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15th June 2015

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

Rulemaking for Dodd-Frank Act, Section 1504

Dear Chair and Commissioners,

I am writing to you with regard to the Dodd-Frank Act Section 1504 rulemaking as an expert with more than 22 years' experience in the field of anti-corruption. Based in New Delhi, recently my roles have included Executive Director of Transparency International India, and Regional Expert for India with TRACE International, an independent consultancy that works with the private sector on anti-bribery issues including compliance, due diligence and training. I have worked closely with India's federal anti-corruption agencies including the Central Vigilance Commission, the Central Bureau of Investigation, and the Comptroller and Auditor General of India. I was also involved in the drafting of the Indian Government's National Anti-Corruption Strategy.

Efforts made by the Securities and Exchange Commission to improve transparency in the extractives sector are warmly welcome. In this letter I would like to highlight how opacity in India's coal licensing process enabled a national scandal to take place that prompted the Supreme Court to revoke 214 extractive licenses. As well as causing harm to companies and their investors, the licensing process resulted in substantial revenue losses to the Indian exchequer.

As the companies involved in this case are not listed in the U.S., the Section 1504 rule would not have had an impact in preventing or curbing the problem in this particular instance. Nevertheless, this example clearly demonstrates why, if the Section 1504 rule is to achieve the aim of rooting out and deterring corruption, it must require the publication of licence-level payment data and the identities of the reporting companies.

Had company-specific, licence-level payment data been publicly available for the case highlighted in this letter, citizens and civil society groups would have been alerted to the fact that companies linked to politically exposed persons were obtaining coal extraction licences for no or virtually no cost, and regulatory agencies would have been prompted to intervene at a much earlier stage.

In August 2012, the Comptroller and Auditor General (CAG)¹ submitted to Parliament the results of an investigation that found 142 coal blocks had been allocated to 57 private and state-owned companies through non-transparent, non-competitive (no-bid) processes from 2004 to 2009.²

The coal blocks were allocated to the companies for free or virtually no cost. No information about licence fee payments, or the lack thereof, was placed in the public domain. Indian citizens had no means therefore of accessing data that would have shown the Government was gifting public assets to extractive companies, or would have shown the identities of the companies that benefited.

Opacity and other flaws in the licence allocation process ultimately harmed extractive companies and their investors. Following the CAG report and a further two-year investigation into the case by the Central Bureau of Investigation, the Supreme Court of India ruled in August 2014 that all 218 coal licenses awarded between 1993 and 2009 are illegal due to serious irregularities in the allocation process, including a lack of transparency.³

Other grounds cited by the Supreme Court for ruling the licenses illegal include that the allocation process violated “the principle of trusteeship of natural resources by gifting away precious resources as largesse”; that it breached the Mines and Minerals Act 1957, which was amended in 2010 to require transparent and competitive bidding for the allocation of coal blocks; and that the selection of companies was “tainted with *mala fides* and corruption and made in favour of ineligible companies tainted with *mala fides* and corruption.”⁴

In a further ruling made in September 2014, the Supreme Court ordered companies to return 214 of the 218 licenses to the Government, and imposed a fine on companies of US\$4.77 per metric tonne of coal extracted from the blocks since the licenses were first granted.⁵

¹ The Comptroller and Auditor General of India is a central public agency that audits the Government of India’s revenue receipts and expenditure.

² Comptroller and Auditor General of India, Report No. 7 of 2012-13, ‘Performance Audit of Allocation of Coal Blocks and Augmentation of Coal Production’ (Chapter IV), laid before Parliament 17th August 2012: http://saiindia.gov.in/english/home/our_products/audit_report/government_wise/union_audit/recent_reports/union_performance/2012_2013/Commercial/Report_No_7/Report_No_7.html; *Wall Street Journal*, ‘Transcript: Singh Counters ‘Coalgate’ Allegations’, 27th August 2012: <http://blogs.wsj.com/indiarealtime/2012/08/27/transcript-prime-minister-singh-counters-coalgate-allegations/>

³ Supreme Court of India, Judgment, Writ Petition No. 120 of 2012, New Delhi, 25th August 2014: <http://supremecourtindia.nic.in/outtoday/wper120.pdf>; *New York Times*, ‘Coal Leases Were Illegally Granted, an Indian Court Says’, 25th August 2014: http://www.nytimes.com/2014/08/26/business/international/india-allocated-coal-fields-to-private-companies-illegally-top-court-rules.html?_r=0

