



November the 13<sup>th</sup>, 2015

**The Honorable Mary Jo White**

Chairwoman  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20459

**Re: Colombian civil society organizations' interest in fully public, project-level, company-specific disclosures under Section 1504 of the Dodd-Frank Act**

Dear Chair White,

The Civil Society Roundtable for Transparency in the Extractive Sector in Colombia (*Mesa de la Sociedad Civil para la Transparencia en las Industrias Extractivas*) is an alliance that promotes greater transparency and access to public information in the extractive sector, oil, mining and gas. The Roundtable includes non-profits, universities, foundations, social organizations, and experts from different regions of Colombia to advocate for transparency in the extractive sector, guarantee effective participation in the Extractive Industry Transparency Initiative (EITI) process in Colombia, and promote open spaces for public policy discussion in the extractive industry.<sup>1</sup>

We would like to thank the SEC for the opportunity to express our views on the development of the implementing rules for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>2</sup> We applaud your government's commitment to the strengthening of civil society and democracy abroad. In Colombia, the extractive industries have contributed to the economic development of the nation, but they have also provoked serious social and environmental impacts. Project-level, company-specific transparency with respect to the payments our government authorities receive from extractive companies will be a key contributor to informed citizen oversight of the sector, and will help ensure that we receive the maximum benefits from extractive activities.

Colombia has made considerable efforts in recent years to improve transparency levels in its extractive sector, including becoming a candidate for the EITI in 2014. However, the road to achieving functioning levels of transparency is arduous, and Colombian authorities are struggling to provide appropriate and timely information for civil society to monitor natural resource revenues. If the SEC promulgates a rule requiring project-by-project and company-by-company disclosure with no provision for exemptions, it will help Colombia down that road tremendously.

## 1. Background on the Extractive Industries in Colombia

The clout of extractive activities over Colombia's economy has grown exponentially over the last two decades. Colombia's main commercial partner is the U.S, which invested \$8.4 billion in 2012, up 30% from 2011. Colombia is the fourth largest-producer of coal in Latin America and the region's fourth-largest oil producer. In 2011 Colombian coal reserves were estimated at 6.5 billion tons; this means that Colombia could extract coal at the current rate of 85 million tons per year<sup>3</sup> for the next 75 years. In 2013 the country

<sup>1</sup> Mesa de Sociedad Civil para la Transparencia en las Industrias Extractivas, Miembros <http://www.mesatransparenciaextractivas.org/Mesa-de-la-Sociedad-Civil/Miembros>.

<sup>2</sup> 15 U.S.C. § 78m(q).

<sup>3</sup> Colombia, Ministerio de Minas y Energía, "[Producción Minera Nacional](#)." Sistema de Información Minero Colombiano (SIMEC). 5 Nov. 2015..



produced more than 1 million barrels of crude per day, and in 2014 the proven oil reserves were 2,308 million barrels.<sup>4</sup> The Colombian government recently estimated a total potential production of over 13,000 million of barrels for the next 20 years.<sup>5</sup> In addition to oil and coal, Colombia produces significant quantities of other important minerals and metals – for example, gold, silver, platinum, iron, and emeralds (57,015 kg, 11,498 kg, 1,135 kg, 676,180 tons, and 1,967 carats in 2014, respectively).<sup>6</sup>

The current government has located the extractive activity at the center of its economic development plans, calling the industry one of the country's main "engines for development"<sup>7</sup>. Within the current development plan, the sector is considered as a key contributor of funding for the implementation of the peace agreements that are expected to be signed between the national government and the guerrillas<sup>8</sup>. However, the increased levels of revenue perceived from the extraction of natural resources have not always translated into widespread tangible benefits for the country, particularly for the communities where extractive companies operate. In a recent report, Guillermo Rudas and Jorge Espitia found for instance that indicators measuring access to health, education and other social services rated lower than expected in mining regions<sup>9</sup>. Other relevant studies conducted by the *Contraloría General de la República* (the General Accounting Office) have also highlighted important environmental impacts<sup>10</sup>. In addition, important levels of corruption in revenue management have also been identified and were one of the main reasons why an important reform on revenue administration was conducted in 2011<sup>11</sup>.

