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By E-Mail
Chairman Mary L. Schapiro
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Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20459-1090

Re: Disclosure of Payments by Resource Extraction Issuers, File No. S7-42-1, Dodd-Frank Act, Section 1504

Dear Chairman and Commissioners:

Global Witness welcomes the opportunity to submit this letter addressing issues pertinent to the final rules for Section 1504 of the Dodd-Frank Act, the Disclosure of Payments by Resources Extraction Issuers Provision. We are very concerned about the long delays in the SEC issuing final rules for implementation of 1504. We are writing to strongly urge the SEC to come out with effective rules now so that investors have access to critical information and citizens in resource rich countries can hold their governments to account for spending natural resource revenues. We believe that Congress intended full disclosure to be completely implemented by the SEC in this rulemaking. Failure to do so risks serious judicial scrutiny.

Build on global momentum

The United States, specifically the United States Congress and the Securities and Exchange Commission (SEC), has been in the vanguard promoting transparency and accountability. The implementation of the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. §§ 78dd-1, *et seq.*, was a watershed moment

that galvanized international initiatives countering corruption.[1] These international initiatives spawned widespread normative development.[2] It is notable that the 1996 U.N. Declaration and 1996 Inter-American Convention largely follow the FCPA model, particularly its definitions of the basic elements of bribery, and the 1988 and 1998 amendments to the FCPA entrenched these international developments within United States law.[3] These norms have also manifested in multiple guidelines from non-governmental organizations like the World Bank (WB), International Monetary Fund (IMF), and International Bank for Reconstruction and Development (IBRD).[4]

In this context, the US continues to set global standards - particularly for extractive industry payments disclosures.[5] The Dodd-Frank Act, specifically Section 1504, has the potential to become another watershed and precedent of international consequence, at a moment when citizens around the world

[1] International initiatives immediately post-FCPA include, but are not limited to, the establishment of the Ad Hoc Intergovernmental Working Group on Corrupt Practices within the Economic and Social Council (ECOSOC) of the United Nations, *see* 1976 U.N.Y.B. 460-61; the drafting of a code of conduct for transnational corporations by the Commission on Transnational Corporations as directed by ECOSOC, *see* 1976 U.N.Y.B 459; and the creation of a Group of Experts on International Standards of Accounting and Reporting, also within ECOSOC, *see* 1979 U.N.Y.B. 628.

[2] *See, e.g.*, Case 68/88, *Commission v. Greece* [1989], ECR 2968 (1989 Greek Maize Case), Argentina, United States of America, and Venezuela: Draft Resolution: Corruption in Transnational Commercial Activities, E.S.C., 1st Sess. Agenda Item 6(i), U.N. Doc. E/1996/L.26 (1996), G.A. Res. 51/59, U.N. GAOR 51st Sess., 82nd mtg., Agenda Item 101, U.N. Doc. A/RES/51/59 (1996) (International Code of Conduct for Public Officials), OECD Recommendation on Bribery in International Business Transactions (1994 OECD Recommendation), OECD Council Recommendation C(94) 75/Final on Bribery in International Business Transactions, May 27, 1994, 33 I.L.M. 1389 (1994), the U.N. Declaration Against Corruption and Bribery in International Commercial Transactions (1996 UN Declaration), G.A. Res. 51/191, U.N. GAOR 51st Sess., Agenda Item 12, Annex, U.N. Doc. A/RES/51/191 (1996), Organization of American States: Inter-American Convention Against Corruption (1996 Inter-American Convention), Mar. 29, 1996, 35 I.L.M. 724, Protocol of the Communities' Financial Interests (EC Corruption Protocol), Council Act of 27 Sept. 1996 Drawing up a Protocol to the Convention on the Protection of the European Communities' Financial Interests, 1996 O.J. (C 313) 1, EU Corruption Convention, 1997 O.J. (C 195) 1, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), Dec. 18, 1997, 37 I.L.M. 1 (entered into force Feb. 15, 1999), African Convention on Preventing and Combating Corruption, 43 I.L.M. 5 (signed 14 July 1999). Criminal Law Convention on Corruption, 2216 U.N.T.S. 225, ETS No. 173 (signed 27 Jan. 1999), Civil Law Convention on Corruption, 2246 U.N.T.S. 3, ETS No. 174 (signed 4 Nov. 1999), UN Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001), and 2003 UN Convention Against Corruption, 2349 U.N.T.S 41, 37 I.L.M. 45 (2004).

