CLEARY GOTTLIEB

ALERT MEMORANDUM

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The SEC's New Proposal on Resource Extraction Payments: A Deeper Dive

On December 11, 2015, the Securities and Exchange Commission (the "Commission") issued a proposed rule (the "Proposed Rule") on disclosure of resource extraction payments,[1] more than two years after a federal court vacated a prior version of the rule.[2] The Proposed Rule is similar in many ways to the Commission's original rule, adopted in August 2012[3] (the "2012 Rule") – in large part because the Commission is implementing a detailed congressional directive contained in Section 1504 of the 2010 Dodd-Frank Act.[4] However, in addition to addressing the deficiencies the court found in the original rulemaking, the Commission has made other notable changes to reflect global developments in transparency for resource extraction payments, particularly in the European Union and Canada.

I. THE CONTEXT: GLOBAL TRANSPARENCY INITIATIVES, THE DODD-FRANK ACT AND COURT CHALLENGES

Section 1504 is one of the "specialized disclosure" requirements included in the Dodd-Frank Act, which use the Commission disclosure system to promote public policy objectives not directly related to the usual purposes of corporate disclosures. The other prominent example is the conflict minerals disclosure rule – requiring reporting companies to provide disclosure about the sources of specified minerals, with the aim of impeding the financing of armed conflict in the Congo.

The disclosure of resource extraction payments is also designed to promote a foreign policy interest. The Commission summarized the congressional intention this way: to support global efforts to improve transparency in extractive industries, to help combat corruption and to empower citizens of resource-rich countries to hold their governments accountable. To those ends, the Dodd-Frank Act requires the Commission to adopt rules under which any reporting company engaged in the commercial development of oil, natural gas or minerals must provide annual disclosure of amounts it pays to governments for that purpose. The statute imposed a 270-day deadline, but it took the Commission almost 25 months before it finally adopted the 2012 Rule.

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1 SEC Rel. No. 34-76620 (Dec. 11, 2015), available at https://www.sec.gov/rules/proposed/2015/34-76620.pdf.

2 We published an initial alert on the Proposed Rule on December 24, 2015, available here. This memorandum provides a more detailed discussion of the Proposed Rule.

3 SEC Rel. No. 34-67717 (Aug. 22, 2012), available at https://www.sec.gov/rules/final/2012/34-67717.pdf.

4 The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203.

The 2012 Rule was challenged by various industry groups and was vacated by the U.S. federal district court for the District of Columbia on July 2, 2013, on two grounds.[5] First, the 2012 Rule required public filing of the payments disclosure, which the Commission had concluded was required under the statute. The court disagreed, finding that the Commission had discretion to consider whether the disclosure should be publicly filed or only provided confidentially to the Commission itself. Second, the 2012 Rule had no exemption for payments in countries that prohibit disclosure, and the court found that omission was arbitrary and capricious.

In September 2014 (more than a year after the decision vacating the 2012 Rule), the Commission had still not made a new proposal, and Oxfam brought an action in federal court to compel the agency to adopt a rule as required by the Dodd-Frank Act. In September 2015, the court held that the Commission had unlawfully withheld action by not promulgating a final rule,[6] and in October 2015, the Commission filed with the court an expedited schedule to put a final rule to a vote by June 27, 2016.[7] The Proposed Rule is the first milestone on that path.

Whenever the Commission adopts a final rule – presumably later this year – it seems likely that opponents will challenge it anew in federal court. In particular, in 2013 the District Court expressly reserved the constitutional argument that the disclosure of resource extraction payments is a prohibited instance of compelled speech, and that argument has lately shown signs of life in cases challenging the conflict minerals rule.[8] As in other recent controversial rulemaking exercises, the Commission has clearly sought to strengthen its process with a view to an eventual challenge, but the rule's prospects in the courts, particularly on constitutional grounds, remain uncertain. It is also hard to predict whether the Commission would suspend the effectiveness of its final rule pending resolution of a judicial challenge.

Section 1504 is broadly derived from the Extractive Industries Transparency Initiative (the "EITI"), a global initiative of a voluntary coalition of companies, governments, investor

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5 *See* API et al. v. SEC, No. 12-1668 (D.D.C. Oct. 10, 2012). Petitioners also filed suit in the U.S. Court of Appeals for the D.C. Circuit, which subsequently dismissed the suit for lack of jurisdiction. *See* API v. SEC, 714 F. 3d 1329 (D.C. Cir. 2013).

6 *See id*.

