



SEC Adopts Final Resource Extraction Disclosure Rules

On June 27, 2016, the Securities and Exchange Commission (“SEC”) adopted final rules requiring disclosure by resource extraction issuers of payments made to governments for the commercial development of oil, natural gas, or minerals. Specifically, issuers must disclose payments of \$100,000 or more made to the United States federal government or any foreign governments¹ during a fiscal year, including production entitlements, taxes, royalties, fees, and payments for infrastructure improvements. The disclosures will be required by Rule 13q-1 and will appear on a Form SD, which issuers must file annually within 150 days after their fiscal year end beginning with fiscal years ending after September 30, 2018.

Mandated by Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Rule 13q-1 was initially adopted by the SEC in August 2012 but was subsequently vacated and remanded by the U.S. District Court for the District of Columbia in July 2013 in a suit initiated by industry groups. In response to a federal court order, the SEC repropoed the rule in December 2015 and proposed to hold a vote on the adoption of final rules on an expedited timeframe by June 27, 2016.

New Disclosure Requirements

Who Is Subject to the Rules? Rule 13q-1 will apply to “resource extraction issuers,” which is any U.S. or foreign company, including any smaller reporting company, that is required to file an annual report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (“Exchange Act”) and is engaged in the commercial development of oil, natural gas, or minerals.

The commercial development of oil, natural gas, or minerals, in turn, includes exploration, extraction, processing, and export of oil, natural gas, or minerals, or the acquisition of a license for any of those activities.

Notably, foreign private issuers are not excluded from the definition of “resource extraction issuer,” and a resource extraction issuer will be subject to the rules regardless of its size, ownership, or the extent of its business operations constituting the commercial development of oil, natural gas, or minerals.

The rules do not apply, however, to issuers subject to Tier 2 reporting requirements under Regulation A, to crowd-funded issuers, or to registered investment companies.

¹ The rules define “foreign government” as a foreign government; a department, agency, or instrumentality of a foreign government; or a company at least majority owned by a foreign government. It includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.

What Constitutes a Payment? The term “payment” means payments that are made to further the commercial development of oil, natural gas, or minerals and are “not de minimis,” and it includes the following:

- Taxes;
- Royalties;
- Fees (including license fees);
- Production entitlements;
- Bonuses;
- Community and social responsibility payments that are required by law or contract; and
- Payments for infrastructure improvements.

A payment, whether a single payment or a series of related payments, is “not de minimis” if it equals or exceeds \$100,000 during the most recent fiscal year.

What Disclosure Do the New Rules Require? A resource extraction issuer must file its payment disclosure on Form SD no later than 150 days after the end of its fiscal year.

The final rules amended Form SD, which is currently used to provide conflict minerals disclosure, to require disclosure of the following information regarding applicable payments made by resource extraction issuers:

- The type and total amount of payments made for each project;
- The type and total amount of payments for all projects made to each government;
- The total amount of the payments;
- The currency used to make the payments;
- The fiscal year in which the payments were made;
- The business segment of the resource extraction issuer that made the payments;
- The governments (including any foreign government or the U.S. federal government) that received the payments and the country in which each such government is located;
- The project of the resource extraction issuer to which the payments relate;
- The particular resource that is the subject of commercial development; and
- The subnational geographic location of the project.

In addition, a resource extraction issuer is required to disclose payments made by its subsidiaries and other entities under its control.

The payment disclosure is required to be “filed,” rather than “furnished,” and is therefore subject to liability for false or misleading statements under Section 18 of the Exchange Act and must be presented using XBRL and the electronic tags identified in Form SD.

What Constitutes a Project? A “project” is defined as operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government. Agreements that are both operationally and geographically interconnected may be treated by a resource extraction issuer as a single project.

What Exemptions Are Provided by the Rules? The final rules contain two exemptions. First, a resource extraction issuer that has acquired a company that was not previously subject to the final rules will not be required to report payment information for the acquired company until the Form SD filing for the first fiscal year after the acquisition. Second, the rules provide for a one-year delay in reporting payments related to exploratory activities.

In addition, a resource extraction issuer is permitted to use a report prepared for another disclosure regime in order to comply with the rules, provided that the SEC has determined that the requirements applicable to those reports are substantially similar. The SEC issued a separate order on June 27, 2016, in which it determined that the current reporting requirements of the European Union Accounting and Transparency Directives (as implemented in a European Union or European Economic Area member country), Canada’s Extractive Sector Transparency Measures Act, and the U.S. Extractive Industries Transparency Initiative are substantially similar to the SEC’s rules, subject to certain conditions specified in the order and in the final rules.

When Does the Reporting Obligation Go into Effect? The obligation commences starting with issuers’ fiscal years ending on or after September 30, 2018.

Practical Considerations

While industry groups may seek to challenge the final rules, domestic and foreign private issuers should take the following steps to prepare for the revised disclosure requirements in anticipation of implementation of the final rules:

- Determine whether they are a resource extraction issuer and are subject to the new disclosure rules;
- Determine whether they are already subject to the requirements of an approved alternative disclosure regime that is substantially similar to the SEC rules, and can therefore use the same report to satisfy all or some of the SEC requirements;
- Identify their projects, which may require analysis of whether agreements are sufficiently interconnected that they may be treated as a single project;
- Review payments that may be subject to the reporting obligation;
- Consult counsel regarding the presentation and disclosure that is required, and whether and how to seek an exemption on a case-by-case basis from the SEC, for example if the disclosure would be prohibited by the laws of a foreign jurisdiction or by contract, or would involve the release of commercially sensitive information;
- Review contracts and contract procedures in light of the required disclosures; and
- Begin developing a compliance program to ensure that data collection systems and controls are in place to gather the information necessary to comply with the rules.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com/contactus/.

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