



Stakeholder Assessment for the United States Extractive Industries Transparency Initiative (USEITI) Implementation and Formation of a Multi-Stakeholder Group (MSG)

July 9, 2012
Final

About the Consensus Building Institute

The Consensus Building Institute (CBI) is a not-for-profit organization founded in 1993 by leading practitioners and theory builders in the fields of negotiation and dispute resolution that empowers stakeholders — public and private, government and community — to resolve issues, reach better, more durable agreements and build stronger relationships. As a non-profit organization, CBI is committed to ensuring its work is transparent and addresses the interests and needs of all involved parties.

Through an agreement with the U.S. Department of the Interior (DOI), the U.S. Institute for Environmental Conflict Resolution, an independent, nonpartisan, and impartial federal program of the Udall Foundation, contracted with CBI to provide neutral assistance with completing Step 4 of the U.S. Extractive Industries Transparency Initiative (USEITI) process: *“The government is required to establish a multi-stakeholder group to oversee the implementation of the EITI.”*¹ EITI Requirement 4(h)(v) notes that the “government may...wish to undertake a stakeholder assessment” as part of forming the Multi-stakeholder Group (MSG). CBI was tasked with gathering input via independent interviews across all three core EITI sectors (civil society, industry and government); facilitating public listening sessions seeking similar input; collecting public comments; and, informed by input gathered through the above venues, providing recommendations for MSG formation.

CBI is not an advocate for any particular outcome or interest and strives to conduct its work in a fair, deliberate, and non-partisan fashion. CBI is bound by the Association for Conflict Resolution’s (ACR) Code of Ethics: “The neutral must maintain impartiality toward all parties. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.” More about CBI can be found at www.cbuilding.org. CBI Managing Director Patrick Field and Senior Associate Rachel Milner Gillers conducted the interviews and wrote this assessment report. Saman Hussain, internal facilitator with DOI’s Office of Collaborative Action and Dispute Resolution (CADR), conducted selected Tribal and federal government interviews with CBI and is similarly bound by ACR’s Code of Ethics.

The U.S. Institute for Environmental Conflict Resolution is an impartial, nonpartisan federal program that provides professional expertise, services, and resources to all parties involved in environmental disputes involving the federal government. Congress created the U.S. Institute in 1998 with the mission to assist public and private parties in resolving environmental, natural resources, and public lands conflicts. The U.S. Institute is part of the Udall Foundation, an independent federal agency.

¹ For a complete list of EITI requirements, see <http://eiti.org/document/rules>

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Executive Summary

1. Background and Purpose

On September 20, 2011, President Obama announced the United States' intention to implement EITI as a signature initiative of the U.S. National Action Plan for the Open Government Partnership. The Action Plan identified two goals for USEITI implementation: "Implement the EITI to Ensure that Taxpayers Are Receiving Every Dollar Due for Extraction of our Natural Resources; Work in Partnership with Industry and Citizens to Build on Recent Progress." In October, the President announced that Secretary of the Interior Ken Salazar "and his staff will work with industry and civil society to develop a sensible plan to disclose relevant information about revenues from oil, gas, and mining assets, and to enhance the accountability and transparency of our revenue collection efforts."² DOI was thus officially charged with implementing USEITI, including the critical step of establishing the USEITI MSG.

This document serves as an official record of the USEITI Stakeholder Assessment regarding USEITI implementation and the formation of the USEITI MSG. This stakeholder assessment was conducted by the Consensus Building Institute (CBI) and represents CBI's independent findings and recommendations based on input from a public comment period, public listening sessions, and targeted multi-sector interviews. Publication of this document marks the close of the initial stakeholder assessment phase for initiating EITI in the U.S. Please note there may be other important stakeholders and experts that likely have different concerns and viewpoints who were not interviewed, did not attend public listening sessions, and/or did not provide written comment. For instance, more formal tribal consultation is only beginning and a fuller range of views on tribal interests is not included in this draft report. *CBI is solely responsible for the content of this report and any errors and omissions.*

2. The Potential Benefits and Challenges of USEITI Implementation

Benefits and concerns cited reflect an array of perspectives, including domestic, international and sector-specific viewpoints. Key opportunities, both for the U.S. as a whole and for specific sectors, range from U.S. global leadership on transparency, improving domestic transparency, and creating an inclusive multi-stakeholder process, to improving relations between industry and the public and building public trust around resource governance. Stakeholders identified unique challenges of implementing EITI in the U.S., including but not limited to defining and ensuring adequate civil society representation; defining scope in light of complicated governance and the size, scale and diversity of U.S. industry; alignment of U.S. policies and regulations; process and implementation-related costs; the legality of convening an independent MSG; and the challenge of providing sufficient education and outreach.

3. Convening a Multi-Stakeholder Group

EITI requires that the government establish a MSG comprised of representatives from civil society, industry, and government to oversee implementation. Most commenters noted the importance of

² <http://www.whitehouse.gov/the-press-office/2011/10/25/white-house-announces-secretary-ken-salazar-administrations-senior-offic>

balancing inclusiveness with efficiency and suggested the MSG comprise 10-25 participants. Stakeholders provided a range of advice on the balance of sectors within the MSG, but almost all commenters suggested an equal balance of representatives across sectors to ensure the practice and perception of fairness. Commenters named criteria both for overall and sector-specific representation on the MSG and identified a range of potential roles on the MSG including principals, alternates, advisors or technical or other liaisons. Most commenters strongly advised allowing civil society, industry, and government to self-select representation on the USEITI MSG in order to preserve process legitimacy and the spirit of inclusivity. A smaller number of commenters stated that the government should be empowered to select the MSG with input from the sectors, given its role as convener and potential role in developing the “regulation, administrative directive, or law of congress that puts the seal on mandating all companies to disclose.” Others are concerned that convening the MSG through a Federal Advisory Committee Act (FACA) process would violate the spirit of EITI self-determination and present procedural and bureaucratic hurdles, such as the lobbyist ban on FACA participation, that would unduly confine the pool of eligible participants from key groups.

4. Options for Action

Based on the public listening sessions, written public comment, detailed input from over sixty interviewees, dialogue with the Department of the Interior EITI team, and an interagency working group, CBI developed the following recommendations and, in some cases, options for further public and stakeholder consideration. These options and recommendations have been refined given the public comment received during the May-June 2012 public comment period.

- *Who should establish the initial scope and direction of EITI implementation in the US?*
The MSG is the best body to determine the initial and overall scope of the effort, to affirm, and if needed, add to its membership, to conduct the important cross-sectoral work around implementation of EITI principles within the large and complex U.S. landscape, and to reach out to and communicate with constituents.
- *Should the MSG be initially established as an interim or full MSG?*
We conclude that the MSG should be stood up in full, but that it should be considered as an “initial MSG.”
- *What decision rule should the MSG use to reach its decisions?*
In reviewing comments, the EITI procedures, and the operations of the international EITI governing board, we conclude that the MSG, in whatever form it takes, should operate by a decision rule of consensus.
- *What is an appropriate size for the MSG and how should sufficient balance be established across sectors?*
Given public comment received on this issue across sectors, including stakeholder feedback at the June 22 USEITI public workshop, we recommend an initial MSG of twenty-one (21) members with seven (7) members per sector. We also recommend that there be up to seven (7) alternates per sector, whom would not have to be from the same organization or entity serving as the principal representative.
- *What might be the role of tribes and Individual Indian Mineral Owners (IIMOS) ?*

Tribal engagement regarding EITI implementation in the U.S. has only just begun. Thus, this assessment does not reflect adequately nor sufficiently the views of tribes or individual Indian mineral owners regarding their potential interests in this process. We do recommend formal and informal ongoing Tribal consultation as the MSG is formed. As the findings note, tribes may have a range of interests in EITI, from how their revenues are reported through the current Office of Natural Resources Revenue (ONRR), to the individual Indian mineral owners who are Tribal members. Because of tribes' unique status as nations within the nation, there may be several possibilities for how tribes participate in EITI: 1) DOI or MSG, at least initially, "carve out" any issues related to tribes; 2) The MSG, once formed, develops a plan to engage with tribes to determine how to proceed early in its work plan. 3) In coordination with the MSG, DOI establishes an ongoing government-to-government consultation process with tribes; 4) A Tribal representative could be a representative of the government sector or potentially the civil society sector, or serve as a liaison. As a part of the industry sector, Alaska Native Corporations, or serve within that sector; 5) Lastly, it might be possible to establish a pilot approach in Indian Country.

- *How might states be involved?*

Given the potential complexity of including state extractive revenues as part of USEITI disclosure and reporting, and the recommended 7 members per sector for MSG representation, we propose three possible options for state involvement in the MSG for consideration: 1) States choose not to be active in the initial MSG at this time but are kept informed; 2) States choose a liaison or liaison(s) to the MSG who serve as observers and play a critical role in outreach to state-level constituents; or, 3) States choose a representative to sit on the MSG who reports to a second tier of stakeholders comprising states with specific interests.

- *Criteria for representation individually and across the MSG*

Based on input from all our outreach efforts and the public comment period, there are several criteria that we have identified that should guide selection of representatives, including two general kind of criteria: 1) those individual criteria for which all representatives on the MSG should embody or meet; 2) those balancing criteria for which the representation on the MSG overall should seek to achieve, though not all individual members would possess or meet each. The criteria are detailed in the report.

- *Selection of Representatives*

In general, EITI guidance and best practice in collaboration calls for the sectors to "stand themselves" up in terms of representation on the MSG. While that principle is highly desirable, it can be quite difficult to implement. Despite the complexity and breadth of potential stakeholders in the U.S., our outreach to date found that organizations focused particularly on the issue of transparency of extractive revenue payments to government comprise a somewhat defined universe of players, though their current state of organization and capacity varies. While not perfect, we find that a limited number of convening organizations with sufficient interest and relevant knowledge do exist and can serve at least as important intermediaries in creating the initial membership of the MSG. However, the assessment also discovered that a constituency across the United States that is adequately developed around extractive revenue transparency is presently lacking. Capacity building in this area will help ensure a meaningful, inclusive, and robust process for selecting MSG members among a representative pool of organizations. This report includes recommendations to build that capacity. Overall, for all sectors, we recommend a selection process detailed in the report for convening the MSG, with

the federal government serving a “convener” role consistent with its responsibilities under the EITI Rules.

- *Administrative and legal options for establishing the MSG*

Given public comment and dialogue over the last several months, we conclude that two options are the most viable for standing up the MSG. We base the narrowing of the choice against the following criteria.

- Efficiency and timeliness in which the body can be created;
- Legal precedent and protection for the form of the body established;
- Adherence to EITI requirements (see EITI MSG-related requirements above);
- Sustainability of the MSG over time; and,
- Adaptability of the MSG to evolve over time.

Considering the full range of input obtained to date, we conclude that the two viable and preferred options for standing up the MSG are: 1) a non-federal entity with the federal government participating, but not directing; or, 2) a new federal advisory committee as the initial form of the MSG. The parameters governing the creation of each option appear to contain the minimum level of flexibility and structural capacity needed to shape each option into an entity that could perform the core MSG responsibilities as contemplated under the EITI Rules. We note that under the EITI Rules, 2011 Edition, Step 4 in the process, “The *government* is required to *establish a multi-stakeholder group to oversee* the implementation of the EITI.” Therefore, we believe it appropriate for the US Government to make the decision on how to proceed after engaging with and gathering the views of the other sectors as it has done during the stakeholder assessment period from February to June 2012.

1. Background

a. EITI global standard: brief history and structure

In 2002, former British Prime Minister Tony Blair launched the voluntary Extractive Industries Transparency Initiative (EITI)³ to improve public reporting and accountability of monies transferred to governments by companies extracting natural resources. EITI provides a voluntary and transparent framework for examining revenues in a given country by setting up a system in which industry reports to an independent party (a reconciler) the revenues it pays to the government for extraction, the government reports the payments it receives from industry, and that independent entity reconciles the data. The type of data to be reported and verified is decided upon by a Multi-Stakeholder Group (MSG) in each country comprising representatives from civil society, industry and government.

EITI is overseen by an international board of 20 members representing implementing countries, supporting countries, civil society organizations, industry, and investment companies. The EITI Board reviews and decides on country applications for “candidate” and “compliant” status, and evaluates whether a country maintains compliant status. The EITI International Secretariat, based in Norway, supports the work of the International EITI Board and is responsible for coordinating EITI efforts worldwide. International EITI efforts are funded by individual countries and by the World Bank EITI Multi-Donor Trust Fund program. As of April 2012, 14 countries have achieved EITI compliance, and 21 countries are official EITI candidates. The United States is one of several other countries that have announced an intent to implement EITI. *EITI is a voluntary standard and does not have the authority to enforce, implement, or require any action within the U.S.*

b. U.S. Implementation and role of DOI

On September 20, 2011, President Obama announced the U.S.’ intention to implement EITI as a signature initiative of the U.S. National Action Plan for the Open Government Partnership. The Action Plan identified two goals for USEITI implementation: “Implement the EITI to Ensure that Taxpayers Are Receiving Every Dollar Due for Extraction of our Natural Resources; Work in Partnership with Industry and Citizens to Build on Recent Progress.” As a global leader in natural resource extraction, the U.S. holds top-three international rankings in natural gas, coal, and oil production.⁴ The U.S. Department of the Interior’s Office of Natural Resources Revenue (ONRR) collected \$11.16 billion in payments in 2011 for extraction for federal lands and rights.⁵ On October 25, 2011, President Obama announced that the Secretary of the Interior Ken Salazar was appointed as the senior U.S. official to lead the U.S. effort to implement EITI,⁶ and on that same day Secretary Salazar committed to working with civil society, industry, and the American public to

³ For additional information about international EITI and participating countries, see www.eiti.org

⁴ CIA World Factbook Country Comparisons, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/rankorderguide.html>

⁵ Office of Natural Resources Revenue, U.S. Department of the Interior

⁶ <http://www.whitehouse.gov/the-press-office/2011/10/25/white-house-announces-secretary-ken-salazar-administrations-senior-offic>

implement EITI.⁷ The above proclamations satisfy the first three of twenty-one steps required for full United States EITI (USEITI) compliance.⁸

c. Role of a Multi-Stakeholder Group (MSG)

A key requirement for EITI compliance is the formation of a MSG that is responsible for overseeing EITI implementation. The MSG need not mirror the international Board or MSGs in other countries, but it must include representation from a country's civil society, industry and government. Neither the current EITI guidance nor the Open Government National Action Plan defines the above sectors with any specificity. Reviewing past EITI publications, public comment, and general definitions, we offer the following working definitions.

- **Stakeholder** is any person or organization who can be positively or negatively impacted by, or cause an impact on the actions of a company, government, or organization.
- **Civil society** as the aggregate of community-based organizations, non-governmental organizations (NGOs), and institutions outside of government, *representing* the diversity of citizens and their views, seeking to collectively speak on behalf or for the “public interest” and the citizens themselves. More specifically, civil society might include, but not be limited to, non-profits or not-for-profits, the media, trade unions, academic and research institutions, faith-based groups, and individuals. EITI International typically uses “civil society organizations” or “CSOs” in its rules and guidance.
- **Industry** as defined by companies operating within the country, be that domestic or international entities, and business associations (e.g. trade associations or groups) working on behalf of parts or the total of that industry.
- **Government** as defined by the executive and legislative branches of government. Given the federalist system in the U.S., this might include the federal government, state governments, local governments, and/or Tribal governments.

