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December 15, 2020

Walter Joseph “Jay” Clayton III  
Chairman  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

Dear Chairman Clayton,

I am writing in regards to the notice that the Securities and Exchange Commission (SEC or the Commission) will, on Wednesday, December 16, 2020, consider adopting rules that “will require resource extraction issuers to disclose payments made to the U.S. federal government or foreign governments for the commercial development of oil, natural gas, or minerals.”<sup>1</sup> While these rules are mandated by Section 1504 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank),<sup>2</sup> which requires “that all oil, gas, and mineral companies on the U.S. stock exchange disclose any payments they make to foreign governments for licenses or permits for development,”<sup>3</sup> the SEC’s proposal fails to combat corruption and hold bad actors accountable. Instead, the SEC’s proposal “would make such disclosures so general as to be of little value.”<sup>4</sup> Rather than rushing to push through a grievously flawed final rule in the final few days of the Trump administration and your tenure as SEC chair, the Commission should not hold a vote on the rule until these concerns are addressed.

It is deeply disappointing that immediately ahead of your impending resignation as SEC chair<sup>5</sup> and potential efforts to return to your past career “representing many of Wall Street’s top banks”<sup>6</sup> as a “longtime and highly-paid corporate lawyer [who] represent[ed] some of the

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<sup>1</sup> U.S. Securities and Exchange Commission, “Sunshine Act Meetings,” Vanessa Countryman, December 9, 2020, <https://www.sec.gov/news/openmeetings/2020/ssamtg121620-open.htm>.

<sup>2</sup> Public Law 111-203, Dodd-Frank Wall Street Reform and Consumer Protection Act.

<sup>3</sup> The Atlantic, “The House Kills an Anti-Corruption Measure,” Siddhartha Mahanta, February 1, 2017, <https://www.theatlantic.com/international/archive/2017/02/exxon-mobil-tillerson-state-corruption-russia-sec/515244/>.

<sup>4</sup> Washington Post, “Oil and mining companies should disclose what they pay, the law says. Critics say the SEC is undermining it,” Will Englund, April 6, 2020, <https://www.washingtonpost.com/business/2020/04/06/energy-companies-foreign-payments/>.

<sup>5</sup> Wall Street Journal, “SEC Chairman Jay Clayton to Leave Agency at End of 2020,” Paul Kiernan and Dave Michaels, November 16, 2020, <https://www.wsj.com/articles/sec-chairman-jay-clayton-to-leave-agency-at-end-of-2020-11605531600>.

<sup>6</sup> POLITICO, “SEC Chair Clayton’s Wall Street ties cloud U.S. Attorney bid,” Kellie Mejdrih, June 22, 2020, <https://www.politico.com/news/2020/06/22/sec-chair-claytons-wall-street-ties-cloud-us-attorney-bid-334624>.

world’s biggest financial institutions,”<sup>7</sup> you would work to push through a severely weakened version of an anti-corruption rule that would “be a wonderful gift under the tree for the oil industry, allowing them to hide many of their payments and exempting many companies from any reporting at all.”<sup>8</sup>

Congress enacted Section 1504, also known as the bipartisan Cardin-Lugar amendment,<sup>9</sup> 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.”<sup>10</sup> As Senator Ben Cardin and former Senator Richard Lugar, the authors of the Dodd-Frank provision, stated in support of strong rules to implement Section 1504, “One way to fight [corruption], waste and mismanagement is to reveal just how much money the autocrats are making from their oil, gas, copper, gold and other resources,” as “[t]hese vast sums are often secrets known only to the governments and the international extractive industry companies who pay them” and “[d]isclosure of these funds shifts power from the elites to the citizens so they can ‘follow the money’ and hold governments accountable.”<sup>11</sup> The current SEC proposal is not consistent with the anti-corruption goals and transparency requirement of Section 1504.

