

March 16, 2020

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

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 Corporate Finance

Via Email (to: rule-comments@sec.gov)

**Comment on SEC proposed rule 13q-1 to implement Section 1504 of the Dodd-Frank Act**  
**File Number S7-24-19**

Dear Secretary Countryman,

Thank you for the opportunity to comment on the proposed rule.

I have spent my career researching corruption in the oil industry. My book on this topic, *Crude Intentions: How Oil Corruption Contaminates the World*, was published by Oxford University Press in January 2020. For more than ten years, I have worked at the Natural Resource Governance Institute to address the governance challenges experienced by developing countries rich in oil, gas and minerals. I hold a PhD from Cambridge University where I researched Nigeria's oil industry.

Based on my recent review of dozens of oil industry corruption cases involving companies and governments around the world, I would like to share several observations on **(1) why a robust approach to implementing Section 1504 is so important, and (2) how the SEC's proposed rule could be improved.**

**(1) Why is a robust approach to implementing Section 1504 so important?**

**Extractive sector corruption represents a severe and widespread challenge.** In 427 anti-bribery cases pursued by authorities in seventeen OECD countries, the extractive sector produced more cases than any other industry.<sup>1</sup> Here in the US, of the 291 related enforcement actions pursued under the Foreign

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<sup>1</sup> Organization for Economic Co-operation and Development, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*, OECD, 2014.

Corrupt Practices Act (FCPA), a full 20 percent came from the extractive sector –the most prevalent industry by a significant margin.<sup>2</sup>

According to several measures of corruption, such as Transparency International’s *Corruption Perception Index* and the *World Governance Indicators’* “Control of Corruption” scores, a number of resource-rich countries are among the most corrupt countries in the world.<sup>3</sup> Countries falling in the *bottom tenth* of both measures include Chad, Congo-Brazzaville, the Democratic Republic of Congo (DRC), Equatorial Guinea, Iraq, Libya, and Venezuela – all home to large oil, gas or mining industries.

**US-listed extractive companies have engaged in corruption and operate in contexts where corruption is widespread, justifying the need for enhanced transparency and accountability.** Section 1504 is needed to shine light on *corporate* behavior, not just foreign governments. The roster of FCPA and OECD anti-bribery cases, including recent DOJ cases against Och-Ziff, Petrobras, SBM Offshore, TechnipFMC and many other companies large and small, make it glaringly clear: some extractive companies are using corruption to win a competitive edge.<sup>4</sup> In 2019, executives from just one small company called Unaoil pled guilty to bribing officials in nine different countries.<sup>5</sup> US-listed companies also operate in countries where corruption has reached emergency levels, such as Equatorial Guinea, Iraq, Libya, Venezuela and the other countries named above. Given this track record and exposure to risk, the transparency envisioned in Section 1504 is urgently needed.

**Extractive sector transparency protects US foreign policy interests.** US-listed extractive companies do business in countries subject to US sanctions, such as Russia and Venezuela. They work in countries where corruption has worsened the security situation, such as Libya, Iraq and Afghanistan. And they make payments to a number of repressive dictatorships, regimes that stand at odds with US commitments to democracy and human rights. All of these relationships warrant special scrutiny. Transparency can also help US companies avoid controversy and manage risks in such challenging contexts.

**Preventing extractive sector corruption could help meet global poverty targets.** Nearly half of the people living in extreme poverty are in resource-rich countries, including several where poverty rates are rising.<sup>6</sup> Oil corruption siphons off money needed for development. In Brazil, cost overruns from just one corrupt refinery project could have paid to educate 4 million schoolchildren for a year.<sup>7</sup> The Nigerian

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<sup>2</sup> Stanford Law School, Foreign Corrupt Practices Act Clearinghouse. <http://fcpa.stanford.edu/industry.html>, accessed 11 March 2020.

<sup>3</sup> Transparency International, *2019 Corruption Perceptions Index*, TI, 2020; 2018 “Control of Corruption” data from the *Worldwide Governance Indicators*, <https://info.worldbank.org/governance/wgi/>, accessed 11 March 2020.

