Via email (rule-comments@sec.gov) March 16th, 2020

Vanessa L. Countryman

Secretary

U.S. Securities and Exchange Commission

100 F Street, NE,

Washington, DC 20549-1090

Re: File No. S7-24-19

Dear Ms. Countryman:

Oxfam in Kenya is writing to comment on the Securities and Exchange Commission's proposed rule implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Oxfam in Kenya believes the rule as currently proposed does not go far enough to ensure the transparency and accountability of US listed extractive industry companies and would not assist countries developing their resources sector, such as Kenya, in their governance and oversight of multinational companies operating in their borders. The submission below gives a background to the extractives sector in Kenya and outlines the negative impact the proposed rule would have for advancing transparency in the country, and the importance of being able to freely access and monitor data at the subnational level.

We look forward to engaging with you further on this submission.

For any queries please contact

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Background

The discovery of extractive resources almost always brings with it expectations for windfall revenues and socio-economic transformation. However, the potential to generate significant revenues from oil and gas resources also brings with it the prospect of conflict in relation to the sharing of revenues. Communities that live adjacent to extractive resources often bear a disproportionate burden of the costs related to resource extraction and on this basis, argue that they should get a bigger share of the revenues generated. This 'cost' burden related to resource extraction includes involuntary displacement and resettlement, loss of land and grazing, loss of livelihoods, and environmental degradation. In addition to this, these issues tend to be highly localised, which lends credence to the communities calls for a higher share of revenues. While acknowledging this, national governments are often averse to a disproportionate sharing of extractive resource revenues with host local governments and communities. It is often argued that local communities or local governments do not have the capacity to manage windfall revenues that may hugely exceed their current national budget allocations. Additionally, some national governments assert that extractive resources, while having been discovered in a geographic and administrative locale, do not solely belong to that locale, but remain as national resources. They then argue that the benefits from these resources should, therefore, be aggregated as part of the national treasury purse and distributed using already established revenue sharing formulas. This is a common tension that is at play in Kenya, as the country establishes revenue management plans for the burgeoning oil sector, and also tries to manage the expectations of communities living in mining areas.

Increasingly, however, there has been acceptance that communities where petroleum and mining resources are extracted should get more of the revenues generated from projects, and the related opportunities such as jobs and local content. Sub-national revenue sharing often plays a critical development role as resources are often discovered in regions that are undeveloped and already lagging on various human development indicators such as access to health, education, and water and sanitation. Against this background, it is, therefore, not surprising that one of the more contentious issues around the management of Kenya's nascent petroleum resources has been on national and sub-national revenue sharing.

Subnational revenue payments can be used to address regional inequalities within a country. The exploitation of extractive resources and the establishment of a subnational revenue sharing mechanism that ensures revenue is being returned to the regions in which the resources are extracted from, is a way to address regional inequalities and an opportunity to even-out development outcomes across a country. For example, in Kenya oil has been discovered in Turkana County. Turkana has one of the highest poverty rates in Kenya at 94.3 percent[1]. Education is limited as 82 percent of residents have no formal education, 15 percent have some primary education, and just 3 percent have secondary education.[2] Incomes are low and only 5.6 percent of people have paid employment.[3] In addition to these challenges, Turkana is consistently impacted by drought related disasters. In such a context, sub-national revenue transfers provide an opportunity to address poverty and support social protection in the county.

Articles 202 and 203 of the Kenyan Constitution detail how national revenue should be equitably shared. They provide that revenue raised nationally shall be shared equitably among the national and county governments and that in sharing of revenue there shall be consideration for fiscal capacity and efficiency

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[1] Kenya National Bureau of Statistics and Society for International Development (2013). Exploring Kenya's Inequality: Pulling Apart or Pooling Together: Turkana County, p.12. https://www.knbs.or.ke/exploring-kenya-s-inequality-pulling-apart-or-poolingtogether/?option=com_phocadownload&view=category&id=114:exploring-kenya-sinequality&Itemid=599

[2] *Ibid.*

[3] *Ibid.*

of county governments, the developmental needs of counties, the economic disparities within and among counties and the need to remedy them; and the need for affirmative action in respect of disadvantaged areas and groups. The need to address inequality and regional disparities is, therefore, espoused in Kenya's supreme law.

