January 7, 2016

The SEC's Resource Extraction Payments Disclosure Rule Gets a Do-Over

By Marc Folladori

On December 11, 2015, the U.S. Securities and Exchange Commission (the "**SEC**," or the "**Commission**") issued re-proposed rules (the "**Proposed Rules**"),[1] as authorized under Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank Act**").[2] Enacted in 2010, Section 1504 instructed the Commission to adopt rules requiring every SEC-registered public oil, natural gas and mining company to submit an annual report disclosing information about payments they made to the U.S. federal government or any foreign government for the purpose of developing hydrocarbons or minerals.

The legislative history of the Dodd-Frank Act indicates that Section 1504 was passed by Congress as a measure in favor of increased transparency with regard to payments made by oil, gas and mining companies to foreign governments for commercial development of their resources. The professed goal of this transparency was to help empower citizens of resource-rich countries to hold their governments accountable for the revenues generated by those resources, and thereby reduce opportunities for corruption by their government officials.[3]

Rules to implement Section 1504 were finalized and issued by the SEC in 2012 (the "**Former Rules**"),[4] but the rules were shortly afterwards invalidated by a U.S. federal court in 2013.[5]

In order for SEC-registered oil, natural gas and mining companies to better understand the impetus behind the Proposed Rules (and the changes from the Former Rules), it is helpful to explore the background of the SEC's prior endeavors to comply with its Section 1504 directives. However, it is also important to review developments in the U.S. and elsewhere in the global transparency movement relating to resource extraction payment disclosures since 2012, when the Former Rules were adopted.

Background on the Proposed Rules

Road to the Proposed Rules. Section 1504 added a new Section 13(q)[6] to the Securities Exchange Act of 1934 (the "**Exchange Act**") in July 2010. As noted above, Section 13(q) instructed the SEC to adopt a rule requiring each company engaged in the commercial development of oil, natural gas or minerals that files annual reports with the SEC (a "resource extraction issuer"), to include in an annual report information about certain payments made by that issuer or any of its subsidiaries to the U.S. federal government or to any foreign government, for the purpose of commercially developing oil, gas or minerals.

Section 13(q) defines "payment" as an amount paid to further the commercial development of hydrocarbons or minerals, and includes taxes, royalties, production entitlements, bonuses and other material benefits that the SEC, "consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream" for such commercial development.[7]

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[1] "Disclosure of Payments by Resource Extraction Issuers," SEC Rel. No. 34-76620 (Dec. 11, 2015) (the "Proposing Release").
[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010).
[3] 156 CONG REC. S3816 (May 17, 2010).
[4] "Disclosure of Payments by Resource Extraction Issuers," SEC Rel. No. 34-67717 (Aug. 22, 2012).
[5] *American Petroleum Institute, et al. v. Securities and Exchange Commission and Oxfam America, Inc.*, 953 F. Supp. 2d 5 (D.D.C., 2013).
[6] 15 U.S.C. 78m(q).
[7] *See* note 16 *infra* and accompanying text. The Extractive Industries Transparency Initiative is an international voluntary coalition formed in 2002, comprised of oil, natural gas and mining companies, foreign governments, investor groups, civil society and other international

The Former Rules had added new Exchange Act Rule 13q-1, which required resource extraction issuers to begin complying with the new disclosure requirements with respect to their first fiscal year that ended after September 30, 2013.

However, the Former Rules were almost immediately challenged in U.S. federal court by trade and industry groups. In July 2013, the U.S. District Court for the District of Columbia vacated Rule 13q-1 in *American Petroleum Institute, et al. v. Securities and Exchange Commission and Oxfam America, Inc*. ("***API***"),[8] and remanded the matter to the SEC for further proceedings. In its memorandum opinion in *API*, the D.C. District Court found that the SEC may have misread Section 13(q) as to the degree of detail about resource extraction issuers' payments required to be *publicly* disclosed, and that it had acted arbitrarily in failing to consider any exemption from the rules' operation.

