



TRANSPARENCY INTERNATIONAL | USA

February 16, 2016

Barry Summer, Esq.
Associate Director, Disclosure Operations
Division of Corporation Finance
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Rulemaking under Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Mr. Summer:

We are writing to you in response to the proposed rule implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. §78m(q)) (“Section 1504”) published by the Commission on December 11, 2015. This letter presents Transparency International – USA’s responses to certain requests for comment that accompanied the proposed rule, and supplements our previous letters to the Commission dated June 9, 2014 and December 8, 2015.

Transparency International-USA is a non-profit, non-partisan organization founded in 1993 to combat corruption in government, business, and international development through greater transparency and accountability. TI-USA is represented on the Department of Interior’s Federal Advisory Committee (the “Multi-Stakeholder Group” or “MSG”) tasked with implementing the Extractive Industries Transparency Initiative (EITI) in the United States. TI-USA is also the U.S. chapter of the larger Transparency International movement, a global network of non-partisan, non-governmental organizations in over 100 countries with an international secretariat in Berlin, Germany. Transparency International chapters in many countries are involved in promoting revenue transparency in the extractive sector as a means to combat corruption and promote government transparency and accountability.¹

Request for Comment 13: Should we add other payment types, such as social or community payments, or remove certain payment types from the proposed list of covered payment types?

The proposed rule currently defines payments as being one or more of: taxes, royalties, fees, production entitlements, bonuses, dividends, and payments for infrastructure improvements. TI-USA believes that one class of payments that is missing from this definition is fines and/or penalties. Section 4.1b of the EITI standard requires, in addition to taxes, royalties, dividends,

¹ For a brief discussion of what some TI chapters are doing to promote revenue transparency in the extractives sector, see http://www.transparency.org/news/feature/making_mining_more_transparent_senegal_and_ukraine

bonuses, and fees, that “any other significant payments and material benefit to government” be reported. For the purposes of EITI implementation in the U.S., the MSG has interpreted that to include penalties. The 2015 US EITI report shows that the 45 in-scope companies paid over \$2.5 million in civil penalties in 2013.² As an example of the nature and potential magnitude of penalties, in October 2015 Attorney General Lynch announced that BP Plc would pay approximately \$20 billion in fines to the U.S. federal, state, and municipal governments to resolve nearly all claims from the 2010 Gulf of Mexican spill.³ As fines and/or penalties represent significant payments to governments, and as 15 U.S.C. §78m(q)(1)(C)(ii) instructs the Commission to define payment consistently with the EITI standard, we believe that fines and/or penalties should be included in the Commission’s list of payment types for which reporting would be required.

As a policy matter, the inclusion of these payments would further the main transparency goal of the law, as doing so would shine a light on payments owed and made by companies to governments. In addition, the inclusion of fines would also help bring additional transparency to the interplay between fines and penalties on the one hand, and corporate income taxes on the other, as it is not always clear what portion of a fine or penalty will be tax deductible.⁴ Requiring the publication of both payment types would allow the public to better understand how fines and penalties may be offset by tax deductions.

Request for Comment 24: Should we, as proposed, define “project” as operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government?

TI-USA welcomes the Commission’s proposed definition of “project.” For the reasons stated in our December 8, 2015 letter to the Commission,⁵ we favor this definition and we strongly encourage the Commission to utilize it in the final rule.

Request for Comment 40: Should the rules permit an issuer to submit the required payment disclosure on a confidential basis?

Permitting issuers to submit payment disclosure information on a confidential basis would defeat the purpose of Section 1504. As stated in our December 8, 2015 letter,⁶ there are abundant reasons why payment disclosure information should be published and why this information should not be anonymous. Perhaps most significantly, the disclosure requirement in Section 1504 was designed to “support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.”⁷ These international transparency promotion efforts, namely EITI, require public, non-anonymous

² See, US EITI 2015 Extractive Revenue Appendix, pgs. 53-5, available at https://useiti.doi.gov/downloads/USEITI_extractive-revenue-appendix_2015-12-10.pdf

³ See, U.S. says BP to pay \$20 billion in fines for 2010 oil spill, Reuters, Oct.5, 2015, available at <http://www.reuters.com/article/us-bp-usa-idUSKCN0RZ14A20151005>

⁴ For a discussion of the interplay between fines and corporate income taxes, see, e.g., http://www.nytimes.com/2015/02/04/business/when-a-company-is-fined-taxpayers-often-share-the-punishment.html?_r=0

⁵ See, <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-106.pdf>, pp. 4-5

⁶ See, id.