Moreover, we have learned through the different workshops conducted by the Roundtable at local level that communities where these activities take place are often concerned about the impacts that royalties and other resource rents have on their quality of life, as well as about other environmental and social impacts of the extraction activities. We believe these situations are strongly linked to the lack of relevant, timely and accurate information about these issues. Thus the extractive activity takes place in Colombia in a context characterized by a tremendous promise of development for Colombian society but such expectations have not materialize for many communities. In consequence, project-level, company-specific transparency is needed to maximize those benefits while deterring corruption and allowing communities to balance and consider the potential environmental and social consequences of resource extraction.

## 2. Fiscal administration of extractive revenues in Colombia

Revenue collection, management and public reporting for the extractive sector in Colombia are the responsibility of no fewer than 14 different government agencies and offices. Overall oversight is provided by the Ministry of Mines and Energy. In general, the National Mining Agency (ANM) and the National Hydrocarbons Agency (ANH) are in charge of licensing exploration and exploitation, although environmental license are handled by the National Authority of Environmental Licenses or by the Autonomous Regional Corporations (Corporaciones Autónomas Regionales CAR). The ANH, the ANM, the National Authority for Taxes and Customs (DIAN), and the Ministry of Environment collect different fees, royalties, and taxes. The

<sup>4</sup> Colombia, Ministerio de Minas y Energía, "[Principales Indicadores de Hidrocarburos, Gas y Biocombustibles](#)." Sistema de Información de Petróleo y Gas Colombiano. 5 Nov. 2015.

<sup>5</sup> "[Potencial de hidrocarburos del país es de 13.000 millones de barriles de crudo](#)." *El Espectador* 11 Apr. 2014.

<sup>6</sup> Sistema de Información Minero Colombiano [SIMCO](#).

<sup>7</sup> Colombia, Ministerio de Minas y Energía, [Memorias al Congreso 2010-2011](#). (Bogotá: 2011) 112.

<sup>8</sup> See [Bases del Plan Nacional de Desarrollo 2014-2018](#) "Todos por un nuevo país".

<sup>9</sup> Rudas, Guillermo y Espitia, Jorge. La paradoja de la minería y el desarrollo. Análisis departamental y municipal para el caso de Colombia. Luis Jorge Garay. [ed.] *Minería en Colombia: institucionalidad y territorio, paradojas y conflictos*. Bogotá: Imprenta Nacional, 2013, pp. 27-83

<sup>10</sup> Contraloría General de la República, *Estado de los Recursos Naturales 2011-2012*.

<sup>11</sup> See Contraloría General de la República. (2006). Malos manejos de regalías: Contraloría detectó irregularidades por \$16.143 millones en Casanare, Sucre, Córdoba y Huila (Boletín).



National Planning Department oversees and manages redistribution of royalties to sub-national entities through a General System of Royalties (SGR). The *Procuraduría General de la Nación* (a public integrity oversight body), the *Controlaría* and one presidential Secretary are in charge of ensuring the proper and legal management of revenues and advise on transparency. Financial information on the extractive industries is reported by a number of public entities including the Central Bank, the National Department of Statistics, Ecopetrol (the state-owned oil company), ANH, ANM and the General System of Royalties (SGR).

