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The Fight Against the Extractive Industries Transparency Initiative

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I. Introduction

On September 20, 2011, President Obama declared that the United States would implement the Extractive Industries Transparency Initiative ("EITI").[1] The purpose behind the initiative is to illuminate and curb corruption within the international resource extraction sector and, therefore, in passing the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress provided the Securities Exchange Commission ("SEC") with the authority to promulgate a disclosure rule.[2] At the heart of Dodd-Frank is the United States' attempt at curbing corrupt business practices, and with the addition of section 13(q) of the congressional statute, it has become clear that the U.S. intends to not only combat corruption on U.S. soil but corruption abroad as well.[3] Therefore, the disclosure rule crafted by the SEC would require companies engaged in resource extraction to report to the federal government any payments made to foreign governments, or any payments made to the United States government, for the purpose of the mining and/or drilling of oil, natural gas, or minerals.[4]

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[1] Press Release, Extractive Industries Transparency Initiative, President Obama: The US will Implement the EITI (Sept. 20, 2011), http://eiti.org/news-events/president-obama-us-will-implement-eiti (last visited Oct. 9, 2013).

[2] *See* Barry Russell, *Disclosure Rules May Have Adverse Effect on Energy Firms*, The Houston Chronicle (Oct. 12, 2012, 8:04 PM), www.chron.com/Disclosure-rules-may-have-adverse-effect-on-3944068.php. ("The SEC approved on Aug. 22 the rule implementing Section 1504 of the Dodd-Frank Wall Street reform bill, requiring disclosure of certain payments for resource extraction by U.S. public companies to the federal government."); *see also* Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 177, 56,365 (Sept. 12, 2012) ("Section 1504 added Section 13(q) to the Securities Exchange Act of 1934, which requires the Commission to issue rules requiring resource extraction issuers to include in an annual report information relating to any payment made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer, to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals.").

[3] Daniel M. Firger, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, 41 Geo. J. Int'l L. 1043, 1070-71 (2010).

[4] *Id.*

The SEC therefore required within this rule that U.S. companies file annual reports with the SEC, detailing any non "de minimis" payments made, which include any payments that are equal to or exceeds $100,000.[5] The SEC rule also clearly states that "the size of the company or the extent of business operations" will not limit the reporting obligation and that there are no exemptions to the final rule.[6] This reporting requirement was slated to take effect after September 30, 2013.[7]

This provision has been vehemently opposed by several U.S. corporations engaged in international resource extraction; these corporations argue that such a rule has the potential to damage U.S. corporate interests and ultimately urge the SEC to develop an exemption to the final rule.[8] These arguments, when made unsuccessfully to the SEC, ultimately prompted a lawsuit brought by the American Petroleum Institute ("API") against the SEC; in this suit, API argues the rule financially damages U.S. corporations, is a violation of the First Amendment, exceeds the SEC's rule making authority, and was drafted based on a misinterpretation of section 13(q); these are not the only claims made by API but the ones most compelling for purposes of this comment.[9] Nonetheless, API requested the federal district court in its' suit against the SEC to invalidate the rule on the basis of unconstitutionality.[10]

In its decision published in July 2013, the District Court ultimately held that (1) the decision of the SEC to disallow an exemption when foreign law prohibits disclosure was arbitrary and capricious and (2) that the public disclosure requirements drafted by the SEC were not consistent with rule 13(q) as drafted by Congress.[11] The Court also determined that it need not address the First Amendment argument brought by the plaintiff because such a decision would be unnecessary due to a finding that the above errors were so grave that the rule could not be applied as written.[12]

By failing to address the First Amendment argument, the District Court failed to resolve the deeper issue as to whether the law is valid in the first place; therefore, charging the SEC to rewrite a rule that may later be determined to be an unconstitutional exercise of congressional power by a federal court. This comment, after addressing the global benefits to the rule, will maintain that the district court's ruling was deficient as it failed to address the most crucial charge against the SEC rule.

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[5] Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56, 366.

[6] *Id.* at 56, 368.

[7] *Id.* at 56, 365, 56, 368-69.

[8] *See* Complaint, Am. Petroleum Inst. v. Sec. and Exch. Comm'n. (No. 12-1668), 2013 WL 3307114 (D.D.C. 2012).

[9] *See id.* at 37.

[10] *Id.* at 37.

[11] Am. Petroleum Ins. v. SEC, Civil Action No. 12-1668 (D.D.C. July 2013).

