March 16, 2020

Mrs. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Disclosure of Payments by Resource Extraction Issuers (Release No. 34–87783; File No. S7–24–19).

Dear Secretary Countryman:

Better Markets[1] appreciates the opportunity to comment on the above-captioned rule proposal ("Release" or "Proposal") noticed for public comment by the Securities and Exchange Commission ("SEC" or "Commission"). The Release[2] would require U.S. issuers in the resource extraction industry to disclose through their annual reports certain payments they make to foreign governments or the Federal Government in connection with a project. The rules under the Proposal were mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") and a court order in 2016. However, the Commission's two previous efforts were vacated by a court (in 2013) and disapproved by Congress (in 2017). Thus, we appreciate the Commission's difficult task of attempting to navigate the conflicting and confusing directives from courts and Congress it has received. Nonetheless, the Commission remains under legal obligation to implement a standing provision of law found in Section 1504 of the Dodd-Frank Act.

SUMMARY

Our comment letter would argue that the Commission has not struck the correct balance and has erred on the side of issuers at the expense of investors and against the intent of the legislation. The information that would be required to be disclosed through this Proposal would not adequately empower investors to make informed investment decisions, and will be of little value to other consumers of this information—such as citizens of the country in which the issuer operates or observers and other stakeholders (including other programmatic needs of the U.S. government) concerned about societal impact of these payments (or the projects undertaken by the issuers). The thresholds set in this Proposal would shield the disclosure of large sums of

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

[2] *See* Release No. 34-87783; File No. S7–24–19, 85 Fed. Reg. 2522 (January 15, 2020) *available* at https://www.federalregister.gov/documents/2020/01/15/2019-28407/disclosure-of-payments-by-resource-extraction-issuers.

payments—this is directly contrary to Congress's intent to require transparency in the resource extraction industry.

BACKGROUND AND DESCRIPTION OF THE PROPOSAL

Section 1504 of the Dodd-Frank Act added Section 13(q) to the Securities Exchange Act of 1934 which requires the SEC to issue rules for resource extraction issuers—U.S.-based companies that engage in commercial development of oil, natural gas, and minerals either in the United States or outside. As required by Sec. 1504 of the Dodd-Frank Act, the SEC issued the original rules in 2012. This first generation rules were subsequently vacated by U.S. District Court for the District of Columbia in 2013 on the grounds that the SEC had misread the statute and that the agency had acted in arbitrary and capricious fashion by not exempting from the rules countries that prohibit disclosure of payments. Following another lawsuit in 2015—which compelled the agency to finalize the rules under Sec. 13(q)—the Commission issued new rules in 2016.

The SEC proposed and finalized a second generation of rules to implement Sec. 1504 of the Dodd-Frank Act in 2016. This second version was disapproved through a partisan vote in 2017 by Congress using the Congressional Review Act process ("CRA"). The joint resolution of Congress argued that the 2016 rules would have created unwanted compliance costs, create negative economic effects for companies, and put U.S. companies at a competitive disadvantage to foreign companies. After a CRA disapproval, the agencies are prohibited from implementing the rules in question, or issue substantially similar rules in the future (unless a new law requires them to do so). The current Proposal, thus, is SEC's third attempt at implementing Sec. 1504 of the Dodd-Frank Act, and is substantially different from the rules that Congressed disapproved through a CRA in 2017.

The Proposal would require the disclosure of payments (above certain thresholds) made by U.S. resource extraction companies to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, and minerals. The Commission's goal is to support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.[3] The Commission also cites other objectives such as reducing corruption amongst resource extraction issuers when dealing with resource-rich foreign governments.[4] Transparency of natural resource-based revenues empowers citizens of these foreign countries to hold their governments accountable and to ensure that governments are using these revenues to fight poverty, improve standard of living, and to promote future growth.

The Proposal would require disclosure from resource extraction issuers that file annual reports on Forms 10-K, 20-F, or 40-F.[5] After exempting new categories of companies, the

3 *See* Release at 2524.

4 *See* Release at 2526.

5 10-K, 20-F, and 40-F forms are different filing forms that are submitted to the SEC. The type of form that an issuer submits varies. 10-K form is required by SEC and provides them with a comprehensive summary of the issuer's financial performance. 20-k form is used by certain foreign private issuers. Form 40-F is a filing to the SEC for Canadian companies with U.S. securities.

