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Shining a Light on Payments to Governments: The Current State of “Publish What You Pay” Rulemaking Around the World

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Over the last few years, a number of key jurisdictions have adopted regulations requiring companies engaged in natural resource extraction activities to disclose the payments they make to governments and state-owned companies. These regulatory initiatives, commonly referred to as “publish what you pay” rules, aim to promote fiscal transparency in the natural resources sector.

This client publication provides an overview of the current status of the adoption of “publish what you pay” laws, and the rules and regulations implementing those laws, in four key jurisdictions: the United States, the European Union, Canada and Australia. This publication also aims to offer some initial observations regarding how the reporting framework in each of these jurisdictions applies, or will apply once in effect, to companies, as well as some of the principal ways in which these frameworks are aligned with each other and how they differ.

While the United States was the first major jurisdiction to enact “publish what you pay” legislation, it still does not have rules in effect implementing the requirements for US reporting companies. Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), which was signed into law in 2010, directed the US Securities and Exchange Commission (“SEC”) to issue rules requiring resource extraction issuers to report annually on payments made to governments. In August 2012, the SEC adopted a final rule implementing Section 1504 of the Dodd-Frank Act, but in July 2013 the SEC rule was vacated by US federal courts. The SEC has yet to propose a new rule implementing “publish what you pay” reporting under Section 1504 of the Dodd-Frank Act and has indicated that it may take until Spring 2016 to do so.

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In drafting revised rules, the SEC staff will likely be informed by the reporting regimes adopted in other jurisdictions, and it seems likely that the SEC will act to revise its previous rule narrowly to specifically address the deficiencies identified by the court ruling invalidating its previous rulemaking attempt. Accordingly, in the context of comparing the US reporting regime to other jurisdictions, it is useful to look at the statutory provisions of Section 1504 and the final rule previously adopted by the SEC, although this rule is not in effect and it is possible that the “publish what you pay” rules ultimately adopted by the SEC may differ in significant respects.

Meanwhile, in Europe, in June 2013 the European Parliament and the Council of the European Union adopted Directive 2013/34/EU, commonly referred to as the EU Accounting Directive. The EU Accounting Directive requires Member States to enact implementing legislation by July 20, 2015, with the provisions first to apply in respect of financial years beginning on January 1, 2016 or during calendar year 2016. In the UK, the implementing legislation is The Reports on Payments to Governments Regulations 2014, which came into force on December 1, 2014 and is effective in relation to a company’s financial year beginning on or after January 1, 2015. Norway has also passed government payments reporting legislation, which took effect from January 1, 2014.

Australia and Canada, which both have significant natural resource sectors, are also on the way to implementing “publish what you pay” rules. In Canada, “publish what you pay” legislation received royal assent in December 2014, in the form of the Extractive Sector Transparency Measures Act, which will come into force at a date to be determined by the Governor in Council. The Government had previously indicated its intention to proclaim the Act into law in the spring or summer of 2015, however, no official date for proclamation has been announced. In Australia, the Corporations Amendment (Publish What You Pay) Bill 2014 (Cth) was introduced into the Senate in October 2014 and would need to be passed by both houses of the Australian Federal Parliament in order to be made law.

These laws and regulations are all largely based on the principles established by the Extractive Industries Transparency Initiative (“EITI”), as set forth in the EITI Standard.¹ EITI is a voluntary association comprising a broad range of stakeholders, including representatives of resource-rich developing countries; supporting countries; international and domestic oil, gas and mining companies; civil society members; and investor representatives. The EITI Standard was established in 2003 to promote and support improved governance in resource-rich countries through the full publication and verification of payments by companies and revenues to government from the oil, gas and mining sectors.

Countries implementing the EITI Standard publish reports that disclose the revenues from extraction of the country’s natural resources. Companies report payments to government (taxes, royalties, etc.), and the government reports what it has received.

¹ <https://eiti.org/document/standard>

These two sets of figures are compiled and reconciled by an independent reconciler, chosen by the country, and published in the country's EITI report.

