CLEARY GOTTLIEB

Alert Memo

SEPTEMBER 13, 2012

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SEC Adopts Disclosure Rules on Resource Extraction Payments

On August 22, 2012, the Securities and Exchange Commission (the "Commission") adopted final rules on specialized disclosure relating to payments to governments by companies engaged in resource extraction.[1] New Rule 13q-1 and a new Specialized Disclosure Report, Form SD, implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[2] which added Section 13(q) to the Securities Exchange Act of 1934, as amended (the "Exchange Act").

A company subject to the rule must file resource extraction payment disclosure annually on Form SD no later than 150 days after the end of its fiscal year for fiscal years ending after September 30, 2013; a partial report covering only payments made after September 30, 2013 is permitted for a fiscal year beginning before September 30, 2013.

Also on August 22, 2012, the Commission adopted final rules on specialized disclosure relating to the use of "conflict minerals" from the Democratic Republic of the Congo and neighboring countries,[3] implementing Section 1502 of the Dodd-Frank Act. These rules have broad applicability, including for companies in the resource extraction industry, and companies should carefully consider how they may be affected. Please refer to our separate Alert Memo ("SEC Adopts Disclosure Rules on Conflict Minerals," dated September 12, 2012) available on our website.

Both sets of new rules were adopted after a long delay,[4] as the Commission grappled with disclosure requirements primarily intended to further broad social goals rather than the Commission's investor protection mandate. The final rules reflect thoughtful consideration of the voluminous comments the Commission received on the rule proposals, and include a number of key changes from the proposals. Nevertheless, both sets of rules were only narrowly approved by the Commission, and ongoing debate and legal challenges to the rules are anticipated.

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1 SEC Rel. No. 34-67717 (Aug. 22, 2012) (the "Adopting Release"), available at http://www.sec.gov/rules/final/2012/34-67717.pdf. The rules were originally proposed on December 15, 2010. SEC Rel. No. 34-63549 (Dec. 15, 2010), available at http://sec.gov/rules/proposed/2010/34-63549.pdf.

2 Pub. L. No. 111-203 (the "Dodd-Frank Act").

3 SEC Rel. No. 34-67716 (Aug. 22, 2012), available at http://www.sec.gov/rules/final/2012/34-67716.pdf.

4 The new Section 13(q) of the Exchange Act required the Commission to adopt final rules no later than April 17, 2011. Exchange Act Section 13(q)(2)(A).

I. SUMMARY OF THE FINAL RULES

Affected companies:	• Disclosures are required by any company that is a "resource extraction issuer," defined as an issuer that is required to file an annual report with the Commission and that engages in the commercial development of oil, natural gas or minerals.[5] • "Commercial development of oil, natural gas or minerals" includes exploration, extraction, processing and export, and the acquisition of a license for any such activity. • Reporting foreign private issuers (including government-owned entities)[6] and smaller reporting companies are covered. Registered investment companies are not subject to the rules.
Disclosure location:	• The required disclosures are to be provided in new Form SD (Specialized Disclosure Report), with an exhibit in XBRL format containing the detailed information. • Form SD is not automatically incorporated by reference in Securities Act registration statements, but it appears that failure to file will result in loss of eligibility to use Forms S-3 and F-3 and the Rule 144 safe harbor under the Securities Act of 1933, as amended (the "Securities Act"). • Key changes from the proposed rules: o The new disclosures are in a new standalone form, rather than in the annual report on Form 10-K, Form 20-F or Form 40-F. o The disclosure is "filed," not "furnished" as under the proposal, and is thus subject to liability under Section 18 of the Exchange Act.

[5] Although the Commission has not explicitly defined the phrase "oil, natural gas or minerals," it is generally understood that the phrase as used in the U.S. securities laws includes coal, as well as gold and other metals. See, *e.g.*, *Penturelli v. Spector, Cohen, Gadon & Rosen*, 779 F.2d 160 (3d Cir.1985) (holding that fractional undivided interests in coal are encompassed by "fractional undivided interest in oil, gas, or other mineral rights" in the definition of "security" in Section 2(a)(1) of the Securities Act); Guide 7 under the Securities Act, which contemplates the inclusion of coal, among other things, in the term "mineral deposit."

