Public Statement

Statement at Open Meeting on Disclosure of Payments by Resource Extraction Issuers

Commissioner Elad L. Roisman

Dec. 16, 2020

Before commenting on the rule, I want to offer my thanks and appreciation to the staff in the Division of Corporation Finance, the Division of Economic and Risk Analysis, and the Office of General Counsel. To say writing this rule required threading the needle does not begin to express the challenge you faced. The Commission's first attempt at writing this rule was struck down by the D.C. Circuit Court in 2013.[1] Its second attempt was disapproved by a joint resolution of Congress under the Congressional Review Act ("CRA") in 2017.[2] Meanwhile, the statutory mandate to issue this rule has remained in effect. To make fulfilling this mandate an even more difficult task, there is little case law or other guidance on how to proceed with a new rule in a situation like this. Considering all of this context, it seems more apt to describe this challenge as threading a needle where only one half of the needle's eye is visible. Thank you for all of your very hard work on what was a considerable challenge.

Now, let me address the recommendation before us. As I said when we proposed this rule a year ago, our difficulty in developing—and keeping in place—a rule to fulfill this statutory mandate only underscores how such a rule is simply not within our area of expertise.[3] I want to be quite clear: in my personal capacity, I have very strong views on the utter destructiveness and evil of foreign government corruption. As an SEC Commissioner, however, I am not best equipped nor should I be empowered to make rules to act on these views.[4] Global anticorruption policy, like many policy issues, is complex. It touches on foreign relations, trade policy, and international human rights, among other areas. There are many people, both within our government and outside it, who have focused on mastering the nuances of these issues. But as an SEC Commissioner, I am not one of them. This rulemaking task is simply not within my expertise nor does it further our mission.

Let me say that again: this rulemaking does not advance our mission. As we all well know, the SEC has a tripartite mission: to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. The rule we are adopting today has none of these goals. It does not add to investor protection. As the adopting release notes, our existing rules require disclosure of all material

information.[5] While some investors may choose to invest based on certain idiosyncratic interests and values, our mandate has never been understood to include requiring disclosures of all information that *any* investor might want to know, particularly for making an investment decision. And for good reason. It would burden companies, investors, and other market participants with immense disclosure and review obligations and enmesh the Commission in all manner of social policy judgments and disputes. Again, while the desire to reduce international government corruption is laudable, public disclosures by companies to governments of all manner of project-related fees has never been deemed "material" to their investment decisions. The rule fails on that prong of the SEC mission.

Does this rule help to maintain fair, orderly, and efficient markets? I see no nexus to our securities markets or trading venues.

Does it facilitate capital formation? Not in any way that I can see.

The fact that this rule falls outside our core mandate, and is therefore unmoored from the principles that anchor our traditional and proper rulemaking, is reflected in the sharp divisions it has fostered within the Commission itself over the past decade and over several Commissions. The first time the Commission proposed rules implementing this section of Dodd-Frank, three commissioners voted in favor. The rules were subsequently adopted 2-1. Four years later, new rules were proposed with a 3-1 vote, and then adopted 2-1. None of these commissions serves today. Last year, we proposed the rule on which we will shortly vote, and that vote was 3-2. We have yet to propose or adopt rules implementing this provision with more than three Commissioners voting in favor, even with several changes in the composition of the Commission over the years. I have little hope that we will improve that record today.

However, I *will* vote in favor of adopting this rule. My vote does not reflect any enthusiasm I have for the policy mandate we received from Congress to write such rules in the first place. Rather, I will support this rule because I believe we have a duty to implement the mandates handed to us by Congress, and because I believe this is a reasonable implementation of the mandate set forth in Section 13(q).

After Congress disapproved the last rule pursuant to the CRA, we were required to promulgate a rule that would implement Section 13(q) but that is "not substantially the same" as the rule we adopted in 2016.[6] The key difference between our 2016 rule and the one we are considering today is the new definition of "project" as well as number of additional, smaller changes. I believe the rule before us will elicit the disclosure of government payments that the statute requires while minimizing the potential competitive harm or other burdens on public issuers. Therefore, I believe this is a reasonable implementation of this provision that appropriately balances the relevant concerns. I also believe it is not substantially the same as the 2016 rule, and therefore will satisfy the CRA.

I hope, however, that Congress will cease using our disclosure regime to effect social policy outside of this agency's tripartite mission. Yes, the Commission has broad authority to require disclosures from thousands of companies in the U.S. and abroad. But the sheer breadth of this reach is the strongest argument in favor of exercising *restraint* in its use. We were granted this authority to carry out our mission, not to indirectly advance a myriad of foreign policy, energy policy, environmental policy, and extraterritorial social policy causes that are not material to investors' investing decisions. When we use the disclosure system to effect policy in areas where the Commission has no expertise, the risk of unintended consequences is even greater than usual. In short, we may very well do more harm than good.[7] I hope that the next time Congress wants to fix a non-financial problem, it will take on the task

itself through legislation targeted at the problems it wants to address or delegate to the agencies that have direct authority over and expertise in its root cause. In this case, the Department of State, Organization for Economic Cooperation and Development, and Department of Energy seem more suited to focusing on the problem at hand.

In summary, I thank the staff for their continued work on this rulemaking. I will support the rule to carry out the obligation that Congress imposed on us. I respectfully ask Congress to heed these concerns in the future before it imposes upon us other obligations that draw the Commission into matters best left to others.

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[1] API v. SEC, 953 F. Supp. 2d 5 (D.D.C. July 2, 2013).

[2] H.R.J. Res. 41, 115th Cong. (2017) (enacted).

[3] Elad L. Roisman, Statement at Open Meeting on Resource Extraction, U.S. Securities and Exchange Commission, Dec. 18, 2019, *available at* www.sec.gov/news/public-statement/statement-roisman-2019-12-18-resource-extraction.

[4] While the Commission has a role, along with the Department of Justice, in enforcing the Foreign Corrupt Practices Act, the Commission merely enforces the statute that Congress enacted. In contrast, Section 13(q) delegates responsibility to the Commission to issue regulations—a task that necessitates various policy choices the Commission is ill-suited to make.

[5] The Supreme Court has found that, for information to be deemed material there must be "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988).

[6] 5 U.S.C. § 802(b)(2).

[7] *See, e.g.*, Sudarsan Raghavan, "How a Well-Intentioned U.S. Law Left Congolese Miners Jobless," The Washington Post, Nov. 30, 2014, *available at* www.washingtonpost.com/world/africa/how-a-well-intentioned-us-law-left-congolese-miners-jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2_story.html.