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The SEC's (Re-)Proposed Resource Extraction Issuer Disclosure Rule – An Update, Deep Dive and Selected Takeaways and Action Items for Issuers

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During December, the Securities and Exchange Commission (SEC) issued its long-awaited proposed rule (the Rule) on the disclosure of resource extraction payments by public companies. Under the Rule, a resource extraction issuer would be required to publicly disclose each year payments made by the issuer, its subsidiaries and other controlled entities to a foreign government or the U.S. federal government for the purpose of the commercial development of oil, natural gas or minerals.

The Rule – which is part of the continuing increase in mandatory corporate social responsibility disclosures – is intended to increase transparency in the extractive industries to help combat global corruption and empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources.

This Alert provides a detailed summary of the Rule, an update on the comment period and takeaways for issuers.

The 2012 Rule and Subsequent Litigation

The SEC is required to adopt a resource extraction issuer disclosure rule pursuant to Section 13(q) of the Exchange Act, which was added to the Exchange Act by Section 1504 of the Dodd-Frank Act.

The Rule proposed in December is the SEC's second bite at the apple. A rule was adopted during August 2012 (the 2012 Rule), but was subsequently challenged in court – like many other Dodd-Frank rulemaking initiatives – and then vacated by the U.S. District Court for the District of Columbia during July 2013.

The District Court vacated the 2012 Rule on two grounds. First, the District Court concluded that the SEC misread the statute to require the public filing of the payment disclosure made by issuers. Second, it concluded that the SEC's failure to include an exemption in the 2012 Rule for countries that prohibit payment disclosure was "arbitrary and capricious" within the meaning of the Administrative Procedure Act.

Unhappy that the SEC had not yet re-proposed a resource extraction issuer disclosure rule, during September 2014, Oxfam America filed suit to compel the SEC to adopt a new rule. During September 2015, the U.S. District Court for the District of Massachusetts concluded that the SEC's delay in re-promulgating the resource extraction issuer disclosure rule amounted to final agency action "unlawfully withheld" under the Administrative Procedure Act and ordered the SEC to file an expedited schedule with its plans to finalize the rule. On October 2, 2015, the SEC filed an expedited schedule that contemplates a vote on a final rule by June 27, 2016, although various factors may cause the SEC to deviate from that schedule.

Legislative and Disclosure Developments Since the 2012 Rule

When the 2012 Rule was adopted, it was the first rule of its kind. Since that time, two EU directives – the EU Accounting Directive and the EU Transparency Directive (the EU Directives) – that contain similar payment disclosure requirements have been adopted. During 2015, Canada's Extractive Sector Transparency Measures Act (the ESTMA) came into force. The Canadian ESTMA also is similar to the 2012 Rule.

Since 2012, the Extractive Industries Transparency Initiative's (the EITI) disclosure approach also has become more closely aligned with Section 13(q) of the Exchange Act. At the time, the EITI contemplated confidential submissions by companies of payment information, which would then be aggregated into a report by an independent party. The EITI has since revised its standard to require the independent report to include payment disclosure by each reporting

company, rather than aggregated data, and project level data consistent with the EU Directives and the 2012 Rule. In its December 2015 Proposing Release, the SEC noted that, in proposing the Rule, it considered the guidance in the EITI Standard and the EITI Handbook on what should be included in a country's EITI plan, as well as reports made by EITI member countries.

In addition, during March 2014, the United States completed the process of becoming an EITI candidate country. The first annual USEITI report, which covered 2013, was produced in December 2015.

The Proposed Rule

The SEC has proposed Rule 13q-1 and an amendment to Form SD to implement Section 13(q) of the Exchange Act. This section includes a detailed discussion of the Rule, as well as comparisons to portions of the EU Directives, the ESTMA and the EITI disclosure standards.

Issuers Subject to the Rule

"Resource extraction issuers" would have disclosure obligations under the Rule. This term includes all issuers that:

- file annual reports pursuant to Section 13 or 15(d) of the Exchange Act; and
- are engaged in the commercial development of oil, natural gas or minerals.

