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United States

Myth Busting: The Truth About the Cardin-Lugar Anti-Corruption Provision

The Cardin-Lugar Provision requires US-listed oil, gas and mining companies to publicly disclose the project-level payments they made to the US and foreign governments for the extraction of oil, gas and minerals.

The Cardin-Lugar provision is a landmark piece of bipartisan legislation. The final anti-corruption rule implementing the Cardin-Lugar provision passed by the SEC in June 2016 significantly advances international efforts to curb corruption and has been applauded by investors, companies and governments around the world. However, a great deal of misinformation has been spread about the rule. Below you will find evidence correcting the most glaring inaccuracies put forward.

But before getting into the myths, here are some hard facts.

- Research concludes that increased transparency resulting from the disclosures required by the Cardin-Lugar Rule **could lower the cost of capital for covered companies by $6.3 billion to $12.6 billion**.
- The international norm of resource sector payment transparency, built on strong American leadership, is estimated to have **increased predicted global GDP by $1.1 trillion.**
- **Investors representing nearly $10 trillion** in assets under management support of the Cardin-Lugar Rule.
- Between 2011-2014 conflict linked to corruption in Libya led to five US-listed companies **missing out on an estimated $17.4 billion** due to production disruptions.

Myth 1: Compliance costs for disclosure could reach as high as $591 million per year.

Facts: The only comprehensive cost analysis submitted to the SEC concluded that the total aggregate compliance cost to industry in the first year would amount to $181M and would not exceed $74 million per annum in subsequent years.

The $591 million number comes from an outdated SEC estimate from the 2012 version of the final rule. The reason the number is so high is because API claimed that there were countries that prohibited disclosure and if companies were forced to disclose they would have to hold a 'fire-sale' of all of their assets in that country – this number comes from the assumption that every company would lose their assets in these countries where disclosure was supposedly prohibited. It is 1) disingenuous to quote this cost estimate from the 2012 regulation, instead of quoting form the 2016 regulation, and 2) irrelevant because the SEC now allows for companies to apply for an exemption if they believe disclosure is prohibited in a country, therefore the above estimate is wildly inaccurate.

(See Claigan Environmental comment to SEC Feb 16, 2016)
(See Final SEC rule pp. 189-192)

Myth 2: US companies are at a competitive disadvantage because non-US companies do not have to make the same disclosures, and the rule applies only to public companies.

Facts: The US law covers all oil, gas and mining companies listed on US stock exchanges not simply companies based in the United States. Thus, the rule covers all companies filing an annual report with the SEC both foreign and domestic. This includes foreign oil majors BP, Shell, and Total as well as leading state-owned oil companies from China and Brazil, such as PetroChina and Petrobras. But a significant number of foreign companies are already required to make the same type of disclosures under the rules in other jurisdictions.

Since the passage of Cardin-Lugar in 2010, important US allies have followed our leadership in payment transparency and now 30 countries have adopted their own mandatory disclosure rules for companies listed on their stock exchanges. And while in many ways, the Canadian and EU requirements are more stringent (and also cover private companies), the laws in all jurisdictions have been deemed equivalent by the SEC. Companies are allowed to submit the same reports in all jurisdictions. These laws already cover the vast majority of companies that compete with American firms including Russia's state-owned companies, Gazprom and Rosneft which are required to report in the UK.

(See Rosneft Payments to governments report 2015)
(See Lukoil Payments to governments report 2015)
(See Gazprom Payments to government report 2015)
(See PWYP Factsheet on the EU Accounting and Transparency Directives 2013)
(See PWYP Factsheet on Canada's Extractive Sector Transparency Measures Act 2014)

Myth 3: The SEC rule is burdensome.

Facts: The Cardin-Lugar Provision is a reporting requirement, which is not onerous and does not limit the operations of oil, gas, and mining companies; the rule simply requires companies to publicly report payments that companies would track in the normal course of doing business. The rule is a straightforward requirement to make that data transparent and usable by investors and citizens. Leading global oil and mining majors such as Shell, BP and Total, along with Russian state-owned companies, are entering their second year of reporting under EU rules without any negative impact or reported issue. In fact, many major companies have publicly endorsed this type of reporting and have called on the U.S. to ensure our rules are harmonized with those other markets.

