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Legal Update
July 8, 2013

US District Court Vacates the SEC's Resource Extraction Payments Disclosure Rule

On July 2, 2013, the United States District Court for the District of Columbia vacated Securities and Exchange Commission Rule 13q-1, which required certain companies to disclose payments made to governments in connection with the commercial development of oil, natural gas or minerals.[1] This decision was rendered in *American Petroleum Institute, et al. v. Securities and Exchange Commission and Oxfam America, Inc.*, Civil Action No. 12-1668.

The SEC adopted its resource extraction payments disclosure rule pursuant to the directive contained in the Dodd-Frank Wall Street Reform Act and Consumer Protection Act, which added Section 13(q) to the Securities Exchange Act of 1934.[2] The court vacated the SEC resource extraction payments disclosure rule because it found that the SEC made two substantial errors. According to the court:

- The SEC misread the Dodd-Frank Act as mandating public disclosure of the resource extraction payments reports, and
- The SEC's decision to deny any exemption was, given the limited explanation provided, arbitrary and capricious.

The court remanded the rulemaking to the SEC for further proceedings.

Public Disclosure. As adopted, Rule 13q-1 provided that all issuers subject to the rule were required to publicly file a Form SD annually to report their subject resource extraction payments, based on the SEC's view that the applicable provisions of the Dodd-Frank Act did not allow confidential submissions of the resource extraction payments reports. However, in its opinion, the court held that nothing in Section 13(q) of the Exchange Act required that there be public disclosure of the full resource extraction payments reports. The court noted that while the statute referred to a public *compilation* of the resource extraction payments information required to be submitted, this directive was limited "to the extent practicable" and did not address whether or not the resource extractions payments reports must be made public. Further, the court stated that the concept of compilation permitted the SEC to selectively omit public disclosures of commercially sensitive information rather than provide for full public disclosure of all information submitted in response to the requirement. The court found that Section 13(q) established "a different and more limited requirement for what must be publicly available than for what must be annually reported." As a result, the court concluded that the SEC's resource extraction payments disclosure rule was invalid because the SEC based its rule on an "unjustified assumption that it was Congress' judgment" that a regulation requiring full public disclosure of all resource extraction payments submitted to the SEC was desirable or required.

Rejection of any Exemption for Prohibited Disclosure. The court's opinion also addressed the fact that the SEC did not provide any exemption for disclosure of resource extraction payments made in countries such as Angola, Cameroon, China and Qatar, where such disclosure is prohibited. In not providing an exemption, the SEC argued that adopting an exemption would have been "inconsistent" with the "structure and language of Section 13(q)." The court found that the SEC's denial of any exemption in such situation was "arbitrary and capricious." The court stated that the SEC "impermissibly rested on the blanket proposition that avoiding all exemptions best furthers section 13(q)'s purpose." In particular, the court observed that the SEC failed to consider whether a certain country or issuer representing a high portion of the burden is sufficiently central to the purpose of the statutory directive as to make an exemption unwarranted. The court noted that it would have been possible for the SEC to have created a limited exemption that would have not have eviscerated Section 13(q). According to the court, the SEC focused on a broad and incorrect reading of the statute's purpose rather than undertaking specific analysis and in so doing "abdicated its statutory responsibility to investors."

Remaining Arguments. Because the court found two grounds for invalidating the SEC's resource extraction payments disclosure rule, it did not address the Administrative Procedures Act arguments or the First Amendment challenges raised by the plaintiffs.

Practical Considerations. The SEC will need to decide what action to take next with respect to resource extraction payments disclosure. For example, it may choose to appeal the court's decision or it may propose amendments to its resource extraction payments disclosure rule.

Prior to the court's action, the first Form SD filings containing the specialized disclosures relating to resource extraction issuers would have been due with respect to their fiscal years ending after September 30, 2013, with the Form SD due not later than 150 days after the end of the issuer's fiscal year. For resource extraction issuers having a calendar fiscal year, their first Form SD would have been required to be filed on or before May 30, 2014, reporting resource extraction payments made between October 1, 2013 and December 31, 2013. As a result of the court action, the resource extraction payments disclosure rule is no longer in effect. Therefore, at the present time, there is no requirement to file a Form SD to report resource extraction payments. However, issuers that were impacted by the SEC's resource extraction payments disclosure rule should continue to monitor developments in this rulemaking and related litigation for further developments.

Form SD is also to be used to provide the specialized disclosures required by the SEC's conflict minerals disclosure rule adopted pursuant to the Dodd-Frank Act.[3] The first Form SD with respect to conflict minerals disclosure is due by May 31, 2014. The court's decision with respect to the resource extraction payments disclosure rule did not impact the conflict minerals disclosure rule. However, it is important to note that the conflict minerals disclosure rule has also been challenged in court. Affected issuers should monitor the conflict minerals court proceedings to learn what impact, if any, such litigation will have on the conflict minerals disclosure rule.

If you have any questions regarding the resource extraction payments disclosure rule and related litigation, please contact the authors of this Legal Update, Laura D. Richman, at +1 312 701 7304, Michael L. Hermsen at +1 312 701 7960 or Marc H. Folladori at +1 713 238 2696, or any of the lawyers listed below, or any other member of our Corporate & Securities group.

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Endnotes

[1] The court's Memorandum Opinion is available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2012cv1668-51.

[2] For a detailed description of the resource extraction payments disclosure rule, see Mayer Brown LLP's Legal Update dated September 4, 2012, titled *SEC Adopts Dodd-Frank Resource Extraction Payments Disclosure Rules*, which is available at http://www.mayerbrown.com/SEC-Adopts-Dodd-Frank-Resource-Extraction-Payments-Disclosure-Rules-09-04-2012/ as well as Mayer Brown LLP's Legal Update dated June 5, 2013, titled *Securities and Exchange Commission Provides Guidance on Conflict Minerals and Resource Extraction Payments Disclosure*, which is available at http://www.mayerbrown.com/files/Publication/583aae6d-7f47-4138-a4fc-be72d92650a4/Presentation/PublicationAttachment/0418c673-ab94-40c9-8aa1-c95203e98756/UPDATE-Corp_Conflict_Minerals_0613_V4.pdf.

[3] For a detailed description of the conflict minerals disclosure rule, see Mayer Brown LLP's Legal Update dated September 5, 2012, titled *US Securities and Exchange Commission Adopts Final Conflict Minerals Disclosure Rule*, which is available at http://www.mayerbrown.com/US-Securities-and-Exchange-Commission-Adopts-Final-Conflict-Minerals-Disclosure-Rule-09-05-2012/ as well as the Legal Update on the FAQs referred to in endnote 2.

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