Publish What You Pay
United States

ActionAid International USA
Amnesty International
Bank Information Center
CARE USA
Catholic Relief Services
Columban Center for Advocacy and Outreach
CorpWatch
Crude Accountability
EarthRights International
EARTHWORKS
Environmental Defense Fund
EG Justice
Environmental Defense
Friends of the Earth
Gender Action
Global Financial Integrity
Global Rights
Global Witness
Government Accountability Project
Human Rights Watch
International Budget Project
International Labor Rights Forum
Justice in Nigeria Now
ONE Campaign
Open Society Policy Center
Oxfam America
Pacific Environment
Presbyterian Church USA
Revenue Watch Institute
Robert F. Kennedy Center for Human Rights
Sierra Club
Sustainable Energy & Economy Network
United Steelworkers

December 20, 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-5546

Re: Disclosure of Payments by Resource Extraction Issuers
File No. S7-42-10

Dear Secretary Murphy:

We are pleased to submit the following comments to the Securities and Exchange Commission (the "Commission") on behalf of the Publish What You Pay coalition ("PWYP"). These comments supplement our comment letters of December 15, 2010, and February 25, 2011 regarding the Commission's proposed rule to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

The following responds to issues raised by other commenters in letters to the Commission, provides updates on recent relevant developments in other markets, and highlights how evidence submitted by other commenters supports PWYP's recommendations.

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.

Sincerely,

Isabel Munilla
Director, Publish What You Pay U.S.

PWYP Supplementary Comments – Exemptions
Disclosure of Payments by Resource Extraction Issuers File No. S7-42-10
December 20, 2011

The Commission's Final Rule Should Contain No Exemption For Compliance With Foreign Laws, Regulations or Contracts That Impede Transparency

We reiterate our support of the Commission's proposal to include no exemptions for any class of issuer for any reason. Any exemptions of any class of issuer are foreclosed by the plain language and unambiguous intent of the statute. We take this opportunity to note that commenters have thus far failed to confirm the existence of any laws, regulations or contracts that would actually prohibit Section 1504 disclosures. Commenters have similarly failed to justify the Commission's creation of a compliance loophole to accommodate conflicts with any such rumored laws.

Petrobras' Comment Supports the Position That There Is No Need For A Foreign Law Exemption.

We respectfully draw the Commission's attention to the comment letter from Petrobras[1], which states that:

> *"Brazil's oil and gas regulations do not prohibit the disclosure of payments by resource extraction companies to the Brazilian government or to any government outside of Brazil. We are active in 29 countries outside of Brazil and we are not aware of such a prohibition in any of those countries."*

We note for the Commission that Petrobras is active in Angola and China; countries which other industry commentators have asserted have laws in place to prohibit such disclosures. Commenters have of course been unable to identify specific provisions of Angolan or Chinese law to this effect.

Angolan Production Sharing Agreements allow disclosure

Angolan Production Sharing Agreements (PSAs) allow opt-outs from confidentiality for compliance with companies' home-country securities regulations. Both types of PSA templates provided by the state oil company Sonangol on its website[2] explicitly state that no information can be disclosed by the operator except "to the extent required by any applicable law, regulation or rule (including, without limitation, any regulation or rule of any regulatory agency, securities commission or securities exchange on which the securities of such Party or of any such Party's Affiliates are listed)."[3] This has been standard practice in Angola for at least 20 years, as evidenced by the Angola Model Production Sharing Agreement for Deep Water Blocks of February 1992[4], which also includes such a provision.

---

[1] Marcos Menezes, Chief Accounting Officer, Petrobras. Letter to the SEC, February 21, 2011 at P. 5, at http://www.sec.gov/comments/s7-42-10/s74210-25.pdf. *See also* Petrobras operations: Angola, Argentina, Australia, Bolivia,

[2] *See* "About Licensing Rounds" available at http://www.sonangol.co.ao/wps/portal/epNew/atividades/concessions/licitacoes.

[3] *See* for example, Sonangol Production Sharing Agreement Template, Article 33 at P. 50 available at http://www.sonangol.co.ao/wps/wcm/connect/790e270047e2f8a19ec4dfd5ee7fe2c3/bid07_cpp_KON11_KON12_cabindaCentro_en.pdf?MOD=AJPERES&CACHEID=790e270047e2f8a19ec4dfd5ee7fe2c3.

