SIERRA CLUB

Chair and Commissioners
Securities and Exchange Commission
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Submitted via e-mail to rule-comments@sec.gov

March 14, 2020

Re: File Number S7-24-19: Comments on Proposed Rule 13q-1
"Disclosure of Payments by Resource Extraction Issuers"

Sierra Club respectfully submits the following comments on the Securities and Exchange Commission's ("SEC") proposed rule 13q-1 on "Disclosure of Payments by Resource Extraction Issuers."

I. The SEC Cannot Rely on the Congressional Review Act to Justify a Rule that Fails to Comply with the Underlying Statute.

In the January 15, 2020, Federal Register notice accompanying publication of its draft rule on "Disclosure of Payments by Resource Extraction Issuers" (the "Draft Rule"), the SEC takes the position that its discretion in crafting the rule has been significantly constrained by the Congressional Review Act ("CRA"). This is incorrect and, as a result, the entire Draft Rule is deeply flawed and fails to comply with the requirements of Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). 15 U.S.C. § 78m(q).

The SEC claims in the Federal Register notice that it intends the Draft Rule to satisfy the agency's obligations under the Dodd-Frank Act while complying with the CRA's prohibition against an agency issuing a rule that is "substantially the same" as a rule blocked under that statute. 85 Fed. Reg. 2522 at 2526 (Jan. 15, 2020). The CRA applies here because in February

2017 Congress passed, and the President signed, a Resolution of Disapproval under that statute which had the effect of blocking the SEC's most recent prior attempt to comply with Section 1504 of the Dodd-Frank Act from 2016 (the "2016 Rule"). *See* Pub. L. 115–4 (Resolution of Disapproval blocking the 2016 Rule 13q-1). Unfortunately, the SEC's entire approach to the Draft Rule is based on an overly broad interpretation of the "substantially the same" prohibition that has led the agency to inappropriately constrain the range of policy options considered. In fact, the SEC remains bound by the statutory obligations of the Dodd-Frank Act in formulating the rule.

The root of the SEC's error is that the agency has given too much weight to unverified statements of individual members of Congress and not enough weight to the actual direction of Congress in the clear statutory language of the Dodd-Frank Act and to facts available on the record. The SEC's interpretation also runs directly counter to fundamental canons of statutory interpretation and must be rejected. Those canons should have led the SEC to conclude that it must continue to give maximum effect to the direct mandates in the Dodd-Frank Act. Because Congress failed to adopt a formal statement in the Resolution of Disapproval clarifying its expectations for the SEC's formal rulemaking, and has declined to amend the mandate of the Dodd-Frank Act itself, the SEC must continue to look to the direction provided in the Dodd-Frank Act. Applying a narrower interpretation of the "substantially the same" prohibition would allow the SEC to satisfy Congress' mandate from the Dodd-Frank Act and the factual record already established in the SEC's earlier rulemaking.

As a result, the SEC may not finalize the rule as drafted. Instead, the SEC must promulgate a rule that more fully implements the mandate of the Dodd-Frank Act by imposing tracking, recording, and disclosure requirements on a per contract basis.

A. In the Federal Register notice, the SEC overstates the extent to which it is constrained by the CRA's prohibition against issuing a rule that is "substantially the same" as a blocked rule.

In its Federal Register notice for the Draft Rule, the SEC repeatedly states its belief that its inherent discretion in crafting the rule is limited due to the Resolution of Disapproval passed by Congress under the CRA in February 2017 which had the effect of blocking implementation of the 2016 Rule. 85 Fed. Reg. at 2526. In describing the approach taken in preparing the Draft Rule, the SEC repeatedly invokes the CRA's "substantially the same" prohibition. *See* 85 Fed. Reg. at 2526-2528, 2537-2538, 2552-2552. But in so doing, the SEC adopts an overly broad interpretation of the CRA's "substantially the same" prohibition.

