February 16, 2016

VIA EMAIL (rule-comments@sec.gov)

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Disclosure of Payments by Resource Extraction Issuers; File No. S7-25-15

Dear Mr. Fields:

The purpose of this letter is to express support for, and suggest some enhancements to, the proposed rule of the Security and Exchange Commission (SEC) implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requiring the disclosure of payments to governments by resource extraction issuers.[1] This proposed rule, like the statute it implements, will bring needed transparency to payments made to the United States and foreign governments by the resource extraction industry.

The enhancements recommended by this letter would: (1) expand the rationale offered to support the proposed rule; (2) add guidance favoring disclosure of "payments" that are mandated by contract or raise corruption concerns; and (3) add guidance on the appropriate process and criteria that should be used to grant exemptions from Section 1504's disclosure requirements.

The comments in this letter are based upon investigations conducted by the U.S. Senate Permanent Subcommittee on Investigations where I worked as staff director and chief counsel for Senator Carl Levin. In those investigations, the Subcommittee examined U.S. bank records and other documents that disclosed payments made by oil companies to the government of Equatorial Guinea, its officials, and others in connection with oil exploration and development efforts. Based upon that information, Senator Levin submitted two comment letters, dated February 1, 2011 and February 17, 2012, on the predecessor to this proposed rule.[2] This letter seeks to build upon that prior analysis.

Improved Rule. The current proposed rule is an improved version of its predecessor. The product of a six-year rulemaking process to date, it takes into account the 2010 proposal, related comments, the final rule adopted in 2012, and the court decision requiring further revision. The current proposal establishes a regulatory scheme

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[1] Disclosure of Payments by Resource Extraction Issuers, SEC Proposed Rule, 80 Fed. Reg. 246 at 80058 (December 23, 2015)(hereinafter "Proposed Rule").

[2] Levin comment letter (2/1/2011), www.sec.gov/comments/s7-42-10/s74210-19.pdf; Levin comment letter (2/17/2012), www.sec.gov/comments/s7-42-10/s74210-173.pdf.

that, compared with its predecessor, offers generally stronger safeguards, greater clarity, and increased international consistency.

The new safeguards include, for example, an anti-evasion provision to prevent circumvention of the rule's disclosure requirements. Other measures respond to actions taken by Canada and the European Union to develop similar extraction industry disclosure requirements, as well as progress in implementing the voluntary Extractive Industries Transparency Initiative (EITI). The proposed rule's improvements include a new definition of "project" that, in most respects, corresponds with the definitions being used by Canada, the European Union, and EITI; and a new authorization permitting U.S. issuers to use equivalent foreign filings to satisfy the SEC's disclosure requirements.

The proposed rule also includes a new explanation of its requirement that the reports filed by U.S. issuers be made public, consistent with the approaches taken by Canada, the European Union, and EITI. In addition, it continues to require covered issuers to "file" rather than "furnish" their reports to the SEC, thereby subjecting the reports to a higher standard of care and enabling private parties harmed by false or misleading disclosures to file suit. These and other provisions have strengthened and clarified the proposed rule while ensuring its compatibility with international disclosure standards for the extractive industries.

At the same time, the proposed rule has weaknesses that could and should be addressed. This letter recommends three changes: (1) strengthening the rationale supporting the proposed rule; (2) improving the guidance on reportable payments; and (3) adding guidance limiting case-by-case exemptions to the rule's disclosure requirements.

Strengthening the Rationale. One of the striking differences between the current proposed rule and its predecessor is the SEC's decision to highlight in the rule's explanatory materials the legislative history indicating that Congress enacted Section 1504, in part, to combat global corruption, secure U.S. national and energy security, and help civil society hold governments accountable for effective management of their oil, gas, and mineral resources. While greater acknowledgement of that legislative history is welcome, the proposed rule would benefit from a broader discussion of the role it would also play in strengthening U.S. investor protections.

Publicly traded corporations active in the oil, natural gas, and mining industries often operate in countries with unstable, secretive, or corrupt governments. It is critical for investors to understand the nature and extent of each company's financial exposure when operating in those countries. Increased company data on tax, royalty, and other payments, provided on a country-by-country and project-by-project basis, would facilitate an informed analysis of each company's fiscal situation, in-country activities, and prospects. Those and other investor benefits have been detailed in several comment letters and Congressional statements on the law, yet receive little attention or discussion

in the proposed rule.[3] The proposed text should be revised to include a better discussion of Congressional intent to use Section 1504 to strengthen investor protections.

