

AN OVERVIEW OF VARIOUS PROPOSED AND EXISTING TRANSPARENCY INITIATIVES IN THE EXTRACTIVE INDUSTRIES BY EDEN M. OLIVER, PARTNER, BENNETT JONES LLP, TORONTO, CANADA

The various categories of payments that may be captured by the anticipated legislation, as well as which levels of government may trigger disclosure requirements for the various categories of payments, are noted below. See the links highlighted in blue. In anticipation of the Canadian bill expected to be presented shortly, the following are indicative:

1. The Government of Canada's Consultation Paper on the Establishment of Mandatory Reporting Standards for the Extractive Sector – May 2014

According to the Consultation Paper, it is expected that the following categories of payments will need to be reported:

- taxes levied on the income, production or profits of extractive companies, excluding consumption taxes;
- royalty payments;
- fees, including entry fees, license fees, rental fees and other considerations for licenses and/or concessions;
- production entitlements, including payments made in-kind;
- bonuses (e.g., signature, discovery, and production bonuses);
- dividends paid in place of production entitlements or royalty payments (note that this excludes dividends paid to governments as regular shareholders); and
- payments made for improvements in infrastructure.

In addition, the Consultation Paper states that payments must be disclosed if they are "made to all levels of government...both domestically and abroad."

Natural Resources Canada, "Establishing Mandatory Reporting Standards for the Extractive Sector Consultation Paper" (Spring 2014), at 3, online at: http://data.gc.ca/sites/default/files/consultation_paper_spring_2014.pdf.

2. The US Securities and Exchange Commission's (SEC) final rules made pursuant to section 1504 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*– August 22, 2012

In 2012, the SEC's Final Rules were adopted pursuant to Section 1504 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*. The SEC's Final Rules dealt with the disclosure of payments by resource extraction issuers. While the SEC's Final Rules were ultimately struck down by a US District Court judge, they may provide some indication of the categories of payments that may be captured if, and when, resource revenue transparency legislation is passed in the US and Canada. Similar to the Consultation Paper discussed above, the SEC's Final Rules defined the term "payment" to include:

- taxes;
- royalties;
- fees;
- production entitlements;
- bonuses;
- dividends; and
- payments for infrastructure improvements.

However, distinct from the Consultation Paper, the SEC's Final Rules do not apply to payments made to any US government entities other than the US Federal Government. The SEC's Final Rules also provide a definition for "foreign government", which includes: "a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government." This would include "a foreign national government as well as a foreign sub-national government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government."

Securities and Exchange Commission, "Disclosure of Payments by Resource Extraction Issuers: Final Rule" (22 August 2012), at 58, online at: <
<http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CEMQFjAD&url=http%3A%2F%2Fwww.sec.gov%2Frules%2Ffinal%2F2012%2F34-67717.pdf&ei=8A0bVObDDMb-yQSQ2IH0Aw&usq=AFQjCNHL3ZfOUmlxMbAqUz8YJneYfY1iJQ>>.

3. The European Union's (EU) *Transparency and Accounting Directives*– June 26, 2013

On June 26, 2013, the European Parliament and Council of the European Union approved final rules, which require resource extraction issuers to annually report the payments they make to governments. The categories of payments contemplated by the Transparency and Accounting Directives include:

- production entitlements such as "profit oil", which refers to oil production that is shared between an issuer and government after investment and operating costs are recovered;
- taxes applied to the income, production or profits of extractive issuers (this excludes consumption taxes);
- royalty payments;
- dividends (includes dividends paid to governments in place of production entitlements or royalties, but excludes dividends paid to governments as ordinary shareholders);
- bonuses (e.g., signature, discovery, and production bonuses);
- fees including entry fees, rental fees, license fees, and other payments made for licenses and/or concessions; and
- payments for infrastructure improvements.

Under the Transparency and Accounting Directives, "Government" is defined as "any national, regional, or local authority of a Member State or of a third country, [including] a department, agency or undertaking controlled by that authority."^[1] "Control", in turn, is defined in accordance with the process for determining members included in a consolidated financial statement. In particular, control

^[1] *Ibid* Article 41(3).

may be based on holding a majority of voting rights, but may also exist where there are agreements between members or shareholders.