The SEC claims that its goal with the new rulemaking was "to achieve an appropriate balance between implementing the statute as required by Congress and addressing the concerns expressed by commenters and members of Congress." *Id*. at 2528. The SEC specifically states its position that its "discretionary choices have been informed, in part, by the disapproval of the 2016 Rules under the CRA, and in particular, the concerns expressed by members of Congress about the compliance costs and burdens of the 2016 Rules and the CRA's restrictions on promulgating a substantially similar rule." *Id*. at 2552. The SEC properly recognizes that Congress failed to provide any formal guidance on the scope of the "substantially the same" prohibition, either generally in the CRA itself, or specific to this rule in the 2017 Resolution of Disapproval. *Id*. at 2526. In an attempt to fill this gap, the SEC states that it "looked to the concerns raised by members of Congress during the floor debates on the joint resolution to assist us in developing a rule that is not 'substantially the same' as the 2016 Rules." *Id*.

Ultimately, the SEC's approach is deeply flawed and in violation of the Administrative Procedure Act and the statutory mandate in the Dodd-Frank Act because it improperly elevates the perspectives of a handful of members of Congress over the express language of the Dodd-Frank Act, and fails to provide independent analysis or corroboration for those perspectives.

B. The meaning of the CRA's "substantially the same" prohibition remains undefined, but is certainly narrower than the interpretation adopted by the SEC.

The CRA itself offers limited insight or guidance on the scope of the prohibition against new rules that are "substantially the same" as rules subject to a Resolution of Disapproval. In the more than two decades since the law's passage, Congress has done little to fill that gap or define the inherently ambiguous phrase. What is clear is that the prohibition is not absolute, and agencies retain significant latitude in issuing new rules.

The prohibition in the CRA states only that "a new rule that is substantially the same as [a rule subject to a resolution of disapproval] may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." 5. U.S.C. § 801(b)(2). There is no explanation of what factors are to be considered in determining whether the new rule is "substantially the same" as the prior rule, nor is there any explanation of how similar a new rule may be before it crosses into "substantial" similarity.

The legislative history of the CRA offers little additional clarity. There was no formal Congressional debate on the CRA itself. A subsequently filed explanatory statement by the co-sponsors of the Act notes that because the law "did not go through the committee process, no other expression of its legislative history exists," and that "no formal legislative history document was prepared to explain the legislation or the reasons for changes in the final language negotiated between the House and Senate." 142 Cong. Rec. S3683 (April 18, 1996) (joint statement of Sens. Nickles, Reid, and Stevens).

The joint statement itself devotes very little discussion to the meaning of the "substantially the same" prohibition. The statement provides only that "Subsection 801(b)(2) is necessary to prevent circumvention of a resolution [of] disapproval." *Id*. at S3686. That statement makes clear that agencies may not attempt to re-issue a blocked rule, but offers little additional insight into the scope of the prohibition.

The remainder of the two paragraphs devoted to the "[e]ffect of enactment of a joint resolution of disapproval" make clear only that the scope of the prohibition will depend in large part on the original statute giving rise to the agency's rulemaking authority. The joint statement specifically provides that the "substantially the same" prohibition "may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule." *Id.* The statement also makes clear that the authors of the CRA intended that Congress, when issuing a Resolution of Disapproval, provide specific guidance to the agency on the contents of any subsequent rule, with a particular "focus on the law that authorized the rule," so as to "make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval." *Id*.

Where, as here, Congress fails to provide any guidance to the agency in the Resolution of Disapproval, the agency must continue to look to the original statute. In such a situation, "[i]t will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded *under the original law*." *Id*. (emphasis added). In this instance, that "original law" is the Dodd-Frank Act.

The plain text of the CRA, read as a whole, also supports a narrower reading of the "substantially the same" prohibition than that relied on by SEC in the Draft Rule. For example, Section 803 of the Act provides a one-year extension for any statutorily-imposed deadline for promulgation of a rule. 5 U.S.C. § 803. One year is an exceedingly short time for an agency to prepare an entirely new rule. Agencies typically take several years to finalize rules, between issuance of a notice of proposed rulemaking and publication of a final rule. *See* Richard J. Pierce, Jr., Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis, 80 Geo. Wash. L. Rev. 1493, 1496 (2012) (finding that "most rulemakings" are "actually completed within six to eight years"). Here, the SEC took just under three years to prepare the Draft Rule, measuring between the date President Trump signed the Resolution of Disapproval (February 14, 2017) and the date of publication of the Draft Rule in the federal register (January 15, 2020). *See* 85 Fed. Reg. at 2525. Prior to that, the SEC had also taken just under three years to promulgate the 2016 Rule, measuring between the date a federal court had invalidated the prior rule (July 2, 2013), and the date the SEC issued the final 2016 Rule (June 27, 2016). *See id*. at 2523. By providing agencies with only one additional year to issue a new rule following a Resolution of Disapproval, Congress clearly did not contemplate that agencies would need to make major changes to a rule in order to avoid violating the "substantially the same" prohibition.