Under the Colombian Constitution, the State is considered to be the owner of all natural resources. Thus, companies are required to paid a compensation to the national government, a royalty, that is then distributed to local governments following SGR rules. Prior to 2011, under the regime established by Law 141 of 1994 the national government redistributed a set percentage of mining royalties (*regalías*), both in the form of direct payments to the departments and municipalities where the resources were extracted (*regalías directas*) and indirect payments to projects to be executed by local governments in the rest of the country (*regalías indirectas*). In 2011, the system was restructured, with the intention of providing more equitable distribution of benefits and reducing the misuse of these funds<sup>12</sup>. This decision was based on the premise that the pre-2011 system disproportionately favored locations that produce natural resources, and that those locations were unable to use the amounts of royalties that they received to improve people's lives because of corruption, inefficiency, and lack of institutional capacity.

Besides royalties there are other payments made by extractive companies that are not available in a desegregated base for citizens. They include taxes and other rights and fees. Some of them are set by law on an equal basis for all companies, while other are negotiated with each company within the framework of the signature of contracts or during negotiation rounds (economic rights). Some companies have been required by contract to fund specific social programs at the local level. At the sub national level, companies are also liable for local taxes (i.e. *ICA*) and establish ad-hoc agreements with local governments within the framework of their social responsibility programs. From an environmental perspective, companies pay a number rights and fees to different authorities and they also invest on their own important amounts of resources according to the agreements (contracts, licenses) signed with the national governments. For instance, in a recent study conducted by our Civil Society Roundtable<sup>13</sup> we established that companies not only pay specific fees to obtain their licenses but they have to pay particular fees in relation to the use of natural resources like water. They are also required by law to invest a portion of their operational investments on reforestation and restoration activities. In addition, as part of their environmental licensing process some companies have to conduct free prior consultation (FPC) with indigenous people. As a result they often sign agreements with these communities where diverse compensation activities or payments are set (*acuerdos de protocolización*)<sup>14</sup>. There are other types of payments or revenues provided by the extractive companies on an *ad-hoc* basis to fund specific national public programs (i.e. *Pacto Minero-Energético para la superación de la Pobreza*) or to support specific sector as the Armed Forces.

### 3. Transparency under the current regime

Even though in recent years Colombia has made important efforts to increase transparency in the sector, at present it is not possible to have consistent information on all the payments made by the extractive sector in Colombia. Different agencies collect different types of information, using different criteria, and different

<sup>12</sup> La Silla Vacía, "[La reforma de regalías: la recentralización del poder más drástica en décadas](#)". (Bogotá:2011).

<sup>13</sup> Néstor Ortiz Pérez, "Pagos e Inversiones Ambientales del Sector Extractivo: Marco Conceptual y Normativo, Análisis de Contexto y Propuesta de Ruta para la divulgación progresiva de gastos ambientales de las empresas del sector extractivo en Colombia". (Bogotá: 2015).

<sup>14</sup> See for instance Protocolización de la Consulta al PND 2014- 2018. <http://www.opiac.org.co/index.php/noticias/nacionales/311-protocolizacion-de-la-consulta-al-pnd-2014-2018>



methods, thus making the aggregation of these defused sets of data impossible at worse or tremendously difficult at best. While the SGR discloses information on projects financed with royalty revenues at a fairly granular level,<sup>15</sup> neither it nor the mining and oil agencies (ANM, ANH) publishes data on payments collected at the local level or disaggregated information about the social payments/investments that each company have been required by contract to undertake.<sup>16</sup>

The ANH, on the other hand, does publish project-level payment data but does not identify the company that made the payments.<sup>17</sup> Economic rights are disclosed only on an aggregated basic making impossible to identify how much each company has contributed with each fee. For instance how much each company has extra paid for high prices or how much has it paid for technology transfer. Ecopetrol, the state-owned oil company, publishes information on its production costs, taxes, and dividends in its annual report; but income taxes from other companies are aggregated and published at the national level by the Ministry of Finance and there is no systematic publication of other taxes or fees paid. The situation is more complex for other payments/revenues at the local level. As part of the EITI standard implementation in Colombia we were made aware by the National Government that national authorities do not count with an information system that gathers and reports on such mandatory payments made at local level. As for environmental payments and compulsory investments, the Roundtable has identified that there is very limited access from local communities to such public information<sup>18</sup>. Also, there is very limited access to information about compensation payments related to FPC with indigenous people, contributions to specific social programs at national or local level or to the military.

