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March 2, 2011

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

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

Dear Ms. Murphy:

In Release No. 34-63549 (the "Release"), the Commission has proposed amendments to its rules and forms (the "Proposed Rules") to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") by requiring disclosures relating to payments to governments by resource extraction issuers. We welcome the opportunity to comment on the proposal.

In general, the proposal is a laudable effort to establish a workable disclosure regime in light of the statutory strictures imposed by Congress. Moreover, we think that the Commission's general determination to allow issuers a degree of flexibility in interpreting and applying the resource extraction payment disclosure requirements is the correct one. However, we recommend that the proposed rules be modified in certain respects, while still respecting the statutory provisions, to better conform with what we view are the twin purposes of Section 1504: (i) to encourage international transparency efforts relating to the commercial development of oil, natural gas, or minerals; and (ii) to provide citizens and investors with clear, manageable information on the money made by governments from oil, gas and mineral extraction and production.

We believe the rules implementing Section 1504 should take into account these purposes, which as noted in the Release are "qualitatively different from the nature and purpose

of existing disclosure that has historically been required under Section 13 of the Exchange Act."[1] Section 1504 of the Dodd-Frank Act, much like the provision on conflict minerals in Section 1502 of the Dodd-Frank Act, is best understood as an attempt to use the existing disclosure regime to accomplish a policy aim that is essentially unrelated to the traditional objective of disclosure under the securities laws — in the case of Section 1504, to increase transparency over payments made by resource extraction issuers to foreign governments in an attempt to promote accountability for these payments. Because the disclosures mandated under Section 1504 are intended for a different audience and have an entirely different purpose than investor and market protection, the statute should be implemented in a way that makes the disclosure readily available to interested parties without unduly burdening issuers or interfering with the traditional disclosure made for the use of investors. To the extent that any of the information is material to investors and it falls within line item requirements or its omission would make the statements made misleading (under the circumstances in which they are made), it is already required to be disclosed by the Commission's existing rules.[2]

We anticipate that compliance with the specialized disclosure rules required by Section 1504 will impose significant burdens on issuers, particularly in the initial period as they work to develop the necessary policies and procedures to monitor, organize and report on payments made to governments for the purpose of resource extraction. We strongly urge the Commission to keep these burdens of compliance in mind when promulgating final rules and, where possible, seek to reduce the cost to issuers where doing so will not be inconsistent with specific statutory provisions or undermine the statutory purposes of the disclosure.

Limit to Payments Directly Connected to the Commercial Development of Resources

Section 1504 provides the following general list of the types of payments by resource extraction issuers that may be subject to disclosure: "taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits." It further establishes two criteria for payments that are subject to disclosure: (i) payments "made to further the commercial development of oil, natural gas, or minerals;"[3] and (ii) payments that are part of the "commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals."[4] In the Proposed Rules, the Commission appears to have focused primarily on the second of these two criteria in determining which payments should be disclosed. Accordingly, the Commission appropriately excluded personal income taxes and value-added taxes despite the use of the broad category "taxes" in Section 1504, because consumption taxes are not "part of the commonly recognized revenue stream for the commercial development of oil, natural gas,

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1 Release at 60.

2 For example, material information may be required in periodic reports under the Securities Exchange Act of 1934, as amended (the "Exchange Act") pursuant to Regulation S-K Item 101 (Business), Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations) and Item 503(c) (Risk Factors).

3 Section 1504(a)(1)(c)(i)(I).

4 Section 1504(a)(1)(c)(ii).

and minerals." However, the first criterion should also be incorporated in the rules, to focus the resulting disclosure more effectively on the payments as to which the statute appears to seek information.

We believe the two criteria of "made to further the commercial development" and "part of the commonly recognized revenue stream for the commercial development" of oil, natural gas, and minerals, read together, should be understood to require disclosure only of payments directly tied to the commercial development of oil, natural gas, or minerals. Not only would this approach better track what Section 1504 mandates, a more careful tailoring of the required disclosure to those payments particular to resource extraction issuers would also have the dual benefit of improving the usefulness of the disclosure provided and lowering the burdens of compliance.

