<sup>406</sup> We do not believe this suggested provision is necessary because the adopted instruction already provides that tax reporting by the entity level on Form SD is dependent on the government levying the tax at the entity level. Moreover, if an issuer listed or registered in the UK is subject to such a per project tax reporting requirement, it would likely provide such tax reporting when it submits its Form SD under the alternative reporting provision.<sup>407</sup>

Another commenter recommended that we require the reporting of tax payments at the contract level.<sup>408</sup> We decline to adopt this recommendation because, even under the 2016 Rules, which used a contract-based project definition, we permitted the reporting of corporate taxes levied at the entity level in response to earlier expressed concerns 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.<sup>409</sup>

#### 2. Royalties, Fees, and Bonuses

We are adopting the proposed inclusion of royalties, fees, and bonuses in the list of payment types required to be disclosed<sup>410</sup> because Section 13(q) includes them in its definition of “payment.” The statute provides “license fees” as an example of the types of fees covered by that term but

<sup>393</sup> See 2019 Rules Proposing Release at Section II.C.  
<sup>394</sup> 15 U.S.C. 78m(q)(1)(C)(ii).  
<sup>395</sup> *Id.*  
<sup>396</sup> See letters from Oxfam America and Earthrights International; PWYP-US (Mar. 16, 2020); and J. Williams, NRGJ.  
<sup>397</sup> See *supra* Section II.I.2.  
<sup>398</sup> See *infra* Section II.J.6.

<sup>399</sup> See Item 2.01(d)(9)(A) of Form SD.

<sup>400</sup> See Instruction (9) to Item 2.01 of Form SD.

<sup>401</sup> See Instruction (4) to Item 2.01 of Form SD. Pursuant to this instruction, and as proposed, if an issuer does report a tax at the entity level, it may omit certain inapplicable electronic tags, such as a project or business segment tag, for that payment as long as it provides all other electronic tags, including the tag identifying the recipient government.

<sup>402</sup> See letters from API (Mar. 16, 2020); Petrobras; and PWYP-US (Mar. 16, 2020).

<sup>403</sup> See letter from API (Mar. 16, 2020).

<sup>404</sup> See letter from Petrobras. This commenter urged the Commission to provide additional guidance on the reporting of tax payments “considering the particularities of income tax payments in each country.” *Id.* Providing such detailed guidance would exceed the scope of this rulemaking. To the extent that issuers have questions regarding the reporting of tax payments, or any other payments, on Form SD, they should contact the staff.

<sup>405</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>406</sup> See *id.*

<sup>407</sup> See *infra* Section II.N.

<sup>408</sup> See letter from KCSPG.

<sup>409</sup> See Instruction (4) to Item 2.01 of Form SD under the 2016 Rules; see also 2012 Rules Adopting Release, note 155 and accompanying text.

<sup>410</sup> See Item 2.01(d)(B), (C), and (E).

does not provide examples of royalties and bonuses.<sup>411</sup> As under the 2016 Rules, we proposed an instruction to Form SD to provide further clarification of these terms.<sup>412</sup> The proposed instruction stated that 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; and bonuses include signature, discovery, and production bonuses.<sup>413</sup>

We received a limited number of comments on the proposed instruction. One commenter supported the disaggregation of payments into the proposed categories of royalties, fees, and bonuses because it would help the public hold their governments accountable for the specific types of payments.<sup>414</sup> Another commenter supported the inclusion of an instruction that provides a non-exhaustive list of fees, bonuses, and royalties because providing examples of these payment types would help companies more accurately interpret the rules' requirements.<sup>415</sup> In order to clarify that the list of examples is non-exhaustive, this commenter recommended revising the proposed instruction to state that each payment type includes, but is not limited to, the provided list of examples.<sup>416</sup>

While it was our intention that the list of examples for royalties, fees, and bonuses would be non-exhaustive,<sup>417</sup> we agree with the commenter that stating this in the instruction would be a useful improvement. We are therefore adopting the proposed instruction with this one modification.<sup>418</sup>

The examples of fees and bonuses included in the instruction are specifically mentioned in the EITI's guidance as payments that should be disclosed by EITI participants,<sup>419</sup> which supports our view that they are part of the commonly recognized revenue stream. The instruction also includes examples of royalties.<sup>420</sup> Although not

mentioned in the EITI's guidance, based on the experience of the Commission staff's mining engineers and the support of commenters,<sup>421</sup> we believe that these examples are part of the commonly recognized revenue stream and that the instruction will provide additional clarity for issuers. These are only examples, however, and resource extraction issuers could be required to disclose other types of royalties, fees, and bonuses, depending on the facts and circumstances.

### 3. Dividend Payments

We are adopting the proposed inclusion of dividends in the list of payment types required to be disclosed.<sup>422</sup> We also are adopting the proposed instruction clarifying 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.<sup>423</sup> 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.<sup>424</sup>

Although we received little comment on the treatment of dividend payments in response to the 2019 proposed rules, the comments that we received supported our approach. One commenter stated that our proposed approach would align with the text and Congressional intent of Section 13(q), as dividend payments are material benefits that are part of the commonly recognized revenue stream, and are recognized by the EU Directives, ESTMA, and the EITI Standard as payments required to be disclosed.<sup>425</sup>

20060911105823/Rendered/PDF/372580  
Mining0r101OFFICIAL0USE0ONLY1.pdf.

<sup>421</sup> See, e.g., letter from PWYP-US (Mar. 16, 2020).

<sup>422</sup> See Item 2.01(d)(9)(F) of Form SD.

<sup>423</sup> See Instruction (11) to Item 2.01 of Form SD.

<sup>424</sup> See 2016 Adopting Release, Section II.C.2.a.; and 2012 Adopting Release at Section II.D.1.b.

<sup>425</sup> See letter from PWYP-US (Mar. 16, 2020).

As in 2016, no commenter objected to the treatment of dividend payments.

### 4. Infrastructure Payments

We are also adopting the proposed inclusion of payments for infrastructure in the list of payment types required to be disclosed.<sup>426</sup> Such payments would include those made to build a road or railway to further the development of oil, natural gas, or minerals. As we have previously noted, payments for infrastructure often are in-kind payments rather than direct monetary payments.<sup>427</sup> We continue to 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 because they are required to be disclosed under the EITI<sup>428</sup> and their inclusion as required payments under Section 13(q) has been supported by commenters since the earliest rulemaking.<sup>429</sup>

Our inclusion of infrastructure payments in the list of payment types required to be disclosed under Section 13(q) continues to find support in the current rulemaking. As in 2016, no commenter objected to the inclusion of such payments, and one commenter provided affirmative support. That commenter indicated that because natural resources are frequently located in remote or under-developed areas, many extractive companies, in particular mining companies, make infrastructure-related payments, which are generally viewed as part of the cost of doing business in these regions.<sup>430</sup> According to this commenter, infrastructure payments make up a commonly recognized revenue stream from natural resource extraction and are covered payments under the EU Directives, ESTMA, and the EITI.<sup>431</sup> We therefore agree with this commenter that the inclusion of infrastructure payments under Section 13(q) would help support the commitment of the Federal Government to international transparency promotion efforts, pursuant to Section 13(q).<sup>432</sup>

<sup>426</sup> See Item 2.01(d)(9)(G) of Form SD.

<sup>427</sup> See 2019 Rules Proposing Release at Section II.C.4.

<sup>428</sup> See EITI Standard at 24.

<sup>429</sup> See, e.g., letters from AngloGold Ashanti (Jan. 31, 2011); Barrick Gold Corporation (Feb. 28, 2011); EarthRights International (Jan. 26, 2011); Earthworks (Mar. 2, 2011); Global Witness (Feb. 25, 2011); ONE (Mar. 2, 2011); and PWYP-US (Feb. 25, 2011).

<sup>430</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>431</sup> See *id.*

<sup>432</sup> See 15 U.S.C. 78m(q)(2)(E).

<sup>411</sup> 15 U.S.C. 78m(q)(1)(C)(ii).

<sup>412</sup> See 2019 Rules Proposing Release at Section II.C.2.

<sup>413</sup> See proposed Instruction (10) to Form SD in the 2019 Rules Proposing Release.

<sup>414</sup> See letter from KCSPOG.

<sup>415</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>416</sup> See *id.*

<sup>417</sup> See 2019 Rules Proposing Release at II.C.2.

<sup>418</sup> See Instruction (10) to Item 2.01 of Form SD.

<sup>419</sup> See EITI Standard (October 15, 2019) at 22–23.

<sup>420</sup> 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\\_](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/09/11/000090341_)

## 5. Community and Social Responsibility Payments

We are adopting the proposed inclusion of CSR payments that are required by law or contract in the list of payment types required to be disclosed under Section 13(q).<sup>433</sup> 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. For the reasons discussed below, we continue to believe that such CSR payments are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.

When proposing the inclusion of CSR payments required by law or contract, we noted that most commenters on the 2016 Rules Proposing Release that addressed the issue supported the inclusion of CSR payments.<sup>434</sup> This view was supported by a broad range of commenters, including one industry commenter.<sup>435</sup> Although we received little comment on this issue in the current rulemaking, the one party that did comment supported the proposed inclusion of CSR payments required by law or contract because they are material benefits that are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals, as evidenced by: The required reporting of mandatory CSR payments by the EITI; the adoption by numerous countries of provisions in their mining laws and policies that require extractive companies to make CSR payments; the significant amount of CSR payments routinely made by oil, gas, and mining companies, which can total in the millions or, in some cases, billions of dollars annually; and the fact that many oil, gas, and mining companies already voluntarily report CSR payments.<sup>436</sup>

We find the evidence cited by this commenter and those in the 2016 rulemaking to be persuasive.<sup>437</sup> When determining whether there are “other material benefits” that are part of the

commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals, we are statutorily required, to the extent practicable, to adopt a determination that is consistent with the EITI’s guidance.<sup>438</sup> We find it instructive that disclosure of CSR payments that are required by law or contract has been required under the EITI since 2013.<sup>439</sup> The fact that several resource extraction issuers already report their voluntary or required CSR payments also supports our conclusion that such payments are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.<sup>440</sup>

## 6. In-Kind Payments

We are adopting the proposed requirement that a resource extraction issuer must disclose payments that fall within the specified payment types that are made in-kind rather than through a monetary payment to the host country government.<sup>441</sup> Examples include production entitlement payments<sup>442</sup> and infrastructure payments. Although no commenter objected to the inclusion of in-kind payments, a small number of commenters raised concerns about different aspects of the proposed instruction providing guidance on how to report in-kind payments.<sup>443</sup>

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, the proposed instruction stated that, when reporting an in-kind payment, a resource extraction issuer must determine the monetary value of the in-kind payment.<sup>444</sup> Similar to the 2016 Rules, the proposed instruction further provided that a resource extraction issuer must report the in-kind

payment at cost, or if cost is not determinable, fair market value, and provide a brief description of how the monetary value was calculated.<sup>445</sup>

One commenter objected to the proposed instruction to use historical cost when determining the monetary value of an in-kind payment.<sup>446</sup> The commenter stated that fair market value represents the best benchmark for valuing in-kind payments because fair market values are readily available and more relevant to providing transparency than cost data. The commenter also expressed concern that publishing specific cost information could result in issuers having to share business sensitive data with third party competitors.<sup>447</sup>

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. We also believe that adoption of the Modified Project Definition, which allows for the aggregation of payments, including in-kind payments, across multiple contracts should mitigate the concern raised about the publishing of competitively sensitive information.

Two other commenters supported the proposed instruction requiring the use of historical cost if determinable, but recommended that we also require the disclosure of the volume of in-kind payments, where applicable.<sup>448</sup> Those commenters stated that such a requirement would be consistent with the valuing of in-kind payments under the EU Directives and would enable users of the payment data to understand better the methodology used to calculate the value of in-kind payments.<sup>449</sup> We decline to follow this recommendation because we do not believe such information is necessary.<sup>450</sup> The adopted instruction requires an issuer to provide a brief description of how the monetary value of an in-kind payment was calculated, which would provide additional context for assessing the reasonableness of the disclosure.<sup>451</sup> An issuer may disclose volume information when providing this description if it

<sup>433</sup> See Item 2.01(d)(9)(H) of Form SD.

<sup>434</sup> See 2019 Rules Proposing Release at Section II.C.5; and 2016 Rules Adopting Release at Section II.C.2.a.

<sup>435</sup> See letter from ExxonMobil (Feb. 16, 2016).

<sup>436</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>437</sup> For example, in the 2016 rulemaking, one commenter noted the prevalent discussion of CSR payments in industry conferences, studies, guidance, and compliance manuals. See letter from Harry G. Broadman and Bruce H. Searby (Jan. 25, 2016).

<sup>438</sup> See 15 U.S.C. 78m(q)(1)(C)(ii).

<sup>439</sup> See EITI Standard at 29; see also 2019 Rules Proposing Release at Section II.C.5.

<sup>440</sup> See, e.g., Equinor 2019 Sustainability Report (disclosing that in 2019 Equinor made \$23 million in social investments, sponsorships, and donations); Newmont 2019 Sustainability Report (reporting a total of \$23.3 million in community development and donations); and BHP 2019 Sustainability Report (reporting that BHP’s voluntary community investment totaled \$93.5 million in 2019).

<sup>441</sup> See Instruction (12) to Item 2.01 of Form SD.

<sup>442</sup> See Item 2.01(d)(9)(D) of Form SD.

<sup>443</sup> See letters from API (Mar. 16, 2020); Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020).

<sup>444</sup> See 2019 Rules Proposing Release at Section II.C.6. 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 instruction further stated that issuers providing a monetary value for in-kind payments must tag the information as “in-kind” for purposes of the currency tag.

<sup>445</sup> See *id.*

<sup>446</sup> See letter from API (Mar. 16, 2020).

<sup>447</sup> See *id.*

<sup>448</sup> See letters from Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020).

<sup>449</sup> See *id.*

<sup>450</sup> See 2019 Rules Proposing Release at Section II.C.6 (citing letter from ExxonMobil (Mar. 8, 2016)).

<sup>451</sup> See Instruction (12) to Item 2.01 of Form SD.

believes such information would be appropriate under the circumstances.

