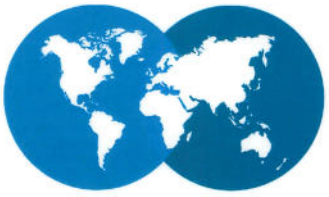

GLOBAL FINANCIAL INTEGRITY

The Honorable Luis Aguilar, Commissioner
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

The Honorable Kathleen Casey, Commissioner
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

The Honorable Elisse Walter, Commissioner
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

March 1, 2011

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

Dear Commissioner Aguilar, Commissioner Casey and Commissioner Walter,

Global Financial Integrity ("GFI"), a project of the Center for International Policy, is pleased to provide this submission to the Securities and Exchange Commission (the "Commission") in response to the Commission's proposed rulemaking for Section 1504 ("Section 1504" or the "Statute") of the Dodd-Frank Wall Street Reform and Financial Protection Act.[1] GFI is a Washington, DC based civil society organization that promotes national and multilateral policies, safeguards, and agreements aimed at curtailing capital flight out of developing countries. GFI is an active member of the Publish What You Pay US coalition ("PWYP") and we have been involved with the legislative process leading to the adoption of Section 1504 since we joined PWYP in November 2009.

We appreciate the thoughtful and exhaustive approach that the Commission has taken to proposing rules under Section 1504. The proposed rules themselves, for the most part, follow the text of Section 1504 where Section 1504 explicitly spoke to a particular issue. The Commission has followed each of these proposed rules with a series of questions that appear designed to elicit opinions as to whether additional, more detailed rules should also be promulgated in instances where Section 1504 may be silent or not as detailed as might be necessary to allow issuers to properly implement the law.

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[1] *See* Securities and Exchange Commission. Disclosure of Payments by Resource Extraction Issuers, Release No. 34-63549; File No. S7-42-10. December 15, 2010 (*hereinafter* Proposed Rules).

We observe, however, that there also appear to be questions included in the proposal document that ask whether language explicitly included in the text of Section 1504 should, in fact, be adopted as a rule and questions that seem to suggest that the Commission may be open to considering the promulgation of rules that are contrary to the intent of the legislation. We would like to draw the Commission's attention to some of these apparent inconsistencies and request that the Commission consider this concern as it reviews any responses it may receive to these questions.

We appreciate that executive agencies such as the Commission have significant autonomy and authority when promulgating rules that implement Congressional statutes. We understand, however, that (a) whether Congress addressed the precise question at issue (which may be indicated by defining a specific term, among other things), and (b) whether the proposed rule is manifestly contrary to the statute, are both factors relevant to the rulemaking process. [2]

In light of these concerns, we respectfully request that the Commission consider the following observations with respect to statutory construction, plain language and Congressional intent in relation to the Commission's questions as identified below.

Questions 1, 3, 4, and 5

Questions 1, 3, 4, and 5 of the Proposed Rules ask whether certain types of issuers or issuers with certain characteristics should be exempted from the disclosure requirement. The Commission's proposed rule does not provide for any such exemptions. In setting forth the rationale for its approach, the Commission observes that the Statute does not indicate that the Commission should exempt any issuers from the new requirements.[3] The Commission's observation is correct; the language of the statute is clear and unambiguous. Given this clarity, we do not believe it is necessary to look to Congressional intent to settle these questions, but given that an expression of Congressional intent is available we would like to draw your attention to the letter from United States Senator Benjamin L. Cardin to Chairman Schapiro dated December 1, 2010 (the "Intent Letter").[4] As you may be aware, Sen. Cardin was one of the original two sponsors of Senate Bill S. 1700, the Energy Security Through Transparency Act, (the Bill upon which Section 1504 was based), and was a primary advocate for the adoption of Section 1504. In the Intent Letter, Sen. Cardin states that "the intent of Section 1504 is to provide the broadest possible meaning to the term 'resource extraction issuer,'" and that Congress' specific "intent was to include all issuers, including foreign issuers, which have a reporting requirement to the SEC."[5] Based on both the plain language of the Statute and the clear statement of Congressional intent, we believe that promulgating rules that provide any exemptions to the definition of "resource extraction issuer" would be inconsistent with the language and contrary to the intent of Section 1504.

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[2] *See Mayo Found. for Med. Educ. & Research v. U.S.*, No. 09-837, 2011 WL 66433, at *6, 7 (U.S. Jan. 11, 2011).
[3] *See* Proposed Rule at 11.
[4] Letter from Senator Cardin to the SEC, Dec. 1, 2010, *available at* http://www.sec.gov/comments/df-title-xv/specializeddisclosures/specializeddisclosures-94.pdf (*hereinafter* Intent Letter).
[5] Intent Letter at 1.