Proposal would apply to approximately 236 issuers.[6] The rules under the Proposal use the same definition of a "payment" as found in Section 13(q). These payments will include, taxes, royalties, fees, production entitlements, dividend payments, infrastructure payments, community and social responsibility payments, and in-kind payments. These payments must be made in furtherance of the "development of oil, natural gas and minerals."[7] The Proposal exempts payments related to "exploratory activities."[8]

The Proposal would require that resource extraction issuers provide payment information in an annual report with an interactive date format. The Commission believes that extraction issuers should disclose their payment on Form SD, since it is already used for "specialized disclosures."[9] The Commission explains that, "Section 13(q) defines ''interactive data format'' to mean an electronic data format in which pieces of information are identified using an interactive data standard. It also defines ''interactive data standard'' as a standardized list of electronic tags that mark information included in the annual report of a resource extraction issuer."[10] The Proposal would require electronic tags that identify, for any payment made, the payment total, the currency used, the financial period when payments occurred, the business segment that made the payment, the government which received the payment and their location, and the project for which the payments were made.[11]

The Proposal **would exempt disclosure of payments that are *de minimis***. As we understand the inexcusably poorly written rule language,[12] these *de minimis* thresholds are defined as such:

1. The aggregate payment to the entity (*i.e.*, foreign government or foreign government official, or the U.S. Federal government) is less than $750,000 per project, or;

2. If the aggregate payment to the entity is more than $750,000 per project, the company is required to disclose only those individual payments that exceed $150,000. Thus, if our interpretation is correct—confirmed by discussing with a senior member of the rule writing team at the Commission—an issuer could make in aggregate ***limitless*** payments to foreign governments or government officials as long as each individual payment amount is kept below $150,000.

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6 *See* Release at 2553.
7 *See* Release at 2530.
8 *See* Release at 2546.
9 *See* Release at 2541.
10 *See* Release at 2523.
11 *See* Release at 2523.
12 Here is the rule language: "Not de minimis means any Payment made to each Foreign Government in a host country or the Federal Government that equals or exceeds $150,000, or its equivalent in the issuer's reporting currency, whether made as a single payment or series of related payments, subject to the condition that single payment (or a series of related payments) disclosure for a Project is only required if the total Payments for a Project equal or exceed $750,000. In the case of any arrangement providing for periodic payments or installments, a resource extraction issuer must use the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that series of payments, and accordingly, whether disclosure is required." *See* Release at 2569-70.

The SEC made several changes for the new set of rules that they believe will mitigate the concerns that Congress had in the 2016 proposal. The following are significant changes made:

- Definition of "project": The 2016 rules defined project as operational activities that were controlled by a single contract which creates payment liabilities to a government. The new definition of project uses three factors: type of resource, type of operation, and major subnational jurisdiction.

- Aggregation of payments: In 2016 there were no aggregation of payments unless the activities were governed by multiple agreements and were related in operation and geography. The new rules would allow aggregation of payments at major subnational jurisdictions and levels below major subnational jurisdictions (counties or municipalities).

- Definition in *not de minimis* payment: 2016's rules defined this as a payment of $100,000 or more. The new Proposal defines it "as any payment that equals or exceeds $150,000 made in connection with a project that equals or exceeds $750,000 in total payments."[13]

- New exemptions: Finally, the current Release contains disclosure exemptions for small reporting companies, emerging growth companies, issuers who already must make disclosures to Canada or EEA, issuers that went through an IPO during the fiscal year and companies who reported they are shell companies. The 2016 rules did not contain many of these exemptions. Finally, the Proposal would permit companies that are not outright exempted from the Rules to apply for such exemption on case-by-case basis.[14]

COMMENTS

The Proposal Over-Corrects The 2016 Proposal Which Did Dot Place Competitive Harm to American Extraction Issuers.

