EARTHRIGHTS INTERNATIONAL

September 20, 2011

Ms. Meredith Cross
Director, Division of Corporate Finance
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-4628

Re: Comments of EarthRights International on Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Ms. Cross,

I am writing to comment on a number of matters regarding Section 1504 of the Dodd-Frank Act and Release No. 34-63549, and to address some contentions contained in recent comment letters received by the Commission on this provision.

ERI applauds the Commission for conducting a fair and open rulemaking process, and for proposing rules that by and large track the plain language of Section 1504. In that they require project reporting, do not grant categorical exemptions, decline to limit the projects for which reporting is required to "material" projects, and plan to publish both the issuers' payment disclosures and a separate compilation, the Commision's proposals are prudent and appropriate, implementing the letter of the law, declining to exercise discretion where no discretion has been granted by Congress, and avoiding loopholes that would undermine Congress's intent.

This Comment focuses on three issues: 1) The applicablity of the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Business Roundtable v. SEC*, __ F.3d __, No. 10-1305, 2011 U.S. App. LEXIS 14988 (D.C. Cir. July 22, 2011), to Section 1504; 2) the economic costs and benefits of some of the Commission's proposed rules on project-level reporting; and 3) the statutory requirement that the Commission make public all payments disclosed pursuant to Section 1504.

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I. Organizational Information

EarthRights International (ERI) is a non-governmental organization based in Washington, DC, Thailand, and Peru that works with communities and local groups around the globe to address issues of corporate accountability and liability for human rights and environmental harms. ERI has extensive experience working with communities in Burma, Peru, Nigeria and other countries that are affected by extractive projects. A member of Publish What You Pay (PWYP), ERI has a particular interest in government revenue transparency in weak governance zones and zones of conflict. Robust project-level reporting, full publication of disclosures, and a no-exemptions policy will be particularly important for countries like Burma, where a repressive and secretive military regime funded largely by oil, gas, and mining operations continues to hide revenue information from citizens and international investors alike.

II. Previous Comments

In previous submissions, ERI has supported a number of interpretations of Section 1504 that would ensure the provision's usefulness to civil society groups in the regions where we work. Specifically, on December 2, 2010, ERI submitted a Comment[1] recommending:

- Fact-based inquiry into control, and reporting on a proportionate-share basis for all non-consolidated joint ventures
- Coverage of all issuers – domestic and foreign – without categorical exemptions
- Monitoring of Level I ADRs to determine whether it may be necessary to include them in the disclosure requirements in the future
- No exemptions for contract confidentiality clauses or conflicting local laws

On January 26, 2011, ERI submitted a supplementary Comment,[2] recommending:

- Inclusion of production share, in-kind payments, security and social payments, and infrastructure upgrades in the required disclosures.
- Filing, rather than furnishing of disclosures in the annual report, in order to allow shareholders who are misled and harmed by material mistatements to hold companies liable for their disclosures

ERI would also like to call the Commission's attention to submissions by two grassroots Burmese civil society groups, the Human Rights Foundation of Monland (HURFOM) and the Ta'ang Students and Youth Organization (TSYO). In Comments submitted on July 15[3] and June

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[1] ERI's December 2 Comment is available on the Commission's website at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-116.pdf.
[2] ERI's January 26 Comment is available on the Commission's website at http://www.sec.gov/comments/s7-42-10/s74210-8.pdf,
[3] HURFOM's Comment is available on the Commission's website at http://www.sec.gov/comments/s7-42-10/s74210.shtml.

28, 2011,[4] respectively, HURFOM and TSYO underlined the dangers of providing disclosure exemptions for operations in countries that prohibit such disclosures by law, the need for true project-level disclosure, and the urgency of a release that would require disclosure for payments made to the Burmese government in 2012. Both organizations explain that timely project-level disclosures would greatly empower them to hold the Burmese government accountable for the revenues it receives from particular projects that are associated with political instablity, human rights abuses, land confiscation, and environmental destruction. According to these groups, Section 1504, if properly implemented, will help them ensure that the communities benefit from natural resource revenues.

III. Comments on the Proposed Rules for Project-Level Reporting and Publication

A. Applicability of the Proxy Access Ruling

The Commission has received a number of comments and seen some media attention focusing on the implications the of recent ruling in *Business Roundtable v. SEC*, __ F.3d __, No. 10-1305, 2011 U.S. App. LEXIS 14988 (D.C. Cir. July 22, 2011) for particular provisions of the Dodd-Frank Act – among them Section 1504. The truth is, however, that *Business Roundtable* does not, for the most part, apply to Section 1504, at least with respect to project level reporting and the publication of disclosures. Moreover, industry proposals would depart significantly from the requirements and intent of the statute and, if adopted, could weaken the regulations' ability to withstand a legal challenge. (See Parts B and C, *infra*, for why the Commission's proposed rules satisfy *Business Roundtable*'s requirements, assuming that it *does* apply.)