We will use the above general definitions for the purposes of this report. Specific roles of the MSG include working collaboratively to develop the country's EITI implementation work plan and application for EITI candidacy, and to design and oversee implementation of the framework for achieving EITI compliance. As noted above, the scope of industries, lands, and payments to be included in EITI implementation must be determined by the MSG and included as part of the country work plan. The MSG ensures that a country's EITI framework is widely supported, informed by appropriate expertise, tailored to a particular country's laws, regulations, and culture, and implementable by government and industry.

d. Role of CBI and the Assessment Process

In early 2012, through an agreement with the U.S. Department of the Interior (DOI), the U.S. Institute for Environmental Conflict Resolution, an independent, nonpartisan, and impartial federal program of the Udall Foundation contracted with CBI to provide neutral assistance with completing Step 4 of the U.S. Extractive Industries Transparency Initiative (USEITI) process: *“The government is required to establish a multi-stakeholder group to oversee the implementation of*

⁷ <http://www.whitehouse.gov/blog/2011/10/25/leading-world-transparency-natural-resource-revenues>

⁸ <http://www.doi.gov/eiti/upload/EITI-Fact-Sheet.pdf>

*the EITI.*⁹ From February to April 2012, CBI conducted 66 confidential interviews with stakeholders from civil society, industry, and government, as well as a small group of U.S.-based individuals with substantial experience with international EITI implementation and rules. (see Appendix A for a full list of interviewees). Interviewees were asked to provide comments on the benefits and challenges of USEITI implementation, and input on MSG representation and selection (see Appendix B for CBI’s interview protocol). Interviewees were identified by considering organizations active or representative of interests from the issues and sectors broadly defined by EITI. These included non-governmental organizations focused on transparency, trade associations, academics, and others. The Department of the Interior identified a range of government agency personnel as well. In our conversations, interviewees identified additional potential contacts to interview. The following chart summarizes interviews by sector:

Sector	Industry	Government	Civil Society	Other
# Interviewees	25	22	17	2

In addition, on February 24, 2012, DOI issued a Federal Register Notice requesting comment on the formation of the multi-stakeholder group (MSG) and U.S. implementation of EITI. Members of the public were able to provide written comments to Interior through the website, email and via mail or fax through April 9, 2012. During this period, in March 2012, DOI convened public listening sessions, facilitated by CBI, in St. Louis, MO; Denver, CO; Houston, TX; and Washington, DC, during which members of the public were asked to comment on how best to form the MSG responsible for USEITI implementation.¹⁰ During this comment period, several organizations requested a second public comment period once further information was available. In response, the U.S. Department of the Interior (DOI) conducted a second public comment period from May 18 – June 29, 2012 to gather input from the public on the May 18 publication of the United States Extractive Industries Transparency Initiative (USEITI) Stakeholder Assessment and Multi-Stakeholder Group (MSG) Options. During the May-June 2012 public comment period, public listening sessions were held in Anchorage, Alaska on May 30; Pittsburgh, Pennsylvania on June 11; New Orleans, Louisiana on June 12; and online via a public webinar on June 1. A public workshop was held in Washington, DC on June 22. In conjunction with these activities, the Department of the Interior separately engaged tribes and Alaska native organizations through individual tribal meetings, with a meeting hosted by Alaska Native Corporations, and in a consultation session at a meeting of the National Congress of American Indians (NCAI) on June 17, 2012.

This document serves as a record of the official USEITI Stakeholder Assessment regarding USEITI implementation and the formation of the MSG. This assessment was conducted by CBI and represents its findings and recommendations based on input from the public comment period, public listening sessions, and targeted multi-sector interviews. Publication of this document marks the close of the initial stakeholder assessment phase for USEITI implementation. Please note there may be other important stakeholders and experts that likely have different concerns and viewpoints who were not interviewed. For instance, more formal tribal consultation is only beginning and a fuller range of views on tribal interests is not included in this draft report. *CBI is solely responsible for the content of this report and any errors and omissions.*

⁹ For a complete list of EITI requirements, see <http://eiti.org/document/rules>

¹⁰ A summary of input provided during public listening sessions and via written comment to DOI can be found at www.doi.gov/eiti/upload/EITI-PLS-Summary.pdf

2. The potential Benefits and Challenges of EITI implementation in the U.S.

Benefits and concerns cited below reflect an array of perspectives, including domestic, international and sector-specific viewpoints. Although most stakeholders were able to articulate varying levels of perceived benefits and challenges, some felt less prepared to comment than others. Several noted the need for additional outreach to better inform potential stakeholders on the drivers behind USEITI.

Potential opportunities cited, both for the U.S. as a whole and for specific sectors, include:

- U.S. global leadership on transparency
- Improving domestic transparency
- Creating an inclusive, empowering multi-stakeholder process
- Providing a forum for discussing benefits of extraction
- Strengthening tax collection
- Optimizing existing reporting structures
- Improving relations between industry and the public
- Building public trust around resource governance
- Strengthening relations between DOI and civil society

Stated concerns about U.S. implementation of EITI took shape in the following key themes:

- Defining and ensuring adequate civil society representation
- Complicated governance: federal system and tribal sovereignty
- Size, scale and diversity of U.S. industry
- Alignment of U.S. policies and regulations
- Cost of new or revised reporting systems
- Costs and benefits of implementing EITI in the U.S.
- Cost of the USEITI process itself (MSG + Secretariat)
- Information published might not be value added
- Legality of convening an independent MSG (vs. Federal Advisory Committee)
- Ambitious timeframe
- Insufficient education/outreach
- Sectors may have trouble self-organizing

a. Opportunities: For the nation as a whole

- i. **Global leadership on transparency.** The most frequently stated benefit of USEITI implementation is the role that the U.S. can play in “raising the level of international attention to EITI to make it a truly global standard.” The U.S. could be a leader in setting an example for other large resource countries like Brazil, Mexico, South Africa, and China. Some stakeholders suggested that U.S. commitment to EITI implementation has already influenced countries considering EITI application. Others state it would be hypocritical of the U.S. to continue international EITI advocacy efforts without taking it on domestically. As an EITI compliant country, the U.S. would be both a financial supporter and an implementer. Finally, the U.S. has the opportunity to test the most recent EITI rules (published in 2011).¹¹
- ii. **Improving domestic transparency in the U.S. extractive industry.** Several commenters noted the high level of extractive revenue reporting already required in the U.S. on revenues from federal lands and rights, and therefore do not perceive a domestic advantage in USEITI implementation. Others, however, would like to see more granular reporting, improved readability of published data, and reporting by industries or subnational governments that are not bound by current federal disclosure requirements. Some see EITI as an opportunity to create greater transparency around a number of revenue issues from tax receipts to where and how revenue collected flows back to communities where extractives industries operate. Tribes and individual Indian mineral owners¹² may have an interest in seeing different or increased reporting of revenues derived from trust lands. The EITI process may also be an opportunity to develop different or more comprehensive public reporting of data, accounting and auditing procedures.
- iii. **Creating an inclusive, empowering multi-stakeholder process.** A key stated benefit of EITI is the opportunity for cross-sector dialogue and decision-making, a “merging of government function and the companies or industries in the public sphere by incorporating civil society and [disseminating] all of this to the public.” EITI offers a bottom-up approach to policy formation, and by having the various sectors “at a table, [with] equal footing” the multi-stakeholder process can serve as a model for other policy matters.
- iv. **Providing a forum for discussing the benefits of extraction.** USEITI could provide opportunities for the public to discuss the benefits of extraction in the U.S. One stakeholder suggested there is currently “not enough healthy conversation” about the costs and benefits of extraction, and that USEITI could provide greater understanding among the public about the economic value of natural resource development for the U.S. as a whole. Public discourse may also provide a forum for communities currently

“If countries like the U.S. enter into it, there’s no stigma attached to being an EITI country.”

¹¹ See *EITI Rules, 2011 Edition*, at <http://eiti.org/document/rules>

¹² As defined in 30 USC § 1702, an Indian Allottee is “any Indian for whom land or an interest in land is held in trust by the United States or who holds title subject to Federal restriction against alienation.” See <http://us-code.vlex.com/vid/sec-definitions-19217068>

benefiting from extractive revenue to suggest ways in which the federal government invests funds back into local institutions.

b. Opportunities: For sectors

- i. **Strengthening revenue collection.** Through the third-party EITI reconciliation process, some commenters believe “more attention may be paid to what kinds of payments are or are not being made.” Given high instances of “settlements for underpayment,” better accuracy and external reconciliation could lead to recovery of lost revenue. Some noted that with past problems in federal accounting, EITI would provide an additional measure of transparency and verification.
- ii. **Optimizing existing reporting structures.** Commenters from multiple sectors consider USEITI an opportunity to improve the “clarity and consistency of reporting structures,” thereby improving the timeliness and accuracy of payments. Some civil society and state interviewees noted the difficulty of procuring information about U.S. operations on federal lands. Some noted the importance of gathering more granular data and reporting it in a way more usable by local and regional stakeholders. Review of existing reporting structures may in turn help improve overall transparency in the extractive industries.
- iii. **Improving relations between industry and the public.** Participation in EITI and increased dialogue with civil society presents an opportunity to repair the “relationship between the public and the extractive sector [that] is fraught with mistrust.” Some commenters cited that USEITI would effectively help give companies “the social license to operate” in the wake of concerns from controversial extraction techniques in the U.S. and the social and environmental impact of oil spills. In the process of USEITI outreach, companies with international EITI experience would have the opportunity to demonstrate for Americans their commitment to transparency worldwide. Some noted that the EITI process provides a direct means for sectors to share their underlying assumptions and approaches, to challenge one another to consider a broader range of perspective, and to collectively bring about a better shared understanding of one another’s needs and interests.

“Information has to be beneficial – there is a risk that it won’t mean anything to people reading it.”
- iv. **Building public trust around resource governance and strengthening relations between DOI and civil society.** Some comments noted that USEITI would help advance government oversight in general, in addition to specifically addressing federal resource revenue management. With greater transparency, the public may have greater assurance that government “resources are properly developed and properly conserved.” In addition to discussing benefits specific to extraction, some believe USEITI could serve as a forum for dialogue on issues related to the nexus of energy and financial issues and could open up avenues for public discussion about increased domestic energy independence. Others feel strongly that USEITI should keep its focus solely on extractive revenues reporting. Several commenters noted USEITI is an opportunity for DOI, specifically, to engage with and improve relationships with the public. A range of concerns remain about the federal

government's ability to track extractive revenue, from the ways in which individual Indian mineral owners received payments as raised in the Cobell legal challenge, to the former Minerals Management Service (MMS) and significant concerns with their resource management. Multiple stakeholders believe that DOI is improving on these fronts and consider EITI an opportunity to further improve its transparency and stakeholder relationships.

c. Challenges

i. Defining and ensuring adequate civil society representation

The U.S. "civil society" includes a more limited number of groups focused on revenue transparency in the extractive sector and a much larger universe of groups that are focused generally on extractives, "good" government, tax policy, public policy, and local and community concerns. In addition, there are thousands of investor organizations that may have a stake in the health and direction of the U.S. extractives industry and that may qualify as industry or civil society, as well as numerous academic institutions either generally or more specifically focused on extractives.

Civil society is probably the most difficult sector to adequately and fully define given that the U.S. is a diverse, large country with a very large "third" sector. Several commenters expressed great concern that a diverse and engaged constituency around these issues has not been developed, through either DOI's efforts or the few groups specifically focused on revenue transparency issues. Those local and community groups attending public listening sessions stressed the importance of involving and including communities where extractives industries operate and likely have the greatest direct impact. Some noted that without meaningful capacity building, the EITI requirement for full, multi-sector participation would not be met. Commenters noted that extensive outreach with civil society groups will be critical for building: a) an inclusive USEITI; and, b) adequate feedback loops between the MSG and regional to local organizations.

The Publish What You Pay Coalition and individual organizations such as the Revenue Watch Institute, Oxfam America, Global Witness, ONE Campaign, and Transparency International are some of the most active groups in EITI internationally, while groups such as Project on Government Oversight, Taxpayers for Common Sense, and OpenTheGovernment.org specifically focus on U.S. government transparency particularly. Individual Indian mineral owners' associations might also have an interest from a civil society perspective. Some commenters noted that investors do not easily fit into any of the three categories. Depending on their focus and perspective, they may be interested "observers" or more direct stakeholders in either the Civil Society or Industry sectors.

ii. Complicated governance

Government structure in the U.S. is significantly more complex than in most other EITI implementing or compliant countries. There are executive, legislative, and judicial branches with a separation of powers, numerous federal agencies with an interest in revenue and extractive issues, fifty states, each with their own interests and multiple agencies, counties

that receive some federal oil and gas revenues back from the federal government, and over six hundred sovereign tribal nations. Federal agencies with related interests include the Department of the Interior and various offices within DOI such as the Office of Natural Resources, the Bureau of Indian Affairs, the Office of Special Trustee, and the Bureau of Land Management. The United States Department of Agriculture (USDA) Forest Service also has some limited extraction and coordinates with DOI for BLM management of mineral extraction on Forest Service Lands. Other federal agencies include the Department of Energy, the Securities and Exchange Commission, the Department of State, and the U.S. Treasury, including the Internal Revenue Service.

State-level associations that could play a role in USEITI include the National Governors Association, Western Governors Association, Western Land Commissioners Association, Interstate Oil and Gas Compact Commission, Interstate Mining Compact Commission, and/or State and Tribal Royalty Audit Committee (STRAC), among others. There are also numerous sub-state governments or political subdivisions that could have an interest, such as county and local governments where extractives operate and which receive allocations of some portion of federal revenues from extractives. Some states also receive extractive revenue directly from companies for activities on State lands and may receive state severance taxes on extractives revenues more generally.

iii. Tribal participation in USEITI

The Office of Natural Resources Revenue (ONRR) collects revenues on behalf of tribes and/or receives information on extractives payments to tribes or individual Indian mineral owners from companies for some 40 tribes out of the some 565 tribes in the U.S. It also collected revenues for some 30,000 individual Indian mineral owners. Many of these Tribal rights are fractionated, which means a single right has been further subdivided or “fractionated” due to multiple generations within families passing down the right to all or many descendants.

Some tribes hold extensive mineral rights, not only on and beneath their own lands, but for subsurface rights under private land. During this assessment phase CBI, working with Interior, identified a range of tribes, organizations and agencies with a potential stake in this issue. These include Tribal governments, including such tribes as the Osage, Navajo, and many others with significant mineral interests. There are affiliated groups, including but not limited to: the National Congress of American Indians, Energy Committee; the Oklahoma Indian Land and Minerals Association, an association of individual American Indian mineral owners; the Council of Energy Resource Tribes; the Montana-Wyoming Tribal Leaders Council; and, Alaska Native Claims Settlement Act Regional and Village Corporations. There are some tribal-related, federally-established committees, including but not limited to: the State and Tribal Royalty Audit Committee (STRAC), associated with ONRR; the Tribal Budget Interior Council, established by DOI; the Royalty Policy Committee (RPC), established by DOI; and, the Indian Oil Valuation Negotiated Rulemaking Committee, also established by DOI. There are also various federal agencies or groups involved in energy development affecting Tribes. These include, but are not limited to: the Bureau of Indian Affairs, the Indian Energy and Minerals Steering Committee, established by DOI; the Office of Special Trustee; the Office of Indian Energy and Economic Development, under Assistant Secretary Indian Affairs; and, DOE Office of Indian Energy Policy and Programs.

To date, DOI has mailed a letter to Tribal leaders of all 565 federally recognized tribes on February 16 to inform them of the initiative and then on May 21, 2012, a letter to both Tribal leaders as well as inter-Tribal organizations outlining how this initiative may impact Indian country and the opportunity to comment. Additionally, DOI has presented on EITI at the:

- National Congress of American Indians Mid-Year Conference, Lincoln, Nebraska;
- Tribal Budget Interior Council (TBIC);
- State and Tribal Royalty Audit Committee (STRAC);
- Indian Energy & Minerals Steering Committee (scheduled for July 11);
- ONRR Indian Oil Valuation Negotiated Rulemaking Committee;
- Oklahoma tribes while on business to Oklahoma, including the Cherokee Nation, Osage Nation, and the Choctaw Nation.

DOI has also individually reached out by phone to many of the energy resource tribes and Tribal organizations including the Council on Energy Resource Tribes, Montana-Wyoming Tribal Leader's Council and Oklahoma Indian Land/Mineral Owners of Associated Nations (OILMAN). DOI met with the Alaska Native Regional and Village Corporations in Anchorage, AK and have also reached out to the Alaska Federation of Natives (AFN). Additionally the DOI EITI Team is in ongoing coordination with DOI agencies that have large Tribal networks such as the Office of Special Trustee, Office of Natural Resources Revenue's State & Indian Coordination, Bureau of Indian Affairs and Indian Energy & Economic Development's Division of Energy & Mineral Development.

