Public Statement

Statement on Resource Extraction

Commissioner Caroline A. Crenshaw

Dec. 16, 2020

Today we find ourselves in a difficult situation. On one hand, we have a clear congressional mandate to promulgate a rule directing issuers to disclose certain resource extraction payments. On the other hand, we are bound by the requirements of the Congressional Review Act ("CRA"), which states that any rule we adopt today may not be "substantially the same" as the rule Congress invalidated. We are now faced with novel questions of law: what does "substantially the same" mean in this context and how do we reconcile these congressional directives?[1]

The Commission has tried for nearly a decade to implement the congressional mandate from Section 1504 of the Dodd-Frank Act, without success. In 2012, we approved a rule that was vacated by a federal district court.[2] Then in 2016, the last time a resource extraction disclosure rule was enacted at the end of an administration, the rule was later disapproved by a joint-resolution from Congress under the CRA.[3] It is with this history in mind that we try a third time.

There are a number of factors that we must consider. We remain legally required to adopt a rule that satisfies the requirements Congress set out for us in Dodd-Frank.[4] Moreover, the Commission conducted a thorough analysis and provided a reasoned basis for the 2016 rule. Any departure from those findings must be justified and well-supported by the available data and the administrative record.[5] Further, the world has changed since 2016. Disclosure regimes in Canada, the United Kingdom, Norway, and the European Union have since been implemented, providing us with data about the costs and benefits of disclosures about payments resource extractors make to governments.[6]

We know that when Congress enacted the Dodd-Frank Act in 2010, it intended for the Commission to promulgate a rule that requires issuers to disclose certain resource extraction payments in annual filings. We also know Congress was seeking in part, to address the "resource curse" that affects many countries rich in natural resources.[7] By requiring disclosure of payments to foreign governments related to the extraction of certain natural resources, Congress intended to support our government's commitment to international transparency and anti-corruption efforts around the commercial development of oil, natural gas, and minerals, and to enable greater accountability of government officials.[8] We must achieve this objective in our rulemaking.

I want to thank the staff in the Division of Corporation Finance, the Office of the General Counsel, and the Division of Economic and Risk Analysis.[9] You have put tremendous effort into this rulemaking – many of you have worked on all the prior versions too. The Commission owes you a debt of gratitude for your commitment to getting this right. Unfortunately, I disagree with the majority of my fellow Commissioners on the best way to do that. And I am unable to support today's rule for two primary reasons.[10]

First, the approach the majority is taking does not require sufficiently granular disclosure to meet the objectives of Section 1504 of Dodd-Frank and, notably, departs from the Commission's previous findings on this subject without an adequate and reasoned basis. Section 1504 instructs the Commission to issue disclosure rules that, to the extent practicable, "support the commitment of the Federal Government to international transparency promotion efforts."[11] However, today's rule falls short because it allows resource extractors to aggregate the payments made to governments too broadly, obscuring the particular contract (or project) at issue.[12] Without contract-level disclosure, it is difficult, if not impossible to identify the source of corruption.[13]

Importantly, in support of the 2016 rulemaking, the Commission conducted a fulsome analysis and found that contract-level project disclosure was *necessary* to fulfil the transparency objectives that Congress mandated.[14] Today, the Commission changes course and "disavows" this finding.[15] The Commission is required by law to explain and justify this change in course.[16] Yet today's release abandons, with scant explanation, the transparency and anti-corruption considerations that led the Commission to conclude in 2016 that contract-level disclosure was necessary to fulfill Congress's objectives.[17]

Specifically, today's release does not confront the evidence that led the Commission to adopt a contract-level project definition in 2016, much less the subsequent developments that have further supported that definition. Multiple international regimes have implemented disclosure requirements similar to our 2016 rule, yet the release does not adequately explain the Commission's decision to abandon our own prior findings.[18] Thus, I am concerned that we are changing policy and disregarding prior Commission findings without adequate justification. There is no evidence that granular contract-level disclosures present competitive harms or impose significant cost burdens, and as the release indicates, this refutes concerns that some members of Congress expressed in supporting the resolution to disapprove the 2016 rules.[19]