#### 4. The case for project-level, company-specific disclosure

It is clear that project-level, company-specific payment information is simply not available on a systematic basis in Colombia. But such information would be of tremendous benefit to Colombian civil society for a number of concrete reasons:

***Empowering communities to weigh the impacts of projects against the benefits they receive.*** The Roundtable has hosted workshops around Colombia in which citizens have voiced the strong desire to understand the direct benefits of resource extraction versus the costs in terms of social and environmental impacts. While the SGR has established a web platform for monitoring the projects financed by the royalties system, communities need localized, company-specific payment information in order to balance the costs and benefits of the activity in their territories. Depending on the stage of the project, communities might also push to have a better deal, demand more direct investment from the company or the state, or insist on stronger environmental mitigation measures. Although Colombia approved in 2014 an Access to Public Information Law, so far there is no systematic way to obtain data on the whole project-level deals that their national and local authorities are making with companies, and the clearest way for communities to get the information they need is for companies to disclose what they pay, at the project level.

In addition, as mentioned before it is well established under Colombian constitutional jurisprudence that before mining or oil exploration can be approved by the government on indigenous territory, there must first be good-faith consultation with indigenous communities in which the affected communities are given

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<sup>15</sup> Colombia, Departamento Nacional de Planeación, “Sistema de Monitoreo, Seguimiento, Control y Evaluación: [Informe Primer Trimestre 2015](#).” (Bogotá: 2015) 22.

<sup>16</sup> Colombia, Agencia Nacional Minera, “[Informe de Rendición de Cuentas](#)”. (Bogotá: 2015) 44-45.

<sup>17</sup> Colombia, Agencia Nacional de Hidrocarburos, “[Estadísticas y Informes](#)”. 5 Nov. 2015.

<sup>18</sup> Mesa de Sociedad Civil para la Transparencia en las Industrias Extractivas, “Identificación de Buenas Prácticas en el Acceso y Divulgación de Información Pública Ambiental en el Sector Extractivo.” (Bogotá: 2015).



enough information to allow for a meaningful decision-making process.<sup>19</sup> Indigenous communities can ask for environmental audiences to be informed about the project possible impacts and benefits (*Audiencias ambientales*). Therefore, those Colombian communities would use project-level, company-specific data to consider the fiscal benefits that might result from the project. If the company has conducted prior projects in Colombia, the indigenous community would use company-specific, project-level data to consider the company's track record of fiscal benefits and other type of payments and contributions to communities as part of its overall evaluation of the project.

**Allowing citizens to ensure that revenues are being redistributed to local governments according to the law.** Although the percentage of royalties earmarked for the areas in which the natural resources originated has decreased under the new fiscal regime, the departmental and local governments in those areas still maintain a constitutional right to a fraction of the receipts. Without project-level, company-specific payment data, neither local governments nor communities have any way to verify whether they are receiving the proper amount. Indeed, there have been important controversies around the formula under which royalties are settled and then transferred to municipalities. One of the main goals of an association formed by oil producing municipalities was to help local governments with complaints over the royalties received because according to them not all the revenues received from companies were transferred to the regions<sup>20</sup>. If citizens become aware that the central government is not distributing the required amount under law or that companies are not paying what they must pay, they can take corrective legal actions.<sup>21</sup>

**Giving citizens the tools to hold their local authorities accountable for the responsible use of natural resource revenues.** Given the reduction of royalties transferred, in the new fiscal regime for the extractive industries, local taxes and fees but specially *ad-hoc* agreements signed with extractive companies to fund social programs constitute an increasingly important component of the budgets of local government that have jurisdiction over the communities where extractive operations take place. Without project-level, company-specific information that identifies the payee government entity, those who live in these areas have very limited channels to know what their local governments are actually receiving for natural resource extraction, and, by corollary, what they should be able to expect in terms of social services. They could better oversight their local governments' performance. This also applies to the social programs that are directly funded by companies that although mandatory can be often be confused with their voluntary corporate social responsibility projects. If citizens knew more about the amount and destination of such payments and investments they could hold companies accountable for them and even look for any sort of influence over social investment decisions.

