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By E-mail

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

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

Dear Secretary Murphy:

Global Witness respectfully submits the following written comments regarding the proposed regulations published by the Securities and Exchange Commission (the "SEC" or the "Commission") to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or "Section 1504"), which mandates disclosures concerning certain payments made to foreign governments or to the Federal Government to further the commercial development of oil, natural gas, or minerals.

Global Witness is a non-profit organization that runs pioneering campaigns against natural resource-related conflict and corruption and associated environmental and human rights abuses.[1] Our mission is to expose and to end the brutality and injustice that result from the fight to access and control natural resource wealth. Using first hand documentary evidence from field investigations and undercover operations, we seek to hold accountable those who exploit government failure and disorder. Global Witness strives to break the links between natural resource exploitation, human rights abuses, and corruption. We have played a leading role in developing and implementing international transparency and natural resource governance mechanisms, including the Kimberley Process rough diamond certification scheme, of which we are an accredited observer, and the Extractive Industries Transparency Initiative ("EITI"), of which we are a board member.

We strongly believe that transparency and accountability on an international level is critical to breaking the links between the commercial development of natural resources and poverty, corruption, violence, and human rights abuses. We applaud Congress for recognizing and embracing the gravity of this condition by directing the Commission to issue regulations to

[1] For example, our investigations have had direct and major impacts on the IMF withdrawal from Cambodia in 1996 over corruption in the logging industry and the imposition of timber sanctions on Charles Taylor's Liberia in 2003.

support the Federal Government's commitment to the promotion of international transparency relating to the commercial development of oil, natural gas, and minerals.

Based on our extensive experience in field locations throughout the world, the lack of transparency and accountability surrounding payments made by resource extraction issuers to government entities directly contributes to the gross mismanagement of revenues, widespread corruption, increased poverty, and the reinforcement of authoritarianism. There can be no economic or social progress in certain parts of the world unless this flow of money is made public and a degree of accountability is brought to bear.[2]

Global Witness recognizes the enormous effort made by the Commission and its staff to implement the provisions of the Dodd-Frank Act under the tight time constraints mandated by Congress. Section 1504 of the Dodd-Frank Act represents the Federal Government's firm commitment to shed much-needed light on the often clandestine and corrupt use of payments made in connection with the commercial development of natural resources, to equip investors to make informed decisions regarding resource extraction issuers, and to enable citizens to hold their leaders accountable for the use of natural resource wealth. In crafting Section 1504 to require *detailed* disclosures from *all* resource extraction issuers that are subject to the Commission's reporting requirements, Congress recognized that information concerning payments made by resource extraction issuers to governments is of significant consequence and must be made available to the public. As noted by Senator Dodd, the resource extraction industries:

> [I]nvolve unique exposures to country- and industry-specific risks – including reputational risks, tax and regulatory risks, expropriation risks, and others – as they conduct business operations in countries where governance and accountability systems are rudimentary, at best – and where corruption, secrecy and a lack of transparency regarding public finance are pervasive. Those risks are heightened by the very large multi-year investments that are required of the industry, their need to gain access to natural resources, and the often compelling national security considerations tied to the products developed by this industry.[3]

Viewed through this lens, and granting the appropriate deference to Congress's directive that the Commission adopt rules to support the Federal Government's commitment to achieving international transparency relating to the commercial development of oil, natural gas, and minerals, it is clear that the disclosures required by Section 1504 are qualitatively comparable to other significant disclosures required under Section 13 of the Exchange Act upon which investors rely to make fully informed decisions. In adopting final rules implementing Section 1504, we respectfully urge the Commission to embrace this Congressional mandate and to be mindful not to diminish the substantive importance of the required disclosures.

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[2] For examples of the lack of revenue transparency in the extractive industry, *see* GLOBAL WITNESS, TIME FOR TRANSPARENCY: COMING CLEAN ON OIL, MINING AND GAS REVENUES (Mar. 2004), http://www.globalwitness.org/library/time-transparency.

[3] *See* 156 Cong. Rec. S3817 (daily ed. May 17, 2010) (floor statement of Sen. Dodd regarding the Cardin-Lugar Amendment).

Overall, Global Witness is supportive of the Commission's proposed regulations implementing Section 1504 of the Dodd-Frank Act. Our comments, which are intended primarily to ensure that the rule-making process does not diminish the scope and force of what Congress put in place, are summarized as follows:

- **The regulations should not exempt any classes of issuers.** Categorical issuer exemptions appear nowhere in the text of the statute and the legislative history confirms that Congress intended the statute to apply equally to all resource extraction issuers, regardless of size or location.

- **The regulations should not provide exemptions for host country or contractual prohibitions on disclosure, and the Commission should not create exemptions for purportedly "commercially sensitive" information.** There is no demonstrable need or justification for any such exemptions and building them into the regulations promulgated under Section 1504 would frustrate Congress's intent to achieve transparency and accountability.

- **The disclosures required under Section 1504 should be filed with, not furnished to, the Commission.** Demoting Section 1504 disclosures to "furnished" rather than "filed" status is contrary to the plain language of the statute and clear Congressional intent.

- **Section 1504 plainly requires meaningful project-level disclosure and the Commission should not subvert the statute by promulgating regulations which would allow issuers to report data at the country or entity level.** Detailed project-by-project disclosures are vital to enabling investors to discern an accurate picture of an issuer's entanglements with potentially unstable governments, particularly in those countries in which some regions are more prone to conflict and instability than others.

- **In defining the types of payments to be disclosed, the Commission should include the following "other material benefits" which are part of the "commonly recognized revenue stream:"**

    - "Social payments" made pursuant to a resource extractive contract;
    - Payments related to transport operations, including pipeline transit fees, customs duties and customs user fees, and payments related to pipeline and terminal operations;
    - Ancillary payments made pursuant to the extraction contract (including personnel training programs, local content, technology transfer, and local supply requirements);
    - Dividends;
    - Payments made for infrastructure improvements;
    - Value-added tax payments and offsetting value-added tax credits;
    - Payments of taxes in lieu; and
    - Payments related to any liabilities incurred in connection with a resource extraction contract.

- **The term "not de minimis" is a well-understood term and does not require further definition.** In particular, "not de minimis" is generally and properly understood *not* to be equivalent to the vastly higher standard of "materiality."

- **The Commission should include transport-related activities in the definition of "commercial development."** Transport-related activities are central to the commercial development of natural resources.

- **The implementation of the regulations should not be delayed.** The statute as written provides ample time to allow issuers to prepare to make the required disclosures, particularly since many will already have systems in place to facilitate the process.

Global Witness appreciates the opportunity to comment on the proposed rules and stands ready to meet with the Commission and its staff to further clarify our comments. Specifically, Global Witness offers the following comments:

I. The Commission Should Not Invent Exceptions for Categories of Issuers, for Host Country or Contractual Prohibitions on Disclosure, or for "Commercially Sensitive" Information.

a. The Commission Should Not Exempt Certain Types of Issuers from Section 1504's Disclosure Mandate.

Congress intended Section 1504 to achieve the broadest possible coverage of U.S. and foreign issuers,[4] and Global Witness applauds the Commission's proposal not to exempt any particular category of issuer from Section 1504's disclosure requirements. In so doing, the Commission has respected Congress's intent to establish a global standard for disclosure and to provide investors with the information they need to fully assess an issuer's exposure to potentially unstable or corrupt governments.[5] Uniformity in application of the statute is critical to ensuring that these objectives are achieved.

The EITI[6] and various industry initiatives represent important steps towards increasing transparency in the extractive industry. However, the EITI and other voluntary initiatives are

[4] *See* Letter from Senator Cardin to the Honorable Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission 1 (Dec. 1, 2010) ("The intent of Section 1504 is to provide the broadest possible meaning to the term 'resource extraction issuer.' Specifically, the intent was to require all issuers, including foreign issuers, which have a reporting requirement to the SEC."). *See also* 156 Cong. Rec. S3816 (daily ed. May 17, 2010) (floor statement of Sen. Lugar regarding the Cardin-Lugar Amendment) ("This amendment requires foreign and domestic companies listed on U.S. stock exchanges and exchanging American depository receipts to disclose in their regular SEC filings their extractive payments to governments for oil, gas, and mining.").