Tribal and other Native American discussants' responses to the USEITI efforts from these outreach efforts have included the following:

- General interest in the process, particularly in EITI "plus" and its potential impact on larger social and human rights issues;
- Concern about additional or different reporting requirements than are currently required;
- A better understanding of what benefit would participation in the EITI process provide for tribes with extractives revenues;
- Concerns around revealing extractives revenue information beyond a tribe and its members;
- Holding off on officially 'signing on' to the process and opting to and observe what EITI implementation may look like once the MSG is established and begins wrestling with some of the more substantive issues around materiality and scope;
- How best to involve Native American interests in this process, particularly when tribal interests are diverse and each tribe has a right to direct government-to-government engagement with the federal government;
- That numerous individual Indian mineral owners, above and beyond tribes, have their own particular interests, are numerous in number, and not organized by any national or singular group; and,
- To be kept apprised of USEITI implementation status and progress.

iv. Size, scale and diversity of U.S. industry

Extractive industries, as defined by the EITI International Secretariat, include the oil, gas, and mining industries.¹³ The U.S. industry is a large sector, involved in payments to the U.S. Office of Natural Resources Revenue for federal lands and rights alone, comprising over 2,000 active companies with over 3,000 companies listed in the ONRR database. There are large multi-nationals, some U.S. headquartered, some not, private and publicly held companies, some domestic operating only companies, large, medium and small companies, companies with multiple extractives and some with only one. Industry associations cited as most likely to participate in USEITI are the American Petroleum Institute (API), the National Mining Association (NMA), the Independent Petroleum Association of America (IPAA), and the Council of Petroleum Accountants Societies (COPAS).

Of the average \$11.2 billion in extractives revenues collected annually by ONRR, 90% is from oil and gas, 8% from coal, and the remaining 2% is for a number of other resources that are extracted, including carbon dioxide, copper, geothermal, hot water, lead, limestone, phosphate, potash, sand and gravel, sodium and sulfur, etc. Unlike other countries engaged in EITI, a substantial amount of gas, oil, and mineral production in the U.S. occur on privately-held lands.

Most stakeholders recommend including oil and gas in USEITI at the outset in light of preexisting reporting practices and the large percentage of U.S. extractive revenue to which these industries contribute. There is some debate about whether or how to include mining in the initial stages in addition to oil and gas since such mining revenues are substantially lower overall; however, other metrics for including mining were noted, such as environmental and social impact and a perceived “lack of financial benefit [mining] has traditionally carried to the U.S. government” under current statutes. Several commenters suggested that renewables would be too difficult to include in EITI scope, while some recommend they be considered by the MSG in early scoping deliberations.

Most commenters suggested that industry representation include oil and gas (onshore and offshore), sand, hard rock (especially metals such as copper), and coal. A small number of commenters also recommended that timber, geothermal, and fisheries be included. A few commenters stated that precious metals, such as gold and silver, should also be included though revenues from precious metals are handled differently than other products. Multiple commenters suggested piloting USEITI nationally with one industry (e.g. offshore oil and gas) or by starting in a state with only one industry. Scope of USEITI industries could be determined by impact, extraction technique, revenue, or those industries with less transparent reporting requirements.

¹³ See <http://eiti.org/resource/faq>

v. Alignment of national policies, regulations, and laws and international requirements for compliance.

Concerns emerged in interviews and in public listening sessions about the legality of USEITI and the relationship of the MSG to the U.S. government. Commenters probed whether or not USEITI is “extralegal” to the U.S. and wanted to make sure that whatever structural form the MSG ultimately assumes is aligned with federal laws and procedures. The EITI rules do not require that MSG decisions become enshrined in domestic law, but many commenters feel strongly that some regulatory changes specific to USEITI implementation will be necessary to ensure “USEITI sticks.” Some stakeholders feel strongly that EITI be implemented “in a way that's consistent with the [international] mission and doesn't expand into other rulemaking or missions that are outside of what EITI is intended to be.” Specific statutes, regulations and guidelines cited as having potential relevance to USEITI implementation include the following.¹⁴

- Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)
- Federal Advisory Committee Act (FACA)
- The Federal Income Tax Regime
- Freedom of Information Act (FOIA)
- Generally Accepted Accounting Principles (GAAP)
- The General Allotment Act of 1887 (the Dawes Act)
- General Mining Act of 1872
- Uniform Trade Secrets Act
- Paperwork Reduction Act

Statutes giving ONRR authority to collect royalties:

- Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA)
- Federal Oil and Gas Royalty Simplification and Fairness Act of 1996 (RSFA)
- Geothermal Steam Act of 1979
- Indian Mineral Leasing Act of 1938
- Indian Mineral Development Act of 1982
- Leasing of Allotted Lands for Mining Purposes, Act of March 3, 1909
- Mineral Leasing Act of 1920

Other statutes relevant to offshore leases:

- Deepwater Royalty Relief Act of 1995 (DWRRA)
- Energy Policy Act of 2005 (EPAAct)
- Gulf of Mexico Energy Security Act of 2006 (GOMESA)
- Outer Continental Shelf Lands Act of 1953 (OCSLA)

vi. Dodd-Frank and EU regulatory actions

Passed in July 2010, the Dodd-Frank Act includes Section 1504 (a.k.a. the Cardin-Lugar amendment), that “requires reporting issuers engaged in the commercial development of

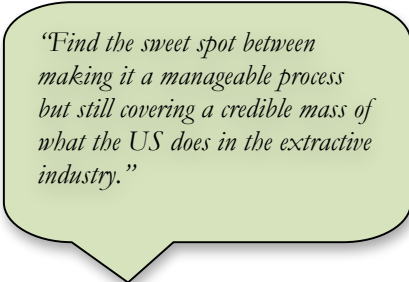
¹⁴ This section does not attempt to add a legal reading, nor is it an exhaustive list of the legal issues at play in USEITI. Rather, it serves to enumerate specific laws and policies raised by commenters from multiple sectors.

oil, natural gas, or minerals to disclose in an annual report certain payments made to the United States or a foreign government.”¹⁵ The Securities and Exchange Commission (SEC) will then make a version of the data available online. The SEC has yet to issue a ruling on how Section 1504 will be implemented and a lawsuit was recently filed seeking to compel the SEC to issue implementing regulations under Section 1504. SEC noticed that they would vote on 1504 rules on August 22, 2012 just as this assessment was completed.

Respondents shared concerns about the implications for USEITI of the SEC’s Section 1504 rulemaking, and noted similar regulatory efforts in the European Union.¹⁶ Perspectives on 1504’s relationship to USEITI vary from those who think the SEC ruling could potentially upend the USEITI process, to those who see Dodd-Frank as complementary to the multi-stakeholder transparency initiative and an opportunity to enhance existing regulation. Given contentious debate among stakeholders over Section 1504, some stakeholders noted the importance of making sure that USEITI does not replicate the “battleground” taking place in the SEC context. Several respondents noted the difficulty of producing the USEITI work plan without knowing how Dodd-Frank will be implemented. Many stakeholders registered concern about the potential for duplicative or conflicting reporting requirements, while others consider 1504 as the framework for expanding its reporting requirements beyond publicly held companies. Some noted that the SEC must be represented on any MSG given their direct role in this issue as required by Dodd-Frank.

vii. USEITI Scope

In general, commenters consider defining USEITI’s scope to be one of the MSG’s biggest challenges. Some prefer the initiative start with discussions about a broader scope of lands and industries with specific project level reporting, so the U.S. can serve as the “gold standard” for international EITI efforts. Others think that “the bigger you make [the scope] the harder it will be to understand and to be enforced.” Some commenters with international experience suggested that USEITI may need to start simple and then, as the process moves forward, the MSG can “go step by step and see what the [additional] problems are that need [to] be solved.” Some noted that the focus should be solely on revenues collected on federal lands or for federal rights. Some commenters suggested federal and state taxes more broadly, and even tax “subsidies” and campaign contributions should be considered. Some commenters in public listening sessions noted the complexity of understanding and making sense of broader tax issues associated with extractives, given complicated corporate taxation, reporting in and across years, and the various means by



“Find the sweet spot between making it a manageable process but still covering a credible mass of what the US does in the extractive industry.”

¹⁵ See <http://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml>

¹⁶ In the EU, proposals were made on 25 October 2011 “which would require EU-based companies to disclose their payments to governments for oil, gas, minerals and logging on a country-by-country and per project basis. The proposals are amendments to existing EU legislation governing accounting and transparency standards, and amend both in order that both listed companies and large un-listed companies are subject to their requirements.” See http://www.revenuewatch.org/training/resource_center/eu-legislative-proposals-country-country-reporting

which companies report, especially publicly-traded ones that must provide a host of information in a variety of different publications and filings. Some noted however, that without a full picture of all extractive revenues, one cannot get a clear sense of revenue flows to the federal government. Some noted that USEITI should consider the federal-government payments back to communities and regions in which extractives take place.

In order to maximize efficiency of the USEITI process, commenters generally suggest that the U.S. government present a range of scoping options for consideration by the MSG. Straw options, according to stakeholders, could include some that are more narrow or manageable (e.g. oil and gas revenue on federal land), others that involve additional complexity up front, and/or options that allow for increase in scope over time. Some stakeholders cautioned against presenting the MSG with “too preformed [an] idea of what will be covered,” and raised the importance of presenting options as draft suggestions from which the MSG can choose and add as appropriate.

Recommended sources upon which to base draft options included public comments, public listening sessions, and EITI processes abroad. Some comments warned against using processes from other countries as models given the unique nature of U.S. implementation, and instead suggest creating draft options from scratch. Regardless of initial scope, some stakeholders advise that the MSG should “ensure a standard that is continually progressive and provides a review mechanism.” Some think it is important to include state and/or tribal revenue up front, while others recommend phasing in tribal and/or non-federal lands later in the process as appropriate. Several commenters note that it is far too complicated to add state and/or tribal lands at any stage. The few respondents who recommend including private lands as part of the MSG’s early scoping conversations rank such revenue less important relative to federal, state and/or tribal payments.

a) Federal revenues

Non-tax revenues

All commenters weighing in on lands to be included in USEITI recommended including revenue collected by DOI’s Office of Natural Resources Revenue (ONRR) that meets an as-yet undefined materiality level. ONRR collects royalties, rents, bonuses, penalties and other payments for extraction on federal land. Reporting templates for federal lands already exist and the U.S. “[has] a decent inventory of federal lands.”

Tax revenues

The separation between extractive revenue and tax collection in the U.S. further distinguishes USEITI from processes in other countries. The U.S. Treasury manages federal income taxes and by law, is prohibited from releasing individual taxpayer information.

Some stakeholders consider the reporting of taxes by publicly traded companies already required in Section 1504 of Dodd-Frank sufficient and perhaps a starting point for other companies. Others note that requiring companies to disclose tax payments in detail is in opposition to existing federal law. Some stakeholders argue that individual company tax payments should be made public through the EITI process. Many stakeholders were unsure about how production-related data could be parsed out from federal taxes given

that revenue from activities such as “chemical [production], refining, and marketing impact the federal income tax burden” yet are not specific to extraction. State severance taxes are perceived as significantly less complicated to report than federal corporate or income taxes, and for some, important to include in USEITI. Some stakeholders believe that the MSG should include at least discussion of federal taxes in early USEITI scoping.

Other revenues

In addition to the revenues mentioned above, other revenue streams were suggested for inclusion in the MSG’s initial scoping conversations. As an example, the Abandoned Mine Land Reclamation Fee, currently assessed by the Office of Surface Mining (OSM) on every ton of coal produced in the U.S. and used to fund the Abandoned Land Mine Program, could be included in USEITI. In 2011, OSM collected \$256 million in fees for extraction on all lands. While not required by EITI guidelines, the MSG may, according to some, also want to consider including environmental impact reporting, and USEITI may be an opportunity to publish data on the natural resource revenue dollars invested back into communities. Some suggested tax “subsidies,” campaign contributions, lobbying expenditures, and payment flows back to communities should also be included.

b) Tribal revenues¹⁷

In terms of reporting, federal and Tribal data are captured in a similar format for ONRR. If this reporting methodology changes in any way, however, tribes may have a stake or interest in the specific changes made. Furthermore, larger tribes may have an interest in USEITI approaches in order to increase transparency for Tribal members, Tribal corporations, and/or investors. Tribes, on the other hand, may have strong concerns about releasing information that they believe to be solely of concern to the tribe and Tribal members.

c) State revenues

By law, States receive federal disbursement of certain revenues collected for mineral extraction on federal lands and waters, and they also collect their own revenues for mineral extraction on State lands. Many states collect proprietary severance taxes on the extraction of natural resources. Each state has its own governance of natural resources and payment structures, however, and royalties and lease terms vary from state to state, which affects the amounts states receive for specific types of payments. In addition to complexity of governance and reporting, states have transboundary challenges (across multiple states) and split rights where federal minerals, state minerals, and private minerals are all on the same surface in different areas. Some consider reconciling state level reporting too time-consuming and costly, while others think it essential to consider including states, especially those with the greatest revenue and/or impact, at the start of MSG deliberations.

¹⁷ Please note that this report does not include fuller information from tribes on EITI. DOI has conducted preliminary government-to-government outreach with tribes and through other means, and will engage in consultation regarding this analysis in an ongoing fashion.

viii. Costs of implementation

Concerns about USEITI cost are twofold: 1) funding needed to adopt new or adjusted reporting procedures, and 2) resources needed to convene and facilitate the MSG.

1. *Costs of reporting.* Some are more focused on the direct correlation between the level of disaggregation required and the cost of reporting. Commenters thus advise the MSG to minimize the cost of reporting by keeping different reporting mechanisms compatible with each other and focused on the objective of the EITI – transparency of revenues – rather than any number of related but different issues such as general governmental oversight of extractives, environmental protection, and so forth. Should changes be made to the tax regime, additional costs would be incurred both by industry and government. Some expressed concern about how potential Dodd-Frank reporting requirements would mesh with EITI-recommended approaches.

2. *Costs of convening and facilitating the MSG.* Several commenters noted that the process itself could be expensive, and the source of funding for MSG operations is not yet clear to stakeholders. The World Bank manages a multi-donor trust fund (MDTF) that helps support its technical assistance and financial support to qualifying countries implementing EITI. As a contributor and developed country, the U.S. does not qualify for this assistance. Some commenters stated that if the U.S. government deems this a worthwhile objective, a U.S. agency will find funds to see the process through, and may provide a secure source for consistent funding. Some noted that funding is essential for capacity building within civil society. Some noted that the three sectors may be able to fund their own participation, if the terms of reference and process are relatively clear. And others suggested that costs should be a shared responsibility among the three sectors, with each contributing funding and/or in-kind staffing, office space or other resources, in order to preserve the independence of the MSG and insulate it from any changes in the government or other sectors.

Whichever route is taken, the MSG needs to identify funds for the overall process and for the staffing of the USEITI “secretariat” (see page 29 for definition) as part of the fully-costed work plan it must submit with the application for candidacy. Several commenters noted that participation could take a considerable amount of time and resources and thus expressed concern about the career level of representatives that should be assigned from within their organizations. Commenters noted that cost could be mitigated by convening a mix of in-person sessions and videoconferences. Some commenters requested that at some point early in the process either the federal government or the MSG undertake a cost-benefit analysis to ensure the effort to advanced transparency is worth the costs of doing so, particularly regarding the administrative costs of managing an EITI process.

ix. Timeframe

All respondents characterize DOI’s proposed timeline of standing up the MSG by in later 2012 as “highly ambitious.” The timeline is perceived as either ambitious enough to inspire quick decision-making across sectors at a time when USEITI has “strong support and momentum from the administration” or unrealistic due to timing and resources needed for MSG structure formation and member selection. Some warned not to overpromise on

timeline and outcome at the expense of sufficient outreach and recruitment. As it stands, noted one stakeholder, the current timeline runs the risk of the “U.S. dictating a solution in order to fit into timing.”