[12] *Id.*

II. The Lawsuit

The greatest concern with transparency is that corporations in nations that have not adopted transparency laws may have an advantage over those who have.[13] Therefore, some United States corporations have argued in favor of the need for an exemption to the rule when foreign law prohibits disclosure, and, thereby, hoped in filing a complaint against the SEC that a federal court would invalidate the newly drafted disclosure rule.[14]

API thereby initiated proceedings against the SEC in a federal district court.[15] In its complaint, API argued "disclosure. . . would cause competitive injury by providing other market participants with commercially sensitive information to the benefit of foreign state-owned oil companies that would not be subject to the disclosure regime."[16] The plaintiff thus argued that by revealing "extensive data about what they pay in licenses, taxes, royalties and other fees," its competitors would gain an unfair advantage over such companies who are required by law to report.[17] In support of its argument, the plaintiff, in an attempt to make its argument more compelling, cited the dissenting opinion of an SEC member.[18] This member, SEC Commissioner Gallagher, heavily criticized the rule, arguing that it would cause a detrimental amount of competition against U.S. interests.[19]

Another argument maintained by the plaintiff in this case was that the SEC failed to properly consider the costs placed upon companies required to adhere to the rule.[20] Therefore, as stated in the complaint, "By the Commission's own reckoning, the Rule will cost U.S. public companies at least $1 billion in initial compliance costs and $200 to $400 million in ongoing compliance costs, and 'could add billions of dollars of [additional] costs' though the loss of trade secrets and business opportunities."[21] The complaint also alleges that costs could

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[13] *See* Complaint, Am. Petroleum Inst. v. Sec. and Exch. Comm'n. (No. 12-1668), 2013 WL 3307114 (D.D.C. 2012); Disclosure of Payments by Resource Extraction Issuers at 56371.

[14] *See* Complaint at 22, Am. Petroleum Inst. v. Sec. and Exch. Comm'n.

[15] *Id.*

[16] *Id.* at 15.

[17] Carlton Carroll, *API Argues Against SEC's Anti-Competitive Regulations*, AMERICAN PETROLEUM INSTITUTE, *http://www.api.org/news-and-media/news/newsitems/2013/june-2013/api-argues-against-sec-anti-competitive-regulations* (last visited Nov. 27, 2013).

[18] *See* Complaint at 15, Am. Petroleum Inst. v. Sec. and Exch. Comm'n. Commissioner Gallagher stated in his dissent, "Let's be clear; we're talking about real competition. Although it would be natural to assume that our large and familiar domestic oil and gas companies fill the list of the world's top ten, that isn't the case. State-owned oil companies, some of them truly huge even by reference to our largest domestic publicly held oil and gas companies are major competitors. I am talking about national oil companies in Russia, China, Iran, and Venezuela among others. These companies do not operate in the highly transparent, intensely regulated world of U.S. Issuers. And, they will reap competitive advantages through today's rules." Daniel M. Gallagher, Commissioner, Sec. and Exch. Comm'n, Statement at SEC Open Meeting: Proposed Rules to Implement Section 1504 of the Dodd-Frank Act (Aug. 22, 2012).

[19] *See* Gallagher, *supra* note 18.

[20] Complaint at 24-25, Am. Petroleum Inst. v. Sec. and Exch. Comm'n.; Carroll, *supra* note 17.

[21] Complaint at 2, Am. Petroleum Inst. v. Sec. and Exch. Comm'n.; *see also* ENERGY GLOBAL, SEC Rule Challenged (November 10, 2012), http://www.energyglobal.com/sectors/processing/articles/SEC_anti_competitive_rule.aspx ("The SEC believe [sic] that developing and operating the systems to gather, validate and report this detailed information will cost the industry US$ 1 billion initially.").

be even greater than the above cited figures when a company has to abandon attempted purchases in nations that forbid disclosure or when companies are forced to sell at drastically reduced prices.[22]

API made other arguments but the ones most notable were that an exemption should have been written into the rule when foreign law prohibits disclosure, and that the SEC wrongly interpreted the congressional statute when it maintained that it was required to publicly disclose all information it acquired from U.S. corporate entities.[23] The SEC refused to allow corporate entities to submit information confidentially on the basis that the congressional statute did not allow such a procedure.[24]

