ALERT MEMORANDUM

# Congress Rolls Back SEC Resource Extraction Payments Rule

*February 3, 2017*

The review of financial regulation under the new administration has its first victim. On February 3, the Senate passed a resolution under the Congressional Review Act that disapproves the SEC's rule on resource extraction payments. The House of Representatives had already passed the resolution, so the SEC's rule is no longer in effect.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or any of our partners and counsel listed under Capital Markets or Corporate Governance in the "Our Practice" section of our website.

**NEW YORK**
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

The target of the joint resolution is a rule requiring each SEC reporting company engaged in commercial development of oil, natural gas or minerals to file annual disclosures on payments it makes to governments. The rule has already had a tortured history, which left it vulnerable to action under the Congressional Review Act (CRA).

The story begins in 2010, with the Dodd-Frank Act. Section 1504 of the Act required the SEC to adopt a rule on resource extraction payments by April 2011. This mandate, like the conflict minerals rule required by Section 1502 of Dodd-Frank, was unrelated to the broader financial regulatory purposes of most of the Act. It was intended, as the SEC concluded, to promote U.S. foreign policy interests in supporting global efforts to improve transparency in the extractive industries. Together with the conflict minerals rule, it presented special challenges for the SEC, because Congress sought to use the SEC disclosure system to promote public policy objectives that were not directly related to the usual purposes of corporate disclosures.

The SEC, with an unprecedented volume of rulemaking required by Dodd-Frank, missed the statutory deadline and finally adopted a rule in August 2012. Industry groups then challenged the rule, and the U.S. federal district court for the District of Columbia vacated the rule in July 2013, finding that the SEC had misread the statute on one point and acted arbitrarily on another. Oxfam, a supporter of resource extraction payment disclosures, then sued in the federal district court in Massachusetts to compel the SEC to implement the statutory mandate, and in September 2015, that court held that the SEC had acted unlawfully by failing to adopt a final rule. Under a schedule filed with the court, the SEC adopted a final rule for the second time in June 2016. The rule took effect in September 2016, but the first disclosures were not due until 2019.

This long path to final adoption meant that the rule was available for disapproval by the new Congress under the Congressional Review Act. That statute requires federal agencies to submit adopted final rules to Congress and allows Congress to disapprove a rule within a specified period following submission. The period for the resource extraction payment rule had not yet run when the 114th Congress adjourned, so the 115th Congress had an opportunity to review it. The CRA makes a fast-track procedure available, under which each house of Congress can act by simple majority without the possibility of a filibuster in the Senate. According to the Congressional Research Service, only once before has an adopted rule been invalidated under the CRA – in 2001, when a rule on ergonomic standards, adopted by the Occupational Safety and Health Administration in the twilight of the Clinton Administration, was disapproved in the early days of the Bush Administration. The President's signature is not required for a disapproval resolution to be effective, but President Bush did sign that resolution. The President can, however, veto a disapproval resolution. President Obama did so on five occasions and Congress did not override those vetoes.

An already effective rule that is disapproved under the CRA is treated as though it had never taken effect, and it may not be reissued in substantially the same form unless the reissuance is specifically authorized by a law enacted after the date of disapproval. Earlier this week, the President's office expressed its support for the joint resolution, so clearly there will be no veto. The CRA also provides that any statutory deadline for agency action relating to a disapproved rule is extended for one year from enactment of the disapproval resolution.

The result for affected issuers is clear: the existing rule is gone. The CRA even expressly provides that Congressional disapproval is not subject to judicial review. For the SEC, the details are more complicated, but the big picture is that the rule will probably not come back from the dead a second time. The mandate under Section 1504 is still law, with a new deadline in February 2018, although it might be challenging to craft a rule that meets both the detailed prescriptions of Section 1504 and the CRA prohibition on reissuing a rule after disapproval. Of course, Congress may yet repeal Section 1504 itself, as House Financial Services Chair Jeb Hensarling already proposed in the Financial CHOICE Act in 2016. But even if it does not, it is hard to imagine the new SEC making adoption of a new rule a high priority unless it is again compelled to do so by a court.

Meanwhile, the SEC's conflict minerals disclosure rule, adopted in August 2012, remains in effect – for now. It requires reporting companies to provide disclosure about the sources of specified minerals, with the aim of impeding the financing of armed conflict in the Congo. On January 31, 2017, acting SEC Chairman Piwowar directed the SEC staff to reconsider its guidance under that rule and whether any additional relief might be appropriate, stating that the disclosure requirements have resulted in a *de facto* boycott of minerals from parts of Africa and that it is unclear whether the costs associated with the rule have resulted in any of the desired benefits. The SEC is soliciting comments from interested parties on all aspects of the rule and guidance. Congress will presumably also consider repealing Section 1502 of the Dodd-Frank Act.

…