

March 13, 2020

Vanessa A. Countryman, Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090

RE: Dodd-Frank 1504 rule, file #S7-24-19

CC:

Mr. William Hinman, Director, Division of Corporate Finance  
Mr. Barry Summer, Associate Director, Division of Corporation Finance  
Ms. Elizabeth Murphy, Associate Director, Division of Corporate Finance  
Mr. Elliot Staffin, Special Counsel, Division of Corporation Finance

**Dear Secretary Countryman,**

We, the 10 civil society members of the International Board of the Extractive Industries Transparency Initiative (EITI), wish to comment on the proposed draft rule for implementing Dodd-Frank 1504.

The EITI is a global multi-stakeholder initiative comprised of countries, civil society, extractive companies and investors that work together to develop and implement what is considered the global standard to promote the open and accountable management of oil, gas, and minerals.<sup>1</sup>

**Bottom line up front**

We believe the draft rule, in its current form, fails to live up to the expressed purpose of the Dodd-Frank 1504 statute: specifically that the rule “shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.”<sup>2</sup>

**An opportunity for a return to U.S. leadership**

The United States has a rich history in the context of global anti-corruption and transparency efforts, with moments of pioneering leadership that have helped establish global norms. Following the groundbreaking passage of the Foreign Corrupt Practices Act in 1977, the United States deepened its commitment to good governance in the high-stakes extractives sector with its strong support of the fledgling EITI in the early 2000s, and the pioneering text of section 1504 of the Dodd-Frank Act in 2010.

With the passage of the Dodd-Frank Act, the bipartisan Cardin-Lugar amendment 1504 inspired a global wave of transparency-minded reform across the extractive industries. Legislation modeled on Dodd-Frank 1504 was subsequently introduced and passed in dozens of countries around the world, such as Norway, Canada, and the countries of the European Union. Compelled by these laws,

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<sup>1</sup> See “EITI: Who We Are”: <https://eiti.org/who-we-are>

<sup>2</sup> Text of Dodd-Frank 1504: <https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>

hundreds of companies, including BP, Shell, Eni, and Total, as well as state-owned or partially state-owned enterprises in Russia and China, have now disclosed over \$800 billion in payments to governments.<sup>3</sup> The original law also inspired the evolution of the EITI Standard. Project-level payment disclosure, in line with the EU project definition, is now a requirement for the 53 countries around the world that are implementing the EITI – a standard of disclosure that applies to U.S. companies operating in those countries.

The United States government has recognized increasing transparency and reducing corruption in the oil, gas, and minerals sector as a key foreign policy interest, as “Corruption and mismanagement of these resources can impede economic growth, reduce opportunities for U.S. trade and investment, divert critically needed funding from social services and other government activities, and contribute to instability and conflict.”<sup>4</sup> It has likewise recognized that improving transparency requires “ensuring a sufficiently detailed level of information concerning payments from the extractive industry to foreign governments for the development of oil, natural gas, and minerals will be made public and accessible to civil society and investors. In the absence of this level of transparency, citizens have fewer means to hold their governments accountable, and accountability is a key component of reducing the risk of corruption.”<sup>5</sup>

Nonetheless, the current draft rule implementing Dodd-Frank 1504 fails to provide this sufficiently detailed level of information.

### **An opportunity to align the U.S. with a global standard and level the playing field**

In particular, we find the proposed rule’s definition of “project” concerning, as well as the reporting deadlines. On project-level disclosure, this has meant no longer defining “project” at the contract level, despite support from USAID, the State Department, Department of Interior, investors, NGOs, and many oil, gas and mining companies to do so. In fact, in the 2016 rule, the SEC itself wrote that “the definition of project that [it] proposed is necessary and appropriate to achieve a level of transparency that will help advance the important anticorruption and accountability objectives underlying Section 13(q).”<sup>6</sup> It is our understanding that this reversal is based largely on concerns expressed from some elements of the industry in 2016 regarding competitive harm and compliance costs.