Second, we should be moving toward a more uniform global disclosure approach that will allow for comparability across issuers operating in the same country. The world has changed in the last four years and while we have been dealing with the implications of the CRA disapproval, the regulatory regimes of several foreign governments—including those with the most resource extraction issuers[20]—have moved forward. Many have imposed detailed disclosure requirements that largely mirror what we adopted in 2016.[21] The majority of the issuers subject to today's rule are already complying with these international requirements. In contrast with the clear benefits associated with uniformity and comparability, we have little evidence that supports the decision to go in a separate direction. No individual issuers submitted letters alleging competitive harm as a result of a contract-level project definition. In fact, multiple issuers submitted individual letters expressing support for a Commission rule that is consistent with the international disclosure regimes.[22] Commenters further noted that adopting yet another distinct disclosure regime would hinder comparability and make it difficult to identify government payees and hold them accountable.[23] We now have more data about the costs and benefits of a detailed disclosure regime to draw upon, and the record before us lacks any evidence of

competitive harm resulting from these disclosures.[24] Given these facts, a more uniform global approach that supports the transparency and anti-corruption objectives hews more closely to our statutory mandate. Ultimately, the lack of evidence of competitive harm and relatively minimal costs of complying with more granular disclosure requirements supports adopting the project definition used internationally—not deviating from it and creating an entirely new one, as we are doing here.[25]

Finally, I understand that we are facing a novel and complex question under the CRA. We have a congressional mandate to issue a new rule pursuant to Section 1504 of Dodd-Frank, but we must also act in line with the requirements of the CRA. This requires us to strike a delicate balance; unfortunately, today's rule strikes the wrong one. I must therefore respectfully dissent.[26]

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[1] *See* Disclosure of Payments by Resource Extraction Issuers, Release No. 34-90679 at 11-12 (adopted Dec. 16, 2020) ("Adopting Release").

[2] *See Am. Petroleum Inst. v. Securities & Exch. Comm'n*, 935 F. Supp. 2d 5 (D.D.C. July 2, 2013).

[3] *See* Adopting Release at 10.

[4] The disapproval of the 2016 rule by the CRA did not repeal or otherwise alter Section 1504's mandate that directs the Commission to "[i]ssue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including (i) the type and total amount of such payments made 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) (2018).

[5] A reviewing court sets aside agency action that is arbitrary or capricious. *See* 5 U.S.C. § 706(2)(A) (2018).

[6] *See* Council Directive 2013/34, art. 41(4), OJ L 182, 29.6.2013 ("EU Accounting Directive"); Council Directive 2013/50 amending Directive 2004/109, OL J 294, 6.11.2013 ("EU Transparency Directive"); The Reports on Payments to Governments Regulations 2014, UK Statutory Instrument No. 3209; Extractive Sector Transparency Measures Act 3209; Extractive Sector Transparency Measures Act 2014 S.C., ch. 39, s. 376 (Can.); Norway's Regulation on Country-by-Country-Reporting FOR-2013-12-20-1682. Additionally, the Extractive Industries Transparency Initiative ("EITI") requires project level reporting at the contract level and 55 countries have implemented the EITI Standard. *See* EITI Standard, 4.7 (2019).

[7] *See* S. Rep. No. 110-49 at v. (2008) ("This report argues that transparency in revenues, expenditure and wealth management from extractive industries is crucial to defeating the resource curse."); Sen. Elizabeth Warren Letter, Comment Letter on Disclosure of Payments by Resource Extraction Issuers at 2 (Dec. 15, 2020) ("Congress enacted section 1504, also known as the bipartisan Cardin-Lugar amendment, to address the 'resource curse,' 'whereby mineral or fossil fuel-rich countries are unable to transform their wealth into economic growth and development, often falling victim to corruption and poor governance.'"). The "resource curse" refers to the case where "large reserves of oil or other resources often negatively affect a country's economic growth, corruption level and stability." *See* S. Rep. No. 110-49 at v.