7 Notice of Proposed Expedited Rulemaking Schedule, *Oxfam America, Inc., v. United States Securities and Exchange Commission*, Civil Action No. 14-cv-13648 (Oct. 2, 2015), available at http://dodd-frank.com/wp-content/uploads/2015/10/SEC-Implementation-of-Resource-Extraction-Rule.pdf.

8 In April 2014, a panel of the D.C. Circuit Court of Appeals held that the conflict minerals rule, and the underlying provision of the Dodd-Frank Act, violate the First Amendment to the U.S. Constitution to the extent they require a company to report to the Commission, and to state on its website, that any of its products have "not been found to be DRC conflict-free." On August 18, 2015, the same panel reaffirmed its original judgment despite an intervening *en banc* decision of the full D.C. Circuit Court of Appeals in another case that upheld certain Department of Agriculture requirements for labeling meat products and took a different view of the applicable standard of review for government compelled commercial speech. *See* Nat'l Ass'n of Mfrs. v. SEC, No. 13-5252 (D.C. Cir. 2015), rehearing Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014); Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014), rehearing en banc Am. Meat Inst. v. U.S. Dep't of Agric., 746 F.3d 1065 (D.C. Cir. 2014).

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. Currently, 29 countries are considered "EITI compliant," another 18 – including the United States – are in the process of complying and two have had their EITI status temporarily suspended. The United States completed the process of becoming an EITI candidate country on March 19, 2014 and published its first report, covering calendar year 2013, on December 15, 2015.[9] In order to become fully EITI compliant, the United States must undergo a formal validation process conducted by an independent Validator procured by the EITI International Secretariat. This process is scheduled to begin by March 2017 and will assess the United States' progress in complying with the EITI Requirements.[10]

One new feature of the Proposed Rule is how it addresses regulatory developments in other jurisdictions. In the time since the 2012 Rule was adopted, governments outside the United States have moved to adopt rules with similar objectives, and the EITI has undergone developments in the intervening years.

- The European Union has adopted two directives providing for disclosures similar to those under the 2012 Rule.[11] Those rules will apply to companies in the European Economic Area that are "large undertakings" or "public-interest entities" active in the extractive or logging industries, as well as companies in those industries that are admitted to trading on a European Union regulated market. The European Union rules require implementing legislation in each Member State and have not yet been implemented in all states.[12]

- Canada has also adopted a federal resource extraction disclosure law, the Extractive Sector Transparency Measures Act, which came into force in 2015.[13] These rules apply to entities that engage in commercial development of oil, gas or minerals and are listed on a stock exchange in Canada, as well as entities that

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9 *See EITI Countries*, EITI.ORG, http://eiti.org/countries (last visited Jan. 21, 2016) and the United States Extractive Industries Transparency Initiative, 2015 Executive Summary, available at https://useiti.doi.gov/downloads/USEITI_executive-summary_2015-12-10.pdf.

10 *See* EITI Standard, Part I, Chapter 2 (Jan. 1, 2015) for full EITI Requirements.

11 Council Directive 2013/34, 2013 O.J. (L 182) 19–76 (EU), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1452556737187&uri=CELEX:32013L0034 (the "EU Accounting Directive"); Council Directive 2013/50, 2013 O.J. (L 294) 13–27 (EU), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1452556769560&uri=CELEX:32013L0050 (the "EU Transparency Directive").

12 Implementing rules have, however, been adopted in several jurisdictions, notably including the United Kingdom and Norway.

13 S.C. 2014, c. 39, s. 376 (Can.), available at http://laws-lois.justice.gc.ca/eng/acts/E-22.7/FullText.html.

have a place of business in Canada, do business in Canada or have assets in Canada and meet certain other criteria.[14]

- Several stock exchanges –the London Stock Exchange's Alternative Investment Market[15] and the Hong Kong Stock Exchange[16] – have rules related to resource extraction payment disclosures for companies listed on those exchanges.

- In 2013, the EITI Standard was revised to require reports that include payment disclosure by each company and, if consistent with European Union and Commission rules, project-level disclosure instead of aggregate data.[17]

- Several companies have begun voluntarily disclosing resource extraction payments to governments.[18]

A chart comparing the requirements of the Proposed Rule and the requirements under the European Union and Canadian rules, as well as summaries of the EITI, London Stock Exchange and Hong Kong Stock Exchange requirements, can be found in Annex A.

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14 The rules apply if during at least one of the previous two financial years, relevant companies have met at least two of the following criteria: (i) have at least C$20 million in assets, (ii) have generated at least C$40 million in revenue, or (iii) employ an average of at least 250 employees.

