December 6, 2010

Meredith Cross
Director, Division of Corporate Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

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

Dear Ms. Cross:

We are pleased to submit the following comments as a contribution to the rulemaking process for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Act"). The Revenue Watch Institute ("RWI") is a member of the Publish What You Pay coalition ("PWYP"), which submitted comments on Section 1504 in a paper dated November 22, 2010. [1] By this separate submission, RWI wishes to supplement the PWYP submission and specifically to address several of the arguments underlying recent contributions by industry and professional groups to the rulemaking process. The arguments in this paper draw from the experience of RWI in the U.S. and around the world. [2]. We feel many of these arguments distort the likely impact of Section 1504 on the Extractive Industry Transparency Initiative, exaggerate the likely impact of Section 1504 on competitiveness, and otherwise unduly seek to weaken the intended impact of Section 1504. We thus wish to stress the following arguments in support of robust disclosure rules under Section 1504:

1. The mandatory disclosure requirements of Section 1504 are fully compatible with, and supportive of, the Extractive Industries Transparency Initiative (EITI).

In meetings and submission letters, the American Petroleum Institute ("API"),[3] the National Mining Association ("NMA")[4] and Royal Dutch Shell plc[5] have asserted that the disclosure

[1] See comment letter by Isabel Munilla, Director, Publish What You Pay U.S., November 22, 2010 (the "PWYP submission"), signed by Karin Lissakers, Executive Director at RWI, Raymond Offenheiser, President of Oxfam American, Ken Hackett, President of Catholic Relief Services, Corinna Gilfillan, Head of Global Witness' U.S. office, Raymond Baker, Director of Global Financial Integrity, and Arvind Ganesan of Human Rights Watch, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-82.pdf.

[2] RWI is based in New York, with a satellite office in London and regional coordinators based in Azerbaijan, Ghana, Nigeria, Indonesia, Tanzania and Peru. We currently support partners in over 28 other countries. Our advocacy also brings us into regular contact with a variety of government, industry, and civil society stakeholders in producing countries around the world. The arguments in this paper were developed with the technical assistance of Global Witness.

[3] See comment letter by Kyle Isakower and Patrick T. Mulva, American Petroleum Institute, October 12, 2010 (the "API submission"), available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-27.pdf. See

requirements under Section 1504 and the voluntary EITI are incompatible, and that deference should be given to the EITI.

PWYP, of which RWI is an active member, is one of the strongest advocates of the EITI. PWYP members helped to found the EITI, helped to write its rules, serve on the EITI international board and serve on and support EITI multistakeholder groups in every EITI implementing country. RWI manages the EITI civil society organization capacity building grant program for the World Bank. In short, RWI and the coalition as a whole have a vested interest in ensuring the success of EITI. PWYP has voiced its strong opinion that Section 1504 is not only compatible with, but is supportive of, the EITI, arguing to the Commission that the "disclosure standardization imposed through the implementation of Section 1504 provides an opportunity for constructive influence" on the EITI and "would address several key challenges to EITI implementation by providing a model for data disclosure that can be emulated by participating governments".[6] This position was also taken by Calvert Asset Management Company, Inc. in its November 15th comment, where it noted that Section 1504's disclosure requirements would correct for "significant shortcomings [in the EITI] as an input for an investor's analysis of political, regulatory and other related risks", and that "the reach and consistency of reporting pursuant to Section 1504 will provide a robust source of information for this initiative and an example of best practice…to inspire and guide EITI implementation" in member nations around the world.[7]

Congress intended that Section 1504 would be complimentary to the EITI by "impos[ing] a new international transparency standard."[8] We believe this new international transparency standard will assist EITI's member nations as they implement the voluntary initiative through mandatory domestic law by providing a model to exemplify. There is simply no reason to believe that Section 1504 will somehow damage the EITI process.

2. The burden of compliance costs associated with project-level reporting, and of necessary updates to internal controls and an expanded auditing system, is unlikely to outweigh the public's and investors' interests in disclosure of the required information.

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also meetings on November 19, 2010 with Luis Aguilar and September 27, 2010 with members of API, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specialized-disclosures.shtml#meetings.