In 2014, a non-profit organization formed to address poverty and injustice issues brought an action against the SEC in U.S. federal district court, seeking a summary judgment to compel the Commission to promulgate final rules under Section 13(q) on an expedited basis. In September 2015, the U.S. District Court for the District of Massachusetts granted the non-profit's motion (*Oxfam America, Inc. v. SEC*, Case 1:14-CV-13648-DJC (D. Mass, Sept. 2, 2015)). Afterwards, the SEC filed with the court a notice of proposed expedited rulemaking schedule, stating that it anticipated issuing proposed rules before the end of 2015, and that it planned to adopt final rules on or before June 27, 2016.

In keeping with its schedule, the Commissioners in December approved and issued the Proposed Rules, which include Rule 13q-1 and its related disclosure form, Form SD. Initial comments on the Proposed Rules are due by January 26, 2016. As proposed, it is likely that most resource extraction issuers would not to have to begin complying with final rules until their fiscal year that ends during 2017.[9]

The SEC release accompanying the Proposed Rules (the "**Proposing Release**")[10] goes to great lengths to describe the many developments in global transparency initiatives that have transpired since the Former Rules' adoption in July 2012, and explains how these developments and certain other factors influenced the direction of the SEC's process resulting in the Proposed Rules.

***API Holding*.** In *API*, the D.C. District Court found that the SEC's analysis of Section 13(q) had been flawed in two respects:

- First, the court determined that the SEC's process had not sufficiently considered the alternative of making publicly available merely a "compilation" of information contained in the annual reports submitted to the SEC (as one reading of Section 13(q) appeared to suggest), instead of requiring the public disclosure of detailed information about each resource extraction issuer's payments to governments.
- Secondly, the court faulted the SEC for failing to consider adequately whether the Former Rules should have provided for express exemptions from disclosure of sensitive information, noting as an example that the laws of certain countries such as Angola, Cameroon, China and Qatar prohibited such disclosures.

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organizations. It describes itself as an organization dedicated to fostering transparency and accountability in resource-rich countries by publishing and verifying oil, gas and mining companies' payments, and government revenues therefrom.

[8] *See* note 5 *supra*.

[9] The Proposed Rules would require resource extraction issuers to commence complying with the final rules with respect to their fiscal years ending no sooner than one year after the final rules' effective date (likely in 2016).

[10] *See* note 1 *supra*.

***Developments Since Adoption of the Former Rules*.** In the "Introduction" section of the Proposing Release, the SEC cited paragraph (2)(E) of Section 13(q), which provides that "[t]o the extent practicable, the rules . . . shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals."[11]

Many sections of the Proposing Release attempt to buttress the SEC's contentions that its reading of Section 13(q), and not the D.C. District Court's, had been the correct one, and that its process in considering and issuing the Proposed Rules had been procedurally sound. In support of its position, the Commission pointed to the numerous legislative developments and related matters in the global transparency movement that had occurred since 2012.

European Union. In 2013, the European Parliament and Council of the European Union adopted EU Accounting and Transparency Directives (the "**EU Directives**"), which included resource extraction payment disclosure rules similar to the Former Rules. In fact, in many respects the EU Directives were modeled on the Former Rules.[12] The EU Directives apply their disclosure requirements to all "large" companies incorporated under the laws of a European Economic Area member state, and to all companies listed on EU-regulated securities markets, even if not incorporated there.

United Kingdom. The EU Directives came into legal force in the United Kingdom in late 2014. As a result, an estimated 220 UK-incorporated and UK-listed oil, gas and mining companies will be required to issue publicly-available annual reports of all payments (above a certain threshold amount) they make to governments for extractive activities, beginning in 2016 for most covered companies. The EU Directives and UK regulations require annual company-by-company and project-by-project public reporting, without any country exemptions.[13]

Canada. Canada has adopted a national resource extraction payments disclosure law, the Extractive Sector Transparency Measures Act ("**ESTMA**"), which is similar to the EU Directives and the Former Rules.[14] The ESTMA came into force on June 1, 2015, and proposed ESTMA guidance and technical reporting requirements have been drafted and opened for consultation ("**ESTMA Guidance**").[15]

