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December 19, 2011

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-109

**Re: Proposed Rule on “Disclosure of Payments by Resource Extraction
Issuers,” File No. S7-42-10**

Dear Ms. Murphy:

This letter is submitted by Publish What You Pay U.S. (“PWYP US”) to address the implications of the European Union’s pending legislation in the area of extractive industries payment disclosure for the Commission’s pending rulemaking to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), Pub. L. No. 111-203, 124 Stat. 1376 (2010). This letter supplements our comment letters of December 15, 2010, and February 25, 2011.

Introduction

The European Commission’s proposal this fall of European Union (“EU”)-wide disclosure requirements for payments to governments by resource extraction companies underscores the need for prompt issuance by the Securities and Exchange Commission (“SEC”) of a Final Rule implementing Section 1504. The proposal—to amend the European Union’s Accounting and Transparency Directives to require extractive industries payment disclosure—is at an early stage but appears fundamentally based upon Section 1504 and designed to complement United States regulation in this area. *See generally* “Proposal for a Directive of the European Parliament and of the Council on the annual financial statements and related reports of certain types of undertakings,” 2011/0308 (COD), COM (2011) 684 (Oct. 25, 2011)¹ and “Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC,” 2011/0307 (COD), COM (2011) 683 (Oct. 25, 2011).²

¹ Available at http://ec.europa.eu/internal_market/accounting/docs/sme_accounting/review_directives/20111025-legislative-proposal_en.pdf.

² Available at http://ec.europa.eu/internal_market/securities/docs/transparency/modifying-proposal/20111025-provisional-proposal_en.pdf.

The European Commission's action demonstrates that Section 1504 is already setting a global standard for extractive industries payment disclosure legislation, as Congress intended. Where European policy-makers have announced their intention to treat United States Section 1504 as a baseline for their own legislation in the area of extractive payment disclosure, the SEC should issue a strong Final Rule forthwith. A Final Rule implementing Section 1504 will serve as an anchoring point for future European Union legislation and regulation, as well as member state enactments implementing the amended Accounting Directive. Such a course is particularly appropriate given that the content of the SEC's Final Rule is constrained by an unambiguous statutory mandate. It will be far easier for European Union officials to resolve regulatory variations in favor of a United States standard at this stage than the reverse. Further, PWYP European coalitions lobbying with European Union governments report that governments have signaled their intent/likelihood of harmonizing with whatever rule the SEC will promulgate.

Congress Enacted Section 1504 So That The United States Would Take The Lead In Extractive Industries Payment Disclosure.

Congress enacted Section 1504 in order that the United States might set a "global standard" for others to follow in the field of extractive industries payment disclosure. *See* 156 Cong. Rec. S.3316 (daily ed. May 6, 2010) (statement of Sen. Cardin). *See also* 156 Cong. Rec. S.3801-02, S.3815 (daily ed. May 17, 2010) (statement of Sen. Cardin) (provision ultimately enacted as Section 1504 intended to establish "a historic transparency standard"). To this end, Congress imposed a tight rulemaking schedule for the SEC's implementation of Section 1504.³ Congress did so, moreover, long before the European Commission's taking formal steps to formulate extractive industries payment disclosure requirements of its own. It would make little sense for the SEC to adopt a "wait and see" attitude with respect to the European Commission's proposal given Congress' express intent to establish a "global standard." The SEC's mandate under Section 1504 is to lead, not to follow. Prompt action by the SEC is the best guarantee that the European Union's ultimate extractive industries payment disclosure regime is in step with that to be established under the SEC's Final Rule.

The European Commission's Proposal Is Intended To Complement Section 1504.

European officials have made clear that the European Commission's proposal of extractive industries payment disclosure requirements is driven by a determination to keep pace with U.S. initiatives in this area, and specifically with Section 1504.

In an official Press Release accompanying the announcement of its proposal to amend the Accounting Directive to require extractive industries payment disclosure, the European Commission answered the question "Why are you proposing to introduce such a system?" by explaining that "[t]he Commission is responding to international *developments in particular the inclusion of a requirement to report payments to governments in the Dodd Frank Act in the United States*. The SEC (the Securities and Exchange Commission) is currently working on the implementation rules." *See* Press Release, European Commission, Proposal for Directive on transparency requirements for listed companies and proposals on country by country reporting—Frequently Asked Questions, MEMO/11/734 (Oct. 25, 2011) at 17 (emphasis added).⁴ In the same Press Release, the European Commission also noted that "in September 2010, the European Parliament made a request to the European Commission for action in this area" and that "in the concluding Declaration of the G8 Summit in Deauville of May 2011 . . . G8 governments

³ As of the date of this letter, the Final Rule is already 515 days behind schedule. Section 1504 mandated a Final Rule "not later than 270 days after the date of enactment" of Dodd- 21, 2010. *See* 15 U.S.C. §78m(q)(2)(A).