[6] A foreign government eligible to register public debt offerings on Schedule B that has listed debt securities in the United States is required to file annual reports on Form 18-K. Accordingly, it appears that such an issuer will also be required to provide resource extraction payment disclosures, including about payments made by the entities it controls. We understand, however, that few Schedule B issuers list their securities on a U.S. exchange. The new disclosure requirements would appear not to apply to a Schedule B issuer that files Form 18-K voluntarily and conducts registered offerings.

	○ CEO/CFO certifications of periodic reports under Exchange Act Rules 13a-14 and 15d-14 will not apply to resource extraction payment disclosures.
Timing:	• The disclosures must be filed annually no later than 150 days after the end of the company's fiscal year. This provides additional time after the due date for annual reports. • The rules apply for fiscal years ending after September 30, 2013. For a fiscal year beginning before September 30, 2013, the company may file a partial report covering only payments made after September 30, 2013. ○ For a calendar-year company, the first report is due May 30, 2014 and may be limited to payments made between October 1, 2013 and December 31, 2013. • Unlike the conflict minerals rules, it appears that companies may not delay reporting of resource extraction payments made by an acquired company.
Disclosure content:	• The disclosure must report payments made (1) during the fiscal year covered by the report, (2) by the company, a subsidiary of the company or an entity under the control of the company, (3) to any foreign government (including any company majority owned by a foreign government) or the U.S. federal government (4) for the purpose of the commercial development of oil, natural gas or minerals. • Payments consist of non-*de minimis* amounts (defined as a single payment or series of related payments that equals or exceeds $100,000) paid to further the commercial development of oil, natural gas or minerals, and include taxes, royalties, fees, production entitlements, bonuses, dividends and infrastructure improvement payments. • In-kind payments must be included and may be reported at cost, or if cost is not determinable, at fair market value. • Required information, to be tagged in XBRL, includes: ○ the type and total amount of payments made for each project;

	○ the type and total amount of payments made to each government; ○ the currency used to make the payments; ○ the fiscal year in which the payments were made; ○ the company's business segment that made the payments (corresponds to financial reporting "reportable segment"); ○ the government that received the payments and the country in which the government is located; and ○ the project of the company to which the payments relate. • Companies must report the amount of payments in either U.S. dollars or the company's reporting currency and disclose the method used to calculate the currency conversion. • Payment information is not required to be audited and may be submitted on a cash rather than an accrual basis. • No exemptions for local laws prohibiting the disclosure, contractual confidentiality provisions, disclosure otherwise provided under similar reporting regimes or safety concerns. • Key changes from the proposed rules: ○ Dividends and infrastructure improvement payments added to the list of payments required to be disclosed. ○ Definition of "not *de minimis*" added. • Project level disclosure not required for payments made at the entity level only (*e.g.*, dividends or corporate income taxes).

II. INTERNATIONAL CONTEXT

Dodd-Frank Act Section 1504 is broadly derived from the Extractive Industries Transparency Initiative ("EITI"), a global initiative of a voluntary coalition of companies, governments, investor groups and non-governmental organizations that seeks to promote accountability for payments made by resource extraction issuers to foreign governments by increasing transparency around these payments. "EITI compliant" countries undergo a reconciliation process in which company payments are matched with government revenues by an independent administrator.[7] This reconciliation process, in which both companies and governments provide payment information confidentially and a report of the reconciliation is published, is fundamentally different from the disclosure approach under Section 13(q).[8] Currently, 14 countries[9] are considered "EITI compliant," another 22 "candidate" countries[10] are in the process of complying with EITI standards and several other countries – including the United States[11] – have indicated their intent to implement the EITI.