Business Roundtable and the other precedents on which it builds impose a stringent interpretaion on the requirement for the Commission under the Exchange Act to consider the effects of certain types of new rules on "efficiency, competition, and capital formation," 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c). Specifically, the Commission is required to apprise itself of the economic consequences of a given rule; otherwise, its rulemaking is arbitrary and capricious. *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005). Where the Commission's analysis inconsistently or opportunistically frames the costs and benefits, contradicts itself, fails to adequately quantify costs or explain why such costs cannot be quantified, neglects to respond to substantial problems raised by commenters, or does not consider reasonable alternatives, it may be inadequate. *Business Roundtable*, 2011 U.S. App. LEXIS 14988 at *8-9.

Crucially, however, the rules struck down in *Business Roundtable* are fundamentally different from the proposed rules for Section 1504 in that *they were not mandated by statute*. The court in *Business Roundtable* took great issue with the Commission's decision to issue rules that would facilitate proxy access for shareholder nominees. This action was originally based on the Commission's longstanding authority under the Exchange Act, although a provision was subsequently written into the Dodd-Frank Act explicitly authorizing – *but not mandating* – the

[4] TSYO's Comment is available on the Commision's website at http://www.sec.gov/comments/s7-42-10/s74210-92.pdf.

Commission to regulate proxy access.[5] It was the Commission's proactive view that proxy access was a problem and that companies would enjoy improved governance if shareholder nominees could more easily contest elections. And one of the biggest problems the D.C. Circuit identified with this decision was the fact that the Commission failed to consider whether there would be a real net gain in value from issuing rules at all. *Business Roundtable*, 2011 U.S. App. LEXIS 14988 at *16-17 (Commission must consider costs of rule facilitating particular conduct, even if that conduct is already authorized by law); *id.* at *27-29 (same); *Id*. at *26 (Commission failed to explain why existing provisions were inadequate).

By contrast, in the case of Section 1504, Congress has required the Commission to issue very specific rules with regard to government payment disclosure, leaving very little room for discretion. At least with respect to project-level reporting and publication of disclosures, the Commission has acted conservatively and hued closely to the language of the statute. For example, given the statutory text, the Commission has no choice but to require project-level reporting and disclose the payment information submitted in issuers' annual reports, and it has no authority under the statute to provide exemptions. Thus, regardless of the fact that to do otherwise would severely undermine the efficacy of the law, it would be inconsistent to apply *Business Roundtable*'s strict rule, which presumes that the Commission is exercising discretion to issue regulations that may or may not be warranted. It is, in fact, the industry proposals that would require the Commission to take unjustified liberties with a statute that is quite clear on its face; if the Commission were to adopt them, they would leave the regulations open to challenge for inconsistency with the statutory scheme.

Similarly, the court faulted the Commission in *Chamber of Commerce* for failing to consider reasonable alternatives that are not "uncommon or unknown." 412 F.3d at 145. Here, the alternatives proposed by industry commenters are frivolous and completely out of bounds. The Commission has no obligation to consider suggestions that flatly contradict the text of the statute – like defining "project" as "country" – or would fly in the face of logic by undermining the law's usefulness for its intended beneficiaries – like withholding the disclosures and publishing only a country-level aggregated compilation.

Finally, although it has promulgated rules pursuant to a non-discretionary mandate from Congress, we assume that the Commission will respond to industry commenters' proposals and cost estimates, as *Business Roundtable* requires. The remainder of this submission considers the economic costs and benefits of project-level reporting and publication rules and questions some of the cost estimates suggested by industry commenters.

B. Project-Level Reporting

A number of Comments by issuers and industry representatives have criticized the Commission's proposal for requiring project-level reporting and have called on the Commission to limit the projects on which reporting is required to "material" projects. These comments have generally focused on three issues: 1) the cost of developing systems to report at the project level, especially

[5] Likewise, the rules challenged and overturned in *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005), and *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010), were initiated by the Commission under pre-existing discretionary authority, rather than being mandated by Congress.

if "non-material" projects are included; 2) the lack of benefit to investors of reporting on "non-material" projects; 3) the potential for project-level disclosure to reveal commercially sensitive information or expose companies to violations of local laws prohibiting such disclosure.