[4] See comment letter by the National Mining Association, November 16, 2010, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-52.pdf.

[5] See comment letter by Martin J. ten Brink, Executive Vice President Controller, Royal Dutch Shell plc, October 25, 2010, available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-33.pdf.

[6] See PWYP submission, *supra* note 1, at pages 18 and 26.

[7] See comment letter by Bennett Freeman, Calvert Asset Management Company, Inc.; Paul Bugala, Calvert Asset Management Company, Inc.; Lisa N. Woll, Social Investment Forum, November 15, 2010 (the "Calvert submission"), available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-49.pdf.

[8] See floor statements of Senator Dodd, available at http://www.c-spanvideo.org/videoLibrary/clip.php?appid=598157015 at 5:06:25; floor statements of Senator Cardin, available at http://www.c-spanvideo.org/videoLibrary/clip.php?appid=598156899 at 4:45:06. Both statements were made on May 17, 2010.

The comments referred to above, along with another by a consortium of law firms,[9] also make the allegation that the compliance costs associated with Congress's intended disclosure regime will be so costly as to require the Commission to exercise its discretion in rulemaking in order to mitigate costs, for example to allow for aggregated reporting rather than project-level reporting of individual payments.

We recognize that implementation of any rules made under Section 1504 will entail additional costs to issuers. However, the marginal weight of these costs is likely to be less significant than has been suggested. As the PWYP submission notes, many issuers will already have systems in place for existing reporting requirements, and it is reasonable to expect that such systems can be adapted in a cost-effective manner to the Section 1504 requirements.[10] Further, there are likely to be significant offsetting benefits accruing to issuers through increased liquidity and lower costs of capital in the long run, as risk premiums adjust to greater stability and lower uncertainty in the extractive industries as a result of greater transparency.[11]

RWI understands the role that rulemaking can play in the mitigation of costs. For example, in extractive projects, some payments are made at the entity level (such as most corporate income taxes) while others are made at the project level (such as royalties, bonuses, fees, and production entitlements). Rules that require strict project-level reporting for all payments could conceivably require the creation of systems to apportion entity level payments among multiple projects where the issuer has multiple projects in a country. We recognize that such apportionment systems, unlike existing payment tracking systems, may be prohibitively expensive, and it could be argued that such apportionment would in any event be somewhat arbitrary. Thus, reasonable rules might mitigate these costs by allowing such entity-level payments to be reported at the country level, rather than the project level.[12] However, the additional cost of reporting project-level payments for most payment streams is unlikely to be equally high, given the fact that these payments are already computed at a project level and recorded internally. Rulemaking should take the variability of reporting costs across payment types into account to preserve the intent of Section 1504 to the greatest extent possible.

3. The exercise of broad exemptive authority by the Commission is unwarranted as there is little risk of conflict with confidentiality clauses in investment contracts or foreign/host-country law, and what risk remains can properly be managed on a case-by-case basis.

We are aware of a common claim that disclosure pursuant to Section 1504 could result in the breach of contracts or contravention of foreign law, and that this risk warrants the exercise of

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[9] See comment letter by Cravath, Swaine & Moore LLP; Cleary Gottlieb Steen & Hamilton LLP; Davis Polk & Wardwell LLP; Shearman & Sterling LLP; Simpson Thacher & Bartlett LLP; Skadden, Arps, Slate, Meagher & Flom LLP; Sullivan & Cromwell LLP; Wilmer Cutler Pickering Hale and Dorr LLP, November 5, , available at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-45.pdf.

[10] See PWYP submission at page 16 & 17, quoting Bennett Freeman of Calvert Capital Asset Management, Inc.

[11] See Calvert submission at page 6, "Benefits of Risk Management Outweigh the Costs of Section 1504."

