



TRANSPARENCY INTERNATIONAL | USA

December 8, 2015

Barry Summer, Esq.
Associate Director, Disclosure Operations
Division of Corporation Finance
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Rulemaking under Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Mr. Summer:

We are writing to you in response to the Notice of proposed expedited rulemaking, filed by the SEC on October 2, 2015 in *Oxfam America, Inc. v. United States Securities and Exchange Commission*. We welcome the Commission's decision to pursue expedited rulemaking in order to more quickly promulgate a final rule implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (15 U.S.C. §78m(q) ("Section 1504"). This letter presents Transparency International – USA's recommendations regarding certain key issues the Commission will need to consider during the rulemaking process.

Transparency International-USA is a non-profit, non-partisan organization founded in 1993 to combat corruption in government, business, and international development through greater transparency and accountability. TI-USA is represented on the Department of Interior's Federal Advisory Committee (the "Multi-Stakeholder Group" or "MSG") tasked with implementing the Extractive Industries Transparency Initiative (EITI) in the United States. TI-USA is also the U.S. chapter of the larger Transparency International movement, a global network of local chapters in over 100 countries with an international secretariat in Berlin, Germany. Transparency International chapters in many countries are involved in promoting revenue transparency in the extractive sector as a means to combat corruption and promote government transparency and accountability.¹

We urge you to propose and adopt a rule that incorporates the following elements,

- A definition of "project" as the operational activities that are governed by a single contract, license, lease, concession or similar legal agreements and form the basis for payment liabilities with a government
- No exceptions should be made for payments to countries that purportedly forbid the disclosure of such payments

¹ For a brief discussion of what some TI chapters are doing to promote revenue transparency in the extractives sector, see http://www.transparency.org/news/feature/making_mining_more_transparent_senegal_and_ukraine

- Disclosures under 15 U.S.C. §78m(q)(2) should be filed with as opposed to furnished to the Commission
- Disclosures under 15 U.S.C. §78m(q)(2) should be publicly available

The inclusion of such elements will ensure that the final rule most fully “support[s] the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.”²

Project Definition

We strongly urge you to define “project” as the operational activities that are governed by a single contract, license, lease, concession or similar legal agreements and form the basis for payment liabilities with a government. By designating the pre-existing exploration and production agreement between a government and a company as the definition of “project” for the purposes of this rule, the Commission would adopt the simplest and most straight-forward solution. This definition of “project” would also be advantageous for civil society groups, companies, and investors. As noted below, this approach would also be consistent with the approach adopted in the European Union, Canada, and Norway.

Civil society groups are primarily interested in maximum revenue transparency and how it can be used to expose corruption and/or unequal distribution of revenues generated by extraction. Given that leases or other similar exploration and production agreements typically relate to a fairly localized geographic area, defining a project as activities governed by a single contract would thereby allow civil society groups to monitor how much money is being generated by extraction in a particular region, state, or province and whether or not the local communities where the extraction is taking place are receiving their fair share of government revenues.³

Companies already pay governments many types of revenues based on exploration and production contracts, as is the case in the U.S.⁴ As such, the additional record keeping burden placed upon companies as a result of this rule would be marginal, given that many types of company payments to governments are based upon leases or other similar exploration and production agreements.

Investor groups have pointed out to the Commission that project-level reporting by companies would enhance their ability to evaluate risk profiles and company performance.⁵ Moreover, such project-level reporting is already being done by Tullow Oil,⁶ Statoil,⁷ and Kosmos Energy.⁸

² 15 U.S.C. §78m(q)(2)(E)

³ See, Letter from Ambassador Mary Ann Peters, CEO of the Carter Center, available at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-68.pdf>

⁴ See, Letter from Robert Prael, Department of the Interior, available at <http://www.sec.gov/comments/s7-42-10/s74210-108.pdf>

⁵ See, Letter from 14 investor groups, available at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-36.pdf>.