Consistent with the 2012 Rule, there are no exemptions based on issuer size, ownership, foreign private issuer status or the percentage of in-scope business operations. Accordingly, emerging growth companies, smaller reporting companies, MJDS issuers and other foreign private issuers all would be subject to the Rule.

Registered investment companies, Rule 12g3-2(b) issuers and issuers subject to Tier 2 reporting obligations under Regulation A are, however, outside the scope of the Rule because they do not satisfy the first prong of the two part test.

Applicability to Subsidiaries and Controlled Entities. Under the Rule, a resource extraction issuer would also be required to disclose payments made by its subsidiaries and other entities under its control. In a departure from the 2012 Rule, whether there is "control" or an entity is a "subsidiary" is based on accounting principles, rather than having the meaning contained in Rule 12b-2 of the Exchange Act. However, in most cases, the result is likely to be the same. The approach taken in the Rule is consistent with both the EU Directives and the ESTMA.

Under the Rule, a resource extraction issuer would have "control" of another entity if the issuer consolidates that entity or proportionately consolidates an interest in the entity or operation under the accounting principles applicable to the U.S. GAAP or IFRS financial statements included in its Exchange Act reports. A foreign private issuer that prepares financial statements according to a comprehensive set of accounting principles other that U.S. GAAP or IFRS and that files a U.S. GAAP reconciliation would be required to determine control using U.S. GAAP.

Under the Rule, a "subsidiary" is defined as an entity controlled directly or indirectly through one or more intermediaries.

Subject Company Statistics. The SEC estimates that 877 issuers might be subject to the Rule based on, among other things, data from 2014 disclosure filings and relevant Standard Industrial Classification codes. The actual number of issuers subject to Rule is likely to be significantly lower, since not all of the issuers in the population identified by the SEC make payments to governments.

The Proposing Release provides the following additional statistics on the estimated filer population, based on 2014 registrant data:

- Approximately 50% of the issuers are smaller reporting companies.
- Approximately 6% of the issuers are emerging growth companies.

- 268 issuers have a business address, are incorporated or are listed on markets in the European Economic Area or Canada.
- 49 issuers described in their annual Exchange Act filings an activity in one of the four countries cited in the Proposing Release as possibly having laws prohibiting at least some of the disclosures required by the Rule (Angola, Cameroon, China and Qatar). 114 additional issuers mentioned those countries for other unrelated reasons.
- 138 issuers had revenues and absolute value net cash flows from investing activities of less than $100,000, and were therefore unlikely to have had any reportable payments had the Rule been in effect for fiscal 2014.
- 56 issuers filed a Form SD pursuant to the Conflict Minerals Rule. All but two of these issuers had a fiscal year end of December 31.

Covered Activities

The activities that would come within the scope of the Rule are the commercial development of oil, natural gas or minerals.

"Commercial Development of Oil, Natural Gas or Minerals" Defined. The Rule defines this term to include the exploration, extraction, processing and export of oil, natural gas or minerals, or the acquisition of a license for any of the foregoing activities. This definition is consistent with the 2012 Rule and covers activities similar to those covered by the EU Directives and the ESTMA, although in some respects the definition is broader.

Meanings of "Extraction," "Export" and "Processing." In response to requests for clarification of the activities that come within "commercial development," the Rule defines and/or provides guidance on the meanings of the terms "extraction," "export" and "processing":

- ***Extraction.*** The production of oil and natural gas as well as the extraction of minerals.
- ***Export.*** The movement of a resource across an international border from the host country to another country by a company with an ownership interest in the resource.

  Cross-border transportation activities by an issuer that is functioning solely as a service provider on a fee-for-service basis, with no ownership interest in the resource being transported, are not considered to be an export.
- ***Processing.*** This term is not defined in the Rule, but the Instructions to the Rule provide examples of activities that would constitute processing.