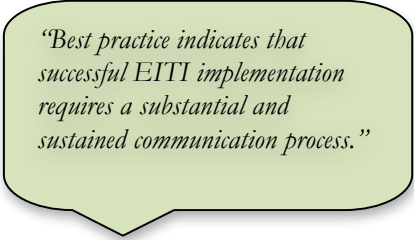
In particular, civil society and tribes will likely need more time for sufficient outreach and internal prioritization, and industry may need more time to educate and recruit smaller companies. The timeline will be further influenced by the process used to select and/or “stand up” the MSG. Others raised concerns that the 2 ½ year timeframe required for EITI compliance may be unachievable should the USEITI scope be too broadly defined.

x. Education/Outreach

As noted above, respondents consider it essential for DOI to proactively engage subsectors of civil society, industry, and government in order to maximize inclusivity and ensure proper representation. Some commenters also noted that each of the sectors should take responsibility

to conduct their own education and outreach within their sectors. In particular, companies and NGOs with experience in EITI internationally can and should educate and mentor their colleagues in U.S. industry and civil society who may be less familiar with EITI. Some stakeholders recommended developing a “comprehensive, modern communication strategy” as soon as possible to maximize compliance with EITI rules concerning public engagement. Such communication could serve to provide baseline education on EITI, ensure proper feedback mechanisms, and publicize the principles, makeup, and activities of the MSG.

Suggested guidelines for engagement include prioritizing geographies in which resource production has the most social and environmental impact, engaging a “diverse range of organizations and institutions,” and seeking input from potentially interested states and tribal governments regardless of scope. Domestic and smaller producers may be more skeptical of the process, so industry associations and ONRR were encouraged by commenters to continue correspondence with all lease holders on federal and tribal lands letting them know about USEITI and their potential role in implementation. Specific outreach methods were noted, including posting educational materials (e.g. DOI’s EITI presentation), drawing on existing federal public engagement mechanisms, convening additional public listening sessions in other regions, extending the public comment period, developing more interactive social media, convening conference calls, moderated email engagement, hosting webinars, creating a more accessible website, more attractive and less complicated outreach materials, and developing a glossary of key terms.



“Best practice indicates that successful EITI implementation requires a substantial and sustained communication process.”

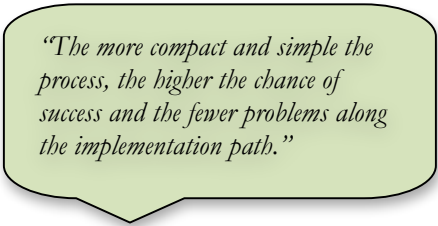
3. Convening a Multi-Stakeholder Group

a. Principles as articulated by the EITI Rules

As mentioned above, EITI requires that implementation be overseen by a multi-stakeholder group “including – but not limited to” – the three major sectors mentioned thus far in this document. The primary requirements for MSG formation and operation are inclusive decision-making, self-determination, capacity, transparency, and representativeness.¹⁸ The USEITI MSG should ensure, according to EITI principles:

- An inclusive decision-making process;
- The right to sector self-selection;
- Freedom to operate and liaise with constituency groups;
- Proper capacity of its members to serve on the MSG;
- MSG representatives bound by public Terms of Reference (TOR); and,
- Transparent record keeping.

Rules specific to the government’s convening role require representation by senior government officials; transparent invitations to participate; adequate representation; and principled rotation of group members out of the MSG. Some USEITI stakeholders suggested that the U.S. MSG mirror the international board¹⁹ in size, composition, and decision rule, while others believe the USEITI MSG ought to be entirely unique as compared to the international process.



“The more compact and simple the process, the higher the chance of success and the fewer problems along the implementation path.”

b. Size and numbers overall

Commenters offered a broad range of advice on the size of MSG membership. Some felt that for the MSG to be efficient and effective, its membership should be no more than ten representatives. Several commenters expressed concern about too large a group being unwieldy, slow, and cumbersome if not outright ineffective. Others felt that since the U.S. is so complex, one might need twenty-five (25) or more representatives to be inclusive and complete. Several commenters stated that five (5) representatives per sector would be insufficient. Most commenters stated that the MSG has to balance inclusiveness with efficiency.

Respondents noted that participation at the MSG level might include a range of roles. The MSG could have principals, alternates, advisors or technical or other liaisons. For some it is important to include alternates who are willing and incentivized to be as invested as full members in the process. In order to maximize participation and retain interest, some suggested it may be useful to institute a mechanism in which principals can rotate in and out of

¹⁸ See *EITI Rules, 2011 Edition*, p. 16 at <http://eiti.org/document/rules>

¹⁹ For a list of EITI International Board members, alternates, and guidance for constituency self-selection, see <http://eiti.org/about/board>

the MSG such that, for example, an alternate could formally replace a primary member and open up the space for a new alternate/entity. Liaisons, or observers, could play a key role in outreach to various constituencies. MSG subcommittees might also provide additional opportunities to increase high-level participation across sectors.

Several commenters noted that each sector within the MSG should and would need to conduct ongoing constituent outreach, and that the MSG as a whole would need to do periodic public engagement on key issues (such as public comment periods, public meetings, etc.) as well as tribal consultation. Stakeholders envisioned a key role for industry associations in convening working groups on specific issues so that companies without seats at the MSG have an opportunity to inform, and be informed by, MSG deliberations. States may likewise employ a “2-tier” model, in which representatives to the MSG participate in a robust feedback loop via governors associations, lands commissioners associations, interstate compact commissions and/or the State and Tribal Royalty Audit Committee. U.S.-based civil society organizations with broader international and/or national perspectives might also set up mechanisms for engaging regional groups throughout the USEITI process.

Some stakeholders suggested that there should be an opportunity to “opt-in” to USEITI for interested parties who are not represented on the MSG but still wish to participate, such as particular states, tribes or companies that do not meet initial scope or materiality criteria. This could result in the creation of a group of USEITI affiliates, members, supporters or some other category to which all interested parties could subscribe.

c. Balance across and within sectors

Stakeholders provided a range of advice on the balance of sectors within the MSG, but most commenters suggested an equal balance of representatives across sectors to ensure the practice and perception of fairness (i.e., equal numbers of representatives for each of the three sectors). Recommendations on size and balance were informed by commenters’ experience with multi-stakeholder initiatives such as Federal Advisory Committees, working groups convened by associations representing specific industries and/or states, and in some cases, international experience with EITI itself.

A small number of commenters suggested that industry should comprise a larger percentage of the MSG due to: a) the size and diversity of U.S. extractive efforts; and b) the notion that industry will, along with government, be most responsible for operationalizing any changes to current revenue accounting systems. Others stressed the importance of establishing parity across sectors in strength of personality and expertise, as well as numbers. Some noted that the federal government ought to be able to represent itself with potentially fewer members than the other sectors (i.e., five instead of seven). Some suggested that allocation of seats within a sector might be done by percentage of revenue of various subsectors paid to the federal treasury, industry diversity, geographic diversity, and/or additional factors.

d. Selection of representatives within sectors

i. Sectors²⁰

a) Government - Federal: Stakeholders recommended that multiple agencies occupy Federal Government seats using, among other overarching principles for selection, a requirement that the agencies be “representatives of the recipients of all (TBD) significant material payments by the mining, gas and oil industries.” It may be useful at some point, even if not at the beginning, to involve congressional participation on the MSG. Federal representation on the MSG, as suggested by different commenters (and not necessarily supported by all commenters) were:

- Department of the Interior (ONRR, Solicitor’s Office, Land-owning/permitting agencies like BOEM, BLM)
- Department of the Treasury (Internal Revenue Service (IRS) and Financial Management Services (FMS) could serve as a Technical Assistance provider and/or on the MSG)
- Securities and Exchange Commission (SEC) given their role in Dodd-Frank
- Office of Management and Budget (OMB)
- State Department
- Environmental Protection Agency (EPA) Mining Team

b) Government - States: Depending on USEITI’s scope and states’ interest, commenters envision representatives from individual governments and/or associations as liaisons or full members of the MSG. Advice on state representation ranged from general to specific criteria, and stakeholders qualified that suggested revenue-based criteria could be further broken down by industry. Potential MSG members could include states that:

“It will be a challenge to figure out states’ role and to what extent they should be involved. They are pressed for time and will need to be sold on the importance / necessity of their participation.”

- Collect and receive royalties for extraction;
- Receive the highest total revenue, regardless of land type;
- Include the most extraction on non-private land;
- Report the highest total extractive revenue on federal lands only;
- Experience the greatest environmental and/or social impact; or,
- Comprise the most diverse mix of extractive industries

c) Industry: According to respondents, industry can be widely represented, by a combination of trade associations, such as those listed above in the Challenges section, and individual companies. According to some, trade associations need to express the views of all their members, which can make decision-making more difficult, or may require trade groups to reflect only the most cautious views of their members.

²⁰ We use sectors in this report to refer to the three groupings of government, industry and civil society as expressed by EITI.

However, many noted that trade associations have well-established means to engage, organize, and reach back to their members, and can identify those within their memberships willing and able to serve and add value. Some expressed concern about small players, though others noted that industry associations such as the Independent Petroleum Association of America (IPAA) can help reach smaller producers that would likely not get a seat at the MSG table. Some think that even smaller producers should have at least one individual company on the MSG. Suggested criteria for industry representation we heard stated include:

- A mix of companies by size and function;
- Half represent mining, half represent oil and gas;
- For oil and gas, trade association representation + two companies (one with a U.S. base and one with an international base);
- Regional diversity;
- Diversity by size;
- Diversity by domestic and internationally operating;
- Diversity by publicly traded versus privately held.

d) Civil Society: As described above, civil society may include a wider variety of representatives than other sectors. Several stakeholders recommended prioritizing recruitment of domestic open government organizations to the MSG, as they have more intimate knowledge than international NGOs about U.S. governance and domestic transparency issues. Others expressed concern that this sector could become a catchall representing anything that is non-governmental or outside of industry. Those concerned about the vague definition of civil society think it important to keep this sector purposeful and perhaps to create a fourth sector as needed. Potential representatives on the MSG may include any or all of the following actors:

- Academics
- Associations of individual Indian mineral owners
- NGO coalition representatives
- Individual NGOs: Industry-focused (e.g. oil/gas or mining) and Functional (e.g. open government or environmental)
- Investors
- Media
- Non-governmental Individuals (NGIs): individual nationally recognized experts on transparency
- Regional or local NGOs
- Representatives of federal, state or tribal governments or companies who choose not to participate in reporting but have an interest in EITI
- Unions
- Individual citizens

Other groups that may serve in an observer status could include private landowners, who may have an interest even if they are not included in USEITI scope.

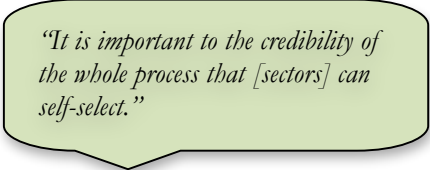
ii. Other Key qualifications

Some highlighted the importance of international EITI experience, while others feel strongly that the MSG should include new and more domestic perspectives. Some also noted the importance of explicitly seeking representatives that are committed to the principles of EITI, particularly the notion of working collaboratively with other sectors. Representatives should have sufficient technical knowledge to follow and engage substantively in the details of EITI implementation, and also possess the authority to speak on behalf of their organization and sector. Thus, representatives might need to be a senior official, but not necessarily the head of an organization.

Criteria for technical advisors, if needed, will also be important but no specific suggestions were given to date. Finally, some commenters cited the importance of utilizing a “very strong facilitator that doesn’t allow the groups to go beyond the scope of discussion and who manages process well.”

e. Administrative or other processes for “standing up” MSG

Most commenters strongly advised allowing civil society, industry, and government to self-select representation on the USEITI MSG in order to preserve process legitimacy and the spirit of inclusivity. A smaller number of commenters stated that the government should be empowered to select the MSG with input from the sectors, given its role as convener and potential role in developing the “regulation, administrative directive, or law of Congress that puts the seal on mandating all companies to disclose.” Others are concerned that convening the MSG through a process such as FACA would violate the spirit of EITI self-determination not to mention be cumbersome and overly bureaucratic.



“It is important to the credibility of the whole process that [sectors] can self-select.”

i. Self-selection

Although industry and state associations may be equipped to orchestrate self-selection of representatives to the MSG, it appears that “some facilitation or coordination assistance would be needed for civil society” in order to coordinate self-selection with a diversity of groups. Should tribes be involved in USEITI, self-organization “would be a fundamental prerequisite to participation.” A larger number of available seats was viewed as helpful by some sectors to expedite the self-selection process, while for others, narrowing the number of available seats would help streamline selection and mitigate the risk of alienating excluded constituents. Most stakeholders identified the need for specific terms of reference that outline the role and qualifications of MSG members. Almost all commenters noted that whatever process is used to create the MSG, the principle of self-selection must be preserved to the greatest extent possible.

ii. Federal Advisory Committee Act (FACA)

According to some stakeholders, an MSG formed via FACA could be an appropriate – though not optimal – structure for USEITI. FACAs are “known territory” and require transparent proceedings, a clear process for selection of members, and have an established history in case law. Some note that this is the clear, legal, established means for the federal government to engage multiple stakeholders in a forum for collective deliberation. However, respondents also noted that FACA presents constraints such as multiple levels of approval, including OMB; difficulty in changing representatives; policies excluding lobbyists that might prevent capable representatives from serving, especially given the current broad definition of “lobbyist” and requirements for registration; and the fact that FACA committees are strictly advisory and not decisional. The concern about lobbyist exclusion particularly pertains to groups representing medium to small entities, and is a concern expressed across sectors. It is also not yet clear whether a FACA will be sufficient for implementing all of the responsibilities required of the MSG. According to one stakeholder, “FACA presupposes that the federal government is the decision maker, obtaining advice from outside parties. The federal government isn’t the decision maker here, though, but only one of three sectors.” Some noted that while FACA clearly states that the President or an officer of the federal government *solely* makes decisions based only on any advice received in a FACA, the International EITI standards clearly states that the MSG requires inclusive, *shared* decision-making among the three sectors. Others note that under EITI rules that the government, in a unique role, is tasked with the responsibility to create and support the MSG.

For some, FACAs are most effective when scope is totally clear. The MSG will not begin its deliberations with full clarity on scope, however, since the group will likely be presented with straw scoping options from which to choose and/or augment. Some suggested FACA may be the best initial means to create the MSG but that this initial FACA MSG should consider whether this format is the administrative approach for the long-term sustainability of the MSG. Overall, as long as sectors can self-nominate and potentially self-select MSG representation, several respondents, but by no means all, believe that FACA could be the most convenient and potentially timely option. Others would prefer a different approach but deferred somewhat to DOI to identify other legally defensible, practical alternatives. Please see the Options section below for additional convening models and legal considerations.

iii. USEITI Secretariat

Related to the above comments about USEITI MSG formation and process cost were questions about who would carry out the administrative functions of USEITI. Implementing countries have formed “secretariats,” comprised of staff whose tasks include the day-to-day work of supporting the MSG between meetings. Some commenters noted the tension between allowing the government to extend its convening role to staffing the secretariat – as is done in some other countries – and maintaining the spirit of EITI inclusivity. Though housing and staffing the secretariat at DOI could be an option, some suggest it prudent to include multi-sector leadership at the USEITI secretariat if possible, in order to preserve the independence of the secretariat from any one sector and to provide greater shared ownership and long-term viability in the face of potential changes in government.

4. Options and Recommendations for Action

Based on the public listening sessions, written public comment, detailed input from over sixty interviewees, dialogue with the Department of the Interior EITI team, and an interagency working group, CBI puts forward the following recommendations and, in some cases, options for further public and stakeholder consideration. These options and recommendations have been refined given the public comment received during the May-June 2012 public comment period, including the June 22 USEITI public workshop.

Our recommendations include the following components:

- Who should establish the initial scope and direction of EITI implementation in the US?
- Should the MSG be initially established as in interim or full MSG?
- What decision rule should the MSG use to reach its decisions?
- What is an appropriate size for the MSG and how should sufficient balance be established across sectors?
- What might be the role of tribes and individual Indian mineral owners?
- How might states be involved?
- Criteria for representation individually and across the MSG
- Selection of Representatives
- Administrative and legal options for establishing the MSG

a. Who should establish the initial scope and direction of EITI implementation in the US?

