March 29, 2011

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-5546

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

Dear Secretary Murphy:

We appreciate the opportunity to comment on the proposed rules related to the implementation of Section 1504 of the Dodd-Frank Act, and write to bring a few points to your attention based on our experience working in Equatorial Guinea.

1) Transparency by no other Means

Equatorial Guinea, the 3rd largest producer of oil in sub-Saharan Africa, exemplifies a case in which the Dodd-Frank Act can have tremendous impact, both for the companies that operate there and the citizens who live there. The country's government, led for the last 32 years by President Teodoro Obiang, has consistently obfuscated efforts to promote greater transparency in the country's lucrative oil and gas industry. President Obiang has publicly referred to the country's oil resources as a "state secret."[1] Corruption is rampant at all levels of government; a 2007 memorandum from the U.S. Justice Department noted the department's suspicion that a large portion of the assets of the president's son and likely successor, Teodorin Obiang Nguema, "have originated from extortion, theft of public funds, or other corrupt conduct."[2] A February 2010 report by the U.S. Senate Permanent Subcommittee on Investigations found that Teodorin used shell companies to evade money-laundering laws and channel more than $100 million into the United States to finance several

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[1] Global Witness. 2004. *Time for Transparency: Coming Clean on Oil, Mining and Gas Revenues*. p. 55, http://www.globalwitness.org/sites/default/files/pdfs/oil_061.04.04.pdf.

[2] Ken Silverstein. 2009. "U.S. Government Documents Crime Spree by Dictator's Son: Why no action by the feds?" http://harpers.org/archive/2009/11/hbc-90006022.

luxury items, including a $35 million seafront mansion in Malibu, California.[3] The country ranks 168 out of 178 countries in Transparency International's 2010 Corruption Perceptions Index.[4]

In April 2010, the country was delisted from the Extractive Industries Transparency Initiative (EITI) after failing to meet the Initiative's benchmarks for transparency and civic participation. It is unclear if or when the country will attempt to rejoin the EITI. For the foreseeable future, therefore, the Dodd-Frank Act will be the singular mechanism that provides citizens with credible information about the amount of money their government receives from the exploitation of the country's hydrocarbons, a necessary step for curbing corruption and holding the government accountable for its use of natural resource revenues.

Companies operating in Equatorial Guinea stand to benefit from a robust Dodd-Frank Act as well. The multinational companies responsible for the vast majority of the country's oil and gas production supported the country's efforts to increase transparency via the EITI process.[5] These same companies will be covered under the Dodd-Frank Act, providing them with political cover—similar to that provided by the Foreign Corrupt Practices Act—to sidestep pressures from government officials to enter into nontransparent and potentially unethical agreements and activities.[6] Therefore, robust rules that mandate disclosures of the business arrangements between companies and governments—in particular project-by-project reporting—would shine greater light on these dealings, thereby providing companies with political cover to sidestep government requests to engage in potentially unethical activities.

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[3] U.S. Senate. 2010. *Keeping Foreign Corruption Out of the United States: Four Case Histories*. Majority and Minority Staff Report, Permanent Subcommittee of Investigations, http://resources.revenuewatch.org/sites/default/files/Keeping%20Corruption%20out%20of%20the%20United%20States.pdf.

[4] Transparency International. 2010. "Corruption Perceptions Index," http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

[5] Exxon Mobil Corporation (U.S.), Marathon Oil Corporation (U.S.), Hess Corporation (U.S.), Noble Energy (U.S.), and Mitsui & Co. (Japan) produce the vast majority of the country's oil and gas and supported the country's EITI effort. Each of these companies—as well as others that are engaged in exploratory drilling in Equatorial Guinea, including the Chinese companies CNOOC and CNPC—will be covered by the Dodd-Frank Act.

[6] For a discussion about the ways in which a nontransparent operating environment can place oil and gas companies in potentially compromised situations vis-à-vis the host government, see for instance Joseph Kraus. 2010. *The Business of State-Building: The Impact of Corporate Social Responsibility on State Development in Equatorial Guinea.* Doctoral Dissertation: University of Florida, pp. 256-262, http://etd.fcla.edu/UF/UFE0042514/kraus_j.pdf.

