THE
CARTER CENTER

March 16, 2020

The Honorable Jay Clayton
Chair, U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20459-1090

Dear Chair Clayton,

I am writing to urge the SEC to improve the proposed reporting rule for Section 1504 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Release No. 34-87783; File No. S7-24-19**)**. The current rule as drafted does not meet global transparency standards for the disclosure of payments by extractive sector companies to governments, instead allowing for the aggregation of payments across projects and establishing exemptions that will result in many important revenue flows going unreported. Tracking these payments is an important element in the fight against corruption, and the proposed rule fails to require the level of disclosure that is needed to enable civil society to hold their governments accountable.

This work is critical in countries like the Democratic Republic of Congo (DRC), where The Carter Center supports civil society to use extractive sector information to advance reforms. The DRC is among the poorest nations in the world despite vast natural resource wealth. If properly managed, extractive industry revenues could help alleviate poverty and generate economic growth. Yet in the DRC and other resource-rich countries, these hopes are often dashed. Opacity facilitates corruption and a lack of accountability, while citizens and communities suffer.

While the DRC has made some progress in improving transparency as a result of its participation in the Extractive Industries Transparency Initiative (EITI) and recent legal reforms, the complex revenue streams remain difficult to track. Mandatory payment disclosures are a credible and timelier complement to EITI data. Individual projects may require multiple payments of varying types to different agencies at the national, provincial, and local levels. Some payments may encompass multiple projects within the same locality. Without data that defines a "project" based on the contract or concession, including detail about the type, justification, and destination of specific payments, it is difficult to assess whether the terms of a particular contract are being fulfilled, whether the funds are being paid to the appropriate recipient, and whether the revenue is being properly utilized. An example is the case of Glencore's aggregated reporting in 2015-2016, which made it difficult to monitor compliance with the fiscal terms of the individual contracts. Glencore has since reported separately on its two major projects in DRC, providing disaggregated detail to comply with UK law.

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Further, the proposed rule establishes a high de minimis payment threshold and other reporting exemptions that will allow many projects to slip through the cracks. While payments less than $750,000 may not seem significant at the national level, they are certainly important to sub-national budgets. This threshold also threatens to exclude larger projects prior to the start of production, as companies can avoid disclosure of certain payments less than $150,000 even if the overall project exceeds the threshold. The exemption for "Smaller Reporting Companies and Emerging Growth Companies" is also problematic, as junior companies are often more likely to pay governments large, up-front bonuses to gain access to resources, particularly in the DRC. By excluding them from the reporting requirement, critical information about the payments associated with the acquisition of exploration and/or extraction permits will remain undisclosed.

Regardless of whether American companies operate in a particular country, U.S. requirements have a global impact. Since the passage of the Dodd-Frank Act, strong disclosure regimes modeled after Section 1504 have been implemented in 30 countries, including Canada, the United Kingdom, Norway, and member states across the European Union. As a result, many multinational companies now have several years of experience with disaggregated reporting and have not seen a substantial increase in costs as a result.

Building on this progress is critically important. I urge the SEC to adopt a reporting rule that meets the global standards that the U.S. itself has worked for years to advance, and that bolsters civil society efforts to advance good governance of natural resources across the globe.

Please do not hesitate to reach out if you would like any further information. A list of practical uses for project-level data and the Center's previous comment are enclosed.

Sincerely,

Ambassador (Ret.) Mary Ann Peters
Chief Executive Officer

Enclosures

cc: Brent J. Fields, Secretary of the Commission, Office of the Secretary
Elizabeth Murphy, Associate Director, Division of Corporation Finance
Tamara Brightwell, Senior Special Counsel, Division of Corporation Finance
Elliot Staffin, Special Counsel, Division of Corporation Finance
Vladimir Ivanov, Financial Economist, Division of Corporation Finance

Enclosure 1: Practical uses of disaggregated payment data

Monitoring revenue distribution to sub-national levels of government

One of the main challenges of the mining sector in the Democratic Republic of Congo (DRC) is the lack of benefits realized at the local level. Revisions to the DRC's Mining Code in 2018 were intended to address this problem by obliging companies to pay a portion of their mining royalties in accordance to a distribution key, disbursing 15 percent to decentralized territorial entities, 25 percent to the provincial government, and 10 percent to a "fund for future generations," rather than relying on the central government to receive and disburse those funds.[1] This innovation represents a great opportunity for the local population of the regions directly impacted by extractive operations to benefit from those activities. However, there are risks, as in the past, that the full amount due to the provinces and localities might not be paid, or that the money in those accounts will be diverted for other uses. Mandatory disclosure of project-level tax data enables civil society groups to monitor these revenue flows at the local level and ensure they are appropriately reinvested in the sustainable development of mining regions.