As a matter of statutory interpretation, interpreting project-level reporting to mean country-level reporting or limiting disclosure to "material" projects contradicts Congress' language and intent and would leave the promulgated rules vulnerable to legal challenge. Regardless, on closer inspection, industry's three major objections appear overblown, if not completely misleading. On balance, the proposed rules promote efficiency and capital formation, and would not undermine U.S. or other issuers' competitiveness.

i. Statutory Language and Congressional Intent

As a preliminary matter, we note that the Commission has acted conservatively and appropriately in determining that Section 1504 requires project-level disclosures. The plain language of the statute clearly calls for reporting on "the type and total of such payments made for *each project* . . ."[6] and then, in a separate sub-clause, requires reporting "the type and total amount of such payments made to each government."[7] Congress could not have meant to allow the Commisison to define "project" as all activites within a given country; this would make the former sub-clause meaningless, as it would be redundant of the latter.[8]

Moreover, the statute requires disclosure on "each" project, not just those that are "material." Clearly, Congress knew how to limit disclosures if it wanted to do so; it chose to explicitly restrict disclosure of payments to those that are "not de minimis,"[9] and could easily have provided an analogous limitation for projects.

Finally, it is important to note that Section 1504, while primarily an investor protection statute, was crafted to provide benefits to the residents of resource-rich countries as well.[10] Congress was quite explicit in noting that the rules are intended to "support the commitment of the Federal Government to international transparency efforts."[11] Thus in developing its rules, the Commission should give weight to the benefits the rules will bring to local governments, and communities affected by oil, gas, and mineral development.

ii. Costs of project-level reporting

[6] Exchange Act, 15 U.S.C. 78m §13(q)(2)(A)(i).
[7] *Id.* §13(1)(2)(A)(ii)
[8] *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotations omitted).
[9] Exchange Act §13(q)(1)(C)(i)(II).
[10] *See* 156 Cong. Rec. S3316 (daily ed. May 6, 2010) (Statement of Sen. Cardin in support of Amendment No. 3732 to the Restoring American Financial Stability Act (S3217), noting benefits to investors and people of resource-rich nations); 156 Cong. Rec. S5902-01, S5913 (daily ed. July 15, 2010) (statement of co-sponsor Sen. Leahy noting that Section 1504 would allow "American people and investors" to better know investment risk, and "citizens of these resource-rich countries to know what their governments are receiving from extractive companies).
[11] Exchange Act, 15 U.S.C. 78m §13(q)(2)(E).

Industry comments on the costs of project-level reporting raise the specter of tens or even hundreds of millions of dollars in compliance costs, although they give little or no support for these estimates. ERI is, of course, not in a position to calculate the disclosure costs for any given issuer and cannot offer competing figures. However, a number of factors lead us to question the accuracy of the assertions from industry participants.

First, some companies already report project-level payments in certain countries in one form or other and under a variety of regimes, although the practice is, admittedly, not as universal or as developed as would be required under the Commision's proposed rules. As HURFOM points out in its July 15 submission, for example, Exxon already reports its government payments for the Chad-Cameroon pipeline project, and the Improved Petroleum Revenue Group of Companies reports project-level payments in Egypt.[12]

Second, some EITI countries are already moving toward project-level disclosure. For instance, EITI reports for Mali disclose payments at the mine level,[13] and the EITI Implementation Team for Indonesia – which includes, among other major companies, Chevron Corp. – has developed a protocol for project-level disclosure, simply because that *is* the level at which the companies keep track of most types of government payments and is therefore the most convenient way for them to report.

Third, it is unclear that companies can save much time or money by reporting government payments at the material project or country level. The European Parliament recently asked the Commission to develop legislation applicable to all European markets requiring reporting on "each project and country"[14] in which a company invests. If that request is adopted as expected, all U.S.-registered issuers with operations or presence in Europe will be subject to project-level reporting, regardless of the U.S. rules; in fact, divergent rules would require the companies to incur *higher* costs by reporting two sets of figures.

Regardless of what the measure Europe ends up adopting, companies must keep records of their subsidiaries' payments to governments as part of the books and records provisions of the Foreign Corrupt Practices Act, so the chief costs of reporting these payments will be in the presentation of the data rather than any need to institute new tracking systems. To the extent that it may be necessary to implement new accounting and reporting systems to keep track of government payments, then the companies presumably will need to develop mechanisms for receiving and attributing information on individual payments *no matter what form the final rules take*.[15] The Commission's proposed rule simply asks companies to provide that information in its raw form,

