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Africa Centre for Energy Policy

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

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

Subject: Proposed Dodd-Frank 1504 Rule, File Number S7-24-19

Submissions by the Africa Centre for Energy Policy

Dear Secretary Countryman,

The Africa Center for Energy Policy (ACEP) and its civil society allies have participated in the evolving transparency rules across the globe for the past decade. In that period, the leadership of the United State of America and the Securities and Exchange Commission (SEC) is recognized by history to have preceded other initiatives from European Union (EU), Canada and Norway, that require companies operating abroad to disclose payments made through taxes, royalties, contract fees and all other payments for infrastructure development and Corporate Social Responsibility to host governments. Further regulation through the Cardin-Lugar Transparency Rule in 2016, which provided express requirement on US companies to disclose payments to host governments, strengthened America's leadership on the subject.

It is worth emphasizing that Section 1504 of the Dodd-Frank Wall Street Reform Act was the trail blazer for others to follow. The law achieved immediate successes for many developing countries. For example, the contract between Ghana and Kosmos Energy became available to the Ghanaian public through the SEC's website as part of disclosure requirements. This allowed citizens to demand greater transparency on revenue receipts and utilization. This positive beginning for a new oil producer encouraged the country to be more transparent and set rules for revenue management which makes it an example for many other countries. The commitment of other countries and the European Union to transparency has resulted in unprecedented levels of data disclosure as companies operating in Africa report their payments as required by EU, Canadian, and Norwegian laws, including project-level payments to governments.

It must be highlighted that the Cardin-Lugar rules on section 1504 witnessed strong opposition from business interests in the US which saw the America Petroleum Institute (API) taking the matter to court. The SEC and civil society organizations led by Oxfam America, as the Intervenor, defended the case for three years until it was thrown out of court in April 2016, to pave the way for the transparency rules to come into force. Having failed in court, some senators filed a Congressional Review Act, which annulled the Cardin-Lugar Transparency Rules. This was a depressing moment for many civic actors including ACEP, who had made submissions that produced the rules, and hailed the leadership of the USA on transparency in the extractive sector where secrecy around resource rents activates bribery, greed, corruption, extreme poverty and many other social injustices.

Following the repeal of the Cardin-Lugar Rules, Kosmos Energy, US oil company based in Ghana, voluntarily committed to disclose project-level payments in line with EU disclosure requirements and civil society appeals to the company.[1] While the voluntary disclosures by American companies is commendable, it is not reliable and sustainable for promoting transparency in the governance of the extractives sector. Again, the voluntary compliance by some companies show that the Cardin-Lugar rules do not cause "competitive harm" and "undue compliance burdens" for companies as was adduced to repeal the rules.

The recent efforts by SEC to set new rules for section 1504 of Dodd-Frank Act reinforces the commitment of SEC to regulate American companies. However, some of the proposed elements of the rules do not promote the transparency other nations learnt from America. Key amongst them are the aggregation of payment, definition of "not de minimis" payment, exemptions from compliance based on conflicts with foreign laws or contract terms, and exemption for smaller reporting companies or emerging growth companies.

Aggregation of Payments

The Cardin-Lugar Rules required payment disaggregation by project. This was an important rule that benefits host countries and America. For the host country, secrecy promotes corruption and weakens accountability around the benefits from the extractive sector. Citizens and civil society organization are denied access to actual data on payments from specific projects to ensure that impact of extractive activities at the local level can be mitigated and the development of the affected areas is achieved through the right revenue allocation from the central government. As a result, most extractive communities lag behind development and provisions of essential services though the central government receives revenues from extractive companies.

The other side of this problem is that companies become the target of community members for impact mitigation and development of their communities. In some instances, communities have

[1] https://www.kosmosenergy.com/transparency/

caused the suspension of company operations through attacks because they cannot account for the benefits of the extraction of the resources. This must be concerning for the SEC on the potential investment losses to American companies because communities do not have publicly disclosed information to demand their share of revenues from their government. Payments to central governments are also sometimes inadequate to address the challenges of communities because companies collude with political elites to divert rents from the state to private pockets. This further risk the shareholders' value in the event of attacks on the companies, when the state fails to address community development needs with payments received.

The new rule entrenches the underdevelopment of host communities and risks the coexistence of projects and communities. As civil society, project-by-project data provides information for engaging communities on their rightful share of payments to government and also to highlight compliance of companies to their tax obligations. This reduces speculation, defines the parameters for benefit sharing among key stakeholders and therefore reduces the risks on the operations of companies.

