World Resources Institute
10 G St., NE, Washington, D.C. 20002 Tel: 202-729-7600 Fax: 202-729-7610 http://www.wri.org/wri

1 March 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: WRI comments on the SEC draft regulations for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Secretary Murphy,

The World Resources Institute (WRI) is an environmental think tank that goes beyond research to find practical ways to protect the earth and improve people's lives. Our mission is to move human society to live in ways that protect Earth's environment and its capacity to provide for the needs and aspirations of current and future generations.

WRI's comments on the Securities and Exchange Commission (SEC) draft regulations—four General Principles and ten Specific Recommendations—draw directly from our nearly 30 years of experience working at both the national and international levels in the environmental policy and sustainable development arenas. Our work with local partners in Africa, Asia and Latin America on the sustainable management of oil, natural gas and minerals is of particular relevance and timeliness for this rulemaking. Much of this work is under WRI's Equity, Poverty and the Environment Initiative.[1]

These comments that follow reflect our interest in promoting the development of extractive resources in ways that are environmentally sustainable and that benefit all citizens, including those directly affected by extractive industry operations. We believe that transparency helps to achieve these results. The revenue disclosure provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act is a monumental achievement and is consistent with U.S. leadership in promoting transparency and accountability for natural resource management around the world. Section 1504 is in line with other U.S. government initiatives to promote access to information, especially in the case of environmental matters. As the rulemaking process continues, we recommend that the rules reflect congressional intent to bolster international transparency efforts around the extractives sector by requiring robust reporting standards.

WRI recognizes the potential of natural resource wealth to help reduce poverty and increase standards of living around the world.[2] Government, industry and civil society have important roles in managing natural resources and ensuring transparency of extractive resource revenues,

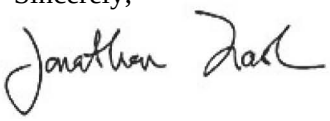
[1] World Resources Institute's Equity, Poverty and Environment initiative, online at: http://www.wri.org/project/equity-poverty-environment.
[2] World Resources Institute et al. *World Resources 2008: Roots of Resilience: Growing the Wealth of the Poor*, World Resources Institute, online at: http://www.wri.org/publication/world-resources-2008-roots-of-resilience.

and Section 1504 of the new law is a critical step in ensuring sustainable and equitable management of these natural resources.

On behalf of WRI, I would like to thank the SEC for the opportunity to submit comments on the rulemaking for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. We are pleased to formally submit our comments in the rulemaking and look forward to engaging further with the process.

For additional information, please contact Peter Veit, WRI Senior Fellow, who directs this work (peterv@wri.org or 202-729-7755).

Sincerely,



Jonathan Lash
President
World Resources Institute

World Resources Institute
10 G Street, NE, Suite 800
Washington, DC 20002
Tel: 1.202.729.7600
Web: www.wri.org

World Resources Institute Comments on SEC Draft Regulations for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Four General Principles

Four principles should guide the U.S. Securities and Exchange Commission (hereafter the SEC) rulemaking process for Section 1504 of the Wall Street Reform and Consumer Protection Act (hereafter the Wall Street Reform Act).

1. Ensure Consistency with Statutory Language. The SEC draft regulations repeatedly request public input on whether specific provisions should be consistent with the statutory language of Section 1504 of the Wall Street Reform Act. Per the U.S. Administrative Procedure Act, rulemaking must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance in the law." We interpret this to mean that the regulations should be both consistent with the statutory language of the law *and* consistent with the intent of the law (see below). We believe that meeting the intent of the law may require the regulations to be more robust and broader in application than the statutory language of Section 1504, but would not result in regulations that are weaker or narrower in application than the language of the law. In a continuum of the scope of the SEC regulations, the statutory language of Section 1504 is the floor and the intent of the law is the ceiling.