National “publish what you pay” regulation complements the EITI framework by requiring disclosure by companies of payments made to governments wherever those companies engage in extractive activities. Because the reporting regimes in each jurisdiction are based on the EITI principles, they tend to be aligned to a significant extent. However, the rules vary from country to country in certain aspects, and many companies will be subject to “publish what you pay” reporting in more than one jurisdiction. Unless an equivalency exemption is available, such as provided in the EU framework, such companies will need to take a “highest common denominator” approach to ensure compliance with each reporting regime. The table appended at the back of this client publication presents a comparison of the US (vacated rules), EU, Canadian and EITI rules.

Companies Subject to “Publish What You Pay” Rules

As a threshold matter, companies must determine whether they are subject to “publish what you pay” reporting in one or more jurisdictions. While in each of the regimes the rules apply to companies engaged in extractive activities in the mining and oil and gas sectors, they differ in whether they apply only to public listed companies or also to large privately held companies.

United States

Section 1504 of the Dodd-Frank Act by its terms applies to “resource extraction issuers.” The statute defines “resource extraction issuer” as an issuer that:

- is required to file an annual report with the SEC; and
- engages in the commercial development of oil, natural gas or minerals (which includes exploration, extraction, processing, export and other significant actions relating to oil, natural gas or minerals, or the acquisition of a license for any such activity, as determined by the SEC).

Accordingly, the SEC rules implementing Section 1504 will likely be limited in their application to issuers that are required to file annual reports with the SEC on Forms 10-K, 20 F or 40-F.

European Union

A key distinction between the EU rules and the US rules is that “publish what you pay” reporting under the EU Accounting Directive applies to certain large private undertakings incorporated in an EU Member State in addition to listed companies. Specifically, the EU rules apply to companies active in the extractive industry or the logging of primary forests that are either:

- *large undertakings*—undertakings which on their balance sheet dates exceed at least two of the three following criteria, whether or not listed:
 - balance sheet total: €20 million;
 - net turnover: €40 million;
 - average number of employees during the financial year: 250; or
- *public-interest entities*—includes undertakings that are governed by the law of a Member State and whose securities are admitted to trading on a regulated market of any Member State.

A subsidiary of a company is subject to EU “publish what you pay” reporting if the subsidiary is organized under the laws of an EU Member State and is either a large undertaking or a public-interest entity, unless:

- it is included in the consolidated report of a parent company that is subject to EU “publish what you pay reporting,” or
- the subsidiary meets the equivalence exemption by complying with third-country “publish what you pay” reporting requirements that the European Commission has assessed as equivalent to the EU rules.

Therefore, companies that have subsidiaries which are governed by the law of an EU Member State and are engaged in extractive activities should consider whether those subsidiaries trigger a reporting obligation under the EU “publish what you pay” rules, even if the parent company is not incorporated or listed in the EU.

Another significant difference from the US and Canadian rules is that the EU rules apply to companies active in the logging of primary forests, in addition to companies in the oil and gas and mining sectors.

Canada

Like the “publish what you pay” rules under the EU Accounting Directive, the Extractive Sector Transparency Measures Act (Canada) applies to certain large companies with a presence in Canada in addition to companies that are listed on a stock exchange in Canada, in each case if they are engaged in the commercial development of oil, gas or minerals in Canada or elsewhere. Specifically, a company that is not listed in Canada would nonetheless be subject to “publish what you pay” reporting in Canada if it has a place of business in Canada, does business in Canada or has assets in Canada and, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years:

- it has at least C\$20 million in assets;
- it has generated at least C\$40 million in revenue; and
- it employs an average of at least 250 employees.

Australia

The “publish what you pay” bill introduced into the Senate would, similar to the US rules, only apply to reporting companies in Australia. Specifically, the Australian regime would be applicable to public companies and large proprietary companies that are otherwise required to prepare financial reports under Section 292 of the Corporations Act 2001 and that are either:

- engaged in one or more resource extraction activities; or
- a holding company of a body corporate that engages in one or more resource extraction activities.

