December 12, 2014

Brent Fields
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

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

Dear Mr. Fields:

EarthRights International (ERI) submits this letter regarding the Commission's rulemaking under Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Section 1504"). This letter responds primarily to legal and other arguments raised in the letter submitted by the American Petroleum Institute (API) on April 15, 2014.[1] The Commission must implement of these rules in a way that provides all intended users – civil society groups, communities, governments, and investors alike – with the information that Congress intended. For investors, this means that the rules must provide adequate information on risk profiles and company performance.[2]

A. Section 1504 Is an Investor Protection Measure and Should Be Construed to Maximize Benefits to All Sectors of the Public, Including Investors

API insists that investor protection was not an important reason for the enactment of Section 1504 – despite all evidence to the contrary – and then astonishingly proposes an interpretation of the provision that strips out its single feature that most clearly confers benefits on investors – the requirement to disclose the identity of the corporation making the payment.

All the dire consequences that the API has predicted for Section 1504 – that it would cause companies to incur hundreds of millions if not billions of dollars in costs, that investors would be swamped with misleading information, and U.S.-listed companies would lose out to their foreign competition in country after country – are completely

[1] Letter from American Petroleum Institute to Chair Mary Jo White ("API Letter") (April 15, 2014), *at* http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-34.pdf.
[2] Letter from Investors to Chair Mary Jo White (April 28, 2014), *at* http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-36.pdf.

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baseless and have been disproven repeatedly.[3] Yet even if there was any truth to these claims, then API's proposed alternative would not prevent them, and the investors representing trillions of dollars in assets under management who want to know what extractive companies are paying governments would not even have the consolation of access to sufficient information to assess and protect their investments. The Commission should uphold its core mission, promoting the interests of investors, rather than favor a futile attempt to maintain the secrecy of payments when disclosure is clearly in the interest of many sectors of the public, including investors.

1. *The congressional, administrative, and judicial record show that, in addition to its foreign policy goals, Section 1504 was intended to protect investors and that the Commission has always recognized this.*

First, API cherry-picks from the record to present a distorted view of Congress's intent in enacting Section 1504, the Commission's findings, and the nature of investor support for the provision. As we have noted repeatedly, while the sponsors of Section 1504 certainly intended payment disclosures to provide foreign policy benefits and assist resource-rich communities to fight the resource curse, they and other senators expressly noted that the provision would be useful for investors, noting in floor statements that:

- "Transparency empowers citizens, investors, regulators, and other watchdogs and is a necessary ingredient of good governance for countries and companies alike"[4]
- Extractive industry companies "operat[e] in dangerous or unstable parts of the world" and investors need to know if their investments are at risk.[5]
- 1504 intends to provide investors access to necessary information about "the full extent of a company's exposure when it operates in countries where it is subject to expropriation, political and social turmoil, and reputational risks."[6]

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[3] *See, e.g.*, Letter from EarthRights International to SEC (Feb. 3, 2012), *at* http://www.sec.gov/comments/s7-42-10/s74210-126.pdf; Letter from Publish What You Pay U.S. to SEC ("PWYP Exemptions Letter") (Dec. 19, 2011), *at* http://www.sec.gov/comments/s7-42-10/s74210-118.pdf; Letter from Revenue Watch Institute to SEC at 11 (Feb. 17, 2011), *at* http://www.sec.gov/comments/s7-42-10/s74210-23.pdf; Peter Rosenblum & Susan Maples, Contracts Confidential: Ending Secret Deals in the Extractive Industries (2009), *available at* http://www.revenuewatch.org/sites/default/files/RWI-Contracts-Confidential.pdf; Letter from Publish What You Pay Canada to SEC (Feb. 6, 2014), *at* http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-29.pdf; Letter from PWYP to Chair Mary Jo White ("2014 PWYP Letter") at 5-7 (Mar. 14, 2014), *at* http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf; Letter from Global Witness to SEC (Dec. 18, 2013), *at* http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf.

[4] Floor Statement of Senator Lugar, (May 18, 2010), *available at* http://lugar.senate.gov/news/record.cfm?id=325030&.