Parts of the Commission's proposal appropriately limit the scope of the rule in this regard,[5] and we strongly support the Commission's decision to exclude infrastructure improvements, "social and community" payments, consumption taxes (including personal income taxes and value added taxes), and dividends from disclosable payments. (Comment Requests #13, 21-23)

However, we strongly urge the Commission to provide in the final rules, or in accompanying instructions, that certain additional payments, described below, also fall outside the scope of the provisions: (Comment Request #25)

- *No Disclosure of Corporate Income Taxes* – The Commission should not require the disclosure of corporate income tax payments, because those payments have no specific connection to the commercial development of natural resources but are instead generally applicable to any business activity. In contrast, specific taxes imposed upon resource extraction issuers, and taxes relating to the exploration, extraction, processing, or export of oil, natural gas, or minerals, should be disclosable. We recognize that the Extractive Industries Transparency Initiative ("EITI"), the global payment transparency initiative from which Section 1504 is broadly derived, includes "profits taxes" and taxes levied on the "income, production or profits of companies" among those benefit streams it suggests "might" be included in a country's disclosure requirements. But, as with dividends, infrastructure improvements, and social and community payments, those payments are merely permitted to be disclosed under the EITI; the EITI does not require their inclusion. (Comment Request #13)

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[5] The Release notes that "[t]he proposed definition [of "commercial development of oil, natural gas, or minerals"] is intended to capture only activities that are directly related to the commercial development of oil, natural gas, or minerals. It is not intended to capture activities that are ancillary or preparatory to such commercial development." Release at 14.

- *No Disclosure of Fees and Permits Not Unique to Resource Extraction Issuers* – The Commission should not require disclosure of any fees or permits that are not unique to the resource extraction industry. The Release seeks comment on whether the rules should specifically list the types of fees subject to disclosure; whether environmental permits, water and surface use permits, and other land use permits, fees for construction and infrastructure planning permits, air quality and fire permits, additional environmental permits, customs duties, and trade levies fall within the categories of disclosable fees; and whether certain types of fees should be explicitly excluded. Our recommended approach would simplify the process of determining which fees are subject to disclosure and render unnecessary any specific recitation of the various fees properly included or excluded – general fees such as customs duties and trade levies or the cost of other standard permits not unique to resource extraction would not be disclosable, while any fees or permits particular to the commercial development of resources or to resource extraction issuers would be. (Comment Request #15)

- *No Disclosure of Ordinary Course Payments for Goods and Services* – The Commission should also exclude ordinary course payments for goods and services. Because the definition of "foreign government" includes any company "at least majority owned" by a foreign government, ordinary course payments to government-owned entities selling goods and services in a non-governmental or commercial capacity would otherwise presumably be subject to disclosure, which does not seem to be what Section 1504 intended.[6] We do not believe the statute mandates, or the Commission's rules should mandate, for example, disclosure of payments of airfare to state-owned airlines or payments for ordinary phone service to state-owned telecommunications companies.

- *No Disclosure by Government-Owned Entities to Home Government* – We do not believe government-owned entities should be exempt from the payment disclosure rules. We recommend, however, that the disclosure requirements should exclude payments by an entity to the government that controls it. Payments of that kind are not "made to further commercial development," but rather distributions to the entity's controlling shareholder (or to itself), and requiring them to be disclosed is inappropriate as a matter of comity. (Comment Request #4)

Avoid Duplication of Other International Transparency Promotion Efforts

Section 1504 comes on the back of broader international efforts to better track and disclose resource extraction payments, including but not limited to the work of the EITI. The statute should be implemented in a way that does not undermine or unnecessarily complicate

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[6] An alternative way to avoid capturing ordinary course payments would be to modify the definition of "foreign government" to exclude companies operating as ordinary commercial market participants.

these broader efforts and, where substantially similar disclosure is already being reported in another forum, the rules should not impose duplicative reporting regimes. Although we recognize this could be viewed as arguably contrary to certain language in Section 1504, the statute also states that "[t]o 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."[7] Accordingly, we believe it would be an appropriate use of the Commission's use of rulemaking and exemptive authority to implement Section 1504 in a way that furthers this clear goal of the statute. We also believe this approach would be appropriate as a matter of comity. Consequently, we urge the Commission to modify the Proposed Rules in the following ways:

- *Compliance with Any EITI Reporting Regime Should Suffice* – The Commission should allow an issuer operating in a country that has implemented an EITI reporting regime to disclose its payments for that country in conformity with the applicable EITI disclosure requirements.[8] Under the EITI, resource extraction companies and the host governments both make disclosure, resulting in reporting of both payments made and payments received. These payments are then reconciled by an independent administrator applying international auditing standards. Disclosure made under a functioning local system for the reporting and matching of payments promotes the ultimate goal of supporting international transparency efforts better than the disclosure under the Proposed Rules. In any event, we see no purpose for requiring duplicative disclosure and believe it would be confusing for investors.