The 2016 SEC proposal, in key respects, had similarities to Canada's Extraction Sector Transparency Measures Act (ESTMA),[15] the EU's Transparency Directive, and the Extractive Industries Transparency Initiative (EITI's)[16] standard regulations. In passing the joint-resolution CRA, Congress argued that the 2016 SEC proposal would put American companies at a competitive disadvantage to foreign extraction issuers. But this was and remains an unconvincing argument since American companies compete with foreign extraction companies that are under ***stricter*** regulations.[17] Therefore, the current Proposal corrects a "problem" that does not exist. In

13 *See* Release at, 2527
14 *See* Release at 2547.
15 *See* Amma Anamam, Jason Comerford, and Rob Lando, *U.S. final rule requiring disclosure of payments by resource extraction issuers*, Osler (2016).
16 EITI is a coalition creating a global standard for the good governance of oil, gas and mineral resources.
17 *See* Jaclyn Jaeger, *EU's Extraction Payments Rules Go Beyond Dodd-Frank*, Compliance Week (2013).

fact, we expect it will not even offer a broad-based regulatory relief to U.S. extraction companies since many of these companies must comply with foreign regulations. [18]

Given the CRA, we could appreciate that the SEC could not re-propose a rule that was substantial similar to the version that was disapproved, however, we do not believe this directive was for the SEC to re-propose a rule that was vastly different in all material respects. In our view, the SEC has mis-interpreted the CRA disapproval and has inappropriately tilted the balance in favor of issuers at the expense of shareholders and against the letter and spirit of Sec. 1504 of the Dodd-Frank Act.

When comparing the 2016 Proposal to the EU's Transparency Directive and Canada's ESTMA, there were many similarities that would have created somewhat of a standard international policy for resource extraction disclosure. The most simple and easy to understand comparison would be the *Not De Minimis* thresholds for each. The 2016 proposal required the disclosure of any payment above $100,000, which was roughly similar to the Canadian and European requirement. Canada's is 100,000 Canadian Dollars, or approximately $73,263 USD. The EU threshold is at 100,000 Euros, or $113,650. Given these similar thresholds, we do not accept that claim that American companies were somehow disadvantaged vis a vis Canadian or European companies.

Opponents of the 2016 Release argued that the definition of "project" was harmful to U.S. extraction issuers and created too many compliance costs since "project" was defined at the single contract level. This definition of "project" goes hand in hand with both Canada's, the EU's, and EITI's definition and enforcement of project-level reporting. The "project" definition in the current Release would allow SEC-registered issuers to aggregate payments for projects by subnational jurisdictions, essentially being able to hide the exact payment for a single project. In our view, the 2016 definition of "project" was not going to harm U.S.-based issuers but would have instead harmonized standards across international regulators. Evidence shows that the EU's project-level reporting has increased transparency, especially in countries not a part of EITI.[19] This evidence argues for the use of a project-level reporting definition, and that the goal should be to empower citizens and shareholders to hold their governments and issuers accountable and transparent, respectively.

Finally, the SEC should aim to align its policies with that of other major regulators, since harmonized standards would allow companies to more efficiently comply with these rules and enable shareholders, citizens, and other stakeholders to analyze and make use of the ensuing standardized and comparable data. Additionally, the U.S. Department of Interior, representing the United States in the EITI, in a comment letter submitted to the SEC, argued for similar

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[18] Some have argued that the 2016 SEC proposal was weaker than international standards, therefore gives U.S. companies a competitive advantage (*See* Letter from Total (February 10, 2020) *available at* *https://www.sec.gov/comments/s7-24-19/s72419-6791650-208331.pdf)*. Normally, we would welcome giving U.S. companies and workers any appropriate advantages, but allowing them to comply with weaker transparency and anti-corruption rules, is not a sustainable public policy.

[19] *See* Letter From Transparency International EU (July 16, 2019), *available* at https://www.sec.gov/comments/s7-24-19/s72419-6784402-208230.pdf.

standardization and harmonization at a heightened level.[20] By aligning these goals and helping develop widely-accepted international standards, the SEC could help increase transparency and help shareholders to hold the executives of the companies they invest in accountable. The provision of robust payment information could also help citizens who live in the communities impacted by corruption connected with the resource extraction industry to hold their governments accountable. With rules that closely match their international counterparts, the Commission could ensure that U.S. shareholders are not at a disadvantage compared to shareholders in foreign companies who have the benefit of the disclosures required by foreign regulators.

The Not *De Minimis* Threshold in The Release Encourages Behavior to Avoid Disclosures.

The new "not *de minimis*" threshold is unacceptably confusing, poorly written, and not user- or compliance-friendly. It also has loopholes that would allow resource extraction issuers to avoid the disclosure of payments, especially when compared to the 2016 proposal and other international transparency requirements. As noted above, we interpret the new "not *de minimis*" thusly:

1. The aggregate payment to the entity (*i.e.*, foreign government or foreign government official, or the U.S. Federal government) is less than $750,000 per project, or;

2. If the aggregate payment to the entity is more than $750,000 per project, the company is required to disclose only those individual payments that exceed $150,000. Thus, if our interpretation is correct, an issuer could make in aggregate ***limitless*** payments to foreign governments or government officials as long as each individual payment amount is kept below $150,000.

