April 29, 2020

VIA EMAIL (rule-comments@sec.gov)

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

RE: **Disclosures of Payments by Resource Extraction Issuers**
File No. S7-24-19

Dear Secretary Countryman:

The purpose of this letter is to provide comments on the proposed rule issued by the Security and Exchange Commission (SEC) to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) requiring disclosure of payments to governments by resource extraction issuers.[1] While I supported the 2016 rule to implement Section 1504,[2] I am unable to support this version due to its many flaws and transparency failures. This letter respectfully recommends withdrawal of the 2020 proposal and its replacement with a stronger rule more in alignment with the law.

The comments in this letter are based upon my spending over a decade conducting investigations at the U.S. Senate Permanent Subcommittee on Investigations as staff director and chief counsel for Senator Carl Levin. Those Senate investigations included several examining extractive industry issues, including a 2004 inquiry into payments made by oil companies to the government of Equatorial Guinea in connection with oil exploration and development efforts in that country. Based upon that information, Senator Levin submitted two comment letters on the 2012 version of this rule.[3] Building upon his comments, this letter offers analysis of the Proposed Rule in light of the needs of policymakers and their staffs for factual information to inform decision-making related to the extractive industries, capital markets, investment, trade, energy, tax, anticorruption efforts, and related policies. Like investors, policymakers look to publicly available SEC submissions by issuers to obtain detailed, accurate, and timely information on a range of issues. Unfortunately, as currently drafted, the Proposed Rule does not meet the letter or spirit of the law in terms of the information that Congress intended to be made available by resource extraction issuers.

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[1] Disclosure of Payments by Resource Extraction Issuers, Proposed Rule, 85 Fed. Reg. 2522 (January 15, 2020) (hereinafter "Proposed Rule").
[2] Disclosure of Payments by Resource Extraction Issuers, Final Rule, 81 Fed. Reg. 49359 (June 27, 2016)(hereinafter "2016 Final Rule"); Bean comment letter (2/16/2016), https://www.sec.gov/comments/s7-25-15/s72515-27.pdf.
[3] Levin comment letter (2/1/2011), www.sec.gov/comments/s7-42-10/s74210-19.pdf; Levin comment letter (2/17/2012), www.sec.gov/comments/s7-42-10/s74210-173.pdf.

Four Principal Flaws

In drafting the Proposed Rule, the Commission faced an unprecedented challenge: a 2017 resolution of disapproval under the Congressional Review Act (CRA) that vacated the 2016 Final Rule implementing Section 1504, but also left in place the Dodd-Frank Act's specific legal requirement to produce a disclosure rule. The Commission's consequent task was to draft a new rule that was not "substantially the same" as the 2016 Final Rule, yet still met the requirements of the law. While the resulting Proposed Rule does differ substantially from its predecessor rule, it fails to meet the legal requirements set out in Section 1504.

The following comments discuss three principal flaws in the Proposed Rule, involving its problematic definition of "project," arbitrarily inflated de minimis reporting thresholds, and inclusion of inappropriate broad-based exemptions, all of which require revision. A fourth flaw is the Proposed Rule's failure to clarify that its disclosure requirements apply both to legitimate and illegitimate or suspect payments to governments, a problem which the Commission could not only solve in a way that strengthens the rule, but also produce a rule that is not substantially the same as the last.

(1) **Flawed Definition of Project**

The most disturbing flaw in the Proposed Rule involves its unusual, counter-intuitive, and ultimately arbitrary definition of "project," leading to inadequate payment disclosures with a level of detail inconsistent with the payment disclosures already being made around the world. This letter accordingly answers the Proposed Rule's Question 35 in the negative and calls for a revised definition that parallels the definitions used in all other national payment disclosure regimes for resource extraction issuers.

Section 13(q)(2)(E) of the Dodd-Frank Act states:

> "To the extent practicable, the rules issued under subparagraph (A) shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals."

This legal requirement not only promotes transparency, but also fosters comity and consistency among the world's governments and helps ensure U.S.-listed resource extraction issuers are subject to similar disclosure requirements despite operating under multiple national reporting regimes. As currently drafted, however, the Proposed Rule fails to comply with this mandatory legal directive.

