

Corporate Practice

SEC Proposes Resource Extraction Disclosure Rules

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On December 11, 2015, the SEC voted 3-1 to re-propose rules requiring resource extraction issuers to disclose payments to the U.S. federal government or foreign governments, including foreign subnational governments, for the commercial development of oil, natural gas or minerals. The proposed rules would implement the statutory mandate of Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").

On July 2, 2013, the U.S. District Court for the District of Columbia ("Court") vacated the initial resource extraction disclosure rules. The Court determined the original disclosure rules were arbitrary and capricious and increased the burden on competition and the cost to investors, because the SEC did not allow an exemption for countries that prohibited disclosure of payment information. Additionally, the Court stated the SEC incorrectly interpreted Dodd-Frank to mandate that issuers make their resource extraction payments public, pointing out that the payment information could be made confidentially to the SEC and the compilation of the information could be provided by the SEC. A challenge to the re-proposed rules is expected. The Court did not address objections to the resource extraction rules claiming they violated the First Amendment.

Who Must Disclose?

Under the proposed rules, any issuer required to file annual reports with the SEC under the Securities Exchange Act that engages in commercial development of oil, natural gas or minerals would be required to disclose certain payments made by the issuer, its subsidiaries or any of its controlled entities.

What Must the Disclosure Include?

The proposed rules would require disclosure of any payments, whether single payments or series of related payments, that equal or exceed \$100,000 during a fiscal year and are made to a foreign government (at the national or subnational level) or the U.S. federal government to further the commercial development of oil, natural gas or minerals. The payments required to be disclosed would include taxes, royalties, fees (including license fees), production entitlements, bonuses, dividends and payments for infrastructure improvements.

The proposed rules would require issuers to provide information regarding these payments including:

- The type and amount of payments made for each project covered under the rules.
- The type and amount of payments for all projects made to each government.
- The total payment amounts by category.
- The currency used to make the payments.
- The financial period in which the payments were made.
- The business segment of the issuer that made the payments.
- The country, and government therein, that received the payments.
- The project to which the payments relate.
- The particular resource being developed.
- The subnational geographic location of the project.

The proposed rules would define “project” based on the legal agreement(s) giving rise to the payment requirements.

The SEC may ultimately provide exemptions from the proposed rules on a case-by-case basis, and the proposed rules would allow issuers to use a report prepared for the U.S. Extractive Industries Transparency Initiative (USEITI) for purposes of these rules if the SEC ultimately determines the USEITI requirements are substantially similar.

How Must Disclosures be Made?

The proposed rules would require issuers to publicly disclose the information on Form SD, with the information included in an exhibit and electronically tagged using XBRL.

When Must Disclosure be Made?

The proposed rules would require issuers to file the Form SD with the SEC annually, within 150 days of the end of the issuer’s fiscal year.

The full text of the proposed rules is available at <http://www.sec.gov/rules/proposed/2015/34-76620.pdf>. Initial public comments on the proposed rules are due by January 25, 2016. Reply comments, which may respond only to issues raised in the initial comment period, are due on February 16, 2016. Consequently, it is unlikely the disclosure will be required until 2017, at the earliest, for issuers on the calendar year.

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