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Take Two—The SEC Adopts Section 1504 Reporting Requirements for Payments to Governments by Oil, Gas, and Mining Companies

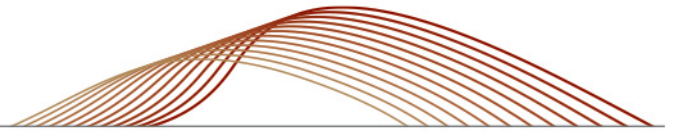
By [Samuel W. Cooper](#), [S. Joy Dowdle](#) & [Spencer D. Bruck](#)

In yet another effort to “combat global corruption and promote accountability,” the Securities and Exchange Commission (the “SEC” or the “Commission”) issued its final Rule 13q-1 on June 27, 2016, requiring all “resource extraction issuers” to provide detailed, public reporting of all payments to governments equal to or exceeding \$100,000 annually, and made “to further the commercial development of oil, natural gas, or minerals.”¹ The new Rule 13q-1 represents the Commission’s second attempt at these reporting requirements (the first being struck by the U.S. District Court for the District of Columbia in July 2013), and will require impacted issuers to make their initial annual filing no later than 150 days from their first fiscal year end on or after September 30, 2018. In view of the reporting requirements—which the Commission estimates will impact approximately 750 issuers at an initial cost potentially exceeding \$570 million—companies in the extractive industries are well advised to undertake a thoughtful strategy for compliance with Rule 13q-1.

Background

Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) amended the Securities and Exchange Act of 1934 and directed the SEC to “issue final rules that require each resource extraction issuer” to include in an annual report . . . information relating to any payment made . . . to a foreign government or the [U.S.] Government for the purpose of the commercial development of oil, natural gas, or minerals.”² In a separate provision, Dodd-Frank requires that “to the extent practicable,” reporting required by Dodd-Frank should be publically available.³

Pursuant to these provisions, on August 22, 2012, the SEC issued its initial payment disclosure rules, which, like the current rules, required annual reporting on a new form—Form SD—of certain details regarding any payment or series of payments to governments aggregating \$100,000 or more during an issuer’s fiscal year.⁴ On July 2, 2013, Judge John Bates of the U.S. District Court for the District of Columbia vacated the August 2012 Rules, finding the Commission committed “two substantial errors”: (1) the Commission “misread” the Dodd-Frank mandate of public disclosure to require complete, public disclosure of all reported payment information; and (2) the Commission failed to appropriately



justify its decision not to exempt from reporting payments made in countries whose laws forbid the mandated disclosure.⁵

On September 14, 2014, Oxfam America filed suit in federal court in Massachusetts to compel the SEC to promulgate new rules implementing Section 1504.⁶ In response to the resulting court order finding the Commission had unlawfully withheld agency action,⁷ the SEC embarked on an expedited rulemaking process in which it reportedly received more than 369 letters providing comments, and resulting in the June 27, 2016 final Rule 13q-1.⁸

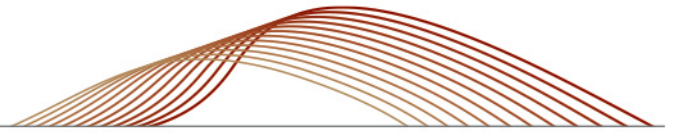
The Current Rule 13q-1

Substantially similar to its predecessor, the current Rule 13q-1 requires annual, detailed, and public filings via an amended Form SD on the Commission's on-line EDGAR system.⁹ The final rule mandates disclosure by all "Resource Extraction Issuers," defined as "all U.S. companies and foreign companies that are required to file annual reports pursuant to Section 13 or 15(d) of the Exchange Act *and* are engaged in the commercial development of oil, natural gas, or minerals"—including all issuers involved in "exploration, extraction, processing, and export, or the acquisition of a license for any such activity."¹⁰

