

Energy Alert

SEC Proposes Burdensome Disclosure Requirements on Oil and Gas Industry as Part of Dodd-Frank Act Implementation

December 23, 2010

On December 15, 2010, the U.S. Securities and Exchange Commission (SEC or “Commission”) proposed new rules to implement Section 13(q) of the Securities Exchange Act of 1934, as amended, as required by Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). If adopted, the proposed rule would require public companies engaged in the commercial development of oil, natural gas or minerals to furnish, in annual reports on Form 10-K, 20-F or 40-F, payments made to the federal government or any foreign government, including a company owned by a foreign government or a subnational government. The proposed rules can be found at <http://edocket.access.gpo.gov/pdf/2010-31943.pdf>.

The Commission’s proposal does not apply to annual reports filed for the fiscal year ending December 31, 2010, but it must enact final rules no later than April 15, 2011 that would likely apply to disclosure in annual reports related to fiscal years ending on or after April 15, 2012. Nevertheless, the disclosure requirements the SEC proposes are extensive and are likely to result in the disclosure of voluminous data that could be extremely burdensome to prepare for such annual reports. If the rules are adopted as proposed, the information required will need to be filed as exhibits to the annual report in HTML/ASCII and interactive data formats.

Scope of the Proposed Requirements

Three defined terms establish the parameters of the new disclosure requirement:

- The requirement applies to “resource extraction issuers,” defined as “an issuer that is required to file an annual report with the Commission and engages in the commercial development of oil, natural gas or minerals.”
- The proposal defines “commercial development of oil, natural gas or minerals” to “include[] exploration, extraction, processing, export, and other significant actions relating to oil, natural gas or minerals, or the acquisition of a license for any such activity.”
- “Payment” is defined to mean an amount paid “to further the commercial development of oil, natural gas or minerals [and] is not *de minimis*.” The term includes taxes, royalties, fees, production entitlements and bonuses.

There is considerable ambiguity created by the broad language for the proposed rules, which mirrors the language in Section 1504. By the same token, there are many critical terms, such as how to determine if payments are *de minimis*, left undefined. Companies or sectors of the industry unsure as to whether they are covered should consider carefully seeking clarification from the Commission during the rulemaking process.

Information to be Furnished

The rules would require a resource extraction issuer to provide detailed information about payments made by it, or its subsidiaries or any entities controlled by it, to further the commercial development of oil, natural gas or minerals. In general, Dodd-Frank



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covers types of payments and “other material benefits” that are part of the “commonly recognized revenue stream for the commercial development of oil, natural gas or minerals.” The proposal requires, *inter alia*, issuers to provide—

- type and total amount of payments made for each project
- type and total amount of payments made to each government
- total amounts of the payments, by category
- currency used to make the payments
- financial period in which the payments were made
- business segment of the resource extraction issuer that made the payments
- the government that received the payments, and the country in which the government is located
- the project of the resource extraction issuer to which the payments relate.

As with the provisions establishing the entities to which the rules will apply, there are many unanswered questions regarding the types of payments that should be furnished.

Opportunities to Change the Proposal

The SEC has requested interested parties to submit comments on the specific aspects of the proposal, as well as regarding additional or different requirements. Critical issues left unresolved include—

- The proposed language does not specify whether oil and natural gas service companies are considered to be “resource extraction issuers.”
- The proposal does not specify whether “payments” are limited to cash payments or whether payments in kind are also included.
- The proposed rules do not account for variations in the size of the issuer or the nature and size of a particular project, leaving tremendous uncertainty as to what payments are *de minimis* and, therefore, not covered.

The SEC notes that comments supported by data and analyses of the issues addressed in the comments receive the greatest weight. Comments on the proposed rule must be received by the SEC by January 31, 2011.

CONTACT INFORMATION

Akin Gump Strauss Hauer & Feld LLP has considerable experience in interpreting and applying SEC reporting requirements, as well as in advising companies on strategies for drafting persuasive comments. If you require any assistance or have questions regarding this alert, please contact—

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