[3] The implementing legislation was the International Anti-Bribery and Fair Compensation Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

[4] *See, e.g.*, Mario Aguilar, Jit Gill, & Livio Pino, Preventing Fraud and Corruption in World Bank Projects: Procurement Guidelines (2000).

[5] *See, e.g.*, 156 CONG. REC. S3303 (daily ed. May 20, 2010) (debate surrounding Restoring American Financial Stability Act of 2010, particularly S3814 *et seq.*).

are demanding transparency from their governments in the management of public wealth. In the past year citizens across the Middle East and North Africa have been overthrowing oppressive regimes that have used secrecy and corruption in the management of state revenues to keep themselves in power. US rules aimed at supporting citizen's ability to hold their governments to account are of utmost importance in supporting these shifts towards openness and democratic accountability.

Unfortunately, ongoing delays in implementation of rules by the SEC hinder further efforts to develop normative and substantive law. For sure, the passage of Section 1504 of Dodd-Frank has already catalyzed global action promoting extractive industry transparency. In October 2011, the European Commission proposed legislation requiring all EU-listed oil, gas, mining and timber companies to publicly disclose their payments to governments on a country and project level, complementing Section 1504. The Hong Kong Stock Exchange (HKSE) also introduced this type of country-by-country disclosure requirements for all newly listed extractive companies in 2010. But the true potential of the United States to foster meaningful transparency and accountability in extractive industries remains extensive.

Given the context and mandate of Section 1504 of the Dodd-Frank Act, the US can accelerate global momentum by issuing strong rules that support the intent of the law and encourage further action in Europe and the rest of the world. Further delay in implementing the rules damages the momentum. In fact, the SEC is overdue by nearly 10 months as statutorily required for promulgating such rules. The SEC should not defer any longer; it should promulgate implementing rules immediately.

No Exemptions:

Global Witness strongly urges the SEC not to include exemptions for any class of issuer. Granting exemptions from disclosure requirements will create serious loopholes and violate the law's main aim of achieving transparent payments from companies to governments of poorly governed, resource rich countries. Moreover, there is no justification for such exemptions under international law conventions outlawing corruption and the public policy rationale for disclosure is clear and convincing.

The rationale for exemptions does not withstand scrutiny. As noted in Publish What You Pay United States (PWYP-US) submission to the Commission on December 20, 2011, commentators have thus far failed to confirm the existence of any laws, regulations, or contracts that would prohibit disclosure under section 1504.[6] PWYP-US drew the Commission's attention to the submission by Petrobras on February 21, 2011 in which the company stated that they were not aware of any laws that prohibited disclosure in the twenty-nine countries in which they were active.[7] As PWYP-US states, Petrobras are active in Angola and China, two countries often cited as countries with laws in place that prohibit

[6]Publish What You Pay USA, Letter to the Securities and Exchange Commission, re: Disclosure of payments by resource extraction issuers, File No. S7-42-10, 20.12.11.

[7]Marcos Menezes, Chief Accounting Officer, Petrobras. Letter to the SEC, February 21, 2011at P. 5, at http://www.sec.gov/comments/s7---42---10/s74210---25.pdf.

disclosure.[8] A separate study undertaken by Revenue Watch Institute and Columbia University in 2009 found that it was accepted industry practice for contracts to allow the disclosure of any information required by regulators in their home countries, as would be the case in Dodd-Frank.[9] The conclusion is that the factual record speaks volumes and must be considered.

This industry practice makes sense as it comports with general accounting practices. For instance, in *SEC v. World-Wide Coin*, 567 F. Supp. 724 (N.D. Ga. 1983), when applying 15 U.S.C. 78m(b) of the FCPA, the court established that the FCPA accounting requirements "give the SEC authority over the entire financial management and reporting requirements of publicly held [US] corporations…." *See also*, 2003 UN Corruption Convention, at Chapter II – Preventative Measures (requiring signatory countries to disclose accounting and to cooperate in transparency). This suggests that the SEC has the authority to demand all accounting, including those of subsidiaries, in spite of another country's laws stating that disclosure is prohibited. In fact, read together, international norms and Dodd-Frank Section 1504 are clear that countries cannot hide behind domestic legislation without risking their legislation being ignored by US courts, especially if the issue has an independent obligation to disclose. Succinctly, exemptions are anathema to the transparency and accountability goals of anti-corruption laws and are misplaced – particularly – in extractive industries disclosures.