In addition, as part of the rule's discussion of the law's foreign policy objectives, it should acknowledge the goal that, by improving available data on the taxes paid by individual companies to foreign governments, the rule will boost ongoing U.S. efforts to build tax capacity in those developing countries in order to lessen their reliance on foreign aid from the United States.[4]

Each of those rationales for the law should be acknowledged and discussed in the final rule.

Improving the Guidance on Reportable Payments. A second issue involves the proposed rule's description of the types of "payments" that must be disclosed in an issuer's annual SEC filings. The proposed definition has three elements. A covered payment must be: (1) made to "further the commercial development of oil, natural gas, or minerals"; (2) "not de minimis"; and (3) the type of payment that "includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the EITI's guidelines (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals."[5] The proposed rule indicates that it would interpret "other material benefits" to include certain "dividend" payments and payments made for "infrastructure improvements."[6] Requests (13) and (14) solicit comment on whether the proposed rule should include other types of payments or add guidance on the types of payments that should be disclosed.

While generally adequate, the proposed definition is deficient in one important respect: it does not provide sufficient guidance on how to handle coercive, secret, or possibly improper payments that exceed the de minimis reporting threshold. Right now, the proposed rule requires disclosure of only legitimate types of payments – taxes, royalties, fees – that are "part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals." It does not acknowledge, discuss, or provide any guidance on disclosing large payments that are not a commonly recognized part of the revenue stream, yet are contractually mandated or raise corruption

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[3] See, e.g., comment letters submitted by Columbia Center on Sustainable Investment (10/30/2015), www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-93.pdf; a group of 34 investors (4/28/2014), https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-35.pdf; and a group of 14 investors (4/28/ 2014), www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-36.pdf.

[4] See, e.g., American Petroleum Institute v. SEC, Case No. 12-1398 (D.C. Cir. 2011), Brief of United States Senator Benjamin Cardin, Former Senator Richard Lugar, and United States Senator Carl Levin As Amici Curiae In Support of Respondent, at 6-7 ("Lack of transparency regarding the extractive industry's payments to governments can also undermine U.S. interests in reducing the burden of foreign aid, as improved governance can stimulate foreign governments' own domestic tax collection."); comment letter by USAID (7/15/2011), http://sec.gov/comments/s7- 42-10/s74210-101.pdf; "The Link Between Revenue Transparency and Human Rights," Hearing Before the Commission on Security and Cooperation in Europe, 111th Cong. 23 (2010), testimony by Oxfam America.

[5] Proposed Rule, at 80070-71.

[6] Id. at 80071.

concerns. They may include payments that were requested by a corrupt official, have a weak legal or contractual basis, or were made in ways that hide the payments from the public. Given Section 1504's anti-corruption and investor-protection purposes, the rule would benefit from clear guidance favoring the disclosure of those types of payments as well when in excess of the de minimis threshold.

A Subcommittee investigation of six oil companies active in oil exploration and development efforts in Equatorial Guinea (EG) illustrates those types of payments, which were made by oil companies to the EG Government from 2000 to 2004.[7] They included oil company payments for EG students' college tuition, EG Government operations and establishments in the United States, employment benefits for EG personnel, and services needed by EG agencies. In addition, the Subcommittee investigation documented substantial oil company payments made in connection with joint business ventures entered into with companies owned or controlled by the EG Government.

More specifically, in addition to sizeable payments for taxes, royalties, and fees, each of the oil companies examined by the Subcommittee was required by its EG oil production sharing contract to pay for "student training expenses." The Subcommittee investigation determined those expenses consisted in many cases of paying tuition and living expenses for the children of EG officials to attend college in the United States. The oil companies were required to make those payments either to a bank account controlled by the EG Government or, in a few cases, to a U.S. university where the EG students were enrolled. The oil company payments included the following:

- two $50,000 payments to the University of South Carolina to pay for the expenses of two EG students;[8]
- $150,000 annual payment for 4 years for EG student expenses;[9]
- $300,000 annual payment for 3 years for EG student expenses;[10]
- $150,000 payment in one year and a $200,000 payment in a second year for EG student expenses;[11]
- $275,000 payment in one year for EG student expenses;[12]
- $250,000 payment in one year for the educational expenses of the children of the EG President's brother;[13] and

[7] See "Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act," hearing before the Permanent Subcommittee on Investigations, S.Hrg. 108-633 (July 15, 2004)(hereinafter "Riggs Hearing"), at 198-209.
[8] Riggs Hearing at 204, footnote 371.
[9] Id. at 203, footnote 366.
[10] Id. at 204, footnote 372.
[11] Id. at 203-04, footnote 367.
[12] Id. at 204, footnote 374.
[13] Id. at 204, footnote 370.