- *Compliance with Home Country Rules Should Suffice* – Various other legislative bodies and securities regulators outside the United States are making similar efforts to implement resource extraction payment disclosure regimes. The Commission should allow a foreign private issuer to comply with Section 1504 by including in its Form 20-F disclosure that follows the rules of its home country or primary trading market. This would directly support international transparency efforts, as contemplated by Section 1504, again with the benefit of avoiding potentially confusing duplicative disclosure.[9] (Comment Request #59)

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7 Section 1504(a)(2)(E).

8 Five countries are currently fully EITI-compliant, and an additional 27 countries have signaled their intent to adopt the EITI standards and are working on implementation.

9 We strongly support the Commission's decision not to require an issuer that has a class of securities exempt from Exchange Act registration pursuant to Exchange Act Rule 12g3-2(b) to provide resource extraction payment disclosure, as any such requirement would be out of line with the existing Exchange Act Rule 12g3-2(b) framework, which permits certain foreign private issuers listed outside the United States to make available to U.S. investors information provided to investors in the home country and not otherwise file Exchange Act reports. (Comment Request #72)

Exceptions to the Disclosure Requirements

We strongly urge the Commission to provide an exemption to the requirements for disclosure that would violate the laws of a host country. The aim of Section 1504 is to increase transparency, not to effectively prohibit issuers from conducting business in countries that prohibit disclosure. While we fully understand the need for the Commission to fully and faithfully implement the intent of Congress, we also believe that implementing these rules in a way that avoids direct conflict with a flat statutory prohibition is an example of appropriate use of the Commission's exemptive authority. The rules should not force issuers to choose between remaining registered in the United States (particularly in the case of foreign private issuers, which often have a practical option of deregistering) and continuing their operations in those countries. We do not believe it was the intent of Congress to force issuers to cease doing business in a country because that a disclosure requirement directly contravenes a local legal requirement. Such an impact on an issuer's business operations as a result of the U.S. disclosure rules seems extreme and may have the effect of placing U.S. issuers at a severe disadvantage to non-U.S. competitors, as well as increasing the likelihood that foreign private issuers will leave or avoid the U.S. public securities markets.

If the Commission declines to include this kind of an exemption in the final rules, it should at the very least include an exception for disclosure prohibited by laws in place prior to the passage of the Dodd-Frank Act. Likewise, payment information subject to pre-existing confidentiality provisions should be exempted. (Comment Requests #55 and 57)

Location, Timing and Liability Standards

New, Standalone Annual Report

In light of the qualitatively different purpose of Section 1504 and the significant burden that compliance with the new disclosure requirements will impose on issuers (and in particular the significant time that will be required to comply with the new disclosure requirements), we strongly urge the Commission to provide for a new, standalone report for this disclosure that would be furnished annually on EDGAR, rather than adding it to the existing requirements of Form 10-K, Form 20-F or Form 40-F (collectively, the "existing annual reports"). Section 1504 merely requires that the disclosures be included in *an* annual report, but does not specify that it be included in the existing annual reports. Section 1503 of the Dodd-Frank Act, in contrast, specifically requires inclusion of the new disclosure in existing periodic reports. (Comment Request #68)

The Release suggests that requiring disclosure in the existing annual reports would be "less burdensome" than requiring a new separate report because issuers are already required to submit the existing annual reports. We disagree. Inclusion of the new disclosure in the existing annual reports will be significantly more burdensome for issuers than preparing a new form of report. Given the already demanding information-gathering and presentation requirements for the existing annual reports, the imposition of novel and complex requirements may subject some reporting companies to a risk of being unable to file timely reports, which

could result in adverse consequences for investors in, and customers of, those companies. The deadlines for the existing annual reports were developed in light of the purposes and contents of the annual report to investors and practices in the marketplace. There is no reason why the timing of resource extraction payment disclosure should be tied to the timing of the existing annual reports, and a separate report would allow setting a different deadline without requiring amendment of the existing annual reports, which may cause investor confusion.