Not within the complaint, but similar in argument, involves the notion that the US economy could be damaged due to a loss in American jobs when corporate earnings are reduced.[25] These same critics also argued that a loss in contractual agreements would damage the energy sector by making it "difficult for U.S. firms to gain access to resources abroad."[26] Other arguments not within the complaint but still relevant for purposes of determining whether the SEC rule can accomplish its purported goal provided by Congress, involved whether the SEC could properly police companies subject to the rule, and whether transparency could truly curtail corruption. The argument, therefore, is that "the SEC's inability to inspect foreign government bookkeeping. . . makes it far too easy for firms to falsify or underreport natural resource payments when it is in their interest to do so."[27]

A number of significant questions are raised in the SEC's inability to evaluate foreign government bookkeeping practices. For example, without the ability to even second-guess a corporation's annual report, how will the SEC achieve the stated goal? Secondly, as indicated by the EITI, the goal of the reporting requirement is to empower citizens of the resource rich nations, but how would public disclosure in the U.S. do so? Does the SEC plan on presenting this information to special interest groups in resource rich countries? If so, how will the SEC do so, and who will the SEC contact? Ultimately, "without actors who are willing or able to use disclosed information to hold corrupt leaders accountable," the goal created by Congress may never be attained.[28]

Therefore, the plaintiff in this lawsuit sought to invalidate the rule by arguing the rule violated the First Amendment by forcing U.S. corporations to "engage in speech that they do not wish to make, in violation of their contractual and legal

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[22] *See* Complaint at 2, Am. Petroleum Inst. v. Sec. and Exch. Comm'n.

[23] *Id.* at 30-31.

[24] *Id.*

[25] *See* ENERGY GLOBAL, *supra* note 21 ("'The rule as written would impose enormous costs on US firms and put them at a competitive disadvantage against government owned oil giants not subject to the rule. . . Not only will the rule hurt the millions of Americans who own shares in oil and natural gas companies, it will also cost jobs and damage America's energy security by making it more difficult for US firms to gain access to resources abroad.'").

[26] *Id.*

[27] Firger, *supra* note 3, at 1083.

[28] *Id.* at 1050.

commitments."[29] The plaintiff also argued that an exemption must be made to the rule in order to prevent the loss of contractual opportunities when disclosure is against a nation's laws.

III. Holding of the District Court

Although API made many arguments against the SEC rule, the District Court responded to two before ruling vacating was the appropriate remedy.[30] The court first addressed the public disclosure argument. As noted above, API argued that the SEC erroneously determined that section 13(q) required that all information submitted to the SEC be disclosed to the public.[31] According to the complaint, API suggested that some annual reports be filed confidentially so that the SEC could determine what information should be publicly disseminated, especially when public disclosure could financially harm corporate interests.[32] The SEC, however, would not incorporate such a suggestion.[33]

Nonetheless, the court agreed with API, finding that 13(q) did not require that all annual reports submitted to the SEC be publicly disclosed.[34] Further, through a close statutory reading, the court held that it was clear that the SEC may selectively omit information when considering the financial burdens.[35] This is the case because the statute made no mention of making every annual report publicly accessible, and the court, therefore, deemed such omission as the intent of Congress to provide the SEC with discretion.[36] Therefore, the court held that the SEC misinterpreted the congressional statute.[37]

The district court also addressed the exemption argument and found in API's favor.[38] In finding in API's favor, the court determined that the failure to provide exemptions was arbitrary and capricious.[39] The court disagreed with the SEC's argument that an exemption would undermine the goal of Congress and also looked to the congressional mandate upon the SEC that required the SEC in drafting any rules to do so in a way not to impose burdens by way of excessive competition.[40] The court also reasoned that Congress's addition of the phrase "to the extent practical," when addressing the compilation of information disseminated to the public, illuminated the intent of Congress to allow the SEC leeway

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[29] *See* Complaint at 4, Am. Petroleum Inst. v. Sec. and Exch. Comm'n. (No. 12-1668).

[30] *See* Am. Petroleum Ins. V. SEC, Civil Action No. 12-1668.

[31] *Id*. at 6-7; *see also* Complaint at 30-31, Am. Petroleum Inst. v. Sec. and Exch. Comm'n. (No. 12-1668).

[32] *See* Complaint at 30-31, Am. Petroleum Inst. v. Sec. and Exch. Comm'n.

[33] *See* Am. Petroleum Ins. v. SEC, Civil Action No. 12-1668 at 7-8.

[34] *Id*. at 12-13.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 14.

