September 26, 2013

Mary Jo White, Chair
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Chair White,

We write this letter to congratulate you on your recent appointment as Chair of the SEC and to share our views on the important steps that need to be taken to finish implementation of Section 1504 of the Dodd-Frank Act (the so-called "Cardin-Lugar" provision on disclosure of payments to governments from oil, gas and mining projects).

Oxfam America is a global organization working to right the wrongs of poverty, hunger, and injustice. We save lives, develop long-term solutions to poverty, and campaign for social change. As one of 17 members of the international Oxfam confederation, we work with people in more than 90 countries to create lasting solutions. Since the 1990s Oxfam America has worked to protect communities from the harms that often come from developing oil, gas and mining projects while working to maximize the benefits from the billions of dollars of government revenues generated each year from the sector. We have deep knowledge and expertise from our work in countries around the world, as well as our engagement and dialogue with oil and mining companies, and have shared that expertise with Commissioners and staff during the rulemaking process. Oxfam America is also an investor in several oil and mining companies and we believe Section 1504 has important dual purpose to both inform investors as well as citizens.

In the coming year, you will have the opportunity as Chair to oversee the implementation of Section 1504 of the Dodd-Frank Act in a way that builds on and honors the impressive efforts that Commission staff have already invested in the rulemaking and helps to maintain U.S. leadership on global transparency efforts. This letter sets forth the position of Oxfam America regarding the timing and substance of the process to rewrite the rule implementing Section 1504 in the wake of the decision by the U.S. District Court for the District of Columbia in *American Petroleum Institute v. SEC*, No. 12-1668 (JDB), 2013 U.S. Dist. LEXIS 92280 (July 2, 2013).

Section 1504 requires extractive companies to include in annual securities disclosure reports the payments they make to governments. This information will provide a crucial tool for investors to better understand the risks oil, gas, and mining companies incur in their global operations, and

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for resource-rich communities to hold their governments accountable for the prudent management of natural resource wealth. Prudent management of natural resource wealth by governments is essential to establish and maintain stable and attractive investment environments. Investors holding over $5.6 trillion dollars in assets under management recently wrote to you to champion the statute and urge the Commission to issue a strong rule requiring detailed public disclosure.

Oxfam provided extensive comments during the initial comment period, was the plaintiff in a suit against the Commission regarding the Commission's failure to promulgate a rule within the statutory deadline, and intervened on the Commission's side to defend the original rule against API's challenge.

Consistent with the tight deadline Congress mandated for rulemaking under Section 1504, Oxfam believes that the Commission must prioritize and expedite any new public comment period and the issuance of a revised rule. Moreover, Oxfam believes that the revised rule can and should require the same level of disclosure – *i.e.* project level, public disclosures without exemptions – as the earlier rule, consistent not only with Judge Bates's guidance and the intent of Congress but also with the recent global progress on payment disclosures.

The District Court's Decision

Judge Bates's decision to vacate the Commission's rule in *API v. SEC* was based on a very narrow holding. Specifically, he rejected the Commission's rulemaking determination that the statutory language of Section 1504 unambiguously required the Commission to make all corporate disclosures public and precluded the Commission from granting any exemptions – in particular, on the basis of purported laws in foreign countries barring disclosure of relevant data. 2013 U.S. Dist. LEXIS 92280 at *24, 28-29, 36, 39. The opinion does not bar any regulatory choices, nor does it dictate any particular outcomes; it merely requires the Commission to use its broad discretion under Chevron Step II, to reasonably interpret what Judge Bates concluded to be an ambiguous statutory mandate. This will entail undertaking the full economic and competitiveness analysis and balancing of alternatives that are mandated under the Exchange Act. In other words, the Commission retains its full range of options, but it must take care that whichever options it chooses are adequately supported and meet the various criteria set forth in the Exchange Act and the Administrative Procedure Act.

