

Canada Announces New Initiative for Disclosure of Payments to Governments

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On June 12, 2013, Canadian Prime Minister Stephen Harper announced the introduction of a new transparency initiative in Canada that will require Canadian companies in the extractive industries, including mining, oil and gas, to disclose their payments made to domestic and foreign governments.

This Canadian initiative follows similar measures being adopted in the European Union and the United States, both of whom are already implementing mandatory payment reporting requirements for their mining, oil, and gas companies.

U.S. Dodd Frank Payment Disclosures

The U.S. *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd Frank),¹ requires oil, gas and mining companies listed on U.S. stock exchanges to disclose payments made to host governments. Companies engaged in the commercial development of oil, natural gas and minerals are required to include in their annual reports information relating to any payment made by the company, a subsidiary or an entity under the company's control to the U.S. federal government or a foreign government for the purpose of such commercial development. According to the U.S. Security and Exchange Commission (SEC), the reporting requirement affects more than 1,100 companies, including around 90 percent of internationally operating oil companies.

On August 22, 2012, the SEC issued its Final Rule implementing the requirement for oil, gas and mining companies to disclose payments made to governments.² This, however, has recently come under attack in a challenge brought before the U.S. Court of Appeals.

On April 26, 2013, the Appeals Court held that such challenge must first be heard by a lower court, as it ruled that the SEC disclosure regulation comes under a section of law requiring review by the U.S. District Court which has jurisdiction over many of the SEC's rules.³ This

ruling could create substantial uncertainty for companies that are required to begin complying with the rules by early next year.

European Union Initiatives

On June 12, 2013, in a similar vein as the new Canadian initiative, and in line with the disclosure rules adopted under Dodd-Frank in the United States, the EU Parliament voted in favor of legislation compelling oil, gas and mining companies to publish their payments made to governments and to release information on their earnings in each country.⁴ Notably, unlike the Dodd Frank reporting system, the EU regime also applies to the forestry sector.

Under the new EU regime, European companies will be obliged to report payments of more than €100,000 made to the government in the country in which they operate, including taxes levied on their income, production or profits, royalties and license fees. The legislation specifies that companies must disclose the payments they make at the project level as opposed to simply at the government level.

Next Steps for Canada

These are still early days. The Canadian government has indicated that it intends to consult with the provinces and territories, First Nations and aboriginal groups, and industry and civil organizations as it begins to formulate and implement its reporting regime. Specific details as to how the reporting regime will be enforced, and by whom, as well as potential penalties for non-compliance still need to be addressed. Uncertainty remains as to whether the proposed regime will be implemented through provincial securities regulation or under a federal reporting regime applicable across the entire extractive sector. It will be important to ensure that the new Canadian regime is sufficiently similar to those of other jurisdictions, including the United States and EU, so that Canadian companies do not face inconsistent reporting requirements that complicate their compliance efforts across multiple jurisdictions.

NGOs and industry organizations have already been formulating possible rules for a disclosure regime. For example, the Canadian Extractive Resource Revenue Transparency Working Group, comprised of the Prospectors and Developers Association of Canada, the Mining Association of Canada, Publish What You Pay - Canada, and the Revenue Watch Institute, has been working on developing a draft reporting framework since September 2012.⁵

Prime Minister Harper has advised that this new regime has been and will be subject to additional consultations and claims that this is the direction this government is determined to pursue since this information is essential for citizens to hold their governments accountable. Even though the specifics have yet to be ironed out, Harper has stated that this initiative is crucial to "enhance transparency and accountability around material payments by extractive companies to all levels of governments domestically and internationally, including taxes, license fees and other receipts."

The Broader Context

This initiative goes hand-in-hand 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 \$10 million range for each company. Further details on these cases and their implication for Canadian companies are set out in *A Closer Look at the Griffiths Energy Case: Lessons and Insights on Canadian Anti-Corruption Enforcement* and [A Deeper Dive Into Canada's First Significant Foreign Bribery Case: Niko Resources Ltd.](#)

New requirements for Canadian companies in the extractive industries to report all payments to governments, in addition to imposing substantial compliance burdens, can also be expected to increase scrutiny and thereby significantly impact anti-corruption enforcement in Canada.

¹ [Dodd-Frank Wall Street Reform and Consumer Protection Act](#)

² See [SEC Adopts Rules Requiring Payment Disclosures by Resource Extraction Issuers](#) (August 22, 2012).

The SEC recently released additional guidance on this rule: see [Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions: Disclosure of Payments by Resource Extraction Issuers](#) (May 30, 2013).

³ See [American Petroleum Institute v. U.S. Securities and Exchange Commission, 12-1398](#) (April 26, 2013)

⁴ See [European Parliament / News: "Oil, gas, mineral and logging firms obliged to disclose payments to governments](#) (June 12, 2013)

⁵ See [Background Q&A: Canadian Extractive Resource Revenue Transparency Working Group](#) (September 6, 2012)
