

securities lawflash

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SEC Issues Guidance on Resource Extraction Issuer Rules

FAQs clarify which entities and payments are subject to the final rules.

On May 30, the Securities and Exchange Commission (SEC) released frequently asked questions (FAQs) providing guidance on certain aspects of its final rules for resource extraction issuers (the Resource Extraction Rules).¹ The Resource Extraction Rules, which were adopted on August 22, 2012 pursuant to section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), require companies that are engaged in the commercial development of oil, natural gas, or minerals and required to file annual reports with the SEC to disclose certain payments made to the U.S. federal government or foreign governments (and related entities) for the purpose of commercial development of oil, natural gas, or minerals.² The FAQs provide guidance, among other things, as to which issuers are subject to the reporting requirements, what the meaning of “minerals” is, which payments must be reported and how they should be reported, and the consequences of a failure to timely file a Form SD.

Questions Answered by the FAQs

Which entities are resource extraction issuers?

- *Holding companies may be resource extraction issuers.* Question 1 clarifies that a holding company is a resource extraction issuer if a subsidiary or other controlled entity is engaged in the commercial development of oil, natural gas, or minerals.
- *Entities engaged in associated services only are not resource extraction issuers.* Questions 2 and 4 clarify that an issuer providing services associated with the exploration, extraction, processing, and export of a resource is not a resource extraction issuer. Only issuers directly engaged in the commercial development of oil, natural gas, or minerals must disclose payments to governments. Issuers providing associated services not covered by the Resource Extraction Rules include the following:
 - Issuers providing hardware and logistics for exploration or extraction
 - Issuers providing hydraulic fracturing or drilling services for an operator
 - Issuers providing transport services, including between countries, so long as the issuer does not have an ownership interest in the transported resources

Question 4 further clarifies that transportation activities are generally not included within the definition of “commercial development” unless they are directly related to the export of a resource. Generally, however, the SEC staff would view the movement of a resource across an international border from one host country to another country by a company with an ownership interest in the resource as export.

1. View the FAQs at <http://www.sec.gov/divisions/corpfin/guidance/resourceextraction-faq.htm>.

2. For more information on the Resource Extraction Rules and the implications for affected companies, see our September 19, 2012 LawFlash, “SEC Adopts Payment Disclosure Rules for Resource Extraction Issuers,” available at http://www.morganlewis.com/pubs/BF_LF_SECAadoptsPaymentDisclosureRulesForREI_19sep12.

- *The term “minerals” has been defined.* Question 3 provides clarity as to the definition of “minerals” under the Resource Extraction Rules by stating that “minerals” are any materials commonly understood to be minerals. Materials extracted and gathered by means of mining activity—including any materials for which disclosure would be required under Industry Guide 7, “Description of Property by Issuers Engaged or to Be Engaged in Significant Mining Operations”³—are encompassed in the definition and include materials such as metalliferous minerals, coal, oil shale, tar, sands, and limestone.

Which payments are subject to the Resource Extraction Rules?

For payments to be subject to the Resource Extraction Rules, they must be made to further the commercial development of oil, natural gas, or minerals and take the forms of taxes, royalties, fees, production entitlements, bonuses, dividends, or payments for infrastructure improvements.

- *Certain payments are excluded.* Questions 5, 6, and 8 clarify that certain payments are not subject to disclosure pursuant to the Resource Extraction Rules. These include the following:
 - Payments made to majority-owned government entities for services or activities that are ancillary or preparatory to the commercial development of oil, natural gas, or minerals, such as payments for providing transportation services to supply people or materials to a job site.
 - Penalties or fines related to resource extraction.
 - Corporate-level income tax payments to governments on income not generated by the commercial development of oil, natural gas, or minerals. (However, a resource extraction issuer is not required to segregate this income and may disclose that the information includes payments made for purposes other than the commercial development of oil, natural gas, or minerals.)
- *The format for payment disclosure has been clarified.* Question 7 provides that a resource extraction issuer is to present payment information on an unaudited, cash basis for the year in which the payments are made.

What are the consequences of failing to timely file a Form SD?

Question 9 provides that, if a resource extraction issuer fails to timely file a Form SD, the issuer does not lose eligibility to use Form S-3.

Contacts

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3. View SEC Industry Guide 7 at <http://www.sec.gov/about/forms/industryguides.pdf>.

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