The Conflict Minerals Decision

A recent District Court decision upholding another the SEC's so-called Conflict Minerals Rule -- another "specialized disclosure" rule under Dodd-Frank – confirms that the Commission can reasonably reissue a rule that requires public disclosure and provides for no exemptions based on its conclusions about congressional intent. The District Court in that case reviewed the Commission's decision not to include a *de minimis* exception to the Conflict Mineral Rule under Chevron Step II. *Nat'l Ass'n of Mfrs. v. SEC*, No. 13-cv-635 (RLW), 2013 U.S. Dist. LEXIS 102616 at *62 (D.D.C. July 23, 2013). The Court ultimately upheld the Commission's interpretation, accepting as reasonable the Commission's conclusion that this was what Congress wanted and that providing such an exception would undermine the impact of the Rule. *Id.* at *66-

67. By analogy, here, the Commission can likewise reasonably decide under Chevron Step II that providing for public disclosures and no exemptions is what Congress intended, even if, as Judge Bates has ruled, these outcomes are not unambiguously mandated by the plain language of Section 1504.

The District Court's review of the Commission's economic analysis in that case was also favorable to the reissuance of a strong rule here. First, the District Court placed a very modest reading on Sections 3(f) and 23(a)(2) of the Exchange Act, holding that they did not mandate the sweeping cost-benefit analysis urged by the plaintiffs. *NAM v. SEC*, 2013 U.S. Dist. LEXIS 102616 at *35-36. Second, the Court relieved the Commission from having to independently verify the "humanitarian benefits" of the rule that Congress had identified. *Id.* at *41. This approach provides solid footing for any new rule that the Commission creates to carry out Section 1504.

A New Law in Europe and Progress in Other Jurisdictions

Swift and strong action by the Commission is now more urgent than ever before. This is because developments around the world have enshrined strong reporting requirements as a global standard, and the U.S. is in danger of lagging behind.

The European Union has enacted disclosure legislation that mirrors the Commission's original rule – and goes farther in several important aspects.[1] Like the original Commission rule, the European Directives grant no exemptions from disclosure requirements from and make all reports public. These were legislative choices made after nearly two years of opportunities for comment by industry and other stakeholders, as well as negotiations between the European Parliament, European Commission and European Council. The European Directives are more demanding than the original Commission rule in that they include the timber industry, apply to large private companies, and define the term "project" at the level of individual contracts, leases, licenses, concessions or similar legal agreements. Moreover, unlike the SEC, EU securities regulators do not have discretion to provide case-by-case exemptions or allow confidential reports of payments.

The voluntary Extractive Industries Transparency Initiative (EITI) has recently amended its standards to include public, project-level reporting, and required this reporting to be consistent with the Commission's rule and European Union requirements. As a result, private and public companies with operations in jurisdictions implementing the EITI will be required to report payments at the project level.

Other important capital markets for extractive companies, such as Canada, Norway and Switzerland, are similarly moving to enact rules that mirror the European requirements.[2] Extractives transparency has been high on the agenda of the G8 and G20, and we expect continuous progress in other markets. For example, the Australian government is studying the

[1] http://publishwhatyoupay.org/resources/fact-sheet-%E2%80%93-eu-rules-disclosure-payments-governments-extractive-companies

[2] *E.g.*, Luke Balleny and Stella Dawson, *EU, Canada join extractives transparency push ahead of G8*, THOMSON REUTERS FOUNDATION, June 13, 2013, *at* http://www.trust.org/item/20130613063809-3vouc/.

issue and it will be taken up in their Presidency of the G20, beginning in 2014. If the Commission does not act quickly and consistently, companies listed in both Europe and the United States could be subject to conflicting reporting regimes, and the U.S. disclosures could lag behind a global standard. And clearly, the emerging disclosure regimes in Europe and elsewhere undermine any argument that a strong U.S. disclosure rule could create a competitive disadvantage or impose undue costs on extractive companies.

Timing of the Public Comment Process and Issuance of the New Rule

The Commission should – and, indeed, is obligated to – move quickly to open a new comment process and issue a new final rule. We recognize that the Commission has a heavy regulatory workload, and that there are a number of pending Dodd-Frank (and other) rules that have yet to be issued. However, unlike for many other rules, the Commission is required by statute to issue a final extractive transparency rule within 270 days of the enactment of the Dodd-Frank Act. The Commission missed that deadline by over a year during the first public comment process, and Oxfam sued the Commission for unjustifiably delaying the rules. The same deadline continues to apply now; the Commission is therefore further out of compliance with the commands of Congress every day that passes without Commission action.