However, global transparency norms – and the accompanying market reality – have progressed since 2016. As noted, earlier versions of the SEC rule in former years inspired copycat legislation in dozens of countries around the world, which is in turn aligned with the requirements for project-level disclosure, and the definition of “project” (defined at the contract level) found in the EITI and required of all its 53 implementing countries.

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<sup>3</sup> See e.g. <http://resourceprojects.org/>

<sup>4</sup> U.S. Department of States submission to the SEC, 2015: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-102.pdf>

<sup>5</sup> Ibid.

<sup>6</sup> United States Securities and Exchange Commission, “17 CFR Parts 240 and 249b Release No. 34-78167; File No. S7-25-15 RIN 3235-AL53 Disclosure of Payments by Resource Extraction Issuers,” 2016, p. 77, <https://www.sec.gov/rules/final/2016/34-78167.pdf>

Extractive companies have now been complying with these requirements, without issue, for several years. What's more, as a consensus-based multi-stakeholder initiative, setting standards and requirements at the EITI international Board requires buy-in from all EITI's constituent parts: governments, civil society, and companies and investors. This means that EITI supporting companies – 61 companies including major industry players such as BHP, BP Plc, Chevron Corporation, Exxon Mobil Corporation, Rio Tinto, Royal Dutch Shell plc, and Total – have endorsed the EITI requirements on project-level disclosure, including its definition of “project” at the contract-level.

Indeed, many EITI supporting companies have clarified their positions in the wake of this latest draft SEC rule, coming out in support of a rule aligned with the current global standard, citing, *inter alia*, reasons related to a level playing field and minimizing reporting burdens by aligning global requirements (see e.g. statements from Newmont Goldcorp Corporation, BP Plc, Kosmos Energy, Rio Tinto, Royal Dutch Shell plc, Total, Eni SpA, and BHP).<sup>7</sup> For example, Kosmos Energy writes how a consistent rule could be useful for companies listed on multiple stock exchanges, writing, “[...] now that we have a secondary listing in London, and therefore reporting obligations in both the US and the UK, it would be helpful and more cost-efficient if there was substantial international alignment on this definition and on payments-to-government reporting requirements more broadly.”<sup>8</sup>

Against previously expressed concerns regarding competitive harm and compliance, it stands to reason that reporting in line with the global standard would in fact ensure a level playing field.

## **EITI insights, experiences, and impact**

On top of the 53 national governments around the world voluntarily implementing EITI, and the 61 international EITI supporting companies mentioned above (not to mention countless more companies engaged in national-level EITI processes), EITI also enjoys broad popular support as an initiative among key groups that would likewise benefit from a strong and sufficiently detailed Dodd-Frank 1504 rule: financial institutions, and citizens of resource-rich countries.

Financial institutions (including lending institutions and institutional investors) are considered a critical pillar of the EITI. Investors have played a key part in EITI since its inception, but increasingly so over time reflecting the growing attention global financial markets place on transparency and good governance.<sup>9</sup> Over the course of the past year, EITI has had two investors hold positions among its limited number of International Board seats. One explained investor interest in EITI by noting that “We believe that the EITI contributes to a better investment climate by reducing instability... The work of EITI is at the core of this chain of transparency, accountability and impact. As investors we need reliable, robust and credible data that is transparent and easily accessible. As financial institutions we support the EITI as a means to monitor the performance and conduct of the multinational extractives companies that they fund.”<sup>10</sup> This dovetails with the official statement of investor support

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<sup>7</sup> Business and Human Rights, 2020: <https://www.business-humanrights.org/en/usa-publish-what-you-pay-calls-on-extractive-companies-to-comment-on-latest-sec-payment-disclosure-rules-including-company-responses/?dateorder=datedesc&page=0&componenttype=all>

<sup>8</sup> Mike Anderson, Kosmos Energy, letter dated 18 Feb 2020, <https://www.business-humanrights.org/sites/default/files/documents/Kosmos%20Energy%20letter%20to%20PWYP-US%20Feb%202020.pdf>

<sup>9</sup> See “Financial Institution Support for EITI”: <https://eiti.org/supporters/financial-institution-support>

<sup>10</sup> Ibid.