15 See the Note for Mining and Oil and Gas Companies – June 2009, available at http://www.londonstockexchange.com/companies-and-advisors/aim/advisers/rules/guidance-note.pdf.

16 See the Main Board Listing Rules (Chapter 10.05(6)(c)) and the Growth Enterprise Market (GEM) Board Listing Rules (Chapter 18A.05(6)(c)) of the HKSE, available at: https://www.hkex.com.hk/eng/rulesreg/listrules/mbrules/documents/chapter_18.pdf and https://www.hkex.com.hk/eng/rulesreg/listrules/gemrules/documents/chapter_18a.pdf, respectively.

17 *See* EITI Standard, Part I, Requirement 5.2(e) (Jan. 1, 2015), available at https://eiti.org/files/English_EITI_STANDARD.pdf.

18 *See e.g.*, BHP Billiton (Economic Contribution and Payments to Governments Report 2015, BHPBILLITON.COM, http://www.bhpbilliton.com/~/media/12d7d9572f1042a4b6cdb0bd7abe5c09.ashx (last visited Jan. 21, 2016)), Statoil (2014 Payments to Governments, STATOIL.COM, http://www.statoil.com/no/InvestorCentre/AnnualReport/AnnualReport2014/Documents/DownloadCentreFiles/01_KeyDownloads/2014%20Payments%20to%20governments.pdf (last visited Jan. 21, 2016)) and Kosmos Emergy (Transparency, KOSMOSENERGY.COM, http://www.kosmosenergy.com/responsibility/transparency.php (last visited Jan. 21, 2016)).

II. SUMMARY OF THE PROPOSED RULE

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 pursuant to Section 13 or 15(d) of the Exchange Act and that engages in the commercial development of oil, natural gas or minerals. • "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), smaller reporting companies and emerging growth companies are covered. Registered investment companies are not subject to the Proposed Rule.
Disclosure location:	• The required disclosures are provided on Form SD (Specialized Disclosure Report). • The detailed payment information is required to be in an exhibit in XBRL format.
Timing:	• The disclosures are required to be filed annually no later than 150 days after the end of the company's fiscal year, covering the prior fiscal year. This provides additional time after the filing deadline for annual reports. • The first report will be for the first year that ends one year or more after the date on which the Commission issues the final rule. If the current timetable is met, and the rule is adopted in June 2016, a calendar-year filer will be required to file its first report by May 2018 for the fiscal year ended December 31, 2017. • No grace period is contemplated to delay reporting of resource extraction payments by a newly public company or by an acquired company.
Disclosure content:	• The report must disclose 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) relating to the commercial development of oil, natural gas or minerals. • Payments consist of amounts paid to further the commercial development of oil, natural gas or minerals, and include taxes, royalties, fees, production entitlements, bonuses, dividends and payments for infrastructure improvements. Only "non-*de minimis* amounts" must be reported, defined as a single payment or series of related payments that equals or exceeds $100,000.

	• The following information is required (additions from the 2012 Rule are marked with an asterisk): o the type and total amount of payments for each project of the company; o the type and total amount of payments for all projects made to each government; o the total amount of payments by category (such as "bonuses" or "fees"); o the currency used to make the payments; o the fiscal year in which the payments were made; o the company's business segment that made the payments (consistent with segments used for financial reporting); o the governments that received the payments and the country in which each government is located; o the project to which the payments relate; o the particular resource that is the subject of commercial development;* and o the subnational geographic location of the project.* • In a change from the 2012 Rule, which left the term "project" undefined, "project" is defined to mean operational activities governed by a single legal agreement that forms the basis for payment liabilities, with agreements that are both operationally and geographically interconnected treated as a single "project." • Project-level disclosure is not required for payments made at the entity level only (e.g., corporate income taxes). • A company is required to report the amount of payments in either U.S. dollars or its reporting currency and to disclose the method used to calculate the currency conversion. • Payment information is not required to be audited and can be submitted on a cash rather than an accrual basis.
Alternative Reporting:	• In a change from the 2012 Rule, a company can meet its disclosure obligations by submitting reports that comply with the requirements of any "alternative reporting regime" if the Commission has concluded that those requirements are "substantially similar" to the Proposed Rule.
Exemption from compliance:	• The Commission will consider requests for exemptive relief from the disclosure requirements on a case-by-case basis.