[8] *See* 15 U.S.C. 78m(q)(2)(E); *see also* Pub. L. No. 111-203 (July 21, 2010). According to Senator Richard Lugar, who co-sponsored the amendment that was the basis for Section 1504, a goal was to provide more information to the global commodity markets and "help empower citizens to hold their governments to account for the decisions made by their governments in the management of valuable oil, gas, and mineral resources and revenues." *See* 156 Cong. Rec. S3816 (daily ed. May 17, 2010). Further, members that were in favor of disapproving the 2016 rule noted the "statutory mandate to propose a new rule to implement the bipartisan Cardin-Lugar anti-corruption provisions [Section 1504] of" Dodd-Frank. *See* Letter from Sens. Bob Corker, Susan Collins, Lindsay Graham, Johnny Isakson, Marco Rubio, & Todd Young to Acting Chairman Piwowar (Feb. 2, 2017) (noting strong "commit[ment] to efforts to encourage corporate transparency on these matters consistent with the international standards already adopted by European and other governments").

[9] Specifically, Barry Summer, Elliot Staffin, Elizabeth Murphy, Bryant Morris, Brooks Shirey, Connor Raso, Vladimir Ivanov, and Chantal Hernandez.

[10] Another element of this rule that I do not agree with is the exemption for delayed reporting for payments related to exploratory activities. This will allow issuers to delay reporting payments to governments made for exploratory activities in the fiscal year in which payments are made in order to mitigate potential competitive harm. *See* Adopting Release at 75-79. Commenters have noted that there is not such an exemption in other regimes, concerns of competitive harm have not arisen, and that exploratory payments are at higher risk for potential corruption. *See* Oxfam America & EarthRights International, Comment Letter on Disclosure of Payments by Resource Extraction Issuers (Mar. 23, 2020) ("Oxfam & EarthRights Letter") (noting that no company has raised concerns about disclosures during the exploratory phase during either UKL or EU reviews of implementation experience); Publish What You Pay U.S., Comment Letter on Disclosure of Payments by Resource Extraction Issuers at 55, 98 (Mar. 16, 2020) ("PWYP Letter") (noting that there is not such an exemption in other disclosure regimes and there have not been any notable competitive issues reported and also providing reasons for why exploratory activities in particular can pose a high risk of corruption).

[11] *See* 15 U.S.C. 78m(q)(2)(E). Specifically, the final rule must require each resource extraction issuer to provide an annual report that contains information relating to any payment made by the issuer to a foreign government, or the Federal Government, to commercially develop oil, natural gas, or minerals. This information must include: (i) the type and total amount of such payments made for each project and (ii) the type and total amount of such payments made to each government. *See supra* note 4.

[12] *See* Adopting Release at 26-29 (summarizing the opposition to the aggregated project definition in the comment file which included, but is not limited to, commenters that noted the aggregated definition we are adopting today would fail to produce the transparency necessary to enable citizens to detect corruption and demand accountability from their host governments as Congress indeed; payments reported in the aggregate, at the country and major subnational level, without requiring disclosure of the contract or license that gave rise to the payments would limit the utility of the reported payment data for citizens in resource-rich countries with revenue-sharing laws that require national governments to distribute revenues from resource extractions to subnational governments or local communities; the aggregated definition does not reflect standard industry practice; and the aggregated definition deviates from international norm); *see also* Sen. Elizabeth Warren, Comment Letter on Disclosure of Payments by Resource Extraction Issuers at 3-4 (Dec. 14, 2020) (noting that "companies would be able to aggregate and hide information about payments to subnational governments, such as states,

provinces, municipalities, severely limiting information that could document corrupt practices" and that the broad aggregation of payments would not be useful to anti-corruption watchdogs); BP America, Inc., Comment Letter on Disclosure of Payments by Resource Extraction Issuers at 2 (Mar. 16, 2020) ("In particular, we would welcome a standard definition of a 'project' for the purposes of disclosing contract-level payments…this would provide meaningful, material data across the different reporting jurisdictions, in a manner that avoids commercial harm to companies, and would improve the quality and comparability of the information provided for the user of these data.").