⁴ Comptroller and Auditor General of India, Report No. 7 of 2012-13, ‘Performance Audit of Allocation of Coal Blocks and Augmentation of Coal Production’ (Chapter 4), laid before Parliament 17th August 2012: http://saiindia.gov.in/english/home/our_products/audit_report/government_wise/union_audit/recent_reports/union_performance/2012_2013/Commercial/Report_No_7/Report_No_7.html

⁵ Supreme Court of India, Order, Writ Petition No. 120 of 2012, New Delhi, 24th September 2014: <http://supremecourtindia.nic.in/outtoday/wr120.pdf>; *BBC*, ‘Indian Supreme Court Cancels 214 Coal Scandal Permits’, 24th September 2014: <http://www.bbc.co.uk/news/world-asia-india-29339842>

According to reports in the financial press, major reductions in the share value of companies that were awarded coal licenses were due to the court rulings and federal investigations into the allocation process. Jindal Steel and Power, a Mumbai-listed firm with a market capitalisation of around US\$3 billion, suffered a 42 percent drop in its share price during 2014 as a consequence of the Supreme Court's September ruling and uncertainties surrounding the case, according to *Reuters*.⁶ The company had nine coal licenses revoked including its 1.5 billion tonne Odisha coalfield, and was forced to halt a US\$10 billion coal-to-diesel project as a result of losing the Odisha field.⁷ Jindal Steel and Power is also due to pay a fine of US\$485 million for the coal it had extracted from the cancelled blocks. According to the *Financial Times*, Hindalco Industries lost 10 percent of its share value as a consequence of the Supreme Court's August 2014 judgment that the coal licenses are illegal.⁸

As well as causing harm to investors and extractive companies, the allocation process diverted financial resources from the Indian national exchequer that could have been used to advance human development. Based on the cost of production and the prevailing selling prices received by Coal India Limited, a state-owned company that accounts for the majority of India's coal output, CAG calculates that the financial gains accruing to private companies would have totaled US\$30 billion over the coal blocks' producing lifespan. CAG concluded that a proportion of this US\$30 billion would have been captured by the Indian exchequer if a transparent and competitive allocation process had been in place.⁹

Even if only a relatively small proportion of the US\$30 billion had reached Government accounts, it could have had a significantly beneficial impact on India's development. To put this sum into context, state funding allocated to India's public healthcare system for 2014-15 is US\$5.4 billion.¹⁰ While India is a middle-income country with a rapidly expanding economy, it ranks only 135 out of 187 on the UN's 2013 Human Development Index. Over 790 million people do not have access to adequate sanitation in India, and 186,000 children under five die every year of diarrhoeal diseases.¹¹

India's 'Coalgate' scandal clearly demonstrates the need for company specific, licence-level payments to be made public. As the Supreme Court noted in its August 2014 ruling, "a large number of allottees are either

⁶ *Reuters*, 'Jindal Steel Shelves \$10 Bln Project After Coal Setback', 24th November 2014: <http://uk.reuters.com/article/2014/11/24/jindal-steel-coal-idUKL3N0TE1UJ20141124>

⁷ *Reuters*, 'Jindal Steel Shelves \$10 Bln Project After Coal Setback', 24th November 2014: <http://uk.reuters.com/article/2014/11/24/jindal-steel-coal-idUKL3N0TE1UJ20141124>

⁸ *Financial Times*, 'India's Supreme Court Declares More Than 200 Coal Mining Licenses Illegal', 25th August 2014: <http://www.ft.com/cms/s/0/7fc47298-2c67-11e4-a0b6-00144feabdc0.html#axzz3PN0HQ26F>

⁹ Comptroller and Auditor General of India, Report No. 7 of 2012-13, 'Performance Audit of Allocation of Coal Blocks and Augmentation of Coal Production' (Chapter 4), laid before Parliament 17th August 2012: http://saiindia.gov.in/english/home/our_products/audit_report/government_wise/union_audit/recent_reports/union_performance/2012_2013/Commercial/Report_No_7/Report_No_7.html