  Instruction (7) indicates that processing would include, but is not limited to, midstream activities such as the processing of gas to remove liquid hydrocarbons, the removal of impurities from natural gas prior to its transport through a pipeline and the upgrading of bitumen and heavy oil, through the earlier of the point at which oil, gas or gas liquids (natural or synthetic) are either sold to an unrelated third party or delivered to a main pipeline, a common carrier or a marine terminal.

  Processing also would include the crushing and processing of raw ore prior to the smelting phase, but not the downstream activities of refining or smelting since issuers do not typically make payments to host governments in connection with refining or smelting.

Excluded Activities. The SEC's Proposing Release notes that the definition of commercial development is intended to capture only activities that are directly related to the commercial development of oil, natural gas or minerals. The Proposing Release indicates that the SEC would not consider an issuer that provides ancillary services, such as an issuer that manufactures drill bits or provides hardware to help companies to explore or extract to be a resource extraction issuer. Similarly, an issuer engaged by an operator to provide hydraulic fracturing or drilling services would not be considered a resource extraction issuer. Marketing activities and security support also would not be included.

Anti-Evasion Provision. The Rule includes an anti-evasion provision that would require disclosure concerning an activity that, although not within one of the categories included in the Rule, is part of a plan or scheme to evade the Rule. The Proposing Release notes that, for example, a resource extraction issuer could not avoid disclosure by recharacterizing an activity as transportation that would otherwise be covered under the Rule.

Payments Within (and Outside) the Scope of the Rule

Under the Rule, a resource extraction issuer would be required to disclose specified types of payments that are made to further the commercial development of oil, natural gas or minerals. The types of payments required to be disclosed are consistent with the EU Directives, the Canadian ESTMA and the EITI's disclosure standards.

"Payments" Defined. The definition of "payments" includes taxes, royalties, fees (including license fees), production entitlements, bonuses, dividends (other than dividends paid to a government as a common or ordinary shareholder) and payments for infrastructure improvements, such as building a road or railway to further the development of oil, natural gas or minerals.

Instructions (8) through (11) to the Rule provide additional guidance on certain categories of payments:

- ***Taxes.*** Payments made for taxes on corporate profits, corporate income and production would be required to be disclosed. However, payments made for taxes levied on consumption, such as value-added taxes, personal income taxes or sales taxes would not be required to be disclosed. (Instruction (8).)
- ***Fees.*** Fees would include, but not be limited to, license fees, rental fees, entry fees and other consideration for licenses or concessions. (Instruction (9).)
- ***Bonuses.*** Bonuses would include, but not be limited to, signature, discovery and production bonuses. (Instruction (9).)
- ***Dividends.*** Dividends paid to a government as a common or ordinary shareholder of the resource extraction issuer that are paid under the same terms as to other shareholders would not be required to be disclosed. However, any dividends paid in lieu of production entitlements or royalties would be required to be disclosed. (Instruction (10).)
- ***In-Kind Payments.*** If an in-kind payment of a type of payment required to be disclosed is made, the in-kind payment would be required to be disclosed. The Proposing Release cites as an example a payment to a government in oil rather than a monetary payment. (Instruction (11).)

De Minimis Exception. Only those payments that are "not de minimis" would be required to be disclosed. This term has the same definition as in the 2012 Rule, and means any payment, whether a single payment or a series of related payments, that equals or exceeds $100,000 (or its equivalent in the issuer's reporting currency) during the fiscal year covered by the filing.

If an arrangement provides for periodic payments or installments, such as monthly payments, the resource extraction issuer will be required to consider the aggregate amount of the related periodic payments or installments of the related payments in determining whether the payment threshold has been met for that series of payments and disclosure is required.

Social and Community Payments. The Rule does not require social or community payments to be disclosed. These include payments such as payments to build a hospital. These types of payments also are not required to be disclosed under the EU Directives or the ESTMA, although they may be disclosable under the EITI standards.

Payments Made Through Third Parties. The Proposing Release notes that, if an issuer were to make a payment to a third party in order to avoid disclosure, pursuant to the anti-evasion provision of the Rule, disclosure of the payment would be required. The anti-evasion provision of the Rule also would apply to the re-characterization of other types of payments.

