



16 February 2016

Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549–1090  
Via Email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

**Re:** Proposed Rule, Disclosure of Payments by Resource Extraction Issuers - File Number S7–25–15

Dear Chair and Commissioners:

I am writing to express my strong support for Dodd-Frank Section 1504 and for a strong 1504 rule, and to provide information to support the new rulemaking by the Securities and Exchange Commission (SEC). As a user of data produced by the SEC, I have provided analysis and technical support to the Publish What You Pay United States coalition in the previous rulemaking, and signed onto the letter of support sent to the SEC by Publish What You Pay International dated April 14, 2014. I fully endorse the February 16, 2016 comment submitted by Publish What You Pay. The following provides additional evidence and information using concrete examples from Ghana that respond to questions the SEC has posed in its rulemaking.

The Africa Centre for Energy Policy (ACEP) is a non-profit think tank and policy advocacy organization based in Accra, Ghana<sup>1</sup>. 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 Ghana to ensure hydrocarbon and mineral development is transparent, accountable and effective. We also support Ghana's Extractive Industry Transparency Initiative (GHEITI). I served as a team member (oil sector) of the independent reconciler for oil and mining industry payment disclosures for the last two EITI reconciliation reports.

A petroleum economist by training, I am Executive Director of ACEP. I previously served in government in several roles: as Energy Policy Analyst at the Ghana Ministry of Energy; as Commissioner of Ghana's Public Utilities and Regulatory Commission; as former Deputy Minister of State in Ghana's Northern Region, and as Mayor of Ghana's third largest city of Tamale.

#### **A. More Extractives Revenue Transparency is Critically Needed in Ghana**

##### *1) Resource production context*

Minerals – Ghana is Africa's largest gold producer after South Africa, and ranks 9<sup>th</sup> in the world in terms of gold production. Revenues from gold production represent about 96% of total mineral receipts, with bauxite, manganese and gemstone production contributing the lesser extent. Revenues from mining constituted 1.8% of

<sup>1</sup> See [www.acepghana.com](http://www.acepghana.com)

<sup>2</sup> [https://eiti.org/files/2012-2013\\_final\\_Mining\\_Sector\\_Report.pdf](https://eiti.org/files/2012-2013_final_Mining_Sector_Report.pdf)

<sup>3</sup> <https://eiti.org/blog/improving-impact-mining-royalties-local-level-ghana>

GDP in 2013<sup>2</sup>, and mineral revenues account for roughly 40% of local government budgets.<sup>3</sup> Mining companies subject to payment disclosure rules operate in Ghana: Ghana's largest mine is operated by US-listed Gold Fields, and the sector includes other leading mining companies such as US-listed Newmont Mining and AngloGold Ashanti as well as Canadian-listed Goldenstar Resources.

Oil - Ghana is home to the largest offshore oil discovery in West Africa in the last decade, the Jubilee field, discovered in 2007. Proven reserves from Jubilee are 1.8 billion barrels. It broke a record for a major offshore oil development, achieving oil extraction within only three and a half years. The first phase of Jubilee is expected to produce 500 million barrels over the lifetime of the project. The government projects that by 2022, Ghana should be producing about 500 thousand barrels per day, and generating revenues of about US\$4 billion annually at current levels of prices. This is substantial and would be a game-changer in Ghana, where poverty and broad-based economic development remain critical challenges. While there has been a decline in overall poverty rates and extreme poverty rates since 2005,<sup>4</sup> critical geographic disparities in poverty incidence still persist. The three northern regions have the highest incidence of poverty and their share of the poor comprises about 80% of the total poor population<sup>5</sup>.

This reflects a continued challenge for the use of current and future oil revenues generated by companies operating in Ghana, making transparency of these revenues so critical. For example, there are plans for continued private sector investment in the oil sector, with Tullow Oil planning to invest US\$6 billion in an adjacent block to Jubilee. Several oil companies subject to payment disclosure rules operate in Ghana: US-listed Kosmos Energy and Anadarko and EU-listed Tullow Oil.