<sup>4</sup> US District Court for the Eastern District of New York, Och-Ziff Capital Management Group Deferred Prosecution Agreement, Cr. No 16-516 (September 29, 2016); US Department of Justice, Petrobras Non-Prosecution Agreement and Statement of Facts (September 26, 2018); District Court for the Eastern District of New York, *United States v. TechnipFMC plc.*, Deferred Prosecution Agreement, Case No. 19-CR-278. (June 25, 2019); US District Court for the Southern District of Texas. *United States v. SBM Offshore N.V.*, Deferred Prosecution Agreement. Criminal No.17-686 (S.D. Tex. November 29, 2017).

<sup>5</sup> US Department of Justice, “Oil Executives Plead Guilty for Roles in Bribery Scheme Involving Foreign Officials,” press release, October 30, 2019.

<sup>6</sup> World Data Lab, <https://worldpoverty.io/map>, accessed March 16, 2020.

<sup>7</sup> Alexandra Gillies, *Crude Intentions: How Oil Corruption Contaminates the World* (New York: Oxford University Press, 2020), 11.

government alleges that an official took a \$40,000 bribe to approve a deal that eventually saddled the government with a \$9 billion liability<sup>8</sup> – enough to pay the federal health budget seven times over in a country where one in ten children dies before they turn five.

**Existing approaches, including the FCPA and the Extractive Industries Transparency Initiative (EITI), are not enough.** The DOJ and SEC’s enforcement of the FCPA has successfully punished acts of bribery and led hundreds of companies to improve their compliance systems. Transparency represents a complementary *preventative* measure (like hand-washing to stave off the need for treatment?). Also, corruption takes forms other than bribery which the FCPA cannot address, from misappropriation and embezzlement to extortion and influence-peddling. The EITI has also recorded great success, and demonstrates that detailed payment reporting is both feasible and useful in generating greater accountability. For instance, in Myanmar, Papua New Guinea and the DRC, EITI reporting identified serious corruption risks related to revenue streams that lacked adequate oversight.<sup>9</sup> However, many countries where corruption is rife have not signed up to the EITI, including high-risk countries where US-listed companies operate such as Angola, Azerbaijan, Equatorial Guinea, Libya, Russia and Venezuela.

## (2) How could the SEC’s proposed rule be improved?

My research also suggests that the proposed rule is misaligned with prevalent corruption trends in a few key areas, and that improvements would result in more valuable reporting.

**Corruption happens within individual deals, not across them.** In most of the cases I examined, companies sought to influence government officials in order to win a specific license or receive favorable contract terms, or to convince regulators or tax authorities to take a lenient approach towards one of their projects. Or, government officials steered lucrative contracts towards their allies, or pressured companies to make inappropriate payments that benefit their private or political interests.

In the extractive sector, most of the deal-making, the money flows, and therefore the manipulations and abuses occur with respect to specific contracts. As a result, aggregating data by region, as allowed in the proposed rule’s modified project definition (section F), would obscure the information that anti-corruption actors need to investigate suspicious transactions, and would not effectively deter companies from manipulating individual deals for their own benefit. Nor would aggregated information lead to more factual, better-informed public debate.

A few examples illustrate this concern:

- In 2011, in their contract for specific oil blocks in Angola, Cobalt and BP agreed to pay hundreds of millions of dollars to fund a research center run by the country’s national oil company. Statoil (now Equinor) entered into a similar agreement. The companies paid large initial installments, but the center has yet to be built.<sup>10</sup> Quite rightly, these payments became the subject of media attention and official investigations. If these companies had reported under the proposed rule,

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<sup>8</sup> Kit Chellel and William Clowes, “Nigeria Says Official Got Bag of Cash from ‘Sham’ Energy Firm,” *Bloomberg*, January 24, 2020.

<sup>9</sup> Alexandra Gillies, “Discussion paper: The EITI’s Role in Addressing Corruption,” *The Extractive Industries Transparency Initiative*, 2019, 5.

<sup>10</sup> Tom Burgis, “US regulator probes Angolan deal involving BP and Cobalt,” *Financial Times*, March 16, 2017.

they could have obscured these payments by aggregating them together with payments from other projects.