[5] *See* 156 Cong. Rec. S3817 (daily ed. May 17, 2010) (floor statement of Sen. Dodd regarding the Cardin-Lugar Amendment).

[6] The EITI, through a multi-stakeholder group comprised of governments, private sector companies, investors, and civil society groups, promotes the public reporting of extractive industry revenues to states on a country-by-country basis through a rule-bound and structured process. It creates a forum for concerned stakeholders (globally and at the country level) to engage in a constructive dialogue that not only ensures the publication of revenue data but also provides a basis for more informed public debate on extractive revenue issues in countries where such debate has

hamstrung by a lack of consistency in their application and scope. For example, some countries' EITI reports publish data on revenues paid to the government by extractive companies in the aggregate, *i.e.*, as if those payments were made by a single entity, while other countries favor disaggregated reporting. The EITI also allows countries to set their own definitions of materiality for reporting purposes, and thus payments reported by one country may go unreported by another. These types of inconsistencies lend opacity to the disclosures that make them difficult to understand and to compare across issuers and countries.[7] We understand that other countries are looking to the implementation of Section 1504 as a source of guidance in shaping their own resource extraction disclosure regimes.[8] For example, Global Witness has spoken with senior officials in the European Union and United Kingdom who have confirmed that they are considering undertaking similar regulations, but are waiting to review the final U.S. regulations before finalizing the parameters of their own programs.

In enacting Section 1504, Congress recognized that, as the global leader in financial reporting systems and regulations, the U.S. has a tremendous opportunity to foster the harmonization of these disclosures and to further the goals of global extractive industry transparency initiatives, such as the EITI, by implementing a consistent set of disclosure standards and applying those standards to all resource extraction issuers. Permitting entire classes of issuers to be exempt from any of the requirements of Section 1504, which unequivocally applies to all issuers "required to file an annual report with the Commission" and who engage in the commercial development of oil, natural gas, or minerals, would significantly undermine the purpose of the legislation.

For example, and in response to Question 1,[9] foreign private issuers account for a significant portion of the issuers who are, by Section 1504's terms, required to report under the

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often been lacking. The EITI disclosure requirements are determined by the host governments in consultation with the multi-stakeholder group. All disclosed payments are verified and reconciled by an independent third party.

[7] As noted by Calvert Asset Management Company and the Social Investment Forum, only five countries have been deemed fully EITI compliant and that EITI data is "of limited use in equity valuation because it is frequently dated, available at staggered and often delayed intervals, sometimes insufficiently disaggregated, inconsistent from one reporting country to another, and not consistently audited to international standards." Letter from Calvert Asset Management Company, Inc. and the Social Investment Forum to Meredith Cross, Director, Division of Corporate Finance, Securities and Exchange Commission 2-3 (Nov. 15, 2010).

[8] For example, French President Nicholas Sarkozy recently announced his intention to spearhead European Union legislation "to compel industries in the extractive sector to disclose their payments to all countries in which they operate." *See Sarkozy tells Bono will seek Africa transparency laws*, AGENCE FRANCE PRESSE, Jan. 30, 2011, *available at* http://www.google.com/hostednews/afp/article/ALeqM5gEObEK6IdnzjwGAlkA9Lt6P5cIDw?docId=CNG.7bdc5ae33cb6afa079d4a84588e766f7.251. This commitment was issued in response to a letter published by activist and rock star Bono in the French daily Le Monde that challenged President Sarkozy to follow the example set by the United States, which had "recently passed historic legislation" on extractive transparency, *i.e.*, Section 1504 of the Dodd-Frank Act. *See id*. More recently, the United Kingdom's finance minister, George Osborne, announced that his country would support the effort, as well. *See* Heather Stewart, *Britain backs "publish what you pay" rule for oil and mining firms in Africa*, THE OBSERVER, Feb. 20, 2011.

[9] For ease of reference, we address the issues raised by the Commission topically and not necessarily in the order of the questions as they appear in the proposing release.

statute. Out of the 1,101 issuers that the Commission's Paperwork Reduction Analysis estimates will be covered, 166 – over fifteen percent – are foreign private issuers.[10] Congress did not intend for the Commission to cut the effective implementation of the statute it passed into law by any amount, let alone by such a significant percentage.[11] We believe that exempting foreign private issuers would deprive investors, and the public, of vital information regarding the extent to which a considerable percentage of issuers intended to be covered by the statute are making payments otherwise covered by the statute. We have found nothing in the plain language of the statute or in the legislative history that provides a reasonable basis for excluding foreign private issuers, which fall squarely within the scope of Section 1504. In other words, exempting large categories of issuers deprives investors and the public of access to information necessary to assess the extent to which such issuers are exposed to reputational, regulatory, and expropriational risks as well as information necessary to hold governments accountable for the related revenue they take in, thereby subverting Congress's commitment to international transparency.

Likewise, and in response to Question 3, permitting foreign private issuers to follow their home country rules for disclosure would mean that the scope, nature, and quality of the disclosures would vary significantly from home country to home country. This lack of consistency would undermine both global transparency initiatives and investors' ability to adequately compare and assess risks. Indeed, in those instances where an issuer's home country required no disclosure, or wholly-inadequate disclosure, there would be no transparency at all.

In response to Questions 1 and 2, Global Witness notes that granting exemptions for smaller reporting companies would raise similar issues as those described above. Smaller reporting companies comprise a significant portion of the resource extractive issuers that are covered by the plain terms of the statute. Of the approximately 798 Form 10-Ks that we estimate were filed by issuers in the resource extractive industry in 2010 (although we cannot confirm that each of these issuers necessarily would be covered by Section 1504), 508 – over sixty percent – were filed by smaller reporting companies.[12]

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[10] Disclosure of Payments by Resource Extraction Issuers, Exchange Act Release No. 63,549, 75 Fed. Reg. 80,978, 80,994-95 (Dec. 23, 2010). This is compared with the 861 domestic issuers that the Commission estimates will be covered by the statute. *Id.*

[11] *See* Letter from Senator Levin to Elizabeth Murphy, Secretary, Securities and Exchange Commission 5 (Feb. 1, 201l) ("**No Issuer Exemptions** . . . Creating issuer exemptions that have no statutory foundation would undermine the law and interfere with its objective of creating a level playing field with meaningful disclosures that will enable investors and the public, for the first time, to understand what payments are being made by extractive industries to what governments.") (emphasis in original).

[12] We acknowledge that our search results do not identify the precise universe of issuers who would be covered by the statute and we recognize that our search results, 798, do not match up with the total number of Form 10-K filers that the Commission estimated would be covered under the statute, 861. For your information, our estimate was derived from a search of Securities Mosaic of the all the Form 10-Ks filed in 2010 by issuers classified as "smaller reporting companies" and under the following industries: Mining (except Oil and Gas), Oil and Gas Extraction, and Support Activities for Mining. While our results might not be exact, we think that the search demonstrates, for discussion purposes, the rough percentage of such issuers that would fall under a small reporting company exemption.

The significance of smaller reporting companies in the resource extractive industry is further borne out in data from organizations such as the Metals Economics Group, which found that mining companies with annual revenues of less than $50 million accounted for more than half of the worldwide mining exploration budgets from 2003-2008.[13] Moreover, smaller companies are generally exposed to greater risk from a single project than larger issuers. In our experience, due to the nature of their operations, these smaller issuers generally have lower management and oversight capacity. Especially in light of their relatively large numbers, smaller reporting companies can present a tremendous risk potential for investors and their inclusion is essential to effective and meaningful implementation of the statute.