## 2) *Legislative context*

The Ghanaian government adopted comprehensive legislation to govern the management of oil revenues, the Petroleum Revenue Management Act, in 2011. The legislation covers how oil revenues are received and managed, how revenues are distributed, and the governance and established an independent body with oversight of these revenues. ACEP, with other NGOs in the local Publish What You Pay coalition, played a central role in the crafting and passage of this law. We now monitor the law's implementation and support oversight. However, significant weaknesses remain. The legislation only covers the oil sector, and Ghana does not have similar legislation in place for the mining sector. As a result, we have not been able to track the revenues that the government receives from mining. The government joined EITI in 2007, becoming compliant in 2010, and while this has helped to address data gaps, weaknesses remain, as described below. For this reason, we welcome the transparency contribution of Section 1504. If the rules remain as proposed by the SEC, and its requirements align with disclosure rules in other markets like the European Union and Canada, it will directly complement our revenue transparency law, and will help to enhance the EITI's effectiveness in Ghana.

## 3) *Fiscal governance context*

Ghana is also facing serious fiscal challenges, and it is essential, especially in a low oil price environment, that every last dollar of oil revenue is collected and accounted for. For instance cash fiscal deficits reached 14% of GDP, unprecedented in Ghana's history, and only receded to 9.5% of GDP in 2014, still very high. To finance these deficits, the authorities have embarked on uncontrolled borrowing taking debt levels to more than 70% of

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<sup>2</sup> [https://eiti.org/files/2012-2013\\_final\\_Mining\\_Sector\\_Report.pdf](https://eiti.org/files/2012-2013_final_Mining_Sector_Report.pdf)

<sup>3</sup> <https://eiti.org/blog/improving-impact-mining-royalties-local-level-ghana>

<sup>4</sup> The overall poverty rate declined from 31.9% in 2005/06 to 24.2% in 2012/13, whereas the extreme poverty rate declined from 16.5% to 8.4%. Source: International Monetary Fund – Ghana: Request for a Three-Year Arrangement Under the Extended Credit Facility, March, 2015.

<sup>5</sup> Government of Ghana, Budget and Policy Statement, 2015.

GDP, a situation that is unsustainable<sup>6</sup>. Ghana has therefore been declared to be at a high risk of debt distress (Ibid). The authorities are committed to an IMF program (2015 – 2017), which requires the government to reduce debts to sustainable levels, but this requires significant mobilization of domestic revenues and oil revenues to replace borrowing. The fiscal challenges led to a downgrading of Ghana’s Sovereign rating by Moody to (B-). Moody’s said that their downgrading was related to “increased government liquidity risks, as the government faces large gross borrowing requirements amid more difficult domestic and external funding conditions.”<sup>7</sup> Oil revenues remain an important source for improving liquidity in this context, and for injecting productivity and growth into the economy, but only if they are used efficiently and comprehensively accounted for. Revenue transparency, such as that being required by Section 1504 and the SEC’s proposed rules, will be critical to underpin public and parliamentary oversight of oil revenues and the role that they can play in addressing our fiscal deficits.

**B. Section 1504 disclosures are needed for ACEP’s monitoring and analysis of government revenue projections and actuals**

A significant part of our work is advocating for high transparency and accountability standards, and campaigning against government and corporate corruption, in particular in the misuse of state funds from energy and mineral resources. Our analysis of state revenues and expenditures is critical to this work.

On the revenue side, we conduct independent analysis of the revenues that are due to the country from each company and contract, and compare these with what the government is reporting. This is very important because without this analysis, there is no guarantee that the revenue figures that government is reporting, is indeed what has been received from the companies, and is a true reflection of what is due the country.

To conduct our analysis in the oil sector, ACEP examines the data that is publicly available including capital expenditure, operational cost and expenditure, as well as benchmark crude oil price, and production volumes. Once we have done the analysis to determine gross revenues, we examine the revenue streams for the government, and determine what is due the state, based on the contractual arrangement. So when the government announces what it has received from the companies, we are able to challenge them. For example, in our latest report, which analyzed three years of government oil revenue management, we challenged the government on some of the figures reported as far as revenues from oil companies.<sup>8</sup> This is a standard independent oversight activity we undertake.

Therefore, Section 1504 disclosures would directly support the core work and mission of ACEP as US-listed companies operate in Ghana as noted above.