⁴ Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/734>.

committed 'to setting in place transparency laws and regulations or to promoting voluntary standards that require or encourage oil, gas, and mining companies to disclose the payments they make to governments.'" *Id.*⁵ In this vein, the text of the European Commission's proposed amendment to the Transparency Directive explains that "[t]his proposal is comparable to the US Dodd-Frank Act, which was adopted in July 2010, and requires extractive industry companies (oil, gas and mining companies) registered with the Securities and Exchange Commission (SEC) to publicly report payments to governments on a country- and project-specific basis," 2011/0307 (COD), COM (2011) 683 at 9, and notes that "[t]he SEC's implementing rules are scheduled to be adopted by the end of 2011." *Id.*

Some European officials have indicated that they are treating Section 1504 as setting a baseline upon which they may construct a more rigorous set of extractive industries payment disclosure requirements. In a statement accompanying the European Commission's announcement of its proposals, EU Commissioner for Internal Market and Financial Services Michel Barnier and EU Commissioner for Development Andris Piebalgs declared that "[t]oday, the Commission establishes itself as an avant-garde in promoting transparency and goes well beyond the US Dodd-Frank Act, putting the interest of developing countries at the forefront." *See* Statement from EU Commissioner for Internal Market and Financial services, Michel Barnier and EU Commissioner for Development, Andris Piebalgs" (Oct. 25, 2011).⁶ Such a characterization of Section 1504 by senior EU officials shows that the statute is already working as the kind of "global standard" Congress intended.

The European Commission's Proposals Broadly Parallel Section 1504 And Implementation Will Ensure Significant Coverage

In their current form, the European Commission's proposals are fundamentally consistent with the provisions of both Section 1504 and of the SEC's Proposed Rule implementing the statute. *See* Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. 80,978 (Dec. 23, 2010) ("Proposed Rule").

The proposals would require regulated "undertakings" to publish annual reports disclosing payments to governments on both a country-by-country and per-project basis. Article 38(1) of the Accounting Directive, as amended, would require reporting of:

- (a) the total amount of payments,⁷ including payments in kind, made to each government within a financial year;

⁵ European leaders at the national level have called for the European Union to adopt a robust extractive industries payment disclosure regime as well. For example, United Kingdom Prime Minister David Cameron recently endorsed Section 1504 as a model for European legislation. During a July 19, 2011 speech in Lagos, Nigeria, the Prime Minister stated: ". . . the US has gone a step further, introducing legally binding measures to require oil, gas and mining companies to publish key financial information for each country and project they work on. *And I'm calling on Europe to do the same.*" (emphasis added). *See* "PM's Speech on Aid, Trade and Democracy" (July 19, 2011), available at <http://www.number10.gov.uk/news/pms-speech-on-aid-trade-and-democracy/>. French President Nicolas Sarkozy has similarly called for Europe to adopt extractive industries payment disclosure requirements. *E.g.*, Letter from Nicolas Sarkozy, President of France, to Bono (Jan. 2011) at 3 ("I have decided to ask the European Union to adopt, as speedily as possible, legislation to compel industries in the extractive sector to disclose their payments to all countries in which they operate."), available at <http://www.publishwhatyoupay.org/sites/pwypdev.gn.apc.org/files/Sarkozy's%20answer.pdf>; French language original available at <http://www.elysee.fr/president/les-actualites/communiqués-de-presse/2011/lettre-adresse-a-bono-en-reponse-de-sa-tribune.10545.html>.

⁶ Available at http://ec.europa.eu/commission_2010-2014/piebalgs/headlines/news/2011/10/20111026_en.htm.

⁷ Covered payments would include, without limitation, (a) production entitlements; (b) taxes on profits; (c) royalties; (d) dividends; (e) signature, discovery and production bonuses; (f) licence fees, rental fees, entry fees and other considerations for

(b) the total amount per type of payment, including payments in kind, made to each government within a financial year;

(c) where those payments have been attributed to a specific project the amount per type of payment, including payments in kind, made for each such project within a financial year, and the total amount of payments for each such project.