As proposed, the adopted instruction clarifies 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. An issuer's purchase of production entitlements affects the ultimate cost of such entitlements. Accordingly, if the issuer is 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 will 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.<sup>452</sup>

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 will be required to report the difference in values in the latter fiscal year if that amount exceeds the "not 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.<sup>453</sup>

#### 7. Accounting Considerations

We are adopting the proposed item on Form SD stating that the payment disclosure must be made on a cash basis instead of an accrual basis and need not be audited.<sup>454</sup> This is consistent with the approach that the Commission proposed and adopted in the 2016 rulemaking.<sup>455</sup> We continue to 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 improve comparability and therefore result in greater transparency.

No commenter opposed the proposed "cash basis" requirement, and one commenter supported it. This commenter stated that the proposed approach is consistent with the approach under the EITI and other non-U.S. payments-to-governments reporting regimes.<sup>456</sup>

When proposing that the payment information is not required to be audited, we noted that the EITI approach is different from Section 13(q).<sup>457</sup> 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.<sup>458</sup> 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, by not imposing an audit requirement for the payment information, we are mindful of the concerns raised by some previous commenters that such an auditing requirement would significantly increase implementation and ongoing reporting costs.<sup>459</sup>

#### K. Anti-Evasion

We are adopting the proposed provision that will require disclosure with respect to an activity or payment that, although not within the categories included in the final rules, is part of a plan or scheme to evade the disclosure required under Section 13(q).<sup>460</sup> 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 prior rulemakings. For example, the provision would cover payments that were substituted for otherwise reportable payments in an attempt to evade the disclosure rules,<sup>461</sup> as well as activities and payments that were structured, split, or aggregated in an attempt to avoid application of the rules.<sup>462</sup> Similarly, a resource extraction issuer could not avoid disclosure by improperly 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 rules.

We received a limited number of comments that addressed the proposed anti-evasion provision.<sup>463</sup> Some commenters recommended specifically stating, to align more closely with the EU Directives and ESTMA, that activities and payments must not be artificially structured, split, or aggregated to avoid the application of the rules.<sup>464</sup> Another commenter recommended that, because a government official may demand that a transaction be structured a certain way to avoid application of the rules, we strengthen the anti-evasion provision to prevent an issuer in such circumstances from claiming that it is just following the demands of the government and is not part of a plan or scheme to evade the disclosure required under Section 13(q).<sup>465</sup> We decline to adopt either recommendation because we believe that the proposed principles-based anti-evasion provision is broad enough, and the most effective way, to prohibit the evasive activity in these, as well as other, cases.<sup>466</sup>

#### L. Annual Report Requirement

##### 1. Form SD

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.<sup>467</sup> For the following reasons, and consistent with the 2016 Rules, we are adopting the proposed requirement that resource extraction issuers provide the required disclosure about payments on Form SD.<sup>468</sup>

Form SD is already used for specialized disclosure not included within an issuer's periodic or current

<sup>463</sup> See letters from Better Markets; Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020).

<sup>464</sup> See letters from Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020).

<sup>465</sup> See letter from Better Markets.

<sup>466</sup> For example, an issuer would be required to report payments characterized or structured as related to exploratory activities, without applying the delayed reporting provision, when in fact they are payments related to development activities.

<sup>467</sup> See 15 U.S.C. 78m(q)(2)(A).

<sup>468</sup> See 17 CFR 240.13q-1(a). As proposed, the amended Form SD will require an issuer to include a brief statement in the body of the form in an item entitled, "Disclosure of Payments by Resource Extraction Issuers," directing readers to the detailed payment information provided in the exhibits to the form. See Item 2.01(a)(3) of Form SD.

<sup>452</sup> See *id.*

<sup>453</sup> See *id.*

<sup>454</sup> See Item 2.01(a)(2) of Form SD.

<sup>455</sup> See the 2016 Adopting Release at Section II.C.3.

<sup>456</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>457</sup> See 2019 Rules Proposing Release at Section II.C.8.

<sup>458</sup> See EITI Standard at 26.

<sup>459</sup> See, e.g., letters from Anadarko Petroleum Corporation (Mar. 2, 2011); 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).

<sup>460</sup> See 17 CFR 240.13q-1(b). This provision is identical to the one included in the 2016 Rules.

<sup>461</sup> See, e.g., letter from Elise J. Bean (Feb. 16, 2016).

<sup>462</sup> See, e.g., letter from PWYP-US (Feb. 16, 2016).

reports, specifically, the disclosure required by the rule implementing Section 1502 of the Dodd-Frank Act.<sup>469</sup> As such, we believe that using Form SD would facilitate interested parties' ability to locate the disclosure. In this regard, we disagree with the commenter that opposed the use of Form SD because it believed that using the same form as is used for conflict minerals disclosure would unnecessarily confuse users of the payment information and cause them to conflate the two issues.<sup>470</sup> Because the amendment to Form SD includes the Section 13(q) disclosure requirements in its own section (Section 2), distinct from the conflict minerals requirements in Section 1 of that Form, we believe that any user confusion would be kept to a minimum.

We also believe that using Form SD would address the concerns expressed by issuers in prior rulemakings about having to provide the disclosure in their Exchange Act annual reports on Forms 10-K, 20-F or 40-F.<sup>471</sup> For example, the adopted approach should alleviate the concern that the disclosure will be subject to the officer certifications required by 17 CFR 240.13a-14 and 240.15d-14 (Exchange Act Rules 13a-14 and 15d-14). It also will allow the Commission, as discussed below, to adjust the timing of the submission without directly affecting the broader Exchange Act disclosure framework.<sup>472</sup>

Section 13(q) also does not specifically mandate the time period in which a resource extraction issuer must provide the disclosure. We are adopting the proposed requirement that an issuer report the payments made in its last fiscal year.<sup>473</sup> We continue to believe that 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).

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.<sup>474</sup> Nevertheless, we continue to believe that the fiscal year is the 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, we do not believe that those benefits outweigh those arising from a reporting regime tailored to a resource extraction issuer's fiscal year.<sup>475</sup>

## 2. Annual Deadline for Form SD

We proposed a Form SD submission deadline that differed depending on a resource extraction issuer's fiscal year-end. We proposed to 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, we proposed the Form SD submission deadline to be no later than March 31 in the second calendar year following its most recent fiscal year.<sup>476</sup> This approach differed from the 2016 Rules, which required all 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 the 2016 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.<sup>477</sup> When proposing the

different annual reporting deadline in 2019, we explained that, although we continued 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 compliance burdens under the 2016 Rules, we were proposing a submission deadline for Form SD that is longer than the 150 day deadline.<sup>478</sup>

Several commenters objected to the proposed annual deadline for submitting Form SD.<sup>479</sup> Noting that the proposed reporting deadline would be significantly longer than the 2016 reporting deadline, particularly for calendar year-end companies, most of those commenters stated that the proposed reporting deadline would limit the usefulness of the disclosed payment information and undermine its effectiveness for citizens, investors, and other data users.<sup>480</sup> For example, one commenter stated that, under the proposed deadline, for a calendar year-end company, there would be 465 days between the end of the fiscal year and the deadline for reporting payments for that fiscal year, which would unnecessarily limit benefits to citizens and investors.<sup>481</sup> Some commenters recommended that we instead reinstate the annual report deadline under the 2016 Rules (*i.e.*, 150 days after the end of the issuer's most recent fiscal year).<sup>482</sup>

We understand commenters' concerns regarding adopting an annual report deadline that could significantly limit the usefulness of the payment disclosures. We also, however, believe that the annual report deadline should be longer than the 150-day deadline under the 2016 Rules so that it does not interfere with an issuer's annual reporting obligations under the Exchange Act.

Accordingly, we are adopting an annual deadline for Form SD that requires an issuer to submit Form SD no later than 270 days following the end of its most recently completed fiscal year.<sup>483</sup> Although this deadline is longer than the deadline imposed under the 2016 Rules, it is significantly shorter

<sup>469</sup> 17 CFR 240.13p-1 (Rule 13p-1). *See also* Exchange Act Release No. 34-67716 (Aug. 22, 2012) [77 FR 56273 (Sept. 12, 2012)] ("Conflict Minerals Release").

<sup>470</sup> *See* letter from PWYP-US (Mar. 16, 2020).

<sup>471</sup> *See* 2012 Rules Adopting Release, notes 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.").

<sup>472</sup> 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.

<sup>473</sup> *See* Item 2.01(a)(1) of Form SD.

<sup>474</sup> General Instruction B.1 of Form SD. *See also* Exchange Act Rule 13p-1.

<sup>475</sup> Of the 414 companies that we estimate would be subject to the final rules, only 50 filed a Form SD pursuant to Rule 13p-1 in 2019. 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, note 352 and accompanying text. The same reasoning does not apply to the issuer-driven disclosure under the Section 13(q) rules.

<sup>476</sup> *See* 2019 Rules Proposing Release at Section II.H.

<sup>477</sup> *See* 2016 Adopting Release at Section II.G.3.

<sup>478</sup> *See* 2019 Rules Proposing Release at Section II.H.

<sup>479</sup> *See* letters from Sens. Cardin *et al.*; EITI Civil Society Board (Mar. 13, 2020); PolicyAlert!; Eric Postel; Public Citizen; and PWYP-US (Mar. 16, 2020).

<sup>480</sup> *See, e.g.*, letters from Sens. Cardin *et al.*; EITI Civil Society Board; Eric Postel; Public Citizen; and PWYP-US (Mar. 16, 2020).

<sup>481</sup> *See* letter from PWYP-US (Mar. 16, 2020).

<sup>482</sup> *See, e.g.*, letters from EITI Civil Society Board; Eric Postel; Public Citizen; and PWYP-US (Mar. 16, 2020).

<sup>483</sup> *See* General Instruction B.2. to Form SD.

than what we proposed. We believe that this annual report deadline appropriately balances the interest of users in maintaining the effectiveness of the payment disclosures with the interest of issuers in reducing the compliance burdens of the Section 13(q) rules. We also believe that reducing the likelihood that the filing of the Form SD will interfere with an issuer's annual reporting obligations under the Exchange Act is consistent with the Commission's statutory duty to adopt rules that promote efficiency in U.S. capital markets.<sup>484</sup>

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

As required by Section 13(q),<sup>485</sup> and as proposed, the final rules will require a resource extraction issuer to submit the required disclosure on EDGAR in an XBRL exhibit to Form SD.<sup>486</sup> Providing the required disclosure elements in a machine readable (electronically tagged) format will enable users easily to extract, aggregate, and analyze the information in a manner that is most useful to them. For example, it will 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.

When proposing to require the use of XBRL as the interactive data format, we noted that most commenters on the 2016 Rules Proposing Release that addressed the issue supported the use of XBRL, but did not similarly support the use of Inline XBRL.<sup>487</sup> Inline XBRL 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 adopted rule amendments to require the use of the Inline XBRL format for the submission of operating company financial statement information and mutual fund risk/return summaries.<sup>488</sup> One commenter recommended that we require the use of Inline XBRL for the

Section 13(q) payment disclosure.<sup>489</sup> Another commenter, however, supported the proposed use of XBRL and was "agnostic as to whether conventional (XML-based) XBRL or Inline (HTML-based XBRL) is adopted."<sup>490</sup> Like the proposed rules, however, the final rules do not require a resource extraction issuer to use Inline XBRL when submitting the Section 13(q) payment information. Given the nature of the disclosure required by the Section 13(q) rules, which is primarily an exhibit with tabular data, we continue to believe that Inline XBRL would not improve the usefulness or presentation of the required disclosure.

Under the final rules, and consistent with the statute, a resource extraction issuer will 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 payment type;<sup>491</sup>
- The currency used to make the payments;
- The financial period in which the payments were made;
- The business segment of the resource extraction issuer that made the payments;
- The government that received the payments, and the country in which the government is located;<sup>492</sup> and
- The project of the resource extraction issuer to which the payments relate.<sup>493</sup>

In addition to the electronic tags specifically required by the statute, a resource extraction issuer will also be required, as proposed, 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.<sup>494</sup> These additional tags relate to information that is specifically required to be included in the resource extraction issuer's annual report by Section 13(q).<sup>495</sup>

<sup>489</sup> See letter from PWYP-US (Mar. 16, 2020) (stating that Inline XBRL would be useful because, in the reports filed under the EU Directives and Canada's ESTMA, issuers include narrative, context, and clarifying footnotes in addition to the statutorily required data). In this regard, however, the final rules require that the alternative reports must be tagged using XBRL.

<sup>490</sup> Letter from XBRL US (Mar. 16, 2020).

<sup>491</sup> For example, payment types could be royalties, bonuses, taxes, fees, or production entitlements.

<sup>492</sup> An issuer must provide an electronic tag identifying the government for each national and subnational government payee.

<sup>493</sup> See Item 2.01(a)(5) of Form SD.

<sup>494</sup> See Item 2.01(a)(5)(i) through (ii).

<sup>495</sup> See Section 13(q)(2)(A)(i) through (ii).

The final rules will also require resource extraction issuers, as proposed, 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.<sup>496</sup> While these three items of information also would be included in the project description, we believe that having separate electronic tags for these items will 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, the final rules require, as proposed, that the issuer use an electronic tag that is consistent with the appropriate ISO code.<sup>497</sup> 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.<sup>498</sup>

Consistent with the statute, the final rules will require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments.<sup>499</sup> 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 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 adopting the instruction to Form SD, as proposed, clarifying that issuers will be required to report the amount of payments made for each payment type, and the total amount of payments made for each project and to each government, in U.S. dollars or in the issuer's reporting currency if not U.S. dollars.<sup>500</sup> We understand that

<sup>496</sup> See Item 2.01(a)(5)(ix) through (xi).

<sup>497</sup> See Instruction (3) to Item 2.01 of Form SD. ISO 3166-1 pertains to countries whereas ISO 3166-2 pertains to major subdivisions in the listed countries.

<sup>498</sup> See 2016 Rules Adopting Release at Section II.K.3.

<sup>499</sup> See Item 2.01(a)(5)(iv) of Form SD.

<sup>500</sup> See 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 17 CFR 210.3-20 (Rule 3-20 of Regulation S-X).

<sup>484</sup> See *supra* note 232.

<sup>485</sup> Section 13(q) provides that the rules shall require that the information included in the annual report of a resource extraction issuer be submitted in an interactive data format. See 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, note 50.

<sup>486</sup> See Item 2.01(a)(5) of Form SD.

<sup>487</sup> See 2019 Rules Adopting Release at Section II.K.

<sup>488</sup> See Release No. 33-10514 (Jun. 28, 2018) [83 FR 40846 (Jul. 16, 2018)].