EITI. As noted above, the definition of "payment" in Section 13(q) explicitly refers to the Extractive Industries Transparency Initiative ("**EITI**").[16] In addition, Section 13(q) directs the SEC to adopt rules supporting the commitment of the U.S. federal government to promote international transparency relating to oil, natural gas or minerals extraction.[17]

- The 2012 SEC release accompanying the Former Rules had stated that at that time, the EITI's approach to payments disclosure was fundamentally different from Section 13(q)'s. At that time, EITI-participating companies and EITI-member countries would each separately submit payment information confidentially to an independent administrator selected by a "stakeholder group" of government, company and civil society representatives overseeing EITI implementation in a country. The

[11] 15 U.S.C. 78m(q)(2)(E).
[12] Comment letter from Publish What You Pay UK (July 9, 2015). The SEC continued to receive comment letters from interested parties after the Former Rules were adopted in 2012. See http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resource-extraction-issuers.shtml. One can certainly question the logic in the SEC's position that the Proposed Rules should be modeled for consistency's sake on the EU's, Canada's and others' payments disclosure legislation, since those countries' legislation had been modeled on the Former Rules, which a U.S. federal court had subsequently found were flawed.
[13] *Ibid.* The EU Directives also apply to logging companies, which are not covered by Section 13(q). According to the Proposing Release, as of November 2015, twelve EU companies (including Germany, Italy, Spain and the UK) had filed notifications of full transposition of the Accounting Directive with the European Commission. In addition, Norway, which is not a member of the EU, has adopted legislation that complies with the EU Directives, and is effective for fiscal years beginning on or after January 1, 2014.
[14] Extractive Sector Transparency Measures Act ("ESTMA"), S.C. 2014, ch. 39, S. 376 (Can.).
[15] *See* https://www.nrcan.gc.ca/acts-regulations/17727.
[16] Section 13(q)(1)(C)(ii) of the Exchange Act. *See* note 7 *supra*.
[17] Section 13(q)(2)(E) of the Exchange Act.

administrator would compile this information to produce a report; the data that had been submitted could be presented on an aggregated basis if the stakeholder group in that country so desired.

- However, since 2012, EITI protocols and procedures, or "Standards," have been revised to require each country's report to disclose information on individual projects and payments by each company rather than aggregated data, if consistent with EU and SEC rules. Now, the data in each EITI report must be presented by (i) individual payment type, (ii) company and government agency and (iii) project.
- Further relevant was the fact that in March 2014, the United States completed the process of becoming an EITI candidate country. The Proposing Release provides that in re-proposing its rules under Section 13(q), the SEC considered the guidance in the EITI Standards on what should be included in a country's EITI report, as well as the reports made by EITI member countries.

These developments served to reinforce the SEC's views expressed in the Proposing Release that public disclosure of all of the information required to be submitted under Section 13(q) was the correct reading of the statute, rather than only a compilation summarizing that information.

The Proposing Release also addressed the D.C. District Court's second issue with the Former Rules, which was the SEC's failure to explain adequately whether the Former Rules should have provided for certain exemptions from disclosure of sensitive information. Like the Former Rules, the Proposed Rules contain no such *express* exemption. However, the Proposed Rules do provide that resource extraction issuers could apply for, and the SEC would consider, exemptive relief on a case-by-case basis, as currently permitted under the Exchange Act.[18]

The Proposed Rules

The Proposed Rules are similar in many respects to the Former Rules, but notable differences do exist. Some changes from the Former Rules should be helpful to issuers. These changes either clarify certain requirements or incorporate new concepts raised by additional comments that were submitted after the Former Rules had been adopted.

***Form SD*.** The Proposing Release provides that a resource extraction issuer must file the required payments information annually on a Form SD[19] not later than 150 days after the end of the issuer's fiscal year. The required information would be included in an exhibit to the Form SD and electronically tagged using the extensible Business Reporting Language (XBRL) electronic format. As the case with the Former Rules, the resource extraction payment information would not be required to be audited or provided on an accrual basis.