Section 13(q) explicitly links the disclosures it requires to broader international efforts to better track and disclose resource extraction payments, including but not limited to the work of the EITI, directing 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."[12] In the Adopting Release, the Commission acknowledged this directive and, noting the explicit reference to the EITI in the statutory definition of "payment,"[13] generally tracked the definitions used

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[7] See EITI Rules, 2011 Edition (Nov. 1, 2011), available at http://eiti.org/files/2011-11-01_2011_EITI_RULES.pdf; The International Bank for Reconstruction and Development / The World Bank, Implementing the Extractive Industries Transparency Initiative: Applying Early Lessons from the Field (2008), available at http://siteresources.worldbank.org/INTOGMC/Resources/implementing_eiti_final.pdf.

[8] Section 13(q)(3) does require the Commission to make publicly available online a compilation of the information required to be submitted under the new rules, but that compilation was not intended to be a substitute for the disclosure of payment information by companies. The Commission has not yet determined the content, form or frequency of the compilation. See Adopting Release, p.125.

[9] Azerbaijan, Central African Republic, Ghana, Kyrgyz Republic, Liberia, Mali, Mauritania, Mongolia, Niger, Nigeria, Norway, Peru, Timor Leste and Yemen. See http://eiti.org/countries (last visited Sept. 13, 2012).

[10] See http://eiti.org/countries (last visited Sept. 13, 2012).

[11] See U.S. President Barack Obama, Opening Remarks by President Obama on Open Government Partnership (Sept. 20, 2011) (transcript available at http://www.whitehouse.gov/the-press-office/2011/09/20/opening-remarks-president-obama-open-government-partnership) and The Open Government Partnership, National Action Plan for the United States of America (Sept. 20, 2011), available at http://www.whitehouse.gov/sites/default/files/us_national_action_plan_final_2.pdf. The U.S. EITI framework and initial report is expected within one to two years after the establishment of a multi-stakeholder group (MSG) comprised of government, industry and civil society representatives, under the oversight of the U.S. Department of the Interior. Validation of payments and EITI-compliant status is expected within two to three years after MSG establishment. The U.S. Department of the Interior filed the charter for the proposed initial MSG on August 13, 2012, and the MSG is expected to be established in 2012.

[12] Exchange Act Section 13(q)(2)(E).

[13] Exchange Act Section 13(q)(1)(C)(ii).

under the EITI framework in the final rules "except for where the language or approach of Section 13(q) clearly deviates from the EITI."[14]

These "clear deviations" mean that, in addition to the fundamental difference in process, there are key differences between the scope of the final rules and the EITI framework. EITI implementing countries may further vary reporting processes and standards within that framework. Other similar international transparency efforts, such as London and Hong Kong stock exchange rules and proposed European Union disclosure requirements, also impose different standards. Accordingly, companies will need to develop systems to track and report payments in a variety of ways to comply with these differing approaches. (See "Next Steps and Recommendations" below and the brief summary of other disclosure requirements in Annex A.)

III. KEY DEFINITIONS AND GUIDANCE

Definition of "Commercial Development"

The statutory definition of "commercial development of oil, natural gas or minerals" includes processing and export activities, in an example of a "clear deviation" from the EITI framework, which focuses on "upstream activities."[15] However, the Commission declined to expand the scope of the definition beyond the language of Section 13(q), citing consistency with EITI. Accordingly, marketing and transportation are not included in the list of covered activities, although transportation is included if it is directly related to export. The Commission also clarified that activities that are ancillary or preparatory to commercial development activities are also not covered; for example, manufacturing drill bits or other machinery used in the extraction of oil do not fall within the definition of "commercial development." The Commission included in the Adopting Release guidance and examples for some of the terms in the definition:

- *Extraction* – includes the production of oil and natural gas as well as the extraction of minerals.

- *Processing* – includes field processing activities, such as the processing of gas to extract liquid hydrocarbons, the removal of impurities from natural gas after extraction and prior to its transport through the pipeline, and the upgrading of bitumen and heavy oil. Processing also includes the crushing and processing of raw ore prior to the smelting phase. Consistent with the EITI, processing does not include refining or smelting.

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[14] Adopting Release, pp.11-12.