[12] See PWYP submission at page 14.

the Commission's exemption authority, for example to "grant allowances for compliance with conflicting foreign laws, rules and orders."[13] However, in our experience as a globally active research and technical assistance institute, we find that such laws are in fact uncommon. In addition, research we commissioned from the Columbia University School of Law concluded, after a global survey of over 140 resource-extraction investment contracts, that boilerplate language in most contracts includes an explicit exception for "information that must be disclosed by law," and that where such language is not explicit it generally would be "read into" any such contract under judicial or arbitral review.[14] Further, as the Calvert submission makes clear, there is every reason to believe that foreign countries will allow such disclosures: investment contracts allow it, EITI nations have committed to disclosure, and many countries (such as Angola and Brazil) have unilaterally disclosed information similar to that covered by Section 150.[15]

Even if laws prohibiting disclosure are not currently common, we recognize that Section 1504 may create an incentive for some governments to pass such laws or for companies to lobby for their introduction in order to avoid reporting requirements. And we recognize that confidentiality clauses may in the future evolve to remove the now-standard "by law" exception. However, we believe that normal exemption procedures conducted on a case-by-case basis are sufficient to deal with such conflicts. Accommodating these concerns at the rulemaking phase merely creates the opportunity for abuse of the Commission's exemption authority. For example, a final rule listing an exception in the case of conflict with "laws, rules and orders", as suggested by a consortium of law firms,[16] would open the possibility that governments could provide issuers with formal, or even informal, orders on request and would facilitate avoidance of the entire section. We believe such broad and easily exploitable exemptions would not be consistent with Congressional intent. *It is the clear intent of the legislation to make available payment information to citizens whose governments may wish to withhold that information from the public. Providing the kind of loophole proposed by the API and others would directly contravene that intent.*

4. There is no reason to believe that adverse competitiveness effects will be significant, or that disclosure will lead to the publication of commercially sensitive information to the detriment of issuers' competitive positions.

Two distinct claims have been made regarding competitiveness: that companies subject to this disclosure regime will be at a competitive disadvantage as compared to companies not subject to it, for example by being less attractive in the eyes of foreign governments of resource

[13] See comment letter by Cravath, Swaine & Moore, LLP, et al., *supra* note 9, at page 2.

[14] Peter Rosenblum & Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* (RWI 2009), available at http://www.revenuewatch.org/news/publications/contracts-confidential-ending-secret-deals-extractive-industries. As the report notes at page 27, many "provisions do not just require compliance with the law of the host state; they also usually state that the parties may make disclosures under any law to which the party is subject."

[15] See Calvert submission at pages 5-6.

[16] See comment letter by Cravath, Swaine & Moore, LLP, et al., *supra* note 9, at page 2.

exporting nations that desire to prohibit disclosure of payments they receive; or, in the alternative, that the release of commercially sensitive information will allow competitors to utilize this information in unfair competition with issuers subject to the Act, for example by allowing them to divine the bidding strategies of issuers subject to the Act.

Section 1504 applies to a very high percentage of those companies listed on stock exchanges around the world. For instance, 90 percent of the top 30 oil and gas companies (as measured by reserves of oil and gas) would be covered by the Act.[17] Still, we are aware that some foreign issuers will not be required to report in line with the disclosure requirements of Section 1504, and that this raises the concern that these participants will enjoy advantages over issuers that are subject to Section 1504's requirements. However, the success of companies with robust voluntary disclosure practices (such as Statoil,[18] Newmont Mining[19] and Talisman Energy[20]) suggests strongly that disclosure practices in general are unlikely to weigh too heavily amongst the range of factors upon which competition is based in the extractive industries. Further, in the RWI-commissioned study mentioned above, the authors conducted an analysis of information disclosure akin to that required under Section 1504 (i.e., payment information) and found that most such information would likely already be in the "public domain" (i.e., known to actors within the industry) or would be of such minimal competitive value that, with the exception of references to future transactions and trade secrets (for which Section 1504 does not require disclosure), they would not be "likely to cause substantial harm" to an issuer's competitive position.[21] The types of information that are most sensitive within the extractive industries, namely geological data, costs or profits, are not covered by Section 1504.