[13] I'd like to address any arguments that resource disclosure requirements are not "in our lane," so to speak, or that these disclosures are not material to investors. Congress resolved that debate when it directed us to promulgate a rule and laid out fairly specific requirements. It is our job to issue one that is in line with that mandate. *See also* The Carter Center, Comment Letter on Disclosure of Payments by Resource Extraction Issuers at 1 (Mar. 16, 2020) (noting that allowing for aggregation of payments across projects will result in many important revenue flows going unreported and hamper tracking these payments, which is an important tool in the fight against corruption).

[14] Specifically, the 2016 Rule found that a granular definition would: (1) help reduce instances where government officials are depriving subnational and local communities of revenue allocations to which they are entitled; (2) potentially permit "comparisons of revenue flows among different projects" to identify "payment discrepancies that [may] reflect potential corruption and other financial discounts"; (3) help citizens and others ensure that firms are meeting their payment obligations; (4) help local communities and civil society groups possibly weigh the costs and benefits of a project; and (5) possibly deter companies from underpaying royalties or other monies owed. *See* Disclosure of Payments by Resource Extraction Issuers, Release No. 34-78167 at 77-80 (adopted June 27, 2016). Further, the 2016 final rule stated that the Commission "found that requiring issuers to maintain detailed, disaggregated records of payments to government officials significantly decreases the potential for issuers and others to hide improper payments and as such their willingness to make such payments. This experience has led us to believe that, where corruption is involved, detailed, disaggregated disclosures of payments minimizes the potential to engage in corruption undiscovered. We thus believe that the more granular the disclosure in connection with the transactions between governments and extractive corporations, the less room there will be for hidden or opaque behavior." *Id.* at 86-87.

[15] *See* Adopting Release at 34.

[16] *See supra* note 5.

[17] Several commenters opposed the aggregated project definition and supported a contract-level project definition. *See, e.g.*, Sens. Benjamin L. Cardin and Richard J. Durbin, Comment Letter on Disclosure of Payments by Resource Extraction Issuers (Dec. 11, 2020); Oxfam & EarthRights Letter at 3; PWYP-US Letter at 36-43; Reps. Wm. Lacy Clay, Ted Deutch, Eliot L. Engel, Raul M. Grijalva, Stephen Lynch, & Maxine Waters, Comment Letter on Disclosure of Payments by Resource Extraction Issuers at 3 (March 13, 2020); Sens. Benjamin L. Cardin, Sherrod Brown, Richard J. Durbin, Edward J. Markey, Jeffrey A. Merkley, Sheldon Whitehouse, Patrick Leahy, Elizabeth Warren, Christopher A. Coons, and Jeanne Shaheen, Comment Letter on Disclosure of Payments by Resource Extraction Issuers (Mar. 11, 2020). *See also infra* note 22.

[18] *See* Adopting Release at 34 ("Based on the foregoing, as well as our consideration of the text of Section 13(q) and the history leading to its adoption in 2010, we do not find any persuasive support for

the 2016 Adopting Release's conclusion that Section 13(q) requires payment disclosures that could advance the five purposes enumerated in that release."). This suggests that the majority has a fundamentally different understanding of Section 1504 than my own, and certainly one that differs from the Commission's understanding in 2016, but, again, with no real justification. *Id.* at n. 89.

[19] *See* Adopting Release at 164 (noting that the Commission is not aware of evidence that suggests more granular disclosures in line with foreign reporting regimes results in competitive harm); *id.* at 197 (noting that average initial cost of compliance would be 0.005% of the total assets of the smallest issuer that provided cost estimates, Tullow Oil, and that those compliance costs are based on more granular disclosures required by the EU Directives). Indeed, today's release goes so far as to argue that anonymized disclosure of payments would satisfy the purpose of Section 1504; *see also id.* at 23-24 ("[T]he concerns expressed in these floor statements about costs and competitive effects may be based on estimates and economic analyses in the 2016 Rules Adopting Release that have been called into question by actual cost data and information regarding the potential anti-competitive effects derived from resource extraction issuers' experiences with the disclosure regimes in Europe and Canada.").

[20] *See* Resource Projects, Country Profiles (last visited Dec. 15, 2020) (showing that over 538 resource extractors are reporting in Canada, the U.K., and Norway alone).