Whilst there are no provisions that currently prohibit disclosure of payments under Section 1504, the inclusion of exemptions in the final rules would undermine the purpose of mandatory revenue disclosure. Exemptions would also provide a perverse incentive for corrupt governments to pass laws to prohibit disclosure in order to continue the shroud of secrecy over oil, gas and mining revenues. It would create a "Tyrant's charter" enabling dictators to continue keeping this information secret so that they can siphon off oil revenues that rightfully belong to the citizens of these countries. As stated by the US Agency for International Development (USAID) in their July 15, 2011 letter to the SEC: "if such exemptions are granted, the intent of [Dodd-Frank] will be easily thwarted by every opaque government seeking to hide all or some of its oil revenues".[10]

However, if implemented as Congress intended, without exemptions, Section 1504 has the potential to significantly and positively impact countries rich in natural resources but stuck in a cycle of poverty due to revenue mismanagement or corruption.

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[8]Publish What You Pay USA, Letter to the Securities and Exchange Commission, re: Disclosure of payments by resource extraction issuers, File No. S7-42-10, 20.12.11.

[9]Contracts confidential: Ending secret deals in the Extractive Industries, Peter Rosenblum and Susan Maples, Revenue Watch Institute, 2009.

[10]US Agency for International Development letter to the SEC, 15 July 2011, p.3, http://sec.gov/comments/s7-42-10/s74210-101.pdf

Case in point: Angola

Global Witness has been documenting serious concerns about corruption in the Angolan government's management of oil revenues for over a decade. Ten years after the end of the civil war, the Angolan economy is one of the fastest growing in Southern Africa, driven by oil revenues which account for two-thirds of government income.[11] However, seventy percent of all Angolans continue to live on less than $2 a day.[12] It is widely accepted that the misappropriation of public funds and assets by corrupt elites is a major cause of underdevelopment in Angola. Greater transparency and public scrutiny over revenues from the extractive industries are essential for creating necessary public accountability and ensuring that national wealth is used for the benefit of Angolan citizens. It is also important to note that transparent disclosure of payments helps foster a more stable business operating environment for the private sector and helps protect investors from inadvertent involvement in corrupt practices. Transparency helps governments function more effectively and in a manner that benefits a country's citizens, which has long term benefits for companies and investors.

The successful implementation of Dodd-Frank Section 1504 would have unprecedented impact on transparency in Angola. Almost all oil companies active in Angola are listed on stock exchanges in the United States. As such, they are required to report payments made to the Angolan government under Dodd-Frank. Access to this information would allow civil society activists and observers to hold their government accountable and accurately assess revenues paid to government by the oil sector. This information will enable Angolans to compare the government's published figures for revenue receipts (by company and by block) with data filed by companies at the SEC. As it stands, it is impossible for investors and for civil society to accurately verify data currently published by the Ministry of Finance because there is no independent scrutiny of reports or any participation of Angolan civil society in the preparation or dissemination the reports.

Commentators have cited Angolan laws as a justification for exemptions.[13] But analysis produced by the Publish What You Pay coalition has found no evidence to support this position. In fact production sharing agreements (PSAs) in Angola include opt-outs from confidentiality clauses for compliance with home-country securities regulations.[14] Official PSA templates state that no information can be disclosed by the operator except 'to the extent required by any applicable law, regulation or rule (including … any

[11]Angola Ministry of Petroleum: *Relatório de Actividades do Sector do Petrolifero de 2009, (Report on Petroleum Sector Activities for 2009),* pg.2

[12]World Bank: Poverty headcount ratio at US$2 a day (PPP). Available at http://data.worldbank.org/indicator/SI.POV.2DAY

[13] Angola cannot remain opaque without violating the accounting provisions of the 2003 UN Corruption Convention, *inter alia*, to which it is a signatory.