While we are aware that implementing the systems necessary to make adequate disclosures will not be without cost, smaller reporting companies will, by dint of their smaller size, generally have fewer development projects in fewer parts of the world for which they must account than will larger issuers. Many will already have systems in place, and as noted by Publish What You Pay ("PWYP"),[14] the majority of the information required to be disclosed under Section 1504 is already collected by companies for internal record keeping and audit purposes.[15] Accordingly, making the disclosures required of them will not be unduly burdensome. More importantly, whatever marginal burden imposed will be significantly outweighed by the enormous benefit of providing the information to investors and to the public in a comprehensible and comparable format in furtherance of the fundamental policy goals which Congress sought to achieve in enacting the statute.[16]

Moreover, and in response to Question 72, Global Witness believes that the Commission should require an issuer that has a class of securities exempt from registration pursuant to Exchange Act Rule 12g3-2(b) to, at a minimum, provide the required payment information in its Annual Reports to Security Holders ("ARS")[17] or in English on its website if it does not

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[13] *See* METAL ECONOMICS GROUP, WORLD EXPLORATION TRENDS 4 (2010), http://www.metalseconomics.com/pdf/WET%202010%20(English).pdf.

[14] Publish What You Pay ("PWYP") is a network of over 600 civil society organizations from resource-rich developing countries and international non-governmental organizations working to ensure that oil, gas, and mining revenues are used for economic development and poverty reduction. Global Witness is a founding member of the PWYP coalition.

[15] Letter from PWYP to Meredith Cross, Director, Division of Corporation Finance, Securities and Exchange Commission 16 (Nov. 22, 2010).

[16] Question 5 asks whether asset-backed issuers should be permitted to omit the required disclosures in their annual reports on Form 10-K. Global Witness opposes the granting of such an exemption. Although we are not currently aware of this practice, it is possible that resource extraction issuers could seek to securitize their operations or the resources they control and make payments to governments through special purpose vehicles. The Congressional Record makes clear that Congress intended the statute to apply and to apply equally to all issuers. *See, e.g.*, 156 Cong. Rec. S3816 (daily ed. May 17, 2010) (floor statement of Sen. Lugar during Senate Debate on the Restoring American Financial Stability Act). The Commission's regulations, therefore, should not create exemptions where none are required and we see no justification to create a safe harbor that might serve to shield creative legal structures from compliance with the law.

[17] Global Witness notes that Senator Cardin specifically listed ARS as a form in which Congress expected to see the required payment disclosure to appear. *See* Letter from Senator Cardin to the Honorable Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission 1 (Dec. 1, 2010).

distribute an ARS. Doing so would, for example, extend the requirements of Section 1504 to companies that issue Level I Over-the-Counter American Depositary Receipts. While these exempt foreign private issuers are not currently required to provide annual reports to the Commission, we note that, but for the regulatory exemption promulgated by the Commission, they would be required to do so.[18] Furthermore, in order to maintain their exempt status, such issuers must publish in English on their websites all information that is "material to the investment decision."[19] We respectfully submit that the Commission should add the Section 1504 disclosures to the list of disclosures expressly required by Rule 12g3-2(b)(1)(iii). We further submit that, if the Commission remains silent on this point, there are meritorious arguments supported by the Congressional record that exempt issuers who do not publicly disclose Section 1504 payments have omitted information that is "material to the investment decision," and therefore have lost their exempt status. In order to reflect the significance which Congress attached to Section 1504 disclosures and to avoid any ambiguity that might negatively impact exempt foreign private issuers and their investors, we believe that the Commission should expressly direct these issuers to make the required disclosures.

In sum, clarifying that Section 1504 disclosures are intended to extend to foreign private issuers that rely on Rule 12g3-2 is necessary to effectively carry out Congress's intent to achieve the broadest possible coverage across the industry[20] and would go a long way towards levelling the playing field for all resource extractive issuers who avail themselves of the U.S. markets. Moreover, clarifying that Section 1504 applies to these companies would address the competitive disadvantage concerns raised by some industry commentators.[21]

b. The Commission Should Not Create Exceptions for Host Country or Contractual Prohibitions on Disclosure.

Question 55 of the proposing release asks whether the Commission should include an exception to the payment disclosure requirement if the laws of the host country prohibit the issuer from making such disclosure. In short, there is no demonstrated need and no sufficient justification for any such exception. As Senator Cardin's letter to Chairman Schapiro unequivocally states:

> The language of Sec. 1504 is very clear: there should be no exemptions for confidentiality or for host-country restrictions. It would be too easy for

[18] Exchange Act Rule 12g3-2(b)(2) provides in relevant part, "In order to maintain the exemption under paragraph (b) of this section, a foreign private issuer shall publish, on an ongoing basis and for each subsequent fiscal year, in English, on its Internet Web site or through an electronic information delivery system generally available to the public in its primary trading market, the information specified in paragraph (b)(1)(iii) of this section."

[19] Exchange Act Rule 12g3-2(b)(3)(i) ("The information required to be published electronically under paragraph (b) of this section is information that is material to an investment decision regarding the subject securities . . . .").

[20] *See* Letter from Senator Cardin to the Honorable Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission 1 (Dec. 1, 2010).

[21] *See, e.g.*, Letter from the American Petroleum Institute to Elizabeth Murphy, Secretary, U.S. Securities and Exchange Commission 34 (Jan. 28, 2011) ("Requiring all registrants with securities exempt from registration pursuant to Exchange Act Rule 12g3-2(b) to comply with Section 13(q)'s disclosure requirements would help ameliorate competitive disadvantage concerns.").

> countries who want to avoid disclosures to simply pass their own law against disclosure. The purpose of Sec. 1504 is to not allow for exemptions for confidentiality or other reasons that undermine the principle of transparency and full disclosure.[22]

Accordingly, we believe that arguments in favor of a host country confidentiality exception are without merit. Similarly, with respect to confidentially clauses in resource extractive contracts, a study of over 140 resource-extraction investment contracts found that the majority of these contracts contained an explicit exception for "information that must be disclosed by law" and, where such language is not explicit, that the provision generally would be "read into" any such contract under judicial or arbitral review.[23]

Nonetheless, industry commentators have advanced a number of arguments in an effort to create regulatory loopholes not contemplated by Congress. We address these in turn:

i. Industry arguments based on foreign law and practice are unpersuasive.

We are aware that some industry commentators have argued that not allowing issuers to avoid disclosure in the case of host country restrictions would force issuers to choose between violating U.S. law or the laws of the host country.[24] Prior to the promulgation of the proposed regulations, these commentators had failed to identify any country that maintains such laws. Now, commentators assert that they are aware of four countries – Cameroon, China, Qatar, and Angola – that maintain such laws, but fail to provide any supporting documentation or citation to any such provision.[25]

The validity of these assertions with respect to at least two of these countries is questionable. While the reliability of the data published by Angola has been called into question, Angola has nonetheless previously and unilaterally disclosed information similar to that called for by Section 1504.[26] In addition, we understand that Angolan law implies a general principle of allowing opt-outs from confidentiality clauses for legal compliance purposes and some contracts specifically provide an opt-out for companies to comply with home-country securities regulation. For example, the latest generation of Angolan Production Sharing Agreements ("PSAs") allow for opt-outs from confidentiality for compliance with companies' home-country

[22] Letter from Senator Cardin to the Honorable Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission 1 (Dec. 1, 2010).

[23] PETER ROSENBLUM & SUSAN MAPLES, CONTRACTS CONFIDENTIAL: ENDING SECRET DEALS IN THE EXTRACTIVE INDUSTRIES (2009), 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."

[24] *See, e.g.*, Letter from Cravath, Swaine, & Moore LLP, *et al.* to Meredith Cross, Securities and Exchange Commission 2 (Nov. 5, 2010).

[25] *See* Letter from the American Petroleum Institute to Elizabeth Murphy, Secretary, U.S. Securities and Exchange Commission 25 (Jan. 28, 2011).

