



Kenya Civil Society Platform Oil and Gas (KCSPPOG) & Publish What You Pay (PWYP) Kenya Draft Comments on the Proposed Rule by the Securities Exchange Commission on Disclosure of Payments by Resource Extraction Issuers

16 March 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:

Jay Clayton, Chairman
Robert J. Jackson, Jr., Commissioner
Hester M. Peirce, Commissioner
Elad L. Roisman, Commissioner
Allison Herren Lee, Commissioner

Dear Secretary Countryman:

Thank you for the opportunity to offer comment on the proposed Dodd-Frank 1504 rule. The rule has great potential to help countries like ours and others throughout the world by giving us the ability to hold our governments and the companies operating in our countries accountable for the responsible sale and management of our natural resources. However, in its current form, the rule does little to advance this objective.

Kenya Civil Society Platform Oil and Gas (KCSPPOG) and Publish What You Pay Kenya are civil society organizations that push for transparency in the Kenyan energy sector, analyze data to hold our governments and the companies operating in our country accountable, and train and empower citizens to do the same.

Kenya hosts several Canadian (e.g., Africa Oil Corp) and European companies (Tullow, ENI, Total and others) and so we have had experience using the new payments to governments data that has recently been provided by the mandatory disclosure legislation used in those countries. Our experience has provided us valuable insight into how the proposed Dodd-Frank 1504 rule would work in our fellow countries and in

Kenya should any US-listed companies (that are not also listed in other markets) begin operations here. We are submitting these suggestions in the hopes that you design a law that will provide citizens like our colleagues and us in other countries, who are working to improve transparency and find and use payment data, stronger tools to effectively monitor government revenue and financial flows to ensure accountability, prevent corruption, and ensure that valuable natural resources are used for the betterment of our societies.

I thank you for providing us with an opportunity to comment on the proposed legislation and to share what we have learned from our many years working to improve transparency and governance in Kenya. If we can be of any further help, please do not hesitate to be in touch.

Sincerely,

A handwritten signature in dark ink, appearing to be 'A. Mutsotso', with a small dot at the end.

Angela Mutsotso

for
Charles Wanguhu
Kenya Platform on Oil and Gas Platform (KCSPOG)
Publish What You Pay - Kenya

Specific Rule Component	Comment
<p>A. Definition of “Resource Extraction Issuer”</p> <p>B. Definition of “Payment” (9) The “Not De Minimis” Threshold</p> <p><i>Exemption of smaller reporting companies and emerging growth companies from the scope of Rule 13q-1</i></p>	<p>Kenya’s extractive sector is still in its early stages of development. So far, we have noted a trend of companies entering the sector as smaller exploration companies before subsequently expanding their portfolios when they commercialize resources. This is the case with the Kenyan joint venture (KJV) that is comprised of Tullow Oil BV, Africa Oil, and Total, which began exploring in Turkana County beginning in 2010. During their exploration phase, they reported payments (fees) to the Kenyan government across 5 different projects that totalled \$365,000 (in 2017) and \$345,000 (in 2018).¹ Because Africa Oil is registered on the Canadian stock exchange, and the Canadian Extractive Sector Transparency Measures Act (ESTMA) requires the company to disclose its payments to governments, we are able to assess the impact of these potential “not de minimis” payments and to use this to estimate payments to government in future. The information shared by Africa Oil together with additional information gathered from platforms such as resourcecontracts.org has been used by Kenyan civil society to analyze potential revenues and in discussions around models of subnational revenue management. This was evidenced in two recent reports: KCSPORG Potential Government Revenues from Turkana 2016 Discussion Paper and Oxfam’s Sub-National Payments in Kenya’s Oil Industry 2019 Discussion paper, which proposed an alternative model of revenue-sharing based on the available data.²</p> <p>Various reports from civil society cite the lack of transparency of fiscal terms as a difficulty when analyzing sub-national revenue management models and analyzing various aspects of the sector—both of the reports mentioned above note that the lack of data is a hindrance to civil society and the public’s ability to contribute to the oil and gas conversation. This situation results in reduced accountability for the companies and governments and erodes public trust and goodwill in industry players.</p> <p>While these payments by the KJV would be classified as “not de minimis” under the proposed Dodd-Frank 1504 rule because they are less than the USD 750,000 project threshold, they must be disclosed as they fill a critical transparency gap in countries like Kenya, where the government does not publicly disclose its extractive contracts or receipt of payments from companies.</p>