Laws enacted by Canada, member countries of the European Union, Norway, and the United Kingdom all define "project" as operational activities governed by a single contract, lease, or similar legal agreement leading to the payments made to a government.[4] In 2019, the Extractives Industry Transparency Initiative (EITI), a voluntary disclosure regime endorsed by

[4] See, e.g., Directive 2013/34/EU of the European Parliament and of the European Council (June 26, 2013) (defining "project" as "the operational activities that are governed by a single contract, license, lease, concession, or similar legal agreements and form the basis for payment liabilities with a government").

52 countries, revised its definition of "project" to match that consensus approach.[5] Also in 2019, the International Monetary Fund updated its fiscal transparency standards for natural resource management and deemed "project-level disclosure of resource revenues" to be a "key transparency practice[ ]," further establishing contract-level reporting as the international norm.[6] Buttressing the existing international consensus on how to define "project" for purposes of tracking payments to governments is a "Projects Payments" data repository containing information on more than 850 resource extraction companies making over $860 billion in payments to governments in over 150 countries, all without those companies reporting practical problems in making those project-level disclosures.[7]

It is important to note that the Commission itself, in its 2016 Final Rule, used a definition of "project" that was modeled after the Canadian and EU definitions and contained the same consensus language: "operational activities governed by a single contract license, lease, concession, or similar legal agreement, which forms the basis for payment liabilities with a government."[8] That 2016 approach not only supported international practice as required by the 2010 law, but also made sense in terms of how U.S. resource extraction issuers actually manage their books and records, and how the U.S. government actually tracks royalty and related payments.[9] On top of all that, during the comment period on this rule, worldwide investors with over $5.3 trillion of assets under management have called for the rule to adopt the international definition of "project" and produce the same types of contract-level disclosures now made worldwide, citing the importance of that level of detail to corporate valuations and risk assessments. Together, these facts make plain that adopting the same definition of "project" used by Canada, EU member countries, Norway, and the United Kingdom would be both "practicable" and in line with international transparency efforts as required by the law.

As currently drafted, however, the 2020 Proposed Rule fails to "support" international transparency standards for resource extraction issuers, despite the mandate in Section 1504. Ignoring the precedents set by over 800 oil, gas, and mining companies already making contract-level disclosures, the 2020 rule instead proposes using a definition of "project" that would treat resource development efforts governed by separate legal agreements as if they were one endeavor, and then report aggregated payments on behalf of those artificial combinations. That approach is out of alignment with the fiscal systems of resource extraction issuers, out of alignment with how those issuers actually operate on a day-to-day basis, and out of alignment with how governments, investors, and citizens currently track and analyze extractive activities. As far as I am aware, no other country in the world uses a definition like the proposed Modified

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[5] See 2019 EITI Standard (defining "project" as the "operational activities that are governed by a single contract, license, lease, concession or similar legal agreement, and form the basis for payment liabilities with a government").
[6] See "Fiscal Transparency Initiative: Integration of Natural Resource Management Issues," International Monetary Fund (Jan 2019), at 7, 15, https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/01/29/pp122818fiscal-transparency- initiative-integration-of-natural-resource-management-issues.
[7] See "Open Source Data on Oil, Gas and Mining Payments," Project Payments database, Natural Resource Governance Institute, www.resourceprojects.org (last visited on April 27, 2020).
[8] 2016 Final Rule, at 49377-378.
[9] See, e.g., "Solid Minerals Production and Royalty Report," U.S. Department of the Interior, Office of Natural Resources Revenue (requiring resource extraction companies to report production, sales, and royalties owed by "API Well Number," "ONRR Lease Number," "MMS Agreement Number," or "Mine Name"), https://www.onrr.gov/ReportPay/PDFDocs/4430.pdf and https://www.onrr.gov/ReportPay/PDFDocs/2014.pdf.

Project Definition which would enable resource extraction issuers to pretend that multiple extraction efforts, subject to different legal agreements, in different locations, with different development plans and different payment arrangements, are somehow a single endeavor for payment reporting purposes.

As a former Senate investigator, I can also attest to the importance for both oversight and policy purposes of having detailed payment information related to individual legal agreements and related industrial and governmental fiscal systems. When investigating the factual foundation of a particular oil block or mine, reviewing payment reports that combine multiple blocks or mines would be both time-consuming and unhelpful. It would take that much more effort to get down to the facts related to a particular development. Aggregated figures unmoored from individual development efforts impede rather than assist the type of investigation and detailed analysis needed to produce informed policies related to investment, trade, energy, natural resource, tax, or anti-corruption efforts. In short, the rule's proposed definition of "project," when compared to the 2016 Final Rule, is neither legally defensible nor empirically useful to investors or policymakers, and should be revised.