### **Investors Support Strong Rules to Implement Section 1504**

Investors have long demanded that the SEC implement strong rules to implement Section 1504 so that they can make well-informed decisions about their investments. In 2011, the California Public Employees’ Retirement System (CalPERS), the nation’s largest public pension fund,<sup>12</sup> which is “reliant upon effective and comprehensive regulation designed to protect investors,” commented to the SEC that “the disclosure objective of Section 1504 is especially vital for companies operating in countries where governance is weak resulting in corruption, bribery and conflict that could negatively impact the sustainability of a company’s operations and [their] ability to more effectively make investment decisions.”<sup>13</sup> The California State

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<sup>7</sup> New York Times, “Jay Clayton, Low-Profile Regulator, Is Catapulted Into a Political Fight,” Matthew Goldstein and Ben Protess, June 20, 2020, <https://www.nytimes.com/2020/06/20/business/jay-clayton-sdny-sec.html>.

<sup>8</sup> Lugar Center, “Will the SEC Play Santa for Big Oil?,” blog, Jay Branegan, December 2, 2020, <https://www.thelugarcenter.org/blog-will-the-sec-play-santa-for-big>.

<sup>9</sup> Publish What You Pay, “LEGISLATIVE HISTORY: Cardin-Lugar Amendment or Section 1504 of the Dodd-Frank Financial Reform and Consumer Protection Act,” December 2015, [http://www.publishwhatyoupay.org/wp-content/uploads/2015/12/Legislative-History-Timeline\\_1504.pdf](http://www.publishwhatyoupay.org/wp-content/uploads/2015/12/Legislative-History-Timeline_1504.pdf).

<sup>10</sup> The Atlantic, “The House Kills an Anti-Corruption Measure,” Siddhartha Mahanta, February 1, 2017, <https://www.theatlantic.com/international/archive/2017/02/exxon-mobil-tillerson-state-corruption-russia-sec/515244/>.

<sup>11</sup> The Hill, “Put the American people first: Keep the anti-corruption rule,” opinion, Richard Lugar and Benjamin Cardin, January 31, 2017, <https://thehill.com/blogs/congress-blog/foreign-policy/317082-put-the-american-people-first-keep-the-anti-corruption>.

<sup>12</sup> Pensions & Investments, “Funded status of the largest U.S. public pension funds,” February 5, 2018, <https://www.pionline.com/article/20180205/INTERACTIVE/180209925/funded-status-of-the-largest-u-s-public-pension-funds>.

<sup>13</sup> Letter from the California Public Employees’ Retirement System to U.S. Securities and Exchange Commission Secretary Elizabeth Murphy, February 28, 2011, <https://www.sec.gov/comments/s7-42-10/s74210-32.pdf>.

Teachers' Retirement System, the second largest public pension system in the United States,<sup>14</sup> also argued that “[w]hile [they] appreciate the [SEC’s] concerns about the regulatory burden for smaller issuers we believe that concern needs to be balanced with the Congressional intent of providing greater disclosure of this type of information to shareholders so they have the ability to assess the risks involved in investing in such companies.”<sup>15</sup>

Other institutional investors have raised similar support for strong disclosure and oversight into payments for resource extraction to foreign governments. In 2014, 34 institutional investors that managed more than \$6.4 trillion noted that their “mandate is to deliver sustainable long-term returns to our pensions, insurance and savings clients” and that “regulations favouring not only high, but just as importantly, globally consistent standards of transparency, are essential to safeguarding the effective functioning of the financial markets.”<sup>16</sup> These investors also note that there is “a clear trend that is now very difficult to reverse: transparency has firmly taken hold, and it would be a mistake to roll backwards.”<sup>17</sup> I urge the Commission to consider these concerns when reviewing a rule that weakens standards for requiring a more transparent anti-corruption regime, and I urge the SEC to postpone the finalization of this rule.