Information submitted in a Form SD will be deemed "filed" rather than "furnished," making the disclosures subject to Exchange Act liability under Section 18. However, the information filed in the Form SD will not be incorporated by reference into any filings made under the Securities Act of 1933 or the Exchange Act unless the issuer specifically incorporates it by reference into the filing.

Item 2.01 of Form SD contains the substantive disclosure requirements under the Proposed Rule, plus definitions of certain terms and instructions that assist in interpreting many of the rules' critical terms.

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[18] Sections 12(h) and 36(a) of the Exchange Act (15 U.S.C. 78l(h) and 78mm(a)). This potential for case-by-case exemptive relief under the Exchange Act, which could apply to situations where confidential treatment may be warranted based upon specific facts and circumstances, had apparently not been mentioned in the SEC release adopting the Former Rules.

[19] By presenting the information in a separate Form SD and not in an annual report on Form 10-K, 20-F or 40-F, the disclosures will not be subject to officer certification requirements under Rules 13a-14 and 15d-14 under the Exchange Act. Form SD is now utilized to provide disclosures required by the conflict minerals rules that implemented Section 1502 of the Dodd-Frank Act.

Item 2.01's definition of "foreign government" includes a department, agency or instrumentality of a foreign government, or a company that is majority-owned by a foreign government (such as a state-owned oil company), and makes clear that foreign subnational governments such as states, provinces, counties, municipalities or territories are intended to be included.

The information that must be included in the exhibit to the Form SD and presented in XBRL electronic format is substantially the same as that provided in the Former Rules, and is listed below. The last two bulleted items below are new and were added in the Proposed Rules.

- The type and total amount of payments made for each project;
- The type and total amount of payments made to each government;
- The total amounts of the payments, by category (see "*Payment*" below);
- The currency used to make the payments;
- The financial period in which the payments were made;
- The business segment of the issuer that made the payments;
- The governments that received the payments, and the country in which each such government is located;
- The project of the resource extraction issuer to which the payments relate;
- The particular resource that is the subject of commercial development; and
- The subnational geographic location of the project.

An instruction in the Proposed Rules is intended to assist issuers in describing the "subnational geographic location" of the project. A project location's description must be sufficiently detailed to permit a "reasonable user" of the information to identify the project's specific location. In identifying the location, issuers may use governmental designations (such as names of provinces, counties, districts, municipalities or territories), or commonly recognized geographic or geological descriptions (such as oil fields, basins, canyons or deserts). The instruction suggests that referring to the description of the project contained in the relevant contract may be helpful in assessing the appropriate level of detail to disclose.

***Commercial Development of Oil, Natural Gas or Minerals*.** Like the Former Rules, the Proposed Rules adopt Section 13(q)'s definition of "commercial development of oil, natural gas or minerals," to mean "exploration, extraction, processing and export of oil, natural gas or minerals, or the acquisition of a license for any such activity." The Proposing Release confirms that the definition is intended to capture only activities directly related to the commercial development of those resources, and not activities that are merely ancillary or preparatory to commercial development. Ordinary operations of oilfield service and equipment companies and their counterparts in the mining industry will not be considered to be engaged in commercial development of a covered resource. Marketing activities and transportation activities for a purpose other than export are also not intended to be included by the definition.

An instruction to the Proposed Rules provides that where a service provider makes a payment to a government on behalf of a resource extraction issuer that meets the definition of "payment" under the Proposed Rules, the resource extraction issuer, and not the service provider, will be required to disclose those payments.

The Proposed Rules include examples of what the terms "processing" and "export" are intended to mean. "Processing" includes midstream activities, such as post-extraction field processing of natural gas to remove liquid hydrocarbons or impurities, and upgrading bitumen and heavy oil, before sale or delivery to a third party. It would also include crushing and processing of raw ore prior to the smelting phase. However, it would not include downstream activities, such as refining or smelting. "Export" is defined as the transportation of a resource across an international border from its country of origin by an issuer having an ownership interest in the resource. Cross-border transportation by a company having no ownership interest in the resource being transported would not be considered to be an export activity.

