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February 17, 2016

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington DC 20549-1090

Re: Payments by Resource Extraction Issuers – File No. S7-25-15

Dear Mr. Fields:

In Release No. 34-76620 (the “Release”), the Commission has proposed amendments to its rules and forms (the “Proposed Rules”) to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act by requiring disclosures relating to payments to governments by resource extraction issuers. We welcome the opportunity to comment on the proposal and offer the suggestions below for your consideration.

Alternative Reporting

We strongly support the Commission’s proposal to include a framework for alternative reporting in the rules. We agree with the Commission that such an approach will promote international transparency efforts as well as reduce compliance costs for issuers.

In response to the Commission’s requests for comment and in an effort to maximize the benefits of this approach, we urge the Commission to modify the alternative reporting framework in the following ways:

- *Standard Should Be “Equivalence”* – We believe the appropriate standard for assessing alternative reporting requirements is “equivalent” rather than “substantially similar,” which would also be aligned with the standard used in the European Union. We also suggest the following criteria, which are similar to those used under the Canadian rules:

- Whether the alternative disclosure achieves the purposes of the reporting requirements under the rules (*i.e.*, to help combat global corruption through improved transparency of payments made in the extractive industries to governments); and
- Whether the alternative disclosure addresses a substantially similar scope as the rules.
- *Permit Inclusion of Supplementary Information to Achieve Equivalence* – The alternative reporting framework should allow an issuer to achieve equivalence by supplying additional information together with the information required under another reporting regime (including the Extractive Industries Transparency Initiative (“EITI”). For example, as the Commission noted in the Release, the U.S. Extractive Industries Transparency Initiative (“USEITI”) would address only payments made to the U.S. Federal Government – if it were found to be equivalent, an issuer should be able to rely on USEITI disclosures for those payments while also reporting payments made to non-U.S. governments under the standards of the rule (or another equivalent framework). The same would be true for EITI reporting standards implemented in other jurisdictions. Similarly, if the Commission were to find that a particular foreign reporting regime does not meet the equivalence standard because certain information is not required, an issuer should be able to achieve equivalence by supplementing the foreign report with that additional information.
- *Mechanism to Determine Equivalence Should Be Both Flexible and Practical* – We urge the Commission to provide a mechanism for determining equivalence that is as flexible as possible. In addition, the process should function effectively in practice and allow for timely responses to issuers seeking clarity on their disclosure requirements. In particular, we urge the Commission:
 - *To Allow Determination at the Request of a Jurisdiction, at the Request of an Issuer or on the Commission’s Initiative* – We believe the Commission should be able to make a determination of equivalence on its own initiative – indeed, we encourage the Commission to make a determination regarding the existing Canadian, U.K. and Norwegian rules at the time of adoption of the rules. We also encourage the Commission to consider the directives adopted by the European Union (and not just the rules implemented in the United Kingdom), as we believe the E.U. requirements should provide sufficient basis to determine equivalence even in advance of being implemented in each E.U. Member State. In addition, the Commission should allow both foreign jurisdictions and issuers to submit an application for an equivalence determination (whether for a jurisdiction as a whole or on a case-by-case basis, potentially with proposed supplemental information). Going forward, the Commission will not be as well placed to identify other jurisdictions that may have sufficiently developed reporting frameworks to warrant an equivalence determination as those jurisdictions themselves and issuers that report in those

jurisdictions. We believe permitting an industry group or law firm to submit an application may also be beneficial, although less crucial than permitting jurisdictions and issuers to do so.

- *Not To Require Formal Commission Action* – We urge the Commission not to require formal Commission action, with notice and a public comment period, for all determinations of equivalence under this framework, as seems to be contemplated in the Release. Use of Rule 0-13 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), for example, would require this kind of formal Commission process. We urge the Commission to implement a process in which issuers could rely on Staff no-action letters, as that process is well understood and can be completed in a timely manner. We believe the Commission could implement such a process by including in the rules a provision that issuers may satisfy the rules, in whole or in part, by providing disclosure prepared pursuant to equivalent alternative reporting requirements that have certain features or satisfy certain criteria (*e.g.*, as suggested above, equivalent alternative requirements that achieve the purposes of the reporting requirements under the rules and that address a substantially similar scope as the rules). In the adopting release for the final rules, the Commission could then set forth determinations with respect to the Canadian, E.U. and Norwegian reporting requirements, which would provide guidance as to the application of the required criteria in practice, and encourage the Staff of the Division of Corporation Finance to provide no-action guidance to issuers or with respect to certain jurisdictions. This approach is similar to that already used by the Commission and the Staff in a variety of areas. Alternatively, the rules could provide that equivalence will be determined by, or based on evidence acceptable to, the Commission and then delegate the authority for that determination to the Director of the Division of Corporation Finance. However, even if the Commission believes that determinations with respect to all issuers reporting under a particular regime should be undertaken pursuant to a more formal Commission process, we would urge the Commission to still permit issuers to seek no-action guidance from the Staff on a case-by-case basis (which could include proposals of supplemental disclosure).
- *To Allow Confidential Submissions* – We urge the Commission to allow applications for equivalence to be submitted on a confidential basis. Even if the process includes a formal notice and public comment period, we believe the discussions about equivalence will benefit from confidentiality, at least initially. This is particularly true for issuers, if they are able to propose possible additional information to supplement existing disclosure to achieve equivalence. However, another jurisdiction may also be more likely to submit an application for equivalence if the request could be confidential in the initial stages.