To begin, the $750,000 threshold—which permits no disclosure whatsoever—seems arbitrary and is unjustifiably high. There is no acceptable economic analysis or comparative analysis in the Release that could shed light how this threshold was determined. There is also no analysis how the Commission determined that $750,000 could by any reasonable standard be considered *de minimis*, especially given the fact that other regulators that oversee the activities of similarly situated resource extraction companies have determined that any payment above $100,000 must be disclosed promptly.

Additionally, the rule language and the accompanying description in the Release make it unnecessarily and unjustifiably difficult to comprehend, comply, enforce, or enable stakeholders to hold accountable those who fail to comply or enforce the rules. There are multiple ways to interpret how the two different thresholds go together. One interpretation is that no disclosure is required, regardless of the aggregate amount, if each individual payment is less than $150,000. If this is the case, this would allow host countries—who would doubtless have knowledge of this lax rule—to require the payment of any amount less than $150,000, say $145,000, in perpetuity of the project or some other self-determined period. This could give license to U.S.-based companies to pay ***limitless amount*** to foreign governments without ***any disclosure whatsoever.*** This is an unfathomable and unacceptable loophole.

[20] *See* Letter From United States Department of the Interior, Office Of Natural Resources Revenue (February 16, 2015), *available* at https://www.sec.gov/comments/s7-25-15/s72515-47.pdf.

Furthermore, as the Release also introduces the concept of "series of payments" or "installments," it is unclear how that could be complied with, tracked or enforced. The lack of clearly delineated key terms and phrases in the *Not De Minimis* provision seemed to be designed to confuse and obfuscate. The Commission must reconsider how this confusion is the result of their deliberate and unnecessary decision to break away from their 2016 proposal and the sensible limits set by Canadian and European regulators, and other standard setters.

These thresholds are too high and leave investors and stakeholders in the dark. The thresholds would hide information from investors and disable their ability to know how their money is being used.[21] Lack of adequate disclosure would also weaken citizens' and other stakeholders' ability to hold corrupt governments accountable. These governments require or welcome the payments made by companies engage in extraction business but often do not invest those payments in their communities. Members of these communities, shareholders, and U.S. policymakers interested in fighting corruption and reduction of poverty could use these disclosures in their efforts to hold corrupt governments to account. In many respects, the U.S. leads the world in the fight against corruption, while this Proposal seems to go the opposite direction. It will allow U.S. companies to make secret payments to foreign governments and foreign government officials. These high thresholds will limit the effectiveness of the Release and will be starkly different from the already established "international disclosure regimes."[22]

<u>The Aggregation of Payments And Project-Level Definition Would Decrease Transparency Amongst Citizens.</u>

The Release states that,

> "Congress enacted Section 1504 of the Dodd-Frank Act to increase the transparency of payments made by oil, natural gas, and mining companies to governments for the purpose of the commercial development of their oil, natural gas, and minerals. According to Senator Richard Lugar, who cosponsored the amendment that was the basis for this statutory provision, a goal of requiring transparency was to provide more information to the global commodity markets and ''help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues.''[23]

If the goal of Section 1504 is to increase transparency, decrease corruption, and empower shareholders and citizens, the SEC is taking a step back with this Proposal. Allowing the aggregation of payments and defining the project level at subnational government jurisdictions will aid in reduction of transparency, eroding the power of investors and citizens to ensure that government revenues from extraction issuers are being properly used.

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21 *See* Commissioner Jackson's statement *available at:* https://www.sec.gov/news/public-statement/statement-jackson-2019-12-18-resource-extraction

22 *See* Commissioner Lee's statement *available at:* https://www.sec.gov/news/public-statement/statement-lee-2019-12-18-resource-extraction

23 *See* Release at 2524.

The aggregation of payments allowed in the Release increases issuers ability to hide payments made to smaller municipalities or government officials. The 2016 proposal contained the level of transparency that could have helped citizens have the sufficient information to hold their government accountable.[24] This Release, unjustifiably, weakens these transparency efforts.

