Statement on Proposed Resource Extraction Rule

Commissioner Allison Herren Lee

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This disclosure requirement is about fighting global corruption through transparency. The United States has long been a leader in international anti-corruption efforts. Congress enacted the Foreign Corrupt Practices Act in 1977, making it illegal for U.S. public companies to pay bribes to foreign government officials.[1] We were for many years the only major nation to have such a law.[2] The U.S. was a founding member of the Financial Action Task Force in 1989, an inter-governmental standards-setting body aimed at combatting money laundering.[3] We helped negotiate the United Nations Convention against Corruption in 2004.[4] We have taken this leadership role in combatting corruption worldwide not only because corrupt governments don't provide adequately for their citizens, but because it is in our own foreign policy interests to promote stability and economic growth abroad.[5] In this tradition, Congress enacted Section 1504 of the Dodd-Frank Act to "help combat global corruption and empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources."[6]

Unfortunately, the rule we propose today would not further that goal. Instead, we would deviate widely from existing international disclosure regimes and severely limit the utility of the required disclosure. We would also complicate compliance for issuers already reporting under those international regimes. And we are doing so without analyzing the data available to us from years of international filings that should inform our policy choices.

While I cannot support this rule proposal, I do want to commend the staff in the Division of Corporation Finance, the Office of the General Counsel, and the Division of Economic and Risk Analysis who have worked hard to see many iterations of this rule through multiple legal challenges.[7] There is a long history here, with the most recent chapter unfolding in 2017 when Congress exercised its authority under the Congressional Review Act (or the CRA) to disapprove the rule that the Commission enacted in 2016.[8]

It's important to remember that Congress did not repeal Section 1504, and that law's mandate endures. Thus, we must propose a new rule that hews to Congress' original intent in Section 1504. At the same time, as dictated by the CRA, we must propose a rule that is not substantially the same as the prior rule.[9] We have little guidance, however, on what that means, apart from concerns about compliance costs and potential anti-competitive effects expressed by members of Congress during floor debate on the disapproval.[10]

We must be mindful of these concerns, but this proposal appears to take the view that the CRA disapproval requires us to promulgate a rule that essentially reverses the 2016 final rule in almost every significant respect.[11] We have not identified any legal authority or precedent that would compel this result. As such, I cannot agree that we must to stray so far from the policy determinations the Commission made in 2016.

This rule is supposed to provide transparency to citizens of resource-rich countries so they can see the money that is being paid to their governments by the extractive industries. The disclosure that would be required by this proposal does not provide that transparency. I know that because the Commission has already made that determination.

The Commission said in 2016 that contract-level disclosure is "necessary to advance in a meaningful way the statute's anti-corruption and accountability objectives."[12] The definition of "project" we propose today would eliminate that detailed disclosure.[13] Today's proposed definition of "project" was specifically urged on us in 2016,[14] but we rejected it because, we said at the time, taking this approach would "severely limit the potential transparency and anti-corruption benefits that the disclosures might provide."[15]

Also, we are proposing a new definition for so-called "de minimis" payments that will further undermine the rule's effectiveness and complicate compliance. We have devised a new de minimis structure that provides two different opportunities to exclude payments from disclosure. First, we have introduced a project-level de minimis threshold—a concept that did not exist in the prior version of the rule—allowing for no disclosure whatsoever for any projects up to three-quarters of a million dollars, a number without support anywhere in the release. It stretches credulity to call three quarters of a million dollars "de minimis" in this context. What's more, under our new proposal, even if you exceed this project-level threshold, you can still avoid disclosure of individual payment types if they do not equal or exceed $150,000.

How have we arrived at these numbers and what effect might they have? We don't know. Despite the fact that the agency has data from international filings that would shed light on this important feature, that data, and an analysis of it, is nowhere to be found in the release.[16]

I also fail to see how adding complexity will address Congressional concerns about compliance costs. It seems to me that the way to minimize compliance costs would be to propose a rule that is consistent with the existing international regimes under which companies are already reporting.[17] Not by proposing a rule that requires them to calculate different payments under a different project definition and a different de minimis threshold, among other disparities.