¹ Africa Oil Corp ESTMA Reports year ending 31 December 2016, 31 December 2017 and 31 December 2018 accessed at <https://www.africaoilcorp.com/s/corporate-responsibility.asp?ReportID=791148>

² KCSPORG Potential Government Revenues from Turkana 2016 Discussion Paper accessed at <https://kcspong.org/wp-content/uploads/2018/08/Revenues-from-Turkana-Oil-April-2016.pdf> and Oxfam’s Sub-National Payments in Kenya’s Oil Industry 2019 Discussion paper accessed at https://cng-cdn.oxfam.org/kenya.oxfam.org/s3fs-public/file_attachments/Sub%20National%20payments%20in%20Kenya's%20oil%20industry-%20Discussion%20Paper.pdf

	<p>Many of Kenya’s contracts are still in the exploration phase, and as such, their payment amounts typically fall below the Dodd-Frank 1504 proposed rule’s de minimis threshold. However, these early exploration amounts are critical to citizens’ understanding of whether extraction contracts will be worthwhile to their country and communities. They must understand, starting in the early exploration phases, whether the companies operating in Kenya are good stewards of their lands and whether they are getting fair value for their resources. Without data from these key early-phase contracts, citizens lack the necessary information to decide whether to provide a company with the social license to operate or to withhold their consent and disallow the project. Knowledge of these early payments also helps project-affected communities advocate to the government about awarding an extraction contract and what the terms of that contract should be.</p> <p>Furthermore, due to the nature of oil and mining deal-making, the risks of corruption are exceptionally high in the early stages of exploration, where smaller lesser-known companies come in to establish initial relations with the central and local governments. For this reason, it is essential that we have access to these smaller payments from lesser-known companies in the early stages of oil sector development.</p> <p>In consideration of the above, we propose that the <i>de minimus</i> payment threshold of \$750,000 should be abolished and the Commission should adopt an approach in line with the standards of Europe and Canada.</p> <p><i>Addressing Competitive Harm Concerns</i> Reporting from smaller companies is vital in ensuring transparency, especially in the global south in countries with newly developing oil and mining industries.</p> <p>Disclosure would ultimately work to the benefit of companies, as early disclosure of even “not de minimis” payments during exploration will allow them to build trust within the communities and countries in which they operate. If citizens are able to see that resource extraction revenue is benefiting their governments and ultimately their communities, and they do not suspect corruption, they will ultimately be happier and more cooperative with the presence of extraction companies on their lands.</p>
<p>C. Definition of “Payment” (1) Taxes</p> <p>12. ... <i>Would allowing disclosure of tax payments at the entity level improperly inflate reported payments?</i></p>	<p>In Kenya, Australian Securities Exchange-listed Base Titanium, which mines and exports rare earth minerals, gives an approximation of payments on their website. Oil and gas companies Tullow (U.K.-listed) and Africa Oil (Canada-listed) report on their different tax payments under EU</p>

	<p>and Canadian laws.³ This information must be available to the public for all oil, gas, and mining companies to allow for greater involvement by civil society and the community.</p> <p>In preparing the <i>Potential Government Revenues from Turkana 2016</i> Discussion Paper KCSPOG had to rely on the fiscal terms in PCSs for adjacent blocks—while some government officials noted that the projections were not completely distorted, it is evident that there is the demand for information from civil society and academia for disaggregated information that shows the different categories of tax paid at the project level in their analyses.</p> <p>To ensure the highest level of transparency, companies should disaggregate their reported payments on a project-by-project basis that is tied to each contract. To ensure clarity and avoid improperly inflating reported payments companies should isolate (i) corporate income tax on payments for different projects and (ii) tax as a result of other business within the jurisdiction, and (iii) a summary of the entity tax.</p>
D. Project definition	<p>In countries like Kenya with revenue sharing, it is vital to isolate these categories. In Kenya, government revenues from the petroleum sector are, by law, to be shared at the national (75%), county (20%) and community (5%) (sub-national) level.⁴ Disaggregating payments in this way would allow citizens to track how different taxes affect their revenue share from the extractives sector. In the Kenyan context this is particularly important as the Mining Act, 2016 in Section 183 (5) dictates that mining royalties shall be shared 70% to National Government, 20% County Government and 10% to host community. However, communities do not have access to information on how much tax Base Titanium (the mining company) pays and among other things—how much they will receive in royalties. This situation with Base Titanium has resulted in host communities demanding for information from the government and in 2020 affected Base Titanium's plans for expanding operations as the community claims they are not benefiting from the mining operations.⁵</p> <p>Additionally, it is vital to note that host communities in Kwale are yet to receive their share of royalties. Although the Kenyan State Department of Mining is working on regulations to allow for</p>

