United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510–6250

February 17, 2012

VIA EMAIL (rule-comments@sec.gov and davisjz@sec.gov)

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: Disclosure of Payments by Resource Extraction Issuers; File No. S7-42-10

Dear Ms. Murphy:

During the comment period on the proposed rule to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) requiring disclosure of payments to governments by resource extraction issuers, a key issue has become how to define a payment that is "not de minimis."[1] Some comment letters have advocated using the de minimis threshold set by the London Stock Exchange's Alternative Investment Market which currently uses a $15,000 minimum threshold for reporting.[2] Other comment letters advocate using a $1 million minimum.[3] The purpose of this letter is to highlight two types of objective information that could be used to determine a reasonable dollar threshold above which all payments should be treated as "not de minimis."

Data on Actual Company Payments. The first set of information is data on the actual payments made by firms in the extractive industry field to the jurisdictions where they operate, including through the payment of taxes, royalties, fees, social investment requirements, and other payments. While some of these payments may be in the millions of dollars, others are much smaller. The amounts vary according to the size of the oil company, the extent of its operations in a particular country, the type of payment being made, government requirements or requests, and other factors. Getting a better understanding these payments would help ground the Commission's analysis in facts, rather than generalizations or suppositions.

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[1] In the definitions section, the law states that "the term 'payment' … means a payment that is … not de minimis." Section 13(q)(1)(C) of the Securities Exchange Act of 1934, as added by Section 1504 of the Dodd-Frank Act.

[2] See, e.g., my comment letter dated February 1, 2011, at 4.

[3] See, e.g., comment letter filed by AngloGold Ashanti, January 31, 2011, at 10-11. Some commentators recommend against specifying any dollar threshold, but a bright line rule would not only simplify compliance, oversight, and enforcement, but also align this rule with other SEC rules specifying dollar thresholds for disclosures. See, e.g., SEC rules regarding disclosure of related party transactions ($120,000) and disclosure of monetary penalties for environmental violations ($100,000).

In my earlier comment letter, I referenced an investigation undertaken by the U.S. Senate Permanent Subcommittee on Investigations which examined a variety of payments made from 2000 to 2004, by six oil companies active in oil exploration and development efforts in Equatorial Guinea ("EG").[4] That investigation provides useful factual data on extractive industry payments, taken from bank account statements and information provided by the oil companies themselves. The investigative results were the subject of a hearing and lengthy report released in 2004.

The report, which is reprinted in the hearing record, contains detailed information and documentation related to a wide variety of payments made by the oil companies to the EG Government, EG officials, and companies owned by EG officials or their family members.[5] Some of these payments were mandated under the "production sharing contracts" between the oil companies and the EG Government; others appear to have been ad hoc payments in response to specific EG agencies or officials.

In addition to sizeable payments for taxes, royalties, and administrative fees, each of the oil companies was required by its production sharing contract to pay for "student training expenses," which the Subcommittee investigation determined consisted in many cases of paying tuition and living expenses for the children of EG officials to attend college in the United States. The oil companies were required to make these payments either to a bank account controlled by the EG Government or, in a few cases, to a U.S. university where the EG students were enrolled. The oil company payments included the following:

- two $50,000 payments to the University of South Carolina to pay for the expenses of two EG students;[6]
- $150,000 annual payment for 4 years for EG student expenses;[7]
- $300,000 annual payment for 3 years for EG student expenses;[8]
- $150,000 payment in one year and a $200,000 payment in a second year for EG student expenses;[9]
- $275,000 payment in one year for EG student expenses;[10]
- $250,000 payment in one year for the educational expenses of the children of the EG President's brother;[11] and
- $158,000 payments over 2 years and another $190,000 over the succeeding 2 years for EG student expenses.[12]

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[4] See "Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act," hearing before the Permanent Subcommittee on Investigations, S.Hrg. 108-633 (July 15, 2004)(hereinafter "PSI Hearing").
[5] "Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act: Case Study Involving Riggs Bank," report reprinted in the PSI Hearing, 126-210 (hereinafter "Riggs Report"), at 200-09.
[6] Id. at 204, footnote 371.
[7] Id. at 203, footnote 366.
[8] Id. at 204, footnote 372.
[9] Id. at 203-04, footnote 367.
[10] Id. at 204, footnote 374.
[11] Id. at 204, footnote 370.
[12] Id. at 205, footnote 380.

These payments, which range from $50,000 to $275,000 at a time, demonstrate a wide variance in dollar amounts even for the same type of payment over the same period in the same country.

One oil company also reported making repeated, low-level payments in support of the EG Government's Embassy in Washington, D.C. and its Mission to the United Nations, located in New York. These payments were made either directly to the Embassy or Mission, or to a U.S. bank account controlled by the EG Government. The payments were made every month and included the following:

- $7,000 monthly payments to maintain the EG Embassy;[13]
- $2,700 monthly payments for social security expenses incurred by EG Embassy personnel;[14]
- $3,500 monthly payments for EG Embassy personnel's medical insurance;[15] and
- $5,400 monthly payments to support the EG Mission.[16]

Taken individually, these payments added up to between $32,400 and $84,000 per year.