2. Recognize Intent of Law. Lawmaking requires a bill or resolution to be passed by both chambers of Congress and approved by the President before it becomes a law. As a result, the intent of the law includes both congressional intent and presidential intent. Many lawmakers have spoken and written on their intent of Section 1504— the Cardin-Lugar Transparency Amendment—including Senators Benjamin L. Cardin (D-MD)[3] and Richard G. Lugar (R-IN).[4] President Obama has also spoken on the intent of the law.[5] In their statements, it is clear that the intent of Congress and the President are similar: that Section 1504 is designed to promote the disclosure of information on extractive resource revenue payments, and that this transparency will help combat corruption and promote accountability. It is noteworthy that this intent includes providing payment information to investors to hold companies accountable and to the public to hold foreign governments accountable. This mandates a comprehensive set of rules that has broad coverage for issuers, projects and payments, and that provides sufficient information to investors to hold companies accountable and the public to hold governments accountable. Providing the public payment information will also drive citizens of foreign countries to the SEC website and to other sources of company information.

3. No Exemptions. Section 1504 of the Wall Street Reform Act does not provide for any exemptions, and, to our knowledge, the sponsoring lawmakers and the President have not called for any specific exemptions. In order to ensure robust coverage and to prevent leakage, the

[3] Senate Adopts Wall Street Reform Including Cardin-Lugar Provision to Increase Transparency and Attack Corruption, Press Release of Senator Cardin, 15 July 2010, online at: http://cardin.senate.gov/news/record.cfm?id=326430.
[4] Lugar Floor Speech on Transparency Amendment, Senate Floor Statement of Senator Lugar, 18 May 2010, online at: http://lugar.senate.gov/news/record.cfm?id=325030&.
[5] President Barack Obama's Remarks to the United Nations General Assembly as Prepared for Delivery – News Event, 23 September 2010, online at: http://www.un.org/democracyfund/Docs/ObamaUNAdress.pdf.

regulations for Section 1504 should not provide any exemptions or exceptions. All extractive resource companies that file annual reports with the SEC should comply irrespective of their size, ownership structure or nationality.

Concerns over compliance burdens to extractive industries are overstated. According to the Extractives Industry Transparency Initiative (EITI), about 35 extractive resource-producing countries have either agreed to comply or stated their intent to comply with EITI guidelines, and about 50 of the world's largest oil, gas and mining companies—including majors such as Alcoa, BP, Chevron and ExxonMobil—"support and actively participate" in the EITI process.[6] These industry leaders are showing that providing payment information is possible and does not increase competitive risks.

Moreover, many small, often specialized extractive resource companies (*e.g.*, companies involved in only one or a few components of the production chain, such as oil exploration) do not file annual reports with the SEC and are not subject to Section 1504 of the Wall Street Reform Act (although many of these companies submit reports other than annual reports to the SEC, some voluntarily). For example, few companies holding legal mining concessions in the Democratic Republic of Congo file annual reports with the SEC and, therefore, must not comply with Section 1504. Further, many oil exploration companies, including Tower Resources, Dominion Petroleum and Tullow Oil do not file annual reports with the SEC. Tullow Oil holds considerable oil real estate in Africa, including the major finds in Ghana and Uganda, two of Africa's emerging petro-states. Extractive resource companies that file annual reports with the SEC are generally large and sufficiently capable of meeting Section 1504 disclosure requirements.

4. Define Terms. To support implementation and enforcement, and to limit discretion and any interpretation inconsistent with the statutory language and intent of Section 1504, the regulations should provide clear and precise definitions of all critical terms (*e.g.*, project, subsidiary). Precise definitions establish specific standards and provide clarity about which companies must comply, which resources and extractive activities are included, which information must be disclosed, how the information should be presented and delivered, and other important matters.