Definition of "Project"

The Rule would require payments to be disclosed at the project level.

The 2012 Rule did not include a definition of "project." In the Adopting Release to the 2012 Rule, the SEC indicated that it believed that, by not adopting a definition, issuers had the flexibility to apply the term to different business contexts, depending on factors such as the particular industry or business in which the issuer operated, or the issuer's size.

After further consideration and in light of the other transparency initiatives since the adoption of the 2012 Rule, the SEC decided to include a definition of "project" in the new Rule. The definition is modeled on those contained in the EU Directives and the ESTMA, and is focused on the legal agreement that forms the basis for payment liabilities with a government.

The Rule defines a "project" to consist of the operational activities that are governed by a single contract, license, lease, concession or similar legal agreement, which form the basis for payment liabilities with a government. Under the definition, agreements that are both operationally and geographically interconnected may be treated by the issuer as a single project. This is similar to the approach taken in both the EU and Canada. However, under the Rule, the agreements would not be required to have substantially similar terms, such as due to a change in market conditions or other circumstances.

Operationally and Geographically Interconnected Agreements. Instruction (12) to the Rule contains a non-exclusive list of factors to consider when determining whether agreements are "operationally and geographically interconnected" for purposes of the definition of project:

- whether the agreements relate to the same resource and the same or contiguous part of a field, mineral district or other geographic area;
- whether the agreements will be performed by shared key personnel or with shared equipment; and
- whether they are part of the same operating budget.

The Proposing Release notes that no single factor would necessarily be determinative.

Definitions of "Foreign Government" and "Federal Government"

The Rule only requires disclosure of payments to a foreign government or the U.S. federal government.

The Rule defines a "foreign government" broadly. In addition to a national foreign government, the Rule includes within the definition:

- 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.

The foregoing definition is consistent with the 2012 Rule, as well as the EU Directives, the ESTMA and the EITI standards.

For purposes of the Rule, "federal government" means the U.S. federal government. Payments made to U.S. state, local or other subnational governments are not required to be disclosed, since disclosure of these payments is not contemplated by Section 13(q).

Information Required to be Disclosed

The following information would be required to be presented under the Rule:

- The type and total amount of the payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas or minerals.
- The type and total amount of the payments for all projects made to each government.
- The total amounts of the payments by category.

For example, categories of payments could be bonuses, taxes or fees.

- The currency used to make the payments.
- The financial period in which the payments were made.
- The business segment of the resource extraction issuer that made the payments.

For purposes of the Rule, a business segment is consistent with the reportable segments used by the resource extraction issuer for purposes of financial reporting.

The government that received the payments, and the country in which the government is located.

The Proposing Release notes that the administrative or political level of subnational government that is entitled to the payment should be identified.

- The project of the resource extraction issuer to which the payments relate.
- The particular resource that is the subject of commercial development.
- The subnational geographic location of the project.

Under the Rule, this location must be sufficiently detailed to permit a reasonable user of the information to identify the project's specific subnational geographic location. In identifying the location, the resource extraction issuer may use one or more subnational jurisdictions, such as a state, province, county, district, municipality or territory. In addition or instead of, it also may use a commonly recognized subnational geographic or geological description such as an oil field, basin, canyon, delta, desert or mountain.

More than one descriptive term may be necessary when there are multiple projects in close proximity to each other or when a project does not reasonably fit within a commonly recognized subnational geographic location. In addition, when considering the appropriate level of detail, a resource extraction issuer also may need to consider how the relevant contract identifies the location of the project.

Entity Level Payments. Consistent with the 2012 Rule, the Rule includes a clarifying instruction (Instruction (4)) indicating that resource extraction issuers do not need to disaggregate payments that are made for obligations levied on the issuer at the entity level rather than the project level.

Calculating Payments

Currency Conversions. Payments would be required to be reported in either U.S. dollars or the resource extraction issuer's reporting currency if not U.S. dollars. If payments were made in a currency other than its reporting currency or U.S. dollars, the issuer would be permitted to choose to calculate the currency conversion in one of three ways:

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

The method used to calculate the currency conversion must be disclosed.