"not de minimis" Payment

The previous Cardin-Lugar Rules required companies to disclose payments above $100,000. The new rule increases this payment threshold to payments that equals or exceeds $150,000 made in connection with a project that equals or exceeds $750,000 in total payments. Both rules are problematic to the extent that either $100,000 or $150,000 these values are significant depending on who is receiving it. For example, in project communities, surface rentals are paid to traditional authorities who owe the responsibility to account to indigenes how those payments are utilized. These are not big amounts yet can be significant in addressing some community needs such as provision of schools, health posts etc. Unfortunately, lack of data results in the abuse of these payments by community leaders. Therefore, a requirement for disclosure of all payments would provide data for communities to hold their leaders accountable. This also has implications on how much development communities demand from companies if their leaders can better utilize payments made to them.

Exemption for "Smaller Reporting Companies" or "Emerging Growth Companies"

The new rule exempts smaller reporting companies or emerging growth companies. This was not the case in the Cardin-Lugar Rules. Per the definition of smaller reporting companies by the SEC, a company qualifies as a "smaller reporting company" if: *it has public float of less than $250 million or it has less than $100 million in annual revenues; and no public float or public float of less than $700 million.* This definition would have made it impossible for companies such as Kosmos Energy to disclose data when they began operations in Ghana. The downside would have been the difficulty for citizens to track how much revenue is reported by the companies to extract accountability. On the contrary, disclosures by the company has deepened knowledge on payments to government and facilitated the institutionalization of revenue management frameworks to hold government to account.

Again, the size of companies considered as smaller companies are rather extremely large in the African context. Given that payment disclosure is advocated for companies from within and outside Africa, if this rule is universally applied, it will create room for almost all African companies not to be transparent.

Exemptions from Compliance Based on Conflicts with Foreign Laws or Contract Terms

This provision puts premium on third world and host country rules and not a commitment by the United States to show leadership in promoting good governance in the extractive sector. The reality is that, most countries in the developing world are averse to disclosures that inhibits corruption and rent seeking behavior of the political elite. It is countries such as the US, who in the past showed leadership to force change in attitude and compliance with transparency rules in the extractive sector. As a result, the governance landscape is shaping the selection of leaders who can be held accountable on those transparency principles. Civil society also use the data to educate the public to hold government to account for the benefits of the resources extracted. The US must therefore not be the vehicle to reverse the gains it contributed to.

ACEP's View on the Future of Resource Governance in Africa

For the past decade, ACEP has deepened conversations and shaped policy on the effective management of natural resources in Africa. Part of that commitment has been on the nature of investments and how they shape benefit sharing among the state, companies and affected communities. From this experience, the Centre is of the firm conviction that African countries must attract investment from countries that regulate their companies within the parameters of globally acceptable transparency principles. The Centre also advocates and build capacity of communities, advocates and other civil society organizations to amplify the need for responsible and regulated companies. This is also part of the process to contextualize these principles in African countries to reduce the endemic corruption that consigns resource rich countries to underdevelopment at the expense of a greedy few. This is why it is important for America to encourage its companies to be part of those that can be supported by civil society and accorded social licenses to operate in communities in Africa. The United States of America has its image to protect in this resource governance conversation to create a fair, transparent and accountable business environment in Africa.

It is on record that the United States led the transparency movement which allowed the European Union and countries like Canada and Norway to follow suit. A local Ghanaian proverb loosely translates, "it is unconscionable to lead someone to an oasis and turn around to pollute it." These new provisions have the potential to encourage other countries to roll back on their transparency requirements.

It is our hope that the above submissions would inform a review of the news on Section 1504 of the Dodd-Frank Wall Street Reform Act, recognizing that that the benefits of transparency accrue to both the host country and the country of origin of companies. This was probably not the case in the past, but citizens are now asserting their rights to know how the benefits from resource extraction are shared.

We thank you for your consideration of our concerns and are happy to provide you any further clarification if necessary.

Sincerely yours,

Benjamin Boakye
Executive Director, Africa Center for Energy Policy

The Africa Centre for Energy Policy (ACEP) is a non-profit think tank and policy advocacy organization based in Accra, Ghana. Our expertise is in petroleum and mineral economics and fiscal policy development as it relates to the extractives sector in Ghana and on the African continent as a whole. We monitor oil and gas markets and finance trends, including those for conventional and unconventional fuels. We produce policy research and analysis, advise government and industry, and work in coalition with NGOs in Africa to ensure hydrocarbon and mineral development is transparent, accountable and effective.

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