Proposed Rule 13q-1(b) includes an anti-evasion provision, which states that attempts to re-characterize an otherwise-disclosable activity or payment as a non-disclosable activity or payment may be considered part of a plan or scheme to evade the rules' disclosure requirements.

***Payment*.** Consistent with the Former Rules, "payment" is defined in Form SD as an amount that:

- Is made to further the commercial development of oil, natural gas, or minerals;
- Is not *de minimis*; and
- Falls into one or more of the following categories:
  - Taxes;
  - Royalties;
  - Fees;
  - Production entitlements;
  - Bonuses;
  - Dividends; and
  - Payments for infrastructure improvements.

As the case with the Former Rules, a "not *de minimis*" payment is one that equals or exceeds $100,000, or its equivalent in the issuer's reporting currency, whether made as a single payment or a series of related payments.

An instruction to Form SD clarifies that "fees" include license fees, rental fees, entry fees, and other considerations for licenses or concessions, and that "bonuses" include signature, discovery and production bonuses. Dividends need not be disclosed where they are received by a government as a common or ordinary shareholder of the issuer on the same terms as other shareholders. However, any dividends paid by the issuer in lieu of production entitlements or royalties must be disclosed.

Payments for infrastructure improvements, such as constructing a road or railway to further the development of the subject resource, must be disclosed. Consistent with the EU Directives and ESTMA, "social" or "community" payments, such as payments to build a hospital or school, need not be disclosed.

An instruction to Form SD provides that payments made for taxes on corporate profits, corporate income and production must be disclosed. However, disclosure is not required for taxes levied on consumption, such as value-added taxes, personal income taxes, or sales taxes. If a government levies a tax or other payment obligation at the entity level instead of with regards to a particular project, the issuer may disclose that payment at the entity level only, and omit disclosing items that are inapplicable (such as project, business segment, etc.).

As the case with the Former Rules, payments covered by the definition that are made "in-kind," such as payments to a government in crude oil, must be disclosed. The monetary value of an in-kind payment may be reported at cost (or its fair market value if cost is not determinable), and must be accompanied by a brief description of how the monetary value was calculated.

***Payments by Subsidiaries and "Controlled" Entities*.** Disclosure would also be required for payments made by a subsidiary of the resource extraction issuer or other entity under the control of the issuer. Unlike the Former Rules, the terms "subsidiary" and "control" are defined in the Proposed Rules by reference to accounting principles rather than to Exchange Act Rule 12b-2.[20] "Control" is defined in Item 2.01 of Form SD to mean that the resource extraction issuer consolidates the entity, or proportionately consolidates its interest in the entity, under accounting principles applicable to the issuer's financial statements included in its periodic reports filed with the SEC. "Subsidiary" is defined in Item 2.01 applying the same contextual meaning. This definitional concept is consistent with the EU Directives and ESTMA, and may provide more clarity to issuers in preparing their Form SDs.

***Project*.** Prior to the adoption of the Former Rules, many commenters had expressed concerns that Section 13(q) required disclosures at a per-project level while the EITI did not, thereby placing SEC-reporting companies at a competitive disadvantage. To afford issuers some flexibility in applying the term to their particular business, the term "project" was left undefined in the Former Rules. However, in light of the definitions of "project" that have been adopted since then under the EU Directives and the ESTMA, the Commission proposed a definition for "project" modeled on their definitions.

Similar to the EU Directives and ESTMA Guidance, a "project" in the Proposed Rules is defined to mean operational activities that are governed by a single contract, license, lease, concession or similar legal agreement, which forms the basis for payment liabilities with a government. The proposed definition adds that agreements that are both "operationally and geographically interconnected" may be treated by the resource extraction issuer as a single "project."[21]

An instruction to Item 2.01 of proposed Form SD provides a non-exclusive list of factors to consider when determining whether agreements are "operationally and geographically interconnected" when identifying a "project." The factors are (a) whether the agreements relate to the same resource and the same or contiguous part of a field, mineral district or other geographic area; (b) whether the agreements will be performed by shared key personnel or with shared equipment; and (c) whether they are part of the same operating budget.