**C. Public filing of company by company payment reporting is necessary for implementation of EITI process and for public oversight of government budgets and revenue reporting. (Response to Question 40)**

In Ghana, it has been very difficult to identify the company making a specific payment to the government. This is because the payments that are made are received by the Ghana Revenue Authority, but when government is reporting to the public, government only reports generically. For example, they report total corporate taxes, without mentioning how much each company contributed to the total. They report participating interest and royalty by contract, without disaggregating them by company, so it is very difficult to determine the company that is making the payment.

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<sup>6</sup> International Monetary Fund – Ghana: Request for a Three-Year Arrangement Under the Extended Credit Facility, March, 2015.

<sup>7</sup> [https://www.moody.com/research/Moodys-downgrades-Ghanas-sovereign-rating-to-B3-outlook-negative--PR\\_321192](https://www.moody.com/research/Moodys-downgrades-Ghanas-sovereign-rating-to-B3-outlook-negative--PR_321192)

*1) Company payment data needed for implementation of EITI process*

Gathering company payment data is also very challenging for the Ghana EITI process, which requires that company payment data and government receipt data is received separately for the purposes of reconciliation by an independent reconciler. As part of the consortium that produces Ghana's EITI reconciliation reports, it was my responsibility to produce the oil sector reports officially sanctioned by the process.<sup>9</sup> This requires gathering data from Tullow Oil, Kosmos Energy, Anadarko, Sabre Oil and Gas and PetroSA.

In this capacity, I could not get any official data from government on the payments made by the companies. I had to resort to gathering the data through company reports such as annual reports filed with regulators such as the SEC and corporate social responsibility reports. My formal requests to companies to supply the data, as required by the EITI Standard, were unsuccessful. However, even with those sources, only Tullow Oil and Kosmos Energy produced information on how much they paid in royalties and how much they paid in taxes.

The SEC's rules for Section 1504 will be critical to enable access to information from Anadarko since they are US-listed. Despite their commitment to participate in the EITI, I was not able to access Anadarko's payment information, because it was not available on their website, and not available in their Form 10-K, because their Form 10-K does not disaggregate the payments. I could not access this information for Sabre, because it was bought by PetroSA, the national oil company of South Africa, and this information was not available on their website. As a result, the EITI report would only include payments made by two companies, even though there are five companies operating the Jubilee project.

It is extremely concerning that those that have been asked by government to assess the payment regime, cannot get data on payments made by companies. It is clear that access for citizens is even less, despite the fact that under Ghanaian law, they are the primary owners of the resources. It is also a serious problem for Ghana, that even the official EITI process cannot access the data on royalty payments by company, participating interest by company, and taxes by company. This example clearly demonstrates that EITI still has many implementation challenges, and that complementary disclosures, such as those required under Section 1504 and similar laws, are necessary.

*2) Company payment data needed for public oversight of government budgets and revenue reporting*

But these problems point to a more disturbing scenario, which is the serious weaknesses demonstrated by government in effectively estimating revenue flows, managing these funds and disclosing total revenues by company and project to the public.

For example, in 2011, the Ghanaian government included in the annual budget approved by Parliament, that government was to collect \$400 million dollars in corporate taxes from oil companies. However, at the end of the year, government collected zero.<sup>10</sup> This was compounded again in 2012. The government again budgeted \$324 million for 2012 as corporate taxes, and again, at the end of the year received zero. In 2013, the government became conservative, and projected to collect \$55 million. At the end of the year, they received \$168 million.<sup>11</sup> This suggests that there is no uniform data held by the companies and the government, and both stakeholders are doing projections based on different sets of data. The government budgeted believing that the companies were in

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<sup>9</sup> The process for gathering reports from companies includes completion of data forms submitted to the companies, as well as verifications with publicly available reports issued by the companies, on company websites or websites of statutory regulators or stock markets where the companies are listed.

<sup>10</sup> Africa Centre for Energy Policy, *Three Years of Petroleum Revenue Management in Ghana – Transparency without Accountability*, Public Interest Report, No. 2. July, 2014.

<sup>11</sup> Ibid.

a tax paying position, but the companies did not believe so. The lack of transparency in company payments prevented any independent oversight of this process.