Proportional Consolidation. If a resource extraction issuer proportionately consolidates an entity or operation under U.S. GAAP or IFRS and is required to disclose payments made by that entity under the Rule, the payments would be required to be disclosed on a proportionate basis and the proportionate interest must be described.

Valuing In-Kind Payments. Instruction (11) indicates that, when reporting an in-kind payment, the resource extraction issuer must determine the monetary value of the payment and tag the information as "in-kind" for purposes of the currency.

For purposes of its disclosure, the resource extraction issuer may report the payment at cost, or, if cost is not determinable, fair market value, and should provide a brief description of how the monetary value was calculated.

Legal and Contractual Prohibitions on Disclosure; Applications for Exemptive Relief

One of the grounds for invalidating the 2012 Rule was that the SEC failed to include an exemption for countries that prohibit payment disclosure. Similarly, the new Rule does not include a blanket exemption when required payment disclosure is prohibited by host country law. In that regard, the Rule is consistent with the EU Directives and the ESTMA. For various reasons, if the Rule is again challenged on these grounds, many commentators expect the Rule to survive that challenge.

The Rule also does not include blanket exemptions for contracts that contain confidentiality clauses or where disclosure would jeopardize competitively sensitive information or potentially jeopardize the safety and security of employees and operations.

Although there are no blanket exemptions from disclosure, a resource extraction issuer would be able to apply for exemptive relief on a case-by-case basis. In its Proposing Release, the SEC indicated that it believes that this approach will enable it to tailor the relief to the particular facts and circumstances, such as by permitting alternative disclosure or by phasing out the exemption over an appropriate period of time.

A resource extraction issuer seeking exemptive relief would be required to submit a written request to the SEC describing the particular payment disclosures that it seeks to omit and the specific facts and circumstances that it believes warrant an exemption, including the particular costs and burdens it faces if the information is disclosed.

The Proposing Release indicates that the SEC would generally expect to provide public notice of an exemptive request and an opportunity for public comment. In addition, to the extent a request for exemptive relief is based on a claim that a disclosure is prohibited by foreign law, the SEC would expect an opinion of counsel in support of that claim.

Exemptive relief is likely to be granted sparingly, given the disclosure requirements that exist in the EU and Canada. In that regard, the SEC notes, in the Proposing Release, that an issuer already making the disclosures at issue under another regulatory regime would have a heavy burden to demonstrate that an exemption from the reporting requirements of the Rule is necessary.

Form and Format Requirements

Filing on Form SD. Disclosures required to be made under the Rule must be filed on Form SD through the SEC's EDGAR system. The SEC has again proposed a public disclosure regime, notwithstanding that this was one of the grounds cited by the court for vacating the 2012 Rule. For various reasons, if the Rule is again challenged on these grounds, many commentators expect the Rule to survive that challenge.

All of the substantive disclosure required to be filed would be contained on an exhibit – Exhibit 2.01 – to the Form SD.

Consistent with the 2012 Rule, the information provided by resource extraction issuers on Form SD would be "filed" instead of "furnished." The distinction is that filed information is subject to liability under Section 18 of the Exchange Act (although not strict liability), while information that is furnished is not.

XBRL Requirements. Payment disclosure required by the Rule would be required to be presented in the eXtensible Business Reporting Language (XBRL) electronic format and contain XBRL tags. The tags would consist of both tags with fixed definitions and customizable tags.

A resource extraction issuer would be permitted to omit data tags that are inapplicable because the payments relate to obligations levied at the entity level rather than the project level. Examples of tags that might be omitted are the project tag and business segment tag. The resource extraction issuer would be required to provide all other electronic tags, including the tag identifying the recipient government.

