

SEC Adopts Final Rules Relating to Disclosure of Payments by Resource Extraction Issuers

Insight — 07/21/2016

On June 27, 2016, the Securities and Exchange Commission adopted rules that require resource extraction issuers to disclose payments to governments for the commercial development of oil, natural gas, and other minerals. These rules require issuers to disclose payments made to the U.S. federal government and foreign governments, with the primary objective of advancing U.S. foreign policy interests by shining a light on payments related to resource extraction around the globe.

According to the SEC release, “the goal of such transparency is to help combat global corruption and empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources.” The rules are intended to dovetail with similar efforts in other agencies. The U.S. Department of State believes that the rules will advance “the United States’ strong foreign policy interests in promoting transparency and combatting corruption globally,” and the U.S. Agency for International Development (USAID) expects that the new rules will “contribute towards U.S. Government foreign policy goals of supporting stable and democratic governments, and in particular towards USAID’s goal of providing assistance to resource-rich countries in support of economic growth, good governance, transparency, and building civil society.”

Resource extraction issuers (meaning U.S. and foreign companies that are required to file annual reports with the SEC and are engaged in the commercial development of oil, natural gas, or minerals) must file a Form SD within 150 days after each fiscal year reporting on a project level basis:

- *Payments*, including taxes, royalties, fees (including licensing fees), production entitlements, bonuses, dividends, infrastructure improvements payments, and if required by law or contract, community and social responsibility payments;
- *to the U.S. federal government or foreign governments*, including departments, agencies, instrumentalities, companies majority owned by a government, and foreign subnational governments such as states, provinces, counties, districts, municipalities and territories;
- *for commercial development of oil, natural gas, or minerals*, including exploration, extraction, processing and exporting, as well as the licensing for such activities;
- *by the issuer and any entity under the issuer’s control*, including

subsidiaries required to be consolidated with the issuer in financial statements filed with the SEC, as well as proportionately consolidated entities and operations.

The Form SD disclosure must include, on an unaudited, cash basis:

- the type and the total amount of payments, by payment type, for each project;
- the type and the total amount of payments, by payment type, for all projects made to each government;
- the total amounts of the payments, by payment type;
- the currency used to make payments or description of in-kind payments;
- the fiscal year in which payments were made;
- the company's business segment that made the payments;
- the governments that received the payments and the country in which each such government is located;
- the specific project to which the payments relate;
- the particular resource that is the subject of commercial development; and
- the subnational geographic location of the project.

For purposes of the disclosure requirements, a “project” includes operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, and agreements that are both operationally and geographically interconnected may be treated as a single project.

The payment disclosure rules include the following exceptions:

- De minimis payments, meaning a single payment or series of related payments that are less than \$100,000 during a fiscal year, are not required to be disclosed.
- Payments made by recently acquired companies that were not previously subject to these rules (or a disclosure regime with substantially similar rules) may be disclosed on the Form SD filed for the fiscal year immediately following the effective date of the acquisition.
- To address competitive concerns, payments related to certain exploratory activities may be disclosed on a delayed basis on the Form SD filed for the fiscal year immediately following the fiscal year in which the payment was made.
- With respect to export activities, payments to governments are not required to be disclosed if the cross-border transportation activities are undertaken by an entity that: (i) is functioning solely as a service provider, with no ownership interest in the resource being transported; or (ii) acquired its ownership interest in the resource

directly or indirectly from a government and is not engaged in the exploration, extraction, or processing of oil, natural gas, or minerals.

- Issuers may also apply for exemptive relief on a case-by-case basis, including in cases where the disclosure required under the rules is prohibited by foreign law.

Alternatively, these issuers may satisfy the disclosure requirements by filing a report the issuer has prepared to comply with other disclosure regimes, provided the reporting requirements are *substantially similar* to these new SEC rules. Subject to certain specified conditions, the SEC announced its determination that reporting requirements of the European Union Accounting and Transparency Directives, Canada's Extractive Sector Transparency Measures Act, and the U.S. Extractive Industries Transparency Initiative are substantially similar. Other governments, industry groups, and trade associations may apply for alternative reporting regime recognition in the future.

Issuers must begin filing the required Form SD for their fiscal year ending on or after September 30, 2018.

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