[26] *See* GLOBAL WITNESS, OIL REVENUES IN ANGOLA: MUCH MORE INFORMATION BUT NOT ENOUGH TRANSPARENCY (Dec. 2010), http://www.globalwitness.org/sites/default/files/library/Oil%20Revenues%20in%20Angola_1.pdf.

securities regulations. The PSAs 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)."[27] We note also that companies have succeeded in operating transparently in Angola.[28] For instance, Statoil regularly reports payments made to the Angolan government.[29] It is hard to imagine the Angolan government penalizing a foreign company for disclosing information to meet a home-country regulatory requirement, when some Angolan contracts allow such disclosure and when the government itself already publishes roughly equivalent information.

The validity of these claims with respect to Cameroon also is suspect. Cameroon is a relatively small oil producer by global standards (less than approximately 85,000 barrels per day[30]) and thus holding it out as a source of potential hardship to resource extraction issuers seems specious. In addition, Cameroon is an EITI Candidate country. As such, Cameroon has demonstrated its commitment to transparency through the EITI and, in our view, cannot be relied on as an example of a country that would necessarily resist Section 1504's disclosure requirements.

While we are not familiar with the laws and practices of the two remaining countries, China and Qatar, we believe the Commission should be hesitant to rely on the industry's unsupported assertions with regard to foreign laws, especially given the facts noted above. Moreover, as stated above, irrespective of the laws of any other country, the law of the United States under Section 1504 is clear – no exceptions should be crafted for host country or contractual prohibitions on disclosure.

ii. Arguments that Instruction E to Form 10-K should be used to allow issuers to omit the required disclosures are nothing more than an attempted end-run around a clear statutory mandate.

We understand that some commentators have argued that Instruction E to Form 10-K would permit issuers to omit Section 1504 information with respect to a foreign subsidiary if the disclosure of such information would be detrimental to the registrant.[31] We disagree and

[27] Template Document, Production Sharing Agreement Among Sociedade Nacional De Combustíveis De Angola-Empresa Pública (Sonangol, E.P.) and __ at 50, http://www.sonangol.co.ao/wps/wcm/connect/790e270047e2f8a19ec4dfd5ee7fe2c3/bid07_cpp_KON11_KON12_cabindaCentro_en.pdf?MOD=AJPERES&CACHEID=790e270047e2f8a19ec4dfd5ee7fe2c3.

[28] PETER ROSENBLUM & SUSAN MAPLES, CONTRACTS CONFIDENTIAL: ENDING SECRET DEALS IN THE EXTRACTIVE INDUSTRIES 30 (2009), http://www.revenuewatch.org/news/publications/contracts-confidential-ending-secret-deals-extractive-industries.

[29] *Id*.

[30] *See* MINISTRY OF FINANCE, REPUBLIC OF CAMEROON, FOLLOW-UP AND IMPLEMENTATION COMMITTEE OF THE EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE (EITI) IN CAMEROON 19 (July 2010), http://eiti.org/files/Raport_CMR_06_07_08_July_2010_EN.pdf. This estimate was derived by dividing the average yearly production figures by 365 days per year.

[31] *See, e.g.*, Letter from Exxon Mobil Corporation to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission 27 (Jan. 31, 2011).

respectfully urge the Commission to clarify that Instruction E is not available for Section 1504 information, just like Instruction E is not available for financial statements or financial statement schedules. Permitting Instruction E to serve as a loophole here would risk creating an exception that swallows the rule.

As set forth in detail above, the plain language of the statute and the plain words of the Congressional leaders who helped craft the legislation cannot be read to tolerate exceptions, let alone expansive carve-outs that would subvert the very purpose of the statute. The legislation is aimed directly at resource extraction payments made to governments around the world. The fact that some of these disclosures might be difficult or uncomfortable for some foreign subsidiaries is not an unintended consequence; it is the very result Congress deemed necessary to promote real and meaningful transparency on an international level. Proponents of the use of Instruction E note that the Commission may, in its discretion, ask for a justification that the required disclosure would be detrimental to the registrant, essentially attempting to delay disclosure and any decision as to relative merits of this argument for another day. We submit that this is neither an appropriate matter for the Commission to attempt to mete out on a case-by-case basis outside of public view nor a productive use of the Commission's valuable resources.

For the foregoing reasons, the Commission should expressly state that Instruction E to Form 10-K may not be relied on to avoid disclosures required under Section 1504.

iii. Analogies to other statutes are inapposite.

The legal arguments advanced by the proponents of the exception are overstated. For example, some commentators have attempted to analogize Section 1504 to the Foreign Corrupt Practices Act ("FCPA").[32] These commentators have argued that, because the FCPA creates an affirmative defense to its anti-bribery provisions where the alleged bribe was "lawful under the written laws and regulations of the foreign official's . . . country,"[33] the Commission should craft a disclosure exemption under Section 1504 where disclosure would conflict with the laws of the host country. This analogy is misplaced. First, the affirmative defense under the FCPA is statutory and was explicitly written into the law by Congress. Section 1504 contains no such exemption, and there is absolutely no reason to believe that Congress intended one to be divined from the text of the statute. Second, the conflict of law defense under the FCPA is an affirmative defense to liability, not an exemption from disclosure.[34] Issuers are still required to adequately maintain their books and records and to provide any required disclosures without regard to host country laws.[35]

iv. Exemptions in this area would create perverse incentives for issuers and host countries.

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[32] 15 U.S.C. §§ 78dd-1, *et seq*.

[33] 15 U.S.C. § 78dd-1(c).

[34] *Id*. ("*Affirmative defenses* – It shall be an *affirmative defense* to actions under subsection (a) or (g) of this section that…the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country….") (emphasis added).

[35] *See*, *e.g.*, 15 U.S.C. § 78m(b).

In addition to being contrary to legislative intent, creating an exemption for host country prohibitions or contractual confidentiality provisions would create a perverse incentive for certain governments and issuers to enact such prohibitions or for issuers to craft such contractual provisions. This is further compounded by the reality that the countries and issuers most likely to undertake such efforts would be those most prone towards corruption and instability.[36]

c. The Commission Should Not Create Exemptions for "Commercially Sensitive" Information.

In response to Question 60, Global Witness believes that it would be inappropriate to provide an exception for commercially or competitively sensitive information. It would be all too easy for issuers to avoid the mandated disclosure by claiming that the payment information was "commercially sensitive" and there would be no avenues available to verify these claims. Further, it is hard to imagine any compelling argument to support the notion that the payment information qualifies as "commercially sensitive" and that the disclosure of such information would cause undue harm. The same study of over 140 resource extractive contracts referenced above found that the majority of disclosures that would be required pursuant to those contracts under Section 1504 would already be known to actors within the industry, or would be of such minimal competitive value that they would be unlikely to cause substantial harm to an issuer's competitive position.[37]

II. The Commission Should Require Section 1504 Disclosures to be Filed with the Commission.

In response to Questions 87-89, Global Witness offers the following comments:

Global Witness opposes the Commission's proposal to stipulate that the resource extraction payment disclosure will be deemed to have been "furnished," and not "filed," with the Commission.

First, such a distinction is contrary to a plain reading of the statute. As constructed, the statute first identifies certain issuers who "file" annual reports with the Commission as "resource extraction issuers"[38] and then details the disclosures those issuers must make in their annual reports.[39] It necessarily follows that, after narrowing the scope of the statute to apply only to issuers who "file" annual reports, all subsequent references to "annual report" were intended to

[36] Question 55 also asks whether, if the Commission permits an exemption in the case of a host country prohibition on disclosure, issuers should be required to disclose the relevant project and country and to articulate why the payment information has not been disclosed. As discussed above, Global Witness strongly opposes any such exemption and believes that risks of a host country prohibition on disclosure can be properly managed on a case-by-case basis. However, if the Commission determines to grant one, Global Witness agrees that issuers should be required to disclose the relevant project and country and to articulate why the payment information has not been disclosed.

[37] PETER ROSENBLUM & SUSAN MAPLES, CONTRACTS CONFIDENTIAL: ENDING SECRET DEALS IN THE EXTRACTIVE INDUSTRIES 36-40 (2009), http://www.revenuewatch.org/news/publications/contracts-confidential-ending-secret-deals-extractive-industries.