(2) **Arbitrarily Inflated De Minimis Thresholds**

A second flaw in the proposed rule is its revised definition of a payment that is "not de minimis."[10] In 2016, the Commission defined "not de minimis" payment as one that "equals or exceeds $100,000, or its equivalent in the issuer's reporting currency, whether made as a single payment or series of related payments."[11] That bright-line approach attracted strong support during the 2016 comment period. But today, with no meaningful explanation or supporting empirical data, the 2020 Proposed Rule abandons the 2016 definition and substitutes a complex, bifurcated approach which, in part, hikes the de minimis threshold more than sevenfold. It proposes disclosure only if "payments in the aggregate equal or exceed $750,000, unless no individual payments per that project equal or exceed $150,000." In response to the Proposed Rule's Question 23, this letter recommends returning to the de minimis approach taken in the 2016 Final Rule.

Similar to the problem with the Proposed Rule's failure to conform to international practice on the definition of "project," the revised de minimis definition fails to support international transparency efforts related to reporting thresholds, in violation of Section 1504. The de minimis reporting threshold currently used in Canada, the European Union, and the United Kingdom, for example, is roughly equivalent to the $100,000 threshold used in the 2016 Final Rule.[12] In contrast, no country in the world currently uses a threshold that resembles the sevenfold increase or bifurcated approach used in the Proposed Rule. The Proposed Rule also fails to provide meaningful analysis of the de minimis reporting experience in those other countries, fails to identify any shortcomings in the prevailing international approach, and fails to explain how its proposed de minimis reporting thresholds, which diverge so sharply from the international norm, would support international transparency efforts.

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[10] Section 1504 defines "the term 'payment'" to mean, in part, "a payment that is … not de minimis." Section 13(q)(1)(C) of the Securities Exchange Act of 1934, as added by Section 1504 of the Dodd-Frank Act.
[11] 2016 Final Rule, at 49371.
[12] Id. at 49373.

Company Payment Data. Actual data on company payments offers additional evidence that the proposed $750,000/$150,000 reporting thresholds are both arbitrary and unreasonably inflated. Consider the database assembled by the Natural Resource Governance Institute to track actual payments by resource extraction companies over time and in multiple jurisdictions. That database shows that more than half of the project and company combinations for which payments were disclosed between 2014 and 2018, using the international de minimis reporting threshold of approximately $100,000, would have fallen below the proposed $750,000 threshold, meaning that more than half of the payments tracked in that database might not have been disclosed under the approach taken in the Proposed Rule.[13] The Proposed Rule offers no justification for selecting a reporting threshold that could exclude from disclosure the majority of resource extraction issuer payments that would otherwise be disclosed under a rule consistent with the international standard.

Oil company payment data compiled by the Senate Permanent Subcommittee on Investigations raises similar concerns.[14] Those payments were made to the government of Equatorial Guinea (EG), from 2000 to 2004, by six U.S. oil companies active in EG oil exploration and development. The Subcommittee uncovered the payments when reviewing U.S. bank records documenting deposits to an "oil account" maintained by the EG Government at Riggs Bank in Washington, D.C. which led to reviews of other bank records, emails, accounting records, and other documents. The payment amounts, payment recipients, and reasons for the payments were further substantiated during interviews of oil company and bank personnel during the course of the Subcommittee's investigation.

Upon completion of its investigation, the Subcommittee held a hearing and released a lengthy report with its investigative results.[15] The report documents a wide variety of oil company payments to the EG Government, EG officials, and companies owned by EG officials or their family members.[16] Some of those payments were mandated under "production sharing contracts" between the oil companies and the EG Government; others appear to have been payments in response to specific requests by EG agencies or officials.

