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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Oil Payment Disclosures Coming, Despite Court's SEC Rebuke

By **Keith Goldberg**

Law360, New York (July 03, 2013, 7:17 PM ET) -- While a Washington federal judge's Tuesday invalidation of a U.S. Securities and Exchange Commission rule requiring oil, gas and mining companies to disclose payments to foreign governments gives the industry a temporary reprieve, attorneys warn that regulatory mandates in both the U.S. and Europe mean energy companies will eventually have to turn over those details in some form.

U.S. District Judge John D. Bates may have determined that the SEC misinterpreted a Dodd-Frank Act provision mandating a disclosure rule when crafting the regulations, but he didn't invalidate the provision itself, which means the agency is still under the gun to produce a rule.

And with the European Parliament signing off on a similar disclosure law June 26, attorneys say it would be a mistake for energy companies — especially those subject to both U.S. and European Union jurisdiction — to abandon their preparations to reveal payment information.

"I don't think it's a pencils-down moment," Covington & Burling LLP partner and former SEC attorney Keir Gumbs told Law360. "At some point, this information is going to have to be disclosed to someone. I think companies would be well-advised to continue to streamline and aggregate the payment data it looks like both the U.S. and EU are going to require."

While the now-vacated SEC rule and the EU rule have some differences, their basic frameworks are the same. The SEC rule required U.S. companies to publicly disclose payments of more than $100,000 made to foreign governments for any projects related to commercial petroleum development, while the EU rule requires EU companies to disclose any payments of more than €100,000 ($131,000) made to foreign governments.

Combined, the U.S. and EU rules would have covered 90 percent of the world's major international extraction companies, according to anti-corruption watchdog Transparency International.

Many of the world's largest energy companies are subject to both U.S. and EU regulations, but attorneys say the odds of compliance chaos due to the axing of the U.S. disclosure rule are low, since member states have until July 2015 to work the new EU requirements into their own laws.

"It remains to be seen what gets implemented in the U.S., but my expectation would be that the U.S. rules would be in place by the time the EU rules take effect," said Richard Price, co-chair of Shearman & Sterling LLP's European capital markets and European corporate practice groups.

Multinational companies are used to living with differing regulatory schemes. And besides, attorneys say, the SEC rule was more draconian than the EU law, which allows companies to use comparable disclosure regimes — such as the Extractive Industries Transparency Initiative standard — to satisfy their EU reporting obligations. So the SEC rule would almost certainly have been an acceptable stand-in for U.S. companies subject to the EU rule.

Whether a revised SEC rule would pass EU muster is an open question, attorneys say.

Judge Bates pointed the way toward one possible revision when he concluded Tuesday that the agency's decision not to grant an exemption for firms doing business in countries that ban such disclosures was "arbitrary and capricious" in light of billions of dollars in potential costs.

But a revised rule that carves out those exemptions might not satisfy the EU, whose rule doesn't contain the exemptions, according to Bob Gray, the co-leader of Mayer Brown LLP's corporate and securities practice. If so, companies that have to play by both U.S. and EU rules will have to make separate filings in both jurisdictions, he said.

"It will create additional costs, headaches and reporting problems for the global companies," Gray told Law360.

The SEC will likely take the EU requirements into account when it proposes a revised disclosure rule, but the agency is still bound by the Dodd-Frank mandate, says former SEC counsel Abigail Arms, now of counsel at Shearman & Sterling.

And with the mandates for greater disclosure standing in both the U.S. and EU, energy companies will have to think about ways to mitigate the competitive harm they claim the rules will cause, says Arnold & Porter LLP partner Mara Senn, who specializes in global anti-corruption matters.

"The discussion will be the form of the [disclosure] reports, and [companies will] try to structure them in a way that will disclose less, rather than more, competitive information," Senn told Law360. "To the extent that they have leeway, they will construct [reports] in a way that a competitor can't glean [competitive] details."

--Additional reporting by Max Stendahl. Editing by Kat Laskowski and Katherine Rautenberg.