[38] 15 U.S.C. § 78m(q)(1)(D).

[39] 15 U.S.C. § 78m(q)(2)(A).

refer back to the issuer's filed annual report – whether it be on Form 10-K, Form 20-F, or Form 40-F. When Congress uses the same term in multiple places in the same statute, it is generally presumed that Congress intended for the same meaning to apply.[40] In other words, the disclosure requirement is triggered by an issuer's status as an annual report filer and, unless there is express language in the statute directing that the disclosures are to be made in some other form, the only reasonable interpretation of the language is that Congress intended the disclosures to be made in the "filed" annual report.[41] To conclude that the required information does not have to be "filed" in the annual report, but rather "furnished" – a term that appears nowhere in the text of the statute – is inconsistent with the plain language of the statute.

Second, permitting issuers to "furnish" rather than "file" the required disclosures would severely undermine the significance which Congress intended to attach to the disclosures both from a global, policy-based perspective and from an investor protection perspective. Section 13(q)(2)(E) of the Exchange Act expressly states that "the rules issued under subparagraph (A) shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals."[42] Allowing these disclosures to be "furnished" rather than "filed" would send a regrettable signal that the Commission believes these disclosures to be of lesser importance at the very moment that issuers, foreign regulators, investors, and governments around the world are looking to the Commission to help establish a new paradigm for payment reporting. Clearly, Congress believes these disclosures are crucial to the promotion of international transparency and significant to investors. To that end, Congress directed the Commission to support the Federal Government's commitment to the importance of the disclosure of this information on an international level, not to diminish it.

One consequence of diminishing the status of the required information from "filed" to "furnished" would be to undermine the investor protection objectives of the legislation. In this regard, we respectfully disagree with the Commission's assessment that the "nature and purpose of the disclosure required by Section 13(q) is qualitatively different from the nature and purpose of existing disclosure that has historically been required under Section 13 of the Exchange Act."[43] To the contrary, by enacting Section 1504 under Section 13 of the Exchange Act, Congress sent a clear message that the resource extraction payment disclosures contain material information necessary for investors to make fully informed investment decisions. As noted by Senator Cardin:

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[40] *See United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U. S. 427, 433 (1932)); *Ratzlaf v. United States*, 510 U.S. 135 (1994).

[41] We are aware that some commentators have pointed out that an earlier version of the statute – which was not enacted into law – required the information to be included in "the" annual report of the issuer, but was later changed to "an" annual report. *See, e.g.* Letter from the National Mining Association 5 (Nov. 16, 2010). These commentators place inordinate weight on the usage of a definite or indefinite article to modify an undefined term. This distinction is without meaning in the context of a statute that expressly requires specific disclosures by issuers who "file" annual reports with the Commission.

[42] 15 U.S.C. § 78m(q)(2)(E).

[43] Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. at 80,992.

> Investors need to be able to assess the risks of their investments. Investors need to know where, in what amount, and on what terms their money is being spent in what are often very high-risk operating environments. These environments are often poor developing countries that may be politically unstable, have lots of corruption, and have a history of civil unrest. The investor has a right to know about the payments. Secrecy of payments carries real bottom-line risks for investors.[44]

To be sure, Section 1504 was also enacted to further the goals of global extractive industry transparency initiatives, which Global Witness strongly supports.[45] However, the fact that Congress felt that there needed to be greater transparency for an audience in addition to investors does not make the disclosures any less important to investors.[46]

Another consequence of diminishing the status of the required information from "filed" to "furnished" would be to deprive investors of certain causes of action normally available to seek redress for misstatements in filed annual reports. We are not advocates for private plaintiffs in this context, but we understand that the availability of private rights of action in this instance would serve two functions: (1) to permit investors to seek remedies for misstatements regarding an issuer's resource extraction payments to governments, and (2) to incentivize issuers (and auditors and underwriters) to conduct an appropriate level of diligence prior to the publication of such disclosures. Given the context, why does the Commission believe that these are unnecessary and unwanted results?

Specifically, the Commission's proposal to diminish the required disclosures to "furnished" status coupled with the proposed proviso that the required disclosures will not be incorporated by reference into an issuer's Securities Act filings, absent a specific statement to the contrary, will have a deleterious effect on the accuracy and fulsomeness of the required disclosures.[47] In essence, the Commission would be removing potential liability under Sections

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[44] 156 Cong. Rec. S3316 (daily ed. May 6, 2010) (statement of Sen. Cardin). For example, in Nigeria, a long history of corruption and lack of government accountability to the public in the management of oil revenues has contributed to a violent insurgency in the Niger Delta region. This insurgency has not only had enormous humanitarian implications for the local population but has also caused significant damage to the bottom line of international oil companies operating in the region. In July 2009, a senior executive of Royal Dutch/Shell in Nigeria stated the company was producing at "less than 30 percent" of its capacity due to rebel attacks, and that the Nigerian government itself had lost $47 billion in revenues, which would have been paid had production not been so drastically affected by the conflict. *Rebel oil attacks cost Nigeria billions: Shell*, AGENCE FRANCE PRESSE, July 28, 2009.

[45] 15 U.S.C.§ 78m(q)(2)(E) reads, "INTERNATIONAL TRANSPARENCY EFFORTS.—To the extent practicable, the rules issued under subparagraph (A) shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals."

[46] *See* Letter from Senator Cardin to the Honorable Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission 1 (Dec. 1, 2010) ("The purpose of Sec. 1504 is to bring greater transparency to extractive-related payments made to governments by resource extraction issuers required to report to the SEC. This transparency will provide information important to investors as well as provide information important to citizens seeking to hold their government accountable for extractive revenues.").

[47] Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. at 80,992-93.

11 and 12(a)(2) of the Securities Act[48] and Section 18 of the Exchange Act[49] where an issuer publishes materially false or misleading information regarding its resource extraction payments. The standards of liability under Sections 11 and 12(a)(2) of the Securities Act, and their attendant due diligence defenses, strongly incentivize issuers, auditors, and underwriters to ensure that appropriate diligence is conducted with respect to any such disclosure when engaged in a public offering.[50] Removing the possibility that the required disclosures could be subject to liability under the Securities Act would disincentivize much-needed diligence in this important area and reduce the consequences for failing to comply with the law. Moreover, removing the potential for Section 18 liability would even further restrict the avenues of redress available to investors when issuers fail to comply with Section 1504's disclosure requirements. Although a private right of action would still be available under Section 10(b) of the Exchange Act, plaintiffs would be required to plead and prove scienter, a significant hurdle for many private plaintiffs to overcome. To be clear, we are not advocating that issuers be subject to heightened liability with respect to resource extraction payment disclosures. We are merely stating that such disclosures should be treated just like any other disclosures filed in an annual report and incorporated by reference into other Securities Act filings.[51]

Question 89 asks, among other things, whether the Commission should require the resource extraction payment disclosure to be filed for the purposes of Section 18 of the Exchange Act, but nonetheless permit an issuer to elect not to incorporate the disclosure into Securities Act filings. As discussed above, Global Witness believes that the required disclosures should be "filed" for the purposes of Section 18 of the Exchange Act and that issuers should not be

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[48] 15 U.S.C. § 77k; 15 U.S.C. § 77l(a)(2).

[49] 15 U.S.C. § 78r.

[50] Under Section 11, any defendant, excepting the issuer, shall not be liable for any portion of a registration not made upon the authority of any expert or made upon his authority as expert, if he can sustain the burden of proof that "after reasonable investigation, he had reasonable ground to believe and did believe, at the time . . . the registration statement became effective, that the statements . . . were true and that there was no omission to state a material fact . . . ." For any portion of an registration statement made upon the authority of an expert (other than himself) or a public official, any defendant, excepting the issuer, shall not be liable if he can sustain the burden of proof that "he had no reasonable ground to believe and did not believe, at the time . . . the registration statement became effective, that the statements . . . were untrue or that there was an omission to state a material fact . . ., or that . . . the registration statement did not fairly represent the statement" of the expert or public official. 15 U.S.C. § 77k(b)(3). Similarly, under Section 12(a)(2), a defendant is not liable if he can "sustain the burden of proof that he did not know, and in the exercise of reasonable care should not have known, of such untruth or omission." 15 U.S.C. § 77l(a)(2).

