

SEC Adopts Final Rules Implementing Dodd-Frank Disclosure Requirements for Resource Extraction Issuers

August 22, 2012

The SEC voted today to adopt final rules to implement Section 1504 of the Dodd-Frank Act relating to resource extraction issuers. Based on statements by Commissioners and staff at today's open meeting and the SEC's press release, we expect the final rules to be similar to the SEC's original [proposal](#) released in December 2010. Our January 18, 2011 memorandum summarizing the proposed rules can be found [here](#).

Section 1504 and the implementing rules generally provide that a U.S. or foreign company that (1) files an annual report with the SEC and (2) engages in the commercial development of oil, natural gas or other minerals, is required to disclose the type and total amount of payments made by the company, its subsidiaries or entities under its control to a foreign government or the U.S. federal government for each "project" and each government in order to further the commercial development of oil, natural gas or minerals.

Companies subject to the rule will be required to report for fiscal years ending after September 30, 2013. For the first report, most companies will be able to provide a report disclosing only those payments made after September 30, 2013. Calendar year companies will file their first report, which will cover the period October 1 to December 31, 2013, by May 30, 2014.

Below is a summary of the changes between the proposed rules and the final rules mentioned at today's meeting. We will provide a more in-depth analysis once the final rule release has been reviewed in detail.

- **Types of payments to be disclosed.** "Payments" covered by the rules extend beyond those outlined in the guidelines of the Extractive Industries Transparency Initiative (EITI) referenced in Section 1504, to include payments for infrastructure improvements. The rules permit the exclusion of "de minimis" payments, defined to mean any payment (whether a single payment or a series of related payments) less than \$100,000 during a company's most recent fiscal year.
- **Definition of "project".** The SEC declined to define "project" in the final rules, but suggested that the text of the rules will provide guidance surrounding the term. The SEC indicated that it generally believes a "project" correlates to a specific contract to develop oil, natural gas or minerals.
- **No exception for foreign law or confidentiality provisions.** The SEC declined to allow companies to exclude reporting payments that may not be disclosed pursuant to foreign law or a confidentiality agreement. The SEC acknowledged that the absence of an exemption could force companies to choose between complying with U.S. law and complying with their obligations under foreign law or contract, but decided that an exemption could simply result in the passage of laws prohibiting disclosure. The SEC also noted that it believed most resource development contracts contain an "as required by law" or similar exception to confidentiality provisions, which may permit the disclosures required by the rule.
- **New form.** The final rules create a new form, Form SD, to be filed on EDGAR no later than 150 days after the end of a company's fiscal year. The SEC originally called for disclosure in a company's Form 10-K or 20-F, which we believe would have increased the burden on issuers during the already taxing year-end reporting period. Form SD will be subject to XBRL tagging.

- **Increased liability.** Form SD will be “filed” with the SEC rather than “furnished.” Accordingly, any materially “false or misleading statement” in the disclosure will be subject to liability under Section 18 of the Exchange Act. However, because the new form is separate from a company’s Form 10-K or 20-F, it will not be covered by those forms’ CEO and CFO certifications or automatically incorporated into a company’s shelf registration statement.

Commissioner Gallagher dissented from today’s vote to adopt final rules, indicating his belief that the SEC was not the correct government body to be tasked with furthering Congress’s foreign policy objectives, and that the required cost/benefit analysis was inadequate. A suit challenging the final rules on the latter basis could stall implementation, as happened following judicial challenges to the SEC’s rules mandating [proxy access](#) and [independence standards for mutual fund boards](#).

For the adopting release containing the final rules follow this [link](#).

For the SEC’s press release announcing today’s rulemaking, follow this [link](#).

For Commissioner Aguilar’s statement at today’s open meeting, follow this [link](#).

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