The transfers of oil revenues to host communities could also be useful in addressing latent or existing conflicts. The different tribes inhabiting the Karamoja Cluster[4], including the Turkana, Pokot, Karamojong, Toposa, Nyangatom and Didinga, have historically been in regular conflict over water, pasture, and livestock. These traditional conflicts are increasingly violent. resulting in deaths, injury, and property destruction, but also limit the mobility of people and livestock that is crucial to the pastoral lifestyle.[5] Recurrent droughts and under-development have contributed to disillusionment with the national government and the sense within the community that the county has been neglected for decades. However, commercial development of oil resources in Turkana, could serve as a double-edged sword in that it could exacerbate pre-existing conflict as community members compete for benefits and resent 'non- Turkanas' for benefiting from jobs and local content related contracts.[6] Conversely, a widely-accepted revenue sharing formula and consistent transfers could ensure that conflict is mitigated as the county government and local community can begin to leverage these resources to improve living, social service delivery, and general development outcomes.

On 12th March 2019, Kenya's Petroleum Bill was enacted into law. This legislation, which replaced the Petroleum (Exploration and Production) Act, CAP 308- 1984 revised edition, had gone through a lengthy development process that stretched from 2013 until the signing of the bill in 2019, in which time it underwent four legislative attempts at obtaining a new oil and gas legal regime in Kenya. The delay was partly because of lengthy negotiations between the President and the Turkana leadership through the Governor on subnational revenue share allocation. There were fierce debates around the passage of the law on what the counties should get as a share of oil revenue once Kenya reaches first oil.

When the Bill was reintroduced in Parliament in February 2018 it proposed the following revenue sharing model under Section 85:

85(1) The national government share of the profits derived from upstream petroleum operations shall be apportioned between the national government, county and the local community.

(2) The county government's share shall be the equivalent to 20% of the national government's share; provided that the amount allocated in accordance with this subsection shall not exceed the amount allocated to the county government by Parliament in the financial year under consideration.

(3) The local community's share shall be equivalent to 5% of the government's share and shall be payable to a trust fund managed by a Board of Trustees established by the county government in consultation with the local community:

Provided that the amount allocated in accordance with this section shall not exceed ¼ of the amount allocated to the county government by Parliament in the financial year under consideration.

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[4] The Karamoja Cluster refers to the area along the South Sudan, Ethiopia, Kenya and Uganda borders.
[5] Cordaid, 2015, Oil Exploration in Kenya: Success Requires Consultation. Assessment of Community Perceptions of Oil Exploration in Turkana County. Pg. 16 https://www.cordaid.org/media/medialibrary/2015/09/Turkana_Baseline_Report_DEF-LR_Cordaid.pdf
[6] G.Lynch, 2017, Turkana has to deal with challenges that have come with devolution and oil, Daily Nation, 17 February 2017 https://www.nation.co.ke/oped/opinion/gabrielle-lynch-turkana-deal-challenges-devolution-oil/440808-3817478-r175cbz/index.html

(4) The respective county government shall legislate on the establishment of the Board of Trustees and the prudent utilization of the funds received under this section for the benefit of present and future generations.

The main rationale that was given by the Presidency for the revenue sharing formula proposed in the Bill is that a capped formula would ensure that the revenue accruing to county governments and the local community is not disproportionately high as they may struggle with absorptive capacity.[7] Turkana leaders counter-argued against the proposed revenue sharing model and pushed for 20% of government's share to go to local counties and 10% to go to local communities. Local leaders led by the Governor of Turkana and other county executives argue that a lesser share would result in the continued marginalization of Turkana by successive governments.[8]

Further, local leaders contended that the President's concerns that county governments and the local community do not have the capacity to manage oil funds does not provide the basis for government to withhold revenues that county leaders argue is due to them.[9] In other words, the view is that reforms should not be abandoned solely on the basis that they are capacity demanding. There may equally be capacity concerns with respect to whether national government can effectively manage windfall oil revenues. The government at both national and county level would still need to build up its capacity to effectively manage oil revenues.

The heated discussions relating to the proposed revenue sharing models revolved around percentages on the revenue sharing formulae and not because of any financial modelling of the Turkana oil project. Therefore, the public debate was based mostly in the hypothetical, rather than actual dollar amounts or concrete projections of revenue. To ensure that the people of Turkana were truly informed, and to ground the conversation in reality, Oxfam in Kenya decided to look at how the community actually stood to benefit using a fiscal model.