### **SEC’s Current Section 1504 Proposal is Severely Flawed**

The SEC’s proposed rule to implement Section 1504 contains significant transparency and accountability gaps that the Commission must address before finalizing the rule. Notably, under the SEC’s proposal, “information on payments in most cases would be aggregated at a national level, instead of on a contract-by-contract basis.”<sup>18</sup> In other words, rather than providing the public with specific information about payments regarding specific projects, which is “the level where corruption occurs,”<sup>19</sup> companies would be able to aggregate and hide information about payments to subnational governments, such as states, provinces, and municipalities, severely limiting information that could document potential corrupt practices. Allowing broad aggregation of payments would “be of no use to watchdog groups looking to hold companies accountable for potentially corrupt payments.”<sup>20</sup> Giving companies the opportunity to hide resource extraction payments to foreign governments directly conflicts with the law’s goal of

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<sup>14</sup> Pensions & Investments, “Funded status of the largest U.S. public pension funds,” February 5, 2018, <https://www.pionline.com/article/20180205/INTERACTIVE/180209925/funded-status-of-the-largest-u-s-public-pension-funds>.

<sup>15</sup> Letter from the California State Teachers’ Retirement System to U.S. Securities and Exchange Commission Secretary Elizabeth Murphy, March 1, 2011, <https://www.sec.gov/comments/s7-42-10/s74210-59.pdf>.

<sup>16</sup> Letter from 34 institutional investors to U.S. Securities and Exchange Commission Chair Mary Jo White, April 28, 2014, <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-35.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> Wall Street Journal, “SEC’s Latest Extractive Industry Rule Seeks to Lighten Compliance Burden,” Dylan Tokar, December 19, 2019, <https://www.wsj.com/articles/secs-latest-extractive-industry-rule-seeks-to-lighten-compliance-burden-11576801736>.

<sup>19</sup> Washington Post, “Oil and mining companies should disclose what they pay, the law says. Critics say the SEC is undermining it,” Will Englund, April 6, 2020, <https://www.washingtonpost.com/business/2020/04/06/energy-companies-foreign-payments/>.

<sup>20</sup> Wall Street Journal, “SEC’s Latest Extractive Industry Rule Seeks to Lighten Compliance Burden,” Dylan Tokar, December 19, 2019, <https://www.wsj.com/articles/secs-latest-extractive-industry-rule-seeks-to-lighten-compliance-burden-11576801736>.

giving the public and investors the information they need to reveal potential corruption and hold companies accountable. As the Commission itself noted in 2016, broad aggregation of payment information “would not generate the level of transparency... necessary or appropriate to help meaningfully achieve the U.S. Government’s anti-corruption and accountability goals” and “would not provide... payment information at the level of granularity necessary [to] know what funds are being generated [from] extraction activities.”<sup>21</sup>

Furthermore, the SEC’s proposal also contains broad exemptions to public disclosure which would put the United States out of step with robust international transparency requirements.<sup>22</sup> This is particularly troubling because the strong disclosure standards envisioned by Section 1504 “became an international example.”<sup>23</sup> Former foreign policy officials noted that the SEC’s proposal “if adopted, would lag far behind parallel legislation modeled on Dodd-Frank 1504 that has since been implemented in Canada, the European Union, the United Kingdom, and Norway, as well as diverge from the Extractive Industries Transparency Initiative, which is currently being implemented by more than 50 countries.”<sup>24</sup> Specifically, the rule would exempt disclosure “by oil and mining companies of payments made to government bodies, project by project,” which “could both inform local populations of money coming into their communities and act as a check on corruption.”<sup>25</sup> Instead, the SEC proposal would “require companies to report payments country by country, rather than for each contract, as earlier versions had required,” allow for payments “of less than \$150,000 [to] no longer need to be itemized,” and even “screen the company reports to the SEC from public scrutiny.”<sup>26</sup>

Finalizing a rule that would implement weak transparency standards would represent a retreat from Dodd-Frank’s mandate and U.S. leadership on this issue. Commissioner Allison Herren Lee noted that the proposal “would deviate widely from existing international disclosure regimes and severely limit the utility of the required disclosure” and “would also complicate compliance for issuers already reporting under those international regimes.”<sup>27</sup> Additionally, allowing for loopholes in disclosure requirements, from broad aggregation of information to arbitrarily high thresholds to disclose payments to the public would, as then-Commissioner

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<sup>21</sup> U.S. Securities and Exchange Commission, Federal Register Notice, “Disclosure of Payments by Resource Extraction Issuers,” July 27, 2016, <https://www.federalregister.gov/documents/2016/07/27/2016-15676/disclosure-of-payments-by-resource-extraction-issuers>.