Subsidiary and Other Controlled Entity Registrants. If a resource extraction issuer is controlled by another resource extraction issuer that has filed a Form SD disclosing the information otherwise required to be disclosed by the controlled entity, then the controlled entity would not be required to separately file the same disclosure. The controlled entity only would be required to file a notice on Form SD indicating that the disclosure was filed by the controlling entity, identifying the controlling entity and the date the information was filed. The reporting controlling entity also would be required to note that it is filing the disclosure for the controlled entity and to identify the controlled entity in its filing.

Effective Date and Timing of Filings

Resource extraction issuers would be required to make filings starting with their fiscal year that ends no earlier than one year after the effective date of the Rule.

Filings would be required to be made on Form SD on an annual basis, no later than 150 days after the end of the applicable fiscal year. The EU Directives and the ESTMA contain the same reporting schedule.

Use of Foreign Reports to Satisfy the Requirements of the Rule

In light of the disclosure initiatives in the European Union and Canada, as well as the USEITI, the Rule contemplates that a resource extraction issuer may file a report prepared for foreign regulatory purposes or for USEITI to comply with the Rule if the SEC deems the applicable reporting regime to be substantially similar to the requirements of the Rule.

The Proposing Release indicates that the SEC anticipates making determinations as to the similarity of other reporting regimes either unilaterally or pursuant to an application submitted by an issuer or a jurisdiction. The SEC has not yet indicated whether it will in the final Rule or through simultaneous guidance deem one or more of the existing reporting regimes to be substantially similar. The SEC indicated in the Proposing Release that it would consider the following criteria, among others:

- the types of activities that trigger disclosure;
- the types of payments that are required to be disclosed;
- whether project-level disclosure is required and, if so, the definition of “project;”
- whether the disclosure must be publicly filed and whether it includes the identity of the issuer;
- whether the disclosure must be provided using an interactive data format that includes electronic tags;
- whether disclosure of payments to subnational governments is required; and
- whether any exemptions from reporting are allowed and, if so, whether there are any conditions that would limit the grant or scope of the exemptions.

We expect that, during the comment process, the SEC will be urged to recognize as substantially similar the EU, Canadian and USEITI reporting regimes, especially given the commentary in the Proposing Release acknowledging the similarities in approach. During July 2015, Canada concluded that the requirements of the EU Directives were an acceptable substitute for Canada’s requirements under the ESTMA.

To the extent that alternative reporting is permitted, that information would still have to be filed as an exhibit to Form SD.

Next Steps in the Rule-making Process

The Rule is still in the comment phase and may, therefore, undergo changes before it is adopted. In the Proposing Release, the SEC requested feedback on 82 specific questions, although comments may be submitted on other aspects of the Rule as well.

There are two separate comment periods on the Rule. Initial comments are due on February 16, 2016. This period was recently extended from January 25, 2016. Reply comments, which may respond only to issues raised in the initial comment period, are due on March 8, 2016. The SEC has noted that it may take into account both new comments and comments that it received in connection with the 2012 Rules.

Selected Takeaways and Action Items

Based on our experience with both the 2012 Rule and other proposed corporate social responsibility legislation, we believe it is premature for issuers to finalize and implement compliance programs to comply with the Rule. The timetable for the adoption of the Rule still may change. There also are likely to be at least some changes between the proposed Rule and the final Rule, although we expect these to be fairly modest given other disclosure developments over the last three years. Once the final Rule is adopted, it also may be challenged in court, although that does not guarantee a stay of the Rule, as discussed in more detail below. In any event, due to the proposed transition period, there will be a fairly significant lead time for compliance once a final Rule is adopted.

Although we believe it is premature to put in place a compliance program in furtherance of the Rule, there are, nevertheless, action items that should start to be tackled now.

Determine the Applicability of the Rule. Larger companies generally have a good handle on the Rule and how it impacts them. They have been following it closely, and, in many cases, commented on the 2012 Rule and have been involved in industry advocacy efforts and/or the EITI.

In contrast, we have found that many smaller and mid-sized public companies are significantly less up to speed on the Rule. These issuers should start to assess the applicability of the Rule to their business. As a threshold matter, they should determine whether they are a resource extraction issuer. If so, they should then determine whether they would have a reporting obligation under the Rule and what their disclosure obligations would be. In some cases, this will require an analysis and determination of what the issuer's projects are for purposes of the Rule, since that will not always be clear on its face.