¹⁰ IHS, Global Insight Perspective, 'India Cuts Healthcare Spending by 10% in 2014-15 Government Budget', 18th February 2014: <https://www.ihs.com/country-industry-forecasting.html?ID=1065985237>

¹¹ WaterAid: <http://www.wateraid.org/where-we-work/page/india>

powerful corporate groups or shady companies linked with politicians and ministers or those who came with high profile recommendations. Most of these allottees were in fact ineligible for allocation; they had misrepresented the facts and were not more meritorious than others whose claims have been rejected, but by serious manipulations and abuse, they were able to get the coal blocks.”¹²

As stated above, had company-specific, licence-level payment data been publicly available, citizens and civil society groups would have been alerted to the fact that companies linked to politically exposed persons were obtaining coal blocks for no or virtually no cost, and regulatory agencies would have been prompted to intervene at a much earlier stage. It is also reasonable to consider that licence-level disclosure may have deterred government officials from gifting coal blocks to companies in the first instance.

As the Coalgate scandal and similar cases in other countries show, licensing in the extractives industry is acutely vulnerable to corruption and mismanagement.¹³ Improved transparency measures to help prevent further cases of malfeasance are therefore urgently needed. However, if the Section 1504 rule did not require the identity of reporting companies to be disclosed, or if the data was aggregated above licence level, it would be rendered useless for rooting out and deterring corruption in the licensing process.

Furthermore, anonymising the reporting companies and aggregating payment data by district, state or other sub-national jurisdiction would prevent citizens and civil society from accessing information that would help dispel suspicions of financial malpractice at the company level; reassure stakeholders that a company was making a reasonable contribution to the public finances; and build trust with local communities affected by extractive operations.

For example, cases of companies underpaying royalties, alleged and proven, are commonplace in the extractive industries, including in India.¹⁴ Under an aggregated and anonymised system of disclosure, citizens and civil society would not be able to monitor individual companies’ royalty and other

¹² Supreme Court of India, Judgment, Writ Petition No. 120 of 2012, New Delhi, 25th August 2014, p57: <http://supremecourtindia.nic.in/ottoday/wperl120.pdf>

¹³ See for example Africa Progress Panel, 2013, ‘Equity In Extractives: Stewarding Africa’s Natural Resources For All’, p55: http://www.africaprogresspanel.org/wp-content/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf; Reuters, ‘Special Report – Depleted Oil Field Is Window Into China’s Corruption Crackdown’, 18th December 2014: <http://www.reuters.com/article/2014/12/19/us-china-corruption-indonesia-specialrep-idUSKBN0JX00720141219>; Global Witness, ‘The Scandal Of Nigerian Oil Block OPL-245’, 25th November 2013: <http://www.globalwitness.org/library/scandal-nigerian-oil-block-opl-245-0>;

¹⁴ *New Indian Express*, ‘The Bellary Mining Scam’, 20th September 2011; <http://www.newindianexpress.com/education/student/article364571.ece>; Reuters, ‘Colombia, BHP Billiton Settle Royalty Dispute – Minister’, 29th August 2011: <http://fr.reuters.com/article/idUKN1E77S1SI20110830>; Thomson Reuters Foundation, ‘What Oil Companies Paid The U.S. Over Revenue Disputes’, 13th May 2014: <http://www.trust.org/item/20140513082534-hupqw/> *Metal Bulletin*, ‘Zimplats accused of underpaying royalties by Zimbabwe authority’, 10th January 2012: <http://www.metalbulletin.com/Article/2958774/Zimplats-accused-of-underpaying-royalties-by-Zimbabwe-authority.html#axzz3TbsUKg1x>

licence-level revenue contributions to seek assurance that firms are paying their dues.

This letter has shown that licence- and company-level reporting of payments to governments will have strong beneficial impacts, particularly in countries such as India that have been affected by resource-related corruption scandals, as well as social conflict between communities and resource companies. In addition to providing transparency for payments made by US-listed firms that hold extractive licences in India,¹⁵ the introduction of a robust Section 1504 rule that requires public, licence-level disclosure will set a positive example for India to follow with regards to establishing much-needed domestic transparency measures for the extractive industries.

I appreciate the opportunity to provide these comments, and I would be happy to provide further information on request.

Yours sincerely,

Anupama Jha

¹⁵ Currently these include BP, Eni, BHP Billiton and Sesa Sterlite.