(See Kosmos comment to SEC Oct. 19, 2015)
(See BHP Billiton comment to SEC Jan, 25, 2015)
(See Total SA comment to SEC Jan. 13, 2016)

Myth 4: The rule requires companies to disclose proprietary information that could help foreign competitors.

Facts: The SEC rule requires companies to disclose payment information; it does not mandate the disclosure of proprietary, confidential or commercially sensitive information by companies. Numerous companies are already reporting under the similar rules in other markets, such as Shell and BP, and none have reported any competitive harm from payment transparency. However, the SEC's rule nonetheless contains safeguards. To the extent a company legitimately believes that disclosure will risk exposing proprietary information, they can apply to the SEC for exemptive relief on a case-by-case basis.

Furthermore, a competitor cannot use payment data to "reverse engineer" a company's return on investment or the contract terms of a specific project. Complex factors such as access to technology and finance determine a company's success in winning bids with host governments – not transparency of payments. Extractive companies that are covered by payment disclosure requirements in other jurisdictions have continued to win bids.

(See comment from Economist Robert Conrad to SEC July 17, 2015 p. 4)
(See comment from Publish What You Pay-US to SEC March 14, 2014 p. 35-37)

Myth 5: This rule was not properly vetted by Congress.

Facts: The Cardin-Lugar Amendment enjoyed bipartisan support and was subject to extensive review in both the House and Senate, and it was unanimously supported in conference. It is based on underlying legislation with a long Congressional history that was the subject of multiple hearings in both the House and Senate. In fact, the first precursor was a Republican House resolution on oil and mining transparency from 2006. For this reason, propositions to repeal the rule signify an inappropriate use of the CRA. The intent of the CRA is to address midnight rules, not rules like 1504 that have undergone years of extensive regulatory development.

Myth 6: **The SEC rule will cause companies to lose out on foreign contracts.**

Facts: Opponents of the Cardin-Lugar anti-corruption provision have claimed that companies could be placing themselves at odds with legal or contractual prohibitions on reporting in countries like Angola, China, Qatar, and Cameroon and may subsequently lose out on business in those countries due to the transparency rule. In the six years since this law was passed, no company has produced evidence that any country prohibits this type of disclosure, and numerous submissions to the SEC have demonstrated no such prohibitions exist. The experience of companies already reporting under the parallel disclosure rules in other countries likewise confirms the absence of any prohibition on reporting; companies like BP and Shell have disclosed project-level payments made in Angola, China, and Qatar with no repercussions. Nor have these companies lost out on bids because of payment disclosure requirements. Nonetheless, the Cardin-Lugar provision contains safeguards to ensure that companies that face a legitimate problem can apply for an exemption from disclosure on a case by case basis.

(See BP 2015 Payments to governments report)
(See Shell 2015 payments to governments report)

Myth 7: **The Cardin-Lugar provision has nothing to do with the SEC or investors.**

Facts: It is important to note that the SEC extractives transparency rule is not a case of agency overreach. Congress specifically mandated the SEC issue this rule in Section 1504 of the 2010 Dodd-Frank Act, and by issuing the 2016 rule the SEC complied with the will of Congress. Both Senator Cardin and Senator Lugar, the original sponsors of the bill, along with Senators Leahy, Durbin, Brown, Warren, Baldwin, Markey, Coons, Shaheen, Whitehouse, Menendez and Merkley, expressed explicit support for the SEC's interpretation of Section 1504 during the rulemaking process.

(See Senator Ben Cardin comment to SEC Feb. 5, 2016)
(See Senator Richard Lugar comment to SEC February 4, 2016)

The rule has significant benefits for investors. Throughout the rulemaking process, investors worth nearly $10 trillion of assets under management repeatedly emphasized their support for payment disclosures under the rule. The rule provides investors with critical information for assessing risk in the often murky and unstable oil, gas and mining sectors, with positive follow-on impacts for firms that benefit from increased investor confidence and certainty. The increased transparency resulting from this provision has been estimated to lower the cost of capital for covered US-listed firms by $6.3 billion to $12.6 billion.