See 2011/0308 (COD), COM (2011) 684 at art. 38(1). Payments would be reported “where material to the recipient government.” *Id.*⁸

There are certain differences. The European Commission’s proposed extractive industries payment disclosure regime would actually have broader applicability than Section 1504 or the SEC’s Proposed Rule. Section 1504 applies only to issuers of securities obliged to file annual reports with the SEC. Under the European Commission’s proposal, reports would be required from large private companies as well as publicly traded entities. See 2011/0308 (COD), COM (2011) 684 at art. 37. The European disclosure regime would apply not only to entities involved oil, gas and mining, but also to those engaged in “logging of primary forests.” See *id.* at art. 36(2). Most significantly, the European Commission currently proposes to exempt regulated entities from reporting on payments to governments where reporting has been “clearly prohibited by the criminal legislation of that country.” See *id.* at art 38(5). In such cases, regulated entities are to include a notation in their reports to the effect that they have “not reported payments . . . and shall disclose the name of the government concerned.” *Id.*⁹ The SEC’s Proposed Rule contains no such exemption. None would be consistent with the text of Section 1504. See Letter from Sen. Benjamin L. Cardin, Sen. John F. Kerry, Sen. Patrick Leahy, Sen. Charles E. Schumer, and Rep. Barney Frank to the SEC (Mar. 1, 2011) at 2 (“Cardin Letter”)¹⁰ (“[G]ranting an exemption for host-country laws would be contrary to the spirit and intent of this Section 1504.”).¹¹

It will be easier for European policymakers to make a final European extractive industries payments disclosure regime conform to the details of the SEC’s Final Rule, than the reverse. The European

licences and/or concessions; (g) other direct benefits to the government concerned. See 2011/0308 (COD), COM (2011) 684 at art. 38(2).

⁸ Any materiality standard would be inconsistent with the unambiguous statutory language – which speaks only of excluding *de minimis* payments – and could undermine the intent of Section 1504. However, a reporting standard based on materiality to the recipient government is qualitatively different from one based on the materiality of a project or a payment to the reporting issuer and arguably would be more consistent with the objectives of Section 1504. Cf. Proposed Rule at 80,985 (soliciting comment on whether the definition of “project” under Section 1504 should be qualified to mean only those projects material to a regulated issuer). As explained in a letter submitted to the SEC by Raymond C. Offenheiser, President of Oxfam America, if the concept of “materiality” were to be included in a Final Rule, it must account for “Section [1504]s goal of indirectly regulating or promoting transparency by host governments.” Letter from Raymond C. Offenheiser, President, Oxfam America, to the SEC (Feb. 21, 2011) (“Offenheiser Letter”) at 13. See also Letter from Dr. Byron Grote, CFP, BP p.l.c., to the SEC (Feb. 11, 2011) at 6 (“We accept that other users have an interest in payment information that would be below the materiality levels ordinarily adopted by extractive industry issuers.”). Thus the fact that the European Commission’s reference to “materiality” in its proposals is distinct from the concept of materiality as referred to in the request for comments in the Proposed Rule and, offers no policy rationale for the SEC’s adoption of a materiality-to-the-issuer qualifier in its Final Rule. Such a qualifier would also, of course, be inconsistent with the unambiguous text of Section 1504. See *id.*

⁹ PWYP Europe coalition members have held briefings and served as panelists in events with European Members of Parliament on the European disclosure rules, and it is clear that removing the exemption from the European proposal language will be a priority for a number of parliamentarians.

¹⁰ Available at <http://www.sec.gov/comments/s7-42-10/s74210-42.pdf>

¹¹ See also Letter from Sen. Carl Levin to the SEC (Feb. 1, 2011) at 4 (“Exemptions for companies where laws in the host country prohibit required reporting would contradict the purpose of the legislation and create a clear incentive for those countries, who want to prevent transparency, to pass laws against disclosure. In fact, it is precisely those jurisdictions for which investors and the public need additional transparency.”), available at <http://www.sec.gov/comments/s7-42-10/s74210-19.pdf>; See also PWYP US letter to SEC (Feb. 25, 2011) (“PWYP Letter”) at 45; and Offenheiser Letter at 17–18.

Commission's proposals remain at an early stage, while Section 1504 is a statute consistent with which, the SEC *must* adopt a Final Rule. Before they take effect as a European "Directive," the proposals will have to be approved by both the European Parliament and the Council of Ministers (comprising the relevant cabinet minister from each member state).¹² Subsequently, the European Union's extractive industries payment disclosure requirements will be implemented through distinct national legislation in each of the European Union's 27 member states.¹³ The European Parliament forecasts a Committee vote on the European Commission's proposals by the end of May of 2012.¹⁴

Harmonization Of United States and European Extractive Industries Payment Disclosure Regimes Will Not Be Served By Delay.