for EITI, which outlines their reasons for involvement, underlining the understanding that “through our support of the EITI, we are promoting access to information that will inform our investment choices.”<sup>11</sup>

Obviously, a primary beneficiary of both EITI and legislation like Dodd-Frank 1504 is intended to be the citizens of resource-rich countries. This is enshrined in EITI’s first listed principle, “We share a belief that the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction, but if not managed properly, can create negative economic and social impacts.”<sup>12</sup>

In this regard, EITI has had some notable success stories over the years. EITI and the data it provides has led to reforms and new legislation in a host of member countries. These include:

- Philippines, where reforms have enabled local government to assess whether they are receiving their allocated share of extractives revenues;<sup>13</sup>
- Ukraine, which enshrined in domestic legislation key EITI requirements on the collection, disclosure, and dissemination of extractives data;<sup>14</sup>
- Ghana, where gaps exposed by EITI led to changes to the fiscal regimes governing the sector such as the introduction of capital gains tax, higher ground rent and fixed royalty rates;<sup>15</sup>
- Democratic Republic of the Congo (DRC), where EITI exposed \$88 million worth of leakages from the revenue collection agency. This information was then used by civil society to advocate for a legal enquiry that helped recover \$82 million of the funds, prompted reforms including better oversight mechanisms for the mining revenue collection system, and ultimately increased the government’s tax intake;<sup>16</sup>
- Nigeria, where EITI has been effective in strengthening public debate and promoting policy options around signature bonuses, unpaid royalties, crude oil and refined products theft. It has identified \$9.8 billion owed to the federal government, of which \$2.4 billion has been recovered through Nigeria EITI’s efforts,<sup>17</sup> further resulting in major reforms intended to curb similar issues in the future.<sup>18</sup>

It is worth noting the history of project-level disclosure in EITI, why it was adopted as a requirement and how it has deepened the effect EITI can have over time. EITI as a global standard, via the deliberations and primarily consensus-based decision-making model of its International Board, has been able to grow and adapt over the years in line with shifting global transparency norms and a growing understanding – built over years of practice across dozens of countries – of what information is needed to counter the most dire corruption risks.

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<sup>11</sup> See, “Statement of Support for the EITI from financial and lending institutions”: <https://eiti.org/document/statement-of-support-to-eiti-from-financial-lending-institutions>

<sup>12</sup> See “EITI Principles”: <https://eiti.org/document/eiti-principles>

<sup>13</sup> See EITI Philippines page: <https://eiti.org/philippines>

<sup>14</sup> See EITI Ukraine page: <https://eiti.org/ukraine>

<sup>15</sup> See EITI Ghana page: <https://eiti.org/ghana>; also NRGI, “From Reports to Results: The Story Behind Ghana’s EITI Success”: <https://resourcegovernance.org/blog/reports-results-story-behind-ghanas-eiti-success>

<sup>16</sup> One.org, “Digging into bad accounting to recover millions”: <https://www.one.org/international/follow-the-money/extractives-industry-bury-bad-accounting-digging-up-the-truth-recovered-million-in-drc/>

<sup>17</sup> See EITI’s Nigeria page: <https://eiti.org/nigeria>

<sup>18</sup> One.org, “Auditing What’s Extracted”: <https://www.one.org/international/follow-the-money/auditing-whats-extracted-recovering-2-4billion-and-uncovering-revenue-losses-of-9-5b/>

For the first 10 years of its existence, national-level EITI reports included revenues broken down by company, but conglomerated at the national level not project-by-project. Project-level reporting was first introduced as a requirement in 2013, but the same companies resistant to previous Dodd-Frank 1504 rules cited lack of a 1504 rule as reason not to implement EITI's project-level requirement.<sup>19</sup> In 2017, the EITI International Board moved past this roadblock and reaffirmed the EITI's project-level disclosure requirement for reports covering 2018 onwards.<sup>20</sup> In 2019, the EITI Standard was revised to require project-level disclosure at the contract level.<sup>21</sup> In early 2020, the EITI International Secretariat issued revised guidance in line with the EITI's contract-based project definition.<sup>22</sup>

