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Canada Joins the Global Push towards Mandating Disclosure of Payments to Governments

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Background

On June 12, 2013, the Canadian government announced its intention to introduce new legislation requiring the disclosure of payments made by Canadian extractive resource companies to domestic and foreign governments. While the United States and European Union have both already taken steps towards implementing mandatory payment reporting requirements for their mining, oil, and gas companies, Canada has now also joined the global movement towards transparency in this regard. In addition to leveling the playing field for extractive resource companies, this initiative is aimed at aligning Canadian policy with the standards of other G-8 countries and reducing corruption within the extractive resource industry. This initiative seems to be consistent with Canada's increased enforcement of its anti-corruption legislation, including the *Corruption of Foreign Public Officials Act* ("CFPOA"). In the past two years, there have been two significant convictions under the CFPOA resulting in penalties in the range of $10 million for each company.

Reporting Regime

Although Canada does not currently have a mandatory reporting regime in place, it has supported the transparency movement since 2008 through the Extractive Industries Transparency Initiative ("EITI"). The EITI has established a disclosure framework in which 25 countries have agreed to voluntarily disclose payments to governments. While some countries have expressed their intention to implement the EITI (in addition to their own transparency requirements), Canada has chosen to undertake its own separate transparency regime.

Shortly after the Canadian government had announced its payment disclosure initiative in June 2013, the Resource Revenue Transparency Working Group (the "Working Group") released a recommended framework which includes proposed legislative disclosure requirements for Canadian mining companies (the "Draft Recommendations").[1] The Working Group was formed in 2012 by several organizations including the Mining Association of Canada, the Prospectors & Developers Association of Canada, Publish What You Pay Canada, and the Revenue Watch Institute. The objective of the Working Group has been to develop a reporting framework for Canadian extractive resource companies in order to establish greater transparency, both within Canada and abroad. The Draft Recommendations borrow heavily from the legislation which has been implemented in the United States, but have also drawn on the mandatory Directives issued by the European Union relating to transparency.[2] The Working Group expects to finalize the framework in November 2013.

[1] The Resource Revenue Transparency Working Group, *Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments*, online: Publish What You Pay <www.pwyp.ca>.
[2] On June 12, 2013, the European Union voted in favour of legislative reporting requirements for oil, gas, mining and forestry companies. Pursuant to mandatory European Union Directive, European companies will be legally required to publish any payments exceeding

In their Draft Recommendations, the Working Group has proposed mandated disclosure for payments made by "covered companies", which include the company itself, its subsidiaries and other entities under its control. According to the Draft Recommendations, various forms of payments must be disclosed, including profit taxes, royalties, fees, production entitlements, bonuses, dividends, infrastructure payments as required by law or contract, transportation and terminal operation fees, as well as fines and penalties paid to government. The Draft Recommendations also propose the inclusion of two reporting thresholds to accommodate both large and small issuers. The recommended threshold for issuers listed on the TSX is $100,000, while a lesser threshold of $10,000 is proposed for TSX Venture Issuers.

U.S. Developments

As many Canadian mining companies are listed both in Canada and the United States, they are already subject to the mandatory reporting requirements relating to payments made by resource extractive issuers to governments.

In August 2012, the United States Securities and Exchange Commission ("SEC") adopted new reporting rules under the *Dodd-Frank Wall Street Reform and Consumer Protection Act*[3] ("Dodd-Frank Act") that require resource extractive issuers to file an annual report disclosing payments to domestic and foreign governments for the commercial development of oil, gas and minerals (e.g. taxes, royalties, license fees, and payments for infrastructure) (the "Disclosure Rule"). Since the legislation has been implemented, the SEC has interpreted the Disclosure Rule to mean that resource extractive issuers are required to make public disclosures of such payments. This interpretation was challenged in the July 2, 2013 decision of *American Petroleum Institute et al., v. Securities Exchange Commission* [4] where a U.S. District Court for the District of Columbia vacated the Disclosure Rule and remanded it back to the SEC for further proceedings. Ultimately, the District Court found that the SEC had wrongly interpreted the Disclosure Rule to mean that annual reports must in all cases be publicly disclosed as filed by the U.S. reporting issuer. More specifically, the District Court found that the Disclosure Rule permits the SEC to consider what portion of the payment disclosure filed should be made public, and that the SEC should have exercised its discretion in making that determination when adopting Section 1504 of the Dodd-Frank Act. The District Court also held that the SEC had erred in denying exemptions for countries with laws prohibiting payment disclosure. For the time being, the implications of the Disclosure Rule for U.S. reporting issuers following the District Court's ruling are uncertain. However, the SEC has indicated that it does not intend to appeal the ruling and will redraft the Disclosure Rule to address the District Court's concerns.

Looking Ahead

The legislative framework governing a prospective reporting regime in Canada will undoubtedly be influenced by a variety of factors over the coming months. It is expected that Canadian government officials, as well as the Working Group, will closely observe the ongoing developments in the United

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€100,000 that are made to governments at home and abroad; See European Parliament legislative resolution of June 12, 2013, on the proposal for a directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC.

[3] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, 124 Stat 1376 (2010) (to be codified at 12 USC §1504).

[4] *American Petroleum Institute et al., v. Securities Exchange Commission,* Case No. 1:12-cv-01668 (D.D.C. July 2, 2013).

States to inform its implementation of a legislative and regulatory regime and to ensure that Canada does not encounter similar challenges. In addition, the Canadian government has indicated that it intends to consult with the provinces and territories, First Nations and aboriginal groups, as well as industry and civil organizations to develop a reporting regime. While momentum for this initiative appears to be well underway, the implementation and enforcement of such a framework is still unclear, particularly with respect to whether a provincial approach will ultimately be adopted as opposed to a federal reporting regime. It remains to be seen how these types of considerations will be addressed by the Canadian government.

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