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26 October 2015

By email:

Chair Mary Jo White
Commissioner Luis Aguilar
Commissioner Michael Piwowar
Commissioner Kara Stein

U.S. Securities and Exchange Commission
100 F Street, NE Washington, DC
20549-1090
USA

**Re: Specialized Disclosures; Resource Extraction Issuers, Title XV -
exemptions related to conflict of law or conflicts of contract and
current practice**

Dear Chair and Commissioners:

We write to comment on the Securities and Exchange Commission rulemaking for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

As a Berlin-based energy consultancy and publishing house, we have published widely on extractives contracts, including “How to Read and Understand Oil Contracts”¹, which has been downloaded over 100,000 times, translated into five languages and has been used by institutions such as the government of Nigeria, Royal Dutch Shell and numerous law firms. Johnny West, founder of OpenOil, is also a member of the Association of International Petroleum Negotiators (AIPN), the professional association of attorneys handling oil industry negotiations. Maintaining the world’s largest open collection of contracts from the extractives

¹ <http://openoil.net/understanding-oil-contracts/>

industries², we have acquired extensive experience of current industry practice in regards to contract confidentiality, and its relationship to regulatory requirements. Some 406 of the 806 contracts in the database in fact entered public domain because they were published by companies, largely in response to reporting requirements in their home jurisdictions.

Some commentators have argued that disclosures required under Section 1504 of Dodd-Frank would conflict with confidentiality requirements in national laws or contractual arrangements.

We cannot support this view, based on our review of our database of over **800 contracts from 73 countries**. Our research shows that:

- A. **Most contracts in the database explicitly allow for disclosure** when required by law. This represents standard industry practice, as evidenced by the model confidentiality agreement form produced by AIPN.³
- B. Negotiations are conducted, and contracts signed, based on an **understanding of the need to comply** with state and market regulations, even as these change over the lifetime of a project. The regulations currently under consideration should not therefore be considered as an unusual or unreasonable burden.

A -- Most contracts explicitly allow for disclosure.

Confidentiality is, indeed, an important issue in company-government relationships. It is explicitly discussed in at least 419 -- more than 50% -- of the contracts in our database⁴. However, contracts typically contain exemptions from their confidentiality clauses, allowing for legal requirements to take precedence. Terms suggesting exemptions appear frequently in proximity to mentions of confidentiality -- “except” or “exceptions” occur in 178⁵ contracts in proximity to mentions of confidentiality, “without” in 159⁶, and “unless” in 93⁷. Clearly the presence of a confidentiality clause is the beginning of a debate about contract transparency, as the advocates say, rather than the end of it.

Some industry voices have claimed that there are four countries which allegedly prohibit disclosure of information: Angola, China, Cameroon and Qatar. We present confidentiality clauses extracted from contracts from three of these countries⁸.

² <http://repository.openoil.net/>, with full text search at <http://search.openoil.net/search?source=openoil-contracts>

³ AIPN Model Form Confidentiality Agreement, Article 4.1, as cited in Appendix A to the comment submitted by Oxfam (March 20, 2012), <http://www.sec.gov/comments/s7-42-10/s74210-294.pdf>.

⁴ OpenOil Contracts repository search for “confidential”, “confidentiality” and similar terms. http://search.openoil.net/search?q=confidentia*&source=openoil-contracts

⁵ <http://search.openoil.net/search?q=%22confidential%20except%22~50&source=openoil-contracts>

⁶ <http://search.openoil.net/search?q=%22confidential%20without%22~50&source=openoil-contracts>

⁷ <http://search.openoil.net/search?q=%22confidential%20unless%22~50&source=openoil-contracts>

⁸ We exclude Qatar since our database does not contain any contracts from Qatar. However, we have no reason to expect confidentiality clauses in Qatari contracts to be substantially unlike those from the other countries considered

Contract 1: Angola -- Block 21/09

... either Party may, without such approval, disclose the aforementioned data:

....

(c) to the extent required by any applicable law, regulation or rule (including, without limitation, any regulation or rule of any regulatory agency, securities commission or securities exchange on which the securities of such Party or of any such Party's Affiliates are listed),⁹

Contract 2: Angola -- Block 9/09

...either Party may, without the approval of the other Party, disclose this Agreement:

...

(c) to the extent required by any applicable Law, Decree or regulation (including, without limitation, any requirement or rule of any regulatory agency, securities commission or securities exchange on which the securities of such Party may be listed);¹⁰

Contract 3: Cameroon -- Douala Basin

15.1 (a) Subject to the provisions of the Contract, the Parties agree that all information and data acquired or obtained by any Party in respect of Joint Operations shall be considered confidential and shall be kept confidential and not be disclosed during the term of the Contract to any person or entity not a Party to this Agreement, except:

...