   Of particular importance, the regulations should include a precise definition of *extractive resources*. Extractive resources commonly refer to oil, natural gas and minerals, yet in 2009, the government of Liberia passed the Liberia Extractive Industries Transparency Initiative (LEITI) Act which also includes forestry.[7] The definition should recognize the full range of known minerals, as well as oil and natural gas in all its primary forms. In 1995, the International Mineralogical Association (IMA) adopted the following definition: "a mineral is an element or chemical compound that is normally crystalline and that has been formed as a result of geological processes." The IMA-Commission on New Minerals, Nomenclature and Classification's list of minerals (March 2009) includes about 6,500 entries[8] but new minerals are always being discovered.[9] Moreover, the regulations should be clear that Section 1504 applies to all hydrocarbons in all primary forms. As demand for oil and natural gas increases, new technologies

[6] Extractives Industry Transparency Initiative, online at: http://eiti.org/.
[7] An Act Establishing the Liberia Extractive Industries Transparency Initiative (LEITI), 10 July 2009, online at: http://www.leiti.org.lr/doc/act.pdf.
[8] IMA/CNMNC List of Mineral Names, March 2009, online at: http://pubsites.uws.edu.au/ima-cnmnc/IMA2009-01%20UPDATE%20160309.pdf.
[9] Additional information on the International Mineralogical Association, online at: http://www.ima-mineralogy.org/.

are being developed to effectively exploit new sources of hydrocarbons, such as oil shale. The regulations should anticipate and recognize such developments.

Ten Specific Recommendations

1. Joint Ventures (responding to SEC Section B, questions #1-5, pp. 12-13 and D4, questions #49-53, pp. 37-39). The regulations should clarify that all companies or their subsidiaries—no matter the number of intermediaries—in a joint venture which file annual reports with the SEC must abide with Section 1504, even if the majority holder, controlling partner, subsidiary or other extractive resource entity does not need to comply. This clarification is needed given the complex, multi-level ownership structures often seen in the extractive resource sector in Africa. For example, in Uganda,[10] Tullow Oil, which does not file annual reports with the SEC, intends to sell some shares of its proven concessions to France's Total S.A. and the China National Offshore Oil Corporation (CNOOC), both of which file annual reports (form 20-F). Even if Tullow Oil retains the majority of shares in its concessions, Total and CNOOC should be required to comply with Section 1504 of the Wall Street Reform Act. In another example, in the Democratic Republic of Congo (DRC), the Mine d'or de Kisenge (MDDK) project in 2009 was a joint mining venture between Kisenge Ltd (80% of the shares) and EMK-Mn (20%). Kisenge Ltd was a subsidiary of Goldfields, a Zambian mining company which files annual reports with the SEC. Kisenge Ltd does not file annual reports with the SEC. In this case, Goldfields should be compelled to comply with Section 1504 and provide information on payments made by Kisenge Ltd to the DRC Government.

2. Transportation (responding to SEC Section H, p. 63). The regulations should require payment information from companies involved in the transportation of extractive resources, including transportation by road, rail, pipeline, air, ship or other means. Companies involved in the export of extractive resources are included in Section 1504, but the regulations should ensure that companies involved in internal, domestic transportation should also comply. Local transportation of extractive resources can generate considerable revenues for governments and, therefore, should be included in the regulations to meet the intent of Section 1504. Moreover, research shows that there is considerable government corruption, involving monopolies and cartels associated with domestic transportation of extractive resources and other natural resources, which could be addressed by the disclosure of payment information.[11]

3. "De minimis" Payments (responding to SEC Section D2, questions #26-32, pp. 28-31). The "de minimis" threshold for disclosure should be company payments to governments of less than U.S. $5,000. Providing more than one threshold (*e.g.*, a U.S. dollar amount and a percentage of total or project earnings) can create confusion in interpreting the payment information, especially among the public in developing nations. The regulations should protect against companies disaggregating payments to keep some or all payments below this threshold. While this "de minimis" is below the standard of the Alternative Investment Market (AIM) of the London Stock Exchange, payments of $5,000 or more are significant in many developing countries and information on such payments should be disclosed. Gross National Income per capita in most African countries is less than $500 per year, and in many countries is under $200. At $500 per year, a single

