AUTHORIZED
REPRINT

THE NORTHERN MINER
THE GLOBAL MINING NEWSPAPER
www.northernminer.com
SEPTEMBER 24-30, 2012 • VOL. 98, NO. 32 • SINCE 1915

COMMENTARY

The new SEC rules for disclosing payments

BY MARK N. SILLS AND
JENNIFER L. EGSGARD
SPECIAL TO THE NORTHERN MINER

New measures requiring public disclosure by U.S. issuers of payments to governments for mineral exploration and development rights were announced on Aug. 22, 2012, by the U.S. Securities and Exchange Commission pursuant to the *Dodd-Frank Act*.

The new SEC rule requires companies engaged in the commercial development of oil, natural gas or minerals (termed "resource-extraction issuers") to disclose, in their annual reports to the SEC, payments of US$100,000 or more made to the U.S. federal government, or to any foreign government to obtain rights to commercial development of those resources.

The objective of these new measures is to foster greater accountability of governments of resource-rich countries to their citizenry for the wealth generated by those resources.

Companies must disclose payments made to the U.S. federal government — or a foreign government for such commercial development — for fiscal years ending after Sept. 30, 2013. The obligations also apply to subsidiaries or entities under the company's control, and there is no exemption for small- to medium-sized companies from these 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 licence for such activity as determined by the SEC. Refining and smelting activities are not included in the scope of the rule.

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.

These new transparency measures are only the latest salvo in the growing international trend to compel resource extraction companies to behave more transparently and refrain from engaging in bribery or corrupt practices in the course of their overseas operations. Reputable companies attempt to operate abroad in the same fashion as at home.

But the difficulties and pressures of operating in unfamiliar foreign environments have caused a few to try to fast-track their way out of delays and obstructions by means of payments to government officials to expedite issuance of approvals, licences and other governmental requirements for their operations.

Payments to foreign officials to facilitate operations were once regarded as an inevitable cost of doing business abroad. Now stepped-up enforcement of anti-bribery and corruption laws in Western countries in recent years is resulting in heavy civil and criminal penalties for companies and their officials, in relation to many such payments.

The anti-bribery laws in Canada, the U.S. and the U.K., to name just three countries, contain intersecting and overlapping liability for acts of bribery or corruption by companies operating internationally.

In Canada, recent prosecutions for bribery include the Niko Resources case, where the company pleaded guilty in June 2011 to a violation of Canada's *Corruption of Foreign Public Officials Act* (CFPOA) by reason of a subsidiary's bribe to a former Bangladeshi Minister of Energy. An Alberta court sentenced Niko to a $9.5-million fine and imposed extensive books and record-keeping obligations on the company.

There are over 30 Canadian companies reportedly under investigation by the RCMP for alleged foreign bribery-related activities. Two SNC Lavalin executives are facing charges laid in April 2012 for payments made in relation to a bridge project in Bangladesh.

The U.S. Department of Justice has stepped up enforcement of the *Foreign Corrupt Practices Act* (FCPA) in recent years. The FCPA contains broader obligations than Canada's CFPOA, including stringent books and record-keeping obligations, and requirements to create and maintain internal controls to prevent acts

AUTHORIZED
REPRINT

THE
NORTHERN MINER
THE GLOBAL MINING NEWSPAPER
www.northernminer.com
SEPTEMBER 24-30, 2012 • VOL. 98, NO. 32 • SINCE 1915

of bribery.

U.S. law provides that managers and employees convicted of bribery offences may not be compensated by their employers for any fines levied. Liability includes civil and criminal liability and possible prison sentences, backed by a "whistle-blower regime" that provides incentives for company employees to disclose corrupt practices to U.S. government officials. Cases are normally settled by negotiations with the U.S. Department of Justice, but the costs of settlement are becoming increasingly exorbitant. For example, Siemens AG was ordered to pay $1.6 billion in criminal and civil fines — and other penalties — in both the U.S. and Germany.

If your company is "carrying on business" in the U.K. as defined by the U.K. authorities, you may also be subject to the provisions of the U.K.'s *Bribery Act 2010*. This act, among other things, creates liability for bribery committed by your company's agents, even if you do not know about their activities.

Unlike the U.S. FCPA, the bribery act also prohibits bribery in relation to private officials as well as government officials. Individuals may be sentenced up to 10 years in prison, and individuals and companies may be ordered to pay unlimited fines. In December 2010, pursuant to agreements with the U.K. Serious Fraud Office in relation to fraud allegations involving the sale of a military radar system, BAE Systems agreed to pay £29.5 million to the people of Tanzania, costs of £225,000 and a £500,000 fine.

Companies wishing to shield themselves from liability should consider implementing adequate procedures to ensure that company officials, employees and persons acting on their behalf do not engage in corrupt practices. These procedures must be backed by clear and vigorous commitments to implement and enforce the procedures from the very top of the company.

Such company procedures would include developing and implementing internal anti-bribery and anti-corruption policies, and codes of conduct to meet the requirements of all jurisdictions where the company is operating.

This in turn would require an in-depth risk assessment of a company's activities, including, where required, interviews with personnel in the field. Implementation of anti-bribery strategies should ideally include training sessions for company employees in anti-bribery strategies, and due diligence techniques in relation to agents and business partners.

The company's accounting systems must be set up to preclude any illegal payments being disguised as expenses. U.S. security-reporting obligations, as noted above, would require full and accurate disclosure of all payments made by companies to governments for commercial development of mineral resources.

The time to implement all of the above would be before any investigation begins by government authorities of company practices and procedures in its foreign operations.

Needless to say, should effective anti-bribery and corruption procedures not be in place, a company would require effective legal and accounting representation in the course of any audit and or prosecution arising from activities relating to government authorities.

The costs of compliance and settling outstanding charges at that juncture are likely to outweigh the costs of prior implementation of effective internal anti-bribery procedures and practices.

— Mark Sills and Jennifer Egsgard are partners in Sills Egsgard LLP, a Toronto law firm specializing in international trade and investment and related regulatory compliance issues. Visit www.lexmercantile.com *for more information.*