

March 8, 2016

By E-Mail:

Chair Mary Jo White
Commissioner Michael Piwowar
Commissioner Kara Stein

US Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Dodd-Frank Section 1504 Rule

Dear Chair and Commissioners:

As one of the European Parliamentarians who brought about the EU Accounting and Transparency Directives, I write in response to certain misleading statements made concerning European laws, in particular the comments you received from the American Security Project (“ASP”) (23 November, 2015 and 21 January, 2016) and ExxonMobil (16 February, 2016). I am in agreement with ASP regarding the importance of transparency to prevent corruption and increase investor and citizen trust in the oil, gas, and mining sectors.¹ There are, however, erroneous assertions made by ExxonMobil and by ASP that I would like to address.

First, ExxonMobil’s letter seriously understates where we are in Europe on natural resource transparency. They are wrong as a factual matter to claim that “many if not most Member States with significant oil and gas developments are still finalizing their implementing legislation.”² In fact, most Member States have transposed the EU Directives into their national laws, and first company reports are expected to be filed this spring. In particular, this includes countries such as the United Kingdom and France, which have the most developed capital markets for oil, gas and mining companies.³

In addition, Exxon’s suggestion that a review of the EU Directives may result in a weakening of the Directives is misleading. It is equally likely that this review could result in a further strengthening of the

¹ Comment submitted by American Security Project (23 November 2015), p.1. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-101.pdf>.

² Comment submitted by ExxonMobil (16 February 2016), p. 2. Available at: <https://www.sec.gov/comments/s7-25-15/s72515-33.pdf>.

³ UK Reports on Payments to Governments Regulations 2014. Available at: <http://www.legislation.gov.uk/ukxi/2014/3209/contents/made>; UK Disclosure and Transparency Rules (Reports on Payments to Governments) Instrument 2014. Available at: http://media.fshandbook.info/Legislation/2014/FCA_2014_63.pdf; French LOI n° 2014-1662 du 30 décembre 2014 portant diverses dispositions d'adaptation de la législation au droit de l'Union européenne en matière économique et financière. Available at: <https://www.legifrance.gouv.fr/eli/loi/2014/12/30/FCPM1411464L/jo/texte>.

Directives, including consideration of “the extension of the reporting requirements to additional industry sectors ... whether the report on payments to governments should be audited ... [and] the disclosure of additional information on the average number of employees, the use of subcontractors and any pecuniary penalties administered by a country”.⁴

ASP states that a competitive challenge is created when only one company is required to disclose payments made to the host government. They say this results from the government favouring another company that does not disclose payments in order to continue corrupt practices.⁵ To illustrate their point, ASP cited a 15-year-old report by Publish What You Pay that stated Angola threatened to revoke BP’s operating license when BP planned to voluntarily disclose payments made to Angola.⁶ It is important to point out, though, that the same report concluded that BP lacked due diligence in communicating their intentions to the Angolan government.⁷ It also stated the BP incident “underlined the case for mandatory disclosure through, for example, stock exchange disclosure rules” to include national and international companies to report to every country of operation.⁸ Therefore, the very report ASP uses as support for their argument emphasizes the importance of disclosure with no exemptions for national and international companies listed on all stock exchanges. Furthermore, Angola’s Production Sharing Agreements provide a standard exception from confidentiality: “to the extent required by any applicable Law, Decree or regulation (including, without limitation, any requirement or rule of any regulatory agency, securities commission or securities exchange on which the securities of such Party may be listed).”⁹

Beyond this, there is no evidence that companies covered by current or pending transparency rules, or that report payments voluntarily, have lost out to competitors. In fact, since the EU, Canada, and Norway extractive industry transparency laws have been in place, companies have continued to win contracts from countries even when they are required to disclose payments to host governments. A comment submitted by Global Witness in 2013 highlighted five countries where multiple companies are winning oil contracts with no indication of concern for their forthcoming mandatory payment disclosure requirements under Section 1504 and/or the EU Directives.¹⁰

⁴ EU Accounting Directive, Article 48, Review. Available at: http://new.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:JOL_2013_182_R_0019_01&from=EN

⁵ Comment submitted by American Security Project (23 November 2015), p.3. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-101.pdf>.

⁶ Ibid.

