United States Senate
WASHINGTON, DC 20510

March 11, 2020

The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549

Re: File No. S7-24-19, Rulemaking for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Chairman Clayton:

As the Securities and Exchange Commission (Commission) seeks comments on its new proposed rule to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Section 1504"), we write today to urge the Commission to strengthen the rule in key respects to ensure the final rule is an effective tool for combating corruption and fulfills the Commission's statutory directive. We also write to request that the Commission extend the public comment window to ensure commenters have adequate time, in light of the legal context and the significant shift in the international transparency landscape since the last rulemaking, to provide the thorough analysis and vital evidence that will most aid the Commission.

We commend the Commission for the work that it has done on this rule over the years, despite litigation challenges and other challenges from Section 1504 opponents in Congress. We are concerned, however, that the current proposed rule is inconsistent with the transparency, accountability and investor protection goals Congress intended in enacting Section 1504 and does not appropriately consider or reflect the significant shift in industry practice and market realities since the last rulemaking. This includes the fact that hundreds of companies in more than 30 countries outside the United States are now regularly publicly reporting disaggregated project-level payments to governments. In order to restore US leadership on transparency and combating corruption, it is essential that the final rule align closely with the existing international standard to fulfill Section 1504's directive to promote international transparency efforts.

The Final Rule must be strengthened to fulfill the goals of Section 1504.

We note with deep concern that the Commission appears to have reversed course on virtually every significant feature of this rule. However, nothing in the Congressional Review Act (CRA), nor any other legal precedent requires such a dramatic reversal. If adopted as currently proposed, the loss of the transparency and accountability benefits Congress intended in enacting Section 1504, combined with the dramatic divergence from the international transparency standard, would represent a breathtaking retreat from the leadership position the U.S. has sought to play in advancing extractive transparency and combating corruption. We address below a few of the most essential features of the rule that must be strengthened to fulfill Section 1504's purpose and that we are confident can be strengthened without running afoul of the CRA.

First, and most significantly, it is essential that payment information be disaggregated and publicly disclosed on a project-basis, with "project" defined as the contract, lease or license that forms the basis of the payment liability, consistent with the definition already used in other markets and the Extractive Industries Transparency Initiative. There is already overwhelming support in the record for a contract-based definition of "project," from issuers, investors, anti-corruption experts, civil society groups, the U.S. Department of State, USAID, and the Department of Interior. By now the Commission also has the benefit of multiple years of reporting from companies disclosing under this definition in the United Kingdom, Europe and Canada. This reporting outside the U.S. is new evidence that significantly bolsters the case for a contract-based definition and disaggregated public disclosure. It also shows that the prior estimates and predictions of potential costs and competitive harms by the Commission and certain members of Congress were grossly exaggerated.

The proposed rule's alternative approach to defining "project," allowing significant aggregation across multiple separate projects and multiple resource types, would be a serious break with current practices in the international community and fall far short of what Section 1504 requires. It is inconsistent with how companies in the extractive resource sector refer to their projects, would substantially complicate the resulting disclosures, limit the utility of the information disclosed for investors, citizens, and other data users, and seriously undermines the rule's ability to effectively deter and detect corruption. Moreover, we note the Commission itself has already correctly found that this approach would render the disclosures "less useful for purposes of realizing the statute's objectives," and "would not generate the level of transparency... necessary or appropriate to help meaningfully achieve the U.S. Government's anti-corruption and accountability goals."[1]

We share Commissioner Jackson's concern in his statement on December 18, 2019, that the "proposal does not give investors nearly enough information about how their money is used to pay for the right to extract certain natural resources." The Commission cannot ignore the interest of investors who have repeatedly called for a strong rule requiring contract-based project-level disclosures, aligned with the rules in other markets, as a valuable tool for assisting investors in assessing securities valuations as well as company exposure to risks caused by local corruption and instability. These investor goals and benefits are consistent with the goals of the Commission's mission to protect American investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.

