

### **SEC ADOPTS RULES REQUIRING PAYMENT DISCLOSURES BY RESOURCE EXTRACTION ISSUERS**

The Securities and Exchange Commission (SEC) recently adopted rules mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) requiring resource extraction issuers to disclose certain payments made to the U.S. government or to non-U.S. governments.

The Dodd-Frank Act directed the SEC to issue these rules requiring certain companies engaged in the commercial development of oil, natural gas, or minerals (resource extraction issuers) to disclose certain payment information annually. In particular, Section 1504 of the Dodd-Frank Act amends the U.S. Securities Exchange Act of 1934 (Exchange Act) by adding a new section, Section 13(q).

#### **Timing of Required Disclosure**

A resource extraction issuer is required to comply with the new rules for fiscal years ending after Sept. 30, 2013. A new form containing the newly mandated payment disclosure, Form SD, must be filed with the SEC no later than 150 days after the end of the resource extraction issuer's fiscal year. For the first report, most resource extraction issuers may provide a partial report disclosing only those payments made after Sept. 30, 2013.

#### **Entities Required to Provide Disclosure**

The new rules require a resource extraction issuer to disclose payments made to U.S. and non-U.S. governments if:

- The issuer is required to file annual reports with the SEC and
- The issuer engages in the commercial development of oil, natural gas, or minerals.

The new disclosure requirements apply to U.S. and non-U.S. issuers. There are no exemptions for smaller reporting companies or for disclosures otherwise prohibited by non-U.S. law, for disclosures prohibited by confidentiality agreements, or for disclosures of commercially sensitive information.

Importantly, a non-U.S. entity exempt from Exchange Act reporting pursuant to Rule 12g3-2(b) of the Exchange Act (i.e. an issuer sponsoring a Level I ADR program or a Rule 144A/Reg S GDR program) will be exempt from the disclosure required by the newly adopted rules.

In addition, a resource extraction issuer is required to disclose payments made by a subsidiary or another entity controlled by the issuer. A resource extraction issuer needs to make a factual determination whether it has control of an entity based on a consideration of all relevant facts and circumstances.

#### **Scope of Required Disclosure**

Under the new rules, a resource extraction issuer is required to disclose certain payments made to a non-U.S. government (including subnational non-U.S. governments such as non-U.S. states, provinces, counties and territories) or the Federal U.S. government.

Resource extraction issuers need to disclose payments that are:

- Made to further the commercial development of oil, natural gas, or minerals,
- “not *de minimis*”, and
- Within the types of payments specified by the SEC in the new rules.

The rules define “commercial development” of oil, natural gas, or minerals to include exploration, extraction, processing, and export, or the acquisition of a license for any such activity. Importantly, the definition of “commercial development” excludes refining, smelting, marketing and transport not related to export.

The rules define “not *de minimis*” to mean any payment (whether a single payment or a series of related payments) that equals or exceeds U.S. \$100,000 during the most recent fiscal year.

The types of payments (including in-kind payments) related to commercial development activities that are required to be disclosed on Form SD include:

- Taxes
- Royalties
- Fees (including license fees)
- Production Entitlements
- Bonuses
- Dividends
- Infrastructure Improvements

The new rules require a resource extraction issuer to provide the following information about payments made to further the commercial development of oil, natural gas, or minerals:

- 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
- The project of the resource extraction issuer to which the payments relate

The new rules do not provide any disclosure accommodation to non-U.S. issuers on the basis of home country disclosure standards.

The new disclosure information must be included in an exhibit to Form SD and electronically tagged using the eXtensible Business Reporting Language (XBRL) format.

#### **Entity-Level vs. Project Disclosure**

The rules permit issuers to disclose payments at the entity level if the payment is made for obligations levied at the entity level rather than the project level. Thus, if an issuer has multiple projects in a host country, and that country’s government taxes the issuer on its income in the country as a whole, and not with respect to a particular project or

operation within such country, the issuer is permitted to disclose the resulting income tax payments without specifying a particular project associated with the payment. This entity level disclosure may be used in such a manner as to assuage concerns regarding the anti-competitive nature of the new rules in that non-specific disclosure may be utilized in certain instances where specific project disclosure might lead to competitors learning otherwise sensitive information.

### **"Filed" vs. "Furnished" Disclosure**

The rules provide that the payment disclosure included as an exhibit to Form SD will be considered "filed" with the SEC. As such, the disclosure will be subject to liability under Section 18 of the Exchange Act (liability for material misstatements or omissions in documents filed with the SEC). However such information will not be deemed to be incorporated by reference into any other documents (such as prospectuses) filed with the SEC unless the issuer explicitly provides otherwise.

### **No Certification or Audit Requirement**

As discussed above, the SEC is requiring that the relevant disclosure be contained in, or an exhibit to, the new Form SD. As this disclosure is separate from an issuer's existing Exchange Act annual report, the senior officer certifications mandated by Exchange Act Rules 13a-14 and 15d-14 are not required for the information supplied in, or pursuant to, Form SD. Furthermore, the new rules do not require that the Form SD disclosure information be audited or provided on an accrual basis.

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