

## SEC Issues Controversial New Rule on Payment Transparency in the Natural Resource Sector

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December 17, 2020

On December 16, 2020, the Securities and Exchange Commission issued a new regulation that revises and reinstates a previously-repealed SEC regulation to implement Section 1504 of the Dodd-Frank Act.

The new rule is the culmination (for now) of a long process to implement the ten-year old Section 1504, which Congress included in Dodd-Frank with the intent of making payments to foreign governments by oil, gas, and mining companies more transparent. The ultimate goal of Section 1504 was to hold companies to greater account and help eradicate a major source of corruption in the public sectors of countries already suffering from weak governance. In addition, the lawmakers who spearheaded Section 1504 also understood that more robust disclosure rules could yield information material to investors, thus empowering investors and consumers alike. The European Union passed a similar measure in 2013, and other countries in Europe have also adopted Dodd-Frank payment disclosure requirements.

When President Trump took office in 2017, he worked with the Republican-controlled Congress to pass a special type of disapproval resolution that allowed lawmakers to repeal the original Section 1504 rule, which had set a relatively high standard for payment transparency. The resolution remanded the old rule back to the SEC and only allowed the agency to issue a new rule that is “not substantially similar” to the old rule.

The new rule was approved 3-2 by the SEC’s Republican-majority panel of Commissioners. The two dissenting Democrat Commissioners issued statements strongly excoriating the decision.

The new regulation contains the following key provisions:

- Extractives companies covered by the rule will only have to report their aggregate payments at the national or subnational level, rather than the previous rule’s requirement that payments be reported on a more detailed per-project basis. Critics of the new rule note that the majority of corruption happens at the project level, as part of the contract negotiation phase.
- Companies would be exempt from the new rule’s reporting requirements in situations where foreign laws prohibit disclosure. The new rule also does not necessarily preclude foreign laws at both the national or local level that are passed after the new rule is in place. Critics posit that this provision will perversely incentivize foreign governments to rush to pass new laws that make the reporting requirements moot.
- The new rule raises the minimum payment reporting threshold from \$100,000 under the old rule to \$150,000. Critics were already weary of the six-figure reporting threshold under the old rule. With the threshold now upwardly revised, they argue that the new rule will further encourage bribes, since “small” six-figure payments in impoverished countries are still, in actuality, substantial amounts that can easily induce favorable quid pro quo action by low-paid local policymakers looking to enrich themselves.

The effort to repeal the old rule and formulate a new regulative standard was led in large part by the American Petroleum Institute, the largest hydrocarbon-focused trade association in the United States that represents approximately 600 companies in the oil and gas industry.

At the same time, there have been major hydrocarbon companies, particularly those headquartered outside the United States, who support the congressional spirit and objectives of Section 1504 and who may support efforts to oppose the new rule.

This may lead to parallel or even coordinated initiatives by certain companies and civil society organizations to attempt to influence the

new rule. As these groups contemplate a potential course of action, here are some initiatives that could emerge in the near and longer term:

- Civil society organizations such as Oxfam and Public Citizen will continue their already sustained push to repeal the new rule or effectively stop it from being implemented. Some hydrocarbon companies may endorse these efforts either through public statements, joint initiatives, or other advocacy means.
- President-elect Biden is likely to commit the United States to rejoining the Extractive Industries Transparency Initiative, which supports Section 1504 and the original rule based on international principles for transparency in the extractive sector. Some companies may align their positions on Section 1504 with EITI and also seek to collaborate on advocacy.
- The incoming Biden Administration will take a serious look at the new rule with an eye towards using administrative rulemaking authorities to issue subsequent regulations that honor the intent of Section 1504, and proponents of the old rule will push hard on the new Administration to exact changes. At the same time, there is also a possibility that the “not substantially similar” requirement in the disapproval resolution may constrain the SEC under Biden from substantively improving on the new rule.
- If the Biden Administration announces an interest in using rulemaking procedures to attempt to improve the new rule, some companies may submit public comments in favor of such changes, similar to what several major extractive companies did when earlier versions of the rule were moving through the rulemaking process.
- Critics of the new rule contend that it contravenes the congressional intent of Section 1504, which could prompt a legal challenge in federal courts. If a court case materializes, civil society organizations, EITI, and likeminded companies may consider filing an Amicus Curiae brief calling for the new rule to be struck down and replaced.

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