Although the DRC is implementing Extractive Industries Transparency Initiative (EITI), the associated reporting is often released two or three years after the end of the fiscal year. Civil society actors are heavily engaged in analyzing EITI data to assess the level and required allocation of revenues at the local level, but they often need to compare with other sources of information that may be timelier, including mandatory payment disclosures and stock exchange reporting. These sources may also be more reliable, given the limitations of the EITI data reconciliation mechanism. For example, The Carter Center supported Congolese civil society organizations in Lualaba and Ituri provinces to analyze the 2017 EITI-DRC contextual report, finding irregularities in the reporting of subnational payments given that the data provided was not disaggregated by province or local entity.[2] Mandatory disclosure of project-level tax data would enable civil society groups to monitor these revenue flows at the local level and ensure they are appropriately reinvested in the sustainable development of mining regions.

Holding state-owned companies and their private-sector partners accountable

Access to project-specific disclosures is critical to oversight efforts related to state-owned companies, as these revenue flows have historically been difficult to track. State-owned companies continue to play a major role in the Congolese extractive sector. The last 20 years have unfortunately been marked by a great opacity in financial transactions between these state-owned enterprises and their joint-venture partners. Investigations by The Carter Center and other civil society organizations have shown that hundreds of millions of dollars in revenue appears to have failed to reach the Congolese treasury or been foregone in undervalued asset sales.[3]

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[1] See DRC Mining Code, 2018, Art. 242.

[2] See *CdC/RN, "Rapport d'Analyse du Project de Rapport Contextuel ITIE-RDC 2017-2018,"* December 2019, available at http://bit.ly/2TYNqD7 and *"Memo des Organisations de la Societé Civile du Lualaba sur le Rapport Contextuel ITIE-RDC 2017-2018*," December 2019, available at http://bit.ly/33jlZbt.

[3] See, e.g., The Carter Center, "A State Affair: Privatizing Congo's Copper Sector," November 2017, available at http://bit.ly/2TOeF4J and Africa Progress Panel, Equity in Extractives: Stewarding Africa's Natural Resources for All: Africa Progress Report 2013 (2013), 100.

For example, in The Carter Center's report, EITI payments data was cross-checked with public disclosures by companies in order to calculate what the DRC's largest state-owned mining company, Gécamines, should have received from its joint venture partnerships. These calculations were then compared with Gécamines' partnership accounts, ultimately showing that Gécamines was contractually entitled to $1.1 billion between 2011 – 2014, of which nearly two-thirds cannot be reliably tracked to Gécamines' accounts.

The DRC civil society organization *Cadre de Concertation de la Société Civile de l'Ituri sur les Ressources Naturelles* (CdC-RN) also used payment data evidence to raise similar concerns when another Congolese state-owned mining company, SOKIMO, was unable to account for revenues it had received from one of its corporate partners in exchange for access to the country's largest and most productive gold deposit.[4] In CdC-RN's analysis of the Kibali gold mining project, now held by Barrick Gold and AngloGold Ashanti, EITI-DRC payment disclosures showed that SOKIMO – a company which previously signaled it was in financial distress – had in fact received revenues of $113.6 million from the sale of assets to private parties. Based on this information, civil society sparked a public debate and demands for increased oversight about how that revenue was managed and inspired a broader campaign to improve state-owned company governance. This work has led to the creation of a new civil society coalition called *Coalition des OSCs pour la Gouvernance des Entreprises Publiques* (COGEP) that has joined other international and national civil society voices on mining sector governance.[5] Among other key issues, they contributed to efforts to ensure that state-owned enterprise governance reforms are a necessary condition of a new IMF loan program in DRC.

Project-specific disclosures were also instrumental in uncovering a previously unreported transaction between Gécamines and joint venture partner Kamoto Copper Company (KCC), a subsidiary of Glencore. In each of the 2013 and 2014 EITI-DRC reports, KCC reported paying Gécamines $15 million in contractual royalties, while Gécamines initially declared nothing, raising concerns about the accuracy of Gécamines' reporting. The figures were subsequently revised to match KCC's disclosures. The discrepancy appears to have been related to the sale of Gécamines' royalty rights to a company associated with middleman Dan Gertler. The transfer was hinted at by stock exchange declarations by Glencore's Toronto-listed subsidiary, Katanga Mining Limited, and then later confirmed by Glencore, Gécamines, and via contractual documents that were later disclosed.[6] Had Glencore been subject to disaggregated disclosure requirements at that time, including a strong enforcement mechanism to ensure compliance, the situation would likely have been made public much earlier.[7]