The bank records document oil company payments to the EG Government for taxes, royalties, and administrative fees. In addition, each of the oil companies was required by its production sharing contract to pay for "student training expenses," which the Subcommittee investigation determined consisted in many cases of paying tuition and living expenses for the children of high-level EG officials to attend college in the United States. The oil companies were required to make those payments either to a bank account controlled by the EG Government or, in a few cases, to a U.S. university where EG students were enrolled. The documented oil company payments include the following:

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[13] See "Open Source Data on Oil, Gas and Mining Payments," Project Payments database, Natural Resource Governance Institute, www.resourceprojects.org (last visited on April 27, 2020).
[14] See "Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act," hearing before the Permanent Subcommittee on Investigations, S.Hrg. 108-633 (July 15, 2004) (hereinafter "PSI Hearing").
[15] Id.; report reprinted in the PSI Hearing, 126-210 (hereinafter "Riggs Report").
[16] Riggs Report, at 200-209.

- two $50,000 payments to the University of South Carolina to pay for the expenses of two EG students;[17]
- $150,000 annual payment for 4 years for EG student expenses;[18]
- $300,000 annual payment for 3 years for EG student expenses;[19]
- $150,000 payment in one year and a $200,000 payment in a second year for EG student expenses;[20]
- $275,000 payment in one year for EG student expenses;[21]
- $250,000 payment in one year for the educational expenses of the children of the EG President's brother;[22] and
- $158,000 payments over 2 years and another $190,000 over the succeeding 2 years for EG student expenses.[23]

This series of payments helps illustrate the transparency that would be lost under the Proposed Rule. Some of the payments fall below the $150,000 minimum reporting threshold in the Proposed Rule. Other payments were in excess of the $150,000 threshold but could still escape disclosure under the Proposed Rule if the total per project payments fell below the proposed $750,000 threshold, depending upon which payments were made by which oil companies. Yet all of these payments were mandated by contract, all were paid to the EG Government, and together they add up to more than a million dollars – payments that merit public disclosure.

The bank records also document one oil company making repeated, relatively low-level payments in support of the EG Government's Embassy in Washington, D.C. and its Mission to the United Nations located in New York. Those oil company payments were made either directly to the Embassy or Mission, or to a U.S. bank account controlled by the EG Government. The payments were made every month and include the following:

- $7,000 monthly payments to maintain the EG Embassy;[24]
- $2,700 monthly payments for social security expenses incurred by EG Embassy personnel;[25]
- $3,500 monthly payments for EG Embassy personnel's medical insurance;[26] and
- $5,400 monthly payments to support the EG Mission.[27]

Each category of monthly payments adds up, on a yearly basis, to between $32,400 and $84,000. Each payment, as well as each series of like payments made over the course of the year, fall below the $150,000 minimum reporting threshold in the Proposed Rule. If added

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[17] Id. at 204, footnote 371.
[18] Id. at 203, footnote 366.
[19] Id. at 204, footnote 372.
[20] Id. at 203-04, footnote 367.
[21] Id. at 204, footnote 374.
[22] Id. at 204, footnote 370.
[23] Id. at 205, footnote 380.
[24] Riggs Report at 202-03, footnote 360.
[25] Id. at 203, footnote 360.
[26] Id.
[27] Id. at 202, footnote 359.

altogether, all of the embassy-related payments total $158,000 over a year, which meets the minimum reporting threshold but not the $750,000 reporting threshold per project. The U.N. mission-related payments do not meet even the $150,000 minimum. Yet again, these substantial government payments, requested by EG officials but not contractually required, merit public disclosure.

Bank records also documented a variety of other oil company payments to the EG Government or to companies owned by EG officials or their relatives to lease housing or land, obtain security services, or pay for other services, materials or equipment sought by the EG Government. Those payments include the following:

- $7,000 in annual rent payments for undeveloped land owned by the EG President, later raised to $10,000 per year;[28]
- $130,000 in annual rent payments for buildings owned by the EG President, later raised to $175,500 per year;[29]
- $445,800 in rent payments over 4 years to a 14-year old relative of the EG President;[30]
- $45,020 and $236,160 in annual rent payments for houses owned by the EG Minister of Agriculture;[31]
- $300,000 in payments over 4 years for security services provided by a company owned by the EG President's brother, after being told that company held a monopoly on those services within the country;[32] and
- variable payments to the EG Government to "purchase services, materials and equipment for the [EG] Government's use as reasonably requested by the Government."[33]

Again, some of these oil company payments fall below the $150,000 minimum reporting threshold in the Proposed Rule. Depending upon which companies made which payments, it is also possible that some or even all of the six oil companies could omit disclosure of even the largest of these payments under the $750,000 per-project reporting threshold. Yet again, the Proposed Rule offers no justification for concealing these types of payments from the public.