[38] *Id.* at 13-14.

[39] *Id.* at 14.

[40] *Id.* at 13.

when imposing the rule upon business entities.[41] In all, the court found API's competition argument to be compelling and, therefore, held that the SEC should have written into an exemption into the final rule.[42]

IV. The Arguments for Transparency

In analyzing the district court decision, this comment will first look to the arguments for transparency before addressing the First Amendment argument made by API, which this comment maintains is most important to successfully incorporating transparency into U.S. law. The comment will then conclude without an examination of the constitutional argument the court's decision was deficient and will only cause further problems with the implementation of the rule.

To begin with, the EITI is the driving force behind convincing nations to adopt transparency laws in order to battle the issue of global corruption. The EITI's global campaign, therefore, sought to encourage nation states to adopt laws that would "promote and support improved governance in resource-rich countries through the full publication and verification of company payments and government revenues from oil, gas, and mining."[43] The EITI believed that by encouraging nation states to adopt laws requiring transparency, citizens of reporting countries could more easily hold their governments "accountable for how revenues are used in public expenditure programs."[44] The reasoning behind the EITI was that transparency would "reduce the risk of conflict and promote stability" and would improve the reporting country's creditworthiness by keeping information in the public domain.[45] Ultimately, according to the EITI, an improvement to a country's credit worthiness would "enhance a country's likelihood of attracting loan and equity finance, and. . . lower the cost of such finance."[46] Such a credit rating allows an investor to assess the cost of potential investments and, in turn, clearly enhances a country's economy by encouraging further investment opportunities.[47] In addition to the credit rating, the EITI maintains transparency would encourage long-term sustainable development by promoting "good corporate risk management benefits," which, in turn, would have positive effects on resource extraction companies by lowering corporate costs and to reporting countries by attracting investors.[48] As of November 23, 2013, the EITI reports

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[41] *Id.* at 14.

[42] *See id.* ("The Commission could have limited the exemption to the four countries cited by the commentators or to all countries that prohibited disclosure as of a certain date, fully addressing this concern.").

[43] THE WORLD BANK & EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, IMPLEMENTING THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (2008), *available at* http://siteresources.worldbank.org/INTOGMC/Resources/implementing_eiti_final.pdf.

[44] *Id.* at 8.

[45] *Id.*

[46] *Id.*

[47] *See* e.g. Carsten Thomas Ebenroth & Thomas J. Dillon, Jr., *The International Rating Game: An Analysis of the Liability of Rating Agencies in Europe, England, and the United States*, 24 LAW & POL'LY INT'L BUS. 783, 784-85 (1992-93).

[48] THE WORLD BANK & EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *supra* note 43, at 7-8.

twenty-five (25) compliant countries and sixteen (16) candidate countries.[49] A nation becomes compliant by fully adhering to the seven steps outlined by the EITI organization, while those who have committed to require transparency are candidates.[50] A major step towards compliance requires nations to establish an entity to supervise extractive industries located within the nation's jurisdiction.[51]

Combating corruption is the EITI's main purpose behind encouraging nation states to develop disclosure laws.[52] In fact, according to one scholar, "[t]he framers of the EITI. . . hoped not just to increase transparency per se but also to lift the resource curse by countering corruption, one of its root causes."[53] Furthermore, supporters of transparency argue that without transparency laws, the potential for fund misappropriation by governmental officials is increased because of confidential payments.[54] Also confidentiality "makes it less likely that voters punish bad government as bad politicians or policies are less likely to be identified and therefore replaced."[55] Moreover, "[i]n recent years, researchers have found evidence that resource-rich states not only develop more slowly than others, but also tend to be less democratic, more corrupt, and more likely to experience civil conflict."[56]

In an effort to illustrate the need for global transparency, the EITI published a case study on Nigeria.[57] In the Nigerian case study, the EITI claims that Nigeria suffers from widespread government corruption. The EITI's position is that a country as rich in natural resources as Nigeria would substantially benefit from disclosure.[58]

Nigeria is one of the world's greatest producers of oil. The country reported approximately $50 billion in oil revenue in 2011.[59] Oil accounts for 90% of the government's revenue, however, the country is also rich in aluminum, gold, tin, iron ore, coal, niobium, lead, and zinc.[60] Although Nigeria possesses abundant resources and that "the Nigerian economy continues to grow, the proportion of

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[49] *EITI Countries*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, http://eiti.org/countries (last visited Oct. 9, 2013).