Included among the members of our Roundtable are a number of Royalty Surveillance Committees (*Comités de Seguimiento a las Regalías*) that are dedicated to exercising oversight over the projects that local governments undertake with the royalties from extractive operations. These groups ferret out irregularities in pricing and contracts, find reasons for project delays, and seek to combat corruption.<sup>22</sup> While the Committees are able to oversee actual expenditures and may be aware of the amounts designated by the national government for particular local projects, they have no information about local taxes paid by companies or the revenue local governments garner directly from agreements with extractive companies. If companies disclose this information, they will arm community members with the most basic tools of

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<sup>19</sup> Corte Constitucional [C.C.] [Constitutional Court], octubre 22, 2002, Sentencia C-891/02, (Colom.); Corte Constitucional [C.C.] [Constitutional Court], octubre 26, 2006, Sentencia T-880/06, (Colom.).

<sup>20</sup> See <http://www.ampetdecolumbia.com/quienesomos.html> or <http://www.vanguardia.com/historico/22655-ampet-de-colombia-peleara-por-la-inversion-de-regalias>

<sup>21</sup> Law 393 of 1997, art. 8, July 29, 1997 (Colom.)

<sup>22</sup> Edith Quiroz, "[En Sucre se requiere mayor control social a inversiones de regalías.](#)" *El Universal* 30 Aug. 2013.; Carmen Villalba, "[Ciudadanos ya vigilan las regalías: proyectos en distintos departamentos mejoran su rumbo.](#)" *Interelectricas* 5 Nov. 2010.



democracy: the ability to vote irresponsible leaders out of office, prevail upon law enforcement to crack down on embezzlement and corruption, and organize in numbers to demand that the government spend resource revenues on citizen priorities.

***Giving a boost to the EITI implementation process in Colombia.*** It might be hoped that Colombia's 2014 candidacy for EITI membership would help to rationalize and systematize revenue management and report. However, according to the EITI scoping study for Colombia, there are serious problems of law, efficiency, efficacy, and administrative culture that need attention and are hindering the implementation of proper and useful transparency and revenue reporting mechanisms. Various government representatives and civil society organizations have concluded that the information currently available is not useful enough for the average citizen hoping to exert some form of informed influence over the development of policy.<sup>23</sup> Moreover, the problem is exacerbated at the institutional level by rivalry and a general lack of cooperation and among agencies, which limits the level of cooperation.<sup>24</sup> In this difficult environment, Section 1504 could provide the boost that Colombia needs to properly implement EITI. Notably, the scoping report looks to important international transparency measures as being complementary to the EITI process and specifically mentions Section 1504 of the Dodd-Frank Act because most extractive companies working in Colombia are covered by this law.<sup>25</sup> The current EITI standards require project-level, company-specific disclosure consistent with Section 1504 and the European transparency rules. Because, as the scoping study noted, a large percentage of the extractive companies operating in Colombia are covered by Section 1504, a robust rule that parallels the EITI standard would also create a strong incentive for EITI implementation.

***Building trust between companies and communities.*** Without transparent mechanisms to prove compliance, and given the rapid expansion of extractive enterprises over the last decade, mistrust between communities and extractive companies has become almost endemic. Disclosure in a company-specific and project-specific format would help dispel doubts about whether a specific company is complying or not with its assumed responsibilities at both the national and local level, thus addressing a critical issue in the relationships between communities and companies.