C. The legislative history of the Resolution of Disapproval for the 2016 Rule offers little guidance, and does not support SEC's excessively narrow interpretation of its authority.

When Congress passed the Resolution of Disapproval, it failed to adopt or include a statement expressing the view of Congress as a whole regarding the portions of the blocked 2016 rule that a majority of senators and representatives found objectionable. This lack of clear guidance is counter to the intention of Congress when it passed the CRA. In the absence of a formal statement adopted by Congress, the statements of individual members do not provide SEC with a sufficiently clear understanding of what aspects of the 2016 rule must be changed, and which may be retained. Accordingly, the Dodd-Frank Act statute remains the only clear expression of Congress' intent for the contents of the rule.

1. Congress failed to provide any guidance when it issued the Resolution of Disapproval.

At the same time that Congress passed the CRA, the Act's primary authors published an "explanatory statement" describing how various parts of the act were intended to function. 142 Cong. Rec. 8196-8201 (1996) (joint statement of Sens. Nickles, Reid, and Stevens). That explanatory statement provides a brief discussion of how the "substantially the same" prohibition should function in practice, including the duty of Congress to provide guidance to the agency. 142 Cong. Rec. S3683 at S3686 (April 18, 1996). Specifically, the explanatory statement expressed the authors' intent that Congress "make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval," with a particular focus on "the law that authorized the rule." *Id.*

The Resolution of Disapproval on the 2016 SEC rule, however, lacks any preamble or other guidance on which aspects of the 2016 Rule Congress found objectionable or which parts of the rule would need to be changed to render a new rule not "substantially the same." This lack of clear Congressional guidance is particularly problematic given the clear mandate of the Dodd-Frank Act that the SEC issue a rule and the Act's requirements for the content of that rule.

The statements of individual representatives and senators in the Congressional Record that reference the Resolution of Disapproval do not provide the sort of reliable indication of Congressional intent envisioned by the CRA's authors. At best, the Congressional Record provides indications of why individual members or senators voted for or against the Resolution of Disapproval, but these statements fail to coalesce into meaningful or usable guidance.

2. Statements of individual representatives carry little weight, cannot control over statute.

In contrast to preamble language inserted into a Congressional act, or a formal report from the drafters of a statute, statements from individual lawmakers provide insight only into the opinions of the respective lawmakers. *See Zuber v. Allen*, 396 U.S. 168, 186 (1969) ("A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen."). Indeed, the Supreme Court has made clear that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

Here, the legislative history of the Resolution of Disapproval for the 2016 Rule contains statements from 21 Senators and Representatives, plus a letter signed by an additional six Senators. *See* 163 Cong. Rec. H848 (Feb. 1, 2017); 163 Cong. Rec. S634 (Feb. 2, 2017). Of these, eight Representatives and three Senators, plus the six letter writers, offered statements in support of the resolution, indicating their displeasure for the 2016 Rule. Five Representatives and five Senators opposed the resolution, offering support for the 2016 Rule. The SEC, however, cites to the statements of just five Representatives and one Senator, plus the additional multi-Senator letter, all of whom supported the resolution. The SEC fails to cite to or even acknowledge any of the statements made in opposition to the resolution.

Although 422 Representatives and 99 Senators voted on the Resolution of Disapproval, the SEC has taken the position that the statements of just eight Representatives and nine Senators should provide the sole guidance to the Agency on what it may or may not include in the updated rule. This approach finds no support in the CRA itself. The SEC's approach also has the improper and inappropriate effect of giving greater weight to the personal views of these 17 members of Congress than to the actual statutory text of the Dodd-Frank Act. This is particularly notable given that despite passage of the Resolution of Disapproval, Congress has not amended the text of the Dodd-Frank Act itself.

a. The cherry-picked statements relied on by the SEC are not reliable or binding on the agency.