- $158,000 payments over 2 years and another $190,000 over the succeeding 2 years for EG student expenses.[14]

These substantial payments benefited powerful EG Government officials, yet were paid by the oil companies primarily by wiring funds to an EG Government bank account or to a university account specified by the EG Government.

The Subcommittee uncovered a second series of payments made by one oil company, at the direction of the EG Government, to support the EG Government's Embassy in Washington, D.C. or its Mission to the United Nations located in New York. The oil company made those payments by wiring funds to bank accounts controlled by the EG Government, EG Embassy, or EG Mission. The payments, which were made every month, included:

- $7,000 monthly payments to maintain the EG Embassy – payments explicitly required by one of the oil company's production sharing agreements;[15]
- $2,700 monthly payments for social security expenses and $3,500 monthly payments for medical insurance to benefit EG Government personnel working at the EG Embassy;[16] and
- $5,400 monthly payments to support the EG Mission, after which the oil company was permitted to subtract those amounts from royalty payments it otherwise owed the EG Government.[17]

Under another production sharing contract, the same oil company was required to "purchase services, materials and equipment for the [EG] Government's use as reasonably requested by the Government."[18] The oil company was permitted to deduct the value of those purchases from amounts it otherwise owed the EG Government.

A third category of payments uncovered by the Subcommittee involved joint business ventures entered into by some of the oil companies with state-owned companies in Equatorial Guinea. The payments included capital contributions to the business ventures or dividends paid by the joint ventures to their business partners.[19] One example involved an oil company that entered into two business ventures with a state-owned EG corporation to operate an EG methanol plant and an EG liquid petroleum gas facility. Together, the business ventures paid millions of dollars in dividends over a three-year period to the state-owned company, which was suspected of being owned, not only by the EG Government, but also in part by unnamed senior EG officials. A second example involved an oil company that entered into three business ventures with a different state-owned company, also suspected of being secretly owned, in part, by EG officials. Those three business ventures involved sharing oil production revenues from certain EG oil fields. A final example involved an oil company that partnered with a company

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[14] Id. at 205, footnote 380.
[15] Id. at 202-03, footnote 360.
[16] Id. at 203, footnote 360.
[17] Id. at 202, footnote 359.
[18] Id. at 203, footnote 361.
[19] Id. at 205-206.

controlled by the EG President to operate an EG oil distribution business used by the oil company's own local subsidiary. Over a three-year period, that oil distribution business paid substantial dividends to the President's company.

It is unclear whether any of the types of payments just described would qualify as "part of the commonly recognized revenue stream" associated with commercial oil development. It is possible that some of the payments would qualify, perhaps as "material benefits," since they were explicitly required by the oil companies' production sharing contracts, but a counter-argument could be made that payments for college tuition, EG Embassy maintenance, or EG Government equipment – even if contractually required – did nothing to "further" commercial oil development and so would not have to be disclosed. To resolve the issue, the proposed rule should add guidance requiring that all payments mandated by a resource development contract be disclosed, if the aggregate payments exceed the de minimis threshold.

Other types of payments, such as the oil company's paying to support the EG Mission to the United Nations or the social security and medical insurance expenses of EG Embassy personnel, appear to have had no contractual basis but were made in response to EG Government requests. A counter-argument could again be made that those types of payments did not "further" commercial oil development and so were not subject to disclosure. An alternative analysis might find that disclosure of the payments was required by the proposed rule's new anti-evasion provision – especially if the amounts were subtracted from royalties or other payments that otherwise would have had to be disclosed – but if so, additional guidance should make that clear.

The final category of payments – capital contributions to joint business ventures and related dividend payments – also warrant adding guidance favoring public disclosure. It is possible that both types of payments would be reportable as "material benefits" under the proposed rule, but better guidance would eliminate any ambiguity. In the EG investigation, some of the business ventures appeared to be thinly disguised schemes to funnel payments to corrupt officials. Surely, those types of payments, when in excess of the de minimis reporting threshold, should be disclosed under Section 1504.