⁶ See, Tullow Oil plc. 2014 Annual Report. Pages 169 to 171, available at https://www.tulloil.com/Media/docs/default-source/3_investors/2014-annual-report/tullow-oil-2014-annual-report-and-accounts.pdf?sfvrsn=4

⁷ See, Statoil 2014 Payments to governments report, available at http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_Ke yDownloads/2014%20Payments%20to%20governments.pdf

⁸ See, <http://www.kosmosenergy.com/responsibility/transparency.php> (last verified on December 2, 2015)

While the Commission's original implementing rule, issued on August 22, 2012, declined to include a definition of project, we believe that several developments since that time should cause the Commission to reconsider its earlier position and adopt the definition of project that we are proposing. First, in June 2013, the European Commission adopted a directive requiring that European companies in the extractives sector begin reporting revenues paid to governments at the project level.⁹ This directive defines project as we have suggested, namely as "the operational activities that are governed by a single contract, license, lease, concession or similar legal agreements and form the basis for payment liabilities with a government."¹⁰ The United Kingdom¹¹ and France¹² have already implemented this directive by passing national legislation. Norway, although not a member of the European Union, passed a resource extraction transparency law of its own in December 2013 that contains an identical definition of project.¹³ Canada is also in the process of adopting an identical definition. The Extractive Sector Transparency Measures Act came into force in Canada in June 2015, and the proposed implementing rule adopts the same definition of "project" as we are proposing.¹⁴

Adopting this definition would therefore contribute to establishing a global standard definition. It is also worth noting that as many large energy and mining companies are cross-listed on American and European or Canadian stock exchanges, a standard project definition would reduce such cross-listed companies' compliance costs, and the marginal cost of compliance for such cross-listed companies with an American rule incorporating this definition would be minimal.

In addition, the U.S. EITI MSG was unable to come to agreement regarding a definition of project. It is therefore important that the Commission defines "project" as the Commission's definition would likely help the MSG in its deliberations over how to define project for the purposes of EITI reporting.

No Exceptions

We urge you to adopt a rule that does not make any exceptions for payments made to governments that may prohibit their disclosure. A global survey of over 140 resource-extraction investment contracts demonstrated that "[d]isclosures required by law are a very common exception to

⁹ See, Directive 2013/34/EU, Chapter 10, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0034>

¹⁰ See, *id.*, Article 41(4)

¹¹ See, The Reports on Payments to Governments Regulations 2014, 2014 No. 3209, Regulation 2, available at <http://www.legislation.gov.uk/ukxi/2014/3209/regulation/2/made>

¹² See, Loi n° 2014-1662 du 20 décembre 2014 portant diverses dispositions d'adaptation de la législation au droit de l'Union européenne en matière économique et financière (Law No. 2014-1662 of December 20, 2014 concerning various adaptations of national law to conform with European Union law in economic and financial matters), article 12, available at

http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=38B0C4133E65EB9CD3E172B911CD8CAA.tpdila15v_3?cidTexte=JORFTEXT000029999826&categorieLien=id

¹³ See, <http://www.publishwhatyoupay.no/en/node/16414> (English translation of Norwegian law done by Publish What You Pay Norway)

¹⁴ See, Extractive Industry Sector Transparency Measures Act – Technical Reporting Specifications, Section 2.2.2, available at

http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/estma/Technical_Reporting_Specifications_EN.pdf

confidentiality clauses.”¹⁵ In addition, the Association of International Petroleum Negotiators (AIPN)¹⁶, in its model confidentiality agreement, specifically permits disclosures “to the extent the Confidential Information must be disclosed under applicable law, including by stock exchange regulations or by a governmental order, decree, regulation or rule, provided that Receiving Party shall make all reasonable efforts to give prompt written notice to Disclosing Party prior to such disclosure.”¹⁷ Moreover, Statoil currently reports payments to Angola, one of the countries alleged to forbid such disclosures.¹⁸ It therefore appears clear that even if laws and/or regulations in a few countries do prohibit disclosure of payments as has been alleged, there are already commonly-employed contractual ways that permit disclosure of resource extraction payments.