Some may disagree with Section 1504 or that the Commission should be in the business of promulgating anti-corruption rules. But that is the law. We are in the difficult position of trying to strike a balance between Congress' intent under Section 1504 and the concerns expressed in the CRA disapproval. But this proposal abandons the former in service to the latter, and in so doing, undercuts Section 1504's transparency and anti-corruption goals. I cannot support it.

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[1] Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq.

[2] *See* David A. Gantz, *Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 NW J. Int'l L. & Bus. 457 (1997).

[3] *See* History of FATF, https://www.fatf-gafi.org/about/historyofthefatf/.

[4] *See* Combating Corruption and Promoting Good Governance, U.S. Department of State, Bureau of International Narcotics and Law Enforcement Affairs, https://www.state.gov/combating-corruption-and-promoting-good-governance/.

[5] *See* Letter from the United States Department of State (Jan. 21, 2016). Unless otherwise noted, letters are available in the comment file for Disclosure of Payments by Resource Extraction Issuers, File No. S7-25-15.

[6] *See* Disclosure of Payments by Resource Extraction Issuers, Final Rule, Rel. No. 34-78167 (June 27, 2016) ("2016 Adopting Release"), at 7.

[7] In particular, I want to thank Bill Hinman, Barry Summer, Elizabeth Murphy, Michael Seaman, Elliot Staffin and John Hodgin in the Division of Corporation Finance; Bryant Morris, Brooks Shirey, and Connor Raso in the Office of the General Counsel; Vladimir Ivanov and Walter Hamscher in the Division of Economic and Risk Analysis; and Jonathan Duersch in the Office of Chief Accountant.

[8] *See* H.R.J. Res. 41, 115th Cong. (2017).

[9] *See* 5 U.S.C. 801(b)(2) (prohibiting the reissue of a rule "in substantially the same form" or the issuance of a new rule that is "substantially the same" as the disapproved rule).

[10] *See* Disclosure of Payments by Resource Extraction Issuers, Proposed Rule, Rel. No. [] (Dec. 18, 2019) ("Proposing Release"), at 18-19.

[11] We are reversing course on nearly every significant feature of this rule and coming down squarely on the side of certain industry commenters in each instance: (1) Definition of Project: In 2016, our rule defined project at the contract level. At the time, non-governmental organizations (NGOs), investors, USAID, the State Department, and the Department of Interior supported the contract-level definition. Issuers and an industry group opposed defining project at the contract level and supported instead a definition of project proposed by the American Petroleum Institute that would permit a higher level of aggregation. *See* 2016 Adopting Release at 74-75 nn.259, 269. Today we are proposing the project definition recommended by the American Petroleum Institute. (2) Exemption from Compliance: In 2016, our rule did not permit a blanket exemption from compliance where payment disclosure was prohibited under a host country's laws. At the time, NGOs, the State Department, Senators Cardin and Lugar, and members of the public supported this approach. Issuers, a consulting firm, and an industry group argued for a blanket exemption. *See id*. at 111-112 nn.375-381. Today we are proposing a blanket exemption from compliance where a host country's laws or a prior contractual obligation prohibit disclosure. (3) The de minimis Payment Threshold: In 2016, our rule set the de minimis payment threshold at $100,000. At the time, NGOs, the Department of the Interior, and members of the public supported the $100,000 threshold. A single consulting firm argued the threshold was unreasonably low and costly for issuers. *See id*. at 51-52 nn.189, 192. Today we are proposing to raise the de minimis threshold to $750,000 at the project level and $150,000 at the payment level. (4) Filed versus Furnished: In 2016, our rule required that issuers file, rather than furnish, the required disclosure with the Commission such that liability under Section 18 of the Securities Exchange Act of 1934 attached (i.e., created a private right of action). At the time, NGOs favored filing the disclosure, while issuers and an industry group argued in favor furnishing. *See id*. at 146 n.499. Today, we are proposing that the disclosure be furnished so that liability under Section 18 does not attach. (5) Definition of Control: In 2016, our rule required disclosure of the proportionate amount of payments by a resource extraction issuer's proportionately consolidated entities or operations. At the time, NGOs expressed concerns about issuers structuring joint ventures to avoid disclosure. Issuers and an industry group argued against proportionate disclosure. *See id*. at 66 nn.234, 238. Today we are proposing to exclude from disclosure the proportionate amount of the payments made by a resource extraction issuer's proportionately consolidated entities or operations. (6) Exemption from Compliance for Smaller Reporting Companies and Emerging Growth Companies. In 2016, our rule did not provide an exemption for smaller reporting companies and emerging growth companies. Commenters, including an NGO and the Department of Interior, generally expressed support for a definition of "resource extraction issuer" that did not provide such an exemption; one issuer commenter voiced support for such an exemption. *See id*. at 30-31 nn.108-09. Today we are proposing to exempt smaller reporting companies and emerging growth companies from the scope of the rule. Moreover, while we are still proposing that issuers publicly disclose payments, the release states that we