[5] Floor Statement of Senator Leahy (July 15, 2010), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2010-07-15/p,df/CREC-201 0-07-15-pt1-PgS5902.pdf.

[6] Floor Statement of Senator Cardin, "The Dodd-Frank Wall Street Reform and Consumer Protection Act" (July 15, 2010), *available at* http://www.cardin.senate.gov/newsroom/statements_and_speeches/the-dodd-frank-wall-street-reform-and-consumer-protection-act.

- 1504 also addresses protection of investor rights, specifically the ability "to make intelligent decisions as to whether to invest in an oil or gas or mineral company."[7]

The Commission also recognizes that Section 1504 benefits investors. Although its August 2012 rule release concluded that the primary benefits were to be realized by communities in resource-rich countries, it also noted, "investors and other market participants, as well as civil society in countries that are resource-rich, may benefit from any increased economic and political stability and improved investment climate that transparency promotes."[8] The Commission did decline to attempt to quantify these benefits – a decision that does not invalidate its consideration of them[9] – but it did not "studiously avoid adopting these positions as its own," as API claims.[10] And the Commission confirmed its position in its Response Brief to the D.C. Circuit, in which it noted:

> The legislative history also indicates that Congress intended for the Section 13(q) disclosures to serve as an informational tool for investors. In adopting Rule 13q-1, the Commission acknowledged that some investors may find the disclosures beneficial. 77 FR 56,397/3, 56,398/2-3, 56,399/1.[11]

The API is mistaken, therefore, when it insists that the Commission would be making an unsupported about-face if it were to find that Section 1504 protects investors.[12]

2. *Section 1504's placement shows the intent to protect investors, among others.*

Second, the API argues unpersuasively that Section 1504's placement in the Dodd-Frank Act – in the "specialized disclosures" section, alongside provisions requiring disclosure of conflict minerals due diligence and mine safety violations in annual reports – is evidence of the lack of congressional intent to benefit investors.

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[7] *Id.*
[8] SEC, *Disclosure of Payments by Resource Extraction Issuers*, Final Rule, 77 Fed. Reg. 56,365, 56,397 (Sept. 12, 2012).
[9] 77 Fed.Reg. at 56,402.
[10] API Letter, *supra* note 1, at 3.
[11] *American Petroleum Institute v. SEC*, No. 12-1398, Brief of Respondent Securities and Exchange Commission at 6 n.6, Dkt. # 1413016 (D.C. Cir. Jan. 2, 2013).
[12] According to the Supreme Court, a detailed explanation is required when an agency changes its policy based on facts that contradict those underlying its previous policy. *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). The case API cites to support its assertion that the Commission could not change its position on the congressional rationale for the law is inapposite; in fact, it supports the position that the SEC should maintain its position on public, company-specific reporting. Here, it is the *API* that is asking the SEC to change its policy and to ignore facts that it expressly found and espoused in the prior administrative and judicial proceedings.

First this argument ignores another, equally important aspect of Section 1504's placement: the fact that it was inserted in Section 13 of the Securities Exchange Act, 15 U.S.C. § 78m. The first subsection of Section 13 requires all registered issuers to file annual reports in accordance with such rules or regulations that the Commission prescribes "as necessary or appropriate *for the proper protection of investors* and to insure fair dealing in the security."[13] Each of the sub-sections of Section 13 – including Section 13(q), in which Section 1504 of the Dodd-Frank was encoded – addresses precisely the reports described in Section 13(a).

Second, the API lumps together Section 1502 and Section 1503 of the Dodd-Frank Act – the so-called conflict minerals and mine safety disclosures provisions – as foreign policy provisions, but of course mine safety is not a foreign policy issue. In fact, Section 1503 only applies to mines that are located in the United States because it only requires disclosures of violations under U.S. health and safety laws. Section 1503 has analogous public disclosure provisions to Section 1504 – it requires disclosures to be included in periodic reports. The Commission's rules require these reports to be public – a completely non-controversial choice for a law intended to give investors fair warning of patterns of violations that may affect the value of their investments.[14]

Thus the specialized disclosures section of the Dodd-Frank is – like all other disclosures required in Section 13 of the Securities Exchange Act – intended to protect investors. Section 1504's placement in the same section of the Dodd-Frank Act as Sections 1502 and 1503 is more properly characterized as supporting Congress's intent to make public company-specific information about resource extraction payments for the benefit of investors, among other public interests.

