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May 6, 2014

Via email: Resource2812@nrcan-rncan.gc.ca

Grégoire Baribeau
International Affairs Division | Division des affaires internationales
Natural Resources Canada
International Affairs Division
580 Booth Street, 11th floor
Ottawa, ON K1A 0E4

Dear Mr. Baribeau:

Re: Proposed Mandatory Reporting Standards for the Canadian Extractive Sector

INTRODUCTION

We are writing on behalf of the Canadian Bar Association's National Environmental, Energy and Resources Law Section (the CBA Section) to comment on Natural Resources Canada's proposed *Mandatory Reporting Standards for the Extractive Sector* (the proposed standards).[1] The CBA is a national association representing approximately 37,500 jurists, including lawyers, notaries, law teachers and students, across Canada. CBA's primary objectives include improvement of the law and the administration of justice. The CBA Section deals specifically with matters of legal reform, legal education and management relating to the environment, energy and natural resources. CBA Section members include many of Canada's most experienced lawyers in these areas of law.

The proposed standards result from Canada's commitment in June 2013 to establish new mandatory reporting standards for Canadian extractive companies, consisting of the oil and gas and mining sectors. The goal of the proposed standards is to improve transparency and ensure a level playing field for companies operating domestically and abroad. They also seek to enhance investment certainty and ensure that citizens around the world benefit from the natural resources in their respective countries. The proposed standards would require Canadian extractive companies to publish annual reports of payments of $100,000 and over on a project-level basis, made to all levels of government, including Aboriginal entities, both domestically and abroad. We understand that the new mandatory reporting standards are expected to be in place by June 2015.

1 Natural Resources Canada, *Establishing Mandatory Reporting for the Extractive Sector Consultation Paper* (Spring 2014), online: Government of Canada www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/Consultation_Paper_Spring_2014.pdf.

COMMENTS

The CBA Section supports the Government of Canada's commitment to mandatory reporting standards for the extractive sector, which is consistent with a global trend towards promoting greater transparency surrounding the collection of resource revenues. The proposed standards would increase the accountability of governments to their citizens in resource-rich countries and result in a more responsible and transparent management of natural resource development. We also support the Government of Canada's goal to align Canada's reporting requirements with those of the United States and the European Union to eliminate duplicative reporting and reduce the administrative and cost burden on governments and companies.

We have two general comments on the proposed standards, on who reports and what is reported.

Who Reports?

The proposed standards would impose reporting requirements on both publicly-listed companies and medium and large private companies.[2] Requiring private companies to report would be consistent with the EU's Transparency Directive.[3] However, the approach adopted by the US Securities and Exchange Commission (SEC) under the *Dodd-Frank Wall Street Reform and Consumer Protection Act*[4] requires only publicly-listed companies (or other companies that have other forms of