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Canadian Government Tables Legislation Mandating Disclosure of Payments by Extractive Sector Companies

Government

Canada’s federal government recently tabled its newly developed Extractive Sector Transparency Measures Act (the Act), which requires that companies involved in the commercial development of oil, gas and minerals publicly disclose payments that they make to foreign and domestic government entities. While the Act was introduced in the House of Commons in October 2014, the Canadian government has committed to bring it into force by April 1, 2015.

Development of the Act

The Act is part of a larger international movement toward increased disclosure by companies involved in the extractive industry. Similar legislation has already been passed in the European Union and the United States, with both working through the implementation process.

In 2013, the EU approved its Transparency and Accounting Directives (the Directives), which seek to impose mandatory reporting requirements on oil, gas, mining and forestry companies. While countries belonging to the EU have until 2015 to incorporate the Directives into their national legislative frameworks, certain EU members, such as the United Kingdom, France and Germany, have already enacted draft legislation, with the United Kingdom tabling mandatory disclosure legislation on Monday, October 28, 2014.

The American Dodd-Frank Wall Street Reform and Consumer Protection Act similarly requires that “resource extraction issuers” generate annual reports outlining the payments that they have made to

domestic and foreign governments in relation to the commercial development of oil, natural gas and minerals. The US Securities and Exchange Commission is charged with creating rules to implement these disclosure requirements. While the SEC's initial attempt to mandate disclosure pursuant to the Act was vacated by the US District Court for the District of Columbia on July 2, 2013,* the SEC is expected to release new rules pursuant to the Dodd-Frank Act in March 2015.

* In *American Petroleum Institute et al. v Securities and Exchange Commission*, No. 12-1668, the court found that the SEC had misinterpreted the Act as specifically mandating public disclosure of company reports. It also found that the SEC's decision not to include exemptions to the Act's provisions was arbitrary and capricious.

Canada's new Act was generated in the context of these international influences and through stakeholder consultations that have taken place over the past year. The government has indicated that it intends to keep Canadian legislative requirements aligned with those of the United States and the EU. Norton Rose Fulbright LLP provided legal updates in June 2013 and January 2014 summarizing the Resource Revenue Transparency Working Group's recommendations for Canada's new disclosure requirements, which were considered by the government in the creation of this new legislation.

Who must disclose?

The Act applies to a range of companies involved in the exploration and extraction of oil, gas and minerals as well as to companies acquiring or holding rights to these resources. The Act will impose annual reporting obligations on:

1. entities listed on a stock exchange in Canada,
2. entities that have a place of business in Canada, do business in Canada or have assets in Canada and that, based on their consolidated financial statements, meet at least two of the following conditions for at least one of their two most recent financial years:
    1. they have at least $20 million in assets;
    2. they have generated at least $40 million in revenue; and/or
    3. they employ an average of at least 250 employees and
3. any other prescribed entities.

These companies' subsidiaries, and entities falling under their direct or indirect control, will also be subject to the Act. Section 23(c) of the Act allows the Governor-in-Council to define the meaning of "control" by regulation.

What must be disclosed?

When the Act comes into force, the companies that fit the criteria outlined above will be obligated to publicly report the payments they make to all levels of domestic and foreign governments. They will also be required to disclose payments made to bodies established by two or more governments and entities established to exercise government functions such as trusts, boards, commissions and corporations. However, payments made to aboriginal governments in Canada will not be subject to the Act until two years after the legislation comes into effect.

The Canadian government has specifically outlined certain payment categories that must be publicly disclosed. These include:

- taxes, other than consumption taxes and personal income taxes,
- royalties,
- fees, including rental fees, entry fees, regulatory charges and fees or other considerations for licenses, permits or concessions,
- production entitlements,
- bonuses, including signature, discovery and production bonuses,
- dividends other than dividends paid as ordinary shareholders,
- infrastructure improvement payments, and
- any other prescribed category of payment.

The Act currently states that absent any specific threshold prescribed by regulation, companies will be required to disclose only single or cumulative payments amounting to $100,000 or more. This mirrors the EU Directives threshold of €100,000. The Act stipulates that companies must disclose the payments they make to government entities, regardless whether they are monetary or in kind.

While the Act does not currently include project-level payments in its mandatory reporting regime, section 9(5) does provide that project-level disclosure, under the form and manner of reporting, may be required by the minister. We expect an administrative guidance document and the regulations promulgated pursuant to the Act to clarify whether disclosure will be required at the project level.

What information will be made public?

The Act requires that its annual disclosure reports be made available to the public; however, it does not specifically stipulate how or what information will be publicized. The Act provides that these details will be determined through regulations enacted by the minister and Governor-in-Council. We also understand an administrative guidance document will be released by the minister outlining many of the procedural requirements.

Exemptions

Throughout the consultation process, stakeholders raised concerns that Canada's new disclosure obligations could conflict with another jurisdiction's privacy or confidentiality requirements. Although the Act does not list any exceptions to its mandatory reporting requirements, it does allow for future exemptions to be added by regulation.

As noted above, the US District Court for the District of Columbia vacated the SEC's initial rules made pursuant to the Dodd-Frank Act in part because the SEC's decision to deny exemptions to the American disclosure requirements was "arbitrary and capricious."

Will any other reporting regimes be considered equivalent?