III. KEY DEFINITIONS AND GUIDANCE

Public Disclosure Requirement

Like the 2012 Rule, the Proposed Rule requires that disclosure be filed publicly with the Commission on EDGAR. The court that vacated the 2012 Rule found that the Commission has discretion to require that the disclosure be filed either publicly or confidentially. In its proposing release, after considering the question at length, the Commission concludes that public disclosure of company-specific, project-level payment information is the best mechanism for advancing the U.S. government's interest and accomplishing the purpose of the statute. The release emphasizes the asymmetry of information in the extractive industries and the important role of public disclosure in combatting corruption. This approach is also consistent with the public disclosure requirements for resource extraction payment information adopted in the European Union and Canada, and with the 2013 revision of the EITI standard to make public reports include payment disclosure by company.

Definition of "Resource Extraction Issuer"

Like the 2012 Rule, the Proposed Rule relies on the statutory definition of "resource extraction issuer." The Commission is not proposing exemptions to the definition based on size, ownership or foreign private issuer status, indicating in the release that broader coverage will better serve the transparency objectives of the statute. The Commission is nonetheless seeking comment on whether it should exempt certain categories of issuers, such as smaller reporting companies, emerging growth companies, foreign private issuers or companies that are unlikely to make payments above the proposed $100,000 *de minimis* threshold (for example, resource extraction issuers with annual revenues and net cash flows from investing activities below the threshold).

Definition of "Commercial Development"

Consistent with the 2012 Rule and the language of Section 1504, the Proposed Rule defines "commercial development" to include exploration, extraction, processing, export and the acquisition of a license for any such activity. The Commission declined again to expand the term beyond the scope of the statute. The proposing release notes that this definition captures a broader range of activities than typically covered by the EITI, which focuses on "upstream activities," and that it is in some respects broader than the European rules, which, for example, do not specifically mention processing, export, or the acquisition of licenses.

Definition of "Foreign Government"

Like the 2012 Rule, the Proposed Rule requires disclosure of payments to any foreign government, which is defined to include "a company at least majority owned by a foreign government." In many countries, this criterion will capture a variety of commercial entities exercising non-governmental functions.

Payments to the U.S. federal government must be disclosed, but not payments to U.S. state and local governments. The Commission acknowledges that this is a deviation from

European and Canadian rules, both of which require the disclosure of payments to domestic subnational governments, but notes that it believes the statute is clear in only requiring the disclosure of payments to the U.S. federal government.

Required Payment Disclosure

Payments by Subsidiaries and Controlled Entities – The Proposed Rule, tracking the statutory language, captures payments not only by the reporting company but also by its subsidiaries and entities under its control. However, in a change from the 2012 Rule, the Proposed Rule defines the terms "subsidiary" and "control" based on accounting principles rather than using the definitions of those terms provided in Rule 12b-2. Under the Proposed Rule, a resource extraction issuer has "control" of an entity when the issuer consolidates or proportionally consolidates that entity for accounting purposes. An issuer that proportionately consolidates would report payments on the basis of such proportionate interest. The proposing release notes that the change is consistent with the approach taken in the European and Canadian rules and will therefore support the international move towards transparency by increasing the comparability of information disclosed globally. This approach is also less costly for issuers as it applies existing definitions used for financial reporting.

Types of Payments – The Proposed Rule has a list of types of payments required to be disclosed, which includes the items specified by the statute and adds dividends and payments for infrastructure. The Proposed Rule includes instructions stating that the list includes taxes on corporate profits, corporate income and production but not taxes levied on consumption, such as value added taxes, personal income taxes or sales taxes. In-kind payments must also be disclosed, and companies are required to determine the monetary value of such payments and provide a brief description of how the monetary value (at cost or, if cost is not determinable, at fair market value) was calculated. The release also notes that disclosable payments would not include payments for "social or community" matters, such as improving schools or hospitals. An instruction specifies that dividends need not be disclosed if they are paid to the government under the same terms as other shareholders.

Definition of "Project" – Pursuant to the statute, disclosure is required about the type and total amount of payments made for each project. The 2012 Rule did not include a definition of the term "project" (although it did provide guidance); the Proposed Rule, modeled on the regimes in the European Union and Canada, defines a project as operational activities governed by a single legal agreement that forms the basis for payment obligations and allows agreements that are "operationally and geographically interconnected" to be treated as a single project. Where multiple agreements are considered to relate to a single project, the Proposed Rule, unlike the rules in the European Union and Canada, does not require that the agreements have substantially similar terms, looking to give companies flexibility where changes in circumstances compel a government to require different terms for a second agreement in a geographically contiguous area. An instruction provides a list of factors to consider in determining whether multiple agreements are sufficiently interconnected to be considered a single project.