[14]For more information please see, No exemptions: Country by Country reporting: why there should be no exemptions, Publish What You Pay, 2012.

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)'.[15] As evidenced by its model PSA for deep water blocks,[16] disclosure has been standard practice in Angola for twenty years. For example, Statoil regularly publishes payments made to the Angolan government without any negative consequence; in fact it has continued to secure oil blocks in the most recent bidding rounds.[17] Exemptions are not warranted under the law's clear mandate and intent and the impact of such exemptions would simply allow the loophole to swallow the law.

Strong Definition of Project

Global Witness supports the definition of 'project' described by Publish What You Pay US (PWYP-US) in their December 20, 2011 submission the SEC and the rationale behind it. PWYP-US defines project as "...a lease, license or other concession-level arrangement that assigns rights and fiscal obligations". [18] Payment disclosures should be carried out at the project level and include, but are not limited to, license fees, royalties, production entitlements and bonuses. PWYP-US also cited numerous examples where project level reporting is already happening, or is supported by those involved in the extractive industries.

Project-level disclosure at the lease/license level as defined by PWYP-US can aid sustainable natural resource development for the benefit of citizens, governments, companies, and investors. The benefits far outweigh the costs. The cost of project level reporting to the companies will not be as high as extractive companies have represented. A survey of SEC filings from 2008-2010 for oil and mining companies that have submitted comments to the SEC reveals that they have not warned investors of any significant cost from reporting requirements. The European Commission, which has proposed similar rules, has estimated that the cost of reporting at the project level, for 171 countries covered companies, to be 0.05%of the annual revenues for the first year and less thereafter.[19] Some commentators have stated that project level disclosure at the lease/license level would be too costly. We would like to raise the question about the integrity/effectiveness of companies' process for keeping track of consolidated accounts if companies find it too costly to come up with basic cost information to account for the operations of each subsidiary. Credible accounts should surely be based on such data.

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[15]http://www.sonangol.co.ao/wps/portal/epNew/atividades/concessions/licitacoes, PSA templates.

[16]Cited in Global Witness, http://pwypdev.gn.apc.org/sites/pwypdev.gn.apc.org/files/All_the_Presidents_Men.pdf, 2002, p.47.

[17]Maersk Strikes Oil at Angola's First Pre-Salt Deepwater Well, Business week, 04.01.12.

[18]Publish What You Pay USA, Letter to the Securities and Exchange Commission, re: Disclosure of payments by resource extraction issuers, File No. S7-42-10, 20.12.11.

[19]http://ec.europa.eu/internal_market/accounting/docs/sme_accounting/review_directives/20111025-impact-assessment-part-2_en.pdf).

As PWYP-US outlined in their December 20, 2011 submission, project level reporting will have numerous benefits for citizens, governments, investors and companies:[20]

1. Project level reporting is important for investors and companies:

Project level reporting will benefit investors by allowing them to identify significant payments which would otherwise be hidden. The risk of investing in a project is variable on the terms of the development, the capital needs and geographic location within the country. The risk of investing in Western DRC, for example, is very different to the risk of investment in Eastern DRC and all over the world the risk of bribery, appropriation of force majeure varies depending on the exact location of the project, who is involved and the particularities of the resource. Investors are entitled under the law to have this information in a publicly accessible and meaningful fashion, as Congress not only clearly and plainly intended, but directed with 1504.

Furthermore, transparency of natural resource revenues gives companies a social license to operate in countries that is important to ensuring a stable business environment. This type of transparency enables companies to concretely show citizens and communities how they are contributing to government revenues and citizens can then use this information to hold their governments to account. Newmont has specifically cited this as a reason for why they disclose revenue payments on a project level.

2. Project level reporting will give voice to local communities:

It is essential that local communities, who bear the brunt of the social and environmental impacts of extraction, have evidence to show that the benefits outweigh the costs. They need information which allows them to assess whether they are receiving their fair share, to ensure that funds for environmental and social protection are being managed responsibility and to track exactly who is receiving the revenues. This works to promote stability, economic growth as well as public safety.

3. Project level disclosure will increase revenue transparency:

Project payment data is crucial to ensuring the accountability in the transfer of funds between national and sub-national governments. A lack of transparency in these transactions can obscure discrepancies or corruption and can ultimately lead to disputes and conflict, particularly in areas where the resource is concentrated in one region.