2) "Other Material Benefits"

With respect to questions 23-25 in the SEC's proposed rules, Equatorial Guinea provides a strong case in support of the argument that payments for social and community projects as well as ancillary payments (i.e. local content, personnel training programs, technology transfer, and local supply requirements) should be included as "other material benefits." Multinational corporations engaged in upstream activities in Equatorial Guinea's petroleum industry are mandated by Chapter 20, Articles 88-93 of Equatorial Guinea's 2006 Hydrocarbons Law to invest in the country's social development.[7] The minimum requirements imposed by the government on companies, however, are not publicly disclosed, leaving investors in the dark about the investment liabilities of companies that operate in Equatorial Guinea. Furthermore, the government encourages companies to spend more than the minimum required by law. In 2008, for instance, six foreign-owned oil and gas companies spent approximately $35 million on social development and training projects, well above the combined $3.5 million they were legally required to pay.[8]

For companies involved in the downstream production of petroleum products, the government makes case-by-case determinations based upon the value of specific business projects. These payments can reach significant sums. For instance, when a $1.4 billion Liquified Natural Gas (LNG) plant was constructed in 2006-2007, the government mandated that the companies involved had to allocate $100 million toward local content projects.[9] Under current rules, companies have no obligation to publicly disclose these expenditures to investors. Treating these payments as "other material benefits" under the Dodd-Frank Act would provide investors additional information with which to assess the total investment liabilities of companies that operate in countries where social projects and ancillary payments are mandated, whether by law or accepted practice.

3) Disclosure of In-Kind Payments

With respect to question 14, we strongly agree with industry officials that in-kind payments should be considered as "payments" under the new SEC rules.[10] It is not uncommon for governments and companies to use in-kind payments in lieu of cash transfers, particularly in the oil and gas industry. Erecting rules that ignore these types of payments would violate the pro-transparency spirit of the Dodd-Frank Act and dilute its effectiveness in providing investors and citizens with the information

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[7] Republic of Equatorial Guinea. 2006. *Hydrocarbons Law No. 8/2006 of 3 November.* pp. 19-20, http://www.equatorialoil.com/pdfs/EG%20Hydrocarbons%20Law%20(English%20Translation)_v7.1.pdf.

[8] Joseph Kraus. 2010. *The Business of State-Building,* p. 172.

[9] The LNG facility is operated by Equatorial Guinea LNG Holdings Limited (EG LNG), a joint partnership between Marathon Oil Corporation (U.S.), Sonagas (E.G.), Mitsui (Japan), and Marubeni (Japan).

[10] See the SEC comment submissions by the American Petroleum Institute (January 28, 2011), Exxon Mobil (January 31, 2011), and AngloGold Ashanti Limited (January 31, 2011).

necessary to hold companies and governments accountable. In Equatorial Guinea, in-kind payments represented 57% and 59% of all oil revenues received by the government of Equatorial Guinea in 2007 and 2008, respectively.[11] Rules that failed to account for these significant payments would effectively neuter the Dodd-Frank Act in a country like Equatorial Guinea, where the majority of payment transfers between companies and the government occur as payments in-kind.

4) Contract Confidentiality

The official Production Sharing Contract of the government of Equatorial Guinea explicitly states that companies are permitted to share all information relating to the Contract or Petroleum Operations in the following instances:

- ✓ "To the extent that such data and information is required to be furnished in compliance with any applicable laws or regulation." (Article 20.1.1c)
- ✓ "In conformity with the requirements of any stock exchange having jurisdiction over a Party." (Article 20.1.1d)[12]

EG Justice sincerely appreciates the opportunity to provide input in this critical rulemaking process. Please do not hesitate to contact us with follow-up questions.

Sincerely,

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EG Justice is a member of the Publish What You Pay Coalition and the leading international non-governmental organization solely dedicated to promoting human rights, the rule of law, transparency, and civic participation in Equatorial Guinea.

[11] Republic of Equatorial Guinea. 2010. *First Report on the Extractive Industries Transparency Initiative (EITI), 2007-2008*. http://resources.revenuewatch.org/sites/default/files/Equatorial%20Guinea%202007-2008%20EITI%20Reconciliation%20Report.pdf.

[12] Republic of Equatorial Guinea. 2006. *Production Sharing Contract between the Republic of Equatorial Guinea and Guinea Ecuatorial de Petroleos and (The Company) for Block "•"*, p. 44, http://www.equatorialoil.com/PDFs/Model%20PSC_2006_English.pdf.