Project Location – One new disclosure item that is required to be tagged in XBRL under the Proposed Rule is the subnational geographic location of the project. Information regarding the location would need to be sufficiently detailed to permit a reasonable user of the

information to identify the project's specific, subnational location. The Commission notes that more than one descriptive term would probably be necessary where there are several projects in close proximity. The Commission asks for comments about the best way to ensure that users would be able to identify the location of a project and to distinguish it from others nearby and also whether more guidance is needed as to the sufficient level of detail.

Use of XBRL – The Proposed Rule requires that payments disclosure be provided using XBRL.[19] Foreign private issuers that file financial statements under International Financial Reporting Standards (IFRS) are currently not required to use XBRL in other Commission filings, so they will need to learn to do so for the limited purpose of filing resource extraction payments under the Proposed Rule.

Filing Status and Liability

Consistent with the 2012 Rule, disclosures under the Proposed Rule would be "filed" and not "furnished" under the Exchange Act. As a result, resource extraction payment disclosures will be subject to the liability provisions of Section 18 of the Exchange Act, in addition to the general antifraud provisions of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Form SD would specify that it is not deemed incorporated by reference into any Securities Act filing unless the company specifically incorporates it by reference.

If a company required to file Form SD does not do so, it is ineligible to use Form S-3 or Form F-3, the Commission's short-form registration statements under the Securities Act. It is also an "ineligible issuer" as defined in Rule 405 under the Securities Act, so among other things it may not file an automatically effective registration statement or use free writing prospectuses.[20] The company's security holders may not rely on the Rule 144 safe harbor under the Securities Act for resales of the company's securities.[21] Once the filing has been made, however (even if it is untimely), the company is eligible to use short-form registration and ceases to be an ineligible issuer, and its security holders may rely on Rule 144.[22]

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19 The Commission released a draft Form SD XBRL taxonomy for comment in 2012. Presumably, the Commission will provide an updated draft taxonomy for comment after a final rule is adopted.

20 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, General Instruction I.D.1(a)(i) to Form S-3 and General Instruction I.D.1(a)(i) to Form F-3.

21 A selling security holder may rely on 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).

22 In 2013 the Commission clarified that failure to timely file Form SD does not impact a company's S-3 eligibility once the late form has been filed. *Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions: Disclosure of Payment by Resource Extraction Issuers*, Q. 9, SEC.GOV, (May 30, 2013), https://www.sec.gov/divisions/corpfin/guidance/resourceextraction-faq.htm.

Allowances for Newly Public and Acquired Companies

Unlike the conflict minerals rule, which provides that companies may delay reporting upon going public or when they acquire a company that was not previously subject to the rules until the end of the first reporting calendar year that begins no sooner than eight months after the effective date of the company's IPO registration statement[23] or the acquisition[24] (as applicable), the Proposed Rule provides no grace period to delay reporting of resource extraction payments made by newly public or acquired companies.

Alternative Reporting

The Proposed Rule provides that a company can meet its reporting obligations by providing disclosure that complies with requirements of any "alternative reporting regime," if the Commission has determined that those requirements are "substantially similar" to the Proposed Rule. The alternative disclosure would be filed with the Commission as an exhibit to Form SD. This framework – consistent with the approach taken in the European Union and Canada – would reduce compliance costs for companies reporting under multiple regimes. The release notes that the Commission also believes this approach would incentivize foreign countries contemplating adopting resource extraction disclosure rules to align their requirements with those of the United States. The proposing release seeks comment on whether an issuer could comply with the rule by supplementing otherwise "substantially similar" disclosure with XBRL tagging if the foreign jurisdiction requires a different interactive data format. However, it does not otherwise contemplate an issuer complying with the Proposed Rule by supplementing disclosures required under a foreign regime that is not otherwise considered "substantially similar".

The proposing release requests comment on the appropriate mechanism for the Commission to determine that foreign requirements are substantially similar. It suggests a possible mechanism using the Commission's Rule 0-13, under which an application requesting a "substituted compliance order," including supporting documents, is filed with the Commission and then posted to the Federal Register for public comment. However, the Commission also seeks input on alternative mechanisms, on whether it should unilaterally make the determination or only do so upon application of an issuer or a foreign jurisdiction, and on whether it should make the determination with regard to the reporting requirements in United Kingdom, Norway and Canada (where rules are already in place) at the time of issuing the final rule.

Under the European Union rules, companies may benefit from an exemption based on equivalent third-country reporting requirements – an entity that prepares and publishes a report complying with third-country reporting requirements assessed as equivalent to those of the European Union need only publish that third-country report in accordance with the rules laid

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23 *Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions: Conflict Minerals*, Q. 11, SEC.GOV, (May 30, 2013), https://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm; *see also* Form SD, Instructions to Item 1.01(3).