Together, the Subcommittee's payment data offers evidence that the proposed reporting thresholds for de minimis payments in the 2020 Proposed Rule are divorced from the day-to-day reality of payments made by U.S. oil companies to particular governments and are arbitrarily inflated. This letter respectfully urges a return to the de minimis approach that was taken in the 2016 Final Rule and is consistent with international practice.

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[28] Id. at 200, footnote 338.
[29] Id.
[30] Id. at 201, footnote 345.
[31] Id. at 200-01, footnote 342.
[32] Id. at 201-02, footnote 352.
[33] Id. at 203, footnote 361.

(3) **Inappropriate Exemptions**

A third problem with the Proposed Rule involves exemptions. The 2016 Final Rule issued by the Commission did not contain any broad-based exemptions to its disclosure requirements. Nor did it exempt any category of issuers from making required disclosures, such as smaller or emerging growth companies. Instead, the 2016 Final Rule allowed the Commission to use its existing statutory authority to grant exemptions to Section 1504's disclosure requirements, on a case-by-case basis, in response to issuer requests.[34] In contrast, the Proposed Rule unwisely proposes to create exactly the types of broad-based exemptions that the 2016 rule eschewed, in part because those exemptions have no textual foundation in the 2010 law.

Like its flawed approach to the definition of "project" and de minimis reporting thresholds, the proposed exemptions fail to support international transparency efforts, as required by the law. None of the payment disclosure laws now in effect in Canada, the European Union member countries, Norway, or the United Kingdom provide broad-based exemptions. Nor does the EITI. The data also indicates that the absence of such exemptions has not proven to be a problem. None of the four countries originally identified as of concern – Angola, Cameroon, China, and Qatar – have actually taken action against any of the multiple resource extraction issuers that have publicly disclosed their payments to those governments. In fact, after more than three years of payment disclosures by more than 800 companies operating in over 150 countries, not a single instance has unfolded of a foreign government penalizing a resource extraction company for disclosing payments to that government.

Ignoring this international track record of success not only defies logic, it invites a host of problems. For example, handing out disclosure exemptions to hundreds of U.S.-listed issuers would undermine U.S. comity with countries that do not offer similar exemptions and risk international conflict over differing disclosure obligations for the same companies. It would also encourage foreign jurisdictions to enact non-disclosure laws undercutting the very payment transparency Section 1504 was designed to achieve.[35] Exempting smaller issuers and emerging growth companies, in particular, would be problematic due to the absence of any statutory basis for those exemptions and in light of a factual record demonstrating both a low cost of compliance and the dangers arising from a lack of transparency. The Proposed Rule itself observes that exempting smaller issuers and emerging growth companies would eliminate disclosure requirements for 318 issuers out of a total of 677 potentially covered by the rule, an exclusion rate of nearly 50 percent.[36] Authorizing widespread exemptions that have no justification in law or practice invites a legal challenge to reverse this arbitrary and capricious approach.

If the Commission nevertheless insists on authorizing broad-based exemptions to Section 1504 disclosure requirements, the Proposed Rule must be revised to take strong measures to prevent abuse of the proposed exemption authority, develop and enforce consistent exemption

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[34] See 2016 Final Rule; 15 U.S.C. §§ 78l(h) and 78mm(a) (granting the SEC general authority to create exemptions to SEC reporting requirements).

[35] See, e.g., *API v. SEC*, 953 F. Supp. 2d 5, 22 (D.D.C. 2013) ("A broadly written exemption could eviscerate section 13(q) by allowing any country to avoid disclosure by enacting a disclosure-barring law—returning, in effect to the EITI voluntary compliance regime 13(q) sought to augment.").

[36] See 2020 Proposed Rule at 2552-553, 2560.

criteria, and ensure efficient use of agency resources. That means the Proposed Rule must, at a minimum, provide additional guidance on the process and criteria to be used to obtain a Section 1504 exemption.