⁷ Mabel Van Oranje and Henry Parham, “Publishing What We Learned, An Assessment of the Publish What You Pay Coalition.” 2009, p.32-34. Available at: <https://eiti.org/files/Publishing%20What%20We%20Learned.pdf>.

⁸ Ibid.

⁹ Angola Production Sharing Agreement Template. Article 33.2(c). Available at: <http://www.resourcegovernance.org/sites/default/files/Angola%20PSA%20Template.pdf>.

¹⁰ Comment submitted by Global Witness (18 December 2013), p.23. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>. The examples include: Gabon, October 2013: Ophir Energy (UK) Exxon Mobil (US), Eni (Italy), Marathon (US), among others; Myanmar, October 2013: Eni (Italy) and CAOG Sarl (Luxembourg); Malaysia, December 2012: ConocoPhillips (US) and Shell (US/EU); Brazil, May 2013: Chariot Oil & Gas Ltd (UK) and Premier Oil (UK); and Egypt, November 2012: Edison (Italy), BP (UK), Petroceltic (Ireland).

In addition, many companies voluntarily disclose payments on a country-by-country basis and continue to win contracts. A few examples are Statoil (Norway), Tullow (UK), Newmont (US), Talisman (Canada), Kosmos (US), BHP Billiton (UK-Australia), Rio Tinto (UK-Australia), and Anglo-American (UK-South Africa). Taking it a step further, Tullow Oil, Kosmos, and BHP Billiton have all voluntarily reported project-by-project payments to governments in recent years. These disclosures include numerous new projects, demonstrating that these companies continue to expand. For example, in Gabon in October 2015, Tullow and the Government of Gabon reached an agreement for Tullow to regain its 7.5% stake in the Onal Complex producing fields and maintain its licenses until 2034.¹¹ Tullow will also begin operation offshore of Ghana this year at the Tweneboa Enyenra Ntomme field which has gross reserves of 300 million barrels of oil.¹² In 2016, Kosmos will continue to drill wells in Senegal, Mauritania, and the Greater Tortue area.¹³

Overall, transparent companies improve their social licence to operate because they are better trusted by citizens. Extractive business success is not premised on secrecy, but on a host of other factors including technological assets and expertise, capital requirements, and the fiscal terms that companies offer. Disclosure of payments to governments is not costly for extractive companies, and does not provide their competitors with proprietary information.¹⁴ Royalty levels, tax rates, and bonus payments are often already widely known within industry circles and therefore cannot constitute 'commercially sensitive' information. Publication of reports often comes many months after the payments were made - further making these figures of even less interest to competitors. Chinese companies have won some oil and mineral licenses in Africa by outbidding their competitors, not because they – purportedly - will not be required to disclose their financial data. Transparency is not an inhibitor to winning bids for contracts – in fact, it does not factor into negotiations at all. Contracts are won and lost because of the terms offered – for example, a Chinese company might win a contract because of its offer to make major infrastructure improvements in a country.

In addition ASP's claim that the 28 EU Member States lack in follow-through, and in having an cohesive, effective, and efficient data management system in place is incorrect.¹⁵ ASP also asserts that the EU Member States act in a haphazard manner, but Member States are required to implement the Directives faithfully in every essential detail by a set deadline, and the European Commission may undertake infringement proceedings against Member States that fail to do so.

¹¹ See: <http://www.tulloil.com/media/press-releases/onal-agreement-with-the-government-of-gabon>

¹² See: Andreas Exarheas, Exploration, Production Activity in West Africa in 2016, Rigzone (January 15, 2016). Available at:

http://www.rigzone.com/news/oil_gas/a/142517/Exploration_Production_Activity_in_West_Africa_in_2016

¹³ Ibid.

¹⁴ Comment submitted by Robert F. Conrad (17 July 2015), p.4, 9. Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-81.pdf>.

¹⁵ Comment submitted by American Security Project (23 November 2015), p.3. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-101.pdf>.

In regards to ASP's statement that "total revenue to governments cannot be calculated and disclosed, it is patently untrue.¹⁶ Total revenues are only one element of the data need and it is just as important, if not more so, to be able to identify and/or calculate payments by project and by company. The EU Directives are sufficiently specific to minimise any inconsistency between individual company reports and data. A host of data users will access data in many EU Member States to help fight the resource curse, irrespective of whether there is a central EU repository. Moreover, the value of the data is also preventive. Simply knowing that payments will be disclosed will help prevent companies from making dubious payments, and will help ensure that governments manage the revenues responsibly.