To understand this push, it is useful to take into account key events in intervening years that demonstrated the need for project-level data, clearly establishing this data as a key ingredient necessary to achieve accountability, deter corruption, and promote responsible governance of the extractives sector. Take the Nigeria EITI example. Given the strategic importance of its vast natural resource wealth, Nigeria was an early EITI implementing country, and as noted above Nigeria EITI had some notable successes early on. However, there are also clear cases pre-2018 where EITI in Nigeria would have had a greater impact with the data provided by project-level disclosures, and lack of this data had clear negative consequences. Project-level data, at the contract level, would have helped citizens and groups like Nigeria EITI to identify what deals are being made for resources like Nigeria's oil block OPL245. As it stands, the deal crafted for OPL245 by Shell and Eni is estimated to have deprived Nigerian citizens of up to \$6 billion in future revenues.<sup>23</sup> A requirement for project-level reporting would have had an important effect here: as noted by Dotun Oloko, Nigerian anti-corruption campaigner, "Had Shell and Eni been required to declare their payments to the Nigerian Government, it would have exposed the failure of the money to flow on to the public budget and they would not have executed the deal, knowing that the suspect payments would have been brought to light, enabling watchdogs and investigators to follow the money."<sup>24</sup>

Another example – this time of the positive use of project-level data – came from the DRC. EITI supporting company Glencore was one of the relatively rare examples of companies reporting at the project-level within EITI prior to 2018.<sup>25</sup> Glencore's project-level disclosure in EITI reports played a critical role in providing the data civil society needed to discover that \$75 million worth of payments from Glencore's Katanga mining projects which should have been transferred to the Congolese state had instead been redirected to the Cayman Islands account of a controversial businessman accused of bribery in advancing his own mining interests.<sup>26</sup>

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<sup>19</sup> NRGI, "Statement on EITI Project-level Reporting Requirement and Azerbaijan Suspension":

<https://resourcegovernance.org/news/statement-eiti-project-level-reporting-requirement-and-azerbaijan-suspension>

<sup>20</sup> EITI, "Project-level reporting in the extractives industries": <https://eiti.org/document/projectlevel-reporting-in-extractive-industries>

<sup>21</sup> EITI 2019 Standard, "Requirement 4.7: level of disaggregation": <https://eiti.org/document/eiti-standard-2019#r4-7>

<sup>22</sup> EITI, "Guidance note 29 on project-level reporting" (January 2020): <https://eiti.org/GN29>

<sup>23</sup> See Global Witness reporting on this subject, including "The Scandal of Nigerian Oil Block OPL 245": <https://www.globalwitness.org/en/archive/scandal-nigerian-oil-block-opl-245-0/>; and "Take the Future": <https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/take-the-future/>

<sup>24</sup> Dotun Oloko, 2015: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-107.pdf>

<sup>25</sup> Global Witness: "Glencore's \$75 Million Payments Show Why the EITI Must Enforce Project-Level Reporting by Oil and Mining Companies": <https://www.globalwitness.org/en/blog/glencores-75-million-payments-show-why-eiti-must-enforce-project-level-reporting-oil-and-mining-companies/>

<sup>26</sup> Ibid.

Taken together, such examples of the negative consequences of *not having* project-level disclosure, plus the positive effects for transparency and accountability from *having* project-level disclosure, pushed the EITI to require project-level disclosures at the contract level in all EITI countries.

Since EITI's enforcement of the project-level reporting requirement in recent years, EITI countries have capitalized on this more granular data. Citizens have benefitted in places like Indonesia, where Publish What You Pay Indonesia has led a project to increase the capacity of local CSOs across five sub-national producing regions to use project-level EITI data to identify governance issues along the revenue chain and raise public awareness on the importance of extractive industries transparency.<sup>27</sup> Such efforts help demonstrate some of EITI's expected benefits of project-level reporting, including the opportunity to help companies demonstrate the economic contribution they are making in relation to specific projects and the communities they affect, and enabling citizens of resource rich countries to track cash-flows from a company to the community, enabling communities to assess whether and how a project benefits them.<sup>28</sup>