The SEC relies primarily on a statement by Rep. Hensarling relating to the estimated cost of implementing the 2016 Rule. 85 Fed. Reg. at 2525, n. 54-55. But Rep. Hensarling's reference to this figure is misleading and contains unsubstantiated information.

In his statement from floor debate on the Resolution of Disapproval, Rep. Hensarling stated that "The SEC has estimated that ongoing compliance costs for his rule could reach as high as $591 million annually," and that "That is $591 million every year that could better be used to hire thousands more Americans in an industry where the average pay is 50 percent higher than the U.S. average. Literally we could be talking about 10,000 jobs on the line for this ill-advised rule." *Id*. (quoting 163 Cong. Red. H.848).[1] The SEC also quotes a similar, though less specific, statement from Rep. Wagner that the 2016 Rule "will make it more expensive for our public companies that are involved with energy production to be competitive overseas with foreign state-owned companies." *Id.* at 2525-2526, n. 56 (quoting 163 Cong. Rec. H.851).

When discussing these statements by individual Representatives, the SEC fails to note that Rep. Hensarling was citing only the upper estimate for the cost of implementation from the Federal Register notice for the final 2016 Rule, and had omitted the lower estimate of $96 million as well as the average estimate of $267 million. *See* 81 Fed. Reg. at 49410. The SEC also provides no discussion or analysis of Rep. Hensarling's references to the average pay in

[1] The SEC citation for this quote is incorrect. Although Rep. Hensarling expressed similar views, the quoted language actually comes from Rep. Wagner at 163 Cong. Rec. H.851.

extractive industries compared to the U.S. average, or the assertion that 10,000 jobs could or would be created in the absence of the 2016 Rule. The SEC thus accepts as true and binding statements regarding the costs of implementing the 2016 Rule that fail to accurately reflect the actual cost estimates. [2]

The SEC also relies on other statements in the legislative history that raise concerns that are outside the scope of the rulemaking or beyond the SEC's authority. For example, the SEC quotes a statement from Rep. Hensarling that "This is just one regulation out of thousands that are burdening our companies, our job creators, and are costing our households by one estimate, over $14,000 a year." 85 Fed. Reg. at 2525-2526, n. 56 (quoting 163 Cong. Rec. H.851). Reference to this statement is inappropriate because the overall cost of regulations is not at issue in this rulemaking, and because the SEC has made no effort to calculate the cost of implementing the 2016 Rule as specifically applied to an individual U.S. household. The SEC also cites to a statement by Rep. Huizenga suggesting that section 13(q) of the Dodd-Frank Act is outside the SEC's "core mission." *Id.* at 2526, n. 57 (quoting 163 Cong. Rec. H.850). Even if that statement were true—and it is wholly unsupported and highly suspect—the Dodd-Frank Act remains the law and the SEC is bound by its mandate.

b. The SEC ignores statements by members of Congress that provide important additional perspective on the underlying statute and the 2016 Rule.

Statements of individual members of Congress are least informative where the record also contains additional statements that are contradictory or offer an alternative interpretation. As the D.C. Circuit has noted, "where . . . congressional debates reflect individual interpretations

[2] Although the SEC elsewhere in the Federal Register notice for the Draft Rule references the cost estimates for the final 2016 Rule, it does not do so in the context of Rep. Hensarling's statements. 85 Fed. Reg. at 2563.

that are contradictory and ambiguous, they carry no probative weight." *SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 77 (D.C. Cir. 2015) (*quoting March v. United States*, 506 F.2d 1306, 1314 n. 31 (D.C.Cir.1974)).

Here, the legislative history contains statements from additional Members of Congress that directly contradict or challenge the statements relied on by the SEC. For example, Rep. Waters made statements demonstrating how the 2016 Rule already included accommodations to reduce the economic impact of the Rule, stating that "After 5 years of robust debate and input, the final rule accommodated a number of industry concerns, providing companies with a generous 4-year phase-in period and a case-by-case exemption process for companies that face implementation challenges. The SEC also allowed companies to comply with the disclosure by using a report prepared for other substantially similar disclosure regimes, which include regimes in the European Union and Canada." 163 Cong. Rec. H848, H849 (Feb. 1, 2017). Rep. Foster made statements highlighting support for the 2016 Rule from a variety of investors, stating "Private and public institutional investors—representing trillions of dollars invested on behalf of American families—voiced support to the SEC in favor of the rule." 163 Cong. Rec. at H852.