B. Full public disclosure of project-level information with no exemptions will benefit investors.

The API dismisses the benefits to investors from full public disclosure of Section 1504 reports, arguing that these benefits are based on scant evidence and the testimony of a small number of special-interest investors. These assertions completely misconstrue the administrative record and the nature of investor support for full public disclosure under Section 1504.

1. *A diverse group including some of the largest investors in the world believes that full public disclosure will advance their interests.*

[13] 15 U.S.C. § 78m(a) (emphasis added).

[14] The Commission clearly understood that the mine safety disclosures would have value for investors and exercised its discretionary rulemaking authority to make those disclosures more understandable to investors. *See* SEC, *Mine Safety Disclosure*, Final Rule, 76 Fed. Reg. 81,762, 81,870 (Dec. 28, 2011) ("We believe this should simplify the disclosure obligation, promote comparability and consistency of disclosure across issuers and time periods, and make the information more accessible for users, which will benefit investors in their consideration of information about issuers' mine health and safety matters.").

API attempts to address the amply attested investor interest in full public disclosure under Section 1504 by characterizing supporters as "a small number of investors with a special interest in extractive disclosure,"[15] with a reference to a dictum from the *Business Roundtable* decision suggesting that the interests of "investors with a special interest" may be discounted in the Commission's considerations.[16] This argument ignores the extremely broad support that Section 1504 enjoys among major mainstream investors.

In fact, investors representing over $5 trillion in assets under management have written letters to the Commission, supporting full public disclosure as a means of managing risk. These investors include the largest private wealth manager in the world; the global asset management arm of the world's largest banking, financial services, and insurance conglomerate; and the third-largest public pension fund in the world. They also include a large number of major "socially responsible investors," who are no less responsible for maximizing shareholder value than so-called "mainstream investors."[17] API's characterization of this coalition - which is anything but small in number and represents the full spectrum of investor interests –is therefore highly misleading, and the Commission cannot ignore their voices.

In addition, the dictum that API quotes from *Business Roundtable* is not controlling law, and the Commission's mandate to foster an enabling environment for the maximization of shareholder value is not legally limited to the narrow definition of "value" that the API advocates. Even if some of the investors who support full disclosure are motivated in part by some conception of long-term social value rather than mere maximization of the market capitalization of the companies in which they invest, that goal would not disqualify them from the Commission's protection.

2. *There is ample support in the administrative record for the investor benefits of Section 1504.*

Unlike in *Business Roundtable v. SEC,* in which only "two relatively unpersuasive studies" supported the enactment of a discretionary rule,[18] there is broad evidentiary support in the administrative record for benefits that would accrue to investors from full public disclosure of Section 1504 reports. The API does not even attempt to parse the many investor benefits that a broad range of investors, civil society actors, academics, and politicians have identified. Publish What You Pay United States (PWYP), on the other hand, has compiled all evidence of investor benefits that has been submitted to the SEC in its letter of March 14, 2014, to the SEC[19] – along with benefits to

[15] API Letter, *supra* note 1, at 4.
[16] *Business Roundtable*, 647 F.3d at 1152.
[17] *See* PWYP Letter, *supra* note 19 at 13-14, 18-19. Moreover, the Extractive Industries Transparency Initiative has revised its reporting standard to require company-specific, project-level reporting; that standard is backed by investors with $19 trillion dollars in assets under management.
[18] 647 F.3d 1144, 1152 (D.C. Cir. 2011).
[19] 2014 PWYP Letter, *supra* note 3, at 5-7.

governments,[20] communities,[21] and companies themselves.[22] These benefits include – among other things – the ability to use payments to calculate the riskiness of investments in extractive companies operating in opaque countries, to analyze companies for exposure to unexpected changes in tax regimes, calculate the profitable life of significant projects, and consider how operating cash flow might be affected by disruptions or shutdowns.[23] None of these benefits would be realized if the issuers' disclosures were made public only in aggregated form, as investors would be unable to determine investment risk for any particular company. Investors will be able to tie risk to individual investment targets only if their payments are disclosed at the company and project level.