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[12] *See* HURFOM Letter at 3. *See* also Comment of Oxfam America at 11 n.15, submitted to the Commission on Feb. 21, 2011, *available at* http://www.sec.gov/comments/s7-45-10/s74210-76.pdf.
[13] Revenue Watch Institute, *EITI Reports: Results & Analysis – Mali, at* http://data.revenuewatch.org/eiti/country/mali.php.
[14] Samuel Rubenfeld, "EU Parliament Adopts Oil, Gas Transparency Initiative," WSJ BLOG – CORRUPTION CURRENTS, Sept. 13, 2011, *at* http://blogs.wsj.com/corruption-currents/2011/09/13/eu-parliament-adopts-oil-gas-transparency-initiative.
[15] None of the Comments even attempts to quantify the savings that would supposedly accrue if disclosure were limited to "material" projects, as compared to disclosure of all projects. The Commission should attempt to estimate the difference in costs, but it is not required to accept commenters' bare assertions that their "marginal costs would be reduced very significantly." Aug. 1, 2001 Shell Letter at 1.

rather than requiring them to process it and disclose only those payments from projects they deem to be "material." Seen in that light, the Commission's proposed rule could actually save issuers time and money, by allowing them to submit data without having to go through this sifting process.

iii. Benefits to investors and other stakeholders

Industry commenters consistently undervalue the benefits to investors from the Commission's proposed rules, which may be difficult to quantify but are nonetheless quite significant and, moreover, were explicitly contemplated by Congress. Moreover, these commenters completely miss the fact that Section 1504 was enacted with more than just investors and businesses in mind.

1. Efficiency and capital formation benefits to investors

The benefits to investors from project-level reporting are many. First, the risk profiles of individual projects within a given country may vary greatly depending on a number of factors. For example, regional unrest, personal interest by powerful government figures, degree of community opposition, and environmental sensitivity may operate to make one project in, say, Burma more subject to political currents or popular demands than others. Project-level disclosures will enable investors to better understand these risks, whereas country-level reporting would allow companies to mask particularly salient projects by aggregating payments with those from less risky projects. For example, unusually high signing bonus payments for a particular project may be a proxy for political influence, whereas unusually low tax or royalty payments may signal that a project is located in a zone vulnerable to attacks or community unrest. As Calvert Investments noted in its Comment of November 12, 2010, project-level disclosures would assist in its "calculation of cost curves that determine whether and for how long a project may remain economic," using a model that takes into account political, social, and regulatory risks.[16] These signalling benefits would not be available to investors if information were made on a country-level basis, as investors would not be able to be able to use the data to attribute political and regulatory risk at the project level.[17]

It is well established that increased financial transparency has salutary effects for market efficiency, as disclosures can be captured in stock prices or used to appraise projects that may be "value-destroying," as well as helping to reduce liquidity risk.[18] The reduction of information asymmetries through robust disclosure can, in turn be linked to increased capital formation through the ability to more efficiently allocate scarce capital.[19] Project-level disclosures under Section 1504 will serve this function – they will promote capital formation by decreasing

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[16] *See* Comment of Calvert Investments at 2, submitted to the Commission on Nov. 15, 2010, *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-49.pdf.
[17] Moreover, industry commenters' suggestion that aggregation to the country level would help investors because they would not have to sort through reams of overwhelming numbers in order to find relevant information is disingenuous at best. Section 1504 required issuers to provide *both* the raw project-level data and the data aggregated at the country level but broken down by payment type. Thus to the extent that country level information is useful, it will be available *in addition* to project-level data.
[18] *See, e.g.*, Ashan Habib, *Corporate Transparency, Financial Development and the Allocation of Capital: Empirical Evidence*, 44 ABACUS 1, 5-8 (2008) (citing numerous quantitative studies).
[19] *Id.* at 17.

information asymmetry and providing more security and certainty to investors as to extractive companies' levels of risk exposure.[20]

2. Civil Society and Communities

The benefits to civil society and communities of project-level disclosure are significantly greater than those of country-level reporting. As noted in the submissions of numerous civil society groups, which represent communities who are among Section 1504's intended beneficiaries, project-level data will enable locals to know how much their governments earn from the resources that are removed from their own territory. This will empower them to advocate for a fairer share of revenues, double-check government-published budget data, and better calibrate their expectations from the extractive companies.

For example, an ERI report in 2009 calculated that, based on contracts and other documents turned over in the course of litigation, the Burmese regime has received billions of dollars from the Yadana gas project (operated by U.S.-registered issuer Total and owned by, among others, Chevron Corp.) that are not accounted for in Burma's national budget as revealed to the International Monetary Fund.[21] Communities in the project-affected area knew little about the value of the gas that was extracted from and transported across their land, enjoy few benefits from the revenues that accrued to the government, and have been subject to widespread human rights abuses associated with the project. Because Burma does not practice revenue transparency, this information is generally not available; it was only because the relevant contracts were subject to discovery in U.S. litigation that these figures could even be estimated. Robust project-level reporting would enable other Burmese communities to understand the value of their natural resources and advocate for fairer treatment from their government.