4. Project level payment information is of benefit to local governments:

[20]For more information please see Publish What You Pay USA, Letter to the Securities and Exchange Commission, re: Disclosure of payments by resource extraction issuers, File No. S7-42-10, 20.12.11.

Project payment data will also empower local governments whose constituencies have been the most affected by the socio-economic and environmental impacts to provide for the remediation and social protection that their citizens need. Access to project level information is also crucial for efforts to change the revenue transfer formula or increase government funding for local programs.

5. Project level reporting improves worker safety

According to PWYP-US submission, Union's in both Nigeria and the United States have argued that increased disclosure will increase the safety of their workers. United Steel Worker's noted in their submission to the Commission that "enhanced transparency would in fact enhance employers safety…it creates a strong incentive for governments to promote investments that can serve as a pathway to poverty reduction, stable economic growth". PENGASSEN, the Nigerian Union, noted in its letter to the Commission that, "project level disclosure, will help create incentives for investment that benefits communities, alleviating much of the violence in the volatile Niger Delta and improving the safety of our members". [21] In turn, for Nigeria, a strong interpretation of 1504 would radically improve the operating environment for oil companies that have suffered the significant financial consequences of having to shut down major oil production operations because of the violence in the Niger Delta region.

Competiveness

There is no evidence in the public record that demonstrates that disclosures under Section 1504 would provide sufficient information to create competitive disadvantage. As noted by PWYP-US in the December 20, 2011 submission, project level reporting is unlikely to lead to the disclosure of information that is not already available to their competitors.[22] The information required under Dodd-Frank is not commercially sensitive and cannot be used to deduce a company's contract terms, operating costs, or future plans without access to additional information. The European Commission, which has included project-by-project disclosure in their recent proposals, noted that "in the majority of cases the disclosure of payments on a country-by-country and project-by project basis would not give direct insight into confidential company information". [23] Competitive advantage and undercutting is more often linked to access to state-subsidized capital, as in the case of Chinese state-owned companies and state to state deals rather than the transparency of the terms of individual projects.

[21] http://www.sec.gov/comments/s7-42-10/s74210-117.pdf.

[22]Publish What You Pay USA, Letter to the Securities and Exchange Commission, re: Disclosure of payments by resource extraction issuers, File No. S7-42-10, 20.12.11.

[23]http://ec.europa.eu/internal_market/accounting/docs/sme_accounting/review_directives/20111025---legislative---proposal_en.pdf.

De Minimis Standard:

As stated in our submission of February 25, 2011, Global Witness believes that requiring disclosure for payments only if they are related to material projects of a resource extraction issuer would be inconsistent with the meaning, intent and plain language of the statute, which imposes no such materiality constraint on the payments which must be disclosed.

However, if the Commission is inclined to provide a definition of "not de minimis," Global Witness supports the recommendation set forth by PWYP-US in its February 25, 2011 letter that "not de minimis" should be defined as an amount that meets or exceeds (1) the lesser of the following two measures: $1,000 for an individual payment or $15,000 in the aggregate over a period, or (2) a particular percentage of the issuer's per project expenditures.[24] Global Witness also believes that "not de minimis" should be assessed relative to the total expenditures on a project (both individually and in the aggregate) and not relative to the size or valuation of the entity making the payments. This clarification is crucial to ensuring equal treatment of issuers irrespective of the size of the issuer and to providing the full transparency called for by the plain terms of Section 1504.

Conclusion

When managed properly, natural resource revenues have the potential to positively contribute to the development of resource-rich countries. Unfortunately, many countries rich in natural resources are plagued by corruption and a lack of governmental transparency and accountability surrounding the resources sector. Rather than the resources benefitting the citizens of these countries, the revenues are often siphoned off or mismanaged in a way that fuels corruption, conflict and instability. It is vital that the SEC follow the Congressional intent of this law by issuing strong final rules soon that grant no exemptions, have a strong project definition, and do not create loopholes in reporting through non de minimus standards.

Yours Sincerely,

Simon Taylor
Founding Director
Global Witness

[24] *See* Letter from PWYP (Feb. 25, 2011).