Second, we are concerned that the addition of a new project-total "*de minimis*" threshold will significantly limit the intended transparency by excluding from disclosure all payments for a project if the total payments for any project are under $750,000. We see no reason to set such a *de minimis* threshold for total payments, as opposed to each payment, nor is it obvious why such a large number would be considered "*de minimis*" in this context. This new number would create unnecessary inconsistency with the regimes in other countries, which have no project total *de minimis* threshold, and further complicate compliance and comparability.

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[1] Securities and Exchange Commission, Disclosure of Payments by Resource Extraction Issuers, Final Rule, Rel. No. 34-78167, 81 Fed. Reg. 49359, 49381 & n. 297 (2016).

Third, we are concerned by the proposed addition of numerous sweeping new exemptions that would substantially limit the coverage and effectiveness of disclosures, consequently increasing risks for investors. This includes, but is not limited to, the proposed exemptions for Small Reporting Companies and Emerging Growth Companies. According to the Commission's own estimates, this would exclude nearly half of all issuers who would otherwise be covered by the rule, despite the fact that in the last rulemaking, the Commission noted "no commenters supported an exemption or different reporting requirements for small entities," and it would "create a significant gap in the intended transparency."[2]

Fourth, we are concerned that the delayed reporting deadlines will limit the usefulness of the information disclosed and undermine their effectiveness for investors, citizens, and other data users.

We want to reiterate the critical importance of fully public disclosures. While we agree with the Commission's proposal to require public disclosure that includes issuers' identities, we are concerned to see the Commission's suggestion that it is considering the possibility of anonymous disclosures. Public disclosure of issuer-specific payment information is absolutely essential to carry out the pro-transparency intent of Section 1504 and to achieve the statute's anti-corruption and accountability goals, as well as to align with international practice.

The U.S. has long been a leader in fighting corruption and protecting American investors with valuable information on risk profiles and company performance. Now is not the time to retreat from this critical work. The Commission must promulgate a strong rule, in line with the specific concerns addressed herein and consistent with the disclosure laws now in effect in over 30 countries, to restore American leadership.

Extension of the comment period is warranted.

While the resolution of disapproval in February 2017 vacated the Commission's 2016 Rule, it did not repeal Section 1504 nor did it change the Commission's legal obligation to promulgate a rule that is fully compliant with the text of Section 1504 and the anti-corruption, transparency and investor protection goals Congress intended. As one of the first agencies to interpret and apply the CRA's "substantially the same" language in a subsequent rulemaking, the Commission's approach could have broader precedent-setting effects.

We also note that there have been dramatic changes in market realities around the world since the last rulemaking and the 2017 vote on the resolution of disapproval, which are not reflected in the draft rule. We share the concerns Commissioner Lee raised in her dissent on December 18, 2019, that the proposed rule "would deviate widely from existing international disclosure regimes and severely limit the utility of the required disclosure. [The Commission] would also complicate compliance for issuers already reporting under those international regimes. And [the Commission is] doing so without analyzing the data available to us from years of international filings that should inform our policy choices."

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[2] Id. at 49426.

Given the complicated and novel context facing the Commission, we request the Commission grant a 30-day extension of the comment period. We also suggest consideration be given to a rebuttal comment period, similar to the 2016 rulemaking process, to ensure commenters have sufficient time to analyze the broad swath of changes proposed in the rule from its previous version and to aid the Commission in properly fulfilling its various legal mandates.

While we support the Commission for its continuing efforts to protect American investors and for its commitment to reclaiming American leadership in promoting extractive sector transparency, we encourage the Commission to provide more time to commenters to allow for a full analysis of the extensive changes in the proposal and provide evidence to ensure that the final rule fulfills these goals. We look forward to working with the Commission in support of policies that benefit both investors and U.S. national interest.

Sincerely,

Benjamin L. Cardin
United States Senator

Sherrod Brown
United States Senator

Richard J. Durbin
United States Senator

Edward J. Markey
United States Senator

Jeffrey A. Merkley
United States Senator

Sheldon Whitehouse
United States Senator

Patrick Leahy
United States Senator

Elizabeth Warren
United States Senator

Christopher A. Coons
United States Senator

Jeanne Shaheen
United States Senator