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November 5, 2010

Rulemaking under Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

We appreciate the opportunity to provide the Securities and Exchange Commission (the "Commission") with comments on the rulemaking that will be required by the Commission to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), which added Section 13(q) to the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Section 1504 requires the adoption of rules regarding the disclosure of payments by resource extraction issuers. As discussed in Part C of this letter, in developing rules to implement the mandate of Section 1504, the Commission is also required to give significant consideration both to the protection of investors and the promotion of efficiency, competition and capital formation, as required by Section 3(f) and Section 23(a)(2) of the Exchange Act. We believe that the following actions (each further discussed below) will enable the Commission to implement Section 1504, consistent with the mandate of Congress, while also having appropriate regard under Sections 3(f) and 23(a)(2) for the effects of the proposed rules on investors and issuers:[1]

- (A) allow for compliance with foreign laws, rules and orders that limit or prevent disclosure of payments to governments; and

- (B) require disclosure of payments only for projects that are material.

[1] As noted below, there may be additional steps that are necessary and appropriate for the Commission to take when implementing Section 1504. *See infra* note 25 and accompanying text.

A. *Allowance for Compliance with Conflicting Foreign Laws, Rules and Orders*

Section 23(a)(1) of the Exchange Act gives the Commission and other agencies broad power to promulgate rules and regulations for the implementation of the Exchange Act and "for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser, or different requirements for different classes thereof".[2] The authority provided to the Commission by Section 23(a)(1) allows the Commission to grant allowances for compliance with conflicting foreign laws, rules and orders at its discretion.

We understand that some resource extraction issuers operate in countries that have laws, rules or governmental orders that may limit or prevent the disclosure of payments to the government.[3] These restrictions can further important and legitimate national and competition objectives.[4] The Commission should not require issuers to violate the laws of other countries or force issuers to choose between violating U.S. laws or foreign laws. An issuer should not be compelled to select between, on the one hand, avoiding new projects or abandoning existing projects in certain countries and, on the other hand, maintaining its registration under the Exchange Act.[5] It would not be in the best interests of their investors to force issuers to make those choices. Moreover, for a domestic U.S. issuer with non-U.S. operations, the only choice may be to avoid such opportunities and abandon such projects because de-registration would not be possible. To do so would also be contrary to the interests of U.S. investors and competition as well as principles of comity between the laws of the United States and other jurisdictions.

We believe that Section 1504 was intended to promote transparency and disclosure and not to prohibit or discourage particular forms of doing business.[6]

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[2] 15 U.S.C. § 78w(a)(1).

[3] *See, e.g.*, Letter from Martin J. ten Brink, Executive Vice President Controller, Royal Dutch Shell plc, to Meredith Cross, Director, Division of Corporation Finance of the Securities and Exchange Commission, 2-3 (October 25, 2010) (on file with the Securities and Exchange Commission), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-33.pdf; Letter from Kyle Isakower & Patrick T. Mulva, American Petroleum Institute, to Division of Corporation Finance of the Securities and Exchange Commission, 5-6 (October 12, 2010) (on file with the Securities and Exchange Commission), *available at* http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-27.pdf.

[4] *See* Letter from Martin J. ten Brink, *supra* note 3, at 2-3; Letter from Kyle Isakower & Patrick T. Mulva, *supra* note 3, at 5-6.

[5] *See, e.g.*, Letter from Martin J. ten Brink, *supra* note 3, at 3.

[6] In a press release from Senator Benjamin Cardin that announced the adoption of the Dodd-Frank Act and the inclusion of Section 1504 (referred to as the "Cardin-Lugar Provision"), Senator Cardin described Section 1504 as "a critical part of the increased transparency and corporate responsibility that we are striving to achieve in the financial industry". Press Release, Senator Cardin, Senate Adopts Wall Street Reform Including Cardin-Lugar Provision to Increase Transparency and Attack Corruption (July 15, 2010), *available at* http://cardin.senate.gov/pdfs/eiti2.pdf (describing the Cardin-Lugar Provision as providing

However, for the reasons outlined above, Section 1504 could, if improperly implemented, have an unwarranted business prohibition effect.[7] In our view, such negative consequences for business operations are outside the scope of intended consequences of a transparency and disclosure statute.

