

# Hot Topic: SEC Rules Section 13(q)

## SEC final rule requires extraction industry government payments disclosures



January 8, 2021 (updated January 26, 2021<sup>1</sup>)

### The SEC adopted final rules<sup>2</sup> that require disclosure of payments to governments by companies in the extraction industry.

#### Background and impacts

The Dodd-Frank Act directed the SEC to issue rules requiring resource extraction companies to disclose certain payments made to governments for the commercial development projects of oil, natural gas or minerals. In response to this requirement, the SEC provided two iterations of such rules, in 2013 and 2016, but they were subsequently overturned.

Nevertheless, the statutory mandate to issue rules remained in effect. The SEC therefore recently adopted final rules with the goal of achieving transparency while fulfilling a congressional requirement that the rules could not be substantially the same as the previous two rules that were overturned. The final rules do this, in part, by providing an updated definition of a 'project'.

#### Key provisions of the rules

##### Payments

The final rules require disclosure of payments made to any government, foreign subnational jurisdiction (e.g. national state, province) or US Federal Government (excluding state or county), for each of a company's projects to further the commercial development of oil, natural gas or minerals, and which are not de minimis.<sup>3</sup> Such payments include taxes, royalties, fees (including license fees), production entitlements, bonuses, other material benefits commonly recognized as part of the revenue stream for commercial development, dividends and infrastructure payments.

<sup>1</sup> New guidance or significant updates are indicated with \*\*

<sup>2</sup> SEC Release No. 34-90679, [Disclosure of Payments by Resource Extraction Issuers](#), December 16, 2020.

<sup>3</sup> Under the adopted definition, a 'not de minimis' payment means any payment, whether made as a single payment or a series of related payments, that equals or exceeds \$100,000, or its equivalent in the resource extraction issuer's reporting currency.

## Project

The final rules require disclosure by 'project' and define a project in terms of three criteria.

- Type of resource (i.e. oil, natural gas or specific mineral)

A project is at the resource level, and is not required to be disaggregated to lower levels within a resource type. For example, a company would not be required to describe whether an oil project is related to the extraction of light or heavy crude oil. Similarly for a coal mining project, the company would not be required to disclose if it is mining bituminous coal or anthracite coal.

- Method of extraction (e.g. well, open pit)

A project is defined at the general method of extraction level, and is not required to be disaggregated at lower levels within that method. For example, a company disclosing payments for oil extracted through the use of a well would not be required to disclose payments separately for wells using different approaches, such as horizontal or vertical drilling, hydraulic fracturing, etc.

- Major subnational jurisdiction (e.g. state, province, district, region, territory), subnational government payee and, if applicable, smallest body of water (for offshore operations)

Projects are defined to be at a major subnational jurisdiction group. For example, a company extracting oil through the use of a well in the three oil sands regions of Alberta, Canada (the Regional Municipality of Wood Buffalo, Northern Sunrise County and the Municipality of Cold Lake) would be required to identify each subnational government entity, and aggregate and report all of its fees paid for environmental and other permits to each entity. The project level under the first two criterion would be the extraction of oil through the use of wells. Under the third criteria, the company could aggregate all of the government payments arising from its operations in the three oil sands areas paid at the provincial level, with disclosure of the particular agency payee, e.g., the Alberta Department of Energy.<sup>4</sup>

The final rules also provide guidance for disclosing offshore projects, such as in the Gulf of Mexico. In these cases, the company would note the nearest major subnational jurisdiction and if equidistant from two, the company may disclose both such jurisdictions. For example, a drilling project off the shore of Veracruz, Mexico that produced natural gas would be described as 'Offshore-Gulf of Mexico/Veracruz/Natural Gas/Well'.

## Reporting

The final rules require submission of the required payment disclosures on Form SD for payments made in a company's most recent fiscal year. The disclosure is required to be furnished to, but not filed with, the Commission, no later than 270 days following the end of the company's most recently completed fiscal year. The rules also apply to reporting foreign private issuers.<sup>5</sup> Further, a company is required to include those payments made by a subsidiary or an entity under its control.<sup>6</sup>

In addition, the final rules allow a company to meet the requirements of the rules, in certain circumstances, by providing disclosures that comply with a foreign jurisdiction's reporting regime.<sup>7</sup>

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<sup>4</sup> Illustrative example in SEC Release No. 34-90679.