[50] EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, Frequently Asked Questions for countries considering to Implement the EITI Standard, htttp://www.eiti.org/eiti/faq-countries-considering-eiti (last visited Oct 28, 2013); Firger, *supra* note 3, at 1066.

[51] EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, Frequently Asked Questions, *supra*, note 50.

[52] *See* EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, NIGERIA EITI: MAKING TRANSPARENCY COUNT, UNCOVERING BILLIONS (2012), *available at* http://eiti.org/files/Case%20Study%20-%20EITI%20in%20Nigeria.pdf.

[53] Firger, *supra* note 3, at 1064. (The "resource curse" refers to the phenomena where "resource abundance is inversely correlated with economic growth, good governance, and political stability."); *Id.* at 1048.

[54] *See* Firger, *supra* note 3, at 1064.

[55] Ivar Kolstad & Arne Wiig, *Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?* 37 WORLD DEV. 521, 524 (2008).

[56] Firger, *supra* note 3, at 1052-53.

[57] *But see* EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *supra* note 52.

[58] *See generally id.* at 1.

[59] *Id.*

[60] *Id.*

the population living in poverty increases every year."[61] In fact, the National Bureau of Statistics determined about "60.9% of Nigerians in 2010 were living in 'absolute poverty'- this figure had risen from 54.7% in 2004."[62]Not surprisingly, it has been discovered that almost 100 million people are living on less than a $1 a day in Nigeria.[63] With such abysmal figures, Nigerians have a strong need to ensure their government uses accumulated wealth from global trade for the public's benefit. Natural resource abundance, governmental corruption, and national poverty, led former Nigerian President Olusegun Obasanjo to implement the EITI initiative because it would benefit Nigeria.[64] In 2004, the Nigerian Government developed the Nigerian Extractive Industries Transparency Initiative ("NEITI").[65]

After development of the NEITI, Nigeria proceeded to enforce the transparency laws.[66] After formation, the NEITI began initiating several audits. These audits strengthened the EITI's argument for global transparency when Nigeria discovered a great deal of fund misappropriation.[67] In 2009, the NEITI "identified unprecedented financial discrepancies, unpaid taxes, and system inefficiencies."[68] Nigeria discovered over $800 million U.S. dollars was unaccounted for.[69] Through NEITI, the Nigerian government discovered corruption by application of the transparency requirements and could therefore attempt to curtail these issues.[70] Using the Nigeria study the EITI's boasts that Nigeria is now in a better position to force societal change.[71]

Like Nigeria, many countries have an abundance of natural resources.[72] These natural resources are extremely valuable commodities.[73] Exporting and importing raw materials from resource rich countries is on the rise. China and India

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61 *Nigeria Poverty Profile*, NAT'L BUREAU OF STATISTICS, http://www.tucrivers.org/tucpublications/Nigeria%20Poverty%20Profile%202010.pdf (last visited Dec. 1, 2013).

62 *Nigerians Living in Poverty Rise to Nearly 61%*, BBC NEWS, Feb. 13, 2013, http://www.bbc.co.uk/news/world-africa-17015873 (quoting the National Bureau of Statistics of Nigeria).

63 *Id.*

64 *See* EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *supra* note 52, at 1.

65 *Id.*

66 *See id.*

67 *Id.*

68 *Id.* at 2.

69 *Id.*

70 *Id.*

71 *Id.* at 4.

72 *See* Ernst & Young, *Disclosing Government Payments,* (2012), http://www.ey.com/Publication/vwLUAssets/Disclosing_government_payments/$FILE/Disclosing-government_ER0036.pdf ("It is estimated that more than 3.5 billion people live in countries with extensive oil, natural gas and mineral resources.").

