Federal Government introduces legislation to mandate disclosure of payments by extractive industry participants

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The Government of Canada yesterday **introduced legislation** to implement the ***Extractive Sector Transparency Measures Act***, following through on the **announcement by Prime Minister Stephen Harper in June 2013** that Canada would be establishing new mandatory reporting standards for extractive companies directed at payments made to foreign and domestic governments at all levels, including Aboriginal groups. The Government of Canada has stated that the legislation is intended to be similar to that being implemented in the European Union, and is anticipated to be similar to that expected to be proposed by the United States **Securities and Exchange Commission** by March 2015.

It is also intended that the Canadian legislation be implemented in a manner that allows for reporting requirements that are uniform across these jurisdictions so as to reduce associated administrative costs for affected companies.

Given that the United States has thus far not introduced comparable legislation, it will be interesting to monitor whether the ultimate orientation and implementation of the Canadian legislation is modified to align with the initiative south of the border. While the SEC introduced **a rule** under Section 1504 of the Dodd-Frank Act in 2012 to require disclosure of payments by resource extraction issuers, the U.S. District Court for the District of Columbia, in ***American Petroleum Institute v. SEC***, concluded, among other things, that the SEC misinterpreted Dodd-Frank by forcing public disclosure of detailed data on payments, and failed to consider associated competitive effects. Following the ruling the SEC has taken no further regulatory action, although the SEC has indicated that it would issue a new proposal under Section 1504 by March 2015.

Who is required to report?

An entity engaged in, or controlling other entities engaged in, the commercial development of oil, gas or minerals in Canada or elsewhere, including exploration and extraction and the acquisition or holding of permits, licenses, leases or other authorizations for such purpose and that either:

1. is listed on a stock exchange in Canada; or
2. has a place of business, does business or has assets in Canada and, for at least one of its two most recent financial years, meets at least two of the three thresholds below:

- the company has at least $20 million in assets (all currency Canadian);
- the company has at least $40 million in revenue; and/or
- the company employs an average of at least 250 employees.

What is Reported?

The proposed legislation would require affected entities to report any payments made in relation to the commercial development of oil, gas or minerals during a financial year that exceed either the amount prescribed by regulation for a particular category (and presently unknown pending the creation of such regulations) or, if no amount is prescribed, $100,000, to all levels of government, domestically and internationally (including Aboriginal entities), of the following nature and whether monetary or "in kind":

1. taxes, other than consumption taxes and personal income taxes;
2. royalties;
3. fees, including rental fees, entry fees and regulatory charges as well as fees or other consideration for licences, permits or concessions;
4. production entitlements;
5. bonuses, including signature, discovery and production bonuses;
6. dividends, other than dividends paid as ordinary shareholders;
7. infrastructure improvements payments; or
8. as otherwise prescribed.

Reporting of payments is anticipated to be done on a project-level basis, the parameters of which are likely to be defined by a company according to its particular industry and business context. All information in reports would have to be attested as to being true, accurate and complete by an independent auditor or accountant.

A number of commentators during the consultation period in respect of the proposed legislation raised concerns with both the breadth of entities likely to be required to report and the types of payments that would be captured. For instance, the Canadian Association of Petroleum Producers (CAPP) noted the inconsistency between the professed intention of the proposed legislation to only capture "medium and large private extractive companies" and a threshold asset level of only CDN $20 million necessary to trigger disclosure obligations.

Further, CAPP noted in respect of the proposed inclusion of payments to Aboriginal entities, that the mandatory reporting obligation might significantly undermine the trust and goodwill developed between industry and Aboriginal entities over time at a particularly sensitive juncture when considering the number of significant infrastructure and other projects currently proposed and vital to ensure export market diversification for Canadian energy resources.

It is perhaps not surprising then, that since the announcement of proposed standards, the Government of Canada indicated an intention to delay by two years the requirement to report payments to Aboriginal entities; which delay has been embodied in the draft legislation. Further, and in light of the fact that the European Union's Transparency Directive does not address payments to Aboriginal entities at all, such delay is in keeping with the goal of harmonization. It remains to be seen whether other concerns voiced to the Government of Canada during the consultative process will have any further impact on the implementing regulations that are ultimately created.

The Reporting Process

It is likely that a common reporting template will ultimately be developed for use in Canada, the European Union and the United States. The Government of Canada is currently working with the other jurisdictions to develop this template and ensure similarity so as to reduce administrative costs for affected companies.

Alternatively, the proposed legislation recognizes that the reporting obligations imposed by another jurisdiction may achieve the intended purposes of the proposed legislation and, as a result, reports

utilized in that other jurisdiction may also be provided to the applicable Minister in satisfaction of Canadian legal requirements.

It is anticipated that reports, in addition to being filed with the applicable Minister within 150 days of the applicable financial year end of an entity, would be posted by affected companies annually and on their corporate websites in XBRL. All or a portion of the information in the reports would be available for free and unrestricted use by the public. After a report had been posted, it is expected that the company would be required to issue a public notice stating that it had complied with its obligations and notify the Government of Canada of its compliance.

Compliance

For the purposes of verifying compliance, the Government of Canada may by order require the provision of any information and documents, including a list of projects for the commercial development of oil, gas or minerals in which the entity has an interest and the nature of that interest, an explanation of the treatment of the payment by the entity, a statement of any policies that the entity has implemented for the purpose of compliance with the proposed legislation and the results of an audit of its report conducted in accordance with GAAS by an independent auditor.

In addition, a person empowered under the proposed legislation will be permitted, for the purpose of verifying compliance with the proposed legislation and with the reasonable assistance of the owner or person in charge, to enter any place reasonably believed to contain any document relating to the administration of the proposed legislation or to which the proposed legislation applies and examine anything therein located, use any means of communication or computer system, examine and reproduce data, copy and photograph, direct operations, remove anything for further examination and prohibit or limit access to all or a portion of the place.

In the event of non-compliance with the reporting requirements, the Government of Canada could impose corrective measures. In addition, any person or entity:

1. failing to comply with the reporting standards or any corrective measures;
2. knowingly making false or misleading statements or knowingly providing false or misleading information; or
3. structuring payments or any other financial obligations or gifts, whether monetary or in kind, that relate to its commercial development of oil, gas or minerals, with the intention of avoiding the requirement to report,

would be liable to a fine of not more than $250,000.

Any officer, director or agent or mandatary of any such person or entity that directed, authorized, assented to or acquiesced in or participated in its commission is a party to and guilty of the offence and liable on conviction to the punishment regardless of whether the person or entity has been prosecuted or convicted.

Exemptions

The Government of Canada has acknowledged that there may be situations in which the proposed legislation requires the disclosure of information that is prohibited by another country's laws; however no exemptions have been granted under the proposed legislation. Both the European Union and the United States have considered this issue as well, and the European Union has confirmed that no exemptions are granted under its equivalent reporting regime.

In the United States the SEC similarly sought to exclude exemptions. However, by virtue of that exclusion, among other things, a District Court invalidated the SEC rule entirely. The SEC has not yet responded to

the ruling, and their response may affect the decision to exclude exemptions from the proposed legislation when regulations are ultimately brought into force.