[4] The 1992 PSA states "…either party may, without such approval, disclose such information…c) to the extent required by any applicable law, regulation or rule (including without limitation, any regulation or rule of any regulatory agency, securities commission or securities exchange on which the securities of such Party or of any of such Party's affiliates are listed)." Angola Model Production Sharing Agreement of February 1992, Article 33, P. 63 as cited in *All the President's Men*, Global Witness, March 2002, P. 47 available at http://pwypdev.gn.apc.org/sites/pwypdev.gn.apc.org/files/All_the_Presidents_Men.pdf

Despite the provision included in standard Angolan PSA templates, ExxonMobil in its March 15, 2011 letter to the Commission cites an unofficial translation of an Angolan decree as rationale for its exemption request.[5] The translation states that: "Companies conducting their activities in the Country are prohibited to provide any information without the previous formal authorization from the Minister of Petroleum." Current corporate practice suggests that the Angolan government regularly provides this authorization. For instance, Statoil regularly reports payments made to the Angolan government.[6] In addition, the government of Angola has unilaterally disclosed information similar to that called for by Section 1504 for each oil operating license[7] Based on this evidence, it is difficult to conclude that the Angolan government would penalize a foreign company for disclosing information to meet a securities regulation requirement: standard Angolan contracts allow for such disclosure; the government appears to allow disclosure by companies operating within its jurisdiction; and the government itself already publishes similar information to a high degree of detail.

There is no conflict with Cameroon law

In relation to the exemption request for reasons of conflicts with laws or contracts in Cameroon, we note the letters from RELUFA in Cameroon confirming that Cameroon's laws and contracts allow disclosure.[8]

Assertions of conflicts with Chinese law provide insufficient evidence to justify exemptions

Based only on a legal opinion from one Chinese law firm, Shell has asserted to the SEC that the Chinese government may treat some Section 1504 disclosures as state or business secrets; however, no textual evidence in law or regulation is provided to support the claim that payments as laid out in Section 1504 constitute such secrets.[9] The legal opinion in fact states that there is no "specific regulation on whether the information of Payment constitutes state secret." (Page 3 of Opinion). Rather, it asserts that production volumes and petroleum reserve information, which the Chinese state "may be unwilling to disclose…to other countries for the protection of state safety and interests", can be derived based on payment data. Shell's Chinese lawyers speculate that "it is very possible" that payment data would therefore constitute a state secret. This legal "opinion" is in turn predicated on the assumption that "information of such Payment may be used to figure out the production volume of petroleum resources, the reserve of petroleum resources, the discovery of new petroleum resources and other information of the petroleum resources in China." No evidence is provided of how such calculations would be made and such data derived. As we have explained in previous comments, Section 1504 disclosures do not include confidential information that can be used to deduce competitively sensitive information, and no industry commenter has explained how they could be used to do so. Ultimately, Shell's legal opinion states no more than the Chinese government's general tendency to resist transparency – surely no surprise, nor a policy to which the Commission can appropriately defer in promulgating rules to implement Congress' mandate to advance international transparency efforts.

---

[5] Angola decree Despacho 385/06 was cited. *See* Patrick T. Mulva, ExxonMobil, Letter to the SEC, March 15, 2011 at P3-4, available at http://www.sec.gov/comments/s7-42-10/s74210-73.pdf.

[6] *See* Statoil Annual Report 2010, Overview of Activities by Country at http://www.statoil.com/annualreport2010/en/financialperformance/positiveimpacts/pages/overviewofactivitiesbycountry.aspx

[7] *See* Global Witness, *Oil Revenues in Angola: Much more information but not enough transparency,* December 2010, at available at http://www.globalwitness.org/sites/default/files/library/Oil%20Revenues%20in%20Angola_1.pdf.

[8] *See* Bamenjo, Jaff, RELUFA Cameroon, letter to the SEC, July 11, 2011, at http://www.sec.gov/comments/s7-42-10/s74210-96.pdf and Nodem, Valery, RELUFA Cameroon, letter to the SEC at http://www.sec.gov/comments/s7-42-10/s74210-74.pdf.