73 *See* Michael B. Sauter, Charles B. Stockdale, & Paul Ausick, *The World's Most Resource-Rich Countries*, 24/7 WALL ST (Apr. 18, 2012, 6:48 AM), http://247wallst.com/2012/04/18/the-worlds-most-resource-rich-countries/ ("[I]n the cases of oil, natural gas, timber and coal, reserves can be worth tens of trillions of dollars in some countries, because demand is high and resources are relatively plentiful.").

have recently increased natural resource imports from African countries.[74] China has increased these exports "at an annual rate of 48 percent between 2000 and 2005,"[75] and the U.S. has recently discovered that Afghanistan has nearly $1 trillion in untapped mineral deposits. This makes the country a very desirable for mining and drilling.[76] Because of the resource wealth in the country "officials and industry experts say the potential resource boom [in Afghanistan] seems increasingly imperiled by corruption, violence and intrigue, and has put the Afghan government's vulnerabilities on display."[77]

The findings in Afghanistan and Nigeria demonstrate the need for transparency. Still, there exists opposition to transparency initiatives in the United States. At the forefront remains the question whether U.S. corporations will be damaged by transparency laws because of released trade secrets to the public, and the possible forgoing of contractual agreements due to foreign law prohibiting disclosure. However, the SEC responded to the above argument when it published the rule. The SEC determined that, although a corporation may be faced with such a law, "an exemption would be inconsistent with the structure and language of Section 13(q) and. . . could undermine the statute by encouraging countries to adopt laws, or interpret existing laws, specifically prohibiting the disclosure required under the final rules."[78] The SEC also found the contractual argument unavailing, finding resolution of such an issue in the contract negotiation process.[79]

Further, other proponents of transparency aside from the SEC are not persuaded by these criticisms. For instance, one proponent argued that the United States would benefit by adopting and encouraging global transparency because doing so would assist the global market toward moving to a "more honest business environment."[80] This author also suggested that a corporation can often shift its business elsewhere if a contract is lost due to unfair trade practices. This means that although the contract is lost, the corporation would not be damaged by the failure to acquire the contract because the goods could be acquired else-

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[74] *See* Harry G. Broadman, *China and India Go to Africa: New Deals in the Developing World*, 87 FOREIGN AFF. 95, 95 (2008).

[75] *Id.*

[76] *See* James Risen, *U.S. Identifies Vast Mineral Riches in Afghanistan*, N.Y. TIMES, (June 14, 2010), http://www.nytimes.com/2010/06/14/world/asia/14minerals.html?pagewanted=all ("The United States has discovered nearly $1 trillion in untapped mineral deposits in Afghanistan, far beyond any previously known reserves and enough to fundamentally alter the Afghan economy and perhaps the Afghan war itself, according to senior American government officials.").

[77] Graham Bowley, *Potential for a Mining Boom Splits Factions in Afghanistan*, N.Y. TIMES, (Sept. 8, 2012), http://www.nytimes.com/2012/09/09/world/asia/afghans-wary-as-efforts-pick-up-to-tap-mineral-riches.html?pagewanted=all&_r=0.

[78] Disclosure of Payments by Resource Extraction Issuers, *supra* note 5, at 53, 672.

[79] *Id.* at 53, 373.

[80] *See* Susan Rose-Ackerman & Sinead Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U ANN. SURV. AM. L. 433, 435-436 (2012) ("A strong U.S. policy against international corruption can encourage other countries to follow suit, with positive effects on the efficiency and fairness of global trade and investment, and can help support government reform efforts in host countries.").

where.[81] Proponents also note that although transparency may provide bribers with the key players who may be bribed, corruption is better battled as transparency improves.

The fight against corruption is global concern. It has the potential to affect the global market by making nations less democratic or simply discouraging trade with corrupt countries.[82] Additionally, many nations with abundant natural resource wealth have a great deal of citizens struggling with poverty. By implementing EITI, Congress hoped that transparency would encourage more governmental assistance programs. Therefore, Congress ostensibly had reason for developing laws related to international trade.

V. The Constitutional Challenge

As indicated above, API's main argument against the SEC rule is that disclosure is damaging to U.S. corporate interests. Such a law violates the First Amendment by requiring companies to engage in speech that the corporations do not want to engage in because the speech may violate foreign law or contractual agreements with foreign governments.[83] Other concerns are that the disclosure would place competitors in an advantageous position in the bidding process, especially when competitors are not subject to the same disclosure requirements. This argument is unavailing.

The SEC has dismissed arguments that many nations have adopted foreign laws prohibiting disclosure as unsupported.[84] Likewise, the complaint itself fails to provide any evidence supporting its contention that the nations stated within the complaint (China, Qatar, and Cameroon) actually prohibit disclosure.[85] The complaint simply cites as support a letter drafted by a fellow extraction corporation.[86] This corporation maintains the above nations have laws in the books against disclosure without providing any convincing proof of such claims.[87] Therefore, such an argument is wholly unconvincing and a court should dismiss the argument as unsubstantiated. However, as noted above, the district court in this case failed to render a decision on the First Amendment argument.[88]

When analyzing the First Amendment claim, it is important to note the U.S. Supreme Court has held that "just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views. . . or from compelling cer-

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[81] *Id.* at 435 ("We defend a more sophisticated view of the loss that recognizes both the firm can usually shift its business elsewhere and that, even if the lost contract involves a resource at fixed location, that resource will generally enter into international trade where it can be purchased by American customers.").