<sup>4</sup> Excludes those that are exempt from Exchange Act registration and reporting obligations pursuant to 17 CFR 240.12g3-2(b) ('Rule 12g3-2(b)').

<sup>6</sup> Resource extraction issuer will have 'control' of another entity when the issuer consolidates that entity under the accounting principles applicable to its financial statements included in the periodic reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act.

<sup>7</sup> Specific order was issued recognizing the EU Directives, the UK's Reports on Payments to Governments Regulations 2014, Norway's Regulations on Country-by-Country Reporting, and Canada's ESTMA.

## Scope, exemptions and relief

The final rules apply to issuers that are required to file an annual report with the SEC, and engage in the commercial development of oil, natural gas or minerals.

The final rules exempt smaller reporting companies<sup>8</sup> and emerging growth companies<sup>9</sup> from compliance with these rules. In addition, the final rules provide exemptions for conflicts of law and conflicts with pre-existing contracts, and allow for specific relief requests, as explained in the following table.

Exemptions	Eligibility criteria for exemption	Disclosures in Form SD
<b>Conflicts of law</b>	The issuer is unable to provide the required disclosure without violating the laws of the jurisdiction where the project is located, even after taking reasonable steps to seek and use exemptions or other relief under the applicable law of that foreign jurisdiction	<ul style="list-style-type: none"> <li>— Jurisdiction with excluded disclosure</li> <li>— Law preventing disclosure</li> <li>— Efforts to seek and use exemptions</li> <li>— Results of efforts</li> </ul>
<b>Conflicts with pre-existing contracts</b>	Prior to the effective date, an existing contract includes expressly written terms that prohibit the disclosure of payments	<ul style="list-style-type: none"> <li>— Jurisdiction where it has excluded such disclosure</li> <li>— Particular contract terms preventing the issuer from providing disclosure</li> <li>— Its efforts to seek consent or other contractual relief</li> <li>— Results of efforts</li> </ul>
<b>Specific exemptive relief requests</b>	An issuer may submit a written request for exemptive relief to the SEC describing: <ul style="list-style-type: none"> <li>— disclosures it seeks to omit</li> <li>— specific facts and circumstances that warrant an exemption (including costs and burdens it faces)</li> </ul>	Based on relevant facts and circumstances

The final rules also provide for delayed reporting related to exploratory activities. An issuer is not required to report payments related to exploratory activities in the Form SD for the fiscal year in which payments are made. Instead, it may delay reporting such payments until it submits a Form SD for the fiscal year following the fiscal year in which the payments were made. For example, a Form SD filed for Fiscal Year 2 could include exploratory payments made in Fiscal Year 1 and non-exploratory payments made in Fiscal Year 2.

<sup>8</sup> See Release No. 33-10513 (Jun. 28, 2018) [83 FR 31992 (Jul. 10, 2018)].

<sup>9</sup> See the definition of emerging growth company in Securities Act Rule 405 and Exchange Act Rule 12b-2.

Transitional relief is also provided in connection with entities acquired during the fiscal year, unless the acquired entities are already subject to the rules' disclosure requirements or those of a foreign jurisdiction's reporting regime prior to their acquisition. In this situation an issuer would include the acquired entities' payment information starting with the first full fiscal year after acquisition.

Relief is also provided for companies completing an initial public offering. Companies are required to comply with these rules starting with payments made in the first fiscal year following the fiscal year of the initial public offering.



## Effective date and transition\*\*

The final rules and form amendments are effective on March 16, 2021. Resource extraction issuers are required to comply with the final rules starting with their fiscal year ending no earlier than March 16, 2023. For example, the submission date for an issuer with a December 31 fiscal year-end would be during September 2024 (i.e. 270 days after its fiscal year end of December 31, 2023).

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