

## **E-Bulletin**

### **New SEC Rules Require Disclosure of Payments to Governments by Resource Extraction Issuers**

On August 22, 2012 the US Securities and Exchange Commission (“SEC”) adopted a new transparency rule pursuant to section 1504 of the *Dodd Frank Wall Street Reform and Consumer Protection Act* (“Dodd Frank Act”). The rule will require companies engaged in the commercial development of oil, natural gas or minerals to disclose, on an annual basis, payments of US \$100,000 or more made to the US Federal Government or any foreign government to further the commercial development of those resources. The stated objective of section 1504 is to help citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources.

#### **Which companies will be subject to the new SEC disclosure requirements?**

The disclosure requirements will apply to all companies that are US issuers, whether US or foreign, who are required to file a report with the SEC and are engaged in the “commercial development” of oil, natural gas or minerals. Such companies, including their subsidiaries or entities under their control, must disclose payments made to the US Federal Government or a foreign government for such commercial development. There is no exemption for small to medium sized companies from these requirements.

#### **When will these new disclosure requirements take effect?**

The issuer will be required to provide a report for the period starting on October 1, 2013 for any fiscal year commencing on or after September 30, 2013.

#### **Which resource extraction activities are subject to the SEC disclosure requirements?**

Commercial development of oil, natural gas or minerals includes exploration, extraction, processing, export and other significant actions relating to such resources, or the acquisition of a license for such activity as determined by the SEC. The SEC has indicated that refining and smelting activities are not included in the scope of the rule.

#### **What types of payments must be disclosed?**

The aggregate of all payments exceeding \$100,000 per year to further the commercial development of oil, natural gas or minerals in relation to a specific “project” must be disclosed.

The term “project” is not defined except to say that it is to be the same as the company uses in its SEC filings. Except as specifically provided, country-based or entity-based reporting is not acceptable.

The term “payment” is defined by the rule to include:

- taxes
- royalties
- fees
- production entitlements
- bonuses
- dividends, and
- payments for infrastructure improvements, whether required by contract or performed voluntarily.

Payments made to foreign governments, including foreign subnational governments such as the government of a state, province, country district or territory will be covered. In the US however, only payments to the US Federal Government are covered. There is an evident imbalance in reporting requirements as they apply to foreign and US sub-national governments.

### **When and in what form must the disclosure be made?**

Resource extraction issuers must make the required disclosure in a new annual report (Form SD) separate from the issuer’s existing Exchange Act annual report. The form must be filed within 150 days after the end of a firm’s fiscal year.

### **Are US SEC rules the only rules mandating disclosure in this area?**

The SEC rules represent the latest attempt to foster greater public disclosure of amounts paid by resource extraction companies to governments for rights to exploit natural resources. The “Extractive Industries Transparency Initiative” (“EITI”) is an initiative by a coalition of resource extraction companies, investor groups, governments and international organizations to bring greater transparency to the area of natural resource-related fees and payments. The EITI has, as a primary focus, exploration and production activities and applies only on a country basis rather than a project basis. There is considerable discretion within the EITI framework as to the nature and scope of the disclosure. Currently 35 national governments and over 60 major international oil, gas and mining companies are participating.

The European Union is currently engaged in passing certain regulations which will require EU-based resource extraction and forestry companies to disclose payments made to governments on both a country and a project basis. The EU has yet to adopt the legislative proposals in final



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form, but the US SEC measures may serve as an impetus to adoption of the EU measures as well.

The London Stock Exchange AIM rules require companies, in their initial listing disclosure, to disclose any payments aggregating over £10,000 made to any government or regulatory authority in relation to the acquisition or maintenance of its assets. Likewise, the Hong Kong Stock Exchange maintains certain requirements in relation to payments made to host country governments on a country basis.

### **How can Sills Egsgard LLP help?**

We would be happy to work with your company to help identify which payments may require disclosure, together with other transparency obligations applying to your company's operations.

We would be happy to discuss your company's specific requirements further with you.

### **About Sills Egsgard LLP**

Sills Egsgard LLP is a boutique law firm based in Toronto specializing in regulatory compliance issues for both Canadian and foreign enterprises. Our lawyers combine solid legal knowledge and experience gained through years of practice in some of Canada's most prestigious law firms, with experience living and working in developing countries and a thorough familiarity with international trade. Our multi-disciplinary skills and experience are provided to our clients at cost-effective prices owing to our low overheads.

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