- Global Witness and other watchdog groups have argued that the government of Guyana negotiated a suboptimal deal with ExxonMobil, and could earn up to \$55 billion less than it should over the life of the company's main Guyanese project – called Stabroek.<sup>11</sup> The government, Exxon and other parties dispute this claim, resulting in acrimonious debate in a fragile political environment. Production in Guyana is only now beginning, and ExxonMobil has additional licenses in the country. If Exxon only reports aggregate data on its payments in Guyana going forward, the disclosures will fail to help inform this crucial debate, leaving it more subject to accusation and cross-accusation.
- In 2011, Shell and ENI entered into an agreement with the Nigerian government to acquire the rights to a large oil block in exchange for \$1.3 billion. Around \$1 billion of this amount then left government accounts and entered private pockets, and the companies and several former government officials stand trial in Italy on related bribery charges.<sup>12</sup> These parties deny wrongdoing, and the trial is ongoing. Shell and ENI participate in other projects in Nigeria, governed by separate contracts. If reporting advanced under the proposed rule, it would not shed light on individual payments such as the one at the heart of this enormous controversy.

In section F of the proposed rule, the SEC acknowledges that contract-level data may hold useful anti-corruption applications, concludes that the commercial costs of producing and disclosing it are too great. At this point in time, with hundreds of companies reporting contract-level data under the EITI and EU and Canadian regulations, this calculation appears off. The other reporting standards as well as the industry more widely use contract-level data, so creating a whole new measures out of step with common practice risks generating additional work while delivering less useful results.

**Small payments can signal important information.** The proposed rule's reporting threshold (\$150,000 for a single payment; \$750,000 for the project) risks obscuring important data. The reporting of smaller payments can help identify which US companies are operating in certain high-risk environments. For instance, the DRC want to re-allocate oil licenses previously held by Dan Gertler, a billionaire investor with close ties to Congolese political elites and who is subject to US Global Magnitsky Sanctions for alleged corrupt activities.<sup>13</sup> Given the controversial history of the assets, these transactions warrant careful oversight. What companies will receive them? What revenues will they generate for the DRC going forward? If the award is made through a secretive process, company payment data may provide the first opportunity for the public to learn who acquires these controversial assets. While the initial payments might be quite small, they would still convey crucial information about who received the assets and on what grounds.

**Small companies require accountability too.** The proposed rule exempts smaller reporting and emerging growth companies. But such companies regularly crop in corruption scandals; indeed, some

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<sup>11</sup> Global Witness, *Signed Away: How Exxon's exploitative deal deprived Guyana of up to US\$55 billion*, February 2020, available at [www.globalwitness.org/ ExxonGuyana](http://www.globalwitness.org/ ExxonGuyana).

<sup>12</sup> Gillies, *Crude Intentions*, 48-54; Sarah Kent and Eric Sylvers, "Inside the Bribery Scandal Sweeping Through the Oil Industry," *Wall St. Journal*, Feb. 13, 2018.

<sup>13</sup> Michael Kavanagh and William Clowes, "Congo Wants to Sell Gertler's Oil Blocks on Ugandan Border," *Bloomberg*, January 9, 2020; US Department of Treasury, "Treasury Sanctions Fourteen Entities Affiliated with Corrupt Businessman Dan Gertler Under Global Magnitsky," press release, June 15, 2018.

have bribed officials to overlook their limited resources. For example, the small upstart Canadian company Griffiths Energy bribed officials as part of its effort to win oil blocks in Chad. In 2011, not long after the company's creation, Griffiths Energy signed contracts with the government of Chad for the rights to two oil blocks. The deals constituted the company's first significant business transactions, and it began to prepare for an IPO once they had been signed. However, internal and external investigations soon followed, and the company pled guilty to bribery in 2013.<sup>14</sup> Under the proposed rule, a US company like Griffiths – of small size but with big ambitions and a big appetite for risk – would be exempted from reporting.

Thank you for the opportunity to comment on the proposed rule. Dozens of cases from around the world illustrate the extractive sector's vulnerability to corruption. This corruption, and the controversy and uneven playing fields it creates, work *against* the interests of US companies and investors, not for them. In order to promote integrity and fairness in this crucial global market, the SEC should strengthen the proposed rule so that the disclosures actually help reduce these urgent corruption risks.

Sincerely,

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<sup>14</sup> Gillies, *Crude Intentions*, 25-27.