

## Mining and Natural Resources Law

October 31, 2014

### New Payment Disclosure Rules for Extractive Companies

The Government of Canada recently introduced the *Extractive Sector Transparency Measures Act* which imposes reporting standards for payments made by Canadian extractive companies (mining/oil and gas) to foreign and domestic governments including to Aboriginal entities. This Act will solidify Canada's international commitment to deter and detect corruption and is intended to align Canadian reporting requirements with those of the United States and the European Union. The Act is expected to come into force by June 2015.

#### Overview

##### *Entities*

The Act applies to any entity, including controlling entities, engaged in the commercial development of oil, gas or minerals. The "commercial development" 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. For the Act to apply, 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:
  - (i) have at least \$20 million in assets;
  - (ii) have generated at least \$40 million in revenue; or
  - (iii) employed an average of at least 250 employees.

##### *Payments to be Reported*

Each entity that is subject to the Act must report all payments to foreign and domestic governments, including to Aboriginal entities, 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*

The entity must report to the applicable Minister no later than 150 days after the end of each of financial year and publicize its report. Where the reporting requirements of another jurisdiction achieve the purposes of the reporting requirements under the Act, the Minister may determine that the reports used in other jurisdictions are acceptable substitutes.

# Goodmans<sup>LLP</sup> Update

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## *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 as 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.

A number of issues will require clarification in the coming months prior to finalization of the Act including:

- The applicability of the Act to payments to Aboriginal entities will be delayed for a two-year period. Concerns have been raised that the disclosure of payments and benefits to Aboriginal entities might hamper future negotiations between industry and Aboriginal groups. The two year delay is consistent with a number of comments raised during the consultation process.
- The initial transparency effort in the U.S. was vacated by the United States District for the District of Columbia in July of 2013. The Securities and

Exchange Commission announced that it expects to issue new rules by March 2015. If these new rules differ substantively from the Act, the Government of Canada may revisit this legislation.

- The Act does not provide any exemptions from disclosure including in the case of conflict with statutory or contractual confidentiality or other restrictions. This is an issue of serious concern for industry and could be addressed through regulations under the Act.
- The Act does not currently provide for project-level disclosure but does provide that the Minister may require such reporting. Project-level reporting has been a key issue in the transparency regime in other jurisdictions.
- The Act provides that the information must be made public, but does not say how or what information will be publicized.

We expect the Government of Canada to provide further clarification on some of these issues in proposed regulations or an administrative guidance document before the Act comes in force.

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