Public Statement

Statement on Adoption of Resource Extraction Disclosure Rules

Chairman Jay Clayton

Dec. 16, 2020

Good morning. This is an open meeting of the U.S. Securities and Exchange Commission on December 16, 2020, under the Government in the Sunshine Act.

Today, we take another step in a winding, resource-consuming, decade-long journey to implement Section 1504 of the Dodd-Frank Act. In 2010, Section 1504 added Section 13(q) to the Securities Exchange Act of 1934, which directed the Commission to issue rules, commonly known as the "resource extraction rules," requiring resource extraction issuers – in essence, certain companies publicly traded on U.S. exchanges – to disclose information about payments made to a foreign government or the Federal government for the purpose of the commercial development of oil, natural gas, or minerals.

The Commission has finalized these rules twice already. Yes, that's correct. Two prior Commissions have gone through the Administrative Procedure Act, or APA, process of developing proposals, publishing those proposals for comment, and then adopting final rules implementing Section 13(q). The first time the Commission went through the APA process and promulgated final rules in 2012, those final rules were vacated by the U.S. District Court for the District of Columbia. The second time the Commission went through the APA process and promulgated final rules in 2016 (the "2016 Rules"), those final rules were disapproved by a joint resolution of Congress pursuant to the Congressional Review Act, or the CRA, in 2017.

The Commission then began the APA process for a third time, which culminated in the 2019 proposing release. In that release, we discussed the unique procedural and substantive posture presented by the combination of two congressional actions, the CRA and the Section 13(q) mandate. First, although the joint resolution vacated the 2016 Rules, the statutory mandate under Exchange Act Section 13(q) remains the law of the land. As a result, the Commission is statutorily obligated to promulgate new final rules. Under the CRA, however, the Commission may not reissue a disapproved rule in "substantially the same form" or further issue a new rule that is "substantially the same" as the disapproved rule. The CRA does not define "substantially the same form" or "substantially the same."

So, over the past few years, in this unique procedural and substantive context, we have strived to finalize *final* rules for a *final* time. This has required substantial staff resources and has been the focus of extensive engagement with a variety of market participants and – somewhat unusually for the Commission – interested parties who are not market participants.

Having mapped out a brief history of this rulemaking, I want to provide some color as to why these rules have proven to be so challenging. Specifically, I want address two areas. First, the staff has taken on the difficult task of crafting rules that fall in the most reasonable place in the Venn diagram intersection of (1) the Section 13(q) mandate and (2) the CRA requirement that the new final rule not be substantially the same as one that was disapproved by Congress. Second, I want to share my personal views on why this process has dragged on way too long and, in the end, is likely to be unsatisfactory — at least in form — to certain parties who are passionate about combatting the corruption that exists in the international extractive resource space and to other parties who believe measures of this type create harm with no investor or other benefit.

Let me note here that I and many members of the Commission and the staff are passionate about combatting international corruption in this space. We have brought 77 cases under the Foreign Corrupt Practices Act (FCPA) in the past four years with financial remedies totaling over $5.5 billion. The United States still stands largely alone in this area. The numbers never tell the whole story, but in this space they are stark. One of the factors that undermines the effectiveness of these efforts is the decades-long lack of effective effort by many of our international counterparts in this area — to be clear — not just enacting and talking anti-corruption laws but enforcing them. As I have noted, anti-corruption laws without vigorous enforcement are just words. In fact, assuming that corruption slows to where it is most profitable — a safe assumption — those types of jurisdictional asymmetries can increase corruption rather than decrease it.

Turning from the broad overriding issue of asymmetric jurisdictional efforts to combat international corruption to the procedural and substantive issues of the day, I will start with the CRA's not "substantially the same" requirement. On this issue, I recommend you take a look at the chart provided in my posted remarks. The same chart is available in the release issued today.

Issue	2016 Rules (Disapproved)	Proposed Rules	Final Rules
Definition of "project"	• Defined as operational activities governed by a single contract, license, lease, concession, or similar legal agreement, which forms the basis for payment liabilities with a government.	• Defined using three factors: (1) type of resource; (2) type of operation; and	• Same as proposed.