Questions 6 and 7

Questions 6 and 7 of the Proposed Rules ask whether it is appropriate to promulgate rules that either derogate from or add to the statutory definition of the term "commercial development of oil, natural gas, or minerals." The Statute states that "the term 'commercial development of oil, natural gas, or minerals' includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas or minerals, or the acquisition of a license for any such activity, as determined by the Commission."[6] The Commission's proposed rule implements this definition without derogation or augmentation, and we believe that this is appropriate.[7] While Congress has provided the Commission with some degree of authority to change this definition by including the phrase "as determined by the Commission," we believe that Congress' use of the term "includes" as opposed to "may include" or "might include" at the beginning of the definition indicates that Congress intended that the stated elements of the definition must be included, but that the Commission could supplement the specified activities if the Commission determined it was necessary or appropriate.[8] In other words, the plain language of Section 1504(1)(A) provides the Commission with a baseline of what should be included in the term 'commercial development of oil, natural gas, or minerals,' but permits the Commission to expand upon that definition. Therefore, we believe that promulgating rules that derogate from the definition of the term "commercial development of oil, natural gas, or minerals" as set forth in the Statute and the Proposed Rule, rather than expand upon what is set forth therein, would contradict both the clear statutory language and Congressional intent.

Question 12

Question 12 of the Proposed Rules asks whether the definition of "payment" should include the list of the types of payments from Section 13(q)(1)(C), as proposed.[9] The Statute states that the term "payment":

> (i) means a payment that is:
>
> (I) made to further the commercial development of oil, natural gas, or minerals; and
>
> (II) not de minimis; and
>
> (ii) includes taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals[10]

[6] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 1504, 15 U.S.C. §78m(q)(1)(A).
[7] *See* Proposed Rules at 13.
[8] *See* 15 U.S.C. § 78m(q)(1)(A).
[9] *See* Proposed Rules at 21.
[10] 15 U.S.C. § 78m(q)(1)(C).

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The Commission's proposed rule incorporates this statutory definition.[11]

As discussed with respect to Questions 6 and 7, we believe that Congress has provided the Commission with some degree of authority to change this definition by including the phrase "and other material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals."[12] However, as also discussed with respect to Questions 6 and 7, we believe that Congress' use of the term "includes" as opposed to "may include" or "might include" at the beginning of clause 13(q)(1)(C)(ii) indicates that Congress intended that the stated elements of the definition must be included, but that the Commission could supplement the specified activities with "other material benefits" if the Commission determined it was necessary or appropriate, provided such supplementation was consistent with the EITI guidelines. Therefore, we believe that promulgating rules that derogate from the definition of the term "payment" as set forth in the Statute and the proposed rule, rather than expand upon what is set forth in the same, would contradict both the clear statutory language and Congressional intent.

Questions 44 and 48

Questions 44 and 48 of the Propose Rules raise the following issues regarding the distinction between "country" and "project": (1) whether the Commission should permit issuers to treat all operations in one country as a "project" and (2) whether the Commission should permit issuers to aggregate payments by country rather than by project.[13] The Commission recognizes that the Statute does not provide a definition of the term "project," and therefore it may be appropriate for the Commission to provide such a definition if necessary.[14]

While the Statute does not include a definition of "project," the Statute does indicate that Congress did not intend for "project" to be equated with "country." The Statute draws a distinction between "country" and "project" in Section (2)(D)(i); the section requiring that all disclosure information provided pursuant to Section 1504 must be provided in an interactive data format.[15] The Statute states that electronic tags shall include, among other things, information regarding: "(v) the government that received the payments, and the *country* in which the government is located; (vi) the *project* of the resource extraction issuer to which the payments relate" (emphasis added).[16] If Congress intended issuers to treat all operations in one country as a "project," or for issuers to aggregate payments by country rather than by project, then this requirement would be redundant. Given that the requirements appear in subsequent clauses, if such a redundancy existed it would have been obvious to Congress. Sen. Cardin's Intent Letter supports the position that the choice of the term "project" was deliberate when he states that the Statute was designed to complement the reporting standards of the EITI and

[11] *See* Proposed Rules at 18.
[12] *See* 15 U.S.C. § 78m(q)(1)(C)(ii).
[13] *See* Proposed Rules at 35, 36.
[14] *See Id.* at 32.
[15] *See* 15 U.S.C. § 78m(q)(2)(D)(i).
[16] *Id.*

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"purposefully [require] reporting at the project level."[17] As an active member of PWYP, GFI was also involved in deliberations concerning the level of reporting that would most effectively achieve the purpose of this legislation. Those deliberations very seriously considered the differences between country level reporting and project level reporting. The more detailed project level reporting was chosen for a variety of reasons, but notably because it improves investors' ability to gauge risk.

