

SEC Reporting & Compliance Alert

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SEC Re-Proposes Rules To Implement Resource Extraction Payment Disclosure Requirements

On December 18, 2019, the U.S. Securities and Exchange Commission (SEC) voted in favor of proposing rules to implement the resource extraction issuer disclosure provisions in Section 1504 of the Dodd-Frank Act, which added Section 13(q) to the Securities Exchange Act of 1934. The proposed rules would require resource extraction issuers to disclose (in an annual report on Form SD) certain payments made to foreign governments or to the U.S. federal government for the commercial development of oil, natural gas or minerals.

Background. At the SEC meeting at which the plan to propose new rules was approved with a 3-2 Commission vote along party lines, SEC Chairman Jay Clayton stated that the proposed rules “would effectively implement the statute’s objective of promoting transparency of resource extraction payments to governments in a manner that responds to Congressional concerns about compliance burdens and potential competitive harms.”

The proposed rules reflect the SEC’s third attempt to implement the resource extraction disclosure mandate under the Dodd-Frank Act, which remained in effect after Congress disapproved, by a joint resolution, the prior version of rules that the SEC had adopted in 2016. Those disapproved rules had replaced the initial set of rules adopted in 2012, which were subsequently vacated by the U.S. District Court for the District of Columbia in 2013.

Scope of Issuers and Exemptions. The proposed rules would apply to domestic and foreign private issuers that (i) engage in the commercial development of oil, natural gas or minerals and (ii) are required to file annual reports on Forms 10-K, 20-F or 40-F with the SEC. The following companies would be exempt from the disclosure requirements:

- newly public companies until the fiscal year immediately following the year their registration statement became effective;
- emerging growth companies; and
- smaller reporting companies.

Consistent with the prior rules, the proposal provides transitional relief for newly acquired companies. The proposed rules also provide conditional exemptions from the disclosure requirements for situations in which a foreign law or a pre-existing contract prohibits disclosing the payment information if certain requirements are met. In a change from the prior rules, reliance on these exemptions would not require preapproval from the SEC.

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Required Disclosures. As proposed, issuers would be required to disclose payments relating to the commercial development of oil, natural gas, or minerals that are made to a foreign government or to the U.S. federal government, including those made by subsidiaries and other entities that the issuer controls.

In addition, the proposed rules define the “not de minimis” language included in the statute. As defined, disclosure would be required only if payments made to each foreign government in a host country or to the U.S. federal government equal or exceed \$150,000, subject to a condition that payment disclosure for a project is required only if the total project payments equal or exceed \$750,000. Qualifying “projects” would be determined based on three factors: (i) the type of resource being commercially developed; (ii) the method of extraction; and (iii) the jurisdiction where the development is taking place.

The updates would allow resource extraction issuers to aggregate by payment type any payments that are made at a level below the major subnational government level (*e.g.*, a county, district or municipality), and to disclose an aggregate amount without identifying the particular subnational government payee.

Alternative Reporting. Similar to the 2016 rules, the proposal provides a framework for companies to apply for recognition by the SEC of an alternative reporting regime (such as the European Union or Canada) that satisfies the transparency objectives of the

resource extraction disclosure requirement. Subject to certain conditions, this framework would permit an issuer to submit an alternative report that was required by an approved foreign jurisdiction in lieu of a separate report that complies with the SEC’s disclosure requirements.

Timing and Liability of Disclosures. The resource extraction disclosures would be required on a Form SD and tagged using XBRL (eXtensible Business Reporting Language). The Form SD would be due by March 31 of the (i) calendar year following the most recent fiscal year for issuers with a fiscal year ending on or before June 30 and (ii) the second calendar year following the most recent fiscal year for issuers with a fiscal year ending after June 30. Unlike in the previous rules, the Form SD would be deemed “furnished” rather than “filed” with the SEC for securities law liability purposes.

Next Steps. Initial comments on the proposed rules are due 60 days after publication of the proposing release in the Federal Register. Given that the SEC would need to approve final rules before they could become effective, no final rules are expected to take effect until late 2020 at the earliest.

Additional Information. Additional information regarding the resource extraction issuer disclosure rules is available in the SEC’s [proposing release](#) and accompanying [press release](#).

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