Finally, we wish to bring the Commission's attention to the evolving nature of disclosure requirements at the international level: while the U.S. Congress has set a new international transparency standard with the passage of Section 1504, it is likely that it will not be the only capital market center to do so in the near future. Many nations have already taken firsts steps in this area, and there have been calls by civil society and legislators in Canada, the UK and the European Union to enact laws and regulations similar to the Section 1504 disclosure standard. PWYP has had interviews with senior EU and UK officials who indicate that they are likely to wait until the U.S. rules are in place before making a decision. It is also possible that once the U.S. rules are issued, affected companies will themselves support universalization of the rules. The OECD is considering a requirement that all multinational corporations publish tax obligations country by country.

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[17] See API submission, *supra* note 3, "Attachment B".

[18] See Statoil, Annual Report 2009, available at http://www.statoil.com/annualreport2009/en/financialperformance/positiveimpacts/pages/overviewofactivitiesbycountry.aspx.

[19] See Newmont, Beyond the Mine Annual Sustainability Report 2009, available at http://www.beyondthemine.com/2009/?l=2&pid=4&parent=17&id=148.

[20] See Talisman Annual Corporate Responsibility Report 2009, available at http://cr.talisman-energy.com/2009/key-performance-indicators/economic-performance.html.

[21] Rosenblum & Maples, *supra* note 14, at pages 36-40.

Perhaps the most important thing the Commission can do to advance a level playing field worldwide, and minimize competitiveness concerns in the long run, is to implement Section 1504 in a manner consistent with Congress's intent to create a new international transparency standard, thereby creating a model for foreign authorities to look to when crafting their own laws and regulations.

5. Issuers should not be allowed to aggregate data or default to materiality concepts that measure the importance of a payment against the balance sheet of the issuer at the global level.

Another common claim is that project-level reporting is burdensome and of such immaterial value to investors that the Commission should exercise its discretion to allow issuers to report only "material projects" or to disclose only those payments that are material to the issuer. This claim is sometimes made in connection with the allegation that the Act will lead to high compliance costs and sometimes made in support of the claim that the amount of information that will be disclosed will "overwhelm" investors.

We recognize that granular reporting is a concept that entails some costs in the short term as issuers adjust to its requirements. But these compliance costs are mostly one-time expenditures incurred as filers adjust their data systems. And, as the Calvert submission makes clear, the value of granular reporting to issuers and their investors will be great: "Section 1504 creates substantial value as a means or risk recognition and mitigation" and should "enable investors to have enhanced confidence in management's guidance".[22] Thus, risk premiums will decrease over time as investors adjust to a less uncertain market. Further, Section 1504 is expected to "provide greater stability to an issuer's asset base and enable management to make forward-thinking decisions in the interest of investors",[23] which not only creates value for equity investors but, over time, greater liquidity for issuers as equity investors see resource extraction issuers as less of an exposure risk.

However, for these benefits to accrue, issuers must report at the granular level. We repeat the imploration made in the Calvert submission when it asked the Commission to "consider the necessity of comprehensive and comparable data for effective investment analysis", something only achievable by granular reporting.[24] The greater the aggregation of payment data, the lower the value of the benefits that accrue from investor analysis.

Finally, reporting only on material payments is contrary to Congress's distinction between a *de minimis* standard applied to individual payments and a materiality standard applied to benefit streams, just as limiting reporting to material projects contravenes Congress's intent to implement a level playing field through a project-by-project disclosure standard.

[22] See Calvert submission, page 6.

[23] See id., page 6.

[24] See id., page 5.

Conclusion

The plain language of the Act is clear and practicable. Where the Commission does have discretion, we trust that it will exercise this to uphold Congressional intent to disclosure project and country-specific risks and create a new international transparency standard. We believe Congress required the Commission to issue final rules for a clear reason: to utilize its superior subject matter expertise to prevent efforts to avoid reporting as mandated by the Act. We urge the Commission to keep this intent in mind when it reviews submitted comments.

The Revenue Watch Institute would like to thank the Commission for the opportunity to submit our comments and inform the proposed rules for Section 1504. We look forward to working with the Commission as it continues to examine these critical issues, and offer to provide any additional information that is needed.

Sincerely,

Karin Lissakers
Executive Director, Revenue Watch Institute