[15] See The International Bank for Reconstruction and Development / The World Bank, Implementing the Extractive Industries Transparency Initiative: Applying Early Lessons from the Field (2008), available at http://siteresources.worldbank.org/INTOGMC/Resources/implementing_eiti_final.pdf, p.35. The Commission also acknowledged the inconsistency with the existing definition of "oil and gas producing activities" in the oil and gas disclosure rules under Regulation S-X Rule 4-10, which is also limited to upstream activities.

- *Export* – includes the export of oil, natural gas or minerals from the host country.

Subsidiaries and Controlled Entities

A company must disclose payments it makes directly, as well as payments made by a subsidiary or entity under its control. The terms "subsidiary" and "control" have the meanings set forth in Rule 12b-2 under the Exchange Act.[16] As the Commission explains in the Adopting Release, the Rule 12b-2 definition of "control" involves a facts-and-circumstances test and covers entities consolidated in the company's financial statements but also may include other entities, such as joint ventures, contractual arrangements and equity investees.

If a resource extraction issuer is a wholly-owned subsidiary of another resource extraction issuer, the subsidiary need not separately file the payment disclosures. Instead, the parent must indicate in its Form SD that it is also filing the required disclosure for the subsidiary, and the subsidiary may file a Form SD stating that the parent filed the required disclosure on Form SD and the date of that filing. To qualify for this approach, however, all of the subsidiary's equity securities must be owned, either directly or indirectly, by a single resource extraction issuer.[17]

Definition of "Foreign Government"

"Foreign government" includes:

- a foreign national government;
- a department, agency, or instrumentality of a foreign government;
- a company at least majority-owned by a foreign government; and
- a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.

Payments to the U.S. federal government must be disclosed, but not payments to U.S. state and local governments.

The inclusion of companies at least majority-owned by foreign governments will require a company to determine whether any recipients of payments that fall in the listed

[16] Exchange Act Rule 12b-2 defines control (including the terms "controlling," "controlled by" and "under common control with") to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise." Under Rule 12b-2, "A 'subsidiary' of a specified person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries."

[17] See Instruction 8 to Form SD. Consequently, it would appear that even a small shareholding by another person would disqualify a subsidiary from eligibility for this approach.

categories may be government-owned. Because of the narrow definition of covered payments, this may not present extensive practical difficulties.

Definition of "Project"

The Commission did not define "project," in order to provide a company flexibility in applying the term to different business contexts depending on factors such as the particular industry or business in which the company operates and the company's size. The Commission did, however, include guidance in the Adopting Release on what constitutes a project. It noted that contractual arrangements typically define the relationship and payment flows between the company and the government, so these contracts generally provide a basis for determining the payments associated with a particular "project." The guidance also states that the term does ***not*** mean "material project," reporting unit as determined for financial reporting purposes, all activities in a single country[18] (although a company might have only one project in a particular country) or a particular geologic resource such as a geologic basin or mineral district.

Definition of "Payments"

The Adopting Release states that the types of payments required to be disclosed are limited to those specified, and that a category of "other material benefits" was not included because Section 13(q) requires that the Commission must determine that any other "material benefits" required to be disclosed are part of the commonly recognized revenue stream. The Commission made such a determination with respect to dividends and infrastructure improvement payments, which are also included under the EITI, and added those categories to the list of specified payments. The instructions to Form SD and the Adopting Release also include clarification of some of the specified payments:

- *Taxes* comprise taxes levied on corporate profits, corporate income and production, but do not include payments for taxes levied on consumption, such as value added taxes, personal income taxes or sales taxes. (As noted above, payments levied at the entity level, such as corporate taxes, may be disclosed at the entity rather than the project level.)

- *Fees* include, but are not limited to, license fees, rental fees, entry fees and other considerations for licenses or concessions.

- *Bonuses* include, but are not limited to, signature, discovery and production bonuses.