Moreover, unlike other rules, the Commission already has most of the information and analysis it needs to promulgate an extractive transparency rule that comports with the words and intent of Congress and all applicable law. The extensive comments the Commission has already received remain relevant; there is certainly no need to start over. Therefore, the upcoming public comment period may be relatively short and focused on the specific issues on which the Commission determines it lacks sufficient input. With this limited additional public comment, the Commission will have all it needs to complete this rule, which constitutes a foreign policy priority for the Obama Administration.[3] We call on the Commission to commit to a timeline for any new public notice period that may be required, as well as for the re-issuance of the extractives disclosure rule. The new comment period, which need be no longer than 30 days, should begin no later than November 1, 2013, and the new rule should be promulgated by March 1, 2014 – just over 270 days from the date that Judge Bates issued his decision vacating the original rule.

The Substance of the New Rule

The Commission can and should ensure that the reissued rule is consistent with its original rule, which faithfully reflects the congressional intent behind Section 1504, and with the new European disclosure requirements. The decision in *API v. SEC* does not in any way preclude the promulgation of a rule that is substantively identical to the Commission's earlier rule, so long as

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[3] In a letter to Oxfam America, Sec. of State Kerry said that "The Department of State and Administration strongly support transparency in the extractives sector, as outlined in Section 1504 of Dodd-Frank, and the new rule issued by the Securities and Exchange Commission. The new SEC standard directly advances our foreign policy interests in increasing transparency and reducing corruption, particularly in the oil, gas and minerals sectors." http://politicsofpoverty.oxfamamerica.org/files/2013/05/Kerry-to-Oxfam-1504.pdf
See also Ben Geman, *State Department: Oil rule 'directly advances' US foreign policy*, THE HILL, Jan. 11, 2013, *at* http://thehill.com/blogs/e2-wire/e2-wire/276711-state-dept-says-sec-oil-rule-directly-advances-us-foreign-policy-interests.

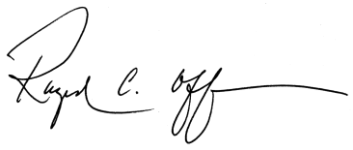
the Commission's justification and analysis is sufficient. Moreover, Oxfam believes that parity with the European Union is of paramount importance both in order to maintain U.S. leadership on this issue, and to ensure that cross-listed companies are not subject to divergent disclosure rules. We acknowledge, of course, that the Commission must reflect on and respond to any additional new material and arguments that are presented in the upcoming public comment process, but given the voluminous comments already received and the Commission's careful consideration of those comments, we are confident that new submissions will not undermine the rationale for a strong rule.

In particular, the Commission's new rule should 1) require that all disclosures be made public, rather than allowing for a compilation that presents data at a high level of aggregation, which would be largely worthless to investors and citizens seeking to use the information for the purposes Congress intended; 2) not grant categorical exemptions based on any purported foreign disclosure prohibitions, not least because – as the Commission has already found – there is no convincing evidence for such prohibitions; and 3) treat project-level disclosures in a way that is consistent with the European Union's definition of "project," which coincides with congressional intent. Moreover, to the extent the Commission concludes that it might be necessary to allow exemptions in certain narrow circumstances, it should address that concern by allowing companies to apply for narrow exemptions on a case-by-case basis, governed by strict criteria. In no event should any pre-determined, categorical exemptions be considered or permitted.

As prominent current and former Senators recently emphasized their August 2 letter to you, it is essential that the United States, through the work of the Commission, maintain its leadership position on this issue. The work of the Commission has already been lauded and emulated around the world, as evidenced by the disclosure standards adopted by the European Union and the EITI. This was precisely the intent of Congress. A strong disclosure rule is essential to maintain U.S. global leadership, to protect investors, and to create stable investment and operating environments around the world. Oxfam America and other Publish What You Pay coalition members and allies stand ready to work with the Commission and supply any information or analysis necessary to support a strong rule.

We thank you in advance for your attention, and look forward to meeting you, your staff, and the other Commissioners to continue discussing this important issue.

Sincerely,



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