In addition, disclosure on a separate form would be easier to locate and use. The users of the resource extraction payment information will include concerned citizens, media academics, governments and non-governmental organizations, some of which may be less familiar with the complex existing annual reports than the investor audience for which the existing annual reports were designed. Using a separate form will better promote the objective of the statute by making information more readily accessible both for its intended users and for investors that may wish to review such information.

If the Commission decides against the use of a new separate form for this disclosure, we recommend that the disclosure be made by means of a new Item to Form 8-K (with a single annual deadline, without the applicability of the four business day requirement) for domestic issuers and on Form 6-K for foreign private issuers. This would also address the difficulty of meeting the timing constraints of the existing annual reports. (Comment Request #90)

If the Commission disagrees with the approaches we recommend above and requires inclusion of the resource extraction payment disclosure in the existing annual reports, we recommend that the Commission permit issuers to amend the existing annual reports post-filing to provide the required resource extraction payment disclosure pursuant to a later deadline, so that the significant time expected to be required to obtain and organize the disclosure information will not prevent an issuer from timely filing its annual report. We believe this should be a permanent feature of the rule, but it would be essential to provide for later deadlines in the early years of implementation. Reasonable later deadlines also have no impact on the underlying effectiveness of Section 1504. We agree with the Commission that Rule 3-09 of Regulation S-X under the Exchange Act[10] would serve as a model for this kind of provision. If the Commission takes this approach, we recommend that it clarify that new registration statements filed and shelf takedowns and other offerings and similar transactions may occur in the period between annual report deadline and the due date for the required conflict minerals disclosure. (Comment Request #69)

In addition, we support the Commission's proposal that there be very brief disclosure in the body of the existing annual report, with the more extensive disclosure on resource extraction payments contained in exhibits. Including any of the resource extraction payment disclosures in the body of the report would be unnecessarily confusing and would

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[10] Regulation S-X Rule 3-09 permits amendment of an annual report post-filing to provide certain subsidiary financial statements.

provide a deluge of information that is not necessarily material to investors in the already extensive annual report. (Comment Requests #73, 74 and 75)

Delayed Effective Date and Phase-In

We strongly urge the Commission to delay the effective date of these disclosure requirements, and believe such an approach is consistent with the language of the statute. Section 1504 requires that issuers begin providing the disclosures for the fiscal year ending *not earlier than* one year following the issuance of final rules. Consequently, the Commission has the statutory flexibility to establish a compliance date that grants issuers sufficient time to institute the necessary reporting systems to adequately comply with the new disclosure regime. As the Commission acknowledges, issuers will be required to "modify [their] existing systems" and "develop disclosure controls and procedures to record, process, summarize and report the required payment information."[11] This will take some time, particularly as Section 1504 represents a departure from the EITI reporting regime that some issuers may already have in place or be in the process of implementing. (Comment Request #91)

Furthermore, because of the complexity of these requirements, the Commission should consider phasing in some or all of the disclosure obligations. For example, a phase-in may make sense in the context of smaller reporting companies, as occurred with the implementation of Section 404 of the Sarbanes-Oxley Act of 2002. Likewise, an issuer should benefit from a phase-in period or temporary exemption with respect to recently acquired operations or operations held on a temporary basis. The one-year exemption for acquisitions in the context of internal control over financial reporting disclosure, [12] or the staged introduction of reporting on internal control over financial reporting, could serve as a model for this approach.

Furnished, Not Filed and Related Provisions

Several other implications follow from the recognition that resource extraction payment disclosure serves different purposes from other disclosures under the Commission's rules and forms. Some of these are already reflected in the Commission's proposal:

- *Furnished, Not Filed* – We strongly support the Commission's proposal that the resource extraction payment disclosures be deemed "furnished" to the Commission and not "filed" or subject to Exchange Act Section 18 liability. (Comment Requests #87, 88 and 89)

- *No Incorporation By Reference* – We strongly support the Commission's proposal that the resource extraction payment disclosure not be deemed to be incorporated by

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11 Release at 76.

12 *See* Division of Corporation Finance: Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports – Frequently Asked Questions, Question 3 (as revised Sept. 24, 2007).

reference into any other filing under the Securities Act of 1933, as amended (the "Securities Act") or the Exchange Act, except to the extent that the issuer specifically incorporates it by reference.