⁷ 15 U.S.C. §78m(q)(2)(E)

reporting. While it is true that the statute qualifies this commitment with an introductory “[t]o the extent practicable,” we see nothing to suggest that publishing all resource extraction payments is not practicable. Indeed, various companies are already publicly disclosing such payments,⁸ and European and Canadian companies will soon be required to make such disclosures under applicable European and Canadian laws.

Without the full publication of all resource extraction payment disclosures, the value of Section 1504 to civil society groups and investors will be severely compromised. Resource extraction payment information is of great interest and use to civil society groups as well as to investors, but only if it is provided on a company by company, country by country, and project by project basis. This level of detail will allow anti-corruption groups to identify corruption and hold governments and companies to account; it will also allow investor groups to make more informed decisions based on a company’s risk profile as revealed by its resource extraction payments. Allowing for confidential or anonymous payment disclosure would defeat the goal of making the extractive industry sector more transparent and less corrupt.

Request for Comment 41: Should the rules provide an exemption from public disclosure for existing or future agreements that contain confidentiality provisions?

Providing an exemption from public disclosure for agreements that contain confidentiality provisions would be ill-advised. As we stated in our December 8, 2015 letter to the Commission,⁹ most confidentiality provisions in contracts contain an exception for where disclosure by law is mandated. A study of over 140 resource-extraction investment contracts concluded that “[d]isclosures required by law are a very common exception to confidentiality clauses.”¹⁰ In addition, the Association of International Petroleum Negotiators (AIPN)¹¹, in its model confidentiality agreement, specifically permits disclosures “to the extent the Confidential Information must be disclosed under applicable law, including by stock exchange regulations or by a governmental order, decree, regulation or rule, provided that Receiving Party shall make all reasonable efforts to give prompt written notice to Disclosing Party prior to such disclosure.”¹²

There is also a strong public policy argument against carving out a payment reporting exemption for agreements that contain confidentiality clauses. Creating such an exemption would encourage

⁸ See, e.g., Tullow Oil plc. 2014 Annual Report. Pages 169 to 171, available at https://www.tulloil.com/Media/docs/default-source/3_investors/2014-annual-report/tullow-oil-2014-annual-report-and-accounts.pdf?sfvrsn=4; Statoil 2014 Payments to governments report, available at http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_Ke yDownloads/2014%20Payments%20to%20governments.pdf; Kosmos Energy website, available at <http://www.kosmosenergy.com/responsibility/transparency.php> (last verified on January 14, 2016)

⁹ See, <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-106.pdf>

¹⁰ Peter Rosenblum & Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (RWI 2009), page 27, available at <http://www.resourcegovernance.org/publications/contracts-confidential-ending-secret-deals-extractive-industries>

¹¹ www.aipn.org. Representatives from such leading firms as Exxon Mobil, BP Exploration Operating Company Ltd., Hess, BHP Billiton Petroleum, Noble Energy, Anadarko Petroleum, Repsol, and Total are among the members of the Board of Directors of AIPN

¹² AIPN Model Confidentiality Agreement (2007), Article 4.1, available at <http://www.rmmlf.org/Istanbul/3-Confidentiality-Agreement-Model-Form.pdf>

corrupt regimes and/or secretive companies to write such confidentiality clauses into contracts in order to be exempt from public payment disclosure, thereby undermining the purpose of Section 1504.

Request for Comment 45: Is a case-by-case exemptive process a better alternative than providing a rule-based blanket exemption for specific countries or other circumstances, or providing no exemptions?

TI-USA believes that the rule implementing Section 1504 should not have any exemptions to disclosure requirements for payments made to governments whose own laws purportedly forbid the disclosure of such payments. The plain language of Section 1504 does not contemplate any exemptions nor do the EU and Canadian resource extraction payment transparency rules. However, if the Commission decides to include an exemption to payment reporting requirements, we believe that a case-by-case exemptive process would be a far better alternative than a rule-based blanket exemption.