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.<sup>501</sup> As we did in the 2016 Rules,<sup>502</sup> in order to address those concerns, we are adopting the proposed instruction that allows a resource extraction issuer 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
- Based on the exchange rate as of the issuer's fiscal year end.<sup>503</sup>

No commenter opposed this instruction, and the one commenter that addressed the Commission's identical currency conversion approach in the 2016 rulemaking supported it.<sup>504</sup>

The adopted instruction requires a resource extraction issuer to disclose the method used to calculate the currency conversion. In addition, as proposed, in order to avoid confusion, the issuer will be required to choose a consistent method for all such currency conversions within a particular Form SD.<sup>505</sup>

Consistent with the statute, the final rules will require a resource extraction issuer to include an electronic tag that identifies the business segment of the resource extraction issuer that made the payments.<sup>506</sup> We are adopting the proposed definition of "business segment" to mean a business segment consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting.<sup>507</sup> 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 will be able to omit certain tags that may be inapplicable (*e.g.*, project tag, business segment tag) for those payment types. Issuers will, however, be required to provide all other electronic tags, including the tag identifying the recipient government.<sup>508</sup>

#### N. Alternative Reporting

##### 1. Alternative Reporting Requirements

As noted above, several countries have implemented resource extraction payment disclosure laws.<sup>509</sup> In light of these developments, and with a view towards limiting compliance costs, we are adopting the proposed provision that will allow issuers to meet the requirements of the Section 13(q) 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 determined that the alternative reporting regime requires disclosure that satisfies the transparency objectives of Section 13(q).<sup>510</sup> The Commission adopted a similar approach to alternative reporting in connection with the 2016 Rules.<sup>511</sup> As in the 2016 rulemaking, all of the commenters that addressed the issue supported this approach.<sup>512</sup>

If the Commission has determined that the foreign reporting regime requires disclosure that satisfies the transparency objectives of Section 13(q), the alternative reporting provision will allow an issuer subject to the foreign reporting regime to submit the report it prepared under the foreign requirements in lieu of the report that would otherwise be required by our disclosure rules, subject to certain conditions. This framework for alternative reporting will, 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 Section 13(q) 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 will 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 that jurisdiction's requirements publicly available prior to submitting it to the Commission.<sup>513</sup> An issuer choosing to avail itself of this accommodation will be required to 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.<sup>514</sup> The issuer also will 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.<sup>515</sup>

In addition, we are adopting the proposed requirement that the alternative reports must be tagged using XBRL.<sup>516</sup> 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.

An issuer relying on the alternative reporting accommodation will also be required to provide a fair and accurate English translation of the entire report if prepared in a foreign language.<sup>517</sup> 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.<sup>518</sup> Other than the XBRL and English translation

<sup>501</sup> See 2019 Rules Proposing Release at Section II.K.

<sup>502</sup> See 2016 Adopting Release at Section II.K.1.

<sup>503</sup> See Instruction 2 to Item 2.01 of Form SD.

<sup>504</sup> See letter from Petrobras (Feb. 16, 2016) (stating 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).

<sup>505</sup> See Instruction 2 to Item 2.01 of Form SD.

<sup>506</sup> See Item 2.01(a)(5)(vi) of Form SD.

<sup>507</sup> See 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. We did not receive any comments on the proposed definition of "business segment."

<sup>508</sup> See Instruction 4 to Item 2.01 of Form SD.

<sup>509</sup> See *supra* note 20.

<sup>510</sup> See Item 2.01(c) of Form SD.

<sup>511</sup> See 2016 Rules Adopting Release at Section II.J.2.

<sup>512</sup> See, *e.g.*, letters from API (Mar. 16, 2020); BHP; BP America; Chamber; Eni; Equinor; PWYP-US (Mar. 16, 2020); Rio Tinto; Royal Dutch Shell; SAF; and Total (Feb. 10, 2020).

<sup>513</sup> See Item 2.01(c)(1) through (2) of Form SD.

<sup>514</sup> See 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. For example, the report may not have been originally submitted in the home jurisdiction in XBRL or may not have been in English, both of which are requirements under the rules we are adopting.

<sup>515</sup> See Item 2.01(c)(3) of Form SD.

<sup>516</sup> See Item 2.01(c)(4) of Form SD.

<sup>517</sup> See Item 2.01(c)(5) of Form SD.

<sup>518</sup> 17 CFR 232.306 (Rule 306 of Regulation S-T) 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 17 CFR 230.403(c) (Securities Act Rule 403(c)) or 17 CFR 240.12b-12(d) (Exchange Act Rule 12b-12(d)).



requirements, an issuer that elects to use the alternative reporting option will not be required to meet a requirement under the final rules to the extent that the alternative reporting regime imposes a different requirement.

Similar to the 2016 Rules, a resource extraction issuer will 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.<sup>519</sup> We proposed that 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 will not be able to rely on the alternative reporting accommodation for the following fiscal year.<sup>520</sup> One commenter recommended that we permit an issuer to submit an alternative report up to ten business days after the deadline of the approved alternative jurisdiction.<sup>521</sup> Although we believe that four business days is a reasonable amount of time to file the alternative report,<sup>522</sup> we are adopting a seven business day deadline instead of the proposed four business day deadline to address concerns about the need for additional time for an issuer to submit its alternative report.

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 pursuant to an application submitted by an issuer or a jurisdiction. We will then publish the determinations in the form of a Commission order. 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.<sup>523</sup> Applicants would follow the procedures set forth in 17 CFR 240.0–13 (Rule 0–13 of the Exchange Act) to request recognition of other jurisdictions' reporting regimes as satisfying Section 13(q)'s transparency objectives.<sup>524</sup> Pursuant to Rule 0–13, the applicant will be required to include supporting documents, and, once complete, the application will be referred to the Commission's staff for review.<sup>525</sup> Also pursuant to Rule 0–13, the Commission will publish a notice in the **Federal Register** that a complete application has been submitted and allow for public comment.<sup>526</sup> The Commission could also, in its sole discretion, schedule a hearing before the Commission on the matter addressed by the application.<sup>527</sup>

## 2. Recognition of EU Directives, U.K.'s Reports on Payments to Governments Regulations, Norway's Regulations on Country-by-Country Reporting, and Canada's ESTMA as Alternative Reporting Regimes

In conjunction with our adoption of the final rules, we are issuing an order recognizing the EU Directives, the UK's Reports on Payments to Governments Regulations 2014,<sup>528</sup> Norway's Regulations on Country-by-Country Reporting,<sup>529</sup> and Canada's ESTMA as alternative reporting regimes that satisfy the transparency objectives of Section 13(q) for purposes of alternative reporting under the final rules, subject to certain conditions. We similarly issued a concurrent order when adopting the 2016 Rules.<sup>530</sup> Several commenters requested that we issue such an order concurrent with or shortly after adoption of these final rules.<sup>531</sup>

We have determined that these disclosure regimes satisfy the transparency objectives of Section 13(q). For example, all four regimes require annual, public disclosure, including the identity of the filer; include the same or similar activities within the scope of their laws or regulations; require

project-level reporting; cover similar payment types; cover similar controlled entities and subsidiaries; and require foreign subnational payee reporting. Although we acknowledge differences between these regimes and the final rules,<sup>532</sup> we do not believe that such differences support reaching a different conclusion, particularly in light of the requirements we are imposing on alternative reporting.<sup>533</sup> We note that, among those commenters that addressed the issue, there was agreement that the Commission should allow alternative reporting under the EU Directives, U.K.'s Reports on Payments to Governments Regulations, Norway's Regulations on Country-by-Country Reporting, and Canada's ESTMA.<sup>534</sup> This further persuades us that it is appropriate at this time to grant these regimes alternative reporting status in their current form.

## O. 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).<sup>535</sup> We are adopting the proposed two-year transition period so that a resource extraction issuer will be required 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. For example, if the rules were to become effective on March 1, 2021, the compliance date for an issuer with a December 31 fiscal year-end would be Monday, September 30, 2024 (*i.e.*, 270 days after its fiscal year end of December 31, 2023).

This two-year transition period is the same as the transition period for the 2016 Rules. In this regard, we note that 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 two-year transition period should provide these issuers with sufficient time to establish the

<sup>523</sup> See 17 CFR 240.13q–1(c).

<sup>524</sup> Rule 0–13 permits an application to be filed with the Commission to request a "substituted compliance order" under the Exchange Act.

<sup>525</sup> See 17 CFR 240.0–13(e) and (g).

<sup>526</sup> See 17 CFR 240.0–13(h).

<sup>527</sup> See 17 CFR 240.0–13(i).

<sup>528</sup> 2014 UK Statutory Instrument No. 3209.

<sup>529</sup> FOR–2013–12–20–1682.

<sup>530</sup> See Release No. 34–78169 (Jun. 16, 2016) [81 FR 49163 (July 27, 2016)] (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).

<sup>531</sup> See, *e.g.*, letters from API (Mar. 16, 2020); BHP; BP America; Chamber; Equinor; and Rio Tinto.

<sup>532</sup> For example, the EU Directives impose disclosure requirements for logging companies in addition to oil, natural gas, and mining companies.

<sup>533</sup> For example, the final rules require alternative reports to be submitted in XBRL format. See *supra* Section II.N.1.

<sup>534</sup> See, *e.g.*, letters from API (Mar. 16, 2020); BHP; BP America; Chamber; Equinor; Rio Tinto; and Total.

<sup>535</sup> 15 U.S.C. 78m(q)(2)(F).

<sup>519</sup> See Item 2.01(c)(6) of Form SD.

<sup>520</sup> See 2019 Rules Proposing Release at Section II.L. We proposed the four business day deadline because it is consistent with other Commission reporting deadlines. See, *e.g.*, General Instruction B.1. to Form 8–K.

<sup>521</sup> See letter from PWYP–US (Mar. 16, 2020).

<sup>522</sup> See *supra* note 520.

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 final rules, such as seeking exemptive relief on a case-by-case basis.

#### P. Other Matters

Pursuant to the Congressional Review Act,<sup>536</sup> the Office of Information and Regulatory Affairs has designated these rules as a “major rule,” as defined by 5 U.S.C. 804(2).

Separately, if any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application. Implementation of these rules has been ongoing since 2011. As a result, we are specifying how the Commission intends for the rule to operate in the event that it is challenged and a court rejects the rule’s approach to either of the two matters that have been a particular focus of dispute among the commenters: The definition of project and the need for, and scope of, exemptions. If the definition of project is challenged and invalidated or otherwise not permitted to take effect, issuers must continue to make all the disclosures required by Section 13(q), but issuers may utilize their own reasonable definition of project while the Commission reconsiders the project definition. In such circumstances, allowing issuers to utilize their own reasonable definition of project (which they will need to identify in Form SD) until such time as a revised rule may be issued and all litigation connected to it is resolved would be an appropriate interim alternative for the reasons discussed in the 2012 Rules Proposing Release. Further, if one or more of the rule’s exemptions is invalidated or otherwise not permitted to take effect, resource-extraction issuers must continue to make all of the required disclosures under this rule, but the Commission, while reconsidering how to proceed with any possible revised rulemaking, retains the authority under Section 36(a) of the Exchange Act to issue exemptive orders as appropriate.

### 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 Federal Government relating to the commercial development of oil, natural gas, or minerals. It does so to help foster payment transparency in resource-rich countries. According to some commenters, increased transparency of payments may further increased accountability and anti-corruption efforts in resource-rich countries.<sup>537</sup>

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.

As such, we have considered the costs and benefits that would result from the final rules, as well as the potential effects on efficiency, competition, and capital formation. Many of the potential economic effects of the final rules stem from the statutory mandate, while others 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 CRA’s prohibition on promulgating a new rule in substantially the same form. The following discussion addresses the costs and benefits that might result from both the statute and our discretionary choices.<sup>538</sup>

The baseline the Commission uses to analyze the potential effects of the final rules is the current set of legal requirements and market practices.<sup>539</sup> To the extent that resource extraction issuers are not already tracking and disclosing the information required under the rules, the final rules likely will have a significant impact on their

disclosure practices and in addition increase aggregate compliance costs. The overall magnitude of the potential costs of the final disclosure requirements will depend on the number of affected issuers and individual issuers’ costs of compliance.<sup>540</sup> In addition, the final rules could impose burdens on competition, although as discussed elsewhere in this release, the anti-competitive effects of transparency disclosures have been called into question based upon resource extraction issuers’ experiences with the disclosure regimes in Europe and Canada.<sup>541</sup> In any event, the changes we are making from the 2016 Rules are intended to mitigate any such effects.

One commenter asserted that the baseline contains significant gaps and fails to recognize current market trends.<sup>542</sup> According to this commenter, we do not consider that the global transparency landscape has changed dramatically since the 2016 Rules; specifically that the international standards of reporting have moved towards fully public, project-level reporting, defined at the contract-level consistent with every other transparency regime, and towards a consistent definition of “not de minimis.” We agree with the commenter that the global transparency landscape has evolved since the 2016 Rules. This has had an effect on the competitive landscape as well, because some of the competitors of U.S.-reporting issuers are now required to provide similar disclosures. We disagree with the commenter that our baseline fails to recognize that change. Indeed, in the baseline we discuss and quantify the number of potential issuers that are reporting under existing regimes and the potential effect on their costs.

We expect that the final rules will affect both U.S. issuers and foreign issuers that meet the definition of “resource extraction issuer” in much the same way, except for issuers already subject to requirements adopted in the EU, EEA, UK, 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 final rules.<sup>543</sup>

<sup>537</sup> See, e.g., letters from Oxfam American and Earthrights International; and PWYP-US (Mar. 16, 2020).

<sup>538</sup> 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.

<sup>539</sup> See *supra* Sections I.A. through B. for a discussion of the current legal requirements and significant international transparency promotion regimes that affect market practices.

<sup>540</sup> Based on the available data, however, it does not appear that the increased compliance costs would be significant on a per issuer basis. See *infra* Section III.D.11.

<sup>541</sup> See *supra* Section II.

<sup>542</sup> See letter from Oxfam America and Earthrights International.