***Improving transparency at Ecopetrol.*** Ecopetrol, Colombia's state-owned oil company, provides more information about its payments to the Colombian government than other entities. Yet, some information about transportation is not always clear. Nevertheless, transportation fees/payments information will not be included within the first EITI report. A preliminary study will assess the materiality of such payments but will not yet disclose them. Since both Ecopetrol and most of its counter-parties would be covered under Section 1504, mandatory project-level, company-specific disclosure of natural resource payments could help to dispel any doubt about the accuracy of Ecopetrol's numbers by allowing regulators and civil society groups to compare the amounts that international oil companies pay for oil transport with the net revenues that Ecopetrol declares.

***Shedding light on controversial payments to the military.*** In Colombia, the disclosure of payment information will be particularly important because companies can establish agreements with the Ministry of Defense that allow for direct payments or in-kind transfers to military units for security at their operational sites.<sup>26</sup> But beyond agreements made under the current regulations, different cases have been documented about collusion between foreign companies (including extractive companies or their private security providers) and illegal armed groups that has led to the murder of trade unionists, community organizers, and

<sup>23</sup> Resource Consulting Services, Extractive Industries Transparency Initiative (EITI) Scoping Study for Colombia. (2012) 38, 41.

<sup>24</sup> Ibid. 38.

<sup>25</sup> Ibid. 54-55.

<sup>26</sup> Resource Consulting Services (2012) 34.



indigenous defenders of traditional territory<sup>27</sup>. Because of the mistrust it can create, Colombian citizens have a strong interest in understanding the flow of revenues to local military units – especially in zones where the military is used to manage community opposition to extractive projects. Only company-specific, project-level disclosures are adequate to address that interest.

***Strengthening citizens capacities to work with the government to identify and combat proper payment of taxes, royalties and financial fees.*** As noted above, the Colombian government has only a limited ability to track and independently verify the resource extraction payments and the production volumes that they are based on. For instance, royalties are paid following good-faith declarations on production volumes made by each company and oversight or auditing capacities of the public institutions were very limited. No surprise that an important debate was created when a decade later the *Contraloría* declared that a company had underpaid royalties during more than 5 years<sup>28</sup>. Although the company denied such evasion, it would be very useful to count on information to have this discussion at the time those payments were made. With company-specific, project-level disclosures, citizens might be able to avoid this situations in the future or they can even assist prosecutors to identify anomalous changes in a company's payments to the government. In a country where regulatory capacity easily outstrips the volume of extractive activity, the ability to essentially crowd-source irregularities detection can only help the Colombian state claim the revenues that are its due.

## 5. Conclusion

This letter has outlined the need in Colombia for transparent and specific data on company contributions and addresses some of the concerns respecting the implementation of a rule mandating project-specific and company-specific disclosure. We urge you to establish a rule for Section 1504 that requires project-by-project and company-by-company reporting with no exemptions. It is the specific contracts and agreements signed by companies that determine the payments and others transfers made to governments; it is also the specific contract that creates the risk of corruption if left unmonitored. Thus, it is only logical that companies should disclose data based on such contracts, agreements or requirements.

We thank you again for your consideration. Please do not hesitate to contact us if you require any additional information.

Sincerely,

**Andrés Hernández**

Secretaría Técnica

Mesa de la Sociedad Civil para la Transparencia de la Industria Extractiva

<sup>27</sup> Revista Semana, “[Informe relaciona a Prodeco y a Drummond con ‘paras’](#)”(2014); ABColombia, “[Caught in the crossfire: Colombia’s indigenous peoples](#)” (2010).

<sup>28</sup> [http://www.contraloriagen.gov.co/c/document\\_library/get\\_file?uuid=d6cf46ff-a9d7-4cb9-8477-7639c1a72d3e&groupId=10136](http://www.contraloriagen.gov.co/c/document_library/get_file?uuid=d6cf46ff-a9d7-4cb9-8477-7639c1a72d3e&groupId=10136)