In order for the USEITI process to be effective, the MSG should be established early in the process. The MSG is the best body to determine the initial and overall scope of the effort, to affirm, and if needed, add to its membership, to conduct the important cross-sectoral work around implementation of EITI principles within the large and complex U.S. landscape, and to reach out to and communicate with constituents. Our reading of the EITI International Rules indicates that best practices include joint sector determination of the scope. There is a limited role someone like a facilitator can play in serving as a conduit of ideas and information for such a complex system as revenues from extractives among and between stakeholders. In addition, the federal government, while a key player, is one of three sectors and in a balanced, inclusive process should engage stakeholders to make decisions that are collaborative, not unilateral.

We believe that a MSG can best undertake the following:

- Develop Terms of Reference for the operations of the initial MSG in detail, including roles and responsibilities of the various actors, decision protocols, roles of support staff, and procedures to ensure joint decision-making by all sectors.
- Consider the range of choices for an initial and longer-term scope for the MSG and determine the initial scope (i.e., there are numerous questions regarding which extractives, which federal revenues, roles of tribes and states, level of materiality, and review and documentation of the existing reporting system).

- Affirm its membership, consider additional members, as needed, to further represent key stakeholder interests, and how best to communicate with and reach out to constituents, increase public awareness of USEITI.
- Develop the administrative, procedural and technical foundations for the US to meet the candidacy and implementation requirements of EITI. This work will be necessary to establish its successor MSG, which may include changes in committee structure, and representation, in order to meet the objective of attaining the most appropriate MSG for sustainably implementing the USEITI over time.
- Define materiality and reporting templates.
- Retain and ensure satisfactory performance of a reconciler.
- Ensure that the reporting is comprehensible and publicly accessible.
- Determine the long-term management, organization, and administrative structure of the MSG, however the initial MSG is established.
- Develop a fully-costed work plan and time table addressing all of the above matters to be submitted with the U.S. application for candidacy status to the International EITI Board.

We recognize that the MSG initial determination of the scope will be a challenge. We recommend that the MSG consider the range of possible options for their initial scope, and then, seek to identify an initial scope that will be achievable and implementable under the timelines established by the EITI Rules. Given the complexity of the U.S., it is likely an initial narrower scope rather than a broader, fully comprehensive scope will be more manageable as the MSG learns to work together, accomplish work, and produce outcomes.

b. Should the MSG be initially established as an interim or full MSG?

In our interviews and discussions, some have suggested it may make sense to create an interim or initial MSG. Most, including the EITI International Secretariat, acknowledge that the U.S. extractives industry, U.S. federalism, tribal sovereignty, and multitude of revenue streams makes the U.S. environment one of the more if not most complex operating environments in which EITI is being implemented. An interim MSG might help engage stakeholders earlier and help consider or decide upon many of the questions and options raised in this assessment. For instance, an interim MSG might help determine how best the selection process for sectoral representatives should be handled, the direction of the considerations report, and the right balance and number of representatives on an eventual full MSG. Such an interim MSG might be stood up more quickly, provide time for all to gather more information on constituents' interests, and help provide direction sooner rather than have the federal government continue to lead the early process. However, several others have raised concern about the time this "interim" approach would take, that the effort to establish an interim MSG would be no different than the effort to create a formal one, and that the energy, momentum and willingness from all sectors to engage in EITI should be tapped now, not later.

We conclude that the MSG should be stood up in full, but that it should be considered as an "initial MSG." Such a MSG might include "pilots" in regard to initial work on particular issues, rather than trying to tackle, at first, a full and complex scope. In any case, the MSG must be created in such a way it has the flexibility to alter its membership, structure, and administrative approach as it deliberates among the three sectors.

c. What decision rule should the MSG use to reach its decisions?

A decision rule is the mechanism by which a group reaches a decision or conclusion. Decision rules range from a simple majority vote of members to a supermajority (2/3rds) or unanimity. In reviewing comments, the EITI procedures, and the operations of the overall internationally governing board of EITI, we conclude that the MSG, in whatever form it takes, should operate by a decision rule of consensus. We note that the international body has operated with such a decision rule for several years. We also recommend that ultimately, however, it is the MSG's prerogative to determine its decision rule and other operating procedures.

By consensus we mean, on decisions reached by the MSG, all representatives:

- will abide by or “can live with” (not necessarily be enthusiastic about or strongly in favor) the outcome; or,
- can abstain from the decision in order to allow the MSG work to move forward and such abstention would be recorded in written documentation.

We recognize that this can be a high hurdle for any group, however congenial, to achieve. On the one hand, given the voluntary nature of the EITI process and the importance of broad support, or at least acceptance, across sectors, it is important to have as inclusive a decision rule as possible.

We do believe that there may be issues that require a difficult decision where consensus cannot be reached. In this case, we recommend a “fall back” rule that would be implemented only in rare circumstances. This secondary decision rule would allow the MSG to reach a decision as long as a majority of each of the three sectors' representatives can accept or live with the decision at hand. With this rule, no two sectors can overrule the strong opposition of a third sector, and at the same time, no one or two individuals can hold up the MSG's actions on important and difficult decisions. For example, if a MSG of nine has three sectors, that is, three representatives from each of three sectors, as long as 2 of 3 representatives of each sector voted favorably, an affirmative decision would be reached. However, if one of the three sectors had 2 members voting no and 1 voting yes, the overall vote would not pass since, in effect, that one sector would have vetoed the decision.

We want to note that early consideration of the decision rule is important because it can affect people's views of the number and balance of a group. That is, if the decision rule is simple majority, for example, stakeholders are likely to have different views on the composition of the MSG than if the decision rule is consensus or near consensus.

Regarding the federal government and decision-making, we note that it is our understanding that consensus decision-making allows the federal government to participate actively and to retain its fiduciary and legal authorities while including and taking significantly and substantially into account the advice, recommendations, and decisions of other sectors. If the federal government sector representatives consent to a decision under a consensus decision rule, those representatives have de facto determined they believe that the federal government can support and can abide by the decision at hand under its authorities and mandate. However, if the consensus decision is, for instance, that the federal government must change regulations, the government may only agree to consider making the changes as recommended. This is because the law requires the government to seek public comment on new rules or changes to existing

rules, The MSG may not view itself as a substitute for the government's seeking broad public comment to satisfy its legal obligations. Additionally we note that if FACA is utilized as the administrative means to create the initial MSG, the federal government cannot guarantee to the committee that the ultimate decision maker (such as the Secretary of Interior) will fully abide by the consensus recommendations of the group. It should also be noted that where multiple federal agencies may be involved in the MSG, the federal government would have to determine how to resolve differences among its various parts through some kind of interagency mechanism.

We also note that "decisions" have legal and practical implications. Can a decision of the MSG be truly and fully binding in any way on federal government or industry actions? What does it mean for a representative of a complex constituency like "smaller gas and oil operators" or "civil society" to make a decision on behalf of others? If a "decision" of the MSG is merely advisory to all sectors, including the federal government, how does one ensure the decisions of the MSG are meaningful, implementable, and effective?

These are complex questions, which the MSG will need to discuss in detail. We do consider the role of "decisions" further below when outlining federal administrative frameworks for establishing the MSG, at least when it comes to the federal government.

d. What is an appropriate size for the MSG and how should sufficient balance be established across sectors?

As noted in our findings, comments suggested the MSG comprise anywhere between 10-25 full members to balance efficiency with representativeness. Given public comment received on this issue across sectors, we recommend an MSG of twenty-one (21) members comprised of seven (7) members per sector. We also recommend that there be up to seven (7) alternates per sector, who would not have to be from the same organization or entity serving as the principal representative.

Why seven members per sector? We believe that this is the absolute minimum number necessary to adequately, though not perfectly, represent the range of interests for beginning (not necessarily completing) the work of EITI implementation in the U.S. Because of the "fall back" sectoral simple majority rule we propose above, in any case, each sector should be represented by an odd number to avoid tie or deadlocked votes within sectors.

Seven members per sector would allow the following:

- Within government, a range of agencies with a direct stake in extractives revenues and distribution, and possibly, allow for a seat also for both a state and tribal government representative;
- Within industry, an opportunity for both mining and gas and oil to be represented, along with trade associations and a diversity of individual companies;
- Within civil society, at least as a starting point, several organizations active in and knowledgeable about EITI issues in the U.S. and internationally as well as regional or local groups engaged in these issues.

We also recommend that each sector have the opportunity to allow for up to seven additional alternates. Alternates may attend and observe USEITI meetings, participate on subcommittees and workgroups (as long as subcommittees or workgroups have a balance of sectoral representation), and fill in when the principal representatives are absent. Allowing alternates will ensure full representation at all USEITI meetings, increase participation by and understanding of the work by more organizations, and allow for newer players to the issues to gain knowledge and skill, and potentially replace principal representatives over time. It may also be useful to have liaisons to the MSG. For instance, as discussed further below, the states might be represented, at least initially, via a liaison to the MSG, if they do not claim a seat as part of the government sector. Because it is not clear if investors are likely part of one sector or another, it may be desirable to create a specific “liaison” seat for investors. Liaisons would be able to participate actively in all discussion and dialogue of the MSG but would not have voting/decision-making authority. It might also be useful to have technical advisors to the group from any of the sectors, as agreed to by the MSG.

e. What might be the role of Tribes and Individual Indian Mineral Owners?

Tribal engagement regarding EITI implementation in the U.S. has only begun. Thus, this assessment does not reflect adequately nor sufficiently the views of tribes or individual Indian mineral owners regarding their potential interests in this process. We do recommend formal and informal ongoing tribal engagement as the MSG is formed. As the findings note, tribes may have a range of interests in EITI, from how their revenues are reported through the current Office of Natural Resources Revenue (ONRR), to the individual Indian mineral owners who are Tribal members.

Tribal governments are sovereign, unique, and distinct within the customs and laws of the United States. While DOI has the authority to collect revenues, royalties and rents on behalf of tribes, tribes may also enter into their own arrangements with companies, have their own government structures, reporting requirements, and needs, and might wish to increase transparency or preserve privacy for their own revenue information. Furthermore, the collection and payment of various revenues by DOI has a long and difficult history, most notably the long-pending Cobell legal case that is only now in the process of implementation of a settlement. For all these reasons, the federal government through DOI cannot and should not speak on their behalf.

Because of tribes’ unique status as nations within the nation, there may be several possibilities for how they participate in EITI. While recognizing this list is incomplete because further Tribal engagement and consultation is still needed, some possibilities include, but are not limited to the following:

- DOI or MSG, at least initially, “carve out” any issues related to tribes. Only later, when options are clearer for how the MSG might proceed on matters of reporting and the like, would tribes be engaged through formal government-to-government consultation.
- The MSG, once formed, develops a plan to engage with tribes to determine how to proceed early in its work plan.
- In coordination with the MSG, DOI establishes an ongoing government-to-government consultation process with tribes if and as they are substantially affected. At key points in the EITI process (e.g., draft scoping report, draft work plan, etc.), DOI on in coordination with

- the MSG actively seeks out tribal advice and opinion and communicates back decisions of DOI and/or MSG to tribes.
- Because energy resource tribes may be meaningfully affected by decisions that a MSG might make, including even early scoping and work planning decisions, a Tribal representative(s) could be sought.
 - A Tribal representative could be a representative of the government sector, or potentially the civil society sector, or serve as a liaison. This representation is complex because no one Tribal representative could bind any tribe other than their own (and only if that Tribal representative is granted such authority by that Tribal council). However, various existing DOI advisory committees do have Tribal representation, however imperfect. A liaison might participate actively but should tribes recommend “standing back” from EITI at this time to some extent, the liaison could serve as an important communications channel to tribes within being a decision maker on the EITI or on behalf of tribes.
 - It might be necessary, though complex, to establish a separate Tribal and individual Indian mineral owners committee related to EITI to address the unique and specific needs of these stakeholders.
 - Lastly, it might be possible to establish a pilot approach in Indian Country to seek to initiate EITI with an interested tribe or tribes (Australia is pursuing a similar approach for some of its states) and learn from that experience to determine if the effort has greater applicability across all resource tribes.

Federally recognized tribes are not the sole American Indian interest in these issues. The General Allotment Act of 1887 (aka The Dawes Act) authorized the President to allot portions of reservation land to individual Indians. The recipients of these allotments became known as allottees. ONRR uses the term "allotted leases" and "individual Indian mineral rights holders" because the status of the land has not changed but the royalties are distributed to the heirs of these original allottees. For a legal definition, according to Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), the term "Indian allottee" means "any Indian for whom land or an interest in land is held in trust by the United States or who holds title subject to Federal restriction against alienation." According to the Office of the Special Trustee, "allottees" no longer are in existence, therefore the use of the term "individual Indian mineral owners".

Though we cannot state with confidence, it may be worth considering individual and Tribal government interests separately. In some sense, individual Indian mineral owners and the existing organizations that represent them might be considered part of civil society. One option, thus, is for civil society to consider among its representatives, a representative of individual mineral owners. Another option is for DOI or the MSG, at least initially, to “carve out” any issues related to these mineral owners. Only later, when options are clearer for how the MSG might proceed on matters or reporting and the like, would these stakeholders be engaged through some kind of outreach and engagement process. This would allow the broader issues related to EITI to proceed while protecting and separating the interests and needs of individual Indian mineral owners.

It should also be noted that there are two other complexities that the MSG will have to address. One, public commenters noted that there are non-federally recognized tribes who may have a stake in extractives issues and would not be represented by federally-recognized tribes. Second, Alaska native interests are organized quite differently than in the lower 48 states. Regional and

village native corporations along with tribes have a stake in actions affecting Alaska and its resources. Since Alaska is rich in natural resources, the interests of these diverse Alaska groups will need to be addressed.

f. How might states be involved?

It is too early to determine the range of state interests and revenues to be included in USEITI. Depending on whether the level of extractive revenues generated on State lands and waters meet the materiality threshold as determined by the MSG, the EITI Rules may require the MSG to consider inclusion of State or sub-national extractive revenues in the USEITI Report (see Requirement 9(e)). However, several interviewees raised the issue of how and if states should be involved, especially given our somewhat unique federal system of government. As revenue collecting entities, many states receive payments from extraction on state land through severance and/or income taxes. Several commenters, including some representatives from the states themselves, consider USEITI an opportunity to improve data control and increase transparency at the state level. Other stakeholders suggested that enhanced federal revenue reporting could be useful to states for comparison purposes, even if state revenue falls outside of USEITI scope.

On the other hand, state sovereignty and complexity pose challenges to ensuring adequate representation on the MSG and, ultimately, constructing an actionable work plan should state revenue be included. Each state has its own regulations and proprietary reporting systems. Inclusion of state income could require major changes to existing reporting practices and, consequently, necessitate additional resources that may be difficult for state governments to provide.

As suggested in the above findings, criteria for state representation could range from states with the highest total revenue to those with the largest impact or the most diverse industries. Existing federal committees do have membership from various state entities (usually, resource-rich states). Given the potential complexity of including state revenue, and the limited number of seats proposed in the above guidelines, we recommend three possible options for state involvement in the MSG.

- States choose not to be active in the initial MSG but are kept informed through various outreach and communications efforts by both the MSG and the federal government.
- States choose a liaison or liaison(s) to the MSG to serve as observers and play a critical role in outreach to state-level constituents. For instance, this liaison might come from the ONRR's existing State Tribal Revenue Audit Committee (STRAC); or,
- States choose a representative to sit on the MSG that reports to a second tier of stakeholders comprising states with specific interests. Several commenters suggested that governors' associations, lands commissioners' associations, and interstate compact commissions could provide the structures (e.g. working groups) and organization necessary to maintain an adequate feedback loop between the states and the MSG. To be sure, selecting one to two representatives and one to two alternates would be a difficult task; however, these same associations could likely produce a shortlist of nominees for the MSG.

g. Criteria for representation individually and across the MSG

From our interviews and the public comment period, there are several criteria that we have identified that should guide selection of representatives. There are two general kinds of criteria: 1) those individual criteria for which all representatives on the MSG should embody or meet; 2) those balancing criteria for which the representation on the MSG overall should seek to achieve, though not all individual members would possess or meet each. It should be noted that representatives *are expected* to solicit and represent the views of their sector and subsectors, and not solely the views of their specific organization or company.