<sup>543</sup> In addition to our analysis against the baseline, we have also noted other instances where

<sup>536</sup> 5 U.S.C. 801 *et seq.*

To estimate the number of potentially affected issuers, we use data from Exchange Act annual reports filed on Forms 10-K, 20-F, and 40-F for the period January 1, 2018, through December 31, 2019. We consider all issuers with oil, natural gas, and mining Standard Industrial Classification (“SIC”) codes<sup>544</sup> as likely to be resource extraction issuers. We also include issuers that do not have the above-mentioned oil, natural gas, and mining SIC codes (because their primary business is not necessarily resource extraction) as likely resource extraction issuers if they have some resource extraction operations, such as ownership of mines. In addition, we 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 will be covered by the final rules.

From these filings, we estimate that the number of potentially affected issuers is 678. 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.

In determining which issuers are likely to bear the full costs of compliance with the final rules, we make three adjustments to the list of affected issuers. First, we exclude issuers that are smaller reporting companies or emerging growth companies and that are not subject to alternative reporting regimes that the Commission has deemed to satisfy the transparency objectives of Section 13(q), as the final 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 than the final rules and therefore are likely already bearing compliance costs for such disclosure.<sup>545</sup>

the final rules differ in their economic effects from the 2016 Rules. To be clear, however, our assessment of the final 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.

<sup>544</sup> Specifically, the oil, natural gas, and mining SIC codes considered are 1000, 1011, 1021, 1031, 1040, 1041, 1044, 1061, 1081, 1090, 1094, 1099, 1220, 1221, 1222, 1231, 1311, 1321, 1381, 1382, 1389, 1400, 2911, 3330, 3331, 3334, and 3339.

<sup>545</sup> We note that such issuers may incur certain tagging and translation costs. *See infra* Section III.D.5. Given that, because we exclude these issuers

Third, we exclude small issuers that likely could not have made any payment above the de minimis amount of \$100,000 to any government entity in the period January 1, 2018, through December 31, 2019.<sup>546</sup>

First, among the 678 issuers that we estimate will be affected by the final rules, 214 reported being smaller reporting companies (SRCs) and 191 reported being emerging growth companies (EGCs) in the period January 1, 2018, through December 31, 2019. There are 84 issuers that reported both SRC and EGC status during this period. There are also 69 issuers with SRC or EGC status that were subject to alternative reporting regimes that, concurrent with adoption of the final rules, the Commission is deeming to satisfy the transparency objectives of Section 13(q). These issuers are therefore not eligible for the EGC/SRC exemption. Subtracting the 69 non-exempt issuers that are either SRCs or EGCs from the total of 321 issuers with SRC or EGC status results in 252 SRCs and EGCs that are potentially exempt from the final rules. Subtracting these 252 SRCs and EGCs from the sample of 678 potentially affected issuers results in 426 issuers that will be subject to the final 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, UK, or Canada.<sup>547</sup> 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 will be required by the final rules and that the additional costs to comply with the final rules will be much lower than costs for other issuers.<sup>548</sup> We identified 177 such

from the number of potentially affected issuers, our estimates of the aggregate compliance costs associated with the final rules may be understated to the extent of these costs.

<sup>546</sup> In a change from the Proposing release, the final rules define “not de minimis” as a payment that equals or exceeds \$100,000. The analysis in this section reflects this change.

<sup>547</sup> 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.

<sup>548</sup> We are adopting 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.D.5 for a discussion concerning how this alternative reporting option could potentially reduce compliance costs to a negligible amount for eligible issuers.

issuers (including the 69 previously mentioned SRCs and EGCs). For purposes of our economic analysis, we assume that these issuers will not have to incur significant compliance costs related to the final rules, as they are already tracking, recording, and reporting resource extraction payment disclosure at a more granular level.<sup>549</sup>

Third, among the remaining 249 issuers (*i.e.*, 426 minus 177) 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 \$100,000. 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 final reporting requirements. We identified 12 such issuers.

Taking these estimates of the number of excluded issuers together, we estimate that approximately 237 issuers (*i.e.*, 678 minus 252 minus 177 minus 12) will bear the full costs of compliance with the final rules.<sup>550</sup>

In the following economic analysis, we discuss the potential benefits and costs and likely effects on efficiency, competition, and capital formation that might result from both the new reporting requirement mandated by Congress and from the specific implementation choices that we have made in formulating the final rules.<sup>551</sup> We analyze these potential economic effects through a qualitative and, where possible, a quantitative 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. Several commenters provided us with data on compliance costs, which we

<sup>549</sup> The primary costs for issuers using the alternative reporting provision would be those related to electronic tagging and translating. *See supra* Section II.N.1. *See infra* Section III.D.5 for a discussion concerning the costs related to tagging and translating.

<sup>550</sup> Because it may be unclear at the beginning of a financial period whether payments from an issuer will exceed the de minimis threshold by the end of such period, an excluded issuer may incur costs to collect the information to be reported under the final rules even if that issuer is not subsequently required to file an annual report on Form SD. Our estimate thus may understate the aggregate compliance costs associated with the final rules.

<sup>551</sup> Our consideration of potential benefits and costs and likely effects on efficiency, competition, and capital formation also is reflected throughout the discussion in Section II above.

have used to estimate the potential initial and ongoing compliance costs for issuers likely to bear the full costs of compliance with the final rules.<sup>552</sup>

Although aspects of the final rules are similar to the 2016 Rules, the final rules include several changes from the 2016 Rules that we believe will help limit the resulting compliance costs and burdens without significantly affecting the potential benefits that the Section 13(q) disclosure is designed to achieve. These 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) the addition of an exemption for smaller reporting companies (SRCs) and emerging growth companies (EGCs); (4) revisions to the definition of “control” to exclude entities or operations in which an issuer has a proportionate interest; (5) limitations on liability for the required disclosure by deeming the payment information to be furnished to, but not filed with, the Commission; (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 believe that these changes taken as a whole would meaningfully reduce, in the aggregate, the compliance costs and burdens for issuers compared to the compliance costs and burden estimated for the 2016 Rules.

#### B. Potential Benefits Resulting From the Payment Reporting Requirement

Section 13(q) seeks increased transparency about the payments that companies in the extractive industries make to foreign governments and the Federal Government. While this statutory goal 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,<sup>553</sup> and several

academic papers have noted the inherent difficulty in empirically validating a causal link between transparency interventions and governance improvements.<sup>554</sup>

Importantly, 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 rule will produce the transparency benefits by providing significant and useful payment information to persons seeking to understand the resource extraction payment flows to foreign

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 Schmalzjohann, “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 Ölcü, 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).

<sup>554</sup> See Andrés Mejía Acosta, *The Impact and Effectiveness of Accountability and Transparency Initiatives: The Governance of Natural Resources*, 31 DEV. POL’Y REV. s89–s105 (2013); Alexandra Gillies and Antoine Heuty, *Does Transparency Work? The Challenges of Measurement and Effectiveness in Resource-Rich Countries*, YALE J. INT’L AFF. 25–42 (2011).

governments.<sup>555</sup> 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.<sup>556</sup> In addition, none of the industry commenters over the years has expressed the view that the disclosures required by Section 13(q) would fail to help produce anti-corruption and accountability benefits.

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 final rules’ indirect effects. In the following paragraphs, we discuss existing theoretical arguments and empirical evidence that reduced corruption and better governance could have longer term positive impacts on economic growth and investment in certain countries where the affected issuers operate, which could in turn benefit issuers and their shareholders.

Although the research and data available at this time 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.<sup>557</sup> High levels of corruption could introduce inefficiencies in market prices as a result of increased political risks and the potential awarding of projects to companies for reasons other than the merit of their bids. This, in turn, could prop up inefficient companies and limit investment opportunities for others. These potential distortions could have a negative impact on the economies of countries with high corruption, particularly to the extent that potential revenue streams are diminished or diverted.

Additionally, the cost of corrupt expenditures, direct or indirect, impacts profitability, and, if the cost is

<sup>555</sup> We note that these intended benefits differ from the investor protection benefits that our disclosure rules typically strive to achieve.

<sup>556</sup> See *supra* note 30.

<sup>557</sup> See, e.g., Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320–1346 (1997); Jakob Svensson, *Eight Questions about Corruption*, 19(3) J. ECON. PERSP. 19–42 (2005) (“Svensson Study”).

<sup>552</sup> See *infra* Section III.D.11.

<sup>553</sup> For positive findings, see Caitlin C. Corrigan, “Breaking the resource curse: Transparency in the natural resource sector and the extractive industries transparency initiative,” *Resources Policy*, 40 (2014), 17–30 (finding that the negative effect of resource abundance on GDP per capita, the capacity of the government to formulate and implement sound policies and the level of rule of law is mitigated in EITI countries but noting that the EITI has little effect on the level of democracy, political

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.<sup>558</sup>

A number of empirical studies have also shown that reducing corruption might result in an increase in the level of GDP and a higher rate of economic growth through more private investments, better deployment of human capital, and political stability.<sup>559</sup> Other studies find that corruption reduces economic growth, both directly and indirectly, through lower investments.<sup>560</sup> To the extent that increased transparency could lead to a reduction in corruption and, in turn, improved political stability and investment climate, some investors may consider such factors in their investment decisions, including when pricing resource extraction assets of affected issuers operating in these countries.<sup>561</sup>

<sup>558</sup> See, e.g., Isaac Ehrlich and Francis Lui, *Bureaucratic Corruption and Endogenous Economic Growth*, 107(7) J. POL. ECON. 270–293 (1999); Keith Blackburn, Niloy Bose, and M. Emanul Haque, *The Incidence and Persistence of Corruption in Economic Development*, 30 J. ECON. DYNAMICS & CONTROL 2447–2467 (2006); Carlos Leite and Jens Weidmann, *Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth* (Int'l Monetary Fund, Working Paper No. 99/85, July 1999).

<sup>559</sup> See, e.g., Paulo Mauro, *The Effects of Corruption on Growth, Investment and Government Expenditure: A Cross-Country Analysis*, in CORRUPTION & THE GLOBAL ECONOMY 83–107, (Kimberly Ann Elliot ed., 1997); Helene Poirson, *Economic Security, Private Investment, and Growth in Developing Countries* (Int'l Monetary Fund, Working Paper No. 98/4, Jan. 1998); Institute for Economics and Peace, *Peace and Corruption 2015: Lowering Corruption—A Transformative Factor for Peace* (2015) available at <https://reliefweb.int/sites/reliefweb.int/files/resources/Peace%20and%20Corruption.pdf>.

<sup>560</sup> See Pak Hung Mo, *Corruption and Economic Growth*, 29 J. COMP. ECON. 66 (2001); Kwabena Gyimah-Brempong, *Corruption, Economic Growth, and Income Inequality in Africa*, 3 ECON. GOVERNANCE 183–209 (2002); Pierre-Guillaume Méon and Khalid Sekkat, *Does corruption grease or sand the wheels of growth?*, 122 PUBLIC CHOICE 69–97 (2005).

<sup>561</sup> Several studies present evidence that reduction in corruption increases foreign direct investments. See, e.g., Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, (Nat'l Bureau of Econ. Research, Working Paper 6030 (1997); George Abed and Hamid Davoodi,

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, there is some empirical evidence suggesting that lower levels of corruption might reduce the cost of capital and improve valuations for some issuers.<sup>562</sup>

One commenter provided additional citations of studies that present empirical evidence on the role of transparency in reducing corruption.<sup>563</sup> Those studies, according to the commenter, show a positive relation between transparency and the lowering of corruption and improvements in socio-economic and human development indicators. The commenter also argued that transparency is a necessary, but not sufficient condition for reducing corruption. Two commenters also listed studies that show benefits from disclosure and transparency improvements in extractive industries.<sup>564</sup> One of these commenters pointed out, however, that there are a number of studies that show mixed or no evidence of a positive effect of transparency in the extractive industries on reduction in corruption.<sup>565</sup> One commenter also provided several concrete examples from countries such as Ghana, Indonesia, and Mozambique on how the transparency resulting from the disclosure of payments to governments from issuers under the European Union regime has enabled citizens to more effectively hold companies and governments accountable.<sup>566</sup>

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

*Corruption, Structural Reforms, and Economic Performance in the Transition Economies* (Int'l Monetary Fund, Working Paper No. 00/132 (July 2000)).

<sup>562</sup> See Daniel Kaufmann and Shang-Jin Wei, *Does 'Grease Money' Speed Up the Wheels of Commerce?* (Nat'l Bureau of Econ. Research, Working Paper 7093 (1999) (finding, based on survey evidence, that firms that pay fewer bribes have lower, not higher, cost of capital); Charles Lee and David Ng, *Corruption and International Valuation: Does Virtue Pay?*, 18(4) J. INVESTING 23–41 (2009) (finding that firms from more corrupt countries trade at significantly lower market multiples).

<sup>563</sup> See letter from Kaufmann (May 1, 2020).

<sup>564</sup> See letters from Kaufmann and PWYP-US (Mar. 16, 2020).

<sup>565</sup> See letter from Kaufmann.

<sup>566</sup> See letter from PWYP-US (Mar. 16, 2020).

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.<sup>567</sup> 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 of 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.

Some commenters on the 2019 Rules Proposing Release criticized us for not discussing in detail the benefits that the disclosures required by Section 13(q) could provide to investors.<sup>568</sup> According to those commenters, the rules, especially the contract-level project definition, provide very useful information to investors in making investment decisions. We discuss the effects of our choice of project definition in more detail below. Although we do not believe this is the primary purpose of the required disclosures, we acknowledge the possibility that the disclosures might provide potentially useful information to certain investors. Notwithstanding the commenters' views, we believe the direct incremental benefit to investors from the Section 13(q) disclosures is limited. Most impacted issuers, other than smaller reporting companies, are already

<sup>567</sup> See letter from C. Corrigan (Feb. 16, 2016) (referring to her earlier study: Caitlin Corrigan, *Breaking the Resource Curse: Transparency in the Natural Resource Sector and the Extractive Industries Transparency Initiative*, 41 RESOURCES POL'Y 17–30 (2014); 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](http://archiv.ub.uni-heidelberg.de/volltextserver/14368/1/Schmaljohann_2013_dp538.pdf) ("Schmaljohann Study")); Letter from ONE Campaign (Mar. 16, 2016).

<sup>568</sup> See letters from Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020).

required to disclose their most significant operational and financial risks<sup>569</sup> as well as certain financial information related to the geographic areas in which they operate, in their Exchange Act annual reports.<sup>570</sup> We discuss this issue in greater detail in Section III.D.1 below where we discuss the implications of the definition of “project.”