[82] THE WORLD BANK & EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *supra* note 43, at 7-8.

[83] *See* Complaint, Am. Petroleum Inst. V. Sec. and Exch. Comm'n. (No. 12-1668), *supra* note 8.

[84] Disclosure of Payments by Resource Extraction Issuers, *supra* note 5, at 56,402.

[85] *See* Complaint, Am. Petroleum Inst. V. Sec. and Exch. Comm'n. (No. 12-1668), *supra* note 8.

[86] *Id.*

[87] *Id.*

[88] Disclosure of Payments by Resource Extraction Issuers, *supra* note 5, at 56,402.

tain individuals to pay subsidies for speech to which they object."[89] Consequently, API is correct when maintaining the federal government cannot compel certain speech. Neither the U.S. Supreme Court, nor any federal appellate court, has dealt with the issue, where a corporation or other organization has argued that mandated disclosure violates the First Amendment. However, United States courts have held that commercial speech is analyzed under the intermediate level of scrutiny when determining whether it is permissible to restrict or mandate this type of speech.[90] Courts have ultimately defined commercial speech as the type that "does no more than propose a commercial transaction."[91] The most common form of commercial speech is advertising. When analyzing cases involving commercial speech, courts note that it is a matter of public policy when a profit is made by individuals failing to disclose relevant information that could influence the decision of the listener.[92] For example, in *U.S. v. Wenger*, the tenth circuit determined that it was valid for the SEC to promulgate rules requiring the disclosure of any personal benefit derived from a public corporation when a radio announcer suggested to his listeners that a specific company's stock should be purchased.[93] When coming to this conclusion, the Court highlighted that the state has an interest in protecting its' consumers from being misled.[94]

In contrast, here we have corporations engaging in the international exchange of goods subject to a requirement to disclose the amount of payments they have made to foreign governments for mining or drilling activities. Therefore, it is likely a federal court might find this commercial speech as defined by the federal law and may subject it to an intermediate level of scrutiny. Similar to *Wenger*, a court should balance U.S. interests against the First Amendment right when dealing with the transparency issue.

Again, U.S. corporations would benefit from the law based on EITI's the positive impact on international trade. Therefore, the federal governments' reasoning behind implementing the law, and the decision to provide the SEC with the task of developing rules, was an exercise of Congress's commerce powers. The issue involving whether the rule violates the First Amendment was not addressed and the SEC will have to restructure its rule, as the rule cannot now be applied as written. Whether the rule will survive judicial scrutiny under the First Amendment remains to be seen. However, the exemption that the court is requiring the SEC to draft into the rule may be enough to curtail further efforts to find the law unconstitutional.

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[89] *U.S. v. United Foods, Inc.*, 533 U.S. 405, 410 (2001).

[90] *U.S. v. Wenger*, 427 F.3d 840, 846 (10th Cir. 2005); *See also Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980) ("The Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

[91] *Id.*

[92] *Id.* at 850; *See also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 (1976) ("We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.").

[93] *Id.*

[94] *Id.*

VI. Conclusion

The district court failed in striking the heart of the issue and instead invalidated the rule without giving the SEC clear guidance on the future of the law. Nonetheless, API's constitutional argument remains unsupported by law and unconvincing. Since the U.S. has an interest in improving global trade for economic purposes, the law should withstand a First Amendment attack if API attempts to mount another suit after Congress redrafts the law. An exemption to the rule, if warranted, would be enough to dissuade a further attempt to invalidate the rule. However, since API initially mounted an attack without providing sufficient evidence whether resource rich nations actually prohibit disclosure, the decision to attack the law most likely stems from a desire to prevent the law from taking effect. Furthermore, while the SEC concedes the rule will be expensive to maintain, such expenses are spread across at least 500 corporations (this figure encompasses only those in the oil and gas sector) and are only initial costs.[95] Consequently, the expense to an individual corporation such as API is unclear. Ultimately, API fails to deliver any evidence to support its claim that an exemption is necessary.

