

New SEC Disclosures for Payments to Governments by Oil, Natural Gas, and Mining Companies: FAQs

What so-called resource extraction issuers need to know ahead of the September 26, 2024 deadline.

Key Points:

- By no later than September 26, 2024, so-called resource extraction issuers (oil, natural gas, and mining companies) with a December 31 fiscal year-end will be required to file a [Form SD \(Section 2\)](#) that includes new disclosures reflecting payments made in 2023 to the US federal government and any foreign governments for **the commercial development of oil, natural gas, or minerals**.
- The disclosure consists primarily of an exhibit with granular tabular data (in XBRL format) showing payments of various types (taxes, royalties, fees, etc.) for projects and jurisdictions.
- Following the inaugural September 26, 2024 filing, Form SD (Section 2) will be due annually no later than 270 days after the end of the issuer's fiscal year.
- There is no change to the conflict minerals disclosure deadline of May 31 for filers who file a Form SD (Section 1).

Affected Companies

1. How does the SEC define “resource extraction issuers” that are required to file Form SD (Section 2)?

- A “resource extraction issuer” is defined as an issuer that is required to file a Form 10-K, 20-F, or 40-F annual report with the SEC and that engages in the commercial development of oil, natural gas, or minerals.

The commercial development of oil, natural gas, or minerals includes: **exploration, extraction, processing, and export** of oil, natural gas, or minerals, or the acquisition of a license for any such activity.

- An issuer providing only services to *assist with* exploration, extraction, processing, or export is generally not considered a resource extraction issuer.

- We expect that many midstream activities will fall within the scope for reporting, while the SEC has indicated that downstream activities of refining or smelting are not within scope.
- Examples from the SEC of companies not considered resource extraction issuers include: (i) an issuer that manufactures drill bits or provides hardware to help issuers explore and extract resources and (ii) an issuer engaged by an operator to provide hydraulic fracturing or drilling services, to enable the operator to extract resources. We expect that many oilfield services will not be within scope, however, companies are encouraged to consider the range of their activities and services to determine whether they are engaged in the commercial development of oil, natural gas, or minerals (including exploration, extraction, processing, and export). See especially, the description of processing in Question 3.

2. Are any public companies exempt that would otherwise qualify as a “resource extraction issuer”?

- Yes. Smaller reporting companies and emerging growth companies are generally exempt from this disclosure, unless already subject to an alternative reporting regime (see Question 12 and Rule 13q-1(d)(3)).
- Foreign Private Issuers (FPIs) are not exempt, including Canadian companies that file under the Multijurisdictional Disclosure System (MJDS). MJDS issuers are likely able to take advantage of reporting under an alternative reporting regime.

3. What types of activities constitute “processing” for the purposes of the definition of a “resource extraction issuer”?

“Processing” includes, but is not limited to, “midstream activities such as removing liquid hydrocarbons from gas, removing impurities from natural gas prior to its transport through a pipeline, and upgrading bitumen or heavy oil, through the earlier of the point at which oil, gas, or gas liquids (natural or synthetic) are either sold to an unrelated third party or delivered to a main pipeline, a common carrier, or a marine terminal. It also includes the crushing or preparing of raw ore prior to the smelting phase. It does not include the downstream activities of refining or smelting.”

4. Which minerals fall within the scope of the new disclosure?

“Minerals” is defined broadly to include any material for which an issuer with mining operations would provide disclosure under subpart 1300 of Regulation S-K. The adopting release specifically refers to “gold, copper, coal, sand, or gravel,” as examples of minerals.

Disclosure Detail – Payments, Projects, and Government

5. What kinds of payments to a foreign government or the US federal government qualify for purposes of disclosure?

A “payment” is broadly defined and qualifies for disclosure if it: (i) is made to further the commercial development of oil, natural gas, or minerals, (ii) equals or exceeds \$100,000 (aggregating a series of related payments), and (iii) includes any of the following:

taxes, royalties, fees (including license fees), production entitlements (payments in-kind), bonuses, dividends, payments for infrastructure improvements, and community and social responsibility payments that are required by law or contract.

Taxes levied on corporate profits, corporate income, and production when such taxes are made to further the commercial development of oil, natural gas, or minerals, qualify as “payments,” but taxes levied on consumption, such as value added taxes, personal income taxes, or sales taxes do not. If a government levies a payment obligation, such as a tax or dividend, at the entity level rather than on a per project basis, a resource extraction issuer may disclose that payment at the entity level.