#### *C. Potential Costs Resulting From the Payment Reporting Requirement*

The disclosures required by Section 13(q) could result in direct compliance costs for affected issuers. The direct compliance costs will stem from the time and effort, to the extent necessary, 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 types of payment (e.g., royalties, taxes, or bonuses), and developing a systematic approach to handle “in-kind” payments. We estimate the direct compliance costs resulting from the final rules in Section III.D.11 below.

Several commenters asserted that Section 13(q)’s mandated disclosures could result in competitive harm to issuers, especially those that are not currently subject to payment disclosure in other jurisdictions.<sup>571</sup> These commenters did not provide specific information or data that would allow us to assess the likelihood or magnitude of any such effect. As a general matter, we acknowledge that the final rules’ mandated disclosures may have under certain circumstances adverse competitive effects on resource extraction issuers covered by the final rules; however, we are not aware of, and no commenter has provided us evidence of, any information demonstrating that

the resource extraction companies that have been subject to similar foreign disclosure requirements for several years have experienced significant adverse competitive effects. We base this on the fact that for several years a large number of companies have been disclosing payment information in the European Union, UK, and Canada, all of which have transparency laws that require more granular disclosure than that required by the final rules, and we are not aware of evidence that would suggest these companies have suffered from competitive harm as a result. We also note that those regimes cover a wider pool of affected companies than the final rules as these regimes are not limited to companies that are publicly traded in their jurisdictions but instead also cover companies of a certain size that are domiciled in their jurisdictions (including potentially foreign subsidiaries of U.S. resource extraction issuers).<sup>572</sup>

We discuss below the significant choices we have made to implement the statutory requirements that are the main drivers of the direct compliance costs of the final rules. 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 because reliable, empirical evidence about the effects is not readily available to the Commission. For most of the choices described below, commenters did not provide any data allowing us to quantify costs or benefits. We do, however, provide an estimate of total compliance costs in Section III.D.11.

#### *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 final 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” 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 track and report payments using a definition of project different from the one included in the final rules (or using no definition at all). The definition of “project” may 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, thus generating compliance costs, at least in the short run. To the extent that some issuers already have internal systems in place for recording payments that would be required to be disclosed under Section 13(q), or that any necessary adjustments to issuers’ existing reporting systems could be done in a timely and cost-effective manner, compliance costs may be low.

The Modified Project Definition that we are adopting may help limit direct compliance costs for affected issuers. With respect to direct compliance costs, the Modified Project Definition will 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 Modified Project Definition, affected issuers will 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 (as compared to the 2016 Rules) because there will be fewer individual data points to be tracked, electronically tagged, and reported. It should also make it easier for the issuer to report the payment information. However, as discussed in Section III.D.11, below, the most recent cost estimates provided by commenters based on experience reporting under the EU Directives indicates that the initial and ongoing costs estimated in the 2016 Adopting Release may have been overstated. To the extent these reporting costs are lower than the Commission previously anticipated, the cost savings associated with the Modified Project Definition, as compared to a contract-based definition, would be reduced.

<sup>572</sup> See, e.g., Canada’s ESTMA at Section 8(1), providing that ESTMA’s reporting requirement apply 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 in assets, (ii) it has generated at least \$40 million in revenue, (iii) it employs an average of at least 250 employees; and (c) any other prescribed entity.”

<sup>569</sup> See 17 CFR 229.305 and 229.503.

<sup>570</sup> See 17 CFR 229.101(d).

<sup>571</sup> See letters from API, Chamber, and NAM.

In addition, because the required payment information is at a higher level of aggregation than under a contract-based definition, it is likely that an issuer already aggregates some of the required payment information for its own internal accounting or financial reporting purposes. For example, one commenter asserted that the vast majority of the revenue stream for extractive industry issuers is realized at the national or subnational jurisdictional level, and that payments below that level tend to be minimal.<sup>573</sup> In that event, requiring payment information at a higher level of aggregation may be less costly 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.

At the same time, the Modified Project Definition will 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.

Finally, we acknowledge that the Modified Project Definition 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 identifies the type of resource, the method of extraction, and the location, will, in conjunction with other aspects of the final rules, provide substantial transparency about the overall revenue flows to national and subnational governments, as explained in Section II.A above.

Several commenters supported the Modified Project Definition, arguing that it would reduce compliance costs while promoting transparency.<sup>574</sup> One commenter noted that this approach would reduce regulatory costs and unnecessary exposure of issuers' competitively sensitive data while promoting transparency.<sup>575</sup>

Many commenters did not support the Modified Project Definition and disagreed with the Commission's analysis in the Proposing Release of the potential benefits and costs of the Modified Project Definition, especially compared to the contract-level

definition used in the 2016 Rule and in other jurisdictions. The criticism followed several broad themes, which we summarize below.

#### a. Effects on Transparency

Many commenters argued that the Modified Project Definition would impede the benefits of transparency compared to a contract-based definition.<sup>576</sup> One commenter stated that the aggregation of payments permitted by the revised definition would increase issuers' ability to hide payments made to smaller municipalities or government officials.<sup>577</sup> Another commenter stated that contract-level disclosure is more valuable since corruption occurs within individual deals and not across them.<sup>578</sup> Several commenters also opposed the Commission's proposal to permit an issuer to aggregate payments of a particular payment type below the major subnational government level without having to identify the particular subnational government payee.<sup>579</sup> We note that under the final rules, an issuer, while still able to aggregate payments by payment type when disclosing payments made at a level below the major subnational government level, will now be required to disclose the aggregated amount paid to, and identify, each subnational government payee.

One commenter argued that contract-level data was very useful for investors and civil society who could only get it from disclosures under Section 13(q).<sup>580</sup> According to this commenter, by eliminating contract-level reporting and allowing the aggregation in the Modified Project Definition, the Commission is effectively proposing to shift the burden of identifying which payments relate to which project, and tracking financial flows from a company to a particular government, to the public and investors. The commenter argued that competitors could get such contract-level information from energy intelligence firms and services, but the price of those is prohibitively high for individual investors and civil society.

We acknowledge, as commenters have asserted, that compared to a contract-based level of disclosure, the Modified Project Definition may limit the ability

of citizens and civil society organizations to identify some payments made to their local government and thus advocate more effectively with them. As discussed above, however, the final rules' disclosure will include the name of the issuer as well as the particular subnational government payee. Thus, although the revised definition will provide less granular information as compared to the 2016 Rules, we believe it still will provide substantial transparency about the overall revenue flows to foreign governments and the U.S. Federal government, as required by Section 13(q).

#### b. Effects on Compliance Costs

Some commenters argued that the Modified Project Definition would not decrease issuers' compliance costs compared to a contract-based definition. One commenter asserted that issuers already track payments at the contract level because of standard business practices.<sup>581</sup> According to that commenter, because of the widespread use of contract-level reporting, our Modified Project Definition could actually increase compliance costs because registrants will have to switch their systems to a new project definition. Also, the commenter stated that issuers that are cross-listed or have substantial subsidiaries in Canada and the EU will not incur large costs because they already collect this information at a contract-based level. Similarly, the commenter argued that many issuers collect data for similar IRS payment disclosure categories and hence have internalized the cost of creating a system that could be used to provide disclosure at a contract-based definition.

We note, however, there is no indication that affected issuers track payments at the contract level as a matter of standard business practices. In addition, not all issuers that would be affected by the final rules have subsidiaries in countries that require contract-level reporting and thus may not have systems in place to track payments at the contract level. Finally, companies that are reporting under other reporting regimes (that the Commission has determined satisfy the transparency objectives of Section 13(q)) can file those reports under the alternative reporting provision. Such issuers will not have to change their reporting systems to conform to the Modified Project Definition.<sup>582</sup>

<sup>576</sup> See, e.g., letters from Oxfam America and Earthrights International; PWYP-US (Mar. 16, 2020); and Better Markets.

<sup>577</sup> See letter from Better Markets.

<sup>578</sup> See letter from Oxfam America and Earthrights International.

<sup>579</sup> See, e.g., letters from Oxfam America and Earthrights International; PWYP-US (Mar. 16, 2020); Congr. Waters *et al.*, and POGO.

<sup>580</sup> See letter from Oxfam America and Earthrights International.

<sup>581</sup> See *Id.*

<sup>582</sup> See *supra* Section II.N.

<sup>573</sup> See letter from API (Mar. 16, 2020).

<sup>574</sup> See letters from API (Mar. 16, 2020); Chamber; NAM; Petrobas; and SAF.

<sup>575</sup> See letter from API (Mar. 16, 2020).



### c. Competitive Harm Effects

While some commenters expressed concern that the Section 13(q) disclosures could potentially cause competitive harm,<sup>583</sup> a number of commenters who opposed the Modified Project Definition argued that there is no need to modify the project definition to address concerns related to competitive harm.<sup>584</sup> Some commenters stressed that a contract-level definition of project would not result in competitive harm to resource extraction issuers based upon the numerous issuers already subject to contract-level disclosure requirements in the foreign payments-to-governments reporting regimes and the EITI and because contract information about competitors is available from paid third-party service providers.<sup>585</sup> Others noted that there has not been evidence of any competitive harm by global and overseas issuers already subject to detailed contract-level disclosures resulting from the EU directives and Canadian legislation.<sup>586</sup>

As noted above, as a general matter, we do not believe that the final rules' mandated disclosures are likely to result in significant adverse competitive effects for affected issuers. Therefore, although the Modified Project Definition might help to mitigate any risk of competitive harm for those issuers that are not currently subject to payment disclosure in other jurisdictions, we view this as an ancillary rather than primary benefit of the modified definition.

### d. Investor Benefit Effects

Some commenters argued that, compared to the Modified Project Definition, a contract-based definition would provide significant benefits to investors, and criticized us for not highlighting these benefits in the economic analysis.<sup>587</sup> According to these commenters, the main investor benefits would be the ability to evaluate regulatory and political risks of registrants in the extractive sectors, value the projects and registrants more accurately, and perform a better portfolio risk evaluation. One commenter argued that it would help

investors understand portfolio risk.<sup>588</sup> The same commenter noted that the current disclosures in Regulation S-K do not apply to smaller reporting companies, which means investors would not be able to evaluate the risks associated with investing in such companies. Another commenter quoted a number of institutional investors stating that contract-based payment disclosure would enhance the identification of opportunities and risks in portfolios with exposure to the extractives sectors, which have a history of volatility due to political and regulatory risk.<sup>589</sup> According to these investors, the disclosures required by Section 13(q) would also help address the need for detailed information regarding the financial relationship between extractives companies and the governments where they operate.

While we acknowledge, as we did in the 2019 Rules Proposing Release, that Section 13(q) disclosures could be helpful for some investors, we remain skeptical of the benefit of contract-level disclosure, as put forth by commenters, for evaluating portfolio risk or providing more accurate project or issuer valuation. It is true that Section 13(q) disclosures, whether contract-level or based on the Modified Project Definition, may provide some information (e.g., taxes paid, operating expenditures such as royalties, etc.) that could be used to value an issuer or its projects in various countries, or the volatility of these projects. Significant information about these projects, however, will still remain unreported because there is no requirement in the relevant laws or regulations that require issuers to report it. This would significantly limit an investor's ability to perform project valuation and risk analyses and hence would limit the usefulness of the Section 13(q) disclosures (whether contract-level or based on the Modified Project Definition) for investors.

For example, even with Section 13(q) disclosures, a major driver of project value and risk such as cash flows will be impossible to calculate because the applicable financial statement disclosure requirements do not necessarily compel issuers to disclose project level revenues and other key project level operating costs such as employee compensation. This lack of key information will make it very difficult for an investor to determine and/or quantify a particular project's valuation and risk. Similar reasoning

applies regarding the potential usefulness of Section 13(q) disclosures (whether contract-level or based on the Modified Project Definition) for the valuation of issuers. The Section 13(q) payments already will be reflected in an issuer's consolidated financial statements, thus making the Section 13(q) payments disclosure (whether contract-level or based on the Modified Project Definition) redundant for an issuer's cash flow projections and its valuation. Moreover, an issuer would also be required to disclose any information concerning a particular project or operation in a country when necessary to understand its financial condition or results of operations.<sup>590</sup>

We also believe that there will be little or no marginal benefit of using the Section 13(q) disclosures to evaluate a country's political and regulatory risks, as suggested by commenters. In this regard, there are other disclosure requirements (risk factors, management's discussion of known trends and uncertainties, etc.) as well as other measures of such risks (e.g., various indices measuring a country's corruption level, governance, ease of doing business, freedom of press, etc.) that are freely available to investors.

### 2. Exemptions From Disclosure

The final rules would provide conditional exemptions for situations in which a conflict with foreign law or a pre-existing (pre-adoption) contract term prohibits the Section 13(q) disclosure. We acknowledge that 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. Specifically, 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, or otherwise be forced to abandon the project. In addition, the country's laws could have the effect of preventing them from participating in future projects. Similar to the 2016 Rules, we are also adopting a provision that will allow an issuer to apply for an exemption on a case-by-case basis using the procedures set forth in Rule 0-12 of the Exchange Act for other situations posing a significant threat of commercial harm.

Several commenters supported the exemptions for conflicting laws or pre-

<sup>583</sup> See *supra* note 571.

<sup>584</sup> See, e.g., letters from Kaufmann; Oxfam America and Earthrights International; and PWYP-US (Mar. 16, 2020).

<sup>585</sup> See, e.g., letters from PWYP-US (Mar. 16, 2020); Kaufmann; and POGO.

<sup>586</sup> See, e.g., letter from Oxfam America and Earthrights International.

<sup>587</sup> See, e.g., letters from Oxfam America and Earthrights International; PWYP-US (Mar. 16, 2020); F. Samama *et al.*; and WK Associates (Mar. 16, 2020).

<sup>588</sup> See letter from Oxfam America and Earthrights International.

<sup>589</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>590</sup> See 17 CFR 229.303.

existing contract terms.<sup>591</sup> These commenters generally argued that the exemptions could reduce costs and competitive burdens for issuers and potentially investors. One of these commenters argued that the exemptions would not impede the statutory purpose because transparency continues to grow as an international practice as new countries continue to join the EITI, and the exemptions are designed to be used in very limited circumstances.<sup>592</sup> That commenter asserted that two countries—Qatar and China—prohibit the required disclosures.<sup>593</sup>

Many commenters opposed the exemptions for conflicting laws or pre-existing contract terms that we are adopting.<sup>594</sup> In general, those commenters pointed out that other disclosure regimes such as those in the EU and Canada do not provide such exemptions and issuers disclosing under those regimes did not report any concerns. One commenter argued that several years of reporting of disaggregated project-level payment information by nearly 800 companies under reporting regimes that provide no exemptions have not led to any companies being barred from operating in certain jurisdictions, or to any large costs to issuers.<sup>595</sup> The same commenter asserted that it was a standard industry practice to include contract provisions that allow disclosure of information that would otherwise be considered confidential if it is required by law, regulators, or exchanges.