[51] The Commission's proposal not to require the payment information to be audited or provided on an accrual basis should in no way be bootstrapped into an argument that the payment disclosures should not be "filed" with the Commission. *See, e.g.* Letter from the National Mining Association 5-7 (Nov. 16, 2010). Indeed, an issuer's Form 10-K, 20-F, or 40-F contains a bevy of information that is nonetheless "filed" with the Commission. In this same vein, we are also aware that some commentators have argued that due to the ''tight annual reporting deadline,'' the payment disclosure should be kept separate from annual reporting on Form 10-K, 20-F, and 40-F. *See id*. We agree with the Commission's assessment that it "could be less burdensome for resource extraction issuers, as well as more useful to investors, to provide the disclosure in a form that issuers are already required to file rather than requiring them to furnish a separate report." Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. at 80,989 n.111.

permitted to elect not to incorporate these particular disclosures into their Securities Act filings. At a bare minimum, however, the disclosures should be "filed" for purposes of Section 18 of the Exchange Act.

III. The Commission Should Articulate a Narrowly-Tailored Definition of the Term "Project."

In response to Questions 39, 40-41, 44, and 47-48, Global Witness offers the following comments:

a. Section 1504 Requires Project-Level Disclosures by Issuers.

Section 1504 unambiguously requires disclosure of payment information at the project-level and the Commission should not promulgate a regulatory definition which would allow resource extraction issuers to aggregate this information at the country or entity level. Section 1504 instructs the Commission to issue rules requiring each resource extraction issuer to report "information relating to any payment made by the resource extraction issuer," including information on "(i) the type and total amount of such payments made for each *project* of the resource extraction issuer relating to the commercial development of oil, natural gas or minerals; and (ii) the type and total amount of such payments made to *each* government."[52] Clearly, Congress intended to require both project-level as well as country-level reporting.

While the EITI does not require project-level disclosures, it is apparent that Congress intended for the disclosures made pursuant to Section 1504 to be significantly more fulsome than the EITI requirements. As Senator Cardin wrote, "[r]eporting under Sec. 1504 is designed to complement reporting done under the [EITI], but does not mimic it, and purposefully requires reporting at the project level, disaggregated by payment stream."[53] The country-level disclosure required by the EITI, while an important step forward, leaves open the opportunity for issuers, governments, and government officials to mask the true nature of the payments that they make or that are made to them, respectively. In certain countries such as Nigeria, for example, issuers engage in resource extraction in a number of different geographical regions, some of which are epicenters of conflict and some of which are not. If these issuers are permitted to report the payments they make at a country-level, it will be impossible to tell whether or not these payments were made in connection with projects in a conflict zone or for projects in a more peaceful region. Without project-level disclosure, investors and other users of the disclosures will be unable to adequately analyze the nature and legitimacy of the payments. Section 1504 was enacted to provide exactly this sort of information.

Moreover, allowing aggregate entity-level reporting would make it impossible for investors to discern the full range and scope of an issuer's activities in a country. As noted by Senator Levin,

> [i]t is critical for investors to understand the extent of a company's exposure when operating in countries where the company may be subject to expropriation, political or social turmoil, pressure from corrupt officials,

[52] 15 U.S.C. § 78m(q)(2)(A) (emphasis added).

[53] Letter from Senator Cardin to the Honorable Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission 2 (Dec. 1, 2010).

> or reputational risks. Increased transparency with respect to the payments made by such companies to government officials, by country and by project, will provide critical financial information, deepen investor understanding, promote competition, and encourage analysis of country-specific, regional, and sector-wide activities.[54]

Issuers can and do engage in a multitude of activities in a host country and investors need to know which of these activities pose the greatest risks. Large payments to governments for a particular project indicate that the success of that project, at least in part, relies on the stability and reliability of the relevant government. Thus, if the project is important in terms of the overall financial health and stability of an issuer, an overly broad definition of "project," such that investors cannot determine which payments are being made for which projects, can mask the full extent of the risks posed by a potentially unstable or otherwise unreliable government. Project-level reporting is likewise critical in enabling citizens to hold their governments accountable. Project-level reporting allows citizens to more accurately assess current and future production of oil, gas, and mining activities. This, in turn, allows citizens to determine the sustainability of revenue payments from natural resources and hold their governments accountable for how the government allows its country's precious natural resources to be used.

Global Witness is aware that some industry commentators have sought to argue that meaningful project-level disclosure could result in terrorists or insurgents using the information in choosing their targets. These arguments largely amount to fear-mongering and are vastly overstated. In truth, it is the veil of secrecy surrounding the flow of money paid in connection with the commercial development of natural resources that contributes to the environments in which terrorists and insurgents are able to thrive.

Global Witness is also aware that some industry commentators argue that the statute does not call for public disclosure of the payment information at the project-level and that the only public disclosure required is the "compilation" described in Section (3) of the statute.[55] These commentators further argue that this compilation should contain only the payment information at the country-level, aggregated across issuers. This interpretation of Section 1504 is squarely at odds with the plain language of the statute, Congressional intent underlying the statute, and the Commission's own preliminary interpretation of the statute. Achieving meaningful disclosure, and thereby increasing accountability, lies at the heart of Section 1504 and this fanciful "compilation" interpretation would eviscerate any hope of achieving either objective.

Section 1504 plainly requires not only the publication of a "compilation" of the required disclosures by the Commission but also the inclusion of the required disclosures in a covered issuer's publicly available annual report. Section 13(q)(2) is captioned "DISCLOSURE" and directs the Commission to promulgate rules requiring resource extraction issuers to "include in an annual report" of the resource extraction issuer information relating to payments made to governments in connection with resource extractive activities. As used throughout the statute, "annual report" consistently refers to annual disclosures made by issuers to the public. Any

[54] Letter from Senator Levin to Elizabeth Murphy, Secretary, Securities and Exchange Commission 1 (Feb. 1, 2011).

[55] *See, e.g.*, Letter from the American Petroleum Institute to Elizabeth Murphy, Secretary, U.S. Securities and Exchange Commission 38-41 (Jan. 28, 2011).

assertion that, for this narrow point, Congress intended the term "annual report" to mean some type of annual submission for the Commission's eyes only is implausible.

The legislative history of Section 1504 is replete with references to the investor protection and transparency goals of Section 1504. The formulation proposed by certain industry commentators would completely and utterly frustrate these goals. Indeed, it is difficult to see what useful information anyone, let alone investors, could hope to glean from a mere compilation of all payments made by all resource extraction issuers to governments. Contrary to the assertions of these industry commentators, such a disclosure regime would not compliment the EITI, but would fall far short of even the EITI's disclosure standards, which require, at a bare minimum, reporting by both the issuer making the payments and the country to whom the payments are made.

b. "Project" Should be Defined in Relation to the Lease, License, or Other Concession-Level Arrangement.

Global Witness supports the recommendation made by Calvert Asset Management Company ("Calvert") and the Social Investment Forum ("SIF") in their November 15, 2010 letter to the Commission that the term "project" be defined as "any oil, natural gas or mineral exploration, development, production, transport, refining, or marketing activity from which payments above the de minimis threshold . . . originate at the lease or license level, except where these payments originate from the entity level."[56] As discussed above, project-level reporting is essential to providing a comprehensive understanding of the full range of an issuer's activities in a region, and lease/license level reporting would ensure consistent and equal implementation of the statute. [57]

Global Witness also supports the recommendation of Calvert and SIF with respect to the relatively limited instances in which resource extraction issuers make payments to governments at the entity level, *e.g.*, the payment of corporate income taxes calculated on the basis of all projects in a given jurisdiction. In those instances, and consistent with the recommendation of Calvert and SIF, a limited reporting allowance permitting issuers to report only those specific types of payments at the entity level should be allowed, but should have no bearing on the definition of the term "project."