6. Which categories of information must be disclosed in the exhibit to Form SD, and how should the information be organized?

Form SD does not prescribe a particular presentation scheme for the information in the table. However, the following detail must be reflected in respect of the projects, payments, governments, and countries covered and must be in XBRL format (see, Form SD Item 2.01(a)(5)(i) – (xi)):

- The type and total amount of such payments, by payment type listed in Form SD (taxes, royalties, fees, etc.), **made for each project** of the company relating to the commercial development of oil, natural gas, or minerals;
- The type and total amount of such payments, by payment type listed in Form SD, for all **projects made to each government**;
- The **total amounts** of the payments, **by payment type** listed in Form SD;
- The currency used to make the payments;
- The fiscal year in which the payments were made;
- The **business segment** of the company that made the payments;
- The governments (including any foreign government or the US federal government) that received the payments and the country in which each such government is located. Note that subnational reporting (i.e., at the state, local, or tribal government level) is not required for payments made to the US federal government;
- The **project** of the resource extraction issuer to which the payments relate;
- The particular resource that is the subject of commercial development (when identifying the type of resource that is being commercially developed for purposes of identifying a project, the company must identify whether the resource is oil, natural gas, or a type of mineral (see, Endnote 1)).
- The method of extraction (the company must choose between well, open pit, or underground mining); and
- The major subnational political jurisdiction of the project. Onshore and offshore development of resources may not be treated as a single project.

7. How does a company determine which activities or contracts constitute a “project” for purposes of organizing and reflecting the required payment information?

A “project” is defined using three criteria: (i) the type of resource being commercially developed (whether the resource is oil, natural gas, or a type of mineral);¹ (ii) the method of extraction (well, open pit, or underground mining); and (iii) the major subnational political jurisdiction (combined country and

subdivision code provided in ISO 3166, if available) where the commercial development of the resource is taking place.

The company may treat all the activities within a major subnational political jurisdiction as a single project, but must describe each type of resource being commercially developed and each method of extraction used in the description of the project. The company may not combine as one project activities that cross the borders of a major subnational political jurisdiction.

8. Is payment information identified and presented on a cash or accrual basis and does the information provided by the company need to be audited?

The payment disclosure must be made on a cash basis, not on an accrual basis, and does not need to be audited.

Subsidiaries and Joint Venture Reporting

A resource extraction issuer must provide the disclosure for any applicable payment made during the fiscal year covered by the annual report and made by such **issuer**, a **subsidiary** of the resource extraction issuer, or **an entity under its control**.

9. How should an issuer provide information with respect to its joint ventures?

It depends. If one joint venture (JV) partner has control, that entity generally will have the disclosure obligation, assuming it files an annual report with the SEC. When no party has control, any *non-operator* member of a joint venture is generally not subject to the disclosure obligation with respect to its own reimbursements to the operator of the venture who makes payments to governments on behalf of the entire venture or arrangement. A non-operator partner in a JV is only required to report payments that it, as a resource extraction issuer, makes directly to governments.

10. How is “control” determined, and would an issuer need to disclose in accordance with its proportionate interest in a JV?

Control generally means that the resource extraction issuer consolidates an entity under the accounting principles applicable to the financial statements it files with the SEC pursuant to the Exchange Act.²

A resource extraction issuer that holds only a proportionate interest in an entity and does not control that entity is not required to disclose the proportionate amount of payments made by that entity.

11. Does a subsidiary that is a resource extraction issuer need to file its own Form SD when it is controlled by an entity that files a Form SD?

Yes, but the controlled entity need only file a truncated Form SD that identifies the name and date of the controlling entity’s Form SD submission. The controlling entity’s Form SD must, correspondingly, identify and reference the fact that it is submitting the form for a controlled entity. Payments made by wholly owned subsidiaries that are not registrants should be captured in the registrant parent entity’s Form SD filing.

Reporting Using a Qualifying Alternative Regime

12. If a company already provides similar disclosure in another jurisdiction, does it still need to file the new Form SD (Section 2)?

Yes. Form SD (Section 2) must be filed this year and going forward. However, the company may satisfy its disclosure obligations by attaching as an exhibit to Form SD a report complying with the requirements of an alternative jurisdiction, if such regime is deemed by the SEC to satisfy the transparency objectives of Section 13(q) of the Exchange Act.

The extraction payment disclosure requirements of the following countries and regional bodies qualify for reliance as alternative reporting regimes: **European Union,³ United Kingdom, Norway, and Canada.**

Notably, smaller reporting companies and emerging growth companies that are already subject to such an alternative reporting regime lose their filing exemption and must provide the report provided under such alternative regime as an exhibit to Form SD (see Question 2).