Resource Extraction Issuers are required to disclose any government payment or series of payments that are "not de minimis"—*i.e.*, those that aggregate to \$100,000 or more in the issuer's fiscal year—and are made "to further the commercial development of oil, natural gas, or minerals," including "taxes, royalties (including license fees), production entitlements, and bonuses, . . . as well as community and social responsibility payments . . . required by law or contract, dividends, and payments for infrastructure improvements."¹¹ The rule mandates disclosure of payments made to both the U.S. government and foreign governments, which is broadly defined to include "a foreign government, a department, agency, or instrumentality of a foreign government, or a company at least majority owned by a foreign government."¹² A Resource Extraction Issuer is required to report not only its own qualifying payments, but also those made by its subsidiaries and any entity "under [its] control," defined by Form SD to include entities that are consolidated into the issuer's financial statements as determined by applicable accounting principles.¹³

Not surprisingly in view of the 2013 litigation, the 268-page final rule and accompanying commentary contains extensive discussion regarding the availability of disclosed information to the public. Form SD mandates the disclosure of significant payment detail,¹⁴ all of which will be publically available (and searchable) on EDGAR. Additionally, the rule contemplates that the Commission will, "to the extent practicable," "periodically" make available online a "compilation of the [submitted] information."¹⁵ Rejecting numerous comments and proposals urging anonymized reporting, the Commission expressly noted that the detailed payment information will provide a useful resource to both citizens and enforcement bodies around the world in identifying "the suspect or corrupt practices" of companies and officials, and/or the diversion of resources.¹⁶ Seemingly in response to the 2013 opinion of the D.C. District Court, the Commission explained its view that this level of transparency is both an appropriate use of its discretion to fulfill its Dodd-Frank mandate and consistent with other reporting regimes also requiring public disclosure.¹⁷

Similarly, the commentary discusses at length the exemptions or alternatives to Form SD reporting. First, Rule 13q-1 provides for "transitional relief or delayed reporting" in certain circumstances, giving Resource Extraction Issuers a one-year extension to report payments relating to exploration,¹⁸ and an extended time period in which to disclose payments made by an acquired entity that was previously



not subject to the rule.¹⁹ Second, issuers subject to reporting regimes the Commission deems “substantially similar” to Rule 13q-1 may satisfy their reporting obligations by submitting “a report complying with the reporting requirements of the alternative jurisdiction.”²⁰ In a separate opinion also issued on June 27, 2016, the Commission expressly blessed as “substantially similar,” reporting under the European Union Accounting and Transparency Directives, Canada’s Extractive Sector Transparency Measures Act, and the U.S. Extractive Industries Transparency Initiative.²¹

Finally, the Commission rejected numerous comments and submissions urging a blanket exception for payments made in countries prohibiting the required disclosure. Noting a “state of uncertainty” as to whether and where Rule 13q-1 disclosure would in fact run afoul of local law, and a desire to avoid incentivizing other countries to adopt conflicting local law, the rule includes what the commentary describes as a “case-by-case approach,” permitting Resource Extraction Issuers to raise concerns and seek reporting exemptions as they deem appropriate.²²

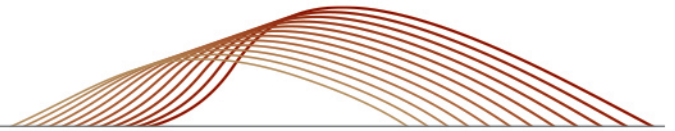
In view of these requirements, Resource Extraction Issuers would do well to avail themselves of the two-year period before initial Form SD reporting to consider the following:

- ***Develop a Comprehensive Approach:*** Many Resource Extraction Issuers are multinational corporations and/or entities with a global footprint subjecting them to multiple extraction reporting regimes. Similarly, many operate via complex corporate structures and partner relationships. Issuers should ensure they have identified and understand the reporting regimes applicable to them, analyzed all potentially impacted entities and relationships within their enterprise, and have developed a comprehensive approach to satisfying reporting requirements.
- ***Carefully Analyze Applicable Local Law:*** As evidenced by the extensive discussion in the commentary accompanying Rule 13q-1, identifying local laws and assessing the extent of any potential conflict with Form SD will prove a complex undertaking. As such Resource Extraction Issuers should work now to identify potential conflicts in applicable legal regimes and develop strategies—via a specific exemption or otherwise—to resolve them.
- ***Ensure Effective Compliance and Local Outreach Efforts:*** Armed with detailed project and payment information, Resource Extraction Issuers will likely face increased scrutiny from both enforcement authorities and the private sector. Beyond the mechanics of Form SD reporting, companies should critically examine their anti-corruption compliance efforts and community involvement—as well as those of any joint venture and/or partnership likely to be impacted by Rule 13q-1—to ensure they are effectively mitigating corruption risk and strategically building reputations for transparency in the communities in which they operate.