Moreover, local governments in resource-rich areas are often highly dependent on revenue sharing formulas whereby national governments – who typically receive the vast majority, if not the entirety, of resource revenues – redistribute a fixed percentage of those revenues to the region of origin.[22] Project-level reporting will enable both local government officials and civil society watch-dogs to monitor the revenue that flows back to the regions from the center and ensure that they receive what is promised – a benefit that would be unavailable if revenue streams were not differentiated below the country level.

3. The Red Herring of "Material" Project Reporting

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[20] *See also* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARVARD LAW REVIEW 1197, 1276-89 (1999) (concluding that both "social" and "economic" investors have interest in so-called social disclosures, as they provide financially relevant information).

[21] *See* EarthRights International, TOTAL IMPACT: THE HUMAN RIGHTS, ENVIRONMENTAL, AND FINANCIAL IMPACTS OF TOTAL AND CHEVRON'S YADANA GAS PROJECT IN MILITARY-RULED BURMA (MYANMAR) 43 (2009), submitted concurrently herewith.

[22] In the Niger Delta, for example, oil and gas revenues are collected by the federal government and redistributed to the states on the basis of a number of factors, including the "derivation rule," which requires that 13% of revenues from a given locality must be remitted to the place of origin. *See* Wumi Iledare & Rotimi Suberu, *Framework Paper: Oil and Gas Resources in the Federal Republic of Nigeria* at 3-4, from the Conference on Oil and Gas in Federal Systems, March 3-4, 2010, World Bank Headquarters, Washington, DC, *available at* http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266445624608/Framework_Paper_Nigeria2.pdf.

Many of the benefits of project-level disclosure would be illusory if the Commission were to permit issuers to report only on "material" projects. This is because the key unit of reporting is the payment, not the project. In other words, it makes little sense to limit disclosure to "material" *projects* (whatever that would mean) when Section 1504 is predicated on the notion that *all* non-de minimis payments are relevant to investors and civil society groups alike.

Allowing issuers to exclude payments made on projects that are deemed non-material presupposes that no payments arising from such projects are relevant to investors. This assumption is unwarranted. Outsized (or undersized, as the case may be) payments linked to minor industry projects may expose companies to investment risk and signal matters of concern – extortion and bribery, for example, or problems with financial controls – just as surely as payments related to megaprojects. Moreover, countries that wish to obscure their natural resource revenue streams would have a strong incentive to shift issuers' payments to these non-material projects to the maximum extent possible. Thus, a materiality limitation could encourage evasion and an overall deterioration in the quality of data reported.

For civil society and communities, the insufficiency of material project reporting is even more manifest. A project that is not "material" to an issuer's investors from a financial point of view may still be one that has serious impacts on standards of living in the communities affected by the issuer's operations. Since the Commission typically evaluates materiality only with respect to "the reasonable investor,"[23] it is not an appropriate concept to import into a statute that was explicitly intended to provide benefits to a wider range of stakeholders.[24]

iv. Project-Level Reporting and Confidential Information

Industry commenters have claimed that project-level reporting could release sensitive confidential information, harming them in two ways. First, the disclosure of payment information about a project in a given country could leave them at a competitive disadvantage by allowing other companies to outbid them or by putting other governments on notice of what they might be able to demand from that company. Second, companies might risk violating local laws or contractual provisions prohibiting disclosure. Neither of these objections withstands scrutiny, and providing exemptions based on them would risk undermining the effectiveness of the law.

1. Competitiveness

The notion that Section 1504 disclosures could release information that damages companies' competitiveness appears superficially reasonable. However, the contract terms giving rise to the payments that are required by Section 1504 are generally known to industry participants already.

[23] *See, e.g.*, Comment of Royal Dutch Shell plc at 1, received by the Commission on Aug. 1, 2011 (proposing limitiation of disclosure to "those projects that *a reasonable investor* considers important") (emphasis added).
[24] For this reason, if the Commission does decide to limit disclosure to those connected with "material" projects, we submit that a specialized definiton of the term "material" should be developed for Section 1504 that explicitly takes into account the interests of non-investor beneficiaries. BP, for example, recognizes that the concept of materiality might need to be more expansive in the Section 1504 context. Comment of BP p.l.c. at 6, received by the Commission on Feb. 11, 2011 ("We accept that other users have an interest in payment information that would be below the materiality levels ordinarily adopted by extractive industry issuers.").