The option to use an alternative reporting regime is available to US issuers as well as FPIs.

Exemptions, Deferrals, and Transitional Relief

13. Does a company still have to provide the disclosure if it is subject to a pre-existing contractual obligation not to disclose such payments, or if the company is under a legal obligation (e.g., statute) in the relevant jurisdiction not to disclose payments made to a government for the commercial development of oil, natural gas, or minerals?

No. Disclosure is not required if doing so would violate the laws of the jurisdiction where the project is located or if the terms of a pre-existing contract prohibit the disclosure. However, a legal opinion from counsel must be furnished to the SEC (as an exhibit to the filing), in order to rely on an exemption claiming conflicts of law or conflict with a pre-existing contract.

14. Are there circumstances in which a company can delay/defer disclosure?

Yes. There is delayed reporting and transitional reporting relief for (i) payments related to exploratory activities, (ii) in respect of certain recently acquired companies, and (iii) companies that completed their initial public offering (IPO) in their last full fiscal year.

- **Payments related to exploratory activities** – disclosure of these payments may be delayed until the Form SD submitted for the fiscal year immediately following the fiscal year in which the payments were made.

Payments related to exploratory activities includes “all payments made as part of the process of (i) identifying areas that may warrant examination, or (ii) examining specific areas that are considered to have prospects of containing oil and gas reserves, or (iii) conducting a mineral exploration program, in each case limited to exploratory activities that were commenced prior to the commercial development (other than exploration) of the oil, natural gas, or minerals on the property, any adjacent property, or any property that is part of the same project.”

- **Recently acquired companies** – disclosure in respect of the acquired entity is deferred until the acquiring entity’s Form SD submitted for the fiscal year immediately following the effective date of the

acquisition *but only if* the acquired entity itself has not been obligated to file a Form SD (Section 2), or been subject to an approved alternative reporting regime, in such acquired entity's last full fiscal year.

- **Companies that recently completed their IPO** – A company that has completed its IPO is not required to file a Form SD (Section 2) until after it has completed a full fiscal year after its IPO. The Form SD (Section 2) would cover payments during that full fiscal year.

Liability and the Purpose of the New Disclosures

The Form SD (Section 2) disclosure on government payments is deemed furnished rather than filed under the Exchange Act, and, therefore, is not subject to liability under Section 18. In addition, there is no automatic incorporation by reference of information provided in Form SD (Section 2) into any filing under the Securities Act or the Exchange Act.

The new disclosure will, however, still be subject to the Exchange Act's general antifraud provisions.

Form SD (Section 2) implements Section 1504 of the Dodd-Frank Act of 2010, under which the US Congress directed the SEC to require disclosure of payments to governments by resource extraction issuers. The SEC has stated that the purpose of the new disclosures is not to provide material information to investors. Rather, the SEC has explained that "the principal goal of this Project-to-Government Payment Disclosure is to provide an informational tool that may help users of the information to hold various governments accountable for how those governments spend money received."

Preparatory Steps for Data Capture and Tagging

For 2023 data, companies should be gathering and categorizing their payments and project information, and should also be using this process to develop codes and tagging protocols for data gathering and reporting going forward.

The data capture process often requires collaboration across teams, including, for example, between the project teams and tax function, since companies must disclose payments for taxes levied on corporate profits, corporate income, and production, when such taxes are made to further the commercial development of oil, natural gas, or minerals.

Companies are advised to begin collecting the information well in advance of the September 26, 2024 deadline and to discuss with legal counsel any questions regarding the scope of information required.

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Endnotes

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- ¹ Instruction 2.01 of Form SD provides that, "a resource extraction issuer should identify synthetic oil obtained through processing tar sands, bitumen, or oil shales as 'oil' and should identify gas obtained from methane hydrates as 'natural gas.' Synthetic oil or gas obtained through processing of coal should be identified as 'coal.' Minerals must be identified by type, such as gold, copper, coal, sand, or gravel, but additional detail is not required."
 - ² A foreign private issuer that prepares financial statements according to a comprehensive set of accounting principles, other than U.S. GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board, and files with the Commission a reconciliation to U.S. GAAP should consider determining control using U.S. GAAP.
 - ³ In the case of member states of the European Union and European Economic Area, the SEC Order refers to Directive 2013/34/EU, as implemented into the national law of each such member state of the European Union or European Economic Area, as the case may be.