24 17 C.F.R. 240.13p-1 (2015); Form SD, Instructions to Item 1.01(3), available at https://www.sec.gov/about/forms/formsd.pdf.

down by the relevant European Member State.[25] If the European Commission determines that the Commission's final rule is equivalent to the European regime, publication of U.S. disclosures will be sufficient for the purposes of the European Union requirements. The Canadian rules similarly allow for compliance using reports prepared under foreign jurisdictions if the Minister of Natural Resources has determined that those requirements are an acceptable substitute – the Minister concluded that the European Union Rules are an acceptable substitute on July 31, 2015.[26]

Exemptions

The Proposed Rule does not include an exemption for disclosures prohibited by foreign governments. Neither do the European Union and Canadian rules. The determination not to include such an exemption was found to be arbitrary and capricious by the court that invalidated the 2012 Rule.

Instead of a general exemption, the Commission says in the proposing release that it will consider providing exemptive relief "if and when warranted." The proposing release argues this will permit the Commission to tailor the relief to the particular facts and circumstances presented. A company seeking relief would need to submit a written request describing the disclosures it seeks to omit and the reasons an exemption is warranted. Any requests for exemptive relief based upon disclosure prohibitions under local law would require an opinion of counsel. Other factors that would be considered include whether disclosure is already publicly available and the frequency with which similar information has been disclosed by other companies. The proposing release indicates that the Commission would generally expect to make any requests for exemptive relief public and to provide an opportunity for public comment. The proposing release does not otherwise address the specific process or timetable for considering requests for exemption, and it is unclear how burdensome and time consuming this process will be.

IV. NEXT STEPS

In an unusual move, there are two separate deadlines for submitting comments on the Proposed Rule: initial comments are due on February 16, 2016 (on January 21, 2016 the Commission extended the deadline from the original due date of January 25, 2016), and reply comments, which may respond only to issues raised in the initial comment period, are due on March 8, 2016. The tight timing presumably results from the expedited schedule for adoption of the final rule, while the additional period for responsive comments is an innovation that may reflect the intense and often adversarial interest in the rulemaking from both industry and proponents of resource transparency.

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25 Council Directive 2013/34, art. 46, 2013 O.J. (L 182) 53–54 (EU).

26 *See* Extractive Sector Transparency Measures Act, S.C. 2014, c. 39, s. 376, art. 10(1) (Can.); *Extractive Sector Transparency Measures Act - Substitution Determination*, MINISTRY OF NATURAL RESOURCES CANADA (Aug. 12, 2015), http://www.nrcan.gc.ca/acts-regulations/17754.

Issuers and industry groups will have little time to formulate detailed comments on this highly complex proposal, and in view of the tight timetable and the Commission's long engagement with the topic, it seems unlikely that the Commission will make major changes in the Proposed Rule. Commenters should, however, engage with the handful of important innovations in the Proposed Rule, and particularly the provisions for alternative compliance and the proposed approach to local law prohibitions on disclosure. For reporting companies in extractive industries, it would make sense to undertake a thorough review of reporting practices and the applicable reporting regimes and to consider developing a plan to adopt best-practice public disclosures. It will be particularly interesting to evaluate the Commission's proposed alternative reporting approach and to consider whether other applicable regimes are substantially similar.

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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 at http://www.clearygottlieb.com if you have any questions.

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ANNEX A

COMPARISON OF PROPOSED RULE WITH OTHER REGIMES

	U.S. - Proposed SEC Rule 13(q)	E.U. - Directives 2013/34 and 2013/50 of the European Parliament and of the Council	Canada - Extractive Sector Transparency Measures Act
What industries and activities fall within the scope of the rule?	Commercial development of oil, natural gas or minerals. Activities include: exploration, extraction, processing, export and other significant activities relating to covered resources, and the acquisition of a license for such activity. Does not include: marketing, transportation, refining or smelting activities. Logging activities are not included.	Extractive industries (minerals, oil, natural gas deposits or other materials) or the logging of primary forests. Extractive activities include: exploration, prospection, discovery, development, and extraction. Logging activities include: clear cutting, selective logging and thinning on land containing primary forest areas and the disturbance of primary forests by mining, mineral, water, oil or gas extraction activities. Does not include support services.	Companies that engage in the commercial development of oil, gas or minerals. Activities include: exploration, extraction, processing, export and other significant actions relating to oil, natural gas or minerals, and the acquisition of a permit, lease, license, or other authorization for any such activity.
Public disclosure requirement	Company-specific, project-level public disclosure.	Company-specific, project-level public disclosure.	Company-specific, project-level public disclosure.
Can companies meet disclosure obligations using reports prepared under another regime?	Yes, if the Commission has determined requirements are "substantially similar."	Yes, if the European Commission has determined requirements are "equivalent."	Yes, if the Minister of Natural Resources has determined requirements are an acceptable substitute. On July 31, 2015, the Minister of Natural Resources concluded that the European Union rules are an acceptable substitute.