Thus, the record (both from the original notice and comment period and the period since the District Court vacated the Final Rule for Section 1504) clearly supports a finding that substantial benefits will accrue to investors if the Commission issues a new rule requiring full public disclosure.

3. *Company and project-specifc disclsoures under Section 1504 provide benefits over and above extractive companies' other disclosure requirements.*

API provides a long list of disclosures that U.S.-listed companies in general, and U.S.-listed oil and gas companies in particular, are required to make in annual reports. API concludes that no reasonable investor would use company-level Section 1504 disclosures over and above these existing disclosures in making a voting or investment decision. This argument, however, ignores the fact that reasonable investors *have already* signaled their intent to use this information, and that Section 1504 disclosures provide different information from existing disclosure regimes.

First, as noted above, some of the largest private and public investors in the world have explained that they would use Section 1504 disclosures to make investment decisions. Enormous asset managers such as UBS, banks such as ING, and major pension funds such as APG and CalPERS are "reasonable investors" who have fiduciary and other legal duties to their investors to obtain and digest only information that is relevant to their investments. Their express support is therefore strong evidence that investors will enjoy benefits from the increased transparency that full disclosure of Section 1504 reports will afford.

Second, by enacting special disclosure requirements in Subpart 1200, Congress and the Commission have already recognized that special information is needed to help investors assess the unique risks to their investments posed by the enormous revenue flows and long-term capital outlays that characterize the extractive industries. API attempts to muddy the waters of Congress's clear intent to expand that universe of public information by citing Supreme Court cases about materiality and information overload.

[20] *Id.* at 9-10.
[21] *Id.* at 10-12.
[22] *Id.* at 7-8.
[23] *Id.* at 6-7.

Neither of these issues is relevant to a regime requiring disclosure of payments that Congress has already determined to be material.[24]

Congress clearly concluded that extractive revenue disclosures would provide significant additional data that does not duplicate the information that investors already receive. For example, none of the specific disclosures already in effect would allow investors to calculate the risk to a company's reputation and social license to operate that flows from company payments to host governments.[25] Moreover, no other disclosure regime would allow an investor to detect anomalous payments that could indicate a specific contextual or business-related risk to the value of an investment. At least one investor has expressed the intent to use payments as a factor in its own calculation of the profitable life of significant projects, as revenue payments provide information on future cost projections that is not available from disclosure of current reserve estimates alone.[26] In other words, company-specific disclosures will allow investors to put a dollar value on risks posed by an aspect of extractive companies' operations for which they previously had only incomplete or indirect information.

Moreover, none of the additional disclosures under Subpart 1200 of Regulation S-K apply to mining companies, which are covered by Section 1504. Thus, any benefits that might accrue to investors in oil companies as a result of Subpart 1200 simply are inapplicable to a large portion of companies covered by Section 1504, which are involved in mining and not oil and gas. Thus, the additional transparency afforded by company-specific extractive revenue payment disclosures is easily justified and meets the Commission's burden to show that the regulations it issues are warranted in light of existing regulations.[27]

C. There is no reliable evidence that company-specific disclosures will harm companies, let alone investors.

In its letter, the API repeatedly recycles a long-discredited argument that the Commission already found that company-specific disclosures could subject companies to

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[24] *Tsc Indus. v. Northway*, for example, was a case that considered the threshold for reporting under SEC Rule 14a-9 under a general materiality threshold, where Congress had given no guidance as to the meaning of "material fact." 426 U.S. 438, 448-49 (1976). By contrast, Section 1504 does give investors precise guidance as to how much to disclose; therefore the issue addressed by the Court -- *i.e.* that issuers may pad required disclosures with additional immaterial information to avoid scrutiny of material information -- is of no application here. *Id.* at 448. In *In re Time Warner Sec. Litigation*, the Second Circuit noted that investors do not have a right to information simply because they want it, but because the issuer has a duty to disclose it. 9 F.3d 259, 267 (2d Cir. 1993). Section 1504 is precisely the opposite of the *Time Warner* case: under Section 1504, companies *must* disclose their payments because they are under a legal duty to do so.