This scenario is surprising given that Ghanaian law requires companies to file their tax returns quarterly. For the oil sector it has been reduced to monthly filings. So month by month, the government should be able to know the tax paying positions of the companies. However, it is clear that the government does not know, and continues to budget for funds that will not arrive.

The negative effects of this unfortunate scenario are multiple:

- 1) Faulty revenue projections throw the entire government budget out of year;
- 2) It significantly wanes the confidence and trust of Parliament in the data that government is presenting to them for their approval;
- 3) It undermines government credibility in translating oil wealth into development, because government will not be able to implement the projects budgeted for the year;
- 4) Government loses credibility in the eyes of the citizens and investors, affecting citizen and investor confidence, putting the country's economic stability and growth at risk.

ACEP believes that public, company by company payment information for each project, could improve public oversight, to avoid these types of problems in the future.

**D. Public, company and project level payment disclosure by contract needed for public oversight of subnational mining revenue distribution. (Response to Questions 24 and 40)**

All mining taxes are collected by the central government, and 20 percent of the royalty on mineral production is redistributed to subnational governments. Taxes on mining profits, which potentially should be much more important in times of high prices, are not redistributed. The distribution of the mining royalty is as follows:

- 80 percent is kept by the central government;
- 10 percent is shared with the Minerals Development Fund;
- 10 percent goes to the Office of the Administrator of Stool Lands, which then shares with districts, traditional councils, and customary land title holders.

In order to ensure that what was allocated according to the formula, was indeed received, disclosure of the total payments by company and by project (defined as a contract) is critical for public oversight. Local communities affected by mines, which are seeking public investment, can determine whether local governments have received what is due according to the statutory allocation, if they have an accurate picture of total revenues received. Moreover, the distribution formula is by administrative fiat<sup>12</sup> and not backed by law; and often not followed strictly. Further, Ghana does not have a Mineral Revenue Management Law, with strict requirements for disclosure of payments and allocation to communities and public investment projects. The EITI is a reconciliation mechanism but the terms of reference for reporting on company payments are developed by the EITI secretariat largely dominated by government representatives. The only means by which communities can determine fiscal allocation disparity is by having access to independent information on total payments made by companies for each contract.

**E. Public, company and project level payment disclosure by contract needed to evaluate and implement effective oil and mineral revenue sharing policies. (Response to Questions 24 and 40)**

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<sup>12</sup> Administrative Fiat of 1991 (letter no. AB.85/156/01)

Ghana is a unitary state, and all oil and mineral resources according to our constitution belongs to all of the citizens.<sup>13</sup> While the law prohibits statutory earmarking<sup>14</sup>, such as earmarking any percentage of the resources for specific communities impacted by oil projects, there is an intense debate underway regarding the potential for instituting a policy on oil and mining revenue sharing. Revenue sharing is seen as an approach to compensate local communities and governments that bear the largest impacts from extractives development. However, the lack of public, project-level payment information by contract, hampers informed debate at the national and community level on the proportions of revenue that should be shared.

For example, the Chamber of Mines has advised the government that the share of the mineral revenues provided to communities is low, and that they would support a statutory allocation of 30% of mining revenues to local communities.<sup>15</sup> This is not surprising, as communities are putting pressure on mining companies for development support, such as for educational infrastructure, for potable water, and for health facilities. But since companies pay taxes and royalties to the state, it should not be the responsibility of companies or their shareholders to provide development services to communities.

Unless the government allocates a substantial portion of mining revenues to communities, the pressure on mining companies will continue, increasing social risk and operational risks for companies at the project level. Therefore, this needs to be resolved before tensions at the project level escalate. However, there is no clarity on what is the basis for the Chamber and its members to propose the 30% of total revenues should be going to communities. Clearly, these companies are aware of the gross revenues generated by the sector, while the public is not.

If communities were to know the total revenues companies are generating by contract, they would be in a better position to request the percentage would suffice their needs for educational facilities, for health infrastructure, drinking water, etc. The endorsement of a 30% proportion of revenues to go to communities, when communities do not even know the total size of the revenues, could lead to an inefficient public policy. It is possible that communities may need 70% of the revenues, or perhaps 10%. Without knowing the total revenues, effective public parliamentary debate on such a proposal is impossible. An inefficient policy proposal could lead to regulatory uncertainty and investment risk. If the right policy is not developed, it could also lead to conflicts with communities that could lead to project delays or stoppages that would be costly for investors and the state.