To that end, the Proposed Rule should be revised to require that any issuer exemption request be published in the Federal Register for public comment to ensure that the request and related facts, legal analysis, and impacts on international disclosure standards are widely examined, and to provide an opportunity for comment by other issuers and countries with resource extraction disclosure requirements. To ensure an informed analysis of a specific exemption request, if the request claims it is based upon or related to a foreign law or rule barring disclosure of payment information, the Proposed Rule should require the requester to provide the following information and materials: (1) the text and an English translation of the foreign law or rule prohibiting disclosure; (2) the date of enactment or promulgation of the foreign law or rule; (3) the text and an English translation of any provision imposing a penalty for violating the non-disclosure law or rule; (4) a signed legal opinion, with an English translation, finding that the foreign non-disclosure law or rule conflicts with U.S. disclosure requirements under Section 1504, explaining the nature of that conflict, and presenting legal precedents or other reasons why the foreign non-disclosure law or rule should take precedence over U.S. law; and (5) a description of any steps taken by the requester to obtain a waiver, exception, or exemption from the foreign non-disclosure law or rule. The Proposed Rule should require publication of that additional information and materials in the Federal Register following the exemption request.

Finally, the Proposed Rule should be revised to provide guidance on the criteria to be used by the Commission when evaluating an exemption request based on foreign law or contract prohibitions on payment disclosures. That guidance should include an instruction that, in light of the law's anti-corruption and investor-protection goals, the importance of extractive industry transparency, the law's preference for consistent international standards, and the U.S. national interest in enforcing its own statutes, Section 1504 exemptions should be granted rarely and only for extremely compelling reasons, and narrowly tailored.

(4) **Failure to Disclose Suspect Payments**

A final issue involves the Proposed Rule's description of the types of "payments" that must be disclosed in an issuer's annual filing with the Commission under Section 1504. Changing that portion of the rule would not only strengthen the public disclosures made by resource extraction issuers, but would also satisfy the legal requirement to issue a rule not substantially the same as the rule disapproved by Congress.

The proposed definition of payments has three elements. A covered payment must be: (1) made to "further the commercial development of oil, natural gas, or minerals"; (2) "not de minimis"; and (3) the type of payment that "includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the EITI's guidelines (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or

minerals."[37] The Proposed Rule also indicates that the term "other material benefits" includes certain "dividend" payments, payments made for "infrastructure improvements," and "community and social responsibility payments" required by law or contract.[38] Question (21) in the Proposed Rule solicits comment on whether the rule should include other types of payments as well or add guidance on the types of payments that should be disclosed.

While generally adequate, the proposed definition is deficient in one important respect: it does not provide sufficient guidance on how to handle payments which are suspect or raise corruption concerns. Right now, the Proposed Rule suggests disclosures may be limited to legitimate types of payments – taxes, royalties, fees – that are "part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals." It does not acknowledge, discuss, or provide any guidance on disclosing large payments that are not a part of the legitimate revenue stream, yet may nonetheless be a common, if unwelcome and illegitimate, source of revenue for a government or its officials. They include payments that were requested by an agency despite having a weak or suspect contractual basis, produce personal benefits to specific officials or their family members, or were made in ways that conceal the transaction from the public.

The Subcommittee investigation described earlier, which uncovered payments to the EG government by six oil companies active in EG oil exploration and development efforts, illustrates those types of payments.[39] In addition to sizeable payments for taxes, royalties, and fees, each of the oil companies examined by the Subcommittee was required by its EG oil production sharing contract to pay for "student training expenses." As set out earlier, the Subcommittee investigation determined that those expenses consisted in many cases of paying tuition and living expenses for the children of high-level EG officials to attend college in the United States, a massive, concealed benefit to specific EG officials.[40]

A second series of payments made by one oil company, at the direction of the EG Government, supported the EG Government's Embassy in Washington, D.C. and its Mission to the United Nations located in New York. The oil company made those payments in monthly installments, totaling from $32,400 to $84,000 per year, by wiring funds to bank accounts controlled by the EG Government, EG Embassy, or EG Mission.[41] None of those payments was contractually or legally mandated, but were made in response to specific requests by the EG Government to cover the specified costs. Under another production sharing contract, the same oil company was required to "purchase services, materials and equipment for the [EG] Government's use as reasonably requested by the Government."[42] That clause was used by the EG Government to request the "purchase" of various goods and services. The oil company was then permitted to deduct the value of its purchases from amounts it otherwise owed the EG Government, thereby hiding the extent of the payments being made to or on behalf of the government.

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[37] Proposed Rule, at 2530.
[38] Id. at 2531.
[39] See Riggs Report, at 198-209.
[40] Id. at 205, footnote 380.
[41] Id. at 202, footnote 359.
[42] Id. at 203, footnote 361.