(vii) to the extent such data and information must be disclosed pursuant to any rules or requirements of any government or stock exchange having jurisdiction over such Party, or its Affiliates; provided that if any Party desires to disclose information in an annual or periodic report to its or its Affiliates' shareholders and to the public and such disclosure is not required pursuant to any rules or requirements of any government or stock exchange, then such Party shall comply with Clause 19.3;¹¹

⁹ http://repository.openoil.net/wiki/Angola_Block-21/09_dd20100224_Risk-Service;
http://downloads.openoil.net/contracts%2Fao%2Fao_Block-21-09_dd20100224_Risk-Service_CIE_Sonangol-P%26P_Nazaki.pdf

¹⁰ http://repository.openoil.net/wiki/Angola_Block-9/09_dd20100224_Risk-Service;
http://downloads.openoil.net/contracts%2Fao%2Fao_Block-9-09_dd20100224_Risk-Service_CIE_Sonangol-P%26P_Nazaki.pdf

¹¹ http://repository.openoil.net/wiki/Cameroon_Douala-Basin_dd20080300_Petroleum-Operations;
http://downloads.openoil.net/contracts%2Fcm%2Fcm_Douala-Basin_dd20080300_Petroleum-Operations_Perenco_Kosmos.pdf

Contract 4: Cameroon -- Kombe-Nsepe-Permit

15.1 (a) Subject to the provisions of the Contract, the Parties agree that all information and data acquired or obtained by any Party in respect of Joint Operations shall be considered confidential and shall be kept confidential and not be disclosed during the term of the Contract to any person or entity not a Party to this Agreement, except:

...

(iii) to the extent such data and information is required to be furnished in compliance with any applicable laws or regulations, or pursuant to any legal proceedings or because of any order of any court binding upon a Party;¹²

Contract 5: China -- Area 25/34

22.5 Necessary information, documents, data and reports may be furnished by the Contractor in accordance with the laws of its home country to the government and stock exchanges provided that the Contractor reports to the JMC in advance.¹³

Contract 6: China -- Zijinshan-Area

21.6 Necessary information, documents, data and reports may be furnished by the Parties or an Affiliate of the Parties related to CBM Operations in accordance with the laws of their home countries to the governments and stock exchanges, provided that the Parties report to JMC in advance.¹⁴

Based on our research, **these confidentiality exemptions are typical** for extractives contracts, whether or not the companies are registered in the USA. We would be happy to provide further examples if this would help the SEC in their deliberations.

B) Contracts allow for developing compliance needs

Some comments have noted that contract terms can be overruled by national laws. This is a broad brush generalisation that does not hold. It is true that some contracts stipulate some

¹² [http://repository.openoil.net/wiki/Cameroon_Kombe-Nsepe-Permit_dd20080321_JOA](http://repository.openoil.net/wiki/Cameroon_Kombe-Nsepe-Permit_dd20080321_JOA;);
http://downloads.openoil.net/contracts/cm/cm_Kombe-Nsepe-Permit_dd20080321_JOA_Perenco_Kosmos_SNH.pdf

¹³ [http://repository.openoil.net/wiki/China_Area-25/34_dd20090217_Petroleum-Contract](http://repository.openoil.net/wiki/China_Area-25/34_dd20090217_Petroleum-Contract;);
http://downloads.openoil.net/contracts/cn/cn_Area-25%3A34_dd20090217_Petroleum-Contract_Primeline.pdf

¹⁴ [http://repository.openoil.net/wiki/China_Zijinshan-Area_dd20071026_PSC-Coalbed-Methane](http://repository.openoil.net/wiki/China_Zijinshan-Area_dd20071026_PSC-Coalbed-Methane;);
http://downloads.openoil.net/contracts/cn/cn_Zijinshan-Area_dd20071026_PSC-Coalbed-Methane_CUCBM_Pacific-Asia.pdf

superiority to national laws in some respects. One can say no more than that. We would further add:

1. The existence of confidentiality exemptions in so many contracts demonstrates that **developing disclosure requirements have already been anticipated** during negotiation processes.

In our view, the inclusion of compliance-related confidentiality exemptions is **already standard industry practice**. The effect of weakening disclosure regulations would be to reward those few companies who have failed to make allowance for possible compliance regulations, at the expense of the majority who have taken their potential legal obligations into consideration.

2. Even where national laws require confidentiality, they typically allow exceptions for compliance with legislation or regulations in the home country. This is clearly true even in the case of Cameroon, cited by Royal Dutch Shell as a case where compliance with Dodd-Frank would contravene national law.¹⁵ Cameroon's petroleum law states that:

Art.110.- The confidentiality undertaking pursuant to the present Section shall not be applicable to any item of information in so far as that item of information has to be disclosed in accordance with legislative or regulatory provisions in force or with a ruling of a competent court¹⁶

In short, our evaluation of extractives industry contracts and regulations suggests that the danger of conflict with national laws has been overstated. We appreciate the opportunity to comment on this issue, and would be glad to provide more information or engage further in the consultation process if requested.

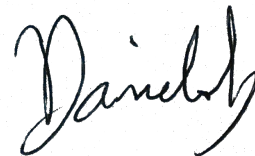
Sincerely,



Johnny West
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Anton Rühling
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Dan O'Huiginn
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¹⁵ <http://www.sec.gov/comments/s7-42-10/s74210-90.pdf>

¹⁶ <http://www.sec.gov/comments/s7-42-10/s74210-90.pdf>