Against this background, prompt action by the SEC is the appropriate course. Section 1504 does not authorize the SEC to delay its rulemaking so as to observe and await European action in this area. Prompt promulgation of a Final Rule by the SEC has the significant advantage of establishing the model upon which European rules will then converge. The SEC's rulemaking is constrained by Dodd-Frank's express statutory requirements. PWYP coalitions in Europe lobbying for these requirements report strong signals that European governments prefer to follow the SEC's lead. As PWYP US, Oxfam America and other commenters have repeatedly pointed out, the SEC has relatively little discretion in determining the contents of its Final Rule. A Final Rule implementing Section 1504, if it is to be consistent with the statutory text, *must* require project based reporting, Cardin Letter at 2, *must not* contain exemptions inconsistent with the blanket reporting requirement imposed by the statute, *id.*, and *must* provide for all reporting to be publicly available. *Id.* A Final Rule implementing Section 1504 will, as a matter of law, have to do all these things *even if* a subsequent or preexisting European Union Directive falls short.

Fortunately, the European Union legislative process on extractive industries payment disclosure is at a much more fluid stage. The European Commission's proposed directive is not yet approved. Until a Directive is finalized, the SEC's action in promulgating a Final Rule will, based upon the European Commission's own public statements, likely have an anchoring effect on the ultimate content of the Directive. Once the United States and the European Union have extractive industries payment disclosure requirements in place, more than 55% of the world's extractive sector (by market capitalization) will be subject to analogous reporting regimes.¹⁵ At that point, extractive industries payments transparency legislation in Australia and Canada, among others, will naturally converge on a U.S.-EU standard.¹⁶ Nearly all commenters agree on the value of a consistent global standard and favor regulatory harmonization.

¹² The fate of the European Commission proposals at issue here will be determined through a legislative process known as "co-decision." For an official account of how "co-decision" works, see European Commission, "Co-Decision or the 'Ordinary Legislative Procedure,'" (last updated Oct. 31, 2010), available at http://ec.europa.eu/codecision/index_en.htm.

¹³ See European Commission, "What is a directive?" (last updated Aug. 17, 2011) (explaining that "EU directives lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals, but are free to decide how to do so."), available at http://ec.europa.eu/eu_law/directives/directives_en.htm.

¹⁴ Legislative Observatory (European Parliament legislative tracking system) entry for 2011/0308(COD), available at <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=EN&procnum=COD/2011/0308> (last visited Dec. 7, 2011).

¹⁵ See Revenue Watch Institute, "Extractive Sector Companies Listed on Global Stock Exchanges" (Oct. 2011) at 3, available at http://www.revenuwatch.org/sites/default/files/rwi_bp_global_listing_OT_upd1_rev2.pdf

¹⁶ See for example, Letter from de Fabio Eduardo Pieri Spina of Vale S.A. to SEC (March 2, 2011) at 2, ("It is our understanding that, while legislative bodies in various other countries are actively considering adopting EITI-inspired disclosure requirements for extractive industry issuers, the United States is the first country to pass such a law. We anticipate that similar disclosure regimes will soon follow."), available at <http://www.sec.gov/comments/s7-42-10/s74210-68.pdf>

The SEC should set that standard by issuing a Final Rule implementing Section 1504 which adheres to Congressional intent, and furthers the U.S. leadership on transparency that has already served as a model for other markets.

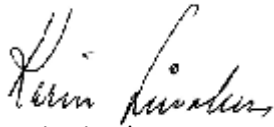
Many thanks again to the Commission for its dedication and hard work to complete the rulemaking for this important provision.

Please let us know if we can provide additional information or if you have any questions.

Respectfully submitted on behalf of the PWYP U.S. coalition,



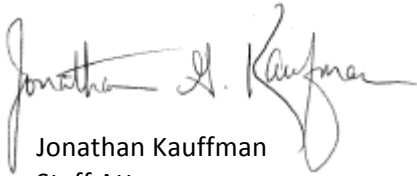
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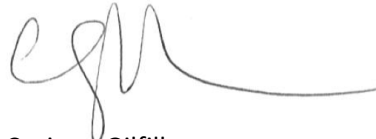
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