The legislative history specifically includes statements that directly challenge the cost figures quoted by Rep. Hensarling and cited by the SEC in the notice for the Draft Rule. Senator Cardin stated: "I heard the numbers, the cost of compliance, and I would challenge that. I would challenge the cost of compliance numbers because this information is already available. Companies know where their money is going. It is a normal business issue. I heard it is going to cost hundreds of millions of dollars of contracts. I don't want to minimize the cost, but as a percentage of the business they are doing, it is minor. The benefit we get if the money can go to the people and deal with these horrible conditions that we see in these resource-wealthy countries, then it is certainly worth the effort." 163 Cong. Rec. S634, S640 (Feb. 2, 2017). The SEC has made no effort to reconcile or assess the statements of Rep. Hensarling and Sen. Cardin.

3. Any factual assertions made by representatives must be separately verified by SEC.

To the extent any member of Congress made any factual or legal statements regarding the 2016 rule, SEC has a duty to independently verify those statements.

When an agency such as the SEC undertakes a rulemaking, it must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 30 (1983). Ultimately, the final rule must be "the product of reasoned decisionmaking." *Id*. at 52. This is no less true for a rulemaking seeking to replace a rule blocked under the CRA than it would be for an entirely new rule. The SEC remains bound by the requirements of the Administrative Procedure Act. As the Supreme Court has stated, "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*. at 43. In the specific case of the Disclosure of Payments Rule, the SEC is also bound by the requirements and specifications that Congress included in the provision of the Dodd-Frank Act requiring the agency to promulgate the rule.

Nothing in the CRA modifies these requirements or constraints on the SEC. Because the original requirements for the rule set forth in the Dodd-Frank Act remain in effect, the SEC must give effect to those statutory mandates. Any factual findings or other determinations made by the agency, including projected costs, must be fully documented and consistent with the evidence. The SEC may not hide behind the CRA to issue a rule that would not otherwise be permissible.

Here, the SEC has inappropriately accepted as true statements made by members of Congress without independently verifying the truth or accuracy of those statements. The SEC has expressly acknowledged that its changes to the 2016 Rule were based on statements made by individual members of Congress during floor debate on the Resolution of Disapproval, noting that "Members of Congress who supported the resolution of disapproval expressed the view that the 2016 Rules would impose undue compliance costs on companies, undermine job growth and burden the economy, and impose competitive harm to U.S. companies relative to foreign competition." 85 Fed. Reg. 2552.

Specifically, as discussed above, the SEC relied extensively on a statement by Rep. Hensarling claiming that annual compliance costs could reach as high as $591 million per year. *Id*. at 2525 n. 54 (quoting 163 Cong. Rec. H.848). The source of Rep. Hensarling's figure appears to be the Federal Register notice for the final 2016 Rule. But Rep. Hensarling failed to state, and the SEC has failed to clarify, that the 2016 notice also provided a much lower figure of $96 million for the lower bound estimate. *See* 81 Fed. Reg. at 49410.

The SEC claims that the primary motivation for the changes to the 2016 Rule is to reduce the implementation costs and thereby render the new rule not "substantially the same" as the blocked rule. *See* 85 Fed. Reg. at 2552 ("the changes we are making from the 2016 Rules are intended to mitigate those [cost of compliance] burdens"). But the SEC has made no effort whatsoever to actually determine whether or how its proposed changes will lower the implementation costs. This plain fact reveals the flimsiness of the pretext the SEC relies on when it cites to the CRA and the Resolution of Disapproval.

D. General principles of statutory construction support a narrow reading of the substantially-the-same prohibition, and the dictates of the Dodd-Frank Act statute still control.

Because Congress failed to provide clear guidance via the 2017 Resolution of Disapproval regarding what the SEC must or must not include in a revised rule, the primary authority on the rule's contents remains the Dodd-Frank Act. Well-established canons of statutory construction maintain that a later-enacted law should not be interpreted as amending an earlier statute unless Congress so states, and that a more specific provision should control over a more general one. Both of those canons support a narrow reading of the Resolution of Disapproval that allows the dictates of the Dodd-Frank Act to continue to direct the contents of the final rule.