1. For individual criteria, we recommend that representatives meet the following criteria:

- Committed to the EITI process and to operating in a multi-stakeholder setting;
- Open to collaboration, new ideas, and joint exploration;
- Access to a constituency and a process for reaching decisions within that constituency, and the authority to make decisions as a member of the MSG on behalf of that constituency;
- Have at least some understanding and working knowledge of what is involved in revenues, reporting requirements, tax collection, and/or royalty distributions (i.e. some form of technical proficiency in the matter) or are willing to be educated on these matters; and,
- Represent U.S.-based constituents, organizations, institutions or companies with significant operations in the U.S.

2. For balancing criteria, we recommend that the composition of the MSG overall ought to include one or more representatives who meet or can represent one or more of the following criteria:

- Mining, gas and oil interests;
- Industry entities with international EITI experience;
- Private and publicly held companies;
- Domestic-only operating companies;
- Trade associations and companies;
- Small and large companies;
- Civil society organizations with EITI international experience;
- Civil society organizations with broad national interests or constituents;
- Civil society organizations with networks, alliances, or coalitions that reach down (or up) into regional and local concerns;
- Geographic diversity;
- Technical expertise; and,
- Policy expertise.

Though we believe that these criteria are useful guidance for convening a MSG, we also note that both EITI guidance and more general best practice in collaboration suggests that self-selection among sectors is an important principle within established broad parameters (e.g., general purpose, number of seats, etc.).

h. Selection of Representatives

In general, EITI guidance and best practice in collaboration calls for the sectors to “stand themselves” up in terms of representation on the MSG. While that principle is highly desirable, it can be quite difficult to implement. How does U.S. civil society, as a whole, select representatives on a MSG? How does industry, with thousands of actors, and the federal government, states, and tribes decide the same? Furthermore, selection or nomination of representatives is at least somewhat dependent on the administrative/legal process used to create the MSG.

Despite this complexity, we find that the organizations focused particularly on the issue of transparency of extractive revenue payments to government comprise a somewhat defined universe of players, though their current state of organization and capacity varies. While not perfect, we find that a limited number of convening organizations with sufficient interest and relevant knowledge do exist and can serve at least as important intermediaries in creating the initial membership of the MSG.

For industry, there are three key national trade associations who can assist with industry selection: these include the National Mining Association, the Independent Petroleum Association of America (IPAA) and the American Petroleum Institute. Each of these has a structured organization, a large number of members, and a means to work with its members through outreach, committees, and other tools to help identify representatives. It is important to note that IPAA represents medium to smaller companies who may not have the time or resources to participate directly in such an intensive effort as the EITI MSG.

For the federal executive branch, there are numerous interagency mechanisms to communicate across agencies and determine representation. The federal government has already established an interagency working group regarding USEITI that could be utilized for this purpose. For the legislative branch, the issue is slightly more complex. However, it is likely in the interest of the MSG to find a way, once established, to create appropriate and effective communication channels with Congress via its related committees and/or key Congressional or committee staff.

For states and tribes, we do find that these different governmental actors pose potentially greater challenges in convening. We have provided consideration of these in two separate sections above. Our sole recommendation is for the U.S. federal government to consider and decide how to include such interests in the initial MSG in some way, through MSG membership, liaisons, and/or through additional outreach.

For civil society organizations, there are international non-governmental organizations based in the United States with extensive experience organizing civil society sectors in other countries. And there are five to ten non-governmental organizations particularly focused on open government and transparency in the United States that can in turn reach out to others in U.S. civil society. However, the assessment also discovered that a constituency across the United States that is adequately developed around extractive revenue transparency is presently lacking. Commenters noted to us that most or all of these groups do not have the resources to conduct extensive outreach solely on their own and do need assistance in convening a larger group of civil society groups to determine best representation. Furthermore, they noted that it is the responsibility of the federal government under EITI to ensure broad public outreach and

education. Because this sector is so broadly defined, the challenge will be to also consider academics, faith-based groups, unions, and certain investor groups who may have a substantive interest in EITI matters.

In order to ensure that civil society organizations are sufficiently engaged to ensure a meaningful, inclusive, and robust process for selecting MSG representatives among a meaningful pool of organizations, we make two recommendations: 1) the federal government partners with civil society organizations to provide technical assistance and rapidly develop and implement a strategy to engage a broader set of organizations and constituents that would form a sufficient enough pool that can then select or nominate among themselves for MSG representation; and, 2) the MSG, once stood up, continues to invest in and support civil society in building greater capacity for U.S. civil society to engage in these issues as well reach out to the general public and citizens as a whole.

Given these findings per sector, overall, we recommend the following process for convening the MSG, with the federal government serving a “convener” role consistent with its responsibilities under the EITI Rules. Please note, depending on the type of administrative process used to establish at least the initial MSG, the following steps might have to be modified.

1. The U.S. Government, either through the White House or the Department of the Interior (DOI) as the Executive Agency granted the authority under the Office of President should implement a convening process.
2. Upon completion of the assessment report after public comment, the US Government should promptly initiate a call for representatives or nominations under the appropriate administrative procedures based on the assessment (including various criteria noted) and comments received on the assessment (*see section below on options for establishing the MSG*).
3. The call for nominations or representatives should adhere at least to the following:
 - a. Sectors, to the greatest extent possible, should involve, narrow, and nominate or select their own representatives based on the criteria noted earlier in this report (i.e. the principle of self-selection).
 - b. Representatives should include principals and up to an equal number of alternates. Principals and alternates would not have to be from the same company or organization.
 - c. Representatives should be individuals representing constituencies but specifically, individuals committed to the process and effort.
 - d. Representatives may be a range of authority or stature levels within each organization and sector, but at the least, should have sufficient authority to speak meaningfully and effectively on behalf of their constituents.
 - e. The US government should commit to accept and ratify the nominations/representatives of each sector with the exception of basic ethics and other reviews for federally-associated bodies. Should more nominees/representatives be offered than seats are available, the US government or the convening entity should work with that sector’s nominees, directly or through a facilitator or similar role, to help the sector to select among its nominations, to the greatest extent possible.
 - f. Sectors, should to the extent possible, manage their own nominations within the sector and seek to put forward collectively within that sector the number of representatives suggested by this final assessment.

- g. Representatives forwarded should include clear support from as large a constituency as is possible within that sector. Such support might be shown through formal actions of trade associations, letters of support from multiple organizations, or other means. Each sector should make public the criteria for its selection and the process it used for selection to ensure both the transparency and legitimacy of the sectoral representative selection process. However, please note that each sector's process may vary greatly and it is the purview of each sector itself to select its representatives to the greatest extent possible.
 - h. For kinds of organizations that may not easily "fit" into a sector, each sector should determine how it wishes to address such organizations such as investor groups, academics, or others. For these "non-sector" organizations, the US government should at least be clear about how they can participate in some way in the process.
 - i. The US government or convening entity should conduct the nomination process with openness, transparency, outreach, and provide each sector with a sufficient opportunity to conduct its own nomination process while also in as expeditious a manner as possible.
 - j. The US government or convening entity should provide independent facilitation or coordination assistance to those sectors that request it to aid in this process.
 - k. Should this effort not produce the requisite number of representatives, the USG or convening entity, as a last resort, would decide among the nominees. Should such an action be necessary, the US government or convening entity should explain clearly its reasoning and use the criteria noted in this assessment as a basis for their decision.
 - l. The MSG, once created, should be able to add to its membership and conduct its own further convening process, as it determines, within, of course, appropriate and legal means.
4. The MSG, once established, should consider providing roles for technical assistance, liaisons, as well as develop a public outreach and tribal consultation strategy/plan.
 5. The US government should continue to conduct effective public outreach and education in an ongoing fashion.

i. Administrative and legal options for establishing the MSG

Through our assessment interviews, public comments, and extensive discussions with both DOI and other agencies, we have identified the following administrative and legal options for creating the MSG. In explicating these options, we note that ultimately the MSG may decide to reconfigure itself under a different structure or framework, at its discretion. In a sense, the federal government has a unique role among stakeholders to help convene the MSG, but once convened, that unique role should diminish as the MSG itself takes up key decisions about its process and actions, and the government becomes one of three coequal sectors represented on the MSG.

We initially identified the following options.

- A non-federal entity or body;
- A federal operating committee or other kind of Congressionally-created entity;
- A federal advisory committee, convened under the Federal Advisory Committee Act (FACA), convened by either DOI or the Executive Office of the President, creating either a new FACA Committee or utilizing an existing federal advisory committee, the Royalty Policy Committee (RPC), or the creation of a subcommittee within the RPC.

For completeness of the record, we describe the options in the below table and also seek to provide some advantages and disadvantages of each. However, given public comment and dialogue over the last several months, we conclude that only two options are the most viable for standing up the MSG. We base the narrowing of the choice against the following criteria.

- Efficiency and timeliness in which the body can be created;
- Legal precedent and protection for the form of the body established;
- Adherence to EITI requirements (see USEITI MSG-related requirements above);
- Sustainability of the MSG over time; and,
- Adaptability of the MSG to evolve over time.

Considering the full range of input obtained to date, we conclude that the two viable and preferred options for standing up the MSG are: 1) a non-federal entity with the federal government participating, but not directing; or, 2) a new federal advisory committee as the initial form of the MSG. The parameters governing the creation of each option appear to contain the minimum level of flexibility and structural capacity needed to shape each option into an entity that could perform the core MSG responsibilities as contemplated under the EITI Rules. We note that under the EITI Rules, 2011 Edition, Step 4 in the process, “*The government is required to establish a multi-stakeholder group to oversee the implementation of the EITI.*” Therefore, we believe it appropriate for the US government to make the decision on how to proceed after engaging with and gathering the views of the other sectors as it has done during the stakeholder assessment period from February to June 2012.

The two most viable options are described below along with a comparison chart of the two further below.

1. *Non-Federal Entity*: The MSG might be created through non-government means. For instance, the two non-governmental sectors (industry and civil society) could come together to create a committee or group separate from the federal government. The two sectors could then seek participation by the federal government in that entity. This entity, once created, could affirm or add members, prepare a scoping document, complete a work plan, and initiate discussions regarding how to satisfying reporting, third-party reconciling, and other requirements.

In this context, the federal government itself could use an appropriate mechanism, such as a contract, grant, or cooperative agreement, to support a separate, third-party entity in convening and/or operating the MSG. The entity could receive funding from the federal government, as long as the federal government does not exercise management and control over it. In order for the federal government not to have management or control, such key decisions as membership (at least of non-federal participants) would have to be made, for instance, by the third-party entity or some initial steering committee of the new entity or the sectors themselves, to the extent possible. Federally-funded, non-federally controlled bodies have been created, such as the National Wind Energy Coordinating Committee (NWCC), a structured, long-standing entity with multiple tiers of multi-stakeholder participation to address the broad topics of wind energy development, and STRONGER, the State Review of Oil and Natural Gas Environmental Regulations effort. A short description of each is provided in Appendix E. It should be noted that some commenters do not find these two entities as appropriate examples for comparison to a MSG. It may also be possible, in narrow circumstances, for the federal government itself to

establish the MSG as a non-federal entity, particularly to the extent that it does not exercise management or control over the MSG. Concerns raised about this non-FACA approach include: 1) the time to establish given the more innovative approach to convening (i.e. further defining the non-FACA mechanism for establishing the MSG, establishing the contract mechanism, competing the contract, bringing the convening entity up to speed if necessary, initiating the nominating process, etc.); 2) the certainty around such an approach’s legal protections and more general legitimacy – one commenter stated: “While the EITI MSG may not look like a typical U.S. advisory committee, analysis of what the government will be doing as a member of the EITI MSG compels the conclusion that the FACA requirements apply;” and, 3) a non-FACA MSG’s ability to provide advice to the federal government at some point without triggering FACA, thus requiring the creation of a FACA committee anyway.

2. *A New Federal Advisory Committee:* A federal advisory committee established under the Federal Advisory Committee Act (FACA) could be used to conduct MSG functions, at least initially, as part of its advice to the federal government. A FACA-created committee would have the benefit of being created under a frequently used, familiar procedure and would allow the federal government to play an active organizing role in establishing the MSG. The MSG in practice could be highly collaborative and in the spirit of EITI’s requirements, depending on the stance and approach of the federal government. Furthermore, the FACA-established MSG as part of its charter could deliberate on the best and most sustainable administrative context for its long-term future, which may not include FACA. However, because a FACA committee only provides advice to the federal government and the federal government selects its members, some stakeholders question whether convening a MSG under FACA satisfies the EITI test of a multi-stakeholder group *overseeing* EITI implementation. One commenter noted that: “this structure is incompatible with the duties and responsibilities of MSG participants.” Additional concerns raised about this approach include: 1) the cumbersome procedures and requirements of FACA; 2) the fact that the federal government selects nominees rather than the sectors selecting their own representatives solely and fully; 3) the fact that the FACA committee is ordinarily limited to providing advice to the federal government even if these decisions are the result of shared decision-making at the representative level; 4) the federal government cannot guarantee that the President or highest federal official responsible will adhere to consensus recommendations; and, 5) the FACA membership lobbyist ban, preventing capable representatives from important organizations serving on the MSG and therefore precluding sufficient representation of constituencies, such as medium and small operators. Please note frequently asked questions about FACA related to standing up the MSG are included as Appendix F.

The table below seeks to compare these two choices.

TABLE 1: Federal Advisory Committee (FACA) and Non-Federal Advisory Multi-Stakeholder Group (MSG): Comparison by Various Factors

Issue	FACA MSG (lead actor or action)	Non-FACA MSG (lead actor or action)
Convenor	U.S. Department of the Interior	Convening entity such as not-for-profit or by initial non-federal “lead” stakeholders; U.S. Department of the

		Interior
Federal funding	Yes	Maybe
Non-federal funding	Likely to be able to accept outside monies; restrictions on accepting money from other federal agencies	Yes
Federal funding mechanism	Appropriations	Contract or grant (requires granting authority by funding agency)
Charter Creation	U.S. Department of the Interior	Convening entity and/or initial non-federal "lead" stakeholders
Determination on initial # seats	U.S. Department of the Interior	Convening entity and/or by initial non-federal "lead" stakeholders
Operating Protocols or By-Law Creation	MSG	MSG
Nomination process management	U.S. Department of the Interior	Convening entity and/or by initial non-federal "lead" stakeholders
Nomination process	Nominations called for in Federal Register; nominations reviewed, prioritized & put forward by DOI; nominees vetted for ethics and other issues; DOI appoint members and announces first meeting in Federal Register. The public does not comment on final FACA members.	Nominations called for by convener or non-federal lead stakeholders from all three sectors; nominations submitted to convener and/or initial non-federal lead stakeholders; if more than number of seats, nominees within each sector convened to narrow nominees to # seats
Self-Selection	While DOI would retain final formal approval of membership, the nomination process can strongly encourage self-selection to the greatest extent possible within each sector.	The nomination process can strongly encourage self-selection to the greatest extent possible within each sector. If more "names" are submitted in a sector than seats, as noted above, nominees would have to be narrowed in some way.
Final selection of members	U.S. Department of the Interior	Convening entity and/or by initial non-federal "lead" stakeholders
Include registered lobbyists as members	No, not of any kind. This is for individuals, not organizations, however.	Yes
Discussion and prioritization of Scope	MSG	MSG
Decision Authority	Advice or recommendations to DOI	Decisions by MSG itself
Recommend changes in	Yes	Unclear – by doing so may trigger FACA

federal rules or regulations		
Invoke Negotiated Rulemaking Act	Yes, can create rulemaking committee, perhaps as subcommittee of FACA MSG. The public does comment on membership on negotiated rulemaking subcommittee (or committee) prior to being finalized.	No, not without creating a new FACA for negotiated rulemaking. The public comments on membership on negotiated rulemaking committees prior to being finalized.
Terms of Charter and Members	Two years, as required by FACA, but renewals allowed	As determined by MSG or Convener
Subcommittees	Yes	Yes
Public Meeting Notice	Meetings noticed and agenda posted at least 15 days in advance; meetings open to public; meeting summary kept; administrative record kept; subcommittees do not have to meet these requirements but cannot be decisional	As determined by the MSG
Well-Established precedence, experience, & Case Law	Yes	No
Potential for Co-Chairs	Yes, with Designated Federal Official (DFO) from government	Yes
Timeline to Create	3 to 6 months	Unknown

In addition, for completeness of the record, we include below the other options originally described in the draft assessment below but removed from further consideration given public comment and input from each sector during the June 22 USEITI public workshop.