[9] *See* ten Brink, Martin J., Royal Dutch Shell plc, letter to SEC, May 17, 2011, Appendix C at P. 3, at http://sec.gov/comments/s7-42-10/s74210-90.pdf

Similarly, the letter concludes that production entitlement, royalty and bonus payments would constitute business secrets only if the information is "unknown to the public, and is defined as confidentiality information by any party." This suggests that the problem is not with Chinese law, but with the contracts that Shell signs with Chinese companies (public or private). Further, the opinion suggests that the "confidentiality provision" in Shell's contracts may be a problem as it allows disclosure only "to the governments and stock exchanges of its home country." As *Contracts Confidential* makes clear, the standard confidentiality clause in model contracts allows for disclosure by stock exchanges of any jurisdiction to which the company is subject.[10] If Shell's model contract falls short of international norms in this respect, the problem is not really one of Chinese law. Nor should the Commission encourage contract drafting that would avoid transparency by classifying covered disclosures as business secrets.

Shell's speculative account of Chinese law is also in conflict with existing corporate experience and practice. As noted, Petrobras has encountered no such prohibitions in China, and Statoil provides regular, public reports of its payments to the Chinese government.[11]

ExxonMobil Has Not Raised A Conflict With Qatari Law

In relation to the exemption request for reasons of conflicts with laws or contracts in Qatar, we note the letter to the Commission from ExxonMobil, which encloses a letter from the Minister of Energy and Industry of Qatar dated December 23, 2009.[12] The Qatari Ministry's letter confirms that joint venture and production sharing agreements in Qatar are structured in the same way as most other such agreements, and include the standard exceptions to confidentiality where disclosure is required by law.

Although the Qatari government's letter indicates that Qatar has begun drafting new laws to control the public disclosure of information, Qatar's new interim requirements for companies (as outlined in the Qatari Ministry's letter), only prohibit companies from disclosing "commercially sensitive information." Not one of the examples of "commercially sensitive information" listed in the Qatari government letter is required to be disclosed under Section 1504. There is therefore absolutely no reason why a resource extraction issuer could not comply with both a robust disclosure regime under Section 1504 *and* the dictates of the Qatari ministry.

To the extent that Qatari law may at some point prohibit compliance with the Final Rule implementing Section 1504, an exemption to accommodate such a law would be inappropriate for the reasons advanced in PWYP's submissions of December 15, 2010 and February 25, 2011. Nor would the Commission's accommodation of foreign laws designed to undermine United States legislation be appropriate where Congress has precluded any exemptions to Section 1504's reporting scheme. The Qatari government's letter also demonstrates that Qatar was alerted that "*absent an express prohibition by the Government of the State of Qatar*," forthcoming changes in U.S. reporting requirements may require disclosure of information by companies, according to the terms of their existing contracts. The letter communicates that the Qatar government began drafting new laws to control the public disclosure

---

[10] *See* Rosenblum, Peter and Maples, Susan, Contracts Confidential: Ending Secret Deals In The Extractive Industries, Revenue Watch Institute, 2009, at http://www.revenuewatch.org/news/publications/contractsconfidentialendingsecretdealsextractiveindustries

[11] See Statoil, Annual Report, Figures for 2007-2009 available at http://www.statoil.com/annualreport2009/en/financialperformance/positiveimpacts/pages/overviewofactivitiesbycountry.aspx. See Statoil Fact Book 2010 for most recent figures at P. 22 http://www.statoil.com/AnnualReport2010/en/Download%20Center%20Files/01%20Key%20Downloads/18%20Fact%20book/Factbook2010.pdf

[12] *See* Mulva, Patrick T., ExxonMobil, Letter to the SEC, March 15, 2011, at P. 5, at http://www.sec.gov/comments/s7-42-10/s74210-73.pdf.

of information in response to potential U.S. legislation. We note that this letter provides clear evidence that explicit reporting exemptions provided for host government disclosure prohibitions provide an incentive to governments seeking to hide payment information to put those precise prohibitions into place, thus undermining the intent of the statute.[13] This view is supported by the U.S. Agency for International Development in its July 15, 2011 letter to the Commission, which states that "if such exemptions are granted, the intent of Section 1504 will then be easily thwarted by every opaque government seeking to hide some or all of its revenue streams."[14]

The Final Rule Should Contain No Exemption for Foreign Issuers

We reiterate our support for the Commission's proposal that the final rules include no exemptions for foreign issuers. We note the letters from BP plc[15], Royal Dutch Shell[16], Talisman[17] and Rio Tinto[18] proposing that the Commission work with the European Commission to develop a global standard that does not include a project-level reporting requirement. The omission of a project-level disclosure requirement from the Final Rule implementing Section 1504 would, however, be incompatible with the plain text of Section 1504 which explicitly requires a "project" level reporting requirement. It is also incompatible with the legislative proposal from the European Commission.