Extractive projects that these issuers undertake can put a serious toll on the local community. The local communities, as envisioned by Congress, should have a right to know what a resource extraction company paid to their government. This information would help citizens to hold their governments accountable, and in turn, promote economic growth in these small communities, some which are poverty stricken. Instead, the Proposal would encourage lumped-together payments for multiple projects, diminishing the gains that have been made with project-level reporting. The change in definition by the SEC gives way for the aggregation of payments, allowing issuers to combine different projects all in a subnational region as one.

Transparency and accountability were the major policy goals of Sec. 1504 of the Dodd-Frank Act, but its implementation in this Release falls short of satisfying the Congressional mandates. While it may arguably make it easier for American companies to compete against foreign companies that are under even weaker rules, it would overtime lead to a race to the bottom. What would stop foreign regulators to permit their companies to pay even greater amount to acquire contracts and operate in the extraction industry? The SEC should lead efforts to improve transparency and empower investors and other stakeholders in holding corrupt governments accountable. At a bare minimum, the Commission should adopt the same regulatory approach as Canada's or European Union's. The new aggregation of payments and project definition will tilt the balance away from investors and concerned citizens towards issuers.

<u>The Anti-Evasion Provision is Weak And Can Easily Be Violated Without Consequence.</u>

The anti-evasion clause would create loopholes that could be easily exploited by governments receiving the payments. The disclosure requirements are imposed only on SEC-registered companies and nothing in the Proposal would prohibit them from meeting the demands of a foreign government or foreign government officials. These demands need not be official acts of the government (*i.e.*, rules, decrees or other regulatory orders) or the legislator, but could simply be oral or written demand.

While SEC-registered companies will be under obligation to report payments that cross the thresholds discussed above, these companies will not be in violation of the rules under this Proposal if they are simply responding to the demands of a foreign government. Simply said, a foreign government may become aware of the thresholds set in the rules under this Proposal and present a demand for payments just below those thresholds and justify those levels in any fashion it chooses. These justifications need not be made publicly available or fairly or transparently applicable to other situations. They can be set according to the whims of the foreign government or foreign government official. So long as the SEC-registered company could credibly claim that it is simply responding to the demand—even if it is set just below the thresholds—the company

[24] *See* Letter from United States Department of State, *Under Secretary for Economic Growth, Energy, and The Environment. Available at* https://www.sec.gov/comments/s7-25-15/s72515-13.pdf

will not be violating the rules under this Proposal, since it is not "part of a plan or scheme to evade"[25] but is merely responding to the exact demands of the government.

At a minimum, the anti-evasion provisions should be strengthened to disallow U.S. companies from engaging in transactions that have the perception of evasion, regardless which side is making the demands for the payment. The Proposal should also be strengthened to require that foreign government demands be in the form of an official decree, rule, order, or law. Finally, the Proposal must be strengthened to require that payments only be made to an official governmental bank account. As it is written, the Proposal seems to allow U.S. companies to make payments in stacks of cash in a suitcase, and hand it to a Deputy Minister (or their driver) of a corrupt government. This is not what shareholders want, and this is exactly what Congress wanted to prohibit.

The Commission Should Re-Proposal a Rule Which Needs To Be In Line With International Standards in Payment Disclosures by Resource Extraction Issuers.

A solid international standard and alignment would produce strong and clear transparency, empowering those who need it the most. The SEC's mission is to protect and empower investors, and investors should be able to use information required by Sec. 1504 of Dodd-Frank Act in making investment decisions. The SEC should assess and learn from the successes of international regulators, and re-propose a rule that is in line with the best practices and Congress's express intent to enable shareholders and citizens to hold companies and governments accountable.

CONCLUSION

We hope the Commission finds our comments helpful. The Commission has an opportunity to empower and protect investors in resource extraction companies. The Commission's actions could also benefit communities ravaged by poverty and corruption. It should not pass on that opportunity.

Sincerely,

Lev Bagramian
Senior Securities Policy Advisor

[25] *See* the rule language at Release 2567: "Anti-evasion. Disclosure is required under this section in circumstances in which an activity related to the commercial development of oil, natural gas, or minerals, or a payment or series of payments made by a resource extraction issuer to a foreign government or the Federal Government for the purpose of commercial development of oil, natural gas, or minerals, is not, in form or characterization, within one of the categories of activities or payments specified in Form SD, but is part of a plan or scheme to evade the disclosure required under this section."

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