The bill defines “resource extraction activity” to include (i) exploration, prospecting, discovery, development or extraction in relation to minerals, oil, natural gas or similar materials and (ii) the logging of primary forests. The bill would require companies subject to “publish what you pay” reporting in Australia to report on activities of both the reporting company and its subsidiaries.

Looking Ahead to SEC Rulemaking: Round Two

As discussed above, in July 2013 a US federal court vacated the SEC final rule implementing Section 1504 of the Dodd-Frank Act. The court ruling vacating the SEC final rule focused on two specific aspects of the rule:

- The court determined that the statutory text of Section 1504 does not compel the SEC to require issuers to publicly file their annual government payments reports or to otherwise make such reports publicly available, in addition to the statutory requirement of the SEC to make publicly available a compilation of the information from such reports.

- The court further determined that the SEC acted arbitrarily and capriciously in concluding that Section 1504 does not allow an exemption to the reporting requirements for payments to governments in countries where disclosure is prohibited by law (specifically, Angola, Cameroon, China and Qatar).

As discussed elsewhere in this client publication, the SEC's previous government payments rule was broadly in line with the requirements subsequently enacted or proposed in other key jurisdictions. As it will be a significant consideration to keep the US rules aligned as closely as possible to international standards, in order to reduce compliance costs on issuers and promote comparability and consistency among reporting regimes, when the SEC issues a new proposed rule, it appears likely that the SEC will act to revise its previous rule narrowly to specifically address the deficiencies identified by the court ruling.

Comparison of Reporting Regimes

The chart on the following pages gives a detailed comparison of the US, EU, Canadian and EITI reporting frameworks. A few caveats should be noted:

- The information presented regarding the US rules is based on the statutory requirements of Section 1504 of the Dodd-Frank Act, as well as the previously issued SEC rule, which has since been vacated. The SEC's second attempt at "publish what you pay" rulemaking may differ in significant respects.
- The information presented regarding the EU rules is based on the EU Accounting Directive and, where noted, the UK Reports on Payments to Governments Regulations 2014. The implementation of the EU Accounting Directive in each Member State may differ in some aspects that are not reflected in the chart.
- The information presented regarding the Canadian rules is based on the statutory text of the Extractive Sector Transparency Measures Act (Canada). Once the act is implemented through the adoption of regulations, further specific definitions and requirements will apply.

* * * *

Mining, oil and gas and logging companies, whether public or private, and regardless of where they are incorporated or headquartered, should ensure that they understand whether they are (or will be, once the relevant rules take effect) caught by the "publish what you pay" reporting regimes of one or more jurisdictions. Companies subject to "publish what you pay" reporting will need to implement appropriate disclosure controls and procedures designed to effect compliance with the rules of all of the jurisdictions that apply.