Public payment disclosure at the contract level is therefore critical to enable the practical policy debates that keep our democracy functioning most efficiently, and maintain a stable investment and operating climate.

#### **F. Critique of API proposal: The anonymous reporting model provides no value to ACEP or Ghana. (Response to Questions 26 and 28)**

We understand that the American Petroleum Institute (API) has proposed that the Commission produce a rule that allows anonymous disclosures without the name of the company making the payment, and using a new project nomenclature that would allow for aggregation of payments.<sup>16</sup> For example, according to API's model, Ghana's offshore projects would be labeled as "Ghana/offshore/oil", with a tag to the agency receiving the payment. For Ghana, this approach would render the oil payment disclosures useless for accountability purposes, and would prove a waste of effort for reporting companies, for the following reasons:

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<sup>13</sup> Article 257 (6) Every mineral in its natural state in, under or upon any land in Ghana, rivers, streams, water courses throughout Ghana, the exclusive economic zone and any area covered by the territorial sea or continental shelf is the property of the Republic of Ghana and shall be vested in the President on behalf of, and in trust for the people of Ghana".

<sup>14</sup> Section 22 of the Petroleum Revenue Management Act 2011 (Act 815) provides that, "Outside of the allocation of the Petroleum Holding Fund, extra budgetary activities or statutory earmarking of petroleum revenue for any consideration is prohibited". This stands against international best practice.

<sup>15</sup> Business News "Allocate 30 per cent of mineral revenue to mining communities". Thursday, 16 February 2012.

<sup>16</sup> American Petroleum Institute. November 7, 2013. <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf>

- 1) ACEP, Parliamentary oversight bodies, EITI, Ministry of Finance and other data users would be unable to link disclosures to the associated contract which governs the terms of the payment. The company name is necessary to know which contract defines the payment terms. Therefore, any effort to determine whether the payment is appropriate to the contract terms would be stymied.
- 2) Ghana's EITI process requires the company name alongside the payment, by project, for the reconciliation process. No reconciliation between government receipts is possible unless the company name is available. This would undermine what we understand is a stated purpose within the law, to "support the international promotion of transparency efforts", such as EITI.
- 3) Nothing in that project nomenclature would allow a user to determine the company actually making the payment. All companies operating offshore largely make payments to the same government entities, and therefore there would be no way to distinguish between companies.

## G. Conclusion

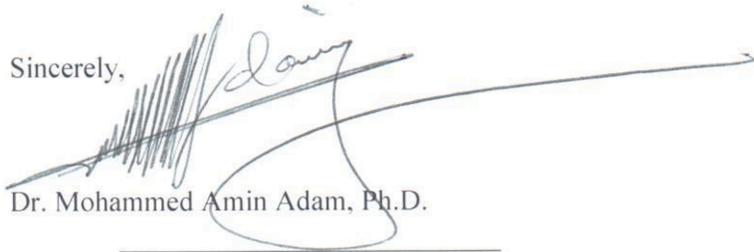
Ghana's problems reflect the enormity of the challenges on the African continent and in the developing world. If we, a functioning democracy with established rule of law are facing these issues, it can only be imagined how this plays out in Niger, Benin, Liberia or other countries with significantly weaker governance. For this reason, public transparency of the payments by oil, gas and mining companies to governments for each project is absolutely critical. It's needed to deter corruption and allow public oversight of contract implementation, government budgeting and revenue management.

As such, we strongly support the Commission's proposal for public, company by company disclosure at the contract level. We also support the Commission's effort to align its rules with those already in force in other countries, such as the UK and Canada. The project reporting definition adopted in the EU and Canada would be appropriate for Ghana, as it would allow for reporting according to contracts, which largely align with a "project" in the Ghanaian context.

We appreciate this opportunity to provide written comments to the Commission. I am regularly in Washington and would welcome an opportunity to discuss these comments in person.

Thank you for your consideration.

Sincerely,



Dr. Mohammed Amin Adam, Ph.D.

Executive Director