A case-by-case exemptive process would allow for consideration of the merits of the claimed exemption. For example, while it has been alleged that Angolan law prohibits the disclosure of resource extraction payments to the Angolan government,¹³ Statoil publicly reports such payments to the Angolan government.¹⁴

We also urge that any exemptive approach, if created, utilize a transparent process requiring all documents in support of the exemption to be publicly filed and providing for published public comment. Any hearings held should similarly be open to the public and allow interested third parties to participate. In the case of a blanket rule, notice of intended rule-making followed by public comment would be required. To avoid encouraging countries to adopt new confidentiality standards, any exemptions granted by the Commission should be only for foreign legal prohibitions in effect at the time of enactment of the new rules.

Request for Comment 67: Should we, as proposed, require the resource extraction payment disclosure to be filed, rather than furnished?

For the reasons stated in our December 8, 2015 letter to the Commission,¹⁵ we believe requiring that disclosures be filed rather than furnished is preferable.

¹³ See, Letter from ExxonMobil to the Commission, January 31, 2011, available at <http://www.sec.gov/comments/s7-42-10/s74210-11.pdf>

¹⁴ See, Statoil 2014 Payments to governments report, pg. 10, available at http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf

¹⁵ See, <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-106.pdf>

Request for Comment 71: We seek information that would help us quantify or otherwise qualitatively assess the benefits of the proposed rules. Please provide any studies or other evidence that show a causal link between transparency efforts, particularly the EITI, EU Directives or ESTMA, and societal outcomes.

Transparency is an essential component of good governance. Research based on the Worldwide Governance Indicators suggests that even small improvements in a country's good governance can result in significant dividends in development. The 2010 Governance Matters study found, for example, that when governance is improved by one standard deviation, infant mortality declines by two-thirds and incomes rise about three-fold in the long run.¹⁶

With respect to corruption, Transparency International has researched the relationship between corruption and human development indicators and found that higher levels of corruption correspond to lower levels of development.¹⁷ For example, in countries where bribery is more common, maternal mortality is higher and youth literacy is lower, even when controlling for per capita income.¹⁸ Indeed, the correlation between bribery rates and maternal mortality is stronger than the correlation between per capita income and maternal mortality.¹⁹ TI's research has also shown that a 1% rise in bribery corresponds to a one half percentage point decline in access to basic sanitation such as public sewers and basic latrines.²⁰

Promoting revenue transparency in the extractives sector with a robust implementation of Section 1504 would provide civil society the necessary tools to prevent and combat corruption worldwide. Given that natural resource extraction accounts for at least 10% of GDP in 61 countries,²¹ the potential benefits of strong rules under Section 1504 are significant in terms of healthier and better educated populations, creating more productive societies and higher economic growth rates.

TI-USA thanks the Commission for its work on this important matter. We respectfully request the Commission to adopt a final rule that incorporates our comments and provides for maximum transparency and accountability in the extractive industries sector. By doing so, the Commission

¹⁶ See, Daniel Kaufmann, *Governance Matters 2010: Worldwide Governance Indicators Highlight Governance Successes, Reversals and Failures*, available at <http://www.brookings.edu/research/opinions/2010/09/24-wgi-kaufmann>

¹⁷ See, 2015 and Beyond: The Governance Solution for Development, page 3, available at http://issuu.com/transparencyinternational/docs/2013_workingpaper1_mdgsgovernance_e?e=2496456/5309602

¹⁸ See, id.

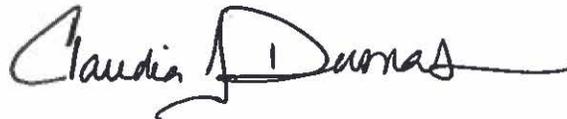
¹⁹ See, id.

²⁰ See, id.

²¹ See, World Bank 2013 Total Natural Resource Rents, available at <http://data.worldbank.org/indicator/NY.GDP.TOTL.RT.ZS>

will be helping to ensure that Section 1504 lives up to its promise and results in a world freer of corruption where resources are more fairly shared.

Sincerely,

A handwritten signature in black ink that reads "Claudia Dumas". The signature is fluid and cursive, with a long horizontal line extending to the right from the end of the name.

Claudia Dumas
President and Chief Executive Officer
Transparency International – USA

Chair Mary Jo White
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