(See Stu Dalheim comment to SEC Feb 16, 2016)
(See Cannizzaro & Weiner comment to SEC Feb 11, 2016)

Myth 8: We don't need Cardin-Lugar because we have the Foreign Corrupt Practices Act.

Facts: While the Foreign Corrupt Practices Act (FCPA) remains an important statutory tool critical to fighting global corruption, its scope is confined to bribery. Bribery is only one tool used to facilitate corruption. All too often, it is the legal payments made to governments that are misused, or siphoned off to the bank accounts of a country's corrupt elites. However, the fact that companies are already subject to the FCPA does mean the burden of reporting payments to comply with the Cardin-Lugar rule is minimal; companies are already required to collect and track payment information as part of the books and records provision of the FCPA. In this way, the two laws work very well together in creating a strong regulatory foundation to prevent corruption.

Myth 9: This rule is the same as the one sent back to be revised by the courts in 2013 and did not incorporate the Court's or industry concerns.

Facts: The American Petroleum Institute filed suit to challenge the original rule issued by the SEC in 2012, despite its largest member companies claiming to support transparency. The earlier version of the rule was vacated by the court and sent back to the SEC in 2013 on narrow procedural grounds, not on the substance of the rule. Since then, the SEC has had another two years of public consultations and internal analysis, resulting in an even more robust record with substantial evidence supporting each aspect of the 2016 rule. That evidence also includes the experience of companies already reporting on their payments under similar rules in other jurisdictions. The SEC's final rule strikes an appropriate balance by requiring the level of transparency Congress intended, while also accommodating industry concerns by providing companies with the opportunity to apply for case-by-case exemptions when they face reporting challenges and a generous phase-in period. Reporting will only begin at the end of 2018.

Myth 10: Sections 1504 (extractives transparency) and 1502 (conflict minerals) are the same thing/substantially similar.

Facts: Section 1504 requires US-listed oil and mining companies to annually disclose the company's major payments made to the US and foreign governments. It is simply a financial disclosure of payments companies already track.

Section 1502 mandates that a certain set of companies using tin, tungsten, tantalum or gold in their products undertake supply chain due diligence and report annually to the SEC regarding the source of the minerals used in their products and whether the minerals are sourced in conflict areas in the Democratic Republic of Congo.

Myth 11: The Cardin-Lugar rule poses a security risk for American companies and their employees working abroad.

Facts: There is no evidence justifying the claims that the Cardin-Lugar rule would have any negative impacts on security. In fact, all available evidence points to the contrary. The United Steelworkers explicitly argue that the Cardin Lugar anti-corruption rule will enhance employee safety. Generally, 1504 helps protect US national security interests by preventing the corruption, secrecy, and government abuse that has catalyzed conflict, instability, and violent extremist movements in Africa, the Middle East and beyond. As ISIS demonstrated, non-state actors can benefit from trading natural resources in order to finance their operations; project level reporting will make hiding imports from non-state actors more difficult, thereby limiting their ability finance themselves with natural resource revenues.

(See Sarah Sewall 2016 CNN article)
(See Sarah Peck & Sarah Chayes comment to SEC Feb. 16, 2016)
(See 2017 article by Kleptocracy Initiative)
(See 1504 Support letter from the United Steelworkers)

Myth 12: This law increases prices at the pump and takes capital away from other business opportunities.

Facts: All of the data suggests that transparency actually helps company balance sheets by lowering the cost of capital and increasing investor confidence. On the other hand, corruption costs oil and mining companies millions of dollars every year from instability and fragility in resource-rich countries, which contributes to increased operating risks, waste, inefficiency, and delays. For instance, between 2011 and 2014, the conflict in Libya fueled in part by citizens' frustration with corruption and poor governance caused five U.S.-listed oil companies to miss out on more than $17 billion in revenues due to production disruptions in the country.

(See Sarah Peck & Sarah Chayes comment to SEC Feb. 16, 2016)
(See ONE Campaign comment to SEC March 2016)

For more information, please visit www.pwypusa.org
Or contact Jana Morgan - jmorgan@pwypusa.org