Issue	2016 Rules (Disapproved)	Proposed Rules	Final Rules
		(3) major subnational jurisdiction.	
Aggregation of payments	• No aggregation of payments beyond contract level, except that payments related to operational activities governed by multiple legal agreements could be aggregated together as long as the multiple agreements were operationally and geographically related.	• Aggregation of the same type of payments permitted at major subnational jurisdiction level, which must be identified; • Aggregation of the same type of payments permitted at levels below major subnational level, which may be described generically (*e.g.,* as county or municipality).	• Aggregation at major subnational jurisdiction level (same as proposed). • Issuer may aggregate payments by payment type, but must disclose aggregated amount for each subnational government payee and identify each subnational government payee.
Exemptions from compliance based on conflicts with foreign laws or contract terms	• No exemptions for conflicts with foreign laws or contract terms. • Case-by-case exemptive process established.	• Conditional exemptions for foreign law conflicts and pre-existing (pre-effectiveness) contract terms that prohibit disclosure.	• Same as proposed.
Exemption for smaller reporting companies or emerging growth companies	• No exemption for smaller reporting companies or emerging growth companies.	• Exemption for smaller reporting companies and emerging growth companies.	• Same as proposed, but limit exemption to companies not subject to an alternative reporting regime, which has been deemed by the Commission to require disclosure that satisfies the transparency objectives of Section 13(q).
Definition of "control"	• Based on established financial reporting principles: Issuer has control over an entity when it is required under GAAP or IFRS to consolidate or proportionately consolidate the financial results of that entity.	• Similar to approach under 2016 Rules, except that an issuer is not required to disclose payments made by entities that it only proportionately consolidates.	• Same as proposed.
Filed vs. furnished -- application of Exchange Act Section 18 liability	• Reports required to be filed; • Potential Section 18 liability.	• Reports are furnished; • No Section 18 liability.	• Same as proposed.
Relief for Initial Public Offerings (IPOs)	• No relief for IPOs.	• Transitional relief for IPOs; • Issuer would not have to comply with the Section 13(q) rules until the first fiscal year following the fiscal year in which it completed its initial public offering.	• Same as proposed.
Deadline for furnishing payment disclosures	• For all issuers, no later than 150 days after the end of the issuer's most recent fiscal year.	• For issuers with fiscal years ending on or before June 30, no later than March 31 in the following calendar year;	• 2 year transition period during which no Form SD due.

Issue	2016 Rules (Disapproved)	Proposed Rules	Final Rules
		• For issuers with fiscal years ending after June 30, no later than March 31 in the second calendar year following their most recent fiscal year.	• Following transition period, Form SD due no later than 270 days after the end of the issuer's fiscal year.

With the aid of the chart, demonstrating satisfaction of the CRA's not "substantially the same" requirement is straightforward.   If you use the 2016 Rules that Congress struck down in 2017 as a baseline, the final rules we adopt today make a few noteworthy changes. Most significantly, we changed the definition of project to require disclosure at the national and major subnational political jurisdiction level, as opposed to the contract level. This change satisfies the CRA criteria. The new definition, in itself and certainly in combination with some of the other less significant changes, renders the new rules not substantially the same as the rules that Congress struck down.

Now, turning to the Section 13(q) mandate, it is clear that the resulting definition, together with the other terms of the rules, provides for a reasonable implementation of Section 13(q) and promotes the statute's goal of transparency into resource extraction payments to governments. In other words, the final rule falls squarely in the center of Venn diagram intersection that I mentioned. In addition, within that Venn diagram intersection, I believe, after considering the various comments and consulting with the staff, with the final rules' project definition and other provisions, we have landed in the best reasonably available place to further Section 13(q)'s objective of providing transparency.

That brings us to the second issue: Why has this rulemaking taken this much time and this many iterations? Moreover, why — after three trips though the Administrative Procedure Act, court actions, congressional actions, countless hours of staff effort and other Commission resources, substantial public input, etc., even though I believe we are landing in the best reasonable place — again, why will the final rules be unsatisfactory to many interested parties?

One part of the answer is straightforward. The purpose of Section 13(q), while laudable and one that I support without hesitation or reservation, simply is not one that the Commission is well-positioned to pursue. It is outside of our area of expertise – note that of our 4,500 personnel, none are stationed outside of the United States. In many cases, using the information generated by the rule to further its purposes will be outside of our jurisdictional authority. Said another way, we are promulgating a disclosure rule that we are counting on others — others not at the table, others who have demonstrated little effectiveness in pursuing anti-corruption efforts — to use as an information tool.

Finally, this rule is employing our world-leading, highly effective, investor-oriented, rigorous disclosure regime to address the interests of non-investors or parties for whom investing is not their primary interest. This posture runs the risk of our disclosure framework subordinating the interests of investors to other interests. That is a risk of which we should all be wary <u>regardless of the nature of the non-investment oriented issue</u>. Due to the focus of the women and men of the SEC on investors and investment decisions, we are the world's most effective securities regulators. We should maintain that focus and be wary of using our effectiveness for purposes beyond our remit. Of course, this perspective in no way changes the obligation we discharge today.

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Before I turn the proceedings over to Betsy Murphy of the Division of Corporation Finance staff to discuss the recommendations, I would like to thank the staff for their continued, thorough work over many years on this rulemaking. I cannot understate the commitment of the staff as they have delved into a complex area essentially unrelated to our traditional areas of expertise in a unique procedural and legal context.

Specifically, I would like to thank Bill Hinman, former Director of the Division, Barry Summer, Elizabeth Murphy, Michael Seaman, and Elliot Staffin in the Division of Corporation Finance; Michael Conley, Bryant Morris, and Brooks Shirey in the Office of the General Counsel; and Vladimir Ivanov and Chantal Hernandez in the Division of Economic and Risk Analysis. I would also like to thank my fellow Commissioners and their counsels for their engagement on this rulemaking.