1. Well-established canons of statutory construction support a narrow reading of the Resolution of Disapproval.

Congress has spoken twice regarding the rulemaking the SEC must undertake to implement Section 1504 of the Dodd-Frank Act: first, in 2010 via the Dodd-Frank Act itself (Public Law 111–203 (July 21, 2010)); and then in 2017 via a Resolution of Disapproval blocking SEC's 2016 rule (H.R.J. Res. 41, 115th Cong. (2017)). When tasked with interpreting a statute, including resolution of any potential conflicts with a separate statute, courts regularly rely on certain well-established canons of statutory construction. When applied to the 2010 Dodd-Frank Act and the 2017 Resolution of Disapproval, these canons clearly support an interpretation that gives greater effect to the Dodd-Frank Act.

One canon states that absent clear intent by Congress to overturn a prior law, legislation should not be read to conflict with the prior law. This is because, as the Supreme Court has recognized, courts "are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also Pittsburgh & Lake Erie R. Co. v. Ry. Labor Executives' Ass'n*, 491 U.S. 490, 510, (1989).

Here, the one-sentence Resolution of Disapproval is entirely silent as to any effect on the Dodd-Frank statute or its mandate to the SEC to complete a rulemaking. The resolution reads, in its entirety: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Securities and Exchange Commission relating to "Disclosure of Payments by Resource Extraction Issuers" (published at 81 Fed. Reg. 49359 (July 27, 2016)), and such rule shall have no force or effect." Pub. L. 115–4. This enactment, then, cannot have modified the specific rulemaking requirements of the Dodd-Frank Act.

In fact, two Senators who voted in favor of the Resolution of Disapproval made clear in their comments during the Senate debate that the resolution would *not* repeal Section 13(q) of the Dodd-Frank Act which creates the disclosure requirement, nor would it eliminate the SEC's obligation to promulgate a replacement rule. *See* 163 Cong. Rec. S635 (daily ed. Feb. 2, 2017) (colloquy of Sens. Isakson and Crapo). A letter sent by an additional six Senators, similarly reference the Dodd-Frank Act's ongoing "statutory mandate."[3]

This canon is especially applicable here given the profound difference in the nature of the two enactments between the Dodd-Frank Act and the Resolution of Disapproval. It is particularly unlikely that Congress would intend to modify the extremely complex statutory and regulatory

[3] https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/cll6-3080156-161926.pdf (February 2, 2017, letter from Senators Corker, Collins, Rubio, Isakson, Graham and Young to Acting SEC Chairman).

scheme of the Dodd-Frank Act via the CRA's expedited legislative process and the bare bones Resolution of Disapproval.

A separate canon states that a more specific provision or enactment will control over one that is more general. Indeed, "it is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

Here, Section 13(q) of the Dodd-Frank Act provides detailed instructions to the SEC on the nature of the rule that it must promulgate. In addition to the direct mandates to the SEC regarding contents of the rule to be promulgated, Section 13(q) includes definitions of multiple terms and even specifies the data formats to be required. In sharp contrast, the Resolution of Disapproval consists of a single sentence indicating the fact that Congress has acted to disapprove the 2016 rule.

E. The statutory mandate provided by the Dodd-Frank Act still controls, but the Draft Rule fails to comply with that mandate.

Whatever final rule the SEC issues must comply with the requirements of the Dodd-Frank Act. The Draft Rule fails to achieve this because it includes provisions that will frustrate the most fundamental purposes of the Act.

1. The definition of "project" in the Draft Rule is inconsistent with the Dodd-Frank Act.

In the Draft Rule, the SEC expressly declines to follow the more granular "contract-level project definition" employed in the 2016 Rule. 85 Fed. Reg. at 2536-2540. Instead, the SEC has proposed a different definition of "project" that would allow resource extractors to aggregate information based on three criteria: "(1) The type of resource being commercially developed; (2) the method of extraction; and (3) the major subnational political jurisdiction where the commercial development of the resource is taking place." *Id*. at 2536-2537. This approach would fundamentally undermine the entire purpose of the Dodd-Frank Act by masking the most important and relevant information for which disclosure is required.