***Alternative Reporting*.** As noted above, in 2014 the U.S. completed its process for becoming a member of the EITI. Representatives from the Departments of the Interior, Energy and Treasury, and representatives from industry and civil society have formed an advisory committee to produce a U.S. Extractive Industries Transparency Initiative (the "**USEITI**"). Because of this ongoing initiative and the legislative developments in the EU and Canada, the Proposed Rules, similar to the EU Directives and the ESTMA, would allow an issuer to satisfy its disclosure requirements by permitting the issuer to include in its Form SD a report that complies with a foreign jurisdiction's rules or that meet the USEITI reporting requirements. The Proposed Rules make clear that the Commission must first determine that it considers the foreign jurisdiction's requirements or the USEITI reporting regime to be substantially similar to the SEC's.

***Effective Date*.** Resource extraction issuers would be required under the Proposed Rules to comply with adopted Rule 13q-1 and Form SD for fiscal years ending no earlier than one year after the effective date of the final rules. For example, if June 17, 2017 is the date that is one year after the effective date of the final rules, a

[20] The terms "control" and "subsidiary," as defined in Rule 12b-2, apply the traditional federal securities laws' notion of "control" – *i.e.*, possessing the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

[21] In order for operationally and geographically interconnected multiple agreements to be considered a single project under the EU Directives and the ESTMA Guidelines, the agreements must have "substantially similar terms." The definition of "project" in the Proposed Rules would not include the requirement that the agreements have substantially similar terms. The Proposing Release acknowledges that different terms for a second agreement between parties that cover operations in an area geographically contiguous to their first project should not, by themselves, preclude treating the second agreement as the same project.

resource extraction issuer with a fiscal year-end of December 31, 2017 would be required to file its first resource extraction payment report no later than 150 days after that fiscal year end, or by May 30, 2018.

Conclusion and Practical Take-Aways

Given the legislation in other countries and the refinements in the EITI Standards since 2012, any further judicial challenges (such as *API*) to the Proposed Rules, if brought, may not be successful.

Although resource extraction issuers would not be required under the Proposed Rules to comply with their disclosure requirements until 2017 at the earliest, there are some actions that issuers should begin taking now to prepare for their implementation:

- First, beginning in 2016, resource extraction issuers should examine their relevant contracts and other arrangements with governments or state-owned enterprises, such as leases, concessions and production-sharing agreements, to begin assessing what would be identified as their "projects" for purposes of the Proposed Rules.
- Also, issuers should review whether the relevant contracts, arrangements or the laws of the subject country contain provisions that would prohibit or restrict any disclosure required by the final rules, and if so, to consider whether making application to the SEC to seek an exemption from such disclosure is warranted. The time it would likely take for any process to seek and receive such an exemption should at this point be assumed to be lengthy, particularly before any procedures and courses of dealing between the SEC and issuers have been established.
- By 2016, there should be an increasing number of examples of country-by-country and project-by-project payment reports filed and made publicly available in non-U.S. jurisdictions, such as the UK and other EU countries. Issuers should review those reports when filed, and compare and contrast them in order to prepare for their own reporting.[22]
- Finally, issuers should begin now to assess the ease or difficulty of tracking their payments for ultimate disclosure purposes under the Proposed Rules. The Proposing Release cited comments submitted by many companies claiming that their costs to comply with the rules would be significant, possibly involving modifications to their enterprise resource planning and financial reporting systems to capture and report payment data at the project level for each type of payment, government payee and currency. Remaining to be tested is the SEC's assertion that issuers' cost concerns should be alleviated by the rules' not requiring the payment information to be audited or reported on an accrual basis.[23]

As noted above, initial comments on the Proposed Rules are due on or before January 26, 2016. We will continue to monitor developments relating to the Proposed Rules, and will publish a similar Alert when final rules are adopted by the Commission.

[22] Some examples already exist: Statoil (www.statoil.com/downloads) and Tullow Oil (*see* Publish What You Pay US comment letter (June 1, 2015) at https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-72.pdf).
[23] *See* note 361 of the Proposing Release.

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