The granting of an allowance for laws, rules and orders that conflict with Section 1504 rules could decrease the potential costs to issuers and harm to investors in ways that are consistent with the mandatory provisions of the Exchange Act.[8] An example of the Commission exercising such authority in the past can be found in the oil and gas disclosure rules in Subpart 1200 of Regulation S-K, which provide that issuers do not have to disclose certain reserves and production information for countries with laws that prohibit such disclosures.[9] In the Commission's cost-benefit analysis regarding the final oil and gas disclosure rules, the Commission explicitly described the allowance for foreign private issuers to omit disclosures that are prohibited by issuers' home countries as possible mitigation of the costs of compliance with the disclosure rules.[10]

In addition, the Foreign Corrupt Practices Act provisions of the Exchange Act provide an exemption for actions that comply with a country's written laws.[11] Similarly, stock exchange rules allow foreign private issuers to follow their home country rules instead of certain stock exchange listing standards[12] and such self-regulatory organization rules are approved by the Commission pursuant to Section 19(b)(1) of the Exchange Act.[13]

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greater corporate transparency, increased predictability to investors, growth opportunities to help alleviate poverty and enhanced energy security).

[7] *See, e.g.*, Letter from Martin J. ten Brink, *supra* note 3, at 2-3; Letter from Kyle Isakower & Patrick T. Mulva, *supra* note 3, at 5-6.

[8] *See infra* notes 21-24 and accompanying text.

[9] *See* 17 C.F.R. §§ 229.1202, 229.1204.

[10] Modernization of Oil and Gas Reporting, Securities Act Release No. 8995, Exchange Act Release No. 59,192, 74 Fed. Reg. 2158, at 2187 (January 14, 2009).

[11] 15 U.S.C. § 78dd-1(c) (providing an affirmative defense for particular payments, gifts, offers or promises of anything of value if such items were "lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country").

[12] *See* NYSE, Inc., Listed Company Manual § 303A (2009) *available at* http://nysemanual.nyse.com/lcm (describing the foreign private issuer exemption to certain corporate governance rules of the New York Stock Exchange); NASDAQ, Inc., NASDAQ Stock Market Rules, § 5615 (2010) *available at* http://nasdaq.cchwallstreet.com/NASDAQ/Main (describing the foreign private issuer exemption to certain corporate governance rules of the NASDAQ Stock Market).

[13] 15 U.S.C. § 78s(b)(1).

B. *Materiality Qualifier for Project Disclosure*

Section 1504 directs the Commission to implement rules that require resource extraction issuers to disclose "the type and total amount of such payments made for each project of the resource extraction issuer".[14] Based on the comments supplied by industry participants, we believe that this requirement has the potential to require issuers to disclose massive amounts of immaterial information.[15] It would not be consistent with the Commission's obligations under Section 3(f) and Section 23(a)(2)[16] or its stated mission to protect investors[17] to require voluminous disclosures of immaterial information that provide little or no benefit to investors, distract from the material disclosures that investors need, may harm the competitive position of companies and may harm efficient capital formation.

One way to implement the mandate of Section 1504 and comply with the Commission's obligation under the Exchange Act framework is to limit the projects that require disclosure to projects that are material to the issuer. Limiting the disclosure to material projects will make it easier for investors to access the information that is most relevant and important to their investment decisions, which is consistent with the Commission's obligation to protect investors.[18] In addition, the elimination of immaterial project disclosure would also be consistent with the Commission's interpretive guidance to remove immaterial information from Management's Discussion and Analysis disclosures in order to better enable investors to access relevant information.[19]

The explicit language of Section 1504 includes a definition of "payment", which requires that the disclosed payments are "not de minimis".[20] The Commission's implementation of a materiality standard for projects would help ensure that the reported

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[14] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2221 (2010).

[15] *See, e.g.*, Letter from Martin J. ten Brink, *supra* note 3, at 3-4; Letter from Kyle Isakower & Patrick T. Mulva, *supra* note 3, at 7-9.

[16] *See infra* notes 21-24 and accompanying text.