[10] Veit, Peter G. et al., "Avoiding the Resource Curse: Spotlight on Oil in Uganda," WRI Working Paper, World Resources Institute, January 2011, online at: http://www.wri.org/publication/avoiding-the-resource-curse.
[11] Larson, Anne M. and Jesse Ribot, "The poverty of forestry policy: double standards on an uneven playing field," *Sustainability Science*, online at: http://pdf.wri.org/sustainability_science_poverty_of_forestry_policy.pdf.

payment of $5,000 represents 10 years of the average income of a country's citizens; at $200 per year, it represents 25 years.[12]

4. Government Levels (responding to SEC Section H, p. 63). Information on company payments to all legally-established, formal levels of foreign government—national and sub-national; federal, state and local—and all branches of government—executive, legislature, judiciary—should be specified and not aggregated. The regulations should require companies to provide information on payments to *all levels* and *all branches* of government established by the constitution and domestic legislation in the foreign country. This includes levels and branches of government that have the authority to generate and expend public revenues, and that are legally liable and accountable to the public. We believe this position is consistent with the intent of Section 1504. In many African countries with centralized governments, companies must make most or all payments to national government, but in other countries, especially those with governments that are democratizing, other levels and branches of government have the legal authority to collect, manage and expend revenues from extractive resource industries, including for the transportation of extractive resources in or across their area of jurisdiction.[13]

5. File Payment Information (responding to SEC Section F1, question #68, p. 48 and Section F3, questions #87-89, p 61). Information on company payments should be filed with the SEC and subject to independent audits. The intent of Section 1504 is to provide transparency in support of investor oversight of companies and citizen oversight of government. Since many foreign governments do not disclose information on extractive industry revenue, citizens will need to rely on the accuracy of payment information provided by companies in order to hold their governments accountable. As a result, payment information should be filed and not simply "attached" to annual reports or "furnished" to the SEC. Requiring that payment information be filed would also be consistent with the SEC reporting requirements of other company information.

6. Community Support (responding to SEC Section D1, question #23, p. 25). Information on social and community payments that are made by companies to government should be reported by the corporation. This should include payments made directly by companies to communities when the village is a legally-established, formal level of local government, as it is in Tanzania and other African countries. History and experience show that community funds which are passed through government, including through sub-national or local government, often do not reach villages and rarely achieve their desired outcomes. WRI and other research institutions have published extensively on the ineffectiveness of local government in generating development outcomes.[14]

7. Types of Payments (responding to SEC Section D1, question #12-25, pp. 21-26). Information on all common payments should be disclosed, including information on payments in cash and in-kind (including payments in stocks, dividends and shares). "Other material benefits" should be an

[12] Gross National Income data, *Data360*, online at: http://www.data360.org/dsg.aspx?Data_Set_Group_Id=593.

[13] Ribot, Jesse C. *Waiting for Democracy: The Politics of Choice in Natural Resource Decentralization*, World Resources Institute, September 2004, online at: http://www.wri.org/publication/waiting-for-democracy.

[14] Munilla, Isabel et al., *People, Power, and Pipelines: Lessons from Peru in the Governance of Gas Production Revenues*, World Resources Institute, 2010, online at: http://www.wri.org/publication/people-power-and-pipelines; Morrsion, Karl et al., *Broken Promises: Forest Revenue-Sharing in Cameroon*, World Resources Institute, December 2009, online at: http://www.wri.org/publication/broken-promises; and Ribot, Jesse C., *Waiting for Democracy: The Politics of Choice in Natural Resource Decentralization*, World Resources Institute, September 2004, online at: http://www.wri.org/publication/waiting-for-democracy.

open list of payment types that the SEC regularly reviews and revises as needed to capture new types of extractive resource payments. "Other material benefits" should not be either a *closed list* or a *residual list* of payment types. A *closed list* invites the design of new payment types by companies and foreign governments to avoid having to disclose information on them. A *residual category* (*i.e.*, the sum of all other benefits not recognized by any specific list of common payments in the regulations), would allow companies to aggregate payment information into this payment category and distort the intent and need for transparent, detailed revenue disclosure.

