DORSEY
DORSEY+WHITNEY LLP

SEC Proposes Resource Extraction Payments Disclosure Rules

December 24, 2019
by Jason Brenkert

At the Securities and Exchange Commission's (the "Commission") open meeting on December 18, 2019, the Commissioners proposed rules to require resource extraction issuers to file an annual Form SD that includes information about payments related to the commercial development of oil, natural gas, or minerals that are made to a foreign government or to the U.S. federal government. The proposed rules implement Section 13(q) of the United States Exchange Act of 1934, as amended, and they are mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

It has been a difficult road for the Commission to implement these rules. The Commission first adopted rules on resource extraction payments disclosure in 2012, but those rules were vacated by the U.S. District Court for the District of Columbia. The Commission then adopted new rules in 2016, which were disapproved by a joint resolution of Congress pursuant to the Congressional Review Act. The new proposed rules are a substantial easing of the requirements in the prior rules.

Proposed Rule 13q-1 requires that every issuer that files an annual report with the Commission on Form 10-K, Form 20-F or Form 40-F and engages in the commercial development of oil, natural gas, or minerals must furnish a report on Form SD.

However, Rule 13q-1 does provide that issuers, governments, industry groups or trade associations can apply for the recognition by the Commission that an alternative reporting regime satisfies the transparency objectives of the Dodd-Frank mandate.

Rule 13q-1 also provides exemptions from disclosure for smaller reporting companies and emerging growth companies as well as issuers that have a conflict of law or a conflict with the provisions of a pre-existing contract, subject to meeting the stated conditions set forth in the rule.

The proposed rules include several changes compared to the vacated 2016 rules. For example, the proposed rules would:

Related People

- Jason Brenkert

Related Capabilities

- Corporate Governance & Compliance

- revise the definition of the term “project” to require disclosure at the national and major subnational political jurisdiction, as opposed to the contract level;
- revise the definition of “not de minimis” to include both a project threshold and an individual payment threshold so that disclosure with respect to payments to governments that equal or exceed $150,000 would be required when the total of the individual payments related to a project equal or exceed $750,000;
- add two new conditional exemptions for situations in which a foreign law or a pre-existing contract prohibits the required disclosure;
- add an exemption for smaller reporting companies and emerging growth companies;
- revise the definition of “control” to exclude entities or operations in which an issuer has a proportionate interest;
- limit the liability for the required disclosure by deeming the payment information to be furnished to, but not filed with, the Commission;
- permit an issuer to aggregate payments by payment type made at a level below the major subnational government level;
- add relief for issuers that have recently completed their U.S. initial public offerings; and
- extend the deadline for furnishing the payment disclosures.

The proposal will be open to public comment for 60 days upon its publication in the Federal Register. The full text of the proposal is available here.