

A Long and Winding Road Ends for Resource Extraction Disclosure

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On February 14, 2017, President Trump approved a joint resolution of Congress that disapproves the SEC's rule requiring specific disclosures by resource extraction issuers, effectively repealing the rule. The rules required resource extraction issuers to disclose payments made to the U.S. federal government or foreign governments, including foreign subnational governments, for the commercial development of oil, natural gas or minerals. Compliance under the rules for resource extraction issuers would have begun for fiscal years ending on or after September 30, 2018.

The quick death of these rules are somewhat ironic given the time and energy taken to adopt them in the first place. Consider the timeline:

2010 - Dodd-Frank Wall Street Reform and Consumer Protection Act enacted, which mandated the implementation of the resource extraction rules

2012 - First set of rules adopted

2013 - Rules vacated by the U.S. District Court for the District of Columbia

2015 - After Oxfam America Inc. brought suit in an effort to expedite the long-delayed rules, a federal judge held that the SEC had "unlawfully withheld" agency action by failing to promulgate final rules on this topic

2015 - SEC re-proposes rules

2016 - SEC adopts final rules

2017 - Rules disapproved under the Congressional Review Act

While the mandate to implement these rules still exists under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Congressional Review Act bars the enactment of a new rule that is substantially in the same form as the repealed rule.

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These rules, like the conflict minerals rules, attempted to further social policy through public company disclosure requirements. The aim here was to promote and support “global efforts to improve transparency in the extractive industries . . . to help combat global corruption and empower citizens of resource-rich countries to hold their governments accountable for the wealth generated by those resources.” While the goal is a worthy one, it was unclear whether the disclosure required by these rules would effectively and efficiently advance that goal. Congress and the White House were concerned with the regulatory burden and competitive disadvantage that these rules imposed. The White House’s Statement of Administration Policy noted that the “rule would impose unreasonable compliance costs on American energy companies” and could put American resource extraction issuers at a “competitive disadvantage in cases where their foreign competitors are not subject to similar rules.”

Reducing the regulatory burden on public companies is both useful and necessary. However, there is one unfortunate aspect of this repeal. The rules provided for alternative reporting, so that issuers could comply with SEC disclosure obligations with a report complying with the requirements of an alternative reporting regime, such as Canada’s Extractive Sector Transparency Measures Act and the EU Accounting Directive and the EU Transparency Directive.

For companies with operations in multiple jurisdictions, the recognition of an alternative reporting regime was a welcome attempt to address concerns of duplicative reporting requirements and implement mandated rules in a more efficient and cost-effective way for many issuers. This allowance was similar in concept to the Canadian Multi-Jurisdictional Disclosure System (the MJDS), a widely used alternative reporting regime for certain types of Canadian issuers. Successful implementation and use under an alternative reporting regime under the repealed rules by a wide variety of resource extraction issuers might have nudged the SEC to consider broader use of alternative reporting systems.

On the whole, the repeal of resource extraction issuers is a positive development. Now if we could just eliminate the conflict minerals disclosure rules and the CEO pay ratio rules...