8. Global Norm (responding to SEC Section D5, question #54-60, pp. 41-43). While the number of EITI countries and companies are increasing, most governments and companies still do not release payment information. In many African countries, information is regulated by a National Security Act. Only five countries in Africa have a comprehensive Access to Information (ATI) law: South Africa (2000), Angola (2002), Uganda (2006), Ethiopia (2010) and Liberia (2010). Legislation in many African countries classifies information on extractive resource payments as state secrets, and makes such information available only to individuals with special clearance. Even with an ATI law, the disclosure of oil payment information in Uganda is a crime, punishable by fine, imprisonment or both. The Government of Uganda also negotiates contracts with companies (*e.g.*, oil Production Sharing Agreements) which include specific provisions restricting the release of revenue and payment information.

   The fact that payment information is often withheld by extractive industries and foreign governments was a principal justification for Congress to include Section 1504 in the Wall Street Reform Act. Countries with supportive legislation and a history of disclosure are not the intended target of Section 1504 and these regulations. Indeed, if the regulations provide broad coverage it will help establish a global norm on payment disclosure and will likely encourage governments around the world to reform their laws to make them consistent with Section 1504, and thereby promote foreign investment.

   Moreover, several governments are considering passing legislation requiring the disclosure of extractive industry payments, including the United Kingdom, Canada, Australia, Spain and Hong Kong as well as the European Union. The enactment of the Wall Street Reform Act in the U.S. increases the likelihood that these other countries will pass similar measures, and decreases the likelihood of SEC deregistration by companies to avoid the disclosure requirement of Section 1504. These are important developments since many mining companies and specialized oil companies are listing in the UK, Canada and Australia, and not with the SEC. For example, Tower Resources, Dominion Petroleum and Tullow Oil are listed on the AIM of the London Stock Exchange, but not with the SEC. A large number of mining companies are also listed in the UK, Canada and Australia, and not with the SEC in the U.S.

9. Competitive Risks (responding to SEC Section V, p. 79). Extractive resource industries often claim that disclosure harms competitiveness, but a growing body of literature shows that the risks to competition from the disclosure of payment information are small and often overstated by companies. Recent research shows that countries which require disclose of information on payments do not experience a loss of competitiveness and may even have reduced risks.[15] The

[15] Haufler, Virginia, "Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World," Global Environmental Politics, August 2010, online at: http://muse.jhu.edu/login?uri=/journals/global_environmental_politics/v010/10.3.haufler.pdf.

unit production cost is often noted by companies as a main concern regarding competitiveness,[16] however, the information needed for competitors to calculate or even estimate such costs does not need to be revealed to comply with Section 1504 of the Wall Street Reform Act. Company payment information is not a trade secret and should not be subject to business confidentiality exceptions. In many cases, companies already have payment information of competitors through their own networks and dealings with government, including having access to the contracts and agreements of other extractive resource companies. And, as noted above, a growing number of extractive resource companies are voluntarily disclosing their payments in support of EITI, without experiencing any significant competitive risks.

10. Presentation of Information (responding to SEC Section H, p. 63). For investors and the public to hold companies and foreign governments accountable, payment information must be readily accessible and presented in formats that are easy for investors and the public to understand. As a result, the regulations should require the SEC to develop an "interactive data format" that is simple to navigate and that presents payment information in various formats, including in graphs, tables and other visuals. The SEC might want to consider engaging investors, the public and other potential users of payment information in the design and pilot-testing of these formats. To facilitate access and use of payment information, the regulations should also require the SEC to develop written guidelines on how to navigate the site and access company-, country- and project-level information on payments. Such material should be available in the world's most common languages, including English, French, Spanish, Chinese and Arabic. User guidelines would also be useful to international development assistance organizations in their training (on the SEC regulations) of investors and citizens of developing countries with extractive resources.

[16] Intermon Oxfam comments on IASB Discussion Paper Extractive Activities, Oxfam International, 30 July 2010, online at: http://www.ifrs.org/NR/rdonlyres/BDB3488A-67F4-41F8-87B8-2E24257B90C7/16026/20100730150711_IntermonOxfamresponsetoIASBIFRS6.pdf.