[25] Calvert Asset Management provided a specific example of this scenario: a situation in which Glamis Gold felt constrained to forego significant tax benefits in Guatemala because of public pressure arising from the perception that it was contributing insufficiently to the national economy. *See* PWYP Letter at 6.

[26] *See* Letter from Calvert Asset Management Co. to SEC, Ex. A at 2 (March 1, 2011), *at* http://www.sec.gov/comments/s7-42-10/s74210-40.pdf.

[27] *See American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166, 178 (D.C. Cir. 2010).

billions of dollars in penalties and competitive costs, which would then be passed on to shareholders. API also advances a new argument – that detailed disclosures will harm shareholders by flooding them with information that is lacking in context and that shareholders are ill-equipped to understand. Both of these assertions are demonstrably false.

1. *The Commission never concluded that companies would face billions of dollars in costs and has already rejected the major premise underlying high cost estimates.*

API recklessly refers to the potential for billions of dollars in costs mentioned in the Commission's original Rule Release, without noting the context or aftermath of those figures. During the notice and comment period, a few industry commenters identified four countries whose governments purportedly prohibit the disclosure of information that must be reported under Section 1504 – a contention that was disputed by numerous others. In its Rule Release, the Commission conducted a conditional analysis, concluding that *if* those four countries prohibited disclosures, and *if* companies were therefore compelled to liquidate all their assets in those countries through a "fire sale" due to their inability to comply with legal requirements, then their losses *might* amount to billions of dollars.[28] In later proceedings over API's request for a stay of the rule, the Commission decisively rejected the central premise of the billion-dollar cost estimate, concluding that the evidence that the four countries prohibit disclosures was "unpersuasive."[29]

There is, therefore, no basis to believe that company-level disclosures would cost the industry billions of dollars. If the Commission were to accept the billion dollar cost estimate now, it would have to reconsider its conclusion that the evidence of foreign country disclosure prohibitions was unpersuasive. However, it has no basis to do so because industry commenters have provided no additional evidence that such prohibitions exist, and others have provided copious evidence that they do not exist.[30]

2. *There is no danger that investors will be overloaded or will misunderstand Section 1504 disclosures*.

API contends that Section 1504 disclosures will become part of a phenomenon of information overload for investors that the Commission itself has been trying to stop, and that investors will make ill-informed decisions based on the disclosures absent additional confidential information that companies cannot afford to make public. Essentially, this argument amounts to a bizarre, patronizing assertion that investors simply don't know what's good for them and can't be trusted to use or understand information responsibly. This claim cuts at the very foundation of the Commission's regulatory regime, which is based on the idea that well-informed investors are the best guarantors of responsible and

[28] 77 Fed. Reg. at 56,411-13.
[29] SEC, Order Denying Stay, Rel. No. 68197 at 7 (S.E.C. Nov. 8, 2012).
[30] *See* PWYP Exemptions Letter, *supra* note 3; Letter from EarthRights International to SEC at 10-12 (Sept. 20, 2011), *at* http://www.sec.gov/comments/s7-42-10/s74210-111.pdf.

well-functioning capital markets. In any case, Section 1504 disclosures are not lacking in context, as the API claims; investors have the benefit of the additional extractive industry-specific disclosures in Regulation S-K to provide exactly the context that the API argues is needed to understand the new disclosures required by Section 1504.

