Yale Law School

SUSAN ROSE-ACKERMAN
*Henry R. Luce Professor of Jurisprudence*
*(Law and Political Science)*

March 28, 2014

Chair and Commissioners
United States Securities and Exchange Commission
100 F Street, NE
Washington DC 20549

Dear Chair and Commissioners:

I am writing to provide my views to the SEC as it moves to reissue a rule to implement **Section 1504 of the Dodd-Frank Act** [15 U.S.C. § 78m(q), "Section 1504"]. I am a professor of Law and Political Science at Yale University with a doctorate in Economics also from Yale. I was one of the first academics to apply insights from economics to the study of corruption in a book published in 1978, and I have continued to be active in the field, publishing a second book in 1999, a number of articles on the topic, and three recent edited books. I write to give you my views on the benefits of implementing this section of the Act.

The law requires the SEC to issue a rule to implement this section of the law, and this mandate is consistent with the Agency's other mandate under the Federal Corrupt Practices Act [FCPA] that deals with books and records. Section 1504 must be enforced by the SEC; it is not an optional provision. Although enforcement of the provision does not depend upon post hoc rationalizations for its passage, the SEC should still consider the social value of the provision.

Global Witness in its letter to the SEC of December 18, 2013 does an excellent job of presenting the value of the provision both to investors in the US markets and globally. I want simply to supplement their arguments with a few additional thoughts. The first point is that neither the US national interest nor the interests of investors ought to be equated with the interests of firms in extractive industries.

Nevertheless, let us start with the impact on those firms. There is naturally some question about whether disclosure of payments will lead to more or fewer contracts for US-listed firms. However, this would seem to be something of a red herring since, as Global Witness points out, many global companies headquartered outside the US are listed on US exchanges and hence are subject to SEC rules. In addition, the EU and several other countries are requiring disclosure comparable to requirements in the SEC's original rule. Thus, once the SEC issues a rule, a large share of the investment in the sector will be covered.

P.O. BOX 208215, NEW HAVEN, CONNECTICUT 06520-8215 · TELEPHONE 203 432-4891 · FACSIMILE 203 432-8260
COURIER ADDRESS 127 WALL STREET, NEW HAVEN, CONNECTICUT 06511 · EMAIL SUSAN.ROSE-ACKERMAN@YALE.EDU

Over and above the limited impact on US firms, there are strong reasons to support the provision. It sends a signal to the world community of a US commitment to transparency and the fight against corruption in the award of extractive contracts and concessions. Firms in extractive industries face a coordination problem. The industries as a whole would gain if the playing field were more level and if large payoffs were not the rule. Payoffs are costs to firms that reduce their profits. Acting alone, each firm has an incentive to provide kickbacks to helpful government officials to beat the competition. If payoffs are made more transparent and, hence, more likely to be subject to prosecution under the FCPA or the OECD Anti-Corruption Convention, their level ought to fall. Given the technical capacity and efficiency of US-listed firms, they ought to be able to improve, or at least maintain. their competitive position, especially given the parallel actions by the EU and other countries. Even if payoffs continue, their overall social cost is likely to fall as firms shift to transparent benefits for ordinary citizens rather than payoffs to wealthy elites.

Of course, as with all efforts to measure the benefits of anti-corruption policies, quantification is difficult, and as with any new policy, quantification is hampered because there is no clearly defined benchmark. We do not know which firms might have obtained contracts in the absence of secret payments. However, the SEC itself could require a study of the impact of the rule on US-listed firms' ability to get contracts and the value of these contracts. This prospective study could be provided for in the rule; it can only be carried out with the rule in place. Global Witness gives examples suggesting that there will be no major impact on leading firms in the industry, implying that the benefits will flow in two directions—into the profit and loss statements of the firms and to the citizens of natural-resource-rich countries.

If the global momentum toward limiting corruption in large contracts is to continue, the US must lead the way. Any indication that it is lagging can embolden those who gain from corrupt contracts and concessions. Of course, the publication of payments is not an anti-corruption strategy standing alone. The information needs to be used by reformers in countries with mineral and oil resources. However, it is a first step. There is a chicken and egg problem that can be mitigated by disclosure. If the information is easily available, groups may begin to demand more transparency in a way that can limit corruption and kickbacks to the benefit of both investors and the citizens of countries with these resources. These benefits cannot, in principle, be quantified. That does not mean that they should be ignored. Disclosure should lead firms both to make fewer payments and to direct the payments they do make toward socially beneficial projects. It is not credible that the out-of-pocket costs will be substantial. After all, the firms must already have records of their payments. It is just a question of filing in a form for the SEC. There is no need for the cost of a separate report. The information can be included in the firms' annual reports.

SEC enforcement of this provision of the law will send a message that can help encourage anti-corruption activities that will ultimately redound to the benefit of both the United States business community and the citizens of countries that are rich in minerals and oil. The provision is a part of a larger project, but it is a needed part that could help facilitate broader anti-corruption efforts.

Sincerely,

Susan Rose-Ackerman
Henry R. Luce Professor of Jurisprudence (Law and Political Science)
Yale University
Mailing address: Yale Law School, P.O. Box 208215
New Haven CT 06520-8215
Courier: 127 Wall St. New Haven CT 06511
Tel: [redacted]
Fax: [redacted]
[redacted]