We do not believe that the exemptions will undermine the purpose of Section 13(q) disclosures as they include several conditions that are designed to limit the availability of the exemptions and help ensure that issuers forgo disclosure only when there is a legitimate conflict. At the same time, we believe the exemptions will substantially decrease any indirect costs and competitive effects that could result from any potential 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.

In addition to the exemptions for conflicts with foreign law and pre-existing contracts, and the case-by-case

exemptive procedure, the final rules will 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 final 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 reduce compliance costs for affected issuers.

In a change from the Proposing Release, we have modified the proposed exemption for smaller reporting companies (SRCs) and emerging growth companies (EGCs). As we discussed, we proposed this exemption because the final rules could result in significant fixed compliance costs, which are likely to have a greater relative impact on smaller resource extraction issuers. Thus, we believe that this exemption will promote capital formation by decreasing compliance costs for SRCs and EGCs.<sup>596</sup>

The exemption we are adopting in this release, however, exempts only those SRCs and EGCs that are not subject to the EU Directives, Canada's ESTMA, or other similar disclosure regimes. We believe that SRCs and EGCs that already provide such payments disclosure under a similar disclosure regime will incur small compliance costs when providing the Section 13(q) disclosure, mainly related to tagging and translation.<sup>597</sup> This is because the final rules will allow them 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).<sup>598</sup>

As noted above, we identified a total of 321 issuers with SRC or EGC status in the period January 1, 2018, through December 30, 2019: 214 issuers reported being SRCs, 191 issuers reported being EGCs and 84 issuers reported being both SRCs and EGCs. Of these 321 issuers, there are 69 issuers with SRC or EGC status that were subject to alternative reporting regimes that, concurrent with adoption of the final rules, the Commission is deeming to satisfy the transparency objectives of Section 13(q), and which are therefore not eligible for the EGC/SRC exemption. This results in

252 issuers that are potentially exempt from the final rules. The exemption for SRCs and EGCs would avoid adding to the costs of being a public reporting company for these companies.

Two commenters supported the exemption for EGCs and SRCs on the grounds that it would result in important cost savings for such companies.<sup>599</sup> Several commenters opposed the exemption for EGCs and SRCs, arguing that those issuers may be equally susceptible to corruption and that they tend to take greater operational risks than larger issuers.<sup>600</sup> We note, however, that exposure to greater operational risks does not automatically result in greater engagement in corruption activity, and we are not aware of any empirical evidence that documents such a link.

### 3. Annual Report Requirement

Section 13(q) provides that the resource extraction payment disclosure must be "include[d] in an annual report." As under the 2016 Rules, the required payment information would be reported on Form SD. Following a 2-year transition period, during which no report would be due, the Form SD would be due no later than 270 days following the end of its most recently completed fiscal year. This should lessen the burden of compliance with Section 13(q) and the related rules because issuers will have additional time to prepare their report and will not have to incur the burden and cost of providing the payment disclosure at the same time that they must fulfill their disclosure obligations with respect to Exchange Act annual reports.<sup>601</sup>

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.

In a change from the 2016 Rules, the final rules require an issuer to furnish

<sup>591</sup> See letters from API, (Mar. 16, 2020); Chamber; Davis Polk; FACT Coalition; NAM; Petrobras; PWYP-US (Mar. 16, 2020); and SAF.

<sup>592</sup> See letter from API (Mar. 16, 2020).

<sup>593</sup> *Id.*

<sup>594</sup> See letters from Africa Center for Energy Policy; Elise J. Bean; Sens. Cardin *et al.*; DAR; EG Justice; FACT Coalition; Friends of the Nation; Shannon Gough; KCSPG; Eric Postel; Robert Rutkowski; Transparency International; and Congr. Waters *et al.*

<sup>595</sup> See letter from Elise J. Bean.

<sup>596</sup> See 2019 Rules Proposing Release at Section II.J.3.

<sup>597</sup> See *infra* Section III.D.5.

<sup>598</sup> See *supra* Section II.N.

<sup>599</sup> See letters from Chamber and NAM.

<sup>600</sup> See letters from and NRG (Mar. 16, 2020); Public Citizen; and PWYP-US (Mar. 16, 2020).

<sup>601</sup> This submission deadline is longer than the 2016 Rules' deadline, which required the Form SD report to be filed no later than 150 days following the most recently completed fiscal year end. A resource extraction issuer may be able to save resources to the extent that the timing of these obligations with enable it to allocate its resources, in particular personnel, more efficiently.

rather than file the payment disclosure in an annual report on Form SD. This will limit the incremental risk of liability under Section 18 of the Exchange Act and promote capital formation. 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. In addition, issuers would still be subject to antifraud liability under the Federal securities laws for material misstatements or omissions, which should mitigate the risk of decreased quality of the reported payment information. We also believe this change is appropriate given the nature and purpose of the Section 13(q) disclosure requirements, which are not for the protection of investors, although some investors may find the disclosures to be useful. Rather, they are to increase the accountability of governments and to support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.<sup>602</sup> Since Section 18 is designed to protect investors,<sup>603</sup> we do not believe it is necessary or appropriate to apply it to the Section 13(q) disclosures.<sup>604</sup>

Commenters were split in their views on whether issuers should file or furnish the payment disclosure. Several commenters argued that furnishing it would reduce compliance costs without compromising the benefits of transparency.<sup>605</sup> A similar number of other commenters generally argued that without the liability that comes with filing the disclosures, the disclosure might be ineffective.<sup>606</sup>

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 final rules will require a resource extraction issuer to furnish the required payment disclosure publicly, including the name of the issuer. As an alternative to requiring payment disclosure by individual issuers, we could have permitted resource extraction issuers to furnish the information non-publicly and having the 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 issuer 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.

Such anonymized public compilation, however, may not further transparency efforts to the same degree as company-specific disclosure. As discussed in Section II.A above, we believe that Section 13(q) is reasonably understood to promote Project-to-Government Payment Disclosure, which identifies the project of the issuer that generated specific payments and the foreign government that received those payments. Absent disclosure of the issuer, the Modified Project Definition would not identify the specific project of the issuer that was the source of the payments. Rather, all similar activities in the same subnational jurisdiction, regardless of issuer, would be indistinguishable. In addition, 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 Commission publishes its periodic compilation. We do not believe that the 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 furnish the same payment information to the Commission. In

addition, for the reasons discussed above, we do not believe there is a significant risk of competitive harm from public disclosure. Moreover, any such risk would be marginal because of the Modified Project Definition and the extended filing deadline.

Many commenters supported the public reporting of the Section 15(q) disclosure.<sup>607</sup> These commenters generally argued that the aggregated, anonymized reporting would undermine the transparency benefits that the statute is supposed to generate and limit the usefulness of the payment disclosure to interested parties such as citizens and civil society in those countries. Some commenters favored the alternative, anonymized compilation approach.<sup>608</sup> According to those issuers, public reporting would cause competitive harm to reporting issuers. As we noted above, however, the potential for competitive harm would be marginal because the Modified Project Definition should significantly alleviate the likelihood of such harm occurring, and because of the extended filing deadline.

#### 5. Alternative Reporting

The final 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. The Commission is making a similar determination in connection with adoption of the final rules, which should significantly decrease compliance costs for issuers that are cross-listed or incorporated in these jurisdictions.

As noted above, we estimated that 177 issuers are subject to other regulatory regimes that may allow them to utilize

<sup>602</sup> See, e.g., letter from API (Mar. 16, 2020).

<sup>603</sup> Exchange Act Section 18 [15 U.S.C. 78r] imposes liability for false or misleading statements made in any application, report, or document filed with the Commission pursuant to the Exchange Act.

<sup>604</sup> See *supra* Section II.F.

<sup>605</sup> See letters from API (Mar. 16, 2020); Chamber; Equinor; Orintiv; and Royal Dutch Shell.

<sup>606</sup> See letters from Chris Barnard; KCSPOG; Public Citizen; and PWYP-US (Mar. 16, 2020).

<sup>607</sup> See letters from Sens. Cardin *et al.*; EITI (International Secretariat) (Mar. 16, 2020); Equinor; FACT Coalition; Friends of the Nation; Oxfam America and Earthrights International; ONE.org; Oxfam in Kenya; POGO; Eric Postel; PWYP-US (Mar. 16, 2020); Transparencia por Colombia; Congr. Waters *et al.*; and Zimbabwe Environmental Law Organization.

<sup>608</sup> See letters from API (Mar. 16, 2020); Chamber; and NAM.

this provision.<sup>609</sup> For these issuers, the costs associated with preparing and furnishing a Form SD should be negligible when compared to the costs associated with tracking, recording, and filing such information, 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. Thus, such issuers may incur certain tagging and translation costs. We are not able to quantify those costs, and no commenter provided estimates of such costs.<sup>610</sup> Commenters generally supported the alternative reporting provision.<sup>611</sup>

As an alternative, we could have excluded such a provision from the final rules. Such an alternative would have increased 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 the marginal costs for complying with an additional disclosure regime would likely be mitigated to the extent of any overlap between these reporting regimes and the final 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, the final rules will define the term “control” based on accounting principles. Alternatively, we could have used a definition based on Exchange Act Rule 12b–2, as in the 2012 Rules.<sup>612</sup> We believe that the approach we are adopting 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 filed with the Commission.<sup>613</sup> 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 final 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 final definition of control would eliminate 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.<sup>614</sup> This in turn could limit compliance costs for affected issuers who might otherwise be forced to renegotiate their joint venture agreements or make other arrangements in order to be able to obtain sufficiently detailed payment information to comply with the Section 13(q) rules.

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 to include proportionately consolidated entities or operations in order to avoid disclosure. We believe, however, that many 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 required disclosure of payments made by a resource extraction issuer’s proportionately consolidated entities or operations. This alternative would have resulted 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 13(q) disclosures compared to the proposed approach. As noted above, however, it could also increase compliance costs to the extent issuers were forced to renegotiate their joint venture agreements or make other arrangements to obtain sufficiently detailed payment information.

Most commenters supported the definition of control that we are adopting.<sup>615</sup> Those commenters generally pointed out that the definition would reduce burdens for issuers, will drive greater consistency in interpretation across companies, and will align with companies’ internal controls.

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

The final rules define “commercial development of oil, natural gas, or minerals” to include exploration, extraction, processing, and export, or the acquisition of a license for any such activity. As described above, the final rules generally track the language in the statute.

We acknowledge that a broader definition of “commercial development of oil, natural gas, or minerals” could increase issuers’ costs. We also acknowledge 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 final rules under the alternative reporting provision. We decided to use the proposed definition

<sup>609</sup> These are issuers that have a business address, are incorporated, or are listed on exchanges, in the EEA or Canada.

<sup>610</sup> See *supra* note 545.

<sup>611</sup> See letters from API (Mar. 16, 2020); BHP; BP America; Chamber; Sarah Chayes *et al.*; Eni; Equinor; PWYP–US (Mar. 16, 2020); Rio Tinto; Royal Dutch Shell; SAF; Gayle Smith *et al.*; and Total (Feb. 10, 2020).

<sup>612</sup> See 2012 Rules Proposing Release at Section II.D.4.

<sup>613</sup> See *supra* Section II.E.

<sup>614</sup> As some commenters noted (*see, e.g.*, letter from API (Mar. 16, 2020)), it is not standard industry practice for an operator to aggregate, quantify and provide its non-operating partners with a list of payments remitted to each governmental entity, the timing of the remittance, and their corresponding share of the remittance. As such, it is possible, if not likely, that affected issuers would have to pay the operator a fee to obtain this information, increasing their compliance costs.

<sup>615</sup> See letters from API; Ovintiv; Oxfam America and Earthrights International; Petrobras; PWYP–US (Mar. 16, 2020); and SAF.

because we believe that the language is consistent with what we believe to be the plain meaning of the statute. Additionally, most commenters did not object to this definition.

On the other hand, we recognize that limiting the definition to these specified 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. We believe, for the reasons identified above, that the definition adopted in the final rules appropriately takes into account both issuers' compliance costs and the benefits of transparency.

#### 8. Types of Payments

As under the 2016 Rules, the final 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. The final rules will include payments of certain dividends and payments for infrastructure because, based on comments to the Proposing Release and 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 final 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 final rules would include CSR payments that are required by law or contract in the list of covered payment types. We also note that the EITI requires the disclosure of CSR payments if required by law or contract.<sup>616</sup> Thus, the addition of CSR payments to the list of types of payments that must be disclosed should improve the quality of the disclosure required by the statute 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, requiring issuers to disclose both CSR payments and infrastructure payments may lead to lower compliance costs, as issuers will not be required to make what can be a difficult distinction, that is, determining whether a particular payment is an infrastructure payment, and as such reportable, or a CSR payment, in the event that such payments were not reportable.

As discussed earlier, under the final rules, resource extraction issuers would incur costs to provide the payment disclosure for the required payment types. For example, there 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 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 final rules because they will have to track a larger number of payments.

To address concerns about the difficulty of allocating payments that are made for obligations levied at the entity level,<sup>617</sup> such as corporate income taxes, to the project level, the final 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 final rules, issuers must disclose payments made in-kind. The EU Directives and ESTMA also require disclosure of in-kind payments, as does the EITI. Consequently, this requirement should help further the goal of supporting the commitment of the Federal Government to 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 requirement could impose costs if issuers have not

previously had to value their in-kind payments. To minimize the potential additional costs, the final rules provide issuers with the flexibility of reporting in-kind payments at cost, or if cost is not determinable, at fair market value. We believe this approach should help limit the overall compliance costs associated with our requirement to disclose in-kind payments. Due to the lack of data, we are unable to quantify the costs related to valuing in-kind payment, either at cost or fair value.