- *No Disclosure in Registration Statements* – We strongly support the Commission's proposal to not require resource extraction payment disclosure in registration statements under the Securities Act. Section 1504 applies only to Exchange Act reporting requirements, and any information about resource extraction payments that is material to investors, at least where it is required by a line item or where its omission would make the statements made misleading (under the circumstances in which they are made), will be already be included in registration statements as a result of existing disclosure requirements. (Comment Request #71)

The Commission should also add the following related concepts to the Proposed Rules (to the extent applicable):

- *Sarbanes-Oxley Act Certifications Should Not Apply* – If the Commission requires the resource extraction payment disclosure in the existing annual reports, we urge the Commission to include a clear statement in the rules or the adopting release that the officer certifications required to be included as exhibits to the existing annual reports[13] would not apply to the resource extraction payment disclosure.[14]

- *No Loss of S-3 or F-3 Eligibility* – We strongly urge the Commission to make clear that, wherever the disclosure is required to be provided, failure to timely file that disclosure will not result in the loss of eligibility to use Form S-3 and Form F-3 registration statements or make the issuer an "ineligible issuer" pursuant to Rule 405 under the Securities Act (resulting in, among other things, ineligibility to file automatically effective registration statements).

- *No Loss of Rule 144 Eligibility* – We also urge the Commission to make clear that, wherever the disclosure is required to be provided, failure to file that disclosure will not affect eligibility to use Rule 144 under the Securities Act (*i.e.*, the approach should mirror that currently applicable to Form 8-Ks).

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[13] Exchange Act Rules 13a-15(e), 13a-15(f), 15d-15(e) and 15d-15(f).

[14] There is precedent for not applying Sarbanes-Oxley Act certifications to information that is "furnished" to the Commission. The Staff of the Division of Corporation Finance has indicated that the furnished compensation committee report in a company's Form 10-K, for example, is not covered by the officer certifications. *See* http://www.sec.gov/news/speech/2006/spch100306jww.htm.

Interpretational Flexibility and Efficiency

We strongly support the Commission's decision not to define many of the terms used in the statute, instead granting issuers the flexibility to interpret the statutory requirements in light of their particular circumstances as well as broader industry practice.

- *"Not De Minimis"* – We support the Commission's decision not to define the phrase "not de minimis" in the Proposed Rules. We believe the rules should allow issuers to make this determination for themselves, as they currently do for the concept of "materiality." We also do not think it valuable to require issuers to disclose the standard that they have applied in making that determination. (Comment Request #27)

- *"Project"* – We agree with the Commission's decision not to define the term "project" for purposes of disclosing payments on a per-project basis. As the Release notes, "project" may be defined in a variety of ways depending upon particular industry, business or financial reporting classifications. (Comment Request #39)

  The Release also requests comment on whether to permit issuers to treat operations in a country as a "project." Although doing so in all cases would seem inconsistent with Section 1504, if a given project happens to include all of the issuer's operations in the host country, there should be no resulting requirement that the issuer make disclosure on a sub-project level. (Comment Request #44)

- *"Business Segment"* – Similarly, we believe the term "business segment" should not be defined and issuers should apply their own judgment as to the appropriate definition. Given the use of this term for tagging payments electronically in the interactive data, we expect that issuers will typically use a definition consistent with that already used for financial reporting purposes. (Comment Request #82)

Definition of "Control" Should be Consistent with Accounting Rules on Consolidation

Section 1504 requires disclosure of payments made by a subsidiary or an entity under the "control" of an issuer. We recommend that the Commission make clear, either in a definition or otherwise, that this concept should track the principles of consolidation used in the generally accepting accounting principles applicable to the issuer. This would be the most consistent with other information the issuer is required to track and disclose, and therefore would be much less burdensome than another definition. We believe this approach would not be contrary to Section 1504 because accounting principles for consolidation are generally based on control concepts. (Comment Request #49)

No Conversion of Payment Information into a Common Currency

We recommend that issuers should not be required to reconcile payments to their reporting currency or to U.S. dollars. Instead, we urge the Commission to maintain flexibility in

the final rules so that issuers can produce the required information in as efficient a manner as possible, in light of their reporting systems and any local requirements. (Comment Request #80)

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We thank you for the opportunity to submit this comment letter. Please do not hesitate to contact Nicolas Grabar or Sandra L. Flow (212-225-2000) if you would like to discuss these matters further.

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP