

FCA consults on the implementation of the Transparency Directive's requirements for reports on payments to governments for financial years beginning on or after 1 January 2015

Mining Bulletin

Public opinion has long championed the introduction of a reporting regime which would require companies in the extractive industries to be open about how much they pay to governments. Those efforts have most recently materialised in the form of the European Union's new legislative framework for transparency in respect of payments made to governments by extractive companies listed on a "regulated market" (and also for large, non-listed extractive companies). This bulletin primarily considers how and when that framework will be implemented and the impact of it.

The 2013 Transparency Directive Amending Directive ("TDAD") which amends the 2004 Transparency Directive ("TD") introduced, amongst other things, country-by-country reporting requirements for issuers active in the extractive industries and which will require the preparation of annual reports on payments to governments. The definition of active in the "extractive industries" includes any activity involving the exploration, prospection, discovery, development, and extraction of minerals, oil and gas.

While all European Union member states are required to adopt legislation to implement the TDAD changes by 26 November 2015, the UK Financial Conduct Authority ("FCA") has published a consultation paper setting out proposals on the early implementation of the TDAD requirements for financial years beginning on or after 1 January 2015 in order to align the implementation of the TDAD with the implementation of Chapter 10 of the 2013 Accounting Directive ("AD").

The TDAD will apply in the UK to companies traded on a "regulated market", which is principally the Official List. However, Faskens believes that these country-by-country reporting requirements will soon be considered to be "best practice" and companies which are not fully listed may wish to consider how they would apply these requirements if required or encouraged to do so.

Who will be affected?

The early implementation proposal would affect issuers where the UK acts as home

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member state and the FCA's Disclosure Rules and Transparency Rules ("DTRs") apply. It would also affect listed companies and issuers of securitised derivatives who are required by the FCA's Listing Rules to comply with DTR4.

Implementation of the TDAD

The FCA proposes to introduce new rules and guidance into Chapter 4 of the DTRs and the inclusion of a transitional provision which shall apply the new rules to financial years beginning on or after 1 January 2015. The required reports must be made public at the latest six months after the end of an issuer's financial year and also be reported at a consolidated level.

The FCA will consider a report on payments to governments which is prepared in accordance with the draft Reports on Payments to Governments Regulations 2014 ("UK Regulations") (proposed to implement the AD) to be in compliance with the requirements of the new rules. Non-UK incorporated issuers subject to the AD would be expected to refer to the rules implementing the AD in their country of incorporation, and non-UK incorporated issuers which are not subject to the AD may wish to have regard to the AD as implemented through the UK Regulations, or have regard to the rules implementing the AD in another European Union member state.

The AD and Reports on Payments to Governments Regulations 2014

UK incorporated issuers subject to the AD will be expected to refer to the AD as implemented through the UK Regulations to prepare their report. The AD (and the corresponding UK Regulations which are subject to approval by the UK Parliament) compel reporting on all payments of EUR100,000 (GB£86,000 equivalent) or more whether made as a single payment or as a series of related payments within a financial year. All payments to governments including production entitlements, taxes levied on income, production or profits, royalties, bonuses, licence fees, rental fees and entry fees as well as payments for infrastructure improvements fall within the scope of the reporting regime. Reporting is also required to be on a country and project basis and disclosure must be made by reference to substance rather than the form of each payment, activity or project concerned.

Despite European Union member states having until 20 July 2015 to transpose the requirements of the new AD into national law, implementation of the AD into UK law is well advanced and is intended to take effect for financial years beginning on or after 1 January 2015.

Canada

While Canada does not currently have a reporting regime on payments to governments a process is underway to ensure a regime is implemented in the near future. The Canadian Prime Minister Steven Harper has announced that the government in Canada is committed to establishing a new mandatory reporting regime on transparency on payments in the extractive industries made to governments. Following a lengthy consultation process, the Resource Revenue Transparency Working Group ("Working Group"), comprised of Canadian exploration and mining associations, in collaboration with non-governmental organizations, released final recommendations for the development of a payment transparency framework for all publicly-traded mining companies in Canada. Natural Resources Minister Joe Oliver's announcement in March 2014 later confirmed Canada's plans to impose mandatory reporting requirements by June 2015 in line with the Prime Minister's statement and the Working Group's substantive recommendations of January 2014.

It seems highly likely that Canada's requirements will be largely similar to those of the TDAD (and AD). The proposed Canadian regime, as currently proposed, will apply to all qualifying Canadian public and private companies operating in the mining and oil and gas industries. They will be required to publicly report all payments of CDN\$100,000 and over made to all levels of government, both domestic and internationally, on a project-by-project basis. Despite the similarities one notable difference, however, between the TDAD requirements and the proposed Canadian regime is the threshold value which triggers the reporting obligations. Whilst the UK regulations set the threshold at GB£86,000 the Canadian regime seems likely to settle at CDN\$100,000 (GB£56,000 equivalent) and companies subject to both regimes will therefore need to be mindful of this difference.