Our proposed definition of the term "project" will foster consistency in the disclosures that is crucial to a level playing field for resource extraction issuers. This is demonstrated by the tremendous diversity of operations that resource extraction issuers undertake within a country. If, for example, the Commission were to determine that issuers could aggregate multiple phases or elements of an operation into a single disclosure, the data reported by an issuer who engages in a wide array of commercial development projects in a given area would not be comparable to one who engages in only one type of activity. Investors need comparable disclosures in order to perform meaningful appraisals when making their investment decisions. Support for a

[56] Letter from Calvert Asset Management Company, Inc. and the Social Investment Forum to Meredith Cross, Director, Division of Corporate Finance, Securities and Exchange Commission 5 (Nov. 15, 2010).

[57] In the event that the Commission permits an issuer to define "project" as it used in the ordinary course of its business, the principles of transparency inherent in Section 1504 compels the conclusion that, at a bare minimum, an issuer should be required to disclose the basis and methodology it used in reaching its definition.

lease/license definition of "project" can be found in Angola, which reports payments made to it by resource extraction companies on a block-by-block and company-by-company basis.[58] This reporting can be found in the annual "accounts of petroleum sector activities" which are published annually by the Angolan Ministry of Petroleum.[59]

In response to Question 47, we are aware that some industry commentators have advocated for a definition of project that contemplates only "material" projects.[60] As a preliminary matter, such a delimiter is plainly at odds with the plain language of the statute, which makes no mention of the term "material" in relation to the term "project." Applying a materiality standard would result in unequal treatment of issuers and would impose a degree of relativity not contemplated by the statute. A project that is material to a smaller issuer might not be material to a larger issuer. A materiality standard would also breed inconsistency in the disclosures, as varying issuers – even those of the same size – would undoubtedly have varying interpretations and internal standards for materiality.

IV. The Commission Should Address the "Other Material Benefits" that Would Trigger Disclosure.

In response to Questions 12-15 and 20-25, Global Witness believes that the Commission should use its authority under Section 1504 to articulate the specific categories of "other material benefits" that are "part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals."[61]

Section 1504 specifies that the "other material benefits" that the Commission determines will trigger disclosure should be "consistent with the guidelines of the [EITI]." Under the EITI guidelines, "benefit streams are defined as being any source of economic benefit which a host government receives from an extractive industry."[62] While these benefit streams are not "*assumed*" to include indirect economic benefits, EITI guidance also makes clear that "all material benefit streams must be reported."[63] The EITI permits countries to select their own criteria for determining which benefit streams to report, and provides a non-exhaustive list of categories of payments that countries may wish to require to be disclosed.[64] It would be

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[58] *See* GLOBAL WITNESS, OIL REVENUES IN ANGOLA: MUCH MORE INFORMATION BUT NOT ENOUGH TRANSPARENCY (Dec. 2010), http://www.globalwitness.org/sites/default/files/library/Oil%20Revenues%20in%20Angola_1.pdf.

[59] *See, e.g.*, MINISTÉRIO DOS PETROLEOS, RELATÓRIO DE ACTIVIDADES DO SECTOR PETROLÍFERO DE 2009 (Aug. 2010), http://www.minpet.gov.ao/PublicacoesD.aspx?Codigo=610.

[60] *See* Letter from the American Petroleum Institute to Division of Corporation Finance, Securities and Exchange Commission 8-9 (Oct. 12, 2010); Letter from Cravath, Swaine, & Moore LLP, *et al.* to Meredith Cross, Securities and Exchange Commission 4-5 (Nov. 5, 2010); Letter from Royal Dutch Shell plc to Meredith Cross, Director, Division of Corporation Finance, Securities and Exchange Commission 3-4 (Oct. 25, 2010).

[61] 15 U.S.C. § 78m(q)(1)(C)(ii).

[62] EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, SOURCE BOOK ("EITI Source Book") 26 (Mar. 2005), http://eiti.org/files/document/sourcebookmarch05.pdf.

[63] *Id*.

[64] *Id*. at 26-27.

impracticable, however, for the Commission to devise separate lists of material benefit streams for each and every country. Therefore, the definition and scope of "other material benefits" requiring disclosure under Section 1504 must be suitably broad to cover potentially significant benefit streams for any country. In this regard, the EITI's non-exhaustive list of benefit streams serves as useful starting place, but must be enhanced to serve the purpose of the statute. Otherwise, certain categories of payments which are considered to be significant in certain countries (and would thus trigger disclosure under the EITI guidelines) will not be covered under the regulations. By specifically referencing EITI guidelines, Congress made clear that it did not intend such a result.

Global Witness believes that there are several material benefit streams that are part of the commonly recognized revenue stream that should be included in the categories of payments that would trigger disclosure under Section 1504. In particular, Global Witness believes that "social payments" made pursuant to a resource extractive contract should be included. Resource extraction issuers frequently make these types of payments in connection with their extractive contracts with governments, and they are therefore part of the "commonly recognized revenue stream."[65] Indeed, the EITI is considering explicitly including social payments in its guidance.[66]

In addition, Global Witness believes the following categories of payments are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals and should be included:

- *Payments related to transport operations, including pipeline transit fees, customs duties and customs user fees, and payments related to pipeline and terminal operations*. Support for the view that these types of payments are part of the commonly recognized revenue stream is found in countries such as Nigeria, which require disclosure of these types of payments under their own EITI programs.[67] Similarly, the World Bank's International Finance Corporation ("IFC") has required disclosure of these types of payments in connection with the Peru LNG Project and the Baku-Tbilisi-Ceyhan ("BTC") Pipeline.[68] The IFC expects the Peru LNG Project "will generate significant tax and incremental royalty payments to the government, equivalent to over 1.5 percent of current state revenues."[69] The BTC Pipeline, which travels through Azerbaijan, Georgia,

[65] *See, e.g., A stitch in time: How companies manage risks to their reputation*, THE ECONOMIST, Jan. 17, 2008; Glen Kelley, Note, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 506 (2001).

[66] *See* Letter from PWYP to Meredith Cross, Director, Division of Corporation Finance, Securities and Exchange Commission 13 n.39 (Nov. 22, 2010).

[67] *See* NIGERIA EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, AUDIT OF THE PERIOD 1999-2004, http://www.neiti.org.ng/files-pdf/PopularVersionof1stAudit.pdf.

[68] *See* Letter from PWYP to Meredith Cross, Director, Division of Corporation Finance, Securities and Exchange Commission 8-9 nn.18-19 (Nov. 22, 2010).

[69] *See* INTERNATIONAL FINANCE CORP., PERU LNG PROJECT, http://www.ifc.org/ifcext/plng.nsf.

and Turkey, is expected to generate $1.5 billion in payments to Turkey and $500 million in payments to Georgia.[70]

- *Ancillary payments made pursuant to the extraction contract (including personnel training programs, local content, technology transfer, and local supply requirements).* As discussed in PWYP's February 25, 2011 letter, payments of this type can be significant.[71] In Ghana, for example, under the terms of an agreement between Kosmos Energy and the state-owned Ghana National Petroleum Company, Kosmos must make payments for personnel and management training and skill transfer programs. These payments can be in excess of $100,000 individually.[72]

- *Dividends*. EITI guidance clearly contemplates "dividends paid to the host government as a shareholder of the national state-owned company in respect of shares and any profit distributions in respect of any form of capital other than debt or loan capital" as a material benefit stream.[73] Given that the statute clearly directs the Commission to define "other material benefits" consistently with EITI guidance, we see no basis for excluding this category.