3. *Existing Federal Advisory Committee or Subcommittee:* It should also be noted that there is already a Royalty Policy Committee established that provides advice to the Secretary of the Interior through DOI’s Office of Natural Resource Revenue (ONRR). This committee could have, in two possible ways, served as the means to stand up the MSG, at least initially. The RPC itself could have served initially as the MSG. Its FACA charter has just been renewed and was inclusive enough in scope to include EITI activities. Alternatively, the RPC is allowed under FACA to create a subcommittee that does not have to include only appointed members of the RPC. This subcommittee could have been convened according to the results of this assessment and public comment. The limitation is that the subcommittee cannot make decisions for or on behalf of the RPC. Rather, the subcommittee would have to make recommendations or suggestions to the RPC, and in turn, the RPC would reach a decision on its collective advice to the Secretary of the Interior through ONRR. We do not recommend either approach under the RPC. Under further review, numerous membership slots would still have to be filled, the RPC as the initial MSG could not be reformed any faster than creating a new FACA and, a new FACA would have the added benefit of having a specific charter to EITI and “fresh start” for the EITI initiative.

4. *Federal Operating Committee (or other legislatively created entity)*: Congress could enact a statute to create the MSG and provide it with any necessary authority, funding, structure, membership, or organization. An operating committee, for example, is a form of an operating and decision-making body that has been created in the past by Congress to perform primarily operational as opposed to advisory functions. Operational functions are those specifically authorized by statute or Presidential directive, such as making or implementing government decisions or policy. A committee is designated operational so long as the operational functions it performs constitute the primary mission of the committee. It may perform advisory functions as long as they are subordinate to the operational functions. We do not recommend this approach at this time because public commenters suggested this approach would not be timely or efficient.

The following chart sought to summarize these initial draft assessment options and described some advantages and disadvantages of each. Please note that the advantages and disadvantages are not a complete listing.

TABLE 2: Advantages and Disadvantages of Various Means to Create the Multi-Stakeholder Group

Form	Convening Body	Legal Authority	Advantages	Disadvantages
Non-Federal Entity	Non-governmental sectors or “third party”; possibly federal government	Could be informal, chartered as a 501(c)3 or other means	<ul style="list-style-type: none"> • Precedents exist within larger society (formal and informal associations) • Range of legal options for creating from informal to formal • Independent of any one sector • Allows for more decision making • Meets the “independent oversight” requirements of EITI • Convening procedures can vary • Could still receive federal funding 	<ul style="list-style-type: none"> • Process may be more ad hoc and less well established than other means • Convening the group would require greater self-organizing not only within but across sectors • Need to ensure to avoid any FACA triggers of federal-government management or control if advice is to be given to federal government • May take longer to convene/organize • Might still require a FACA committee for government to receive advice on particular matters
Operational or other kind of Committee, Commission, or entity	Congress creates; DOI or other agency supports	Public Law	<ul style="list-style-type: none"> • Sanctioned by legislative branch • Could provide a range of clear authority and process • Precedent exists already within DOI (operating committees) and elsewhere in the federal government (various commissions and authorities) • Convening procedures well established in and by law • Allows for shared decision making 	<ul style="list-style-type: none"> • Typically takes some time to establish • Requires Congressional action, which might not be forthcoming or take some time • May have restrictions on membership (similar to FACA requirements in some cases)
Federal Advisory Committee (new)	DOI or White House	Federal Advisory Committee Act (FACA)	<ul style="list-style-type: none"> • Well-known and used procedures • Convening procedures well established • Span of control exists within Government for execution/implementation 	<ul style="list-style-type: none"> • Advisory only to government rather than sharing decision making as suggested by EITI • Government selects, rather than sectors

			<ul style="list-style-type: none"> • Would provide means for action on some, but not necessarily all, of EITI steps for candidacy and compliance 	<ul style="list-style-type: none"> • self-selecting, at least formally • Typically takes some time to establish • Has a time-limited charter (typically 2 years, though can be renewed) • May have restrictions on membership (i.e. ethics review, lobbyist participation limits) • Would provide means for action on some, but not necessarily all, of EITI steps for candidacy and compliance
<p>Federal Advisory Committee – (existing -- full existing Royalty Policy Committee or subcommittee of the RPC)</p>	<p>DOI ONRR's Royalty Policy Committee</p>	<p>Federal Advisory Committee Act (FACA)</p>	<ul style="list-style-type: none"> • Existing structure accelerates timeline • Well-known and familiar procedures • Convening procedures well established • If subcommittee, can create membership as suggested in assessment and public comment • Span of control exists within DOI for execution/implementation • Would provide means for action on some, but not necessarily all, of EITI steps for candidacy and compliance 	<ul style="list-style-type: none"> • Advisory only to DOI rather than sharing decision making as suggested by EITI • If subcommittee, advises only RPC which advises only DOI • Current RPC not balanced across sectors • Existing body not designated specifically for this activity • Is not new and “fresh” in establishing a new initiative • Would provide means for action on some, but not necessarily all, of EITI steps for candidacy and compliance

APPENDIX A: Interviewee List

Please note that the individuals we spoke with had a range of authority on which to express the formal and complete view of their organizations as whole. Thus, views, while not attributed, should furthermore not be construed as the formal comment, view, or position of any entity. Upon request, we are not including the individual names of federal government interviewees because while they may have had expertise on the subject, some might not have had the authority to speak on behalf of their organization as a whole.

CIVIL SOCIETY ORGANIZATIONS		
Calvert Asset Management Company	Paul	Bugala
Global Witness	Corinna	Gilfillan
Oklahoma Indian Land/Mineral Owners of Associated Nations	Marcella	Giles
Oxfam America	Jeffrey	Buchanan
Project on Government Oversight (POGO)	Danielle	Brian
Publish What You Pay	Isabel	Munilla
Revenue Watch Institute	Karin	Lissakers
Revenue Watch Institute	Rebecca	Morse
Revenue Watch Institute	Erica	Westenberg
Revenue Watch Institute / EITI International Board	Anthony	Richter
Tax Justice Network USA	Nicole	Tichon
Taxpayers for Common Sense	Autumn	Hanna
U.S. PIRG	Dan	Smith
University of Utah	John	Heilbrunn
University of Nevada, Reno	Glenn	Miller
University of Houston	Jacqueline	Weaver
Colorado School of Mines	David	Munoz
INDUSTRY ORGANIZATIONS AND COMPANIES		
American Petroleum Institute (API)	Walt	Retzsch
American Petroleum Institute (API)	Khary	Cauthen
American Petroleum Institute (API)	Justin	Spickard
American Petroleum Institute (API)	Surya	Gunasekara
American Petroleum Institute (API)	Emily	Kennedy
ArcelorMittal	Mark	Burtschi
Arch Coal	Rachel	Rogier
BP	Elodie	Grant Goodey
BP	Brian	Miller
Chevron	Manpreet	Anand
Cleary Gottlieb Steen and Hamilton (representing Alpha)	Michael	Komenda
Council of Petroleum Accountants Societies (COPAS)	Bob	Wilkinson
ExxonMobil	Guillermo	Garcia

Freeport	Jim	Miller
Holland and Hart (representing Barrick)	Steven	Barringer
IPAA (Independent Petroleum Association)	Dan	Naatz
National Mining Association (NMA)	Veronika	Kohler
National Mining Association (NMA)	Kate	Sweeney
National Ocean Industries Association (NOIA)	Randall	Luthi
Newmont	Mary Beth	Donnelly
Peabody	Ed	Sullivan
Peabody	Amanda	Boyce
Peabody	Ursula	Wojciechowski
Rio Tinto	Judy	Brown
Walter Energy	Amanda	Lawson

GOVERNMENT AGENCIES AND ENTITIES

FEDERAL

Department of Agriculture (USDA)

Department of the Interior

Office of Natural Resources Revenue (ONRR)

Office of Policy, Management and Budget (PMB)

Bureau of Ocean Energy Management (BOEM)

Bureau of Safety and Environmental Enforcement
(BSEE)

Bureau of Indian Affairs (BIA)

Bureau of Land Management (BLM)

Office of Surface Mining Reclamation and Enforcement (OSMRE)

Department of Energy (DOE) - Indian Energy Office

Department of State

Department of the Treasury - Financial Management

Department of the Treasury - Office of Tax Policy

Energy Information Administration (EIA)

Office of Management and Budget (OMB)

Office of Science and Technology Policy (OSTP)

U.S. Helsinki Commission

STATE

California State Lands Commission

Shahed Meshkati

Interstate Mining Compact Commission

Greg Conrad

New Mexico State Land Office

Kurt McFall

New Mexico Oil and Gas

Valdean Severson

State and Tribal Royalty Audit Committee (STRAC)

Christian Okoye

Utah Division of Oil, Gas, and Mining

John Baza

OTHERS

Goldwyn Strategies

David Goldwyn

World Bank

Anwar Ravat

APPENDIX B: Interview Protocol

Background and Substance

1. How familiar are you with EITI as a process in general?
 - a. If not, what more do you need to know about and how best can that information be communicated to you?
2. Have you or your organization participated in an EITI process in another country before?
 - a. If so, tell us more about that experience. What have you learned? What key steps or actions taken were successful or problematic and why, in your view?
3. For your company or organization, what key benefits do you think a final successful application to EITI will provide? For the country more generally?
4. For your company or organization, what key concerns or problems do you have about an EITI process for the U.S.?
5. Given the current state of reporting and accounting for payments flowing to the U.S. federal government for gas, oil, and minerals on federal and tribal lands,
 - a. What do you think are strengths of the current reporting system?
 - b. Weaknesses?
 - c. What kinds of improvements would you suggest to improve generally transparency, openness, and clarity?

Process

6. Given inherent complexity in the U.S. federal system and the presence of multiple extractive industries, can you comment on whether it makes sense to focus on
 - a. Federal, tribal and/or state land?
 - b. Gas/oil vs. and/or hard minerals?
 - c. Focusing on what kinds of revenues: royalties, rents, bonuses, taxes, other?
 - d. Should DOI leave these questions open or try to narrow them somewhat so the MSG has a starting point?
7. The EITI requires a multi-stakeholder group to be formed to oversee implementation. We want your advice on how best to convene that group.
 - a. Who are the key sectors and sub-sectors that you think need to be involved in the MSG?
 - b. What organizations can effectively represent many or most of the sectors you named?
 - c. What level of individual within an organization should participate?
 - d. What kinds of technical or other skills should participants have?
 - e. How should “balance” in regards to interests and perspectives within the group best be achieved?
 - f. How should smaller companies or groups of such companies be involved?
 - g. What is a reasonable “cut-off”, if any, by total payments per year per company (or some other metric) for participation in the EITI MSG itself and likely the responsibilities that will come out of developing the future requirements?
 - h. What might be the best way to convene the MSG?
 - i. Can your sector “self-organize” to select a representative and alternate?
 - ii. Should DOI provide an application process with categories of participants (say by sector) and selection criteria, let entities apply, and DOI select among them?
 - iii. Other
 - i. The intent is to name the group by early Summer 2012, get to work over the summer, hold the first meeting in early September 2012, and produce a work plan for submittal by December 21, 2012. Any thoughts on this timeline?
8. Anything else you want to add or share?

APPENDIX C: Input Needed from the Public on Assessment Findings and Recommendations

1. The MSG could be formed as a non-federal entity, a federal operating committee or other such legislatively-created entity, or a federal advisory committee. Which structure is most appropriate for forming the MSG and why?
2. Should an interim MSG be established to help engage stakeholders earlier and help consider or decide upon many of the questions and options raised in the assessment?
3. In the interest of balancing efficiency with representativeness, can the core MSG sectors of civil society, industry and government be sufficiently represented by five members and five alternates per sector as a starting point for the MSG?
4. Please comment on the nomination process outlined in the assessment. How best can DOI balance its role as convener with supporting an inclusive self-selection process among sectors?
5. Should states have representation on the MSG at the outset or serve as liaisons until scope of lands and payments have been finalized?
6. What should be the role of tribes and tribal individual Indian mineral rights holders?
 - a. Should the MSG, once formed, consult directly with tribes to determine how to proceed early in its work plan?
 - b. Should the MSG establish a more formal, on-going consultation and engagement process with tribes and individual Indian mineral rights holders, separate from broader public and constituency engagement?
 - c. Would it be best to include one or more tribal representatives, alternates, or observers on the MSG? Is it best to establish a separate tribal and individual Indian mineral rights holders committee related to EITI to address the unique and specific needs of tribes and individual Indian mineral rights holders?
 - d. Should the MSG establish a pilot approach in Indian Country to seek to initiate EITI with an interested tribe or tribes?
7. Other?

APPENDIX D: GLOSSARY OF TERMS FOR THIS ASSESSMENT

Glossary of Terms²¹

Alternate: Alternates may attend and observe USEITI meetings, participate on subcommittees and workgroups (as long as subcommittees or workgroups have a balance of sectoral representation), and fill in when the principal representatives are absent.

Bonus: The cash paid to the United States by the successful bidder for a mineral lease. The payment is made in addition to the rent and royalty obligations specified in the lease.

Civil Society: The aggregate of community-based organizations, non-governmental organizations (NGOs), and institutions outside of government, representing the diversity of citizens and their views, seeking to collectively speak on behalf or for the “public interest” as well as the citizens themselves. More specifically, civil society might include, but not be limited to, non-profits or not-for-profits, the media, trade unions, academic and research institutions, faith-based groups, and individuals.

Civil Society Organizations (CSOs): The aggregate of community-based organizations, non-governmental organizations (NGOs), and institutions outside of government, representing the diversity of citizens and their views, seeking to collectively speak on behalf or for the “public interest.” EITI International typically uses “civil society organizations” or “CSOs” in its rules and guidance.

Consensus: On decisions reached by the MSG, all representatives will abide by or “can live with” (not necessarily be enthusiastic about or strongly in favor) the outcome; or, can abstain from the decision in order to allow the MSG work to move forward and such abstention would be recorded in written documentation.

Convener: As convener of USEITI, the U.S. Department of the Interior (DOI) initiates the USEITI process and is responsible for ensuring formation of the Multi-Stakeholder Group (MSG) that guides USEITI implementation.

Extractives Industry Transparency Initiative (EITI): The Extractive Industries Transparency Initiative (EITI) was founded in 2002 to improve public reporting and accountability of monies transferred to governments by companies exploiting natural resources. EITI provides a voluntary and transparent framework for examining revenues in a given country by setting up a system in which industry reports to an independent party (a reconciler) the revenues it pays to the government for extraction, the government reports the payments it receives from industry, and that independent entity reconciles the data.

Extractive Industries: As defined by the EITI International Secretariat, extractive industries include the oil, gas, and mining industries.

EITI Candidate Country: A country which has publicly committed to implement the EITI, but which has not yet fully implemented all of the required stages.

²¹ Terms defined here include common translation of EITI terms maintained by the International Secretariat as well as those adopted in the USEITI process and gleaned from various sources. See eiti.org/document/glossary for additional EITI definitions. See www.opengovpartnership.org/about for additional information on the Open Government Partnership See www.gsa.gov/portal/content/104514 for more information on FACA.

EITI Compliant Country: A country that has fully implemented the EITI and has been found by an independent validating organization to be meeting all of the validation indicators.

EITI Rules: Set of requirements for implementing EITI, including the EITI Principles, Criteria, Requirements, Articles of Association, Validation Guide and Policy Notes issued by the EITI Secretariat.

Federal Advisory Committee Act (FACA): The Federal Advisory Committee Act was enacted in 1972 to ensure that advice by the various advisory committees formed over the years is objective and accessible to the public. The Act formalized a process for establishing, operating, overseeing, and terminating these advisory bodies and created the Committee Management Secretariat to monitor compliance with the Act.