	U.S. - Proposed SEC Rule 13(q)	E.U. - Directives 2013/34 and 2013/50 of the European Parliament and of the Council	Canada - Extractive Sector Transparency Measures Act
Which companies in the relevant industries are affected?	All companies required to file an annual report with the Commission pursuant to Section 13 or 15(d) of the Exchange Act and that engage in the commercial development of oil, natural gas or minerals. Registered investment companies are not affected.	(1) Large undertakings (undertakings that exceed at least two of the three following criteria: (i) a balance sheet of €20m; (ii) net turnover of €40m; and (iii) 250 employees) and (2) public interest entities (undertakings of any size that are: (i) admitted to trading on an EU regulated market; (ii) credit institutions; (iii) insurance undertakings; or (iv) so designated by Member States, for example, because they are considered to be of significant public relevance due to the nature of their business, their size or the number of their employees).	(1) Entities listed on a stock exchange in Canada and (2) entities that (a) have a place of business in Canada, do business in Canada, or have assets in Canada, and (b) meet at least two of the following criteria during at least one of the previous two financial years: (i) have at least C$20 million in assets, (ii) have generated at least C$40 million in revenue, or (iii) employ an average of at least 250 employees.
Is there an exemption where disclosure is prohibited under local law?	The Commission will consider using its existing authority to provide exemptive relief "if and when warranted."	None.	None.
Payments covered	Taxes on corporate income, production and profits (not on consumption); royalties; fees; production entitlements; bonuses; dividends (other than dividends paid as ordinary shareholders); and infrastructure improvement payments. In-kind payments are captured.	Taxes on corporate income, production and profits (not on consumption); royalties; fees; production entitlements; bonuses; dividends (other than dividends paid as ordinary shareholders); and infrastructure improvement payments. In-kind payments are captured.	Taxes on corporate income, production and profits (not on consumption); royalties; fees; production entitlements; bonuses; dividends (other than dividends paid as ordinary shareholders); infrastructure improvement payments; and any other category of payment subsequently prescribed by regulation. In-kind payments are captured.

	U.S. - Proposed SEC Rule 13(q)	E.U. - Directives 2013/34 and 2013/50 of the European Parliament and of the Council	Canada - Extractive Sector Transparency Measures Act
Reporting requirements for consolidated entities	Must disclose payments by reporting company and its subsidiaries and entities under its control. Issuer has "control" of an entity when such issuer consolidates or proportionally consolidates an interest under the accounting principles applicable to its financial statements.	Must disclose payments on a consolidated basis if required to prepare consolidated financial statements.	Must disclose payments by controlled entities. Both direct and indirect control are considered. Generally, control under the applicable accounting standards will be considered sufficient evidence of control.
Definition of "government"	Includes a department, agency or instrumentality (including political subdivisions) of a foreign government or a company owned by a foreign government (at least majority-owned), as well as the U.S. federal government (but not U.S. state or local governments).	Includes any national, regional or local authority of an EU Member State or of a third country (including a department, agency or undertaking controlled by such an authority). "Control" is established using the accounting principles that determine the entities included in a consolidated financial statement.	Includes (a) any government in Canada (excluding Aboriginal governments for a two-year period) or in a foreign state; (b) a body that is established by two or more governments; (c) any trust, board, commission, corporation or body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government referred to in paragraph (a) or a body referred to in paragraph (b); or (d) any other payee prescribed by regulation.
How is the information reported?	Form SD (Specialized Disclosure Report), with an exhibit in XBRL format.	The manner of reporting will be in accordance with the local implementing legislation in each Member State.	"Extractive Sector Transparency Measures Act – Annual Report" Form promulgated by the Minister of Natural Resources.