Several countries publish all their contracts on-line. A team of researchers at Columbia University that conducted a wide-ranging survey of confidentiality clauses in industry contracts found that many resource extraction contracts can be purchased through commercial database services.[25] In fact, the Columbia researchers concluded that while information on these matters was widely available to industry, it was much less accessible to the public[26] – exactly the sort of information asymmetry that hinders effective capital formation, and that Section 1504 was tailored to remedy.

Moreover, the disclosures required by Section 1504 simply do not involve the commercial terms and trade secrets that could seriously undercut companies' competitiveness. Companies need not disclose projected reserves, contract terms, business models, proprietary technology, or future contracts or transactions. Nor would knowledge of the payments companies make to governments enable competitors to somehow intuit this information, as they would need to know much more about companies' expenses and production numbers in order to do so. The letter from the Qatari Minister of Energy and Industry that ExxonMobil submitted in a Comment to the Commission demonstrates that this is the case.[27] In that letter, the Minister lists three categories of information that he designates as "commercially sensitive," and prohibits companies from disclosing such information. These categories are: production costs, revenue, and reserves – none of which is covered by Section 1504.

The suggestion that payments should be concealed because they might undercut companies' bargaining position with other governments rings false as well. Experts have noted that host state negotiators may lack the capacity to negotiate terms that adequately protect the public interest when working out extractive contracts.[28] Industry's argument amounts to a complaint by industry that the SEC should create loopholes in the law explicitly to assist them to keep struggling developing world governments in the dark as to what a fair price for their resources should be.

2. Disclosure Prohibition Laws and Contractual Provisions

There is reason to doubt industry commenters' claims that *any* of the four countries identified by industry representatives actually has or implements laws prohibiting project-level payment disclosures.[29] Civil society groups from Cameroon have demonstrated convincingly that no

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[25] Peter Rosenblum & Susan Maples, CONTRACTS CONFIDENTIAL: ENDING SECRET DEALS IN THE EXTRACTIVE INDUSTRIES 13, 42 (Revenue Watch Institute 2009).
[26] *Id.* at 27.
[27] Dec. 23, 2009 Letter from Abdulla Bin Hamad al-Attiyah, Deputy Premier Minister of Energy & Industry of the State of Qatar, to ExxonMobil Qatar Inc., annexed to Comment of ExxonMobil, received by the Commision on Mar. 15, 2011, *available at* http://www.sec.gov/comments/s7-42-10/s74210-73.pdf.
[28] *See, e.g.*, *Summary Report* at 3-4, from Responsible Contracting Expert Workshop, June 25-26, 2009, Paris France, *available at* http://198.170.85.29/Report-on-Ruggie-responsible-contracting-workshop-25-26-Jun-2009.pdf.
[29] One comment purports to add one more name to the list of states that restrict transparency: the U.S.. *See* Comment of King & Spaulding LLP, received by the Commission on Sept. 8, 2011, *available at* http://www.sec.gov/comments/s7-42-10/s74210-110.htm . The comment suggests that disclosure of payments at the lease level would conflict with confidentiality provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. 1352. But that law only guarantees the confidentiality of "privileged or proprietary information," 43 U.S.C. 1352(c). The commenter does not show why the payments covered by Section 1504 should be treated as privileged or proprietary, and if there were any question, Section 1504 itself appears to decide that such information is to be divulged in the public interest.

disclosure prohibition exists.[30] The letter from Qatar's Minister of Energy and Industry explicitly states that no disclosure prohibition laws have been drafted and goes on to prohibit interim disclosure of categories of payments that are not covered by Section 1504. A number of companies already report on their payments to the Angolan and Chinese governments, and Petrobras has stated explicitly that it knows of no laws that would limit its ability to disclose such information in any of the countries where it operates, which includes Angola and China.[31]

A legal opinion from Chinese lawyers, opining that the Chinese government might treat some Section 1504 disclosures as state or business secrets, does not ground this conclusion in any clearly written law or regulation. Instead, the determination appears to amount to a general concern that China is sensitive about information related to its natural resources and prefers to keep such information secret.[32] Moreover, the legal opinion appears to be based on erroneous assumptions. Its determination that production entitlement, royalty, and bonus payments would constitute state secrets is predicated on the belief that such payments could be used to deduce sensitive information like reserves and future discoveries,[33] which, as noted above, they could not. And it concludes that such data may also constitute business secrets only if they are unknown to the public; however, as noted above, payment data is generally known to industry competitors, if not to the general public.[34]

As a matter of policy, creating exemptions for foreign disclosure laws would be deeply counterproductive to the congressional intent of Section 1504. As TSYO and HURFOM note, governments like the Burmese regime – which are simultaneously among the most opaque, resource extraction-dependent, and unstable in the world – would not hesitate to take advantage of such an exception to deprive investors and civil society alike of crucial information.[35] Nor is this a hypothetical danger. The letter from the Qatari Minister of Energy & Industry, in which the Minister describes new laws that are being drafted in response to Section 1504 "to control the disclosure of such information,"[36] shows clearly that countries with an interest in combatting transparency may already be crafting legislative responses in hopes that such a loophole will be available.