These industry commentators have stated that if coordination on such a standard as proposed is not possible, they would seek exemptions for foreign issuers. Such an exemption is inappropriate given Congress' unambiguous intent to apply Section 1504's reporting requirements to all regulated issuers. Yet even if such an exemption were a permissible interpretation of Section 1504, it would be counterproductive. The European Commission rules seek to mirror the Final Rule promulgated by the Commission pursuant to Section 1504.[19] This was indicated directly to European PWYP members by Commissioner for Internal Markets and Service Michel Barnier in a meeting in July, and is clearly indicated in the European proposal.[20]

---

[13] If and where foreign laws are directed at impeding the transparency regime established by Section 1504, such foreign laws would be uniquely undeserving of the exercise of international comity which the exemption that some commenters advocate would represent. Comity is not called for where a foreign law is aimed at frustrating U.S. law. In an analogous context, for example, U.S. courts routinely refuse to accommodate foreign "blocking statutes" designed to impede discovery in litigation before United States courts. Cf. generally Société Nationale Industrielle Aérospatiale v. United State District Court for the District of Iowa, 482 U.S. 522, 544 n. 29 (1987); Milliken & Co. v. Bank of China, 2010 WL 5187744 (S.D.N.Y. 2010); MeadWestvaco Corp. v. Rexam PLC, 2010 WL 5574325 (E.D. Va. 2010). Cf. also SEC v. Banner Fund International, Inc., 211 F.3d 602, 613 (D.C. Cir. 2000) (conduct "designed to frustrate a significant policy of the United States" not entitled to comity); Remington Products, Inc. v. North American Philips Corp., 107 F.R.D. 642, 651 (D. Conn. 1985) (frustration of United States law not recognized as a "legitimate national interest" of a foreign country).

[14] Postel, Eric, U.S. Agency for International Development, letter to the SEC, July 15, 2011, at 3 at http://sec.gov/comments/s7-42-10/s74210-101.pdf

[15] *See* Grote, Byron, BP plc, letter to the SEC, July 8, 2011, at http://www.sec.gov/comments/s7-42-10/s74210-95.pdf.

[16] *See* Henry, Simon, Royal Dutch Shell Plc, letter to the SEC, July 11, 2011, at http://www.sec.gov/comments/s7-42-10/s74210-98.pdf

[17] *See* Rooney, Robert, Talisman Energy Inc., letter to the SEC, June 23, 2011, at P. 4, at http://www.sec.gov/comments/s7-42-10/s74210-91.pdf

[18] *See* Elliott, Guy, Rio Tinto, letter to the SEC, July 6, 2011, at http://www.sec.gov/comments/s7-42-10/s74210-102.pdf

[19] *See* Todd, Eloise, ONE, letter to the SEC, August 2, 2011 at http://sec.gov/comments/s7-42-10/s74210-106.pdf; See Allen, Jane et al., Publish What You Pay, letter to the SEC, April 28, 2011, at http://sec.gov/comments/s7-42-10/s74210-88.pdf

[20] 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,

Additionally, companies which already successfully comply with multiple and overlapping disclosure regimes in multiple jurisdictions will not be overly burdened by reporting similar information in each market. As noted in letters to the Commission from ONE, and from European PWYP members, European regulators are likely to follow the United States' example.[21] To provide an exemption for foreign issuers would thus serve only to discourage regulatory convergence on a U.S. standard – a result contrary to Congress' intent that the United States should be a leader in the field of extractive industry transparency.[22]

MEMO/11/734 (Oct. 25, 2011) at 17 (emphasis added). *Available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/734

[21] *See* supra note 19. Moreover, to the extent that foreign regulators do not prescribe identical disclosure regimes, the Commission would risk forcing U.S. investors to compare information disclosed under divergent standards if it provided an exemption for foreign disclosure laws. In order to make effective use of Section 1504 disclosures, investors would benefit most from having access to *comparable* information from all issuers.

[22] *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").