only “preliminarily” believe this is the right approach. It goes on to say we are considering non-public submission and subsequent anonymized, aggregated public disclosure. Again, a position urged upon us by industry. *See* Letter from the American Petroleum Institute (Feb. 16, 2016).

[12] *See* 2016 Adopting Release at 83.

[13] The statute requires payment disclosure for (i) the type and total amount of such payments for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals, and (ii) the type and total amount of such payments made to each government. 15 U.S.C. 78m(q)(2)(A). The proposed rule would define “project” using the following three criteria: (1) the type of resource being commercially developed; (2) the method of extraction; and (3) the major subnational political jurisdiction where the commercial development of the resource is taking place. *See* Proposing Release at 66. In 2016, we defined project to mean activities governed by a single contract that determines the payments the issuer is making to a government in connection with that contract. *See* 2016 Adopting Release at 77. The international regimes also define project at the contract level. *See e.g.*, European Union Accounting Directive, Article 41(4).

[14] *See* Letters from the American Petroleum Institute (Nov. 7, 2013) and (Feb. 16, 2016).

[15] *See* 2016 Adopting Release at 82-83.

[16] We have potentially complicated that analysis because of the new project definition and the needless complexity of our new de minimis structure, but we should nevertheless attempt some analysis of the available data. In fact, there are numerous instances where available data could shed light on the choices we have made, but we have simply declined to consider it in estimating the costs and benefits of our chosen path. For example, today we are proposing a blanket exemption from compliance where a host country’s laws prohibit disclosure. We state in the economic analysis that, without such an exemption, “costs could arise if issuers are forced to cease operations in certain countries or otherwise violate local law.” *See* Proposing Release at 159-60. Issuers have been disclosing under international regimes that include no exemptions from compliance for years. Yet we make no attempt to assess whether any such costs have actually arisen as a result of any host country laws purportedly prohibiting disclosure.

[17] Section 13(q) of the Exchange Act, added by Section 1504, provides that “[t]o the extent practicable, the rules . . . shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.” 15 U.S.C. 78m(q)(2)(E). The statute also specifically references the Extractive Industries Transparency Initiative, a global standard from which we deviate in significant respects today. 15 U.S.C. 78m(q)(1)(C). I also note a letter in our record from six senators who voted in favor of the CRA disapproval, but who voiced their continued support for transparency efforts consistent with the international standards. *See* Letter from Senator Bob Corker, Senator Susan Collins, Senator Marco Rubio, Senator Johnny Isakson, Senator Lindsey Graham, Senator Todd Young (Feb. 2, 2017) (stating they are “committed to efforts to encourage corporate transparency on these matters consistent with the international standards already adopted by European and other governments.”).