Combatting corruption

One of the most prominent prosecutions under the Foreign Corrupt Practices Act (FCPA) was a result of, among other things, advocacy and reporting by civil society organizations using data on

[4] See CdC-RN, "Analysis of Fiscal and Parafiscal Revenues of the Kibali Project," November 2015, available at http://bit.ly/2WbTECn.
[5] See, e.g., "*La COGEP décèle des chiffres contradictoires dans les rapports de la Gécamines,"* Radio Okapi, Jul. 6, 2019, available at http://bit.ly/2TLBxBy; and COGEP, "Gécamines: Des Questions qui Demeurent," May 2019, available at http://bit.ly/2WaKEO3.
[6] See royalty transfer agreement here: http://bit.ly/2vkAJKI; See reporting on royalties payment here: http://bit.ly/2W84b1j.
[7] London-listed companies like Glencore were not required to report under the UK mandatory payment disclosure provisions until 2015, see here: https://www.legislation.gov.uk/uksi/2014/3209/contents/made.

payments to governments. In September 2016, the U.S. Department of Justice announced a Deferred Prosecution Agreement related to a bribery scheme that included an individual matching Dan Gertler's description and resulted in the fourth most expensive settlement in FCPA history at the time.[8] Subsequently, in December 2017, the US Treasury sanctioned Dan Gertler under the Global Magnitsky Act, freezing his assets and those of his related companies and associates.[9] These important steps to fight corruption followed many years of detailed efforts to follow the money, made possible, in part, by payments-to-governments disclosures.[10]

Advancing governance reforms

Project-level disclosures are also integral to the advancement of governance reforms. While civil society and other stakeholders had access to EITI data and some financial reporting from companies to inform dialogue among key stakeholders at the start of the DRC's mining code reform process in 2014, the timeliness of the analyses and the specificity of the recommendations were hampered by the lack of disaggregated reporting. As detailed reporting obligations came into effect in places like the European Union and Canada, civil society analyses also became more robust, with financial models supporting recommendations to improve the fiscal regime, enabling citizens to better understand the impacts of fiscal policies on government revenue.

The issue of profit tax was especially important during the Mining Code debate in DRC. Using EITI data and limited financial reporting from companies, civil society was able to show that corporate income taxes were not being paid by a number of large mining companies operating in the DRC despite the mines being in production for several years. Carter Center partner *Action pour la Défense des Droits Humains* (ADDH) studied payment disclosures from the KCC project and noted the appearance of a strategy that "seems to minimize the tax base" by relying on a high cost of capital with heavy reliance on loans to avoid declaring profits.[11] Similarly, Carter Center partner *Maison des Mines du Kivu* (MMKi) noted the ineffectiveness of a provision on local community development that, like corporate income tax, was profit-based.[12] The Carter Center also provided detailed information on the fiscal regime to key stakeholders and proposed several policy reforms, including ring-fencing provisions, reductions in accelerated depreciation, and greater minimum capitalization requirements aimed at closing tax loopholes, which were ultimately included in the final revision passed in 2018.[13] With more information, civil society analyses would have been even more effective.

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[8] United States of America vs. Och-Ziff Capital Management, Deferred Prosecution Agreement No. 16-516, Sept. 29, 2016.

[9] United States Department of the Treasury, United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe, Dec. 21, 2017, available at http://bit.ly/2W9E7mB.

[10] See Global Witness, "Glencore Redirected over $75 million in Mining Payments," Mar. 3, 2017; available at http://bit.ly/3aTMzuw; RAID, "DR Congo Residents Come Forward as Potential Victims in SFO Corruption Investigation into ENRC," Jan. 28, 2020, available at http://bit.ly/2IIoJWp; and Resource Matters, "The Global Magnitsky Effect: How will U.S. sanctions against Gertler affect the DR Congo's extractive sector?", February 2018, available at http://bit.ly/2w3Tjai.

[11] See *Action pour la Défense des Droits Humains*, "The Kamoto Copper Company Mining Project: Who benefits from it?", 2017, available at http://bit.ly/2TIU5Cu.

[12] See *Maison des Mines du Kivu*, "Analysis of Fiscal and Parafiscal Flows of the Twangiza Mining Project: A Shortfall for the Congolese State?", 2015, available at http://bit.ly/2wPH7tK.

[13] See, e.g., The Carter Center, "*Amender le régime fiscal minier*," April 2014, available at http://bit.ly/33elO0W; "*Réflexion sur le Régime Fiscal du Code Minier*," October 2014, available at http://bit.ly/3cXYlWC; and "Improving Governance of Revenues from the Mining Industry," February 2017, available at http://bit.ly/2Qd9n0l.