³ Base Titanium Website, Economic Contribution accessed at <http://basetitanium.com/kwale-project/project-economic-contribution>; Tullow Oil, “Transparency and Disclosure,” https://www.tulloil.com/Media/docs/default-source/5_sustainability/tullow-oil-transparency-disclosure-2018.pdf?sfvrsn=2; Africa Oil Corp, *ESTMA Report*, 3 April, 2019, <https://www.africaoilcorp.com/i/pdf/2018-aoi-estma.pdf>.

⁴ Matt Smith, “Kenya Enters the Petroleum Business,” *Petroleum Economist*, 26 September 2019, <https://www.petroleum-economist.com/articles/politics-economics/africa/2019/kenya-enters-the-oil-business>.

⁵ The Star, ‘Kwale residents demand bigger share of mining returns’, 9 December 2019 accessed at <https://www.the-star.co.ke/counties/nairobi/2019-12-09-kwale-residents-demand-bigger-share-of-mining-returns/> this article illustrates the demand for information from communities.

The Star, ‘Royalties, land problem slows Base Titanium expansion’, 13 February 2020 accessed at <https://www.the-star.co.ke/business/kenya/2020-02-13-royalties-land-problem-slows-base-titanium-expansion/> illustrates the issues Base Titanium is facing while trying to expand their operations.

	<p>the disbursement to communities, communities and county governments must be aware of the amount of money they should be receiving.⁶ This information will allow them to: (i) commence setting up sub-national revenue management structures and (ii) enable early participatory planning for the accrued revenues that will be paid out as a lump sum.</p> <p>The current proposed definition of project in the rule would not allow communities to track the payments. These are owned under this subnational revenue sharing scheme. If communities cannot track the payments made for the project in their locality, they cannot verify that they are getting the correct royalty distribution. If companies are only required to report at the national and major subnational level, the project-specific payment information needed to track the community share would not be available.</p> <p>In the 2016 version of the Dodd-Frank 1504 rule, the SEC wrote, “Project-level reporting at the contract level could potentially allow for comparisons of revenue flow among different projects, and the potential to engage in cross-project revenue comparisons may allow citizens, civil society groups, and others to identify payment discrepancies that reflect potential corruption and other inappropriate financial discounts.”⁷ This information is vital for Kenyans, and we hope that you will keep with your original thinking and require this level of disclosure.</p> <p>The information provided under Section 13 (q) of the Securities Exchange Act is intended for stakeholders outside governments to understand the economic status of the project and use this to hold companies and governments to account. It is thus vital that payments to foreign governments should be clearly indicated including payments for specific projects and payments to sub-national governments clearly specified.</p> <p>In Kenya, revenues are shared at the national level, county level, and host community level. To understand why one county gets more than another or one community receives a larger share, companies must disaggregate their payment data for each individual project. As elaborated in the comment to <u>C. Definition of “Payment” (1) Taxes</u> the county governments and host communities affected by Titanium have not received their share of royalties, but there is already agitation for communities to receive a larger percentage. As the Kwale Mineral Sands Project has two active dunes there, there is a possibility of disagreements at the sub-national level if one community</p>
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⁶ Standard Digital, ‘Lack of rules delay remittance of royalties to counties and locals’, 27 February 2018 accessed at <https://www.standardmedia.co.ke/article/2001271313/why-the-government-has-not-paid-communities-mineral-royalties>. This article provides insight on the regulatory situation in Kenya's mining sector and why communities and County Governments are yet to obtain their share of revenues.