- *Dividends* paid to a government as a common or ordinary shareholder of the company need not be disclosed as long as the dividend is paid to the government

[18] As noted by one commentator, the Commission's existing oil and gas disclosure rules require only country-level disclosure. See Regulation S-K Item 1201 ff.

under the same terms as other shareholders; however, the company must disclose any dividends paid in lieu of production entitlements or royalties. It also appears that ordinary dividends paid to a government as sole shareholder of a state-owned entity may be excluded if the payments are not made to further the commercial development of oil, natural gas or minerals, unless the dividend is paid in lieu of production entitlements or royalties.[19]

- *Infrastructure improvement payments*, such as building a road or railway, must be disclosed if incurred to further the commercial development of oil, natural gas or minerals, whether required by contract or voluntary. Social and community payments, such as building a hospital or school, are not included, consistent with the EITI framework, as "it is not clear that these types of payments are part of the commonly recognized revenue stream."[20]

In discussing government-owned resource extraction issuers, as well as payments made to a foreign government-owned company, the Commission noted that not all payments made by and to those entities are required to be disclosed – only payments within the specified categories.

In-Kind Valuation, Currency Conversion and Other Payment Guidance

Companies will need to determine the monetary value of in-kind payments, and Instruction 1 to Item 2.01 of Form SD indicates that companies should provide a brief description of how the monetary value (at cost or if cost is not determinable, at fair market value) was calculated. In-kind payments should be tagged as "in-kind" for purposes of the currency tag.

Companies will also need to disclose the method used to calculate the conversion of payments to U.S. dollars or the company's reporting currency. A company may calculate the conversion in one of three ways:

- translating the expenses at the exchange rate existing at the time the payment is made;
- using a weighted average of the exchange rates during the period; or
- based on the exchange rate as of the company's fiscal year end.

[19] See Adopting Release, p.60.

[20] Adopting Release, p.62.

For any arrangement providing for periodic payments or installments, the company must consider the aggregate amount of the related payments in determining whether the "not *de minimis*" threshold has been met.[21]

XBRL Tagging

On August 29, 2012, a draft XBRL tagging taxonomy for the resource extraction payment disclosures on Form SD was published, with comments due no later than October 31, 2012.[22] To the extent that certain tags are inapplicable, those tags may be omitted. For example, if a payment is made for an obligation levied at the entity rather than project level, project and business segment tags may be omitted.

Filing Status and Liability

Because disclosures are "filed" and not "furnished," the disclosures are subject to the liability provisions of Section 18 of the Exchange Act,[23] in addition to the general antifraud provisions of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Form SD is not deemed incorporated by reference into any Securities Act filing, however, unless the company specifically incorporates it by reference.[24] The incorporation by reference language in Form S-3 refers to all documents subsequently filed pursuant to Section 13(a), 13(c), 14 or 15(d) of the Exchange Act. Companies may wish to specifically exclude reports filed under Sections 13(p) and (q) in the incorporation by reference language, since Form SD is arguably filed pursuant to Section 13(a) as well as Sections 13(p) and (q).[25]

Although the Commission noted comments expressing concern that Form SD compliance could affect eligibility to use certain Securities Act registration statement forms, the Adopting Release and final rules do not specifically address those concerns. As a result, it seems that failure to file Form SD will result in the loss of eligibility for the Rule 144 safe harbor under the Securities Act for resales of the company's securities[26] and make the company an "ineligible issuer" pursuant to Rule 405 under the Securities Act (resulting in, among other things, ineligibility to file automatically effective registration statements and

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[21] This approach is similar to that in other rules requiring disclosure of a series of payments, such as Regulation S-K Item 404(a).

[22] The Form SD draft taxonomy is available at http://www.sec.gov/info/edgar/edgartaxonomies_d.shtml. See http://www.sec.gov/info/edgar/drafttaxonomies.shtml.

[23] Under Section 18 of the Exchange Act, a person shall not be liable for misleading statements in a filed document if it can establish that it acted in good faith and had no knowledge that the statement was false or misleading.

[24] See General Instruction B.4 to Form SD.

[25] See Adopting Release, n.477 (noting that issuers that fail to comply with the final rules could be violating Exchange Act Sections 13(a) and (p) and 15(d), as applicable).

