

Mining and Natural Resources Law

June 3, 2015

Mandatory Payment Disclosure Rules Now in Force

The Government of Canada recently enacted the *Extractive Sector Transparency Measures Act* (the “**Act**”) which imposes new mandatory reporting standards for payments made by Canadian extractive companies (mining, oil and gas) to foreign and domestic governments, including Aboriginal entities. The Act solidifies Canada’s international commitment to deter and detect corruption and is intended to align the Canadian reporting requirements with those of the U.S. and EU.

The Act was introduced into the House of Commons in October, 2014 and received royal assent on December 16, 2014. The Act came into force on June 1, 2015.

Overview of the Act

Applicable Entities

The Act applies to any entity, including controlling entities, engaged in the commercial development of oil, gas or minerals. The commercial development of oil, gas or minerals includes exploration, extraction and the acquisition or holding of a permit, licence or lease or any other authorization to carry out the exploration or extraction of oil, gas or minerals. The entity must also:

- (a) be listed on a stock exchange in Canada; or
- (b) have a place of business in Canada, do business in Canada or have assets in Canada and, for at least one of its two most recent financial years meet at least two of the following conditions:

- (i) have at least \$20 million in assets;
- (ii) have generated at least \$40 million in revenue;
- (iii) employ an average of at least 250 employees.

Payments to be Reported

Each applicable entity must report all payments to foreign and domestic governments, including Aboriginal groups, made in relation to the commercial development of oil, gas or minerals that are at least in the prescribed amount for a particular category of payment or, where no amount is prescribed, \$100,000.

Such payments include:

- (a) taxes, other than consumption taxes and personal income taxes;
- (b) royalties;
- (c) fees, including rental fees, entry fees and regulatory charges as well as fees or other consideration for licences, permits or concessions;
- (d) production entitlements;
- (e) bonuses, including signature, discover and production bonuses;
- (f) dividends other than dividends paid as ordinary shareholders;
- (g) infrastructure improvement payments; or
- (h) any other prescribed category of payment.

Reporting Requirements

From the start of the first financial year following June 1, 2015, the entity must: (i) provide a report in prescribed form to the Minister of Natural Resources (the “**Minister**”) no later than 150 days after the end of each of the entity’s financial years; and (ii) publicize the report. Where the reporting requirements of another jurisdiction achieve the purposes of the

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reporting requirements under the Act, the Minister may determine that the reports used in other jurisdictions are acceptable substitutes.

Penalties for Non-Compliance

A person or entity that fails to comply with the reporting standards, knowingly makes false or misleading statements, or structures payments in such a way to avoid the reporting requirements, is subject to a fine of not more than \$250,000.

Further, any officer, director, agent or mandatary of such an entity that directed, authorized, assented to, acquiesced in or participated in the commission of the offence, is a party to and guilty of the offence and liable on conviction to the punishment.

Responses to Consultation Process

The Government of Canada has attempted to address a number of issues that were raised during the consultation process, including the following:

- *Delay of Application to Aboriginal Entities.* The Act's applicability to payments to Aboriginal entities will be delayed until June 1, 2017. There had been concerns that the disclosure of payments and benefits to Aboriginal entities may hamper future negotiations between industry and Aboriginal groups. The two year delay is consistent with a number of comments raised during the consultation process.
- *Broad Definition of Payees.* "Payees" to whom payments must be reported also includes boards, commissions, corporations, trusts or other bodies or authorities that perform a function for a government.
- *No Exemptions From Disclosure in Case of Conflict.* The Act does not include any exemptions from disclosure in the case of conflict with statutory or contractual confidentiality or other restrictions. This has been an issue of serious concern of industry.

- *Breakdown of Payments on Project-Level Basis.* Reporting will require payments to be broken down on a project-level basis. The Government of Canada will provide a definition of "project" in an administrative document.
- *Public Access to Reports.* Reports are required to be accessible to the public by, for example, posting the reports on the entity's corporate website. The Minister will specify an alternative approach should an entity not have a website.
- *Records Retention.* An entity must keep records of its payments for a period of seven years and make its reports available to the public for a period of five years.
- *Enforcement Authority.* The Act includes authorities for the Minister to enforce compliance, including requesting an audit from a reporting entity and inspecting records relating to payments.

The Act will be administered by Natural Resources Canada, rather than the provincial securities regulators. We expect that Natural Resources Canada will provide further clarification on the Act and its application in proposed regulations or an administrative guidance document. We also note that the initial transparency effort in the U.S. was vacated by the United States District for the District of Columbia in July, 2013. The Securities and Exchange Commission has indicated that it may take until Spring 2016 to propose a new rule.

Please contact any member of our Mining and Natural Resources Group for further information on these new disclosure rules.