There is also a strong policy argument against carving out a payment reporting exception for operations in countries that prohibit disclosure. Creating such an exception would incentivize corrupt kleptocratic regimes to enact laws or regulations prohibiting disclosure, thereby undermining the very purpose of Section 1504.

Disclosures Should be Filed

We believe that the final rule should require that information about resource extraction payments be filed with the Commission and therefore subject to liability under Section 18 of the Exchange Act rather than merely furnished to the Commission. We believe that because liability only attaches to those documents that are filed with the Commission, requiring that payment information be filed would improve the quality of this information. Having quality information on resource extraction payments is critical to both civil society groups active in this domain as well as to investors. Indeed, investors believe that requiring that this information be filed will enhance the accuracy of the information as well as protect investors themselves.¹⁹

Disclosures Should be Published

TI-USA strongly urges the Commission to require that all resource extraction payment disclosures be made publicly available. While we of course recognize that the U.S. District Court for the District of Columbia has held²⁰ that Section 1504 does not *require* publication of all resource extraction payment information, nothing in the decision prevents the Commission from issuing a rule requiring such disclosure as an exercise of its discretion.

There are abundant reasons why the Commission should require that all resource extraction payment disclosures be published. First and foremost is the fact that the disclosure requirement in Section 1504 was designed to “support the commitment of the Federal Government to international

¹⁵ Peter Rosenblum & Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (RWI 2009), page 27, available at <http://www.resourcegovernance.org/publications/contracts-confidential-ending-secret-deals-extractive-industries>

¹⁶ www.aipn.org. It is worth noting that representatives from Exxon Mobil, BP, Hess, BHP Billiton, Noble Energy, Anadarko Petroleum, Repsol, and Total all sit on the board of AIPN

¹⁷ AIPN Model Confidentiality Agreement (2007), Article 4.1, available at <https://www.aipn.org/mcvisitors.aspx>

¹⁸ See, Statoil 2014 Payments to governments report, available at http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_Ke%20yDownloads/2014%20Payments%20to%20governments.pdf

¹⁹ See, e.g., Letter from Paul Bugala, Calvert Asset Management Company, available at <http://www.sec.gov/comments/s7-42-10/s74210-40.pdf>

²⁰ See, *American Petroleum Institute v. Securities and Exchange Commission*, 953 F.Supp.2d 5 (2013).

transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.”²¹ While it is true that the statute qualifies this commitment with an introductory “[t]o the extent practicable,” there is nothing to suggest that publishing all resource extraction payments is not practicable. As noted above, some companies are already doing this, and European and Canadian companies are or will soon be required to make such disclosures.

Without the full publication of all resource extraction payment disclosures, the value of Section 1504 to civil society groups and investors will be severely compromised. As explained above, resource extraction payment information is of great interest and use to civil society groups as well as to investors, but only if it is provided on a company by company, country by country, and project by project basis. This level of detail will allow anti-corruption groups to identify corruption and hold governments and companies to account; it will also allow investor groups to make more informed decisions based on a company’s risk profile as revealed by its resource extraction payments. Publishing a summary of resource extraction payment disclosures that does not provide this level of detail would defeat the goal of making the extractive industry sector more transparent and less corrupt.

TI-USA thanks the Commission for its work on this important matter. We urge the Commission to incorporate the above elements into the Commission’s proposed rule. By doing so, the Commission will be helping to ensure that Section 1504 lives up to its promise and results in a world freer of corruption where resources are more fairly shared. TI-USA looks forward to providing further comments next year as the Commission’s rulemaking process on Section 1504 continues.

Sincerely,



Claudia Dumas
President and Chief Executive Officer
Transparency International - USA

Chair Mary Jo White
Commissioner Luis A. Aguilar
Commissioner Kara M. Stein
Commissioner Michael Piwowar

²¹ 15 U.S.C. §78m(q)(2)(E)