

SEC Votes to Repropose Rules Requiring Disclosures by Resource Extraction Issuers

This journal entry has been updated to reflect the SEC's January 21, 2016, [extension](#) of the comment period for the proposal discussed below. The original initial comment period ended January 25, 2016, and the reply period was to end February 16, 2016. Under the extension, the initial comment period ends February 16, 2016, and the reply period ends March 8, 2016.

December 14, 2015 — Last week, the SEC voted 3–1 to repropose [rules](#)¹ (collectively, the “rules” or the “proposal”) mandated under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”)² that would require resource extraction issuers to disclose certain payments made to a foreign government or the federal government. The rules are designed to improve transparency “to help combat global corruption and empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources.” The rules would apply to a domestic or foreign issuer that (1) is required to file an annual report with the SEC under the Exchange Act and (2) engages in the commercial development of oil, natural gas, or minerals.³

Under the rules, such an entity would be required to include, as an exhibit to its annual report on Form SD, information about payments made during the fiscal year by the entity, its subsidiaries, and entities under its control to a foreign government (including a foreign subnational government) or the federal government for the purpose of the commercial development of oil, natural gas, or minerals. The entity would also be required to tag this information by using an XBRL⁴ format. The proposal defines a “payment” as an amount paid that:

- (i) Is made to further the commercial development of oil, natural gas, or minerals;
- (ii) Is not de minimis;⁵ and
- (iii) Is one or more of the following:
 - (A) Taxes;
 - (B) Royalties;

¹ SEC Release No. 34-76620, *Disclosure of Payments by Resource Extraction Issuers*.

² Such rulemaking is required by Section 13(q) of the Securities Exchange Act of 1934 (the “Exchange Act”), which was added by Section 1504 of the Dodd-Frank Act.

³ Under the proposal, commercial development of oil, natural gas, or minerals refers to “exploration, extraction, processing, and export of oil, natural gas or minerals, or the acquisition of a license for any such activity.”

⁴ eXtensible Business Reporting Language.

⁵ The proposed rule defines “not de minimis,” in part, as “any payment, whether made as a single payment or a series of related payments, which equals or exceeds \$100,000, or its equivalent in the issuer’s reporting currency, during the fiscal year covered by . . . Form SD.”

- (C) Fees;
- (D) Production entitlements;
- (E) Bonuses;
- (F) Dividends; and
- (G) Payments for infrastructure improvements.

Editor's Note: Certain disclosures about payments required under the proposal would be disaggregated by project, which is defined as "operational activities that are governed by a single contract, license, lease, concession, or similar legal agreement, which form the basis for payment liabilities with a government." The proposal further states that agreements "that are both operationally and geographically interconnected may be treated by the issuer as a single project."

One required disclosure would be "the subnational geographic location of the project," which "must be sufficiently detailed to permit a reasonable user of the information to identify the project's specific, subnational, geographic location." The dissenting Commissioner feared that this "reasonable user of the information" standard could be interpreted as a new legal standard that differs from the "reasonable investor" standard traditionally used in federal securities laws.

Extraction issuers would be required to file Form SD with the SEC no later than 150 days after their fiscal year-end. If adopted as proposed, the rules would become effective for each issuer for fiscal years ending no earlier than one year after the effective date of the final rules.

The proposal solicits comments on most aspects of its provisions. Initial comments on the proposal are due by February 16, 2016. Reply comments, which may respond only to issues raised in the initial comment period, will be due by March 8, 2016.

For more information about the proposal, see the SEC's December 11, 2015, [press release](#).

Editor's Note: The SEC originally adopted rules to implement the Dodd-Frank mandate in 2012; however, after being challenged, those rules were vacated in 2013 by the U.S. District Court for the District of Columbia. In response to the court ruling and stakeholder concerns, the repropose rules would allow issuers to seek exemptive relief from the SEC on a case-by-case basis (e.g., for situations in which the rules conflict with other countries' prohibitions against disclosing such information). In addition, the repropose rules would allow an issuer to satisfy its disclosure obligation by including as an exhibit to Form SD a "report complying with the reporting requirements of any alternative reporting regime that are deemed by [the SEC] to be substantially similar" to the rules' requirements (e.g., reports filed in a foreign jurisdiction or that meet the requirements of the U.S. Extractive Industries Transparency Initiative).

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