Case study: Using the data to simulate future revenues in Turkana

To help better inform the public debate, the Kenya Civil Society Platform on Oil and Gas (KCSPOG)[10] and Oxfam in Kenya[11] commissioned a research and data use project to forecast oil revenues from the Turkana fields along with what would be due to local counties under the proposed Bill. An analysis of the potential dollar values of the proposed revenue sharing formula helped ensure that the debate around absorptive capacity and other capacity constraints was not abstract but grounded on an understanding of the actual potential cash value of the percentages. Using contract and payment-based data to simulate future transfers helped to illustrate what the different proposed formulas meant with respect to the cash value of transfers to sub-national levels and helped assess absorptive capacity of Turkana county. This was an important part of the research as it was put forward as justifying the proposed revenue sharing formula. The research also explored in which conditions the community would reach its limit or 'cap', as outlined in

[7] K. Senelwa, 3 January 2017, The East African, Row Brewing Over How Turkana Oil Revenue Will be Shared, http://www.theeastafrican.co.ke/business/Row-brewing-over-how-Turkana-oil-revenue-will-be-shared/2560-3505470-sqvlpd/index.html

[8] The East African, 3 January 2017, 'Row brewing over how revenue from the Turkana Basin will be shared' http://www.theeastafrican.co.ke/business/Row-brewing-over-how-Turkana-oil-revenue-will-be-shared/2560-3505470-sqvlpd/index.html

[9] Ibid.

[10] KCSPOG, 2016, Potential Government Revenues from Turkana Oil, discussion Paper, http://kcspog.org/wp-content/uploads/2016/04/Revenues-from-Turkana-Oil-April-2016.pdf

[11] Oxfam, 2016, Potential Petroleum Revenues for the Government of Kenya: Implications of the Proposed 2015 Model Production Sharing Contract https://kenya.oxfam.org/sites/kenya.oxfam.org/files/file_attachments/Potential%20Petroleum%20Revenues%20for%20the%20Government%20of%20Kenya.pdf

Section 85 (3). The proposal to cap the revenue allocation to county and community level, though not sufficiently supported by data or evidence, was provided for in the Petroleum Bill.

The potential revenues from Turkana oil were based on company payments to governments disclosures, the fiscal terms drawn from publicly disclosed PSCs, and base case assumptions with respect to recoverable oil reserves, oil price and cost of developing the Turkana South Lokichar Basin oil fields focusing on Blocks 13T and 10BB.[12] The figures were therefore not definite, but they provided a glimpse of what could potentially accrue to national and subnational governments should the assumptions hold true.

Tables 1 below, shows revenue split between national government, county government and the local community using the revenue formula proposed in the Petroleum Bill based on different oil price scenarios. The $65 column was highlighted as, at the time of publication, the Brent oil price was hovering at $65/bbl, thereby making it the most applicable base case assumption in terms of oil price.

The annual budget for the Turkana County government is between Kshs11-13 billion and transfers from the National Treasury have been about between Kshs10-11 billion annually. The cap as set out in the draft Petroleum bill would be reached at both $65/bbl and $85/bbl during peak years of production.

Table 1- Sub-National Revenue Transfers (Kshs billions)

	2022			2027			2032		
	$45	$65	$85	$45	$65	$85	$45	$65	$85
Total Revenue	**28**	**43**	**61**	**64**	**99**	**253**	**39**	**101**	**161**
National (75%)	21	32	46	48	74	189	29	76	121
County (20%)	6	9	12	13	20	51	8	20	32
Communities (5%)	1	2	3	3	5	13	2	5	8

Source: Kenya Civil Society Platform on Oil and Gas[13]

In the initial oil production period, with the proposed revenue sharing model, it was likely that county governments would hit the proposed cap only at $85/bbl while throughout the peak period, the cap would be reached at all the different price scenarios. What this meant was that at peak production period, expected 2027, the county government could expect to get almost double the current transfers of Kshs$10-$11 billion if the oil price is at $65/bbl. The community cap in the Bill was proposed at 5% if this did not exceed ¼ of the National Assembly transfers to county government. With transfers of about Kshs$11billion, the community cap represented about Kshs$3billion. The community share would hit the cap in all the different price scenarios during the peak production period and in the initial production period only at $85/bbl. The proposed cap of not more than equivalent transfer from National Assembly for the county and ¼ of the county transfer from National Assembly would highly likely come into play with respect to sub-national payments particularly during peak production.