[26] A selling security holder is eligible for the Rule 144 safe harbor for resales of the company's securities if, among other requirements, the company has filed all required reports under Section 13 of the Exchange Act during the 12 months preceding the sale. See Rule 144(c)(1).

use free writing prospectuses),[27] and failure to file Form SD on a timely basis will result in the loss of the company's eligibility to use Form S-3 and Form F-3 registration statements.[28] However, we understand that Commission Staff are currently collecting a variety of interpretive questions relating to this rule (including on these points) as well as the rule on conflict minerals and are considering the appropriate mechanism for responding to these questions.

Anti-evasion Provision

The anti-evasion provision requires disclosure regarding an activity or payment that, although not within the scope of one of the specified payment categories, is part of a plan or scheme to evade the disclosure required under Section 13(q), for example, by re-characterizing an activity that would otherwise be covered.

IV. POTENTIAL LEGAL CHALLENGE

The Commission was sued with respect to Dodd-Frank Act Section 1504 for delaying the issuance of the final rules,[29] and the U.S. Chamber of Commerce and the American Petroleum Institute (API) have suggested that they may bring litigation to challenge the final rules. It seems likely that the Commission's cost-benefit analysis will be challenged in any such litigation. In an action brought by the Chamber of Commerce and Business Roundtable, the federal Court of Appeals for the D.C. Circuit struck down the Commission's "proxy access" rule (Rule 14a-11) because "among other reasons, the Commission failed adequately to consider the rule's effect upon efficiency, competition, and capital formation."[30]

The Adopting Release includes a detailed economic analysis (estimating an initial cost of compliance of approximately $1 billion with annual compliance costs of between $200 million and $400 million). The Commission did not, however, attempt to quantify the potential benefits of the rule or assess whether the choices it made would advance the rulemaking's objective. The Commission noted that the statute aims to achieve compelling social benefits, but that it could not quantify such benefits with any precision. The Commission's economic analysis addressed many of the specific issues raised in the comment letters on the proposed rules, but there could still be a challenge. It is not clear

[27] An "ineligible issuer" includes a company that has not filed all "reports" required to be filed under Section 13 of the Exchange Act for the preceding 12 calendar months. See Rule 405. An ineligible issuer does not qualify as a "well-known seasoned issuer" ("WKSI") and consequently may not use an automatically effective shelf registration statement on Forms S-3 or F-3, and may not use a free writing prospectus in the offering process. See Rules 405, 163 and 164 and General Instruction I.D.1(a)(i) to Form S-3.

[28] The eligibility requirements for Forms S-3 and F-3 require that the registrant has, among other things, timely filed all required reports under Section 13 of the Exchange Act for the 12 calendar months and any portion of a month immediately preceding the filing of the registration statement. See General Instruction I.A.3(b) to Form S-3.

[29] *Oxfam Am. Inc. v. SEC*, no. 12-cv-10878 (D. Mass. filed May 16, 2012).

[30] *Business Roundtable v. SEC*, 647 F.3d 1144 at 1146 (D.C. Cir. 2011).

how the fact that the rule was adopted pursuant to specific direction from Congress in the Dodd-Frank Act will affect the outcome of any such challenge. The dissenting Commissioner focused in his statements at the open meeting on the cost-benefit analysis and on the choices open to the Commission in implementing the Dodd-Frank mandate.

The Adopting Release (like the release the same day on conflict minerals) includes severability language that may be intended to address the effects of potential litigation. The language states that if any provision of the rule, or its application to any person or circumstance, is held to be invalid, that invalidity shall not affect other provisions or the application of those provisions to other persons or circumstances that can be given effect without the invalid provision or application. It also provides that if any portion of Form SD not related to resource extraction payments disclosure is held to be invalid, that invalidity shall not affect the use of the form for purposes of resource extraction payments disclosure.[31]

Despite the potential for litigation, however, given the significant efforts that will be needed for compliance, companies should undertake the necessary preparations that will keep them on a timetable to submit a report in 2014 covering payments made after September 30, 2013.