Canada is one of several jurisdictions enacting legislation requiring disclosure by companies involved in the extractive industry. Section 10 of the Act allows the minister to determine if another jurisdiction's reporting requirements are an appropriate substitute for those mandated by the Act. This equivalency mechanism will minimize the administrative costs associated with the Act's reporting requirements. Companies operating in multiple markets will be able to substitute one jurisdiction's public disclosure requirements for another, instead of generating entirely different reports for each jurisdiction in which they operate.

How will the Act be enforced?

The minister has broad investigative powers that he or she may exercise to ensure compliance with the Act. For example, once it is in force, the Act will allow the minister to order audits of company reports and to conduct inspections of company offices.

The Act also allows the minister to issue corrective orders to ensure that companies subject to the Act are taking steps to comply with its provisions.

The Act will impose fines of up to $250,000 on companies that fail to adhere to its reporting requirements, knowingly make false or misleading statements in their disclosure reports or structure their payments with the intention of avoiding disclosure under the Act.

Although the fines that may be imposed pursuant to this Act are less than those that may be imposed by other federal legislation, it is still important to note that this fine may be imposed per day that the offense is committed or continued. As companies could be charged with multiple offenses arising out of a single event that continues over the course of multiple days, the Act may result in cumulative fines amounting to more than $250,000.

When will the Act come into force?

The federal government has indicated that the Act will be considered by Parliament this winter and that its regulations will be developed in early 2015. The government plans to have this new legislation in force by April 1, 2015, with companies first issuing reports for the financial year following its enactment. As the Act requires that companies submit their reports no later than 150 days after the end of their financial year, companies with fiscal years beginning in May 2015 may be required to generate their first reports by 2016. The Canadian reporting template is expected to mirror that of the United Kingdom, which will likely be released in the coming weeks.

We will continue to monitor both the Act’s progression through Parliament and the availability of draft templates in order to provide updates regarding the status of these new reporting requirements.

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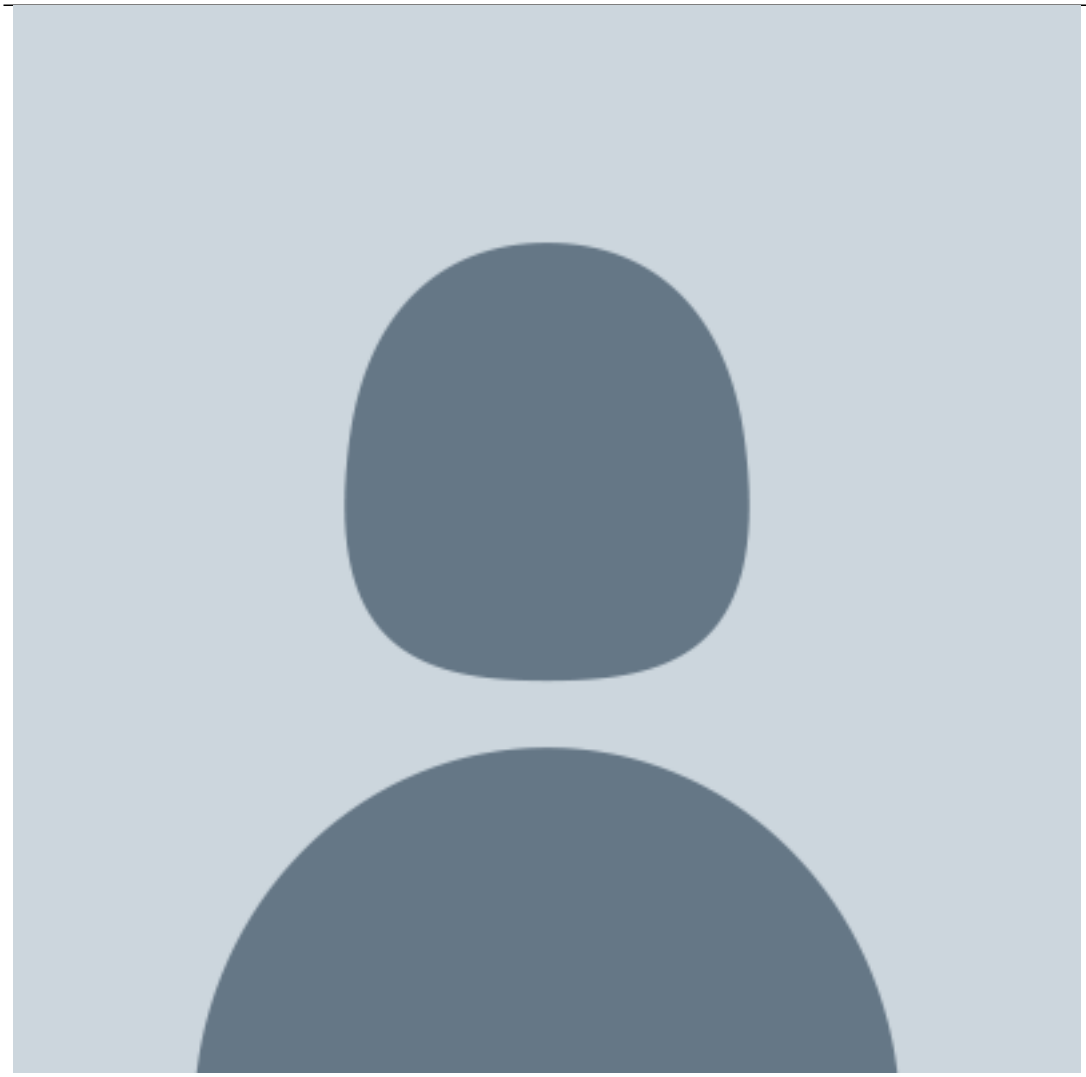

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