[12] Although the PSCs for Blocks 10BB and 13T remain confidential, there are seven Kenyan PSCs in the public domain including Blocks 1, 2B, 11A, L1B, L16, L27, and L28. In addition, companies have provided investor summaries of the core PSC fiscal terms for Blocks 9, 10A, 10BA, 11A, and 12B. An analysis of the fiscal terms applying to the blocks listed above suggests that there is only modest variation in fiscal terms. (KCSPOG, 2016, Potential Government Revenues from Turkana Oil, discussion Paper)

[13] http://kcspog.org/wp-content/uploads/2016/04/Revenues-from-Turkana-Oil-April-2016.pdf

Oxfam in Kenya[14] and other CSOs including the Institute for Law and Environmental Governance (ILEG)-Kenya[15] lobbied for the removal of clauses capping oil revenue shares for county governments and communities in the Petroleum Bill and instead urged the government to explore options of implementing a flexible cap or a cap on sliding scale. Such a cap would recognize increased and improved absorptive capacity at county and community level and would ensure that the formula is not static. Ultimately, the Petroleum Act 2019 retained the revenue sharing formula but the caps on revenue were removed.

This case study is evidence of how CSO's such as Oxfam in Kenya, were able to use publicly available payment and contract information to bring important evidence to political debates, while also demonstrating how important granular fiscal data is in being able to understand and inform proposed policy and legislative reforms. In this way, Oxfam in Kenya were able to harness this data to inform substantive policy prescriptions in the design of Kenya's oil revenue sharing scheme.

Importance of detailed US payments to governments disclosures

The above case study serves to highlight the importance of public reporting; the benefits of disclosures to citizens and communities; and the need for a granular contract-based project definition for payments to governments disclosures. We understand that the SEC is currently considering a proposed implementing rule for Dodd-Frank Section 1504. As part of the global movement for extractive industry transparency, we are very interested in this outcome, since a strong final payment disclosures regulation in the US is important in further codifying the international standard.

Oxfam in Kenya are concerned that the current proposal includes consideration of non-public reporting. From our perspective, anonymous and aggregated payment information would be nearly useless for the data work we do. In our work, we attempt to 'follow the money' all the way through the system from the payer to the ultimate final beneficiary, Kenyan citizens. Removing information about the transactions between each individual company and the government would render our follow the money efforts impossible.

Relatedly, the rule fails to truly reflect the benefits of public disclosure and the constituencies that rely on these disclosures for local accountability efforts. The above case study illustrates just one of the multitudes of instances of data use where payment and contract data helped to inform a sensitive political debate.

With the Petroleum Act 2019 having strong provisions for transparency and accountability[16], the need for a granular contract-based project definition for payments to governments disclosures will enhance monitoring of revenue flows to subnational governments, the community, as well as state owned corporations who opt to exercise their back-in rights. It will also be useful in monitoring single companies operating multiple projects (blocks) that are ring fenced in costs and revenues.

As per the above example, we request that the SEC consider a contract-based definition of project that allows for detailed disclosures, in line with the EU and Canadian disclosure regimes. This project definition is critical for any country's subnational resource revenue sharing system, where local communities are owed a portion of oil and mining revenues. Local communities must be able to access information about the total royalty figures paid to central government for each project, since their share of revenues is based on only the payment from the project in their locality. With project-specific payment information, they can

[14] https://www.standardmedia.co.ke/elections2017/article/2001279936/mps-told-to-drop-caps-on-oil-cash
[15] http://ilegkenya.org/wp-content/uploads/2019/02/Voices-No2-GIVE-TURKANA-ITS-FAIR-SHARE-OF-OIL-REVENUES-HR.pdf
[16] The Petroleum Act 2019 contains a requirement to disclose to the public Production Sharing Contracts signed after the law was in place and the development of framework for transparency and accountability for the oil and gas sector

verify the amount paid by the companies operating the projects in their locality and ensure that they received an accurate disbursal. For Kenya, because our subnational oil revenue sharing system is derivation-based, communities cannot check the accuracy of their disbursals without contract-based project reporting. The project definition would undermine the integrity of revenue sharing systems similar to Kenya's by preventing communities' access to granular project-level information that they need to verify their disbursals.

As outlined earlier in our submission, tensions are already high, and oil has the potential to destabilize an already fragile region of the country. To try and subvert this, Oxfam in Kenya are pushing for full transparency in Kenya's oil sector to minimize suspicion among different actors, manage unrealistic expectations, and to give citizens and communities the information they need to hold local and central government officials accountable. We believe that countries like the US are crucial to supporting our work in this, and therefore urge the SEC to ensure that any rule has full public disclosures and a contract-based definition of project.