- *Not To Require an Opinion of Counsel as to Equivalence* – We urge the Commission not to require an opinion of counsel as to equivalence (or “substantial similarity” or other standard). Such an opinion would be very difficult to deliver without very detailed guidance from the Commission as to the criteria for equivalence. We believe the equivalence determination is one the Commission (or the Staff) should make, rather than counsel. If the Commission wishes to receive legal support regarding the disclosure requirements of another legal jurisdiction, it could require a legal opinion setting out those requirements.

Exemptive Relief

We strongly support the Commission’s willingness to consider exemptive relief on a case-by-case basis, as warranted, in the event of a foreign law prohibition of disclosure or other circumstances. We believe this approach will permit the Commission to provide relief tailored to an issuer’s particular circumstances and address issues that may not be apparent today. To maximize the benefits of this approach, we urge the Commission to provide this exemptive relief through a mechanism that is both flexible and practical. We believe our suggestions above with respect to alternative reporting also apply to this exemptive relief – a no-action letter process would permit case-by-case determinations on a timely basis under an existing and well-understood framework. In this context, however, we believe confidentiality is an even more acute concern, given the likely sensitive nature of any requests for exemption. Indeed, as the Commission notes in the Release, any request for exemption would need to describe the particular payment disclosures sought to be omitted and the specific facts and circumstances that warrant an exemption – *i.e.*, the very information the issuer seeks to omit. Accordingly, confidential treatment must be afforded to the exemptive relief process.

Grace Period for IPOs and Newly Acquired Companies

Because of the complexity of the requirements, we urge the Commission to include a phase-in period or temporary exemption with respect to newly public companies, as well as newly acquired companies. We note that such a grace period exists for the conflict minerals disclosure required under Exchange Act Section 13(p) and Rule 13p-1 thereunder,¹ as it also does in the context of internal control over financial reporting disclosure.²

We propose, however, that the grace period for the resource extraction payment disclosure should differ from that applicable to conflict minerals disclosure in one respect (and respectfully suggest that the Commission consider adopting a similar change with respect to the conflict minerals disclosure). The current grace period for conflict minerals disclosure for newly acquired companies applies only to companies that were not previously required to report under the rules. We respectfully submit that this approach underestimates the amount of transition work that is necessary even for an acquired company that was already subject to the reporting

¹ See Instruction 3 to Item 1.01 of Form SD and Division of Corporation Finance: Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions - Conflict Minerals, Question 11 (May 30, 2013).

² See Division of Corporation Finance: Management’s Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports – Frequently Asked Questions, Question 3 (as revised Sept. 24, 2007).

requirements. This is even more important with respect to resource extraction payment information, as the acquiring company will need time to integrate the financial reporting and disclosure processes for the newly acquired company with its own. This is currently recognized in the internal control over financial reporting context, in which the grace period applies for all newly acquired companies. We suggest that the grace period for resource extraction payment disclosure apply similarly to all newly acquired companies and not just those that were not previously required to report under the rules.

Relationship of Form SD to Commission Rules under the Securities Act

When Form SD was first adopted, there was some uncertainty about the relationship between the requirement to file Form SD and the Commission's rules and forms under the Securities Act of 1933, as amended. The Commission staff addressed this uncertainty in Frequently Asked Questions posted in 2013.³ We urge the Commission, when it adopts final rules on resource extraction payments, to use the adopting release to confirm and restate the guidance the Staff has provided. Specifically, the adopting release should state that:

- Form SD is filed pursuant to Sections 13(p) and 13(q) of the Exchange Act and not Section 13(a);
- In determining eligibility for use of Form S-3 or Form F-3, the requirement that the registrant has filed in a timely manner all reports and materials required to be filed during the prior twelve calendar months refers to reports under Exchange Act Sections 13(a) and 15(d) and materials under Exchange Act Sections 14(a) and 14(c); and
- Consequently, the filing of Form SD does not affect eligibility for Form S-3 or Form F-3.

We welcome proposed Instruction 4 to Form SD, which states that information filed on Form SD is not incorporated by reference into other filings unless the registrant does so specifically. This is important to avoid future uncertainty on the point. The clarification we suggest above – that Form SD is not filed pursuant to Section 13(a) of the Exchange Act – will also help avoid confusion about whether an issuer that uses general incorporation by reference language in a Form S-3 registration statement has inadvertently incorporated Form SD filings, which would be contrary to the intention of Instruction 4.

Use of Cash or Accrual Method

We urge the Commission to clarify in Form SD itself that payments may be reported either on a cash basis or on an accrual basis. The Release states that accrual reporting is not required, leaving open the question as to whether an issuer may elect to present payments on either basis. We note that the Staff's Frequently Asked Questions issued in May 2013 indicated that under the prior version of the rules, payment information was required to be presented on an

³ See Division of Corporation Finance: Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions - Disclosure of Payment by Resource Extraction Issuers, Question 9 (May 30, 2013).

unaudited, cash basis for the year in which the payments are made.⁴ We urge the Commission to clarify this topic in the final rules, or at least in the adopting release. We further urge the Commission to permit payments to be reported on either basis. We expect that reporting on an accrual basis could be more informative or less burdensome than reporting on a cash basis, particularly where it is consistent with the financial statements or with similar reporting requirements in other jurisdictions.

* * * * *

We thank you for the opportunity to submit this comment letter. Please do not hesitate to contact Nicolas Grabar or Sandra L. Flow (212-225-2000) if you would like to discuss these matters further.

Very truly yours,

CLEARY GOTTlieb STEEN & HAMILTON LLP

⁴ See Division of Corporation Finance: Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions - Disclosure of Payment by Resource Extraction Issuers, Question 7 (May 30, 2013).