V. NEXT STEPS AND RECOMMENDATIONS

- *Determine whether the company is subject to the resource extraction payment disclosure rules.*
    - Is the company required to file an annual report with the Commission?
    - Is the company engaged in the exploration, extraction, processing or export of oil, natural gas or minerals, or the acquisition of a license for any such activity?
- *Assess the general scope of the company's required disclosures.*
    - Does the company make payments (including in-kind) itself? Do its subsidiaries make such payments? Does the company control (within the meaning of Rule 12b-2) any other entities that make such payments?
    - In which countries (and to which governments and governmental entities) are such payments made?

[31] Adopting Release, p.135.

- *Establish a compliance program and allocate resources.*
  - Establish a company working group, including individuals from the company's finance/accounting, legal, operations, public relations and corporate responsibility departments.
  - Assign specific authority and responsibility for the program at a senior level.
  - Assess the need for outside consultants.
  - Ensure sufficient resources (include implementation costs related to XBRL data tagging).
  - Establish an organizational structure and communication processes to ensure that critical information reaches relevant employees and that detected noncompliance can be reported and remediated promptly.
  - Establish a system of controls over the systems, including ongoing monitoring and audit of effectiveness.[32]
  - Plan required personnel training (*e.g.*, management, finance and accounting staff, legal staff), including with respect to compliance.
  - Incorporate processes and policy into company-wide code of conduct and grievance mechanism.
  - Consider integration with existing Foreign Corrupt Practices Act (FCPA), U.K. Bribery Act, Office of Foreign Assets Control (OFAC) or other similar compliance programs.
- *Consider establishing a policy describing the company's practices regarding resource extraction payments.*
  - The policy could include a commitment to transparency of resource extraction payments to governments and government accountability, a stance against corruption, and a brief description of the steps the company is taking to track and manage its payments.

[32] In large part, these controls may be required as part of the disclosure controls and procedures mandated by Rules 13a-15 and 15d-15 under the Exchange Act.

- *Develop and implement systems and procedures to track payments.*
    - Does the company already track resource extraction payment information? How will the new systems relate to existing systems?
    - Consider how the company will define a "project" for its activities.
    - Consider how the company will determine which payments must be tracked.
    - Will the company track all payments or only payments above the *de minimis* threshold? Determine how to track the aggregate amount of periodic or installment payments to confirm whether they meet the "not *de minimis*" threshold.
    - Ensure the systems track all the information required to be separately tagged.
    - Does the company make in-kind payments? Determine how to track and value them.
    - In which currency are payments made and tracked? Determine whether to disclose payments in U.S. dollars or the company's reporting currency, and, if necessary, select one of the permitted conversion methodologies.
    - What payments are made at the entity level, rather than the project level? How will those be tracked?
    - Maintain flexibility to allow for compliance with other similar disclosure requirements that may be imposed (*e.g.*, EITI requirements in applicable countries, EU disclosure requirements). For further information about some of the differences between the EITI framework and the new rules, as well as other international resource payment disclosure initiatives, see Annex A.
- *Conduct legal and contractual due diligence and modify practices.*
    - Do any local law restrictions prohibit the required disclosure? It may be possible to obtain authorization from a host country to disclose the information.[33]
    - Do any contractual confidentiality provisions prohibit the required disclosure? Consider whether there are exceptions for disclosure required by law. Attempt to obtain consents or waivers as required.

[33] The Commission referenced comments that cited prohibitions of the required disclosure under the laws of China, Cameroon, Qatar and Angola, although apparently other commentators disagreed. See Adopting Release, p.23 and n.84; see also Adopting Release p.162 (suggesting companies may be able to seek authorizations for the disclosure from a host country).

- Develop systems to track legal and contractual restrictions.
- Consider strategic alternatives if required disclosure is prohibited in certain jurisdictions or for certain projects.
- Consider changes to form contracts and negotiation practices to ensure that future contractual arrangements permit the company to comply with the disclosure requirements.

- *Consider communications strategy.*
  - Beyond the required disclosure, consider whether to include disclosure in a corporate responsibility report, publish a transparency policy or otherwise highlight company activities.