Enclosure 2 : Previous Carter Center submission

THE
CARTER CENTER

April 21, 2015

The Honorable Mary Jo White
Chair, U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20459-1090

Dear Chair White,

I am writing to encourage the SEC to introduce a reporting rule for Section 1504 of the Dodd-Frank Act regarding disclosure of tax payments from extractive industries with no country exemptions. In particular, I urge that the reporting rule requires that payments be differentiated by country, company, project, and tax flow. The disclosure of this information would enable journalists, civil society groups, and parliamentarians to hold governments and state-owned mining companies accountable.

Since 2007, The Carter Center has worked closely with civil society in the Democratic Republic of the Congo (DRC) to advance good governance in the country's industrial mining sector. The DRC has the world's most significant cobalt deposits, over 10% of global copper reserves, and a growing industrial gold mining sector. If properly managed, mining sector revenue could help alleviate poverty and generate economic growth in one of the poorest nations on earth.

U.S. disclosure requirements have a global impact. At the international level, they contribute to the advancement of a global consensus on extractive industry standards for transparency. In the DRC, American multinational Freeport McMoran controls the largest copper mining project. The largest gold mining project, Kibali Gold, is controlled by Randgold Resources, which is listed on the NASDAQ Stock Market. These flagship projects set the standard for information disclosure and corporate social responsibility practices in the DRC.

Further, access to project-by-project data on tax payments in the DRC would directly benefit the work of The Carter Center and its Congolese civil society partners by bolstering their efforts to monitor revenue flows to sub-national governments and state-owned companies. In addition, such data would encourage debate on the fiscal regime and strengthen the fight against corruption. A list of practical uses for the data is enclosed.

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This level of disclosure would not represent a significant additional reporting burden for companies. Corporations already collect such disaggregated data, and the majority of mining companies in the DRC, including Freeport McMoran and Randgold Resources, have demonstrated willingness to report detailed tax payments to their industry body, the Chamber of Mines, based on the notion that a more transparent business environment is in their interest. Moreover, companies already declare such payments to the Extractive Industries Transparency Initiative (EITI), albeit only two to three years after the fact, limiting its utility in current advocacy efforts.

In sum, we believe that requiring the disclosure of tax payments disaggregated by country, project, and type, would not overburden mining companies, but instead would have an immediate and substantial positive impact on the efforts of civil society organizations and activists to advance transparency and accountability in the DRC.

If you would like any further information on any of these points, please feel free to contact me, or my Carter Center colleagues, Atlanta-based Erin Crysler (erin.crysler@emory.edu), or Lubumbashi-based Daniel Mulé (revenues@congomines.org).

Sincerely,

Ambassador (Ret.) Mary Ann Peters
Chief Executive Officer

Enclosure

Practical uses of project-level tax data

Monitoring revenue distribution to sub-national levels of government

The DRC's Mining Code explicitly states that provincial- and local-level authorities are entitled to a percentage of royalties generated by mining projects established within their jurisdictions (25% and 15% of the mining royalties, respectively).[1] In practice, however, the vast majority of revenues is kept by the national government. While civil society actors have repeatedly called for the government to adhere to its legal obligations to decentralize mining revenues, their efforts have been hampered due to the lack of data available on individual mining projects. The disclosure of project-level tax data would enable civil society groups to accurately calculate revenues owed to sub-national governments and to conduct more effective advocacy aimed at ensuring that revenue is appropriately reinvested in the sustainable development of mining regions.

For example, Katanga-based civil society organization *Action contre l'Impunité et pour les Droits Humains* (ACIDH) published a report in 2012 that analyzed the contribution of the province's mining revenues to the national, provincial, and state-owned companies' coffers.[2] The report uncovered widespread inconsistencies between their estimates and the national government's revenue publications. For some mining operations, only very limited data was available, particularly for provincial taxes and for contractual flows to state-owned companies. These gaps made it difficult to accurately calculate revenue flows, let alone the subsequent distribution of those revenues.

Greater transparency of payments to state-owned companies

The DRC's state-owned mining companies, most notably Gécamines, SOKIMO and SODIMICO, control many mining permits covering large swaths of land. Joint venture contracts between international investors and the state-owned companies have become standard practice in the DRC, and the approach has yielded the latter hundreds of millions of dollars. Civil society actors have raised questions about whether some of these payments have been diverted. For example, two $175 million signing bonus payments to the DRC state and its companies were included in the 2008 Sicomines collaboration agreement, but it remains unclear if the payments were actually made, and who collected them.

