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# U.S. to Accept Canadian Resource Transparency Reports

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Oil, gas and mining companies operating in Canada that file annual transparency reports may now be able to use that same report to meet new U.S. requirements. The U.S. Securities and Exchange Commission (SEC) recently unveiled new U.S. transparency reporting requirements similar to Canada's *Extractive Sector Transparency Measures Act* (ESTMA), which require Canadian resource companies to report tax and other payments they make to Canadian and foreign governments. In its announcement of the new reporting regime, the SEC indicated that reports prepared to meet the Canadian ESTMA rules and the European Union (EU) Accounting and Transparency Directives will also comply with the new U.S. transparency reporting requirements, subject to certain conditions. As a result, affected resource companies that would be subject to both the ESTMA and SEC transparency regimes may not have to prepare separate reports for each jurisdiction.

The SEC rules require resource extraction issuers to disclose certain payments made to U.S. federal and foreign governments for the commercial development of oil, natural gas or minerals for fiscal years ending after September 30, 2018. The rules, which were announced on June 27, 2016, are mandated by the *Dodd-Frank Wall Street Reform and Consumer Protection Act.*

**Background**
Canada enacted the new transparency and reporting obligations under the *Extractive Sector Transparency Measures Act* (ESTMA) on June 1, 2015. The reporting rules apply to entities that are subject to Canadian law and that are engaged in the commercial development of oil, gas or minerals (for example, exploration or extraction activities) anywhere in the world and that are either listed on a stock exchange in Canada, or have a place of business or are doing business in Canada, or have assets

in Canada, and meet two of the following three size-related criteria in one of their two most recent fiscal years (all amounts are in Canadian dollars):

- At least $20 million in assets
- At least $40 million in revenue
- An average of at least 250 employees.

Businesses that meet these requirements must report annually on payments of $100,000 or more, or a series of payments in any category totalling $100,000 or more, made to any level of government in Canada and abroad. Examples of these payments include taxes, licenses, fees, royalties, production entitlements, bonuses, dividends and infrastructure payments. The reporting must be done on a payee basis and on a project basis (for example, an oil field or mining site) when the payments can be attributed to a specific project.

Reports are due no later than 150 days after the business' fiscal year-end, starting with fiscal years that begin after June 1, 2015.

For purposes of these rules, entities include corporations, trusts, partnerships or other unincorporated organizations. These categories extend to similar forms of business organizations both within and outside Canada, for example, unlimited liability corporations, limited partnerships and royalty trusts.

For details, see KPMG's *TaxNewsFlash-Canada* 2016-10, "Resource Industry Tax Reporting — Ready, Set, Go" and *TaxNewsFlash-Canada* 2015-27, "Resource Companies —Drill Down into New Tax Reporting Regime".

## New SEC reporting regime

Subject to a *de minimus* rule, these rules apply to resource extraction issuers that are required to file an annual report with the SEC under section 13 or 15(d) of the *Exchange Act* (generally issuers filing annual reports on Forms 10-K, 20-F or 40-F) and engage in the commercial development of oil, natural gas, or minerals. The rules will be effective for fiscal years ending after September 30, 2018.

According to the SEC release, a resource extraction issuer may use a report prepared for other disclosure regimes to comply with the rules, as long as those reports are deemed to be substantially similar. The SEC has already determined that the current reporting requirements that apply in Canada and the EU are substantially similar, subject to conditions including that:

- The issuer is subject to the reporting requirements of that jurisdiction or regime and has made a report prepared in accordance with that jurisdiction's requirements publicly available before filing it with the SEC
- The issuer submits the report as an exhibit to Form SD of the SEC reporting
- The issuer includes a statement in Form SD that it is relying on the substitution accommodation and identifies the alternative reporting regime for which the report was prepared
- The report is tagged using XBRL.

### Canada accepts reports for other jurisdictions

Natural Resources Canada (NRCan) may also allow companies to use reports prepared to meet the reporting requirements of another jurisdiction to meet Canada's requirements. Specifically, NRCan has indicated that the current reporting requirements of the European Union Accounting and Transparency Directives (as implemented in a European Union or European Economic Area member country) are considered acceptable substitutes for ESTMA reports. However, companies must still meet ESTMA's publishing requirements using their report prepared under the other jurisdiction's reporting requirements. NRCan has not indicated whether a report filed under the SEC regime would fulfill its substitution requirements. NRCan makes public substitution determinations for other jurisdictions on its website.

### SEC and ESTMA transparency reporting requirements — Comparison

Although the SEC has stated that Canada's ESTMA reporting requirements are substantially similar to the U.S. transparency reporting requirements, issuers should be aware of certain differences that may affect reports prepared under each reporting regime. Specifically, companies may have to adjust their supporting documentation to account for the type of information to be reported and the presentation of the disclosures depending on whether they are filing a report in Canada or the United States.

#### *Scope*

The SEC's definition of "commercial development of oil, gas and minerals" includes "processing and export of oil, natural gas or minerals" whereas ESTMA states that commercial development generally does not include post-extraction activities such a processing or export of oil, gas or minerals. The SEC rules includes additional guidance on what would be considered export and processing activities subject to reporting, including clarifying that, for companies that process minerals, activities prior to the smelter stage would be included and those processing activities thereafter would be considered "downstream activities" and outside the scope of the rules.

### *Payment type*

The SEC rules stipulate that companies must report Corporate Social Responsibilities (CSR) payments required by law or contract. While CSR payments are not considered a payment category under ESTMA, companies must determine whether the payment was made in lieu of one of the other payment categories that must be reported.

### *Grouping of payments*

It appears that payments to subnational governments in the United States are not required to be reported under the new SEC rules. This is different than the ESTMA rules, which require companies to report payments made to any level of government in Canada or foreign governments abroad. The SEC rules only require disclosure of payments to foreign national and subnational governments and the U.S federal government.

It does not appear that the SEC rules use the “Same Payee” concept included in ESTMA. As such, companies reporting to the SEC will not be required to group payees (e.g., departments, ministries, boards) under the level of government to which they relate (e.g., provincial).

### *Reporting format*

Issuers filing under the SEC rules are required to file their payment disclosure on EDGAR in an XBRL exhibit to Form SD and submit the payment information using electronic tags. However, under ESTMA, reporting entities must use the ESTMA Annual Report template in either XLS or PDF format.

### *Attestation*

Unlike the ESTMA rules, the SEC rules do not require a certification or attestation by a Director or Officer of the company or through an independent audit.

### *Governance*

The governance of the transparency reporting requirement regimes are different for Canada and the United States. As Canada does not have a single regulator, a separate federal legislative act was created, which required a new reporting regime, attestation requirements and fine and penalty provisions. In the United States, the SEC is adopting Section 1504 of the *Dodd Frank Act* by adding Section 13q-1 and an amendment to Form SD under the existing reporting and compliance framework under the *Securities Exchange Act of 1934.*

**KPMG observations**
A careful review of each reporting regime is required to ensure proper compliance with the rules.

## We can help

Your KPMG adviser can help you assess the impact of the new tax reporting regime on your resource industry company. KPMG can provide assistance in assessing the differences in the reporting standards to your company if you are faced with a decision as to which regime to report under as you will need to ensure your internal information systems are properly designed to extract the information required to comply with the applicable transparency reporting regime. For details on this new legislation and its implications for your company, contact your KPMG adviser.

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