<sup>22</sup> Letter from Senators Benjamin Cardin, Sherrod Brown, Richard Durbin, Edward Markey, Jeffrey Merkley, Sheldon Whitehouse, Patrick Leahy, Elizabeth Warren, Christopher Coons, and Jeanne Shaheen to U.S. Securities and Exchange Commission Chairman Jay Clayton, March 11, 2020, <https://www.sec.gov/comments/s7-24-19/s72419-6939819-211852.pdf>.

<sup>23</sup> POLITICO Magazine, “Rex Tillerson Tried to Get This Rule Killed. Now Congress Is About to Do It for Him,” Michael Grunwald, February 1, 2017, <https://www.politico.com/magazine/story/2017/02/rex-tillerson-tried-to-get-this-rule-killed-now-congress-is-about-to-do-it-for-him-214725>.

<sup>24</sup> Letter from Gayle Smith, Nilmini Rubin, Norm Eisen, Fatema Sumar, Jayne Thomisee, Abigail Bellows, Rob Berschinski, Neil Brown, and Matthew Page to U.S. Securities and Exchange Commission Secretary Vanessa Countryman, April 1, 2020, <https://www.sec.gov/comments/s7-24-19/s72419-7021498-215029.pdf>.

<sup>25</sup> Washington Post, “Oil and mining companies should disclose what they pay, the law says. Critics say the SEC is undermining it,” Will Englund, April 6, 2020, <https://www.washingtonpost.com/business/2020/04/06/energy-companies-foreign-payments/>.

<sup>26</sup> *Id.*

<sup>27</sup> U.S. Securities and Exchange Commission, “Statement on Proposed Resource Extraction Rule,” Allison Herren Lee, December 18, 2019, <https://www.sec.gov/news/public-statement/statement-lee-2019-12-18-resource-extraction>.

Robert Jackson stated, “deprive investors of the chance to choose firms that take a different approach to foreign payments,” instead of “arm[ing] American investors with the information they need to make those choices.”<sup>28</sup>

### **The SEC Should Delay Rulemaking Until Corruption and Transparency Concerns In Its Section 1504 Proposal Can Be Adequately Addressed**

Rather than voting on the final rule, the Commission should address its flaws and develop a proposal that would meet the law’s intention to increase transparency and combat global corruption.

The current SEC proposal would severely undermine the anti-corruption measures included in Dodd-Frank, and the Commission should conduct a full and complete analysis of the potential harm caused by implementing this rule before rushing to finalize it before you resign from the Commission at the end of the year.<sup>29</sup> While Congress issued a resolution of disapproval overturning the SEC rule to implement Section 1504 in 2017,<sup>30</sup> thus preventing the Commission from issuing another rule that is “substantially the same,”<sup>31</sup> Congress did not repeal Section 1504. The law, therefore, still mandates that the SEC implement rules that would help combat corruption and increase transparency about resource extraction payments to foreign governments.<sup>32</sup> The SEC should take reasonable steps to ensure that any final rule meets these goals, which means the Commission should not rush to finalize any proposal.

