



SEC Adopts Rules Requiring Payment Disclosures by Resource Extraction Issuers

September 6, 2012

On August 22, 2012, the Securities and Exchange Commission (“SEC”) adopted Rule 13q-1¹ under the Securities and Exchange Act of 1934 (“Exchange Act”), implementing the extractive issuer disclosure provisions of Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), which added Section 13(q) to the Exchange Act and directed the SEC to issue rules requiring that a resource extraction issuer disclose payments to a foreign government or the U.S. federal government for the purpose of the commercial development of oil, natural gas or minerals. Section 13(q) supports the federal government’s commitment to international transparency promotion efforts relating to the commercial development of oil, natural gas or minerals, such as the Extraction Industries Transparency Initiative (“EITI”).²

Rule 13q-1 requires resource extraction issuers to make annual disclosures on new Form SD³ of payments made by the issuer, its subsidiaries, and entities under its control to a foreign government or the U.S. federal government for the purpose of the commercial development of oil, natural gas or minerals. Rule 13q-1 further requires that these disclosures provide information about the type and total amount of such payments by project and by government and that the information be presented in an interactive data format.

The final rule requires that the payment information be filed, rather than furnished, which subjects issuers to liability under Section 18 of the Exchange Act for false or misleading statements in the disclosure unless the issuer can establish that it acted in good faith and had no

¹ Final Rule: Disclosure of Payments by Resource Extraction Issues, Release No. 34-67717 (August 22, 2012), available at: <http://www.sec.gov/rules/final/2012/34-67717.pdf>.

² The EITI is a voluntary coalition of oil, natural gas and mining companies, foreign governments, investor groups and other international organizations dedicated to fostering and improving transparency and accountability in countries rich in oil, natural gas and minerals through the publication and verification of company payments and government revenues from oil, natural gas and mining. The United States is among the countries that supports the EITI. Additional information about the EITI is available at: <http://eiti.org/document/implementingtheeiti>.

³ Form SD is a new disclosure form to be used for specialized disclosure not included within an issuer’s periodic or current reports. In addition to resource extraction issuer payment disclosure, Form SD will also be used to provide disclosure in connection with Rule 13p-1, adopted by the SEC on August 22, 2012, which requires certain issuers to disclose their use of conflict minerals that originated in the Democratic Republic of the Congo (DRC) or an adjoining country. Rule 13p-1 implements Section 1502 of the Dodd-Frank Act. Additional information about Rule 13p-1 is available at: <http://www.sec.gov/rules/final/2012/34-67716.pdf>.

knowledge that the statement was false or misleading. Because Rule 13q-1 requires disclosure on Form SD rather than in an annual report on Form 10-K, however, the disclosures will not be subject to the officer certifications required under the Exchange Act. Resource extraction issuers must comply with the new rule beginning with fiscal years ending after September 30, 2013.

ISSUERS THAT ARE SUBJECT TO THE DISCLOSURE REQUIREMENT

Rule 13q-1 applies to “resource extraction issuers,” which are companies (U.S., foreign or government-owned) that are (i) engaged in the commercial development of oil, natural gas or minerals and (ii) required to file an annual report with the SEC, regardless of the size of the company or the extent of business operations constituting commercial development of oil, natural gas or minerals. The final rule does not provide any exceptions or exemptions from the disclosure requirements.⁴

INFORMATION THAT MUST BE DISCLOSED

Issuers subject to Rule 13q-1 must disclose payments, including payments in kind, to a foreign government (including subnational governments) and the U.S. federal government that:

- (i) are made to further the “commercial development of oil, natural gas, or minerals” (defined to include exploration, extraction, processing, and export of oil, natural gas or minerals, or the acquisition of a license for any such activity);
- (ii) are “not de minimis” (defined as any payment, whether made as a single payment or a series of related payments, that equals or exceeds \$100,000); and
- (iii) include the following specified types of payments⁵:
 - a. taxes;
 - b. royalties;
 - c. fees;
 - d. production entitlements;
 - e. dividends; and
 - f. payments for infrastructure improvements.

Resource extraction issuers must include the following information about disclosed payments:

- (i) type and total amount of payments made for each project;⁶

⁴ For example, Rule 13q-1 does not provide an exemption for situations in which foreign law prohibits the required disclosure, for situations when an issuer has a confidentiality provision in a relevant contract or for commercially or competitively sensitive information. Additionally, a resource extraction issuer may not satisfy the disclosure requirements under the rule by providing disclosure under other transparency requirements, such as under home country laws.

⁵ Resource extraction issuers will be required to disclose only those payments that fall within the specified list of payment types.

⁶ The SEC chose to leave the term “project” undefined to give issuers flexibility in applying the term to different business contexts. The final rule provides some guidance, suggesting that payments based upon a contract document would be a “project.” Rule 13q-1 permits resource extraction issuers to disclose payments at the corporate legal entity level if the payment is made for obligations levied on the issuer at the entity level (e.g., corporate income taxes) rather than at the project level.

- (ii) type and total amount of payments made to each government;
- (iii) total amounts of the payments, by category;
- (iv) currency used to make the payments;
- (v) financial period in which the payments were made;
- (vi) business segment of the resource extraction issuer that made the payments;
- (iv) the government that received the payments, and the country in which the government is located; and
- (v) the project of the resource extraction issuer to which the payments relate.

Rule 13q-1 requires that the information included in Form SD be included in an exhibit and electronically tagged using the XBRL format. The SEC is currently seeking public comment on the draft Form SD taxonomy for disclosure of payments by resource extraction issuers.⁷

ANTI-EVASION PROVISION

Rule 13q-1 includes an anti-evasion provision that requires that an activity or payment be disclosed if it is part of a plan or scheme to evade disclosure, even if such activity or payment is formally characterized to fall outside of the scope of the Rule. Accordingly, resource extraction issuers may not avoid disclosure by re-characterizing payments to fall outside of the specified payment categories.

EFFECTIVE DATE

Resource extraction issuers will be required to file the disclosures required by Rule 13q-1 beginning with fiscal years ending after September 30, 2013. For the first report for a resource extraction issuer whose fiscal year began before September 30, 2013, the issuer may provide a partial year report for the period beginning October 1, 2013 through the end of its fiscal year.⁸

Rule 13q-1 requires resource extraction issuers to file Form SD on EDGAR no later than 150 days after the end of the issuer's most recent fiscal year, which is later than the deadline for an issuer's Exchange Act annual report.

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⁷ Additional information about the draft taxonomy is available at:
http://www.sec.gov/info/edgar/edgartaxonomies_d.shtml

⁸ For example, a resource extraction issuer with a December 31, 2013 fiscal year end will be required to file a report disclosing payments made from October 1, 2013 through December 31, 2013.

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