Comparison of “Publish What You Pay” Reporting Regimes

| | US ² | EU | Canada | EITI |
|--|---|---|--|---|
| In force? | No. SEC has indicated that it will issue new proposed rule by spring 2016. | Yes. Member States to enact implementing legislation by 20 July 2015. | No. Pending proclamation into law. | Yes, in countries that have adopted the EITI Standard. |
| Which companies are subject to the reporting requirements? | Any company that is: <ul style="list-style-type: none"> engaged in the commercial development of oil, natural gas or minerals; <u>and</u> required to file annual reports (10-K, 20-F or 40-F) with the SEC. Does <u>not</u> include foreign private issuers that are exempt from Exchange Act registration pursuant to Rule 12g3-2(b). | Large undertakings ³ (whether or not listed) and public-interest entities (including companies with securities admitted to trading on a regulated market in the EU) that are active in the extractive industry (minerals, oil, natural gas deposits or other materials) or the logging of primary forests. | Any entity that is engaged in the commercial development of oil, gas or minerals and: <ul style="list-style-type: none"> is listed on a stock exchange in Canada; <u>or</u> has a place of business in Canada, does business in Canada or has assets in Canada and, based on its consolidated financial statements, meets at least two of the following for at least one of two most recent financial years: <ul style="list-style-type: none"> at least C\$20 million in assets; at least C\$40 million in revenue; and employs an average of at least 250 employees. | Oil, gas and mining companies that make payments to government within a particular country. Implementing countries may elect to expand to include other sectors/ industries. |
| Equivalency of other reporting regimes recognized? | No. | Yes. | Yes. | Not addressed in EITI Standard. |
| Reporting period | Fiscal year | Financial year | Financial year | Subject to agreement by the country's multi-stakeholder group. |
| Extractive activities subject to the reporting requirements | <ul style="list-style-type: none"> exploration extraction processing export the acquisition of a license for any such activity | <ul style="list-style-type: none"> exploration, prospection and discovery extraction development | <ul style="list-style-type: none"> exploration, extraction the acquisition or holding of a permit, licence, lease or any other authorization to carry out any such activity | <ul style="list-style-type: none"> exploration production Each enacting jurisdiction may elect to include revenue streams from other activities. |

² Based on final rules adopted by the SEC in 2012, which have been vacated and are not currently in effect.

³ A “large undertaking” is defined as a company that, as of the balance sheet date, exceeds at least two of the three following criteria: (a) balance sheet total: EUR 20 million; (b) net turnover: EUR 40 million; (c) average number of employees during the financial year: 250.

| | US ² | EU | Canada | EITI |
|-----------------------------------|---|---|---|--|
| Excluded activities | <ul style="list-style-type: none"> ancillary or preparatory activities (e.g., manufacturing drill bits or other machinery used in the extraction of oil) transportation marketing | <ul style="list-style-type: none"> processing (e.g., refining and smelting)⁴ export ancillary or preparatory activities transportation service companies | <p>None specified. Implementing regulations/regulatory guidance, when issued, may specify excluded activities.</p> | <p>None specified.</p> |
| Types of payments included | <p>Any of the following if made to further the commercial development of oil, natural gas or minerals:</p> <ul style="list-style-type: none"> taxes royalties fees production entitlements bonuses dividends (other than when paid to a government as a common or ordinary shareholder on the same terms as other shareholders) payments for infrastructure improvements | <ul style="list-style-type: none"> taxes levied on the income, production or profits of companies (excluding taxes levied on consumption such as value added taxes, personal income taxes or sales taxes) royalties licence fees, rental fees, entry fees and other considerations for licences and/or concessions production entitlements signature, discovery and production bonuses dividends (other than when paid to a government as a common or ordinary shareholder on the same terms as other shareholders) payments for infrastructure improvements | <p>Any of the following if made in relation to the commercial development of oil, gas or minerals:</p> <ul style="list-style-type: none"> taxes (other than consumption taxes and personal income taxes) royalties fees (including rental fees, entry fees and regulatory charges as well as fees or other consideration for licences, permits or concessions) production entitlements bonuses dividends (other than dividends paid as ordinary shareholders) payments for infrastructure improvements | <ul style="list-style-type: none"> the host government's production entitlement (such as profit oil) national state-owned production entitlement profits taxes royalties dividends bonuses, such as signature, discovery and production bonuses licence fees, rental fees, entry fees and other considerations for licences and/or concessions any other significant payments and material benefit to government |
| Corporate group covered | <ul style="list-style-type: none"> subsidiaries and other entities consolidated in the issuer's financial statements; and other entities "controlled" by the issuer within the meaning of US securities laws | <ul style="list-style-type: none"> consolidated report required if a parent undertaking is obligated to prepare consolidated financial statements under the EU Accounting Directive includes all subsidiary undertakings of the parent undertaking, as defined in the EU Accounting Directive | <ul style="list-style-type: none"> entities controlled by the reporting entity | <p>All companies making material payments to the government.</p> |

⁴ List of excluded activities under the EU rules based on *The Reports on Payments to Government Regulations 2014: Industry Guidance (Draft)* (Nov. 5, 2014), relating to the implementation in the UK.