The obvious desire of the fossil fuel industry and its allies in Congress and the Trump administration for a weaker anti-corruption rule is not enough justification to push through these rules in the waning weeks before you and President Trump leave office and before you potentially rejoin an industry that you worked steadfastly to deregulate.<sup>33</sup> Although opposition to the rule has been a longstanding priority of many Republican leaders, with ExxonMobil’s CEO and future secretary of state under President Trump Rex Tillerson lobbying against the provision’s inclusion long before taking office<sup>34</sup> and a unified Republican government passing

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<sup>28</sup> U.S. Securities and Exchange Commission, “Statement on Proposed Disclosure of Issuer Payments Related To Extraction of Natural Resources,” Robert Jackson, December 18, 2019, <https://www.sec.gov/news/public-statement/statement-jackson-2019-12-18-resource-extraction>.

<sup>29</sup> U.S. Securities and Exchange Commission, “SEC Chairman Jay Clayton Confirms Plays to Conclude Tenure at Year End,” press release, November 16, 2020, <https://www.sec.gov/news/press-release/2020-284>.

<sup>30</sup> POLITICO, “Trump signs bill killing SEC rule on foreign payments,” Alex Guillén, February 14, 2017, <https://www.politico.com/story/2017/02/trump-sec-rule-foreign-governments-235013>.

<sup>31</sup> Congressional Research Service, “The Congressional Review Act (CRA): Frequently Asked Questions,” Maeve Carey and Christopher Davis, January 14, 2020, <https://fas.org/sgp/crs/misc/R43992.pdf>.

<sup>32</sup> Letter from Susan Rose-Ackerman to the U.S. Securities and Exchange Commission, March 4, 2020, <https://www.sec.gov/comments/s7-24-19/s72419-6911526-211213.pdf>.

<sup>33</sup> New York Times, “Trump’s S.E.C. Chairman is Stepping Down,” Andrew Ross Sorkin, Jason Karaian, Michael de la Merced, Lauren Hirsch, and Ephrat Livni, November 16, 2020, <https://www.nytimes.com/2020/11/16/business/dealbook/clayton-sec-stepping-down.html>.


<sup>34</sup> POLITICO Magazine, “Rex Tillerson Tried to Get This Rule Killed. Now Congress Is About to Do It for Him,” Michael Grunwald, February 1, 2017, <https://www.politico.com/magazine/story/2017/02/rex-tillerson-tried-to-get-this-rule-killed-now-congress-is-about-to-do-it-for-him-214725>.

rollbacks of the anti-corruption rule as one of its first major deregulatory measures,<sup>35</sup> it is extraordinarily disappointing that the Commission, during the last few weeks before you and President Trump leave office, is forcing through a severely weakened anti-corruption rule in an apparent attempt to solidify this opposition to the broader anti-corruption principles before a new administration and a new Congress takes office.

In order to allow the Commission to draft an anti-corruption rule without the egregious loopholes and inconsistencies with the goals of Section 1504 currently found in the SEC's proposal, I urge you to withdraw the rule from consideration at the SEC's upcoming meeting on Wednesday, December 16, 2020.<sup>36</sup>

Thank you for your consideration of this important matter.

Sincerely,



Elizabeth Warren  
United States Senator

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<sup>35</sup> Public Law 115-4, "Providing for congressional disapproval under chapter 8 of title 5, United States Code, of a rule submitted by the Securities and Exchange Commission relating to 'Disclosure of Payments by Resource Extraction Issuers;'" Washington Post, "One of the House GOP's first targets for regulatory rollback is top on oil industry's wish list," Steven Mufson, February 1, 2017, <https://www.washingtonpost.com/news/energy-environment/wp/2017/02/01/one-of-house-gops-first-targets-for-regulatory-rollback-is-tops-on-the-oil-industrys-wish-list/>; American Prospect, "The Congressional Review Act: A Damage Assessment," Thomas McGarity, February 6, 2018, <https://prospect.org/health/congressional-review-act-damage-assessment/>.

<sup>36</sup> U.S. Securities and Exchange Commission, "Sunshine Act Meetings," Vanessa Countryman, December 9, 2020, <https://www.sec.gov/news/openmeetings/2020/ssamtg121620-open.htm>.