The oil companies also reported making other kinds of payments to the EG Government or to companies owned by EG officials or their relatives to lease housing or land, obtain security services, or pay for other services, materials or equipment sought by the EG Government. Those payments included the following:

- $7,000 in annual rent payments for undeveloped land owned by the EG President, later raised to $10,000 per year;[17]
- $130,000 in annual rent payments for buildings owned by the EG President, later raised to $175,500 per year;[18]
- $445,800 in rent payments over 4 years to a 14-year old relative of the EG President;[19]
- $45,020 and $236,160 in annual rent payments for houses owned by the EG Minister of Agriculture;[20]
- $300,000 in payments over 4 years for security services provided by a company owned by the EG President's brother, after being told that company held a monopoly on those services within the country;[21] and
- variable payments to the EG Government to "purchase services, materials and equipment for the [EG] Government's use as reasonably requested by the Government."[22]

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[13] Riggs Report at 202-03, footnote 360.
[14] Id. at 203, footnote 360.
[15] Id.
[16] Id. at 202, footnote 359.
[17] Id. at 200, footnote 338.
[18] Id.
[19] Id. at 201, footnote 345.
[20] Id. at 200-01, footnote 342.
[21] Id. at 201-02, footnote 352.
[22] Id. at 203, footnote 361.

This payment data shows that oil companies make a wide variety of payments to government agencies, officials, and related corporations; individual payments can be as low as a few thousand dollars per month; some payments are repeated or increased over time; and together these payments add up to millions of dollars in expenses each year. Seen in this broader context, the data indicates that even relatively lower dollar payments should be included in company figures, if disclosures of company payment totals are to provide accurate and meaningful information. Surely, a $50,000 payment for the tuition expenses of a government official's child or a $7,000 monthly payment for embassy expenses should not qualify as de minimis payments exempt from disclosure under Section 1504.

Data on Past Enforcement Actions. A second type of information involves the size of payments that the Securities and Exchange Commission (SEC) has historically considered sufficient to trigger an enforcement action. Over the period 2004 to 2007, the SEC brought a number of enforcement actions related to corporate payments in apparent violation of the Federal Corrupt Payments Act. In those cases, the SEC took civil enforcement actions against corporations for making payments well below $1 million, indicating that the agency did not view those payments to be de minimus or below the notice of the law. For example, the SEC took the following actions:

- issued a Cease and Desist (C&D) order against BJ Services Co. for a 2001 payment of 72,000 pesos (about $5,600) and payments totaling about 151,000 pesos (about $11,700) to officials in Argentina;[23]
- obtained a civil penalty against Monsanto for a 2002 payment of $50,000 to a senior Indonesian official;[24]
- obtained a civil penalty against Schering-Plough Poland for payments totaling about $76,000 over 3 years, from 1999-2002, to a charitable organization;[25]
- issued a C&D order against GE InVision Inc. for a 2003 payment of $95,000 to a distributor for officials in China, and 2002 payment of $108,000 for officials in the Philippines;[26]
- requested an injunction and civil penalty against a director of ITXC Corp. for payments totaling about $166,000 over two years from 2002-2004 to an official in Nigeria;[27]
- issued a C&D order against Oil States International Inc. for payments totaling about $348,000 from 2003-2004 to officials at a state-owned energy company in Venezuela;[28]
- issued a C&D order against Schnitzer Steel Industries Inc. for payments totaling about $205,000 over 5 years, from 1999-2004, to state owned companies in China;[29] and
- issued a C&D order against Dow Chemical Co. for payments totaling about $200,000 over five years, from 1996-2001, to officials in India.[30]

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[23] 2004 Securities Exchange Act of 1934 (SEA) Release 49390.
[24] 2005 SEC Litigation Release No. 19023.
[25] 2004 SEC Litigation Release 18740.
[26] 2005 SEA Release 51199.
[27] 2005 SEC Litigation Release 19356.
[28] 2006 SEA Release 53732.
[29] 2006 SEA Release 54606.
[30] 2007 SEA Release 55281.

These cases show that industry has long been on notice that payments as low as $15,000 are not viewed as de minimis by the SEC. If those payments had been viewed as de minimis, the SEC would not have taken enforcement actions seeking injunctive relief or a civil penalty against the payor. Determining a de minimis standard for purposes of Section 1504 should take into account the factual record of SEC enforcement actions involving corporate payments.

These two data sets, on actual extractive industry payments and SEC enforcement actions, demonstrate that a de minimis standard with a high dollar threshold would be out of alignment with past SEC practice and miss numerous industry payments to government agencies, officials, and related corporations. The data also suggest that a high dollar threshold would invite gamesmanship – for example, through governments accepting lower, repeated payments – to evade Section 1504's disclosure requirements. Together, these two sets of data provide a strong factual foundation in support of a de minimus standard of $15,000, and certainly one no higher than $50,000. In addition, the data indicate that, when applying the de minimis rule, the SEC should require the aggregation of smaller payments of a similar nature during the covered period. Finally, to prevent abuses, the rule should include an anti-evasion provision.

I hope this information is useful to the Commission.

Sincerely

Carl Levin

Carl Levin
Chairman
Permanent Subcommittee on Investigations

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
U.S. Securities and Exchange Commission