Questions 54, 55, 56, 57, and 59

Questions 54, 55, 56, and 57 of the Proposed Rules ask whether there should be exceptions to the disclosure requirements in circumstances where issuers are prohibited from providing such disclosure (i) under host country laws or (ii) pursuant to contractual agreements that contain relevant confidentiality provisions.[18] The Commission does not propose any such exceptions to the disclosure requirement on the basis that the Statute does not provide such exceptions.[19]

Indeed, the Statute does not provide exceptions to the disclosure requirements in circumstances where issuers are prohibited from providing such disclosure (i) under host country laws or (ii) pursuant to contractual agreements that contain relevant confidentiality provisions. In fact, the Statute provides no exceptions to the disclosure requirements at all. Furthermore, the Statute does not contain any provision authorizing the Commission to create exceptions to the disclosure provisions, whereas Congress did specify in other instances specific provisions that were open to Commission interpretation or expansion. Should any doubt remain as to Congress' intent with respect to this topic, Sen. Cardin's Intent Letter dedicates an entire paragraph to the issue, stating in no uncertain terms that "there should be no exemptions for confidentiality or host country restrictions."[20]

Question 59 of the Proposed Rules asks whether the Commission should permit foreign issuers that are already subject to payment disclosure obligations under their home country laws to follow those laws instead of the provisions set forth in the Statute.[21] We consider this a type of disclosure exception and will not repeat the statutory analysis discussion provided with respect to Questions 54, 55, 56, and 57, but note that we apply the same analysis with respect to this question. With respect to intent, however, there is an independent basis to be considered with respect to this issue. The Statute specifically requires the disclosed information to be provided in an interactive data format and for that information to be made publicly available.[22] This requirement exists so that the information is provided in a standardized form and can be used for comparative analysis. To permit companies to follow the disclosure rules of their home country as opposed to those in the Statute would prevent the type of comparative analysis intended by the Statute and is therefore inconsistent with the Statute.

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[17] *See* Intent Letter at 2.
[18] *See* Proposed Rules at 41-42.
[19] *See Id.* at 40.
[20] Intent Letter at 1.
[21] Proposed Rules at 42-43.
[22] 15 U.S.C. §§ 78m(q)(2)(D) and 78m(q)(3)(A).

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In summation, for the reasons noted above, permitting exceptions from the disclosure requirements (of the nature contemplated by Questions 54, 55, 56, 57, and 59 or otherwise) contradicts both the clear statutory language and Congressional intent.

Question 61

Question 61 of the Proposed Rules asks whether the definition of "foreign government" should include a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as proposed.[23] The Statute states that "the term 'foreign government' means a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the Commission."[24] Similar to our comments with respect to questions 6 and 7, we note that the Statute provides a list of categories of entities that must be included in the term "foreign government."[25] The Commission may add other entities to this list or describe those categories more in greater detail, but it should not omit any category of entity set forth in the Statute.

Questions 88 and 89

We have observed above that the proposed rules themselves, for the most part, follow the text of Section 1504 where Section 1504 explicitly addressed a particular issue. One section of the proposed rules that reflect a question of law on which Section 1504 was *not* explicit, however, is the issue of whether the information provided by issuers pursuant to Section 1504 should be furnished instead of filed and whether information disclosed pursuant to Section 1504 should be subject to Exchange Act Section 18 liability. Although not in keeping with the theme of preventing the contravention of what has been explicitly addressed in the Statute, we feel that this is a significant issue and we would be remiss in not commenting on it.

Section 1504 requires the disclosure of specific payment information by specific entities so that investors can use the information to make better, more informed investment decisions. This is why Congress chose to amend the Exchange Act as opposed to using another vehicle for regulation. Any ancillary benefits for other sectors of society may be a reason for Section 1504's broad popularity outside the investment community, but those factors are essentially irrelevant in this context. There is no qualitative difference between the information to be provided pursuant to Section 1504 and other financial information provided by an issuer. Given that Congress intended that the information be used by investors to make more informed investment decisions, investors should have the same rights to sue an issuer for damages suffered based on their reliance on disclosed information that may be false or misleading as they do with respect to other financial information provided by issuers on which they rely. In short, information provided by issuers pursuant to Section 1504 should be filed, not furnished, and should be subject to Exchange Act Section 18 liability.

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[23] Proposed Rule at 44-45.
[24] 15 U.S.C. § 78m(q)(1)(B).
[25] 15 U.S.C. §§ 78m(q)(1)(A) to 78m(q)(1)(B).

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Preventing investors from bringing suit to recover any losses they incur pursuant to the failure of an issuer to accurately and honestly report the information required to be disclosed under Section 1504 would significantly reduce an issuer's motivation to provide accurate information that is not misleading. While information furnished, as opposed to filed, is still subject to Commission scrutiny and may be the subject of enforcement action by the Commission, issuers are aware that the Commission has limited resources. They understand that the risk of Commission enforcement action against an issuer for failure to comply with the Exchange Act in a manner that is less than egregious is unlikely to be pursued. Therefore, their incentive to provide precisely accurate information is reduced and any loss suffered by investors as a result could not be compensated. We do not believe that this is the outcome that Congress intended.

Thank you for taking the time to consider the ideas and opinions expressed herein. Please do not hesitate to contact me at the coordinates below or at hlowe@gfip.org should you have any questions or wish to discuss our position further.

Kind regards,

Heather A. Lowe
Legal Counsel & Director of Government Affairs