Official Journal of the European Union, "Directive 2013/34/EU of the European Parliament and of the Council" (26 June 2013), Article 41(5), online at:
<<http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&sqi=2&ved=0CB0QFjAA&url=http%3A%2F%2Feur-lex.europa.eu%2FLEXUriServ%2FLEXUriServ.do%3Furi%3DOJ%3AL%3A2013%3A182%3A0019%3A0076%3AEN%3APDF&ei=bh0bVJGNiYKdyATWp4KwCQ&usg=AFQjCNHVwpvAwcuxUq8rW2BEuWv33u9wxw>>.

4. The Resource Revenue Transparency Working Group's (the "Working Group") Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments - January 16, 2014

In addition to the above noted government-led initiatives, resource revenue transparency legislation has received considerable attention and support from non-governmental associations. Specifically, in Canada, the movement towards a mandatory reporting regime for resource revenue payments has been heavily influenced by the efforts of the Working Group. On January 16, 2014, the Working Group, which is comprised of Canadian mining and exploration associations as well as various civil society organizations, published its final recommendations for the development of a transparent payment-reporting framework in Canada. The Working Group's Recommendations suggest that disclosure be required for the following categories of payments, on a disaggregated and cash basis:

- profit taxes (including profit, income and production taxes);
- royalty payments (including royalty payments made in-kind);
- fees (including license fees, rental fees and concession fees);
- production entitlements (by both value and volume);
- bonuses (including signature, discovery and production bonuses);
- dividends (e.g. withholding tax);
- payments made for infrastructure improvements; and
- transportation and terminal operations fees.

Furthermore, the Working Group's Recommendations suggest that payments would need to be disclosed if "made to Canadian and foreign governments, including payments made to national and sub-national authorities (e.g. states, provinces, counties, districts, municipalities or territories under a national government, including state-owned enterprises)." The Recommendations go on to define "state-owned enterprises" as "companies that are at least majority owned by a foreign government."

The Resource Revenue Transparency Working Group, "Recommendations on Mandatory Disclosure of Payments from Canadian Mining Companies to Governments" (16 January 2014), at 5, online at: http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.resourcegovernance.org%2Fsites%2Fdefault%2Ffiles%2Fworking_group_transparency_recommendations_eng20140116.pdf&ei=EJkbVKfPLoz_yQTTjIHwDg&usg=AFQjCNG2K4tN9OSxXSQsxNDmYatNRR2bhQ&sig2=Zx88rm-lmNJgpOOC_b4ssg&bvm=bv.75774317,d.aWw.

5. The Extractive Industries Transparency Initiative (EITI) Standard– July 11, 2013

The EITI is another significant non-governmental association that has been influential in the resource revenue transparency movement, particularly on a global scale. The EITI Association is comprised of sponsoring countries, resource extraction companies, and other civil society organizations. On July 11, 2013, the EITI published the EITI Standard, which sets out an overall framework for resource revenue transparency. In terms of categories of payments, the EITI Standard requires that the following payments be disclosed:

- production entitlements belonging to host governments (e.g., profit oil);
- national state-owned enterprise production entitlements;
- profit taxes;
- royalty payments;
- dividends;
- bonuses, such as signature, discovery and production bonuses;
- entry fees, licence fees, rental fees and other considerations for licences and/or concessions; and

- any other significant payments and material benefit to government.

Under the EITI Standard, the disclosure rules may be triggered for payments made to both national governments and local governments. In addition, the EITI Standard notes that payments that may be of little consequence to a national government may be significant to a local government and thus must be reported.^[2] Lastly, the EITI Standard requires disclosure of material payments to state-owned enterprises.

Extractive Industries Transparency Initiative (EITI) International Secretariat, “The EITI Standard” (11 July 2013), at 26, online at: <http://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf>.



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^[2] *Ibid.*