	U.S. - Proposed SEC Rule 13(q)	E.U. - Directives 2013/34 and 2013/50 of the European Parliament and of the Council	Canada - Extractive Sector Transparency Measures Act
Is there a de-minimis threshold below which reporting is not required?	Yes, only payments (or a series of related payments) that equal or exceed $100,000 within a fiscal year must be reported.	Yes, only payments (or a series of related payments) that equal or exceed €100,000 during a fiscal year must be reported. Payments / activities cannot be artificially split, aggregated or re-characterized with a view to evading the disclosure requirement.	Yes, only payments (or a series of payments) that equal or exceed C$100,000 within one payment category to a single payee during a fiscal year must be reported. Payments not totaling more than C$100,000 in any single payment category are not reportable.
Definition of "project"	Operational activities governed by a single legal agreement that forms the basis for payment obligations. If multiple agreements are operationally and geographically interconnected, they can be treated as a single project.	Operational activities governed by a single legal agreement that forms the basis for payment obligations. If multiple agreements are substantially interconnected (meaning a set of operationally and geographically interconnected agreements with substantially similar terms), they can be treated as a single project.	Operational activities that are governed by a single contract, license, lease, concession or similar legal agreements and form the basis for payment liabilities with a government. Nonetheless, if multiple such agreements are substantially interconnected, they shall be considered a project.
Regular reporting deadline	150 days after the end of the issuer's fiscal year.	Reporting entities admitted to trading on an EU regulated market must publish report within six months after the end of the entity's fiscal year. Filing deadlines for other reporting entities are determined by each Member State.	150 days after the end of the entity's fiscal year.

	U.S. - Proposed SEC Rule 13(q)	E.U. - Directives 2013/34 and 2013/50 of the European Parliament and of the Council	Canada - Extractive Sector Transparency Measures Act
Required information	Required information includes: the total amount of payments by category (such as "bonuses" or "fees"); 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; the project of the company to which the payments relate; the type and total amount of payments for each project; the type and total amount of payments for all projects made to each government; the particular resource that is the subject of commercial development; and the subnational geographic location of the project.	The report is required to include the following: the total amount of payments made to each government; the total amount per type of payment made to each government; and where those payments have been attributed to a specific project, the total amount and total amount per type of payment for each project.	The annual report is required to include: payments by Payee, both by category and in total and payments by Project, both by category and in total.

Extractive Industries Transparency Initiative (EITI) Standard

The EITI is a global initiative of a voluntary coalition of companies, governments, investor groups and non-governmental organizations designed to assess and improve transparency regarding government revenues from extractive industries. "EITI compliant" countries undergo a reconciliation process in which company payments and government revenues are reported to and "matched" by an independent administrator, who prepares an EITI Report. This EITI Report will include both disclosure of such payments and contextual information. The following is a brief summary of the EITI Standard:

- Industries covered: "All extractive industry companies." Enacting jurisdictions may expand this definition, but it includes at a minimum oil, gas and mining companies.

- Payments covered are payments made to national governments, local governments and state-owned enterprises. Transfers between national and local governments are also covered.

- Company specific, project-level public disclosure is required. Individual enacting countries will determine the applicable level of aggregation.

- Covered payments include: (1) the host government's production entitlement (such as profit oil); (2) national state-owned company production entitlement; (3) profits taxes; (4) royalties; (5) dividends; (6) bonuses, such as signature, discovery and production bonuses; (7) license fees, rental fees, entry fees and other considerations for licenses and/or concessions; and (8) any other significant payments and material benefit to government.

- The EITI Standard does not provide for reporting exemptions for companies based on size or status as a consolidated subsidiary, or where disclosure is prohibited by local law. Enacting countries may implement exemptions for *de minimis* payments; however, they should only apply where it "can be demonstrated that [the company's] payments and revenues are not material."

AIM London Stock Exchange Requirements

The relevant rules of the London Stock Exchange's Alternative Investment Market (AIM) apply to companies operating in the mining and oil and gas sectors (that is, companies involved in the exploration, development and production of natural resources, but not companies that only invest in or provide consultancy, advice or other such services to such companies). These rules prescribe that the listing admission document should disclose any payments aggregating over GBP10,000 made by or on behalf of the company to any government or regulatory authority or similar body with regard to the acquisition or maintenance of its assets. The Main Market of the London Stock Exchange has not adopted a similar requirement for resource

companies with a premium or standard listing in its Admission and Disclosure Standards, but its status as an EU-regulated market means that through the UK implementing legislation (Disclosure and Transparency Rule (DTR) 4.3A), the European Union disclosure regime will apply to any company whose securities are admitted to trading on the Main Market and whose home state is the UK.

Hong Kong Stock Exchange Requirements

The relevant rules of the Hong Kong Stock Exchange for both the Main Board and the Growth Enterprise Market (GEM) Board mandate that 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. The rules apply to companies applying for listing, and such disclosure 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.

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