The definition of "project" in the Draft Rule would allow companies to continue to shield corrupt or suspect payments. The only way to achieve the Dodd-Frank Act's transparency and anti-corruption purposes is through contract-level disclosures. This is because corruption occurs at the contract level.

The rationales provided by the SEC for its choice to shift from the contract-level project definition in the 2016 Rule to the aggregated definition in the Draft Rule are not convincing and do not relieve the SEC of its duty to issue a rule that fully complies with the requirements of the Dodd-Frank Act. The SEC primarily relies on the CRA and the statements made by members of Congress to support the change to the definition of "project." *Id*. at 2537-2538. The SEC summarizes those comments as raising "concerns" with "the costs, burdens, and risks of competitive harm related to tracking, recording, and disclosing the payment information on a per contract basis." *Id*. at 2537 (citing to comments made by Rep. Hensarling and Rep. Williams). As discussed above, the comments of individual representatives cannot outweigh express statutory language. That is particularly true where, as here, those comments contain unsubstantiated claims.

The Dodd-Frank Act expressly states that the purpose of the mandated rule is to "support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals." 15 U.S.C. § 78m(q)(2)(E). This commitment to transparency is only possible via contract-specific disclosures. A suspect or inappropriate payment cannot be detected when aggregated with other payments at the national and major subnational level.

Even assuming that the SEC had discretion to adopt an aggregated approach, the SEC has failed in the Federal Register notice to demonstrate that that approach is warranted. The SEC is required to demonstrate that its chosen approach is the result of "reasoned decision making." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 52. But here, the SEC has merely quoted members of Congress without providing any of its own analysis. The SEC cites alleged "costs, burdens, and risks of competitive harm," but fails to substantiate any of those claims. 85 Fed. Reg. at 2537. Indeed, the SEC expressly states that "At present, we do not have data that will allow us to quantify reliably the costs (either direct compliance costs or indirect competitive harm) resulting from the proposed rules." *Id*. at 2563. In the absence of such evidence, the SEC may not diverge from the approach mandated under the Dodd-Frank Act statute.

2. Proposed exemptions in the Draft Rule also conflict with the Dodd-Frank Act.

Other provisions proposed in the Draft Rule also run counter to the requirements of the Dodd-Frank Act and therefore may not be finalized. This includes the proposal to exclude from disclosure all payments for a project if the aggregate project payments for all types of payments for that individual project are below $750,000. *Id.* at 2534. The SEC has also failed to articulate a basis for either the exemption or the specific $750,000 figure, and has not offered any evidence in support of this approach. The SEC has also proposed an exemption for situations where disclosure would allegedly conflict with foreign laws that prohibit disclosure. *Id*. at 2543. Again, the SEC has failed to substantiate the need for this exemption. Indeed, it appears that no such prohibitive laws exist. But the inclusion of such an exemption may invite the adoption of such laws by foreign countries.

Similar to the modified definition of “project,” these proposed exemptions would prevent the rule from satisfying that Dodd-Frank Act’s purpose of promoting transparency. As a result, these provisions should not be included in any final rule.

F. Conclusion

The SEC has proposed a Draft Rule that diverges significantly from the 2016 Rule in ways that compromise its ability to satisfy Congress’s statutory mandate as expressed in the Dodd-Frank Act. The primary rationale offered by the SEC for these areas of divergence is the CRA’s prohibition against issuing a new rule that is “substantially the same” as a blocked rule. But the SEC’s interpretation of this CRA language is overly narrow and conflicts with the relevant legislative history and canons of statutory construction. Because Congress failed in the Resolution of Disapproval to provide any guidance to the SEC on what provisions the agency may or may not include in the updated rule, the SEC remains bound by the mandates of the Dodd-Frank Act. Contrary to the opinion expressed by the SEC in the Federal Register notice accompanying the Draft Rule, unsubstantiated statements by individual members of Congress do not outweigh the Dodd-Frank Act’s mandates. Those mandates prohibit the SEC from adopting the proposed changes to the definition of “project,” or from including the additional proposed exemptions. The SEC must eliminate those provisions and move forward only with a rule that actually complies with the law.

Respectfully submitted,

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