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Please feel free to call any of your regular contacts at the Firm or any of our partners and counsel listed under "Capital Markets" or "Corporate Governance" in the Practices section of our website (http://www.clearygottlieb.com) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

ANNEX A

INTERNATIONAL TRANSPARENCY EFFORTS

	Description	Notes
EITI Framework	• Establishes the regular publication of all material oil, gas and mining payments by companies to governments and all material revenues received by governments from such companies. • In each implementing country, a multi-stakeholder group (MSG) develops the scope of the program (*e.g.*, revenues and types of payments to be reported, the companies that must report, the government entities that will report, and any materiality thresholds). Consequently, the framework provides significant room for differences among the EITI implementing countries. • EITI countries must remove obstacles to EITI implementation, such as agreeing to waive confidentiality clauses in government contracts.	• Governments publish reports reflecting an audited reconciliation process, matching payments from companies with revenues received. • Focuses on exploration and production-related (upstream) payments. • Some countries include a broader range of revenue streams and activities (such as forestry) than exploration and production of oil, natural gas and minerals. • Does not require disclosure at the project level, or separate disclosure of each type of payment, government payee and currency of payment, but: o Some countries require, if material, reporting for subnational levels of governments (*e.g.*, state, district, and traditional leaders) or for social or community groups. o Some countries require reporting by revenue type, and some report payments on a disaggregated basis by revenue type.

	Description	Notes
Proposed EU Rules	• October 2011 proposal to amend the European Union Transparency Directive and adopt a new directive to require resource extraction payment disclosure.[34]	• Would apply to EU private companies in the extractive and logging industries that are large and otherwise of significant public relevance (as designated under EU law), as well as to EU-listed companies in those industries. • Applies to exploration, discovery, development and extraction activities, rather than exploration, extraction, processing and export activities as under the final Section 13(q) rules. • Disclosure only of payments material to recipient government. • Payment disclosure required for each government and each project, but project reporting is based on a company's current reporting structure. • Payments do not include infrastructure improvement payments, but do include a catch-all category of "other direct benefits." • Exemptions for details of payments made to a government in a country where the public disclosure of this type of payment is clearly prohibited by local criminal law.

[34] See Proposal for a Directive of the European Parliament and of the Council Amending Directive 2004/109/EC on the Harmonisation of Transparency Requirements in Relation to Information about Issuers Whose Securities are Admitted to Trading on a Regulated Market and Commission Directive 2007/14/EC (Oct. 25, 2011), available at http://ec.europa.eu/internal_market/accounting/docs/other/20111025-provisional-proposal_td_en.pdf; Proposal for a Directive of the European Parliament and of the Council on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings (Oct. 25, 2011), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0684:FIN:EN:PDF.

	Description	Notes
Hong Kong Stock Exchange Listing Rules	• Companies primarily engaged in the exploration or extraction of minerals and/or petroleum must disclose, if relevant and material to their business operations, tax, royalty and other significant payments made to host country governments, on a country-by country-basis.[35]	• Applies to companies applying for listing and is not required to be updated annually. Listed companies are only required to make disclosures if they conduct a significant acquisition or dispose of assets that comprise solely or mainly mineral or petroleum assets.
London Stock Exchange AIM Listing Rules	• Extractive companies must disclose payments to any government or regulatory authority or similar body for the acquisition or maintenance of their assets.[36]	• Included in a listing admission document only. • Disclosure of payments over £10,000.

[35] See Amendments to the Main Board Listing Rules (Chapter 18.05(6)(c)) and the GEM Board Listing Rules of the Hong Kong Stock Exchange (Chapter 18A.05(6)(c)) (effective June 3, 2010), available at http://www.hkex.com.hk/eng/rulesreg/listrules/mbrulesup/Documents/mb96_miner.pdf and http://www.hkex.com.hk/eng/rulesreg/listrules/gemrulesup/Documents/gem34_miner.pdf, respectively.

[36] Note for Mining and Oil & Gas Companies – June 2009, available at http://www.londonstockexchange.com/companies-and-advisors/aim/advisers/rules/guidance-note.pdf. The London Stock Exchange Main Board has not adopted a similar requirement.

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