Transparency is necessary for the global market. Although the U.S. is not a nation targeted for implementation of the EITI, the U.S. has a very strong presence in the global community. Because of its influential abilities, the U.S. can convince others nations to develop disclosure laws. One can see EITI's success through trade practices with China. Ultimately, the U.S. has proved its ability to influence China. The U.S. has convinced China to develop better intellectual property laws.[96] It is no secret that doing business in China puts a corporation's intellectual property at risk.[97] For instance, recently China has been criticized for fraudulent Apple stores found within the country.[98] However, through extreme pressure from the U.S. government, China has attempted to become more vigilant in protecting intellectual property rights.[99] After negotiations with the U.S. over the Sino-U.S.A. High Energy Physics Agreement and the Sino-U.S. Trade Agreement, "China has made a revolutionary transformation with respect to [Intellectual Property Rights]". They are now a country that initially had no intellectual property laws in place to one with "a broad and systematic system."[100]

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[95] *See* Complaint at 7, Am. Petroleum Inst. V. Sec. and Exch. Comm'n. (No. 12-1668).

[96] DELI YANG, INTELLECTUAL PROPERTY AND DOING BUSINESS IN CHINA 26 (Pervez N. Ghauri series ed., Pergamon 2003).

[97] *See* Gordon C. K. Cheung, Intellectual Property Rights in China: Politics of Piracy, trade and protection 1 (Routledge 2009) ("In China, apart from the counterfeit production of computers, machine parts, garments, golf equipment and so on, fake products also include food, medicine and infant formula milk powder.").

[98] BBC News, *Chinese authorities find 22 fake Apple stores* (Aug. 12, 2011, 6:21 AM) http://www.bbc.co.uk/news/technology-14503724.

[99] YANG, *supra* note 96.

[100] *Id.*

China has recognized the necessity of succumbing to global pressure to remain a key player in the international trade system.[101]

Some have also criticized China for failing to enforce international obligations, and have argued that China will continue to fail to enforce such obligations, only if international trading is unaffected.[102] However, this increases the likelihood of convincing China to implement the EITI. When influencing nations to adopt certain international agreements, market pressure can prove a useful tool. For example, market pressure has been credited for the adoption of the Sullivan principles. A civil rights activist who worked with corporate entities introduced the Sullivan principles.[103] These principles ultimately encourage "desegregating workspaces, promoting non-whites to positions of authority, and donating local education and health charities."[104] Using these principles, U.S. corporations in South Africa would be rated on corporate behavior and attempts at becoming more inclusive to historically oppressed racial and ethnic groups.[105] Findings from the Sullivan principles support the proposition that transparency[106] can create economic pressure and further "suggests that a stronger, more revealing transparency mechanism might have had even more coercive effects on U.S. corporations in South Africa."[107] Although the U.S. economy is extremely important to the American society, the benefits of transparency far outweigh any harm that may arise from transparency.

Ultimately, the rule must be held as a constitutional exercise of congressional authority for purposes of strengthening a world market. The district court should have ruled the statute constitutional in order to inform adversarial corporate entities that the rule will withstand any constitutional attacks. Without such a decision, the rule remains open to further attack even after the required redrafting.

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[101] *See id.* at 27 ("Without proper IPP, nobody would transfer technology into China. On the other hand, developed countries, particularly the US, have been very active in advocating the need for secure protection of IP, particularly in developing countries, such as China").

[102] *See* CHEUNG, *supra* note 97 at 16 ("Ever since the 1978 economic reforms, one observer noticed that 'China had undertaken a broad range of international legal obligations and participated in international organizations to an extent unthinkable before the death of Mao. . . with regard to the deficiency of China in adhering to international obligations, the country is more likely to abide by the international legal framework in relation to trade an investment, due to the fact that it falls in the domain of national interest where economic development is given the highest priority.").

[103] Thomas N. Hale & Anne-Marie Slaughter, *Transparency: Possibilities and Limitations*, 30 FLETCHER F. WORLD AFF. 153, 155 (2006).

[104] *Id.*

[105] *Id.*

[106] Although this article by Hale and Slaughter is not speaking of transparency in terms of resource extraction, the author defines transparency "to denote any kind of measure that publicizes information about an institution's behavior, such as monitoring, reporting, or simply responding to inquires;" thereby making this author's analysis relevant to this paper's thesis.

[107] Hale & Slaughter, *supra* note 103, at 156.