As an alternative, one commenter suggested that the final rules should include large payments that are not a part of the legitimate revenue stream, yet may nonetheless be a common, if "unwelcome and illegitimate," source of revenue for a government or its officials.<sup>618</sup> We note, however, that identifying such payments would create significant compliance costs for issuers because by nature they are likely to be irregular and hence more difficult to track.

#### 9. Definition of "Not De Minimis"

Section 13(q) requires the disclosure of payments that are "not de minimis," leaving that term undefined. In a change from the Proposing Release, we have reduced the "not de minimis" threshold: Under the final 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 \$100,000, or its equivalent in the issuer's reporting currency, whether made as a single payment or series of related payments.

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

Two commenters supported the definition of "not de minimis" in the 2019 Rules Proposing Release primarily because such a definition would reduce issuers' compliance costs.<sup>619</sup> Specifically, defining payments that equal or exceed \$100,000 as "not de

<sup>616</sup> See *supra* Section II.J.5.

<sup>617</sup> See, *e.g.*, letters from API (Mar. 16, 2020); Petrobras; and PWYP-US (Mar. 16, 2020).

<sup>618</sup> See letter from Elise J. Bean.

<sup>619</sup> See letters from API and NAM.

minimis” will lead to more payments disclosure, which could result in higher compliance costs for issuers than under the proposed definition.

Numerous commenters opposed the definition of “not de minimis” in the 2019 Rules Proposing Release.<sup>620</sup> Commenters’ chief concern was the potential elimination of a large number of projects and payments from the Section 13(q) disclosure under the higher threshold in the Proposing Release and the resulting significant negative effect on transparency. One commenter asserted that, based on analysis that that commenter did using disclosure data from issuers reporting under the EU Directives and ESTMA, the threshold in the Proposing Release was expected to leave out about 50% of projects.<sup>621</sup> We believe that adopting a \$100,000 threshold for “not de minimis,” which is similar to the threshold used in the international transparency regimes and is the same as the threshold under the 2016 Rules, will alleviate such concerns. By scoping in more projects, the \$100,000 threshold will enhance the benefits of transparency, and will provide for a standardized reporting threshold across jurisdictions, benefiting the potential users of this disclosure. The \$100,000 threshold could generate higher compliance costs for affected issuers who are not otherwise tracking and recording these payments at the \$100,000 level, compared to the higher threshold in the Proposing Release, but we believe, for the reasons set forth above, that any such costs are justified by the benefits of the additional disclosure.

#### 10. Exhibit and Interactive Data Requirement

Section 13(q) requires the payment disclosure to be electronically formatted using an interactive data format. The final rules will require a resource extraction issuer to provide 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.<sup>622</sup>

We believe that requiring the specified information to be presented in XBRL format will 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 will allow users to quickly examine, extract, aggregate, compare, and analyze the information in a manner that is most useful to them. This includes searching for specific information within a particular submission as well as performing large-scale statistical analysis using the disclosures of multiple issuers and across date ranges.

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 believe that most issuers are already familiar with XBRL as they use it to tag financial and cover page information in their annual and quarterly reports filed with the Commission. Thus, we 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 will be significantly greater than filing the data in a custom XML format.<sup>623</sup> One commenter stated that the final rules should require Inline XBRL tagging rather than XBRL tagging so that the payment information could be “electronically tagged but also be made available in a human readable format together with any further narrative, context, clarificatory footnotes or basis of preparation deemed helpful by the issuer.”<sup>624</sup> Another commenter supported the proposal and was “agnostic as to whether conventional (XML-based) XBRL or Inline (HTML-based XBRL) is adopted.”<sup>625</sup> For the reasons discussed above, we do not believe an Inline XBRL requirement would improve the usefulness or presentation of the payment information.<sup>626</sup>

Consistent with the statute, the final rules require a resource extraction issuer to include an electronic tag that identifies the currency used to make the payments. Under the final rules, if multiple currencies are used to make payments for a specific project or to a government, a resource extraction issuer

may choose to provide the amount of payments made for each payment type and the total amount per project or per government in either U.S. dollars or the issuer’s reporting currency. We recognize that a resource extraction issuer could incur costs associated with converting payments made in multiple currencies to U.S. dollars or its reporting currency. Nevertheless, given the statute’s tagging requirements and the requirement to disclose total amounts, we believe reporting in one currency is necessary.<sup>627</sup> The final 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.

The final rules also require issuers to tag the subnational geographic location of a project using ISO codes. Using ISO codes will 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 will also increase compliance costs for issuers to the extent that they do not currently use such codes in their reporting systems.

#### 11. Quantitative Estimates of Costs Resulting From the Rulemaking

In this section, we discuss the quantitative data in the administrative record relating to the economic considerations connected to this rulemaking. This new lower cost data (as noted in Section I) is based on actual experiences rather than estimates and as such we believe that it is likely more accurate than the estimates the Commission included in the 2016 Rules Adopting Release.<sup>628</sup> While, as reflected in the discussion in Section II above, we have considered these appreciably reduced cost estimates in crafting the final rules, this data has not been the sole basis of any discretionary determinations that we have made.

In the 2016 Rules Adopting Release, the Commission estimated initial issuer compliance costs to be in the range of \$128,787 to \$1,352,268 assuming no fixed costs and in the range of \$561,932 to \$1,547,437 assuming the rule requirements would generate fixed costs for affected issuers. Similarly, the Commission estimated the ongoing issuer compliance costs to be in the range of \$51,515 to \$1,287,874 assuming no fixed costs and in the range of \$224,773 to \$1,389,882 assuming fixed

<sup>620</sup> See letters from Africa Center for Energy Policy; Elise J. Bean; Better Markets; Sens. Cardin *et al.*; Carter Center; DAR; FACT Coalition; Shannon Gough; Kaufmann; KCSPOG; NRGi (Mar. 16, 2020); *ONE.org*; Oxfam America and Earthrights International; Eric Postel; Public Citizen; PWYP-US (Mar. 16, 2020); F. Samama *et al.*; Sierra Club; Total (Feb. 10, 2020); and Congr. Waters *et al.*

<sup>621</sup> See letter from NRGi (Mar. 16, 2020).

<sup>622</sup> Users of this information should be able to render the information by using software available on the Commission’s website at no cost.

<sup>623</sup> See 2016 Rules Adopting Release at Section II.C.9.

<sup>624</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>625</sup> See letter from XBRL US.

<sup>626</sup> See *supra* Section II.M.

<sup>627</sup> See *id.*

<sup>628</sup> We similarly believe that the discussions and explanations concerning competitive effects, also based on actual experiences, are likely more accurate than those included in the 2016 Rules Adopting Release. See *supra* note 67.

costs. We note that those estimates were based on cost estimates provided mostly by three large issuers: Barrick Gold, ExxonMobil, and Rio Tinto.<sup>629</sup> For the reasons discussed below, we no longer rely on these estimates.

Several commenters provided information relevant to the expected compliance costs of the Section 13(q) rules.<sup>630</sup> Total S.A. estimated that its costs to comply with the EU Directives were \$100,000 for a one-time external auditor fee and \$200,000 per year for internal costs.<sup>631</sup> Another commenter reported EU Directives' compliance costs for two companies based on information collected by the EC for its 2018 evaluation of the EU Directives: BASF (Germany), which reported a start-up cost of €47,000 and an annual reporting cost of €26,000; and Eni (Italy), which reported a start-up cost of €1,000,000 and annual reporting costs of €500,000.<sup>632</sup> Similarly, a commenter provided compliance cost estimates for an unaffiliated company: Tullow Oil. According to this commenter, Tullow reported initial costs of \$150,000 and on-going annual costs of \$150,000 to comply with the UK payments-to-governments rules.<sup>633</sup> Similar to the issuers that provided the cost estimates used in the 2016 Rules, all of the cost estimates provided by commenters were for large issuers. Tullow Oil is the smallest issuer with total assets of \$8.3 billion as of 2019,<sup>634</sup> while Total S.A. is the largest issuer with total assets as of 2019 of \$273.3 billion.<sup>635</sup> Additionally, no commenters provided estimates of the compliance costs under the ESTMA reporting regime.

Both the initial and ongoing cost estimates reported by the commenters are generally smaller than the ranges of cost estimates from the 2016 Rules, especially the range that includes fixed costs. We believe these cost estimates are more accurate than the cost estimates considered in the adoption of the 2016 Rules because they are based on real expenses incurred by issuers

under a currently functioning disclosure regime: The EU Directives and the UK reporting regime. In contrast, the estimates in the 2016 Rules were hypothetical estimates based on the requirements of a reporting regime that was not yet implemented. We acknowledge, however, that our current estimates, as were the estimates from the 2016 Rules, are based on a small sample of issuers, and, thus, this limits our ability to draw firm conclusions from the data.

We estimate the average initial cost and ongoing annual cost associated with the final rules by calculating the average of the cost estimates provided by commenters. The average initial cost is approximately \$420,000 per issuer,<sup>636</sup> while the average ongoing cost is approximately \$240,000 per issuer.<sup>637</sup> Based on these averages, the initial cost would be 0.005% of the total assets of the smallest issuer, Tullow Oil, that provided cost estimates. Further, we note that the commenters' estimates are based on compliance with the EU Directives, which has a more granular definition of "project" than the final rules. Thus, to the extent that compliance costs are materially less expensive under the Modified Project Definition, an issuer's costs, both initial and ongoing, are likely to be smaller under the final rules.

Other commenters provided qualitative assessments of compliance costs. One commenter described the costs to comply with the EU Directives as modest and acceptable.<sup>638</sup> Another commenter stated that he did not believe that the compliance costs of reporting at the contract level could be deemed burdensome for companies because many already provide such data under the EITI, EU Directives, or ESTMA.<sup>639</sup> Another commenter similarly stated that the Section 13(q) compliance costs would be negligible because, in addition to being subject to payments-to-governments reporting under other regimes, many extractive companies already report detailed tax payment information on a country-by-country basis.<sup>640</sup>

A 2018 study by the UK Department for Business, Energy & Industrial Strategy (the "UK study") is another

source of potential cost estimates.<sup>641</sup> We reviewed that data and note that the cost estimates presented in the study, like cost estimates provided by commenters, are not based upon compliance with the Modified Project Definition. Based on the data provided by the study, the total compliance costs under the UK rules ranged from approximately \$24,547 per company for small companies to approximately \$2,260,263 per company for large companies. As discussed, the payment disclosure would be provided at a greater level of aggregation under the final rules than under the UK contract-level definition. As such, to the extent that compliance costs under the Modified Project Definition are smaller than those resulting from compliance with the UK rules, the data in the UK study may overestimate the cost estimates for the final rules. Also, the small sample size in the UK study, as only 15 companies that responded, 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 disapproved by Congress under the CRA). In addition, the majority of companies (84%) surveyed in the UK study indicated that they do not track compliance costs. As such, the study, relying on actual or estimated compliance cost data from 15 companies, may or may not be representative of the broader population.

With those caveats, 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. Our compliance costs estimates based on commenters' data fall within this range. Thus, we can view the range of estimates from the UK study as a lower and upper limit on compliance cost estimates under the EU Directives and the UK regime.

A European Commission report in 2018 provided a range of total compliance cost estimates based on data provided by two companies.<sup>642</sup> According to the report that range was between \$14,040 (EUR 12,000) and \$42,120 (EUR 36,000). We note that these estimates are considerably lower

<sup>629</sup> See 2012 Rules Adopting Release (citing letters from Barrick Gold (Feb. 28, 2011), ExxonMobil (Jan. 31, 2011), and Rio Tinto plc (Mar. 2, 2011)).

<sup>630</sup> See letters from Alan Detheridge (Mar. 15, 2020); FACT Coalition; Kaufmann; ONE Campaign; Oxfam America and Earthrights International; PWYP (International Secretariat); PWYP-US (Mar. 16, 2020); Total (Feb. 17, 2020); and Congr. Waters *et al.*

<sup>631</sup> See letter from Total (Feb. 17, 2020) at 1.

<sup>632</sup> See letter from PWYP (International Secretariat) at 4.

<sup>633</sup> See letter from PWYP-US (Mar. 16, 2020).

<sup>634</sup> See [https://www.tullowoil.com/application/files/5815/8636/0065/2019\\_Annual\\_Report\\_and\\_Accounts.pdf](https://www.tullowoil.com/application/files/5815/8636/0065/2019_Annual_Report_and_Accounts.pdf).

<sup>635</sup> See <https://www.sec.gov/Archives/edgar/data/879764/000119312520080490/d862109d20f.htm>.

<sup>636</sup> It is calculated as  $(\$300,000 + \$1,170,000 + \$54,990 + \$150,000)/4$ . We convert BASF's ongoing cost of Euro €47,000 into US dollars using a USD/Euro exchange rate of 1.17.

<sup>637</sup> It is calculated as  $(\$200,000 + \$585,000 + \$30,420 + \$150,000)/4$ . We convert BASF's annual cost of Euro €26,000 into US dollars using a USD/Euro exchange rate of 1.17.

<sup>638</sup> See letter from Equinor.

<sup>639</sup> See letter from Alan Detheridge.

<sup>640</sup> See letter from FACT Coalition.

<sup>641</sup> See 2019 Rules Proposing Release at note 66 and accompanying text. See also letter from PWYP-US (Mar. 16, 2020).

<sup>642</sup> See letter from PWYP-US; see also European Comm'n, Review of Country-By-Country Reporting Requirements for Extractive and Logging Industries (2018), available at [https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/company-reporting\\_and\\_auditing/documents/181126-country-by-country-reporting-extractive-logging-industries-study\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/company-reporting_and_auditing/documents/181126-country-by-country-reporting-extractive-logging-industries-study_en.pdf).



than those provided by commenters and in the UK study. Given that the estimated range is based on data from only two companies, we found it to be of limited use.

In Section IV below, we estimate for the purposes of PRA average total compliance costs of \$300,000 per issuer per year (using \$400/hr. for both internal and professional costs and averaging over three years). If we estimate an average total compliance cost per issuer based on the average initial and ongoing estimates derived above, this estimate is approximately \$300,000 per issuer.<sup>643</sup> Thus, the PRA estimate is approximately equal to the estimate derived using data provided by commenters. It includes an estimate of IT costs (\$100,000) which could be viewed as a fixed cost to issuers.