Another category of payments uncovered by the Subcommittee involved joint business ventures entered into by some of the oil companies with state-owned companies in Equatorial Guinea. The oil company payments included capital contributions to the business ventures or dividends paid by a joint venture to its business partners.[43] One example involved an oil company that entered into two business ventures with a state-owned EG corporation to operate an EG methanol plant and an EG liquid petroleum gas facility. Together, the business ventures paid millions of dollars in dividends over a three-year period to the state-owned company, which was suspected of being owned, not only by the EG Government, but also in part by unnamed senior EG officials. A second example involved an oil company that entered into three business ventures with a different state-owned company, also suspected of being secretly owned, in part, by EG officials. Those three business ventures involved sharing oil production revenues from certain EG oil fields. A final example involved an oil company that partnered with a company controlled by the EG President to operate an EG oil distribution business used by the oil company's own local subsidiary. Over a three-year period, that oil distribution business paid substantial dividends to the President's company.

The Proposed Rule states that dividends, infrastructure payments, and payments for educational expenses may quality as "material benefits" under the third part of the definition of "covered payments,"[44] but it is unclear whether those types of payments would also be viewed as meeting the second criteria – that they qualify as "part of the commonly recognized revenue stream" associated with commercial oil development. While some of those payments were contractually mandated, others – such as those made to support the EG Mission to the United Nations or the social security and medical insurance expenses of EG Embassy personnel – appear to have had no contractual basis but were made in response to EG Government requests. Another problem is whether those dividend, infrastructure, embassy, U.N. mission, and educational payments would be interpreted as meeting the first part of the definition of covered payments, requiring a finding that the payments were made to "further" commercial resource development.

Similar problems apply to payments made as capital contributions to joint business ventures with state-owned corporations along with subsequent dividend payments. Again, while both types of payments may be considered "material benefits" under the Proposed Rule, questions remain as to whether they would qualify as "part of the commonly recognized revenue stream" and were made to "further" commercial resource development. In the EG investigation, many of those payments were made without public disclosure and some of the business ventures appeared to be thinly disguised schemes to funnel payments to corrupt officials. Surely, those types of payments, when in excess of the de minimis reporting threshold, warrant public disclosure under Section 1504.

To resolve the interpretive issues, the Proposed Rule should be revised to state that all contractually mandated payments shall be presumed to be "part of the commonly recognized

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[43] Id. at 205-206.

[44] See, e.g., Proposed Rule at 2532, n. 128 ("CSR payments could include, for example, funds to build or operate a training facility for oil and gas workers, funds to build housing, payments for tuition or other educational purposes, and in general payments to support the social or economic well-being of communities within the country where the expenditures are made.").

revenue stream" and to "further commercial resource development." The rule should provide the same for payments made to governments when the payment amounts are subtracted from royalties or other payments that otherwise would be disclosed to the public. The rule should also classify as reportable payments any payments made to state-owned enterprises as part of a joint business venture and any dividends paid to a government-owned entity, government agency, government official, or entity owned or controlled by a government official arising from such a joint business venture. While each of those payments may already be encompassed within the proposed payment definition, a better approach would be to revise the Proposed Rule to eliminate any ambiguity.

An even stronger approach would be to revise the definition of covered payments to also include any payment made by a covered issuer that is above the de minimis threshold, creates an appearance of corruption or suspicious activity, and would otherwise be undisclosed to the public.

Revising the definition of covered payments would not only strengthen the final rule and enhance the transparency and anti-corruption benefits it produces, but also satisfy the CRA requirement that the 2020 rule not be substantially the same as the 2016 disapproved rule. The changes could make clear that the rule's disclosure requirements apply, not only to common types of legitimate resource extraction payments to governments, but also to payments that raise corruption concerns.

The four flaws described above are far from the only problems with the Proposed Rule. Allowing payment reports to be "furnished" rather than "filed" with the SEC, providing confusing requirements regarding the formatting of the disclosures to be made to the public, raising questions about the extent of public reporting, and allowing delayed reporting of payment data are among many other deficiencies. That is why this letter, again, respectfully requests the withdrawal and replacement of the Proposed Rule.

Thank you for this opportunity to comment on the Proposed Rule.

Sincerely,

Elise J. Bean
Former Staff Director and Chief Counsel
U.S. Senate Permanent Subcommittee on Investigations