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[30] Comment of RELUFA, received by the Commission on Mar. 14, 2011, *available at* http://www.sec.gov/comments/s7-42-10/s74210-74.pdf; Comment of RELUFA, received by the Commission on July 11, 2011, *available at* http://www.sec.gov/comments/s7-42-10/s74210-96.pdf.
[31] Comment of Petrobras at 5, received by the Commission on Feb. 21, 2011, available at http://www.sec.gov/comments/s7-42-10/s74210-25.pdf.
[32] Jun He Law Offices, Legal Opinion at 4, provided to Shell (China) Limited on Jan. 26, 2011, annexed as Appendix C to Comment of Royal Dutch Shell p.l.c., received by the Commission on May 17, 2011, *available at* http://www.sec.gov/comments/s7-42-10/s74210-90.pdf. Even if true – a contention that seems highly doubtful given Petrobras's history of disclosure – this is hardly the sort of policy that would be appropriate for the SEC to recognize and encourage when promulgating rules to implement a law that is specifically aimed to support U.S. efforts to promote international transparency.
[33] *Id.*
[34] *See Freeman v. Bureau of Land Mgmt.*, 526 F. Supp. 2d 1178 (D. Or. 2007) (in FOIA context, information known widely to competitors but not to public at large does not count as commercial secret).
[35] June 28, 2011 TSYO Comment at 1; July 15, 2011 HURFOM Comment at 1-2.
[36] Qatar Letter, annexed to March 15, 2011 Exxon Letter at 5.

Finally, as to contract confidentiality clauses, the Columbia University researchers note that it is standard practice to include an exemption from confidentiality where required by law.[37] Indeed, it would seem that an extractive company's counsel would be negligent if such a basic provision were not included in the boilerplate language of the company's form contract.[38] If exemptions were provided for contract confidentiality clauses, then companies and countries seeking to avoid disclosure could simply write disclosure prohibitions into their contracts; the Commission should not encourage contract drafting that enables companies to evade its regulatory reach.

C. Publication of Payment Information and the Compilation

Some industry commenters have suggested that – especially in light of *Business Roundtable* – the Commission should keep confidential the raw payment data submitted by issuers and instead, publish only a statutorily required compilation that summarizes the amount *each country* receives in revenue. This recommendation is based on two misleading premises: 1) the Commission has the discretion under Section 1504 to *not* publish payment disclosures, and 2) withholding this information would protect industry from conflicting national laws prohibiting disclosure, and from exclusion from future projects based on issuers' obligation to disclose project-level payment information.

i. The Clear Congressional Mandate to Disclose

The Commission does not, in fact, have discretion to withhold the project-level payment information included in annual reports pursuant to sub-clause (q)(2)(A) of Section 1504. The very text of the statute makes clear that this information is to be included in the annual report it submits to the SEC – which is, of course, published on the SEC website.[39]

Most of the rest of the statute would make little sense if that information were meant to be withheld. For example, the requirement that the disclosures be made in an interactive data format,[40] with electronic tags identifying particular information about each payment,[41] is meaningless unless it is meant to allow investors and other users of the data to digest it more efficiently. If the raw data were meant to be viewed only by the Commission for the purpose of developing a public compilation, there would be little reason to make it available in such a user-friendly manner. Moreover, the list of enumerated categories of information for which electronic tags are statutorily required includes "such other information as the Commission may determine is necessary or appropriate *in the public interest or for the protection of investors*."[42] In other

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[37] CONTRACTS CONFIDENTIAL at 23, 27.
[38] The Jun He Legal Opinion notes that Shell's contracts in China typically include a confidentiality exception for disclosures to the stock exchanges and government of Shell's home country. The opinion concludes that since the US is not Shell's home, Section 1504 would not trigger this exception. *Id.* at 5. If Shell has indeed failed to secure a contractual exemption for disclosures required by all regulatory authorities to which it is subject, then it is not the Commission's function to reward such an oversight. On balance, though, it seems unlikely that the provision would be interpreted as narrowly as the opinion proposes.
[39] Moreover, Section 1504's architects have confirmed that they intended for the compilation to be made available *in addition* to the disclosures. Comment of Sens. Cardin, Kerry, Leahy, & Schumer and Rep. Frank, received by the Commission on Mar. 1, 2011, *available at* http://www.sec.gov/comments/s7-42-10/s74210.shtml.
[40] Exchange Act §13(q)(2)(D)(i).
[41] *Id.* §13(q)(2)(D)(ii).
[42] *Id.* §13(q)(2)(D)(ii)(VII).

words, the electronic tags on individual payments are meant to be seen by investors and the public.