#### IV. Paperwork Reduction Act

##### A. Background

Certain provisions of the final rules contain “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>644</sup> The Commission submitted the proposed rules to the Office of Management and Budget (“OMB”) for review in accordance with the PRA.<sup>645</sup> 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).<sup>646</sup>

Form SD is currently used to file Conflict Minerals Reports pursuant to Rule 13p–1 of the Exchange Act. We are adopting amendments to Form SD to accommodate disclosures required by Rule 13q–1. We are adopting Rule 13q–1 to implement Section 13(q) of the Exchange Act, which was added to the Exchange Act by Section 1504 of the Dodd-Frank Act. As described in detail above,<sup>647</sup> 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.

The final rules will require that the mandated payment information be provided in an XBRL exhibit to Form SD, which will be submitted to the Commission on EDGAR. The disclosure requirements will apply equally to U.S. issuers and foreign issuers meeting the definition of “resource extraction issuer.” Compliance with the rules by affected issuers will be mandatory. Responses to the information collections will not be kept confidential and there will be no mandatory retention period for the collection of information. A description of the final rules, including the need for the information and its use, as well as a description of the likely respondents, can be found in Section II above, and a discussion of the economic effects of the final amendments can be found in Section III above.

##### 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 amended, is uncertain, but, as discussed in the economic analysis above, we estimate that the number of potentially affected issuers is 678.<sup>648</sup> Of these issuers, we excluded 252 issuers that reported being either smaller reporting companies, emerging growth companies, or both, and that are not subject to alternative reporting regimes that the Commission has deemed to satisfy the transparency objectives of Section 13(q), because the final rules will exempt these issuers from the Section 13(q) requirements. In addition, we excluded 177 issuers that are subject to resource extraction payment disclosure rules in other jurisdictions that require more granular payment disclosure than will be required by the final rules, and 12 issuers with no or only nominal operations, or that are unlikely to make any payments that would be subject to the final disclosure requirements.<sup>649</sup>

For the 177 issuers subject to those alternative reporting regimes, the additional costs to comply with the final rules likely will be much lower than costs for other issuers.<sup>650</sup> For the 12 issuers that are unlikely to make payments subject to the final rules, we believe there will be no additional costs associated with the final rules.<sup>651</sup> Accordingly, we estimate that 237 issuers will bear the full costs of compliance with the final rules<sup>652</sup> and 177 will bear significantly lower costs.

##### C. Estimate of Issuer Burdens

We derive our burden estimates by estimating the average number of hours it will take an issuer to prepare and furnish the required disclosure. In deriving our estimates, we recognize that the burdens will 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.<sup>653</sup>

to make payments exceeding the proposed “not de minimis” threshold).

<sup>650</sup> Issuers subject to the alternative reporting regimes described above will already be gathering, or have systems in place to gather, resource extraction payment data, which should reduce their compliance burden. In addition, under the final 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 Item 2.01(c) of Form SD. Concurrent with adoption of the final rules, we are issuing an order deeming the following alternative reporting regimes as requiring disclosure that satisfy the transparency objectives of Section 13(q): The EU Directives; U.K.’s Reports on Payments to Governments Regulations; Norway’s Regulations on Country-by-Country Reporting; and Canada’s ESTMA. Since the 177 issuers are subject to one or more of these alternative reporting regimes, they will incur relatively small compliance burdens and costs associated with the final rules. We have nevertheless included them in our estimate of affected issuers for PRA purposes because under the final rules they will still have an obligation to furnish a report on Form SD in XBRL and English, and will incur related electronic tagging and translation costs, but those costs will be significantly lower than the overall compliance burden of issuers subject solely to the final rules.

<sup>651</sup> See *supra* Section III.A.

<sup>652</sup> 678 minus 252 minus 177 minus 12 = 237.

<sup>653</sup> We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes

<sup>643</sup> It is estimated in the following way:  $(\$420,000 + \$240,000 + \$240,000)/3 = \$300,000$  (estimated over a three-year period for purposes of the PRA).

<sup>644</sup> 44 U.S.C. 3501 *et seq.*

<sup>645</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

<sup>646</sup> As discussed above, 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 final rules will be reflected in the burden hours estimated for Form SD. Therefore, there is no separate burden estimate for Rule 13q–1.

<sup>647</sup> See *supra* Section I.A.

<sup>648</sup> See *supra* Section III.A. (explaining how we use data from Exchange Act annual reports for the period January 1, 2018 through December 31, 2019 to estimate the number of issuers that might make payments covered by the final rules). As noted in that section, this number does not reflect the number of issuers that actually made resource extraction payments to governments.

<sup>649</sup> 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

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 final rules' burden will be greatest during the first year of their effectiveness and diminish in subsequent years. We believe that the burden associated with this collection of information will 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 will be less because an issuer will have already made any necessary modifications to its internal systems to capture and report the information required by the final

rules. To account for this expected diminishing burden, we use a three-year average of the expected implementation burden during the first year and the expected ongoing compliance burden during the next two years.

When conducting the PRA analysis in connection with the proposed rules, we estimated that the incremental burden of the proposed rules would be at least 25 percent less than the incremental burden of the 2016 Rules.<sup>654</sup> We continue to believe that this reduction in the burden estimate is reasonable primarily because of the change to the definition of project, which should generally simplify and reduce the collection and reporting of payment information for a resource extraction issuer.<sup>655</sup> We note that this reduction in the burden estimate does not take into account the two new exemptions for conflicts with foreign law and pre-existing contracts.<sup>656</sup> While these

exemptions may result in a reduced PRA burden compared to the 2016 Rules,<sup>657</sup> because it is more difficult to estimate the effects of these exemptions, and to avoid underestimating the final rules' burden and costs, we have not factored them into the current PRA estimates.

The following table shows the estimated internal burden hours and professional and other external costs for the 237 issuers bearing the full costs and burden of the final rules and for the 177 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 will be in addition to the existing estimated hour and cost burdens applicable to Form SD because of compliance with Exchange Act Rule 13p-1.

PRA TABLE—ESTIMATED INCREASE IN TOTAL BURDEN HOURS AND COSTS

Whether issuer is subject to alternative reporting 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 per current affected response	Total additional IT costs	Total external costs
	(A)	(B)	(C) = (A) × (B)	(D) = (C) × .75	(E) = (C) × .25	(F) = (E) × \$400	(G)	(H) = (A) × (G)	(I) = (F) + (H)
No .....	237	1,500	118,500	88,875	29,625	\$11,850,000	<sup>3</sup> \$100,000	\$23,700,000	\$35,550,000
Yes .....	177	<sup>2</sup> 25	4,425	3,319	1,106	442,400	0	0	442,400
Total .....	414			92,194		12,292,400		23,700,000	35,992,400

<sup>1</sup> This is based on 25 percent of 500 hours (the incremental hourly increase estimated for the 2016 Rules).  $500 \times .25 = 125$ . We estimate that compliance with the final rules would require 375 hours (500 – 125) to make initial changes to an issuer's internal books and records and another 375 hours a year on an ongoing basis to review and verify the payment information, resulting in 750 hours per issuer for the initial incremental PRA burden. Using the 3-year average of the expected burden during the first year and the expected ongoing burden during the next 2 years, we estimate that the incremental PRA burden would be 500 hours per fully affected issuer ( $750 + 375 + 375$  hours/3 years).

<sup>2</sup> As proposed, and as we did in the 2016 rulemaking, we estimate that an issuer that is already subject to a qualifying alternative reporting regime will incur an internal burden that is five percent of the burden incurred by a fully affected issuer.  $500 \text{ hours} \times .05 = 25$  hours.

<sup>3</sup> We estimate that an issuer bearing the full costs of the final rules will incur additional initial compliance costs for IT consulting, training, and travel of \$100,000. We have increased the proposed estimate of \$75,000 for such additional costs based on total cost estimates received in response to the 2019 proposed rules. We do not, however, believe that these initial IT costs will 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 alternative reporting regime.

## V. Regulatory Flexibility Act Certification

In connection with the 2019 Rules Proposing Release, the Commission certified that the proposed rules would not, if adopted, have a significant economic impact on a substantial number of small entities. The certification, including the factual bases

of this PRA analysis, we estimate that such costs will 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. Because we believe that a resource extraction issuer likely will seek the advice of an attorney to help it comply with the rule and form requirements under U.S. Federal securities laws, including Section 13(q), we continue to use the \$400 per hour estimate when considering the applicable costs and burdens of this collection of information.

<sup>654</sup> See 2019 Rules Proposing Release at Section IV.C. We continue to believe that basing the PRA analysis initially on the compliance burden estimated for the 2016 Rules is a reasonable approach because the 2016 assessment was based on an estimate of the hourly increase in the compliance burden provided by a prior commenter. Although we received estimates of the costs in

for the determination, was published with the 2019 Rules Proposing Release in satisfaction of Section 605(b) of the Regulatory Flexibility Act ("RFA").<sup>658</sup> The Commission requested comment on the certification and received none.

The final rules will exempt smaller reporting companies and emerging growth companies from the

dollars to comply with the 2019 proposed rules, we did not receive any estimates of the incremental increase in burden hours resulting from such compliance. Nevertheless, we believe that our PRA assessment of the final rules is consistent with the recent cost estimates provided by commenters. See *supra* Section III.D.11.

<sup>655</sup> See *supra* Section II.A. and Section III.D.1.

<sup>656</sup> See *supra* Section II.D.1 and 2.

<sup>657</sup> 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.

<sup>658</sup> 5 U.S.C. 601 *et seq.*

<sup>659</sup> See 17 CFR 240.13q-1(c). Concurrent with adoption of the final rules, the Commission is issuing an order finding that the following alternative reporting regimes satisfy the

requirements of Section 13(q) and Rule 13q-1, but in a change from the 2019 proposed rules, those companies will be exempt only if they are not subject to an alternative reporting regime that has been deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q).<sup>659</sup> Most small entities<sup>660</sup> will fall

transparency objectives of Section 13(q): The EU Directives; U.K.'s Reports on Payments to Governments Regulations; Norway's Regulations on Country-by-Country Reporting; and Canada's ESTMA. See *supra* Section II.N.

<sup>660</sup> 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 likely will fall within the definition of smaller

Continued

within the scope of this exemption and, therefore, will not be subject to the final rules. Although some small entities will not be eligible for the exemption because they are subject to the reporting requirements of a Commission-recognized alternative reporting regime,<sup>661</sup> because those entities will be able to submit a report prepared for the alternative reporting regime to satisfy their Section 13(q) reporting obligations, those entities will have relatively few costs to comply with the final rules.<sup>662</sup> Accordingly, the Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the final rules, including Rule 13q-1 and the amendments to Form SD, will not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

## VI. Statutory Authority

We are adopting the rule and form amendments contained in this document under the authority set forth in Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act.

## List of Subjects in 17 CFR Parts 240 and 249b

Reporting and recordkeeping requirements, Securities.

## Text of the Amendments

In accordance with the foregoing, the Commission amends title 17, chapter II of the Code of Federal Regulations as follows:

## PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 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; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

\* \* \* \* \*

reporting company and, therefore, will be eligible for the exemption from the final rules.

<sup>661</sup> See *supra* Section III.A. (indicating that, based upon a review of filings in 2018-2019, 69 of the 321 issuers with smaller reporting company or emerging growth company status were subject to alternative reporting regimes that likely made them ineligible for the exemption).

<sup>662</sup> The primary costs for issuers using the final rules' alternative reporting provision would be those related to XBRL tagging and, if necessary, translating the alternative report into English. See *supra* Section III.A.

Section 240.13q-1 is also issued under sec. 1504, Pub. L. 111-203, 124 Stat. 2220.

■ 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 78o(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 other 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, unless it 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)), pursuant to § 240.13q-1(c).

(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, Public Law 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.

**BILLING CODE 8011–01–P**

**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.)

---

(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.* A resource extraction issuer must furnish the information required by Section 2 of this form no later than 270 days following the end of the issuer’s most recently completed 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.

\* \* \* \* \*

**INFORMATION TO BE INCLUDED IN THE REPORT**

\* \* \* \* \*

**Section 2 – Resource Extraction Issuer Disclosure**

**Item 2.01 Resource Extraction Issuer Disclosure and Report**

(a) *Required Disclosure.* (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, or (ii) examining specific areas that are considered to have prospects of containing oil and gas reserves, or (iii) conducting 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 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 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 seven 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 should consider determining control using U.S. GAAP. A resource extraction issuer that holds only a proportionate interest in an entity does not control that entity for purposes of Section 13(q) (15 U.S.C. 78m(q)) and is not required to disclose the proportionate amount of payments made by that entity.

(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 or natural gas or the extraction of minerals.

(6) Federal Government means the Federal government of the United States.

(7) Foreign Government means the national government of a foreign country, as well as any department, agency, or instrumentality of the national government, or a company at least majority owned by the national government of a foreign country. As used in this Item 2.01, foreign government also includes a foreign subnational government, such as the government of a state, province, department, 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 \$100,000, or its equivalent in the issuer's reporting currency, whether made as a single payment or series of related payments. 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 a payment meets or exceeds the "not de minimis" threshold, 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 body of water in which the project is located, using the smallest body of water applicable (*e.g.*, gulf, bay, sea), in addition to identifying the nearest major subnational political jurisdiction pursuant to Instruction 3 of Item 2.01. If an offshore project is equidistant from two major subnational political jurisdictions, the issuer may identify both jurisdictions.

(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) In a joint venture or arrangement, where no one party has control, a resource extraction issuer that is the operator of the venture or arrangement and makes payments to governments for the entire venture or arrangement on behalf of its non-operator members must report all of the payments. The non-operator members are not required to report payments made to reimburse the operator for their share of the payments to governments. Such non-operator members are only required to report payments that, as resource extraction issuers, they make directly to governments.

(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, acting as a third-party agent or broker, 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. This disclosure obligation, however, does not apply to a non-operator partner of a joint venture or arrangement that reimburses the operator for its share of the payments to governments made by the operator.

(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 does not include the downstream activities of refining or smelting.

(9) A resource extraction issuer must disclose taxes on corporate profits, corporate income, and production when such taxes are made to further the commercial development of oil, natural gas, or minerals. Disclosure of taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes, is not required.

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

(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, at 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, at 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 subpart 1300 of Regulation S-K (17 CFR 229.1300 *et seq.*) or any successor requirements or policies. It does not include oil and gas resources (as defined in 17 CFR 210.4-10(a)(16)(D) or any successor provision).

### **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 16, 2020.

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2020-28103 Filed 1-14-21; 8:45 am]

**BILLING CODE 8011-01-C**