The EU Directives require reporting companies to identify by name the government body or agency that receives each payment. Whilst it would be useful for every such body to have a unique identifier, civil society organisations are preparing methods and tools to access, analyse and present the data so that it is fully comprehensible to a wide range of users. The UK government has introduced a standard XML-based template for reporting by UK-incorporated companies, whose reports will be outputted as machine-readable files.¹⁷ It also plans to bring in further standardisation of reporting for companies listed on the London Stock Exchange in 2017, following a public consultation in 2016.

There is concern expressed by ASP that if the SEC rule requires a higher standard for reporting than the EU, Norway, or Canada, those countries and the reporting companies will need to upgrade to the American level.¹⁸ Through the SEC's proposed rule, the US is matching a global reporting standard that is already in place and implemented by the EU, Canada, and Norway. Many other countries are reporting at the project-level through the Extractives Industries Transparency Initiative ("EITI"), and others such as Ukraine and Switzerland are currently debating their own laws. The essential elements of EU reporting are consistent with the EITI Standard adopted in 2013, and therefore align with the established global standard. There is comfort in knowing the SEC has now proposed rules that fully accord with the EU Directives and the global reporting standard.

Contrary to ASP's statement, there is indeed a global definition of "project-level" that enables effective and efficient cross-company and cross-country comparison of data.¹⁹ I agree with ASP that defining "project-level" is key to reducing misinterpretation of reporting instructions, and therefore reduces unintended consequences. The EU has provided a very clear definition of "project" in the Accounting Directive (Article 41(4)) 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"; in addition "if multiple such agreements are substantially interconnected, this shall be considered a project". This definition has been mirrored in Canada, Norway and the SEC's proposed rule.

¹⁶ Ibid.

¹⁷ See Companies House extractives service: <https://extractives.companieshouse.gov.uk/>

¹⁸ Comment submitted by American Security Project (23 November 2015), p.4. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-101.pdf>.

¹⁹ Comment submitted by American Security Project (23 November 2015), p.4. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-101.pdf>.

There is little evidence that the American Petroleum Institute's ("API") proposed model for project-level reporting would provide unprecedented transparency in government revenues, as ASP claims. It would certainly keep a vast number of specific company payments hidden from view by being aggregated to such an extent that the data loses all granularity. The model suggests defining project by using the International Organization for Standardization, or ISO 3066, which is the international standard for country codes and subdivisions.²⁰ The subdivisions in the standard are limited to state or provincial level, which again, is not granular enough to truly allow citizens to follow the revenue.

Despite ASP's claims, reports under the EU Directives will not be randomly generated or one-off as ASP suggests.²¹ Civil society and investors will access selected company reports for specific purposes, and benefit from having data far more comprehensive than would be disclosed under the API's proposed approach. Companies will report every year, allowing users to discern trends in payments. Close specification of the reporting required under the EU Directives will enable users to compare payments reported by different companies and by the same company over time. The UK, which is the largest EU home jurisdiction and issuers' market for oil, gas and mining companies, has already introduced standardised reporting for UK-incorporated companies, as I have noted above, and is due to introduce further standardisation for UK-listed companies from 2017.

In conclusion, I am in full agreement with ASP's statement that "the SEC now has a chance to act."²² Many cross-listed international companies are already required to follow the EU Directives, which are consistent with what has become the global reporting standard. Any weakening by the SEC of its robust proposed rule as recently issued would be reduce the benefits to companies, governments or citizens, and would result in confusingly inconsistent reporting requirements across different markets and jurisdictions. The SEC has had time to consider all the arguments, and now has come forward with a proposed rule that properly addresses the need for extractive industry and government accountability.

I congratulate the SEC on proposing a rule that is both strong and fit for purpose, and I urge you to finalize it in its current form.

Yours Sincerely,



Arlene McCarthy OBE

Former Vice-President of Economic and Monetary Affairs Committee, European Parliament drafts person and negotiator on EU Transparency and Accounting Directives

²⁰ See: http://www.iso.org/iso/country_codes

²¹ Comment submitted by American Security Project (23 November 2015), p.4. Available at: <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-101.pdf>.

²² *Ibid.*, 6.

CC:

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