



SEC Adopts Rules on Disclosure of Payments by Resource Extraction Issuers

August 22, 2012

On August 22, 2012, by a 2-1 vote, the Securities and Exchange Commission adopted **final rules** to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The new rules will require annual disclosure of certain payments to governments by “resource extraction issuers.”

Resource extraction issuers will be required to file new Form SD under the Securities Exchange Act of 1934 to provide annual disclosure regarding any payment made by it, its subsidiary, or any other entity under its control to a foreign government or the U.S. government for the purpose of the commercial development of oil, natural gas, or minerals.

Resource extraction issuers must comply with the new disclosure rules for fiscal years ending after September 30, 2013. To the extent that an issuer's initial fiscal year subject to the new requirements begins before September 30, 2013, that issuer will be allowed to provide a partial report disclosing only the payments made after September 30, 2013. Resource extraction issuers will be required to provide full reports for fiscal years that begin on or after September 30, 2013. The reports must be filed no later than 150 days after the end of the resource extraction issuer's fiscal year.

Issuers Subject to the New Disclosure Requirements

The new disclosure rules will apply only to “resource extraction issuers.” Pursuant to the new rules, a “resource extraction issuer” is an issuer that:

- is required to file an annual report with the Commission; and
- engages in the commercial development of oil, natural gas, or minerals.

The Commission defined “commercial development of oil, natural gas, or minerals” to include exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity. This definition is broader than what is contemplated under the Extractive Industries Transparency Initiative, often referred to as “EITI.”

In addition to payments made directly, the new rules require resource extraction issuers to disclose payments made, directly or indirectly, by a subsidiary or another entity controlled by them. The issuers will be required to determine whether they exercise control over such entities based on a consideration of all relevant facts and circumstances.

Despite numerous comments requesting exemptions for certain categories of issuers, the new disclosure requirements will also apply to:

- foreign private issuers that meet the definition of “resource extraction issuer”; and
- smaller reporting companies that meet the definition of “resource extraction issuer.”

Similarly, the new disclosure requirements do not provide an exemption for situations where foreign law or a contract confidentiality provision prohibits the disclosure.

Payments Required to Be Disclosed

The new rules require resource extraction issuers to disclose payments that are:

- made to a foreign government (including subnational governments) or the U.S. government;
- made to further the commercial development of oil, natural gas, or minerals;
- “not de minimis”; and
- within the following categories of payments:
 - taxes
 - royalties
 - fees (including license fees)
 - production entitlements
 - bonuses

- dividends
- infrastructure improvements

The Commission defined “not de minimis” as any payment (whether a single payment or a series of related payments) that equals or exceeds \$100,000 during the most recent fiscal year. The Commission noted that the term “not de minimis” is based strictly on the dollar amount of the payment (or series of related payments) and is different from the “not material” standard used with respect to other issuer filing requirements.

The disclosure regarding the payments made to further the commercial development of oil, natural gas, or minerals must be presented by:

- type and total amount of payments made for each project;
- type and total amount of payments made to each government;
- total amounts of the payments, by category;
- currency used to make the payments;
- financial period in which the payments were made;
- business segment of the resource extraction issuer that made the payments;
- the government that received the payments and the country in which the government is located; and
- the project of the resource extraction issuer to which the payments relate.

The Commission did not define the term “project” in the new rules; rather, the Commission observed that “project” is a commonly used term and individual issuers routinely enter into government contracts for various projects and report on a variety of projects in their filings under the Exchange Act.

Accordingly, for purposes of the new disclosure requirement, the meaning of “project” will vary based on the particular industry and business in which the issuer operates. The Commission also noted that “project” should not be defined with reference to a materiality standard and is not synonymous with “country.” In this regard, it is clear that the new rules call for a more granular disclosure than country-level information.

Filing on New Form SD

Resource extraction issuers must provide the required annual disclosures by filing new Form SD on EDGAR. The payment information disclosed on Form SD must be included in an exhibit to that form with electronic tagging in the eXtensible Business Reporting Language (XBRL) format. Form SD will not

require audited financial statements or an audit of the disclosed payment information.

Information included on Form SD will be “filed” and not “furnished” with the Commission and will be subject to Section 18 of the Exchange Act. Form SD filings, however, will not be subject to the annual CEO/CFO certification. Information disclosed on Form SD will not be incorporated by reference into reports and statements under the Securities Act unless the issuer does so affirmatively.

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