### **EITI does not obviate need for a strong Dodd-Frank 1504 rule**

Despite these successes and the importance of project-level reporting at the contract level as an EITI requirement, EITI does not obviate the need for a strong Dodd-Frank 1504 rule. Firstly, EITI is a voluntary initiative, and not all countries have opted to implement EITI and its requirements. Some of the world's top resource-rich countries (including Russia, China, Saudi Arabia, Iran, Brazil, the United States, and Australia), as well as countries where resource rents play a significant role as a percentage of GDP (including South Sudan, Libya, Kuwait, Equatorial Guinea, Angola, Azerbaijan, and many others<sup>29</sup>), are currently not a part of the EITI. The significant extraterritorial reach of the Dodd-Frank 1504 legislation is crucial to allow citizens in countries that may never join EITI a chance at seeing how much their natural resources are worth, and providing them with detailed project-level data to monitor revenues from those resources.

On top of the importance of Dodd-Frank 1504's global reach, there is the issue of timeliness of information. Currently, EITI reports across many countries are typically around two years old when published, reflecting the amount of time required to collate and audit relevant information. While EITI is seeking to remedy this lag with a shift towards systematized disclosures on the national level, for now a strong SEC rule implementing Dodd-Frank 1504 could provide an important avenue to more timely data access. In EITI implementing countries, a reporting requirement for U.S. listed companies with a 150-day deadline would ensure that citizens have access to regular, timely payment data to enable ongoing accountability efforts in between EITI report publications. This would enable citizens to follow up on reported payments in a timelier manner so that they can detect malfeasance sooner and prevent ongoing mismanagement of funds. The extended deadlines for submitting reports under the SEC's proposed rule undermines the ability of citizens to access timely information.

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<sup>27</sup> Publish What You Pay, "How has extractive project-level data been used at the subnational level?":

<https://www.pwyp.org/pwyp-resources/pwyp-indonesia-on-using-project-level-data/>

<sup>28</sup> EITI: "Project-level reporting in the extractives industries": <https://eiti.org/document/projectlevel-reporting-in-extractive-industries>

<sup>29</sup> World Bank: "Total natural resources rents (% of GDP)":

[https://data.worldbank.org/indicator/NY.GDP.TOTL.RT.ZS?most\\_recent\\_value\\_desc=true](https://data.worldbank.org/indicator/NY.GDP.TOTL.RT.ZS?most_recent_value_desc=true)

Finally, the EITI, through statements of both the International Secretariat and the Chair, has repeatedly expressed support for Dodd-Frank 1504 over the years, noting the complementary nature of EITI and legislative initiatives like 1504, and encouraging a global reporting standard that would avoid duplication of reporting and ensure consistency in data made available to the public.<sup>30</sup>

## Conclusion

In conclusion, we wish to reiterate that global transparency norms and accompanying market realities have shifted since 2016: project-by-project reporting at the contract level is the global norm. U.S. alignment with this global standard ensures a level playing field for companies, and should cut back on unnecessary reporting costs and effort. The draft rule as it stands does not require sufficient detail to be of use to the groups it should benefit, such as citizens of resource-rich countries and investors.

With our sincere thanks for your time and attention to this matter:

### EITI Civil Society Board Members, 2019-2022:



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<sup>30</sup> See e.d. EITI, 2016 “EITI statement on the SEC’s regulation on mandatory company disclosure”: <https://eiti.org/news/eiti-statement-on-secs-regulation-on-mandatory-company-disclosure>; EITI, 2017 “Statement from the EITI Chair on repeal of SEC’s ‘resource extraction’ rule”: <https://eiti.org/news/statement-from-eiti-chair-on-repeal-of-secs-resource-extraction-rule>; EITI, 2017 “Project level reporting – let’s get granular”: <https://eiti.org/blog/project-level-reporting-lets-get-granular>; EITI 2018, “Project-level reporting in the extractive industries”: <https://eiti.org/document/projectlevel-reporting-in-extractive-industries>