The Carter Center has worked extensively to ensure that payments to state-owned companies are publicly reported as part of the EITI. This requires constant monitoring of specialist press outlets and stock market sources to identify when deals have taken place and payments made; otherwise, there are still certain revenue flows that risk being unaccounted for. For example, Anvil Mining reported that it was required to pay an unprecedented $55 million to the state-owned mining company in the context of a takeover.[3] Because the Carter Center regularly monitors relevant stock exchange publications, we were able to ensure it was included in the EITI, but this is only a partial solution. Many payments are not disclosed, partly because large-scale multinationals do not always consider each of those payments as 'material'. Project-by-project reporting would thus provide a systematic source of reliable information on such payments to the state-owned mining companies to avoid potential oversights or omissions in the DRC's EITI reports.

[1] See Law No. 007/2002 of July 11, 2002, *Journal officiel de la République démocratique du Congo*, art. 242 for information on retrocession.
[2] ACIDH, 2012, *Transparence des revenus miniers en RDC: Cas de la Province du Katanga*, www.congomines.org/fr/acidh-transparence-des-revenues-miniers-en-rdc-katanga
[3] See Liezel Hill, *Anvil Reaches Deal With Congo's Gecamines on $1.3 billion Minmetals Offer*, Bloomberg News, Feb. 11, 2012, *available at* http://www.bloomberg.com/news/2012-02-10/anvil-reaches-deal-with-congo-s-gecamines-on-1-3-billion-minmetals-offer.html and Press Release, MMG, Minmetals Resources offer for Anvil Mining proceeds following agreements and approval (Feb. 10, 2012), *available at* http://www.mmg.com/en/Investors-and-Media/News/2012/02/10/Minmetals-Resources-offer-for-Anvil-Mining-proceeds-following-agreements-and-approval.aspx

Encouraging debate on the fiscal regime

The availability of EITI data on DRC mining companies' tax payments by revenue flow has led to a more informed dialogue among key stakeholders about the fiscal regime, particularly in the context of the DRC's Mining Code reform.[4] The discussion has focused on significant under-collection of key revenue flows, such as profit taxes. Data from the EITI and other sources shows that the vast majority of mining companies in the DRC are not declaring profits despite having been in production for several years. In the context of the Mining Code review in 2014, The Carter Center provided detailed information on the fiscal regime to Ministry of Mines officials and other key stakeholders, and proposed several policy reforms, such as ring fencing provisions, reductions in accelerated depreciation, and greater minimum capitalization requirements aimed at closing tax loopholes. Access to timely project-by-project data published by type of tax would allow for more specific comparisons between fiscal projections and actual payments for particular mining projects.

Combatting corruption

Since 2011, the DRC has been embroiled in a series of scandals regarding secret and often underpriced sales of assets of state-owned mining enterprises. Project-level information from the London Stock Exchange (LSE) and the EITI allowed activists to obtain information about how much money changed hands. However, project-by-project payment disclosure would have provided a fuller and more accurate picture of some of the deals. One example relates to the Mutanda and Kansuki mining projects. Gécamines sold its stake in these joint venture projects to some offshore shell companies in 2011. The sale only became public knowledge because one of the joint venture partners, Glencore, reported the sale on the LSE, though without disclosing the sale price. Activists and the International Financial Institutions pushed the Congolese government to publish key contracts related to the share sale, which it eventually did, revealing a combined sale price of $137 million. 2011 EITI-DRC data later gave a contradictory figure for the deal of $189 million, plus a subsequent $20 million in 2012. If project-by-project revenue disclosure had been mandatory, it would have allowed activists and journalists to verify exactly how much money was involved and where these payments went, instead of having to use incomplete and contradictory information.

Another example of potentially diverted revenue relates to OM Group, which is listed on the New York Stock Exchange (NYSE). OM Group's payments to Gécamines were held up in an escrow account due to a pending law suit against a third company. When Gécamines won the case, it was entitled to around $100 million that had accumulated in the escrow account. While not required to do so, OM Group reported the payment to the NYSE because it was related to a high profile legal case. Gécamines, however, reported to the EITI only having received $40 million. This information has enabled to civil society to ask questions about the inconsistency. If not for OM Group's voluntarily disclosure, the $60 million discrepancy would have gone unreported.

[4] See, e.g., Michael Kavanagh, "Congo Said to Plan Boosting Mine Royalties, Increase Stakes", Bloomberg Business, Apr. 14, 2015, *available at* http://www.bloomberg.com/news/articles/2015-04-14/congo-said-to-plan-boosting-mine-royalties-increase-stakes.