

SEC Expands Disclosure Requirements for Energy Exploration Companies (Oil, Gas and Minerals)

August 30, 2012

The U.S. Securities and Exchange Commission (SEC) has adopted final rules requiring oil, gas and mineral exploration companies to make annual disclosures regarding certain payments made to the U.S. government and foreign governments. See [final rules](#). Companies subject to the new requirement to publicly disclose project-specific expenses will likely want to implement new internal procedures, or enhance existing procedures, to ensure that sufficient information regarding such payments is both gathered and retained going forward. Indeed, while the new requirements could potentially increase compliance costs for these companies, termed “resource extraction issuers,” because they direct the companies to formally record and disclose a wide range of government payments, proper planning and implementation of internal procedures in response to the new disclosure requirements could potentially help mitigate those additional costs.

The rules – pertaining to Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd Frank Act) – will require companies to file the disclosure with the SEC for fiscal years ending after September 30, 2013.

Who Must Disclose

The new rules apply to a broad range of domestic and foreign energy companies termed “resource extraction issuers,” which are defined as:

- Any company that files an annual report with the SEC and engages in “commercial development of oil, natural gas or minerals” (i.e., engages in exploration, extraction, processing, export *or* “*other significant actions*” relating to oil, natural gas or minerals *or* the acquisition of a license for any such activity).

The rules include payments made by a subsidiary or other entity controlled by a “resource extraction issuer.”

Public companies should determine the applicability of the rules to their businesses as soon as possible so appropriate internal procedures can be implemented to respond to the new disclosure requirements.

The Impact on Energy Companies

The rules require resource extraction issuers to file a new Form SD disclosure statement to identify a wide range of payments, including in-kind payments made to the U.S. government or foreign governments, including foreign subnational governments, such as the government of a state, providence, county, district, municipality or territory under a foreign national government. The rules do not require the disclosure of payments made to subnational governments in the United States.

© 2012 Sutherland Asbill & Brennan LLP. All Rights Reserved.

This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

Payments that must be disclosed are those:

- “Made to further the commercial development of oil, natural gas, or minerals”;
- “Not de minimis” (i.e., equal to or exceeding \$100,000 during the most recent fiscal year, whether a single payment or a series of related payments); *and*
- Within one of the following categories:
 - Taxes
 - Royalties
 - Fees (including license fees)
 - Production entitlements
 - Bonuses
 - Dividends
 - Infrastructure improvements.

For each covered payment, companies will be required to disclose:

- 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 company that made the payments;
- The government that received the payments, and the country in which the government is located; and
- The company project to which the payments relate.

The final rules do not define the term “project.” As a result, absent further informal guidance from the SEC staff, companies subject to the new disclosure requirement will likely be required to develop an objective basis for distinguishing between separate “projects” for both information gathering and reporting purposes.

The Form SD must be filed within 150 days after the end of the company’s first fiscal year ending after September 30, 2013. If a fiscal year begins after September 30, 2012, the first Form SD will only be required to cover payments made between October 1, 2013, and the end of the company’s current fiscal year. For fiscal years starting after September 30, 2013, each Form SD must report payments for the full fiscal year.

Potential Legal Challenges

Several energy industry groups have expressed concern about the likely impact of the new rules, citing increased compliance costs and competitive disadvantage in seeking new projects. See Comments submitted to 17 C.F.R. 240, *et seq.*, and 249, *et seq.*

Opponents of the new disclosure requirements may seek to delay or prevent their implementation through litigation, particularly in view of the potential regulatory burden the new disclosure requirements may entail. As a result, as with other provisions adopted under Dodd-Frank, there is some uncertainty on whether, and in what form, the new disclosure requirements will actually be implemented. Notwithstanding the potential legal challenges, however, companies should continue to plan and implement appropriate internal procedures to ensure compliance with the new disclosure requirements in the event those requirements go into effect within the time frame the SEC has currently adopted.

For more information on the new disclosures and their potential impact on companies, please contact the attorneys listed below. We will be hosting a webinar on the new Section 1504 disclosure obligations.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Bruce Bettigole	202.383.0165	bruce.bettigole@sutherland.com
Rachel Giesber Clingman	713.470.6189	rachel.clingman@sutherland.com
Mark D. Herlach	202.383.0172	mark.herlach@sutherland.com
Cynthia M. Krus	202.383.0218	cynthia.krus@sutherland.com
John J. Mahon	202.383.0515	john.mahon@sutherland.com
David T. McIndoe	202.383.0920	david.mcindoe@sutherland.com
Harry S. Pangas	202.383.0805	harry.pangas@sutherland.com
Holly H. Smith	202.383.0245	holly.smith@sutherland.com
Stephanie E. Kinzel-Tapper	713.470.6135	stephanie.kinzel-tapper@sutherland.com
Jae C. Yoon	202.383.0835	jae.yoon@sutherland.com