[21] *See supra* note 6; Oxfam & EarthRights Letter at 3 ("There is now a clear international consensus around the most appropriate and effective transparency standard for the extractive industries…In particular, fully-public, disaggregated, project-level disclosures have become the industry norm. There have now been three or more years of project-level reporting of payments to governments by nearly 800 public, private and state-owned companies under mandatory disclosure regimes in the European Union, the United Kingdom, Norway, and Canada, all of which define "project" to mean "operational activities governed by a single contract, license, lease, concession or similar legal agreement, and form the basis for payment liabilities with a government.").

[22] *See* Adopting Release at 153-155 (finding that 177 of the 237 non-exempt issuers subject to today's final rule are already complying with the more granular disclosures required by Canada, UK, or the European Economic Area). Notably, several resource extraction companies submitted comment letters favoring adoption of global standard, which would include a contract-level project definition. *See* Kosmos Energy, Comment Letter on Disclosure of Payments by Resource Extraction Issuers, (Dec. 14, 2020) ("We…recommend that the SEC take more time to review the evidence generated by existing project-level reporting requirements such as in the EITI, Europe and the UK, and develop a strong rule on that basis."); Rio Tinto, Comment Letter on Disclosure of Payments by Resource Extraction Issuers (Dec. 14, 2020) ("Rio Tinto encourages the harmonization of reporting obligations aligned with global best practice. We believe that the creation of a consistent standard by which companies can report their contributions with integrity and responsibility is essential to promoting confidence in business."); ENI, Comment Letter on Disclosure of Payments by Resource Extraction Issuers at 1-2 (Mar. 25, 2020) ("[W]e are yet concerned about the changes introduced by Section 13(q) in respect to the 2016 Rule, which make the provision divergent form the EU Directive 2013/34."); Equinor ASA, Comment Letter on Disclosure of Payments by Resource Extraction Issuers at 2 (Mar. 13, 2020) ("[I]ncreased transparency can play a vital role in driving sound and competitive business practices and avoiding bribery and economic mismanagement…[T]he U.S. should aim to adopt rules that align with existing disclosure regimes – most notable the EU regime."); BHP, Comment Letter on Disclosure of Payments by Resource Extraction Issuers at 2-3 ("BHP does not support the 'Modified

Project Definition', which differs from the definition used in both the EITI Standard and mandatory disclosure regimes such as the European Union (EU) Directive…Even if the SEC were to agree [to] the use of alternative reports by issuers, BHP urges the adoption of EITI's definition of 'project' to align with international transparency efforts"); BP America, Inc., Comment Letter on Disclosure of Payments by Resource Extraction Issuers at 2 (Mar. 16, 2020) ("BP believe that the adoption of 13q-1 should go as far as possible to seek alignment with E.U. and Canadian rules, and consistently with the EITI Standard to the greatest extent possible by law."); Ovintiv Inc., Comment Letter on Disclosure of Payments by Resource Extraction Issuers at 1 (Mar. 16, 2020) ("While Ovintiv supports the rules, we believe the SEC rules should more closely align to the disclosure requirements established by other reporting jurisdictions including the European Union Directives and Canadian disclosures…We believe that narrowing difference between the compliance frameworks will better serve the objective of transparency, consistency of the disclosures and ease the reporting burden for issuers reporting in multiple jurisdictions."); Total, Comment Letter on Disclosure of Payments by Resource Extraction Issuers at 1 (Feb. 10, 2020) ("Total believes that the alignment of [this rule] with Directive 2013/34/EU is key in improving the quality and comparability of information between issuers complying with different reporting regimes.").

[23] *See supra* note 21.

[24] Adopting Release at 164 (noting that no commenter has provided evidence of and we are not aware of, competitive harm related to a contract-level disclosure requirement).

[25] And although the final rule affords issuers reporting to multiple regimes the option to submit alternative disclosures, this option does not address concerns about the need for a uniform and consistent standard to promote transparency and accountability.

[26] Additionally, I must dissent to the order recognizing the resource extraction payment requirements of the EU, U.K., Norway, and Canada as alternative reporting regimes that would satisfy the transparency objectives of Section 1504. I do not object to the finding that those regimes are consistent with Section 1504, rather I object to the order because it is part of a rulemaking package that I disagree with for the reasons I outline in this statement.