- *Payments made for infrastructure improvements.* While this category of payments is not specifically listed in the statute, excluding it would be contrary to the spirit of the statute. Natural resources are frequently located in remote or undeveloped areas, and many companies, especially mining companies,[74] make infrastructure-related payments. We understand that these payments are viewed generally as part of the cost of doing business in those areas. In many developing countries, particularly in Africa and specifically in countries emerging from civil war, transport infrastructure is frequently non-existent and financing to improve that infrastructure is often crucial for the export of natural resources once developed. In Guinea, for example, one of the world's largest Iron Ore deposits at Simandou[75] is landlocked and unconnected to the deep-water port in the West of the country at Matakan, because there is no railway.[76] This means that the commitment to reconstruct the railway, known as the Trans Guinean, has been a crucial element of all

[70] *See* Letter from PWYP to Meredith Cross, Director, Division of Corporation Finance, Securities and Exchange Commission 9 n.19 (Nov. 22, 2010).

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

[72] *See id.* at 12 n.36 and accompanying text.

[73] EITI Source Book at 27-28.

[74] Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. at 80,983-84 n.63.

[75] David Gauthier-Villars, *Simandou iron ore on new President's agenda*, WALL ST. J., Jan. 27, 2011, *available at* http://www.theaustralian.com.au/business/news/simandou-iron-ore-on-new-presidents-agenda/story-e6frg90x-1225995414502.

[76] Saliou Samb, *Foreign Firms Scramble for Iron, Bauxite*, INTER PRESS SERVICE NEWS AGENCY, Nov. 8, 2004, *available at* http://ipsnews.net/africa/interna.asp?idnews=26194.

negotiations over rights to the Simandou deposits.[77] Bellzone Mining was awarded the right to develop its deposits in the west of the country based on a commitment to invest $2.7 billion dollars in improving the infrastructure, specifically the railway and a port.[78]

- *Value-added tax payments and offsetting value-added tax credits.* While we acknowledge that these types of payments are "indirect" benefits, many country-specific EITI programs require reporting of value-added tax payments.[79]

- *Payments of taxes in lieu*. As discussed in PWYP's February 25, 2011 letter,[80] instances in which a national oil company joint venture partner pays taxes "for and on behalf of" the issuer and then provides the issuer a receipt that can be credited against home-country tax filing should be should be disclosed by the issuer, even if the issuer did not make the payments.[81]

- *Payments related to any liabilities incurred in connection with a resource extraction contract.* For example, payments made after the completion of a project, including penalties due to a failure to obtain required licenses, penalties for violations of laws or regulations, environmental and remediation liabilities, and bond guaranties entered with the central bank, as well as subsequent foreclosure on the same should be included. The recent British Petroleum disaster in the Gulf of Mexico provides a recent example of such potential payments.

In addition, and in response to Question 14, Global Witness supports the Commission's position that "payments" include not only cash payments but also payments in-kind and believes that this should be made clear in the regulations.

V. A Regulatory Definition of "Not De Minimis" is Unnecessary.

Global Witness believes that the Commission does not need to propose regulations to define "not de minimis," which, as described below, is a commonly-understood term. The notion, expressed by a few commentators, that "not de minimis" is analogous to "material" is an obvious overreach and there is no legitimate support for reaching that conclusion.

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[77] *See, e.g.*, Africa Mining Intelligence, *Conakry Puts Squeeze on Rio Tinto* (May 25, 2005); Africa Mining Intelligence, *Dadis Camara Confirms Transguinean Plan* (Sept. 16, 2009).

[78] Press Release, Bellzone Mining plc, Definitive agreements signed with China International Fund with the addition of a mine development financing package (Aug. 2, 2010), http://www.bellzone.com.au/Portals/0/docs/RNS%20-%20Finalised%20Agreement%202%20August%201010%20clean.pdf.

[79] *See* EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, OVERVIEW OF EITI REPORTS (2010), http://eiti.org/node/1133.

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

[81] INITIATIVE FOR POLICY DIALOGUE, ESCAPING THE RESOURCE CURSE 387 (2007).

Under the U.S. tax code, "de minimis" is defined as "[a] property or service the value of which . . . is so small as to make accounting for it unreasonable or unpractical."[82] Conversely, existing materiality guidance under Staff Accounting Bulletin 99 and federal case law demonstrate a much higher threshold for "materiality."[83] The two terms are conceptually distinct and the notion advanced by some industry commentators[84] that the definition of "not de minimis" should be tied to materiality ignores wholesale the vast range of payments that fall somewhere between "not de minimis" and "material." Moreover, as noted by Revenue Watch Institute in its December 6, 2010 letter, interpreting the "not de minimis" standard as a materiality standard would be "contrary to Congress's distinction between a de minimis standard applied to individual payments and a materiality standard applied to benefit streams."[85] Indeed, Congress purposefully did *not* define the required disclosure of payments in terms of materiality. Therefore, and in response to Questions 26-27 and 29, Global Witness agrees with the Commission's preliminary assessment that "not de minimis" does not equate to a materiality standard. Similarly, and in response to Question 38, 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 plain terms of the statute, which imposes no such materiality constraint on the payments which must be disclosed.

However, and in response to Questions 28 and 30-37, if the Commission is inclined to provide a definition of "not de minimis," Global Witness supports the recommendation set forth by PWYP 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.[86] 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.

VI. Global Witness Supports the Commission's Proposal to Include "Transport for Export" in the Definition of "Commercial Development."

Global Witness supports the recommendations in PWYP's February 25, 2011 letter regarding the proposed definition of "commercial development."[87] While Global Witness agrees with the Commission's proposal to include activities related to the transport of resources for the

[82] 26 U.S.C. § 132(e)(1).

[83] *See TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); *Basic, Inc. v. Levinson*, 485 US 224 (1988).

[84] *See, e.g.*, Letter from the American Petroleum Institute to Elizabeth Murphy, Secretary, U.S. Securities and Exchange Commission 12-13 (Jan. 28, 2011).

[85] Letter from Revenue Watch Institute to Meredith Cross, Director, Division of Corporate Finance, Securities and Exchange Commission 6 (Dec. 6, 2010).

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

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

purposes of export in this definition, Global Witness also believes that other types of transport should be included in the definition as well.

VII. The Commission Should Not Delay Implementation of the Rules.

Question 91 asks whether the Commission should provide a delayed effective date for the final rules, both with respect to all issuers or with respect to certain categories of issuers. Global Witness objects to delaying the effective date for any category of issuer. The statute explicitly identifies the date on which the Commission's final rules shall take effect.[88] As the proposing release points out, resource extractive issuers will first be required to provide Section 1504 disclosures in their annual reports for the fiscal year ending on or after April 15, 2012.[89] This means that resource extraction issuers will have well over a year to prepare for the required disclosures. Issuers who file reports as of June 30 will not be required to make the required disclosure until more than a year and half from now. Calendar year filers have more than two years from now. Moreover, many issuers already report substantially similar information pursuant to host country implementation of the EITI, so they have already developed and implemented procedures to make similar disclosures. Finally, given the vital policy goals underlying Section 1504, there is no valid basis to accept arguments that the statutorily imposed effective date is insufficient.

VIII. Conclusion

Global Witness appreciates the opportunity to provide comments on the proposed rules. Section 1504 is a critical step forward in bringing much-needed transparency to the payments made to governments in connection with the commercial development of oil, natural gas, and minerals. While Global Witness is generally supportive of the Commission's proposed rules, we would ask the Commission to bear in mind that every exemption granted, whether it is with respect to a particular category of issuer or with respect to a host country or contractual prohibition on disclosure, chips away at Congress's intent to craft a broadly-applicable disclosure regime that promotes international transparency. Similar dangers lurk in moderating the status of Section 1504 disclosures relative to other disclosures required under the federal securities laws and in failing to provide clear guidance regarding the definition of "project" and the types of payments that must be disclosed. We hope that our comments will be of assistance as the Commission finalizes its rules with respect to Section 1504. As noted above, we would welcome the opportunity to meet with you to clarify any of our comments and recommendations.

Sincerely,

Corinna Gilfillan
Head of U.S. Office
Global Witness

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[88] 15 U.S.C. § 78m(q)(2)(F).

[89] Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. at 80,993.