In sum, given the law's anti-corruption and investor-protection goals, the proposed rule would be strengthened if language were added to make clear that its disclosure requirements apply, not only to common types of legitimate resource extraction payments to governments, but also to coercive, secret, or improper payments. At a minimum, new guidance should make it clear that disclosure is required for all contractually-mandated payments in excess of the de minimis threshold, because they automatically qualify as "material benefits" that "further" commercial resource development. New guidance should also make plain that all capital contributions made by resource extraction companies to joint business ventures with state-owned or controlled corporations and all dividends paid by those joint ventures to those state-owned or controlled corporations are "material benefits" that must also be disclosed.

In addition, guidance should be added to either the discussion of reportable payments or the new anti-evasion provision indicating that payments by a resource

extraction issuer in excess of the de minimis threshold should be disclosed if: (1) the payments were subtracted from or substituted for otherwise reportable payments; (2) the payments were requested by or associated with a government official suspected of corruption; or (3) the payments raise corruption concerns, including by creating an appearance of possible corruption, and those payments would otherwise be undisclosed to the public.

Limiting Case-by-Case Exemptions. A final issue involves exemptions. The proposed rule takes the sensible approach of foregoing any broad-based exemptions to its disclosure requirements for issuers operating in countries that prohibit such disclosures. That matches the approach taken by Canada, the European Union, and EITI, and ensures U.S. policy is not made subordinate to non-disclosure laws enacted by secretive or corrupt regimes. However, the proposed rule also observes that the SEC may use its existing statutory authority to grant exemptions to Section 1504's disclosure requirements, on a case-by-case basis, in response to issuer requests.[20]

The proposed rule acknowledges that granting case-by-case exemptions is not authorized by Canada, the European Union, or EITI, and that granting U.S. exemptions risks producing international conflicts. Despite that acknowledgement, the proposed rule fails to provide any guidance on the process or criteria to be used to decide when an exemption from Section 1504's disclosure requirements might be appropriate. Requests (45) and (46) solicit comments on the rule's proposed approach.

To prevent abuse of the SEC's exemption authority, ensure efficient use of agency resources, develop effective exemption standards, and foster international consistency and comity, the proposed rule should at a minimum provide guidance on the process to be used to obtain a Section 1504 exemption. Specifically, it should require that any exemption request be published in the Federal Register for public comment to ensure that the request and related facts, legal analysis, and impacts on international disclosure standards are widely examined, and to provide an opportunity for comment by other countries with extractive industry disclosure requirements.

To ensure an informed analysis of a specific exemption request, if the request is based upon or related to a foreign law or rule barring disclosure of payments information, the proposed rule should require the requester to provide the following information and materials: (1) the text and an English translation of the foreign law or rule prohibiting disclosure; (2) the date of enactment or promulgation of the foreign law or rule; (3) the text and an English translation of any foreign law or rule imposing a penalty for violating the non-disclosure law or rule; (4) a signed legal opinion, with an English translation, finding that the foreign non-disclosure law or rule conflicts with U.S. disclosure requirements under Section 1504, explaining the nature of that conflict, and presenting legal precedents or other reasons why the foreign non-disclosure law or rule should take precedence over U.S. law; and (5) a description of any steps taken by the requester to obtain a waiver, exception, or exemption from the foreign non-disclosure law or rule.

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[20] Proposed Rule, 80 Fed. Reg. at 80082. See 15 USC §§ 78l(h) and 78mm(a) (granting the SEC general authority to create exemptions to SEC reporting requirements).

The proposed rule should require publication of the additional information and materials in the Federal Register following the exemption request.

Finally, the proposed rule should provide guidance on the criteria to be used when evaluating an exemption request. That guidance should include an instruction that, in light of the law's anti-corruption and investor-protection goals, the importance of extractive industry transparency, the law's preference for consistent international standards, and the U.S. national interest in enforcing its own statutes, Section 1504 exemptions should be granted rarely and only for extremely compelling reasons.

Thank you for this opportunity to comment on the proposed rule. The SEC is to be commended for issuing a strong rule in line with the statutory requirements.

Sincerely,

Elise J. Bean
Former Staff Director and Chief Counsel
U.S. Senate Permanent Subcommittee on Investigations