| | US ² | EU | Canada | EITI |
|---------------------------------------|---|--|---|---|
| Exemptions | N/A | <p>An undertaking need not be included in a consolidated report if:</p> <ul style="list-style-type: none"> ▪ severe long-term restrictions substantially hinder the parent undertaking in the exercise of its rights over the assets or management of that undertaking ▪ extremely rare cases where the information cannot be obtained without disproportionate expense or undue delay ▪ the shares of that undertaking are held exclusively with a view to their subsequent resale | <p>During two-year transition period, payments to Aboriginal governments in Canada need not be disclosed.</p> | <p>None (other than materiality standard).</p> |
| Definition of “government” | <ul style="list-style-type: none"> ▪ foreign national and subnational governments ▪ companies at least majority-owned by a foreign government ▪ US Federal Government (but not subnational level in the United States) | <ul style="list-style-type: none"> ▪ any national, regional or local authority of a Member State or of a third country ▪ includes a department, agency or undertaking controlled by any such authority | <ul style="list-style-type: none"> ▪ any government in Canada or in a foreign state ▪ a body established by two or more governments ▪ bodies and authorities that exercise or perform a power, duty or function of government for any of the foregoing | <p>All government entities, including:</p> <ul style="list-style-type: none"> ▪ state-owned enterprises ▪ subnational governments ▪ transfers/revenue sharing between national and subnational government entities |
| De minimis exemption threshold | <p>\$100,000</p> <p>whether made as a single payment or a series of related payments.</p> | <p>EUR 100,000</p> <p>(£86,000 in UK)</p> <p>whether made as a single payment or as a series of related payments within a financial year.</p> | <p>C\$100,000 (unless otherwise prescribed by regulation for the category of payment)</p> <p>total amount of all payments within a category of payment that are made to the same payee within the financial year.</p> | <p>Only “material” payments are required to be reported. Each country’s multi-stakeholder group agrees on appropriate materiality definitions and thresholds.</p> |

| | US ² | EU | Canada | EITI |
|--|--|---|--|--|
| Exemption for disclosure prohibited by foreign law or subject to confidentiality? | No. However, per US federal court ruling, such an exemption is not necessarily inconsistent with the statute and this may be revisited by the SEC in issuing a new proposed rule. | No. ⁵ | No. | No. In order to achieve EITI Compliant status, countries must remove legal and regulatory obstacles to EITI reporting (for example, by governments waiving contractual confidentiality provisions). |
| Anti-evasion provision? | Yes. | Yes. | Yes. | No. |
| Report required to be audited? | No. | No. | Yes (report must include an attestation either by a director or officer or by an independent auditor or accountant). | Yes (EITI report must either be reconciled or audited by an independent third-party firm). |
| Level of disclosure | By project. "Project" is not defined in rules, but per SEC guidance based on relationship and payment flows defined in contract with government. Payments may be disclosed at the entity level if the payment is made for obligations levied on the issuer at the entity level rather than the project level (e.g., corporate income taxes). | By project, where payments have been attributed to a specific project. "Project" is defined as: the operational activities that are governed by a single contract, license, lease, concession or similar legal agreements and form the basis for payment liabilities with a government. None the less, if multiple such agreements are substantially interconnected, this shall be considered a project. Payments made in respect of obligations imposed at entity level may be disclosed at the entity level rather than at project level. | To be determined in regulations to be promulgated. | Each implementing country's multi-stakeholder group decides on the level of disaggregation in public EITI report, which may be by individual company, government entity, revenue stream and/or project. |

⁵ However, in such cases, *The Reports on Payments to Government Regulations 2014: Industry Guidance (Draft)* (Nov. 5, 2014) recommends that companies subject to the UK rules should report any inability to obtain permission from a host government or state-owned enterprise to the UK Department of Business, Innovation and Skills and provide all of the relevant evidence, including copies of relevant legal opinions.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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