Consider Whether to Comment on the Rule. Some resource extraction issuers have complained to us privately that the short comment period, coupled with the holiday season, did not give them enough time to meaningfully review the Proposing Release and then internally propose, consider, draft and approve comments. The three-week extension of the comment period from January 25 to February 16 is a gift to issuers that may wish to comment on the proposed Rule.

As noted earlier in this Alert, the SEC has solicited feedback on 82 specific questions. However, comments are not limited to those areas and, in particular, we encourage resource extraction issuers with technical comments to make those during this period. We have seen with other supply chain disclosure rules in both the U.S. and abroad that regulators often do not appreciate some of the technical or industry-specific nuances and difficulties of nuts and bolts compliance, which can result in unintended disclosure consequences or compliance burdens that do not advance the policies underlying the rule.

Assume That the Rule Will Take Effect Even if Challenged. There is speculation that, once adopted, the Rule will be challenged in court on the grounds that certain of its disclosure requirements are compelled speech that violate the First Amendment. In 2014 and again on appeal in 2015, this argument was successful in striking certain disclosure requirements under the SEC's Conflict Minerals Rule. However, even if portions of the Rule are challenged on First

Amendment or other grounds, the application of the Rule may not be stayed pending resolution of the challenge, or only discrete portions of the Rule may be stayed (as was the case with the Conflict Minerals Rule), which will mean that resource extraction issuers will be required to comply with the other requirements of the Rule.

Review Relevant Contracts. As discussed in this Alert, a confidentiality provision in a contract does not excuse a resource extraction issuer from making the disclosures required by the Rule. In contemplation of an eventual disclosure requirement, resource extraction issuers should determine whether any of their contracts would prohibit disclosure mandated by the Rule, with a view to seeking to renegotiate those provisions at the appropriate time before disclosure is required.

Modify Contract Procedures Going Forward. When negotiating new contracts, resource extraction issuers should be mindful of the disclosure requirements of the Rule, so that non-disclosure provisions do not conflict with the Rule.

In addition, because the definition of "project" is keyed off of the legal agreement that forms the basis for payment liabilities with a government, the effect, if any, of the contractual arrangement on what constitutes a project should be considered at the negotiation and drafting stage.

Assess the Adequacy of Existing Data Collection and Internal Reporting Processes. Many resource extraction issuers are expected to need to modify aspects of their enterprise resource planning systems and financial reporting systems so that they can efficiently capture and report payment data at the project level for each type of payment, government payee and currency of payout. Issuers also may need to add dividends and payments for infrastructure improvements to their tracking and reporting systems. Resource extraction issuers should begin to assess where modifications to existing processes and/or systems may be necessary and should cost out the modifications and develop a plan for implementing the modifications once the final Rule is adopted.

Start to Assess Communications Risk and Develop a Communications Strategy. Expect disclosures by resource extraction issuers to be scrutinized by NGOs, socially responsible investors, community activists and other external stakeholders. As has been the case with other corporate social responsibility and human rights disclosures, disclosures by resource extraction issuers will be used by external constituencies to help determine which companies to target and the engagement strategy. Issuers should begin to assess how their particular disclosures may be perceived and used by external stakeholder constituencies, as well as what additional messaging they may want to put out beyond the required disclosures under the Rule and the form of that messaging.

Assess Other Business Risks. During the comment process and in other venues, issuers and trade associations have identified other potential risks that might result from disclosure, including competitive harm and risks to personnel and property. These risks – and the responses – will differ greatly by issuer. And, many of these risks may require substantial lead-times to mitigate. Accordingly, issuers should start to assess the likelihood and potential severity of business risks that may result from disclosures under the Rule. This is another area where we have seen a substantial dichotomy between the level of attention by larger issuers and other companies.

If you would like to learn more about the issues in this Alert, contact your usual Ropes & Gray attorney.

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