Although API cites Commission initiatives and speeches by Chair White describing the need to streamline and carefully target disclosures so as not to overwhelm investors with irrelevant information to support their assertions, which few would argue with, company-specific Section 1504 disclosures do *not* fall under this category. Indeed, they are evidently useful to investors given the number of them who seek to use those disclosures and the number of uses for which they seek company-specific, project-level disclosures. Moreover, Section 1504 reports cannot be used to obscure negative facts in other annual reports by burying investors in an avalanche of information because they are *separate* reports that can easily be ignored if investors find them uninformative, with no inconvenience or effort.

It is clear that companies can disclose the information required by Section 1504 without fear of backlash or investor misunderstanding. In fact, in the context of the Extractive Industries Transparency Initiative (EITI), extractive companies voluntarily disclose their payments to governments, which are then published in annual EITI reports, often without the additional "context" that API asserts would be required for investors to use them responsibly. Outside the context of the EITI, Tullow Oil has unilaterally begun disclosing its payments – down to the project level - globally.

Moreover, disclosure requirements that are equivalent in effect to Section 1504 have already gone into effect in the United Kingdom[31] and Norway[32] and will be enacted in other major European markets in the coming year. Yet no regulator has concluded that these disclosures will overload investors or lead them to make catastrophic investment decisions based on additional information. API insists that the European definition of "project" is unworkable and would obscure material information, a contention that ignores the reporting template that civil society, government, and industry representatives have been developing through a collaborative process in the United Kingdom.

3. *International oil companies are not competing with national oil companies on the basis of transparency.*

API insists that companies that are not covered by Dodd-Frank or the European transparency regulations will have advantages against U.S.-listed companies if they must publish company-specific payment information that their competitors do not have to disclose. As PWYP has argued extensively, there is simply no evidence that any country chooses to do business preferentially with non-U.S.-listed companies based on an

[31] *See* The Reports on Payments to Governments Regulations, 2014 No. 3209, *available at* http://www.legislation.gov.uk/uksi/2014/3209/pdfs/uksi_20143209_en.pdf.

[32] *See* Ministry of Finance, Kingdom of Norway, Forskrift om land-for-land rapportering (adopted Dec. 20, 2013), *available at* http://www.regjeringen.no/nb/dep/fin/dok/lover_regler/forskrifter/2013/forskrift-om-land-for-land-rapportering.html?id=748525 (available in English translation on the Publish What You Pay Norway website at http://www.publishwhatyoupay.no/nb/node/16414).

aversion to transparency. Many major national oil companies, such as Petrochina, Petrobras, Gazprom and Rosneft, will be covered by U.S. or European rules. Of those not covered, many of the largest national oil companies simply do not compete internationally at all – for example, Saudi Aramco, which has the world's largest proven reserves, has no upstream operations outside Saudi Arabia. Other companies may gain a competitive edge for entirely unrelated reasons, for example because their governments provide access to low-cost loans or offer sweeteners to host countries such as oil-for-infrastructure deals. And even for those national oil companies and non-Western-listed companies that do compete internationally with U.S-listed oil companies, transparency is not a determinative factor in the granting of oil bids.[33]

D. The Commission is well justified in requiring the disclosure of company-specific, project-level payments.

In sum, the record is clear that the company-specific disclosures Congress intended will benefit investors in concrete and material ways, and is devoid of evidence that such disclosures would harm investors or competitively disadvantage the companies whose shares they hold.

We close by noting that this is sufficient legal justification for the Commission to require company-specific disclosures. The fact is that the record – both prior to the August 2012 Rule Release and since the original rule was vacated – is replete with evidence that would enable the Commission to meet its obligations under the Exchange Act to understand the likely economic consequences of fully public, company-specific, project-level disclosure. The record is also more than adequate to support a determination by the Commission at *Chevron* Step Two that requiring such disclosure is consistent with congressional intent and in the interests of investors and resource-rich communities alike. To allow anonymized, aggregated public disclosure, by contrast, would *negate* Section 1504's dual purpose of protecting investors and promoting accountability for communities in resource-rich countries.

We remain available to discuss the information contained in this submission, and to provide any further information that may be useful to the Commission

Respectfully submitted,

Jonathan Kaufman
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[33] *See* 2014 PWYP Letter, *supra* note 3, at 34-41.