Industry commenters base their proposal on a sub-clause mandating that a compilation of Section 1504 disclosure shall be made available to the public, on-line, *to the extent practicable*.[43] But by its terms, this provision would allow the Commission to refrain from publishing the compilation entirely if it were not practicable (for example, if the Commission were not provided with sufficient appropriations). If that were the case and industry's proposal were implemented, then *none* of the information on payments would ever be made public, and investors and the public would enjoy none of the benefits of increased revenue transparency. Congress cannot, therefore, have intended for the compilation to serve as a replacement for publishing project-level payment information.

Moreover, under industry's proposal, investors and the public would not even be able to sort out how much revenue governments receive from each company, as the compilation would be aggregated to the level of how much each country receives in each revenue category across all issuers. Yet industry ignores not just the civil society groups who are the intended secondary beneficiaries of Section 1504, but also the very investors and shareholders the Commission is ordinarily charged with protecting. Industry's proposal would, of course, eviscerate the intent of Congress, which was to allow investors to assess investment risk for particular issuers.

ii. Competitiveness and Transparency

As noted above, industry commenters' contentions that publication of Section 1504 disclosures threatens projects in countries that prohibit such disclosures and whose contracts have confidentiality clauses are overblown and misleading. But if it were true that Section 1504 disclosures are prohibited by law or contract, requiring the Commission to withhold the disclosures would not protect companies from the consequences of breaching such restrictive provisions. The very act of reporting to the U.S. government would constitute the breach; any further publication by the Commission would not subject the companies to further liability.

As to the idea that issuers subject to disclosure will not be awarded future projects by governments that wish to hide payment data, this contention is difficult to credit. Section 1504 covers the vast majority of major international oil companies, including many important foreign competitors like Petrochina, Shell, and Lukoil.[44] The idea that all important companies –some of whom have unique technical expertise and capacity that cannot be matched by national oil companies or most unlisted competitors – would be excluded from projects simply because of a transparency initiative is simply not believable.

Moreover, it is demonstrably untrue. For example, StatoilHydro announced in January that it had been granted operator status for two promising deep-water blocks and participant status in

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[43] *Id.* §13(q)(3)(A).

[44] *See* Comment of American Petroleum Institute, Attachment B, received by the Commission on Ocr. 12, 2010, *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-27.pdf.

three other blocks in Angola.[45] Yet Statoil is one of the most proactively transparent oil companies in the world on government payments, while Angola is regularly cited as one of the chief opponents of disclosure.[46] If transparency were a major determinant in the awarding of projects, then it is hard to imagine that Statoil could have won its bid, especially after the enactment of Section 1504, which applies to Statoil as a registrant with the Commission.

IV. Conclusion

For the foregoing reasons, ERI believes that the Commission has satisfied any existing statutory requirement to develop rules that take into consideration the effects of project-level reporting and publication of disclosures on capital formation, market efficiency, and competitiveness. By proposing rules requiring full project-level reporting and publication of project-level disclosures, the Commission follows the strict mandate of the law, declines to exercise discretion where none is granted, and provides a boon to investors, a boost to markets, and a tremendous benefit to the people of resource-rich countries.

We respectfully request that the Commssion promptly promulgate these rules as proposed, and offer our further assistance and insights as required.

Sincerely,

Jonathan Kaufman
Staff Attorney
EarthRights International

Cc:

The Honorable Luis A Aguilar
Commissioner
US Securities and Exchange Commission

The Honorable Elisse Walter
Commissioner
US Securites and Exchange Commission

Mr. Mark Cahn
General Counsel
US Securities and Exchange Commission

[45] *See* Camilla Knudsen, *Statoil sees work in 5 concessions in Angola*, REUTERS AFRICA, Jan. 24, 2011, *at* http://af.reuters.com/article/investingNews/idAFJOE70N0HX20110124.
[46] In fact, Angola is one of the four countries listed by industry commenters as prohibiting revenue disclosures.

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