[17] *See* U.S. Securities and Exchange Commission, Putting Investors First — 2009 Performance and Accountability Report, *available at* http://www.sec.gov/about/secpar/secpar2009.pdf.

[18] Notably, Section 1504 does not require that the Section 1504 disclosures be in the annual filings that are required by Section 13 of the Exchange Act; it simply requires that the disclosures be made in "an annual report". Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504, *supra* note 14, at 2220. Thus another alternative that the Commission may consider is putting the Section 1504 disclosures in a separate annual report so as not to distract from the other disclosures in an issuer's Form 10-K or Form 20-F filing.

[19] *See* Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operation, Securities Act Release No. 8350, Exchange Act Release No. 48,960, 68 Fed. Reg. 75,056 (December 29, 2003).

[20] Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504, *supra* note 14, at 2220.

payments comply with Section 1504's non-de minimis standard and a materiality qualifier would not conflict with Section 1504's definition of project given that the section contains no such definition.

C. *The Commission's Obligations under Sections 3(f) and 23(a)(2)*

Section 1504 of the Dodd-Frank Act, which mandates certain disclosure rules, must be read together with Sections 3(f) and 23(a)(2) of the Exchange Act as the Commission promulgates Section 1504 rules.[21] Section 23(a)(2) requires the Commission to consider the effects of new rules and regulations on competition.[22] Under Section 3(f), when the Commission is engaged in rulemaking and required to determine if an action is needed for public interest, the Commission must consider investor protection and the promotion of efficiency, competition and capital formation.[23] Sections 3(f) and 23(a)(2) further the Commission's obligation to provide rules and regulations that protect investors and serve the public interest.[24] The Dodd-Frank Act did not repeal or amend Sections 3(f) and 23(a)(2) of the Exchange Act and we do not believe that Section 1504 of the Dodd-Frank Act is irreconcilable with Sections 3(f) and 23(a)(2). Instead, we believe that the proposed actions in Parts A and B of this letter should be part of any rulemaking under Section 1504 because, as set out above, these provisions will allow the new rules to give appropriate effect to the considerations identified in Sections 3(f) and 23(a)(2), while still implementing Section 1504 in a manner that is consistent with the Congressional mandate.

Finally, we note that the proposals outlined in this letter are not exclusive of other steps that may be necessary or appropriate in order to implement Section 1504 in

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[21] The U.S. Supreme Court has held that acts of Congress should be read as a group of related provisions. *See* Gustafson v. Alloyd Co., 513 U.S. 561 (1995). Moreover, the U.S. Supreme Court has long held that the canons of statutory construction require that a later statute does not affect the provisions of an earlier statute unless such later statute expressly repeals the earlier statute or the statutes are irreconcilable. *See, e.g.*, Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976); Morton v. Mancari, 417 U.S. 535 (1974); Rodgers v. United States 185 U.S. 83 (1902).

[22] 15 U.S.C. § 78w(a)(2) (requiring that the Commission "shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this title").

[23] 15 U.S.C. § 78c(f). Legislative history indicates that by implementing Section 3(f), Congress intended for the Commission to "analyze the potential costs and benefits of any rulemaking initiative, including, whenever practicable, specific analysis of such costs and benefits". H.R. REP. NO. 104-622, at 39 (1996).

[24] Section 2 of the Exchange Act describes all regulation under the Exchange Act as being required by national public interest, stating that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a *national public interest* which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto". 15 U.S.C. § 78b (emphasis added).

a manner that is practical, workable and responsive to the Commission's obligations under Sections 3(f) and 23(a)(2).[25]

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We thank you for the opportunity to comment on the Commission's implementation of Section 1504 of the Dodd-Frank Act. We would be pleased to discuss the contents of this letter in greater detail with the Commission. Please feel free to contact any of the representatives of the undersigned firms listed in Annex A with questions you may have regarding the contents of this letter.[26]

Very truly yours,

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[25] *See* Letter from Martin J. ten Brink, *supra* note 3; Letter from Kyle Isakower & Patrick T. Mulva, *supra* note 3 (discussing additional steps that the Commission should consider when it implements Section 1504 rules).

[26] The firms that are signatory to this letter advise clients that may have an interest in this matter.

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