Companies who effectively utilize the two-year lead period to strategically prepare for reporting and enhance their anti-corruption efforts are likely to both facilitate efficient disclosure and minimize the risk of regulatory and public scrutiny arising from Rule 13q-1 compliance.



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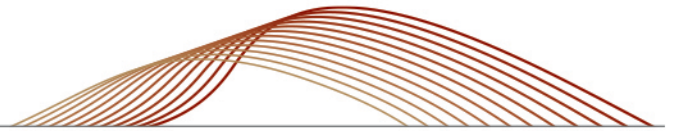
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- ¹ Disclosure of Payments by Resource Extraction Issuers, 17 CFR Parts 240 and 249, Release No. 34-78167 (June 27, 2016) (the "Final Rule"). The Final Rule and accompanying SEC Release can be found [here](#).
 - ² 15 U.S.C. § 78m(q)(2)(A).
 - ³ 15 U.S.C. § 78m(q)(3)(A).
 - ⁴ Disclosure of Payments by Resource Extraction Issuers, 17 CFR Parts 240 and 249, Release No. 34-67717 (August 22, 2012) (the "August 2012 Rules"). The August 2012 Rules can be found [here](#).
 - ⁵ See *American Petroleum Inst. v S.E.C.*, 953 F. Supp. 2d 5 (D.D.C. 2013). For a fulsome analysis of the August 2012 rules and related API litigation, see our July 2013 Client Alert available [here](#).
 - ⁶ See *Oxfam America, Inc. v. S.E.C.*, 126 F. Supp. 3d 168, 171 (D. Mass. 2015).
 - ⁷ *Id.* at 172-73.
 - ⁸ Disclosure of Payments by Resource Extraction Issuers, Release No. 34-78167, at 10.
 - ⁹ 17 C.F.R. § 249b.400 ("Form SD").
 - ¹⁰ *Id.* at 264.
 - ¹¹ Form SD, Item 2.01(d)(7-8); see also Final Rule at pgs. 25-26.
 - ¹² Form SD, Item 2.01(d)(6); see also Final Rule at pg. 26.
 - ¹³ Form SD, Item 2.01(d)(3); see also Final Rule at pg. 26.
 - ¹⁴ Specifically, Form SD mandates disclosure of the following information for each qualifying payment: the total value of each "type" of payment (*i.e.*, taxes, royalties, fees, production entitlements, bonuses, dividends, payments for infrastructure improvements, and community and social responsibility payments that are required by law or contract); the currency used to make the payment(s); the fiscal year in which the payment(s) were made; the business segment of the issuer that made the payment(s); the government to which the payment(s) were made; the project to which the payment(s) relate; and the subnational geographic location of the project. Form SD, Item 2.01(a).
 - ¹⁵ Disclosure of Payments by Resource Extraction Issuers, Release No. 34-78167, at 100.
 - ¹⁶ Final Rule at pgs. 98-109.
 - ¹⁷ *Id.*
 - ¹⁸ The Commission explained that it "considers payments to be related to exploratory activities if they are made as part of the process of identifying areas that may warrant examination or examining specific areas that are considered to have prospects of containing oil and gas reserves, or as part of a mineral exploration program. [H]owever, exploratory activities are limited to activities conducted prior to the development or extraction of the oil and gas or minerals that are the subject of the exploratory activities." Final Rule at pg. 119.
 - ¹⁹ *Id.* at 27.
 - ²⁰ Form SD, Item 2.01(c).
 - ²¹ Securities and Exchange Commission, Release No. 34-78169 (June 27, 2016), available [here](#).
 - ²² Final Rule at pgs. 117-118.

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