⁷ Securities and Exchange Commission, “17 CFR Parts 240 and 249b, Release No. 34-78167; File No. S7-25-15, RIN 3235-AL53,” p. 78, <file:///Users/aubreymenard/Downloads/2016%20rule.pdf>.

	receives higher royalties based on the dune’s productivity than another. ⁸ To avoid conflict and possible civil unrest by communities that would adversely affect companies, companies and governments should transparently report payment data for each individual project so that communities can see their shares clearly.
E. Definition of “Payment” (2) Royalties, Fees and Bonuses	<p>KCSPOG supports the disaggregation of payments into categories. In particular, companies should be required to state whether fees include rental fees, entry fees, and concession fees and whether bonuses include the signature, discovery, and production bonuses and other categories as proposed. This disaggregation will make it possible for the public to ascertain the money paid to the different levels of government, and thus enable it to hold different levels of government accountable for these payments. In 2016, the Auditor-General of Kenya noted that there is a need for a policy that ensures auditors general have access to auditable information in the oil and gas sector, and so having requirements for differentiated payment reporting will be vital in supporting the work of audit institutions in the global south.⁹</p> <p>In countries such as Kenya, where the government does not publicly disclose contracts, communities still need to know how much money is paid to the government in the form of surface fees when advocating for community land rights.</p>
F. Definition of “Subsidiary” and “Control” <i>Request for comment 32</i>	<p>As is also required under ESTMA, Dodd-Frank 1504 should require entities to report on any projects that they are involved in, even if they are not the operator or have main control over the venture.</p> <p>While we agree that the company may have to collect information from the other companies who may not be subject to the Act, it is in the spirit of the Act to ensure transparency of US companies in the jurisdictions in which they operate. For example, Africa Oil, a Canadian Company, which owns only a 25 percent stake in the Kenyan Joint Venture Upstream Project in Kenya, is required to make full project disclosure under ESTMA. Their participation in the KJV requires them to make project-level disclosures which, forces the other companies to disclose. All the companies in the KJV have been able to meet these transparency requirements without difficulty, and so a similar requirement in the Dodd-Frank Act 1504 is reasonable.</p>
G. Exemptions from Compliance	Introducing exemptions based on conflict of laws and pre-existing contracts is counterproductive for Section 1504 of the Dodd-Frank Act. Such exemptions could be used by governments across

⁸ The Kwale Mineral Sands Project has 2 active dunes as stated on the Base Titanium website (<http://basetitanium.com/kwale-project/project-overview>) Further, numerous communities have been relocated to allow for the project, and during the distribution of royalties the Company and Government need to be transparent on how much each community gets

⁹ Daily Nation, ‘Lack of policy hampering access to information from extractive industries for audit’, 24 August 2016 accessed at <https://www.nation.co.ke/counties/mombasa/Lack-of-policy-to-blame-for-poor-audit-of-extractive-industries-/1954178-3356770-gbeduiz/index.html>

<p><i>Exemption for compliance because of conflict of laws or Pre-existing contracts</i></p>	<p>the world to enact secrecy laws around their extractives industries and base future contracts on pre-existing contracts to ensure there is no disclosure. In Kenya, after the passage of the 2010 Constitution, all oil, gas and mining contracts were to be made public. However, KCSPOG has continually requested these contracts, and the government argues that because these contracts were signed before 2010, they cannot be released.¹⁰ Such exemptions will be used by governments and companies to advance arguments that support a lack of transparency within the industry.</p> <p>As has been previously noted by the Kenyan Auditor General, lack of transparency in the sector hampers their work and thus results in government managing revenues from the extractive sector inefficiently.¹¹ KCSPOG strongly requests that these two additional exemptions be reversed as we have strong reason to believe, based on past events, that this would have a negative impact on advancing transparency efforts in Kenya's extractive industries.</p>
<p>H. Treatment for Purposes of the Exchange Act and Securities Act</p>	<p>Companies must file reports directly with the Commission. This will make it easier for the Commission to hold companies to account for the accuracy of information provided, ensure that it doesn't change over time, that it follows a standard reporting format, and that it is all available in one place. While companies are encouraged also to publish these reports on their website, this cannot be substituted for official filing.</p> <p>Additionally, to enforce the transparency objectives of the Act, there must be strict liability for companies. Without liability, the rules are ineffective, as it is at the discretion of companies to fully comply with the rules and the Commission's directives.</p>

¹⁰ The Draft Transparency and Accountability Framework and Action Plan for Kenya's Petroleum Sector published on 3 May 2019 provides for Partial Disclosure of Contracts signed before 2010 which KCSPOG has challenged. The final Framework has not been developed but introducing the 2 exemptions will enable governments to further such arguments against full transparency in the extractives sector.

¹¹ Daily Nation, 'Lack of policy hampering access to information from extractive industries for audit', 24 August 2016 accessed at <https://www.nation.co.ke/counties/mombasa/Lack-of-policy-to-blame-for-poor-audit-of-extractive-industries-/1954178-3356770-gbeduiz/index.html>