Federal operating committee: An operating committee is a form of operating and decision-making body that has been created in the past by Congress to perform primarily operational as opposed to advisory functions.

Government: The executive and legislative branches of government. Given the federalist system in the U.S., this might include the federal government, state governments, local governments, and/or tribal governments.

Individual Indian mineral owners: The General Allotment Act of 1887 (aka The Dawes Act) authorized the President to allot portions of reservation land to individual Native Americans. The recipients of these allotments became known as allottees. ONRR uses the term "allotted leases" and "individual Indian mineral owners" because the status of the land has not changed but the royalties are distributed to the heirs of these original allottees.

Industry: Companies operating within the country, be that domestic or international entities, and business associations (e.g. trade associations or groups) working on behalf of parts or the total of that industry.

Interagency Policy Committee (IPC): The Interagency Policy Committee of the U.S. Government is a senior interagency forum for consideration of policy issues. Final determinations on behalf of the U.S. government are made by Secretary of the Interior Ken Salazar.

Liaison: Liaisons, or observers, could play a key role in outreach to various constituencies. Liaisons would be able to participate actively in all discussion and dialogue of the MSG but would not have voting / decision-making authority.

Materiality: A threshold amount or percentage to determine if a company or a payment is significant to an outcome. EITI-implementing countries often set materiality levels based on company or payment size.

Multi-Donor Trust Fund (MDTF): The Multi-Donor Trust Fund is administered by the World Bank and provides technical and financial support to countries implementing or considering implementing EITI.

Multi-Stakeholder Group (MSG): The type of data to be reported and verified in a given country's EITI process is decided upon by a Multi-Stakeholder Group (MSG) comprising representatives from civil society, industry and government. The MSG works collaboratively to develop the country's EITI implementation work plan and application for EITI candidacy, and to design and oversee implementation of the framework for achieving EITI compliance.

Negotiated Rulemaking: Negotiated rulemaking is an administrative procedure sanctioned by the Negotiated Rulemaking Act of 1996. Negotiated rulemaking typically involves establishing a Federal

Advisory Committee Act (FACA) of diverse stakeholders whose purpose is to jointly develop a rule or regulation.

Office of Natural Resources Revenue (ONRR): DOI's Office of Natural Resources Revenue is responsible for the management of revenues associated with federal offshore and federal and American Indian onshore mineral leases, as well as revenues received as a result of offshore renewable energy efforts.

Open Government Partnership (OGP): The Open Government Partnership is a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.

Principal/Representative: Full member of the MSG with the authority to make decisions on behalf of a constituency.

Rent: Annual payments made by the lease holder during the primary lease term for the right to use the land or resources for purposes established in the lease.

Royalty Policy Committee (RPC): The Royalty Policy Committee (RPC), established by DOI, provides advice on royalty management issues and other mineral-related policies to the Secretary of the Interior.

Royalty: Payments made

Second tier: Associations, regional groups, or other sector constituents who provide feedback to the MSG through consultation or other stakeholder engagement.

Secretariat: Staff whose primary tasks include the day-to-day work of supporting the MSG between meetings

Sectors: As defined by International EITI, the three core EITI sectors are Civil Society, Industry and Government

Self-selection: Each sector chooses its own representation to the MSG.

Severance tax: Payments made to state governments by industry for extraction on state land.

Stakeholder Assessment: Neutral report conducted in the early stages of a decision making process. The stakeholder assessment maps stakeholder interests and concerns; gauges prospects for successful engagement; considers various process design approaches; and frames issues and problems. The USEITI Stakeholder Assessment represents independent findings and recommendations regarding USEITI implementation and the formation of the USEITI MSG based on input from a public comment period, public listening sessions, and targeted multi-sector interviews.

USEITI: The U.S. Department United States Extractive Industries Transparency Initiative was launched in 2011 and is the official process for implementing EITI in the United States.

USEITI Scope: The industries, lands, and payments to be included in USEITI reporting.

USEITI Stakeholder: Anyone who expresses interest in or may be impacted by USEITI.

USEITI Work Plan: One of the key requirements of EITI Candidacy is the development of a report (aka work plan) documenting how the country intends to achieve EITI compliance. The work plan must be discussed with and agreed by key stakeholders.

United States Government (USG): The United States federal government, for the purposes of this report, reflecting primarily the Executive Branch and its agencies within its authorities by the Constitution and Congressional statute to consider, fund, and act upon various matters.

Validation: The process by which progress on implementing the EITI by countries is measured against the EITI criteria. The agreed standard is for an EITI candidate country to be independently validated at least every two years, using an independent validator who will gather information on that country's EITI process, interview key stakeholders and measure the country against a set of validation indicators. Countries that meet all of those indicators will be assessed as being 'EITI compliant.' Compliant countries must be validated every five years or earlier if the EITI International Board requires.

APPENDIX E: DESCRIPTION OF TWO NON-FACA ENTITIES

Group: The National Wind Coordinating Collaborative (NWCC)

General Description: The National Wind Coordinating Collaborative (NWCC) provides a neutral forum for a wide range of stakeholders to pursue the shared objective of developing environmentally, economically, and politically sustainable commercial markets for wind power in the United States. Created in 1994, this partnership of experts and interested parties identifies issues that affect the use of wind power. By establishing dialogue on key and current topics and catalyzing activities that build consensus among its stakeholders, the NWCC has successfully addressed critical challenges in the areas of transmission, wildlife and habitat impacts, siting, power markets, and other aspects of wind development.

The NWCC is now only working on wildlife issues, and is managed under subcontract to the American Wind Wildlife Institute. The American Wind Wildlife Institute, a 501(c)3, brings together wind industry and conservation non-profit leaders in a shared mission: *To facilitate timely and responsible development of wind energy while protecting wildlife and wildlife habitat (www.awwi.org)*. The NWCC is now providing outreach on wind wildlife through AWWI.

Mission of the Wildlife Workgroup: to identify, define, discuss, and through broad stakeholder involvement and collaboration address wind-wildlife and wind-habitat interaction issues to promote the shared objective of developing commercial markets for wind power in the United States.

Form: Non-incorporated entity with management and facilitation from an independent facilitation organization (was RESOLVE, Inc. and now the American Wind Wildlife Institute).

Funding Source: The NWCC has been funded primarily by the U.S. Department of Energy's Wind and Water Technologies Program under contract won through competitive bid four times since 1994. Now AWWI is providing match support for the program.

Staffing: Management and facilitation provided by the American Wind Wildlife Institute.

Activities: Research, White Papers, Data, Coordinated Clearing house, Newsletters, Webinars, Research and Policy Meetings, Publications, Work Groups

Website: <http://www.nationalwind.org/>

Governance: Has been managed by neutral facilitation; a Steering Committee made up of representative interest groups and subcommittees focused on specific issues. There are a set of ground rules guiding decision-making and the work of the NWCC, all focused on supporting the mission of the NWCC – to promote sustainable development of wind power.

Group: State Review of Oil and Natural Gas Environmental Regulations (STRONGER)

General Description: The name, STRONGER, is an acronym for State Review of Oil and Natural Gas Environmental Regulations. STRONGER was formed in 1999 to reinvigorate and carry forward the state review process begun cooperatively in 1988 by the U.S. Environmental Protection Agency (EPA) and the Interstate Oil and Gas Compact Commission (IOGCC). STRONGER is a non-profit, multi-stakeholder organization whose purpose is to assist states in documenting the environmental regulations associated with the exploration, development and production of crude oil and natural gas. STRONGER shares innovative techniques and environmental protection strategies and identifies opportunities for program improvement. The state review process is a non-regulatory program and relies on states to volunteer for reviews.

Mission: The mission of STRONGER is to educate and provide services for the continuous improvement of regulatory programs and industry practices in order to enhance human health and the environment.

Form: 501(c)3 with by-laws.

Funding: U.S. EPA and the U.S. Department of Energy have provided grant funding to STRONGER to support its activities. The American Petroleum Institute has also provided no-strings attached funding to support the state review process.

Staffing: Administrative staff provided by Ground Water Protection Council (GWCP) and consultants

Activities: Program reviews, development of new guidelines and updates of existing ones

Website: <http://www.strongerinc.org>

Governance: A Board of Directors comprised of stakeholders representing states, industry and public interest groups. Board Chairmanship rotates among the stakeholder groups. EPA and DOE participate on the Board of Directors as non-voting, non-managerial members

APPENDIX F: FREQUENTLY ASKED FACA QUESTIONS AND ANSWERS

The questions and answers below are factual in nature and are intended to supplement the information provided at the USEITI Public Workshop held on Friday, June 22, 2012, and to address questions raised by stakeholder participants. This information is not intended as legal advice and is not meant to supplant full legal review of FACA-related questions posed during DOI's consideration of establishing a Federal Advisory Committee or other mechanism in support of EITI. Any errors and omissions are the sole responsibility of the Consensus Building Institute (CBI), the USEITI facilitator.

1. **What are the authorities for establishing advisory committees?** The FACA identifies four sources of authority for establishing advisory committees. They are: (1) a statute requires the establishment of a committee; (2) a Presidential Executive Order or directive requires the establishment of a committee; (3) a statute authorizes but does not mandate creation of a committee; or (4) agency-authorizing statutes allow for the creation of discretionary committees.
2. **When does FACA apply?** When an agency has not yet decided to establish an advisory committee under the FACA and it is meeting with non-federal entities, several factors are considered to determine whether the requirements of FACA should apply. These factors include:
 - a. Federal agency establishes and exercises management or control over the group
 - b. Group provides collective advice to federal agency
 - c. Federal agency selects members
 - d. Federal agency funds the group's activities
 - e. Federal agency sets agenda for the group
 - f. Federal agency arranges meeting dates and locations
 - g. Federal agency uses the group on a recurring basis
 - h. Federal agency gives the group formal structure
3. **How does the FACA process work?** There are many internal and external steps to creating a FACA managed by DOI. A brief description of these elements follows.
 - a. Internal steps –
 - i. A charter is drafted and circulated for approval through various DOI offices, including the Solicitor's Office (General Law and Ethics), programmatic office and appropriate Assistant Secretary.
 - ii. Names of potential members are sent to the Committee Management Officer (CMO), who coordinates the vetting of potential members' names for ethics and other issues. Once this is done, the members may be appointed by the Secretary.
 - b. External steps –
 - i. Consultation on vetting of potential members
 - ii. Consultation with General Services Administration (GSA) is required for discretionary committees.
 - iii. A Federal Register Notice is required for a discretionary committee. A notice of establishment is required at least 15 days before the charter is filed. This might take less time if good cause is shown to GSA.

- iv. No committee may meet or take action until a charter has been filed by the CMO or other properly designated agency official. The charter is filed with the Secretary, standing committees of the House and Senate having legislative jurisdiction over the agency (the date this is done is considered the official establishment date of the committee), the Library of Congress, and the GSA.

4. **How is a FACA committee funded?** The agency responsible for establishing and maintaining the committee funds the committee out of its appropriations. The program office most closely aligned with the work of the committee is generally responsible for designating the funds to be used to cover these costs. Direct and indirect costs of committee management include establishment, Federal Register notices, facilitation, maintaining appropriate records, communications at and between committee meetings (website development, webinars, etc.). Appropriations law prohibits the agency from taking contributions from other federal agencies to support the operation of the FACA committee. The agency may potentially take donations of money and in-kind services from non-federal entities to support the operation of the committee, subject to gift acceptance authority and donations policy.
5. **What does the committee charter cover?** An advisory committee charter is intended to provide a description of an advisory committee's mission, goals, and objectives. Items that must be included in the charter are: official designation; objectives and scope of the committee's activity; period of time necessary to carry out committee purposes; agency or official to whom the advisory committee reports; description of the duties for which the committee is responsible; estimated annual costs to operate the committee; estimated number and frequency of meetings; planned termination date, if less than 2 years from the date of establishment; name of the President's delegate, agency or organization responsible for complying with FACA reporting requirements; and the date the charter is filed.
6. **What factors should be considered in achieving a "balanced" advisory committee membership?** The FACA mandates that Federal advisory committees be balanced in the points of view represented by the members, but leaves it to the discretion of each agency on how to do this. The FACA regulations offer several factors that should be considered by agencies in determining a balanced membership. These factors include:
 - a. The committee's mission;
 - b. The geographic, ethnic, social, economic, or scientific impact of the committee's recommendations;
 - c. Types of specific perspectives required, such as those of consumers, technical experts, public-at-large, academia, business, or other sources;
 - d. The need to obtain divergent points of view on the issues before the committee; and
 - e. The relevance of State, local, or tribal governments to the development of the committee's recommendations.
7. **May government employees be appointed to serve on an advisory committee?** Yes. A Federal employee appointed to serve on a FACA committee generally performs the duties of a committee member as part of his/her duties as a Federal employee. That is, if a committee has a purpose that is tied to a particular program area or is in need of program expertise, the agency establishing the committee may appoint a federal employee to serve in that role.

- 8. What is the difference between “representative” members and “special government employee” members on a FACA committee?** Representative members are specifically appointed to a committee to provide the committee with the points of views of nongovernmental entities or of a recognizable group of persons, such as an industry sector, labor union, environmental group, or other group that has interests in the subject matter under a committee’s charge. Representative members are not appointed to exercise their own individual best judgment on behalf of the government. Instead, representative members serve as the voice of groups or entities with a financial or other stake in matters before the committee. Special government employee members are expected to provide their own independent judgment in committee deliberations. They are generally appointed to a committee because of a specific expertise (technical, scientific, etc.) that is needed to help the committee carry out its functions. Special government employees are not expected to represent the interests or views of a particular sector or group. When someone is appointed to a committee as a special government employee, certain government ethics rules apply, including financial disclosure requirements and the requirement that they will serve without conflicts of interest.
- 9. Can lobbyists serve on a FACA Committee?** According to the OMB guidance on this issue, which was published in the Federal Register on October 5, 2011, the most pertinent points based on the discussion at the workshop on Friday are as follows. A link to the full guidance may be found here: <https://www.federalregister.gov/articles/2011/10/05/2011-25736/final-guidance-on-appointment-of-lobbyists-to-federal-boards-and-commissions>
- a) Who is affected by the policy? The policy applies to federally registered lobbyists and does not apply to individuals who are registered as lobbyists only at the state level. A lobbyist affected by the policy is someone who is subject to the registration and reporting requirements of the Lobbying Disclosure Act of 1995 at the time of appointment to the advisory committee, board, or commission.
 - b) Can a former lobbyist serve on an advisory committee, board, or commission? Someone who previously served as a federally registered lobbyist may be appointed or re-appointed only if he/she has been de-listed by his/her employer as an active lobbyist. Such de-listing must reflect the actual cessation of lobbying activities or if he/she has not appeared on a quarterly lobbying report for three consecutive quarters as a result of actual cessation of lobbying activities.
 - c) Does the policy restrict the appointment of individuals who are themselves not federally registered lobbyists but are employed by organizations that engage in lobbying activities? No, the policy only applies to federally registered lobbyists and does not apply to non-lobbyists employed by organizations that lobby.
 - d) Does the policy also restrict the participation of lobbyists as members of a subcommittee or other work group that performs preparatory work for its parent board, advisory committee or commission? Yes, the policy does not permit the appointment of federally registered lobbyists to a subcommittee or any other subgroup that performs preparatory work for a parent board, advisory committee, or commission. The goal of the policy is to restrict the

undue influence of lobbyists on federal government commissions, which includes subcommittees or other bodies, regardless of whether the positions require formal appointment.

- e) Does the policy also restrict lobbyists from appearing before a board, advisory committee, or commission to provide information, testimony, etc.? No, lobbyists may appear before such bodies to provide information, testimony, or input in the same manner as non-lobbyists. The policy is meant to restrict/prevent lobbyists from being in privileged positions in government. It is not intended to prevent lobbyists or others from petitioning their government. Boards, advisory committees and commissions should endeavor to hear from a balanced set of perspectives and are not gathering information and advice exclusively from registered lobbyists.
- f) Will there be any waivers available for circumstances in which a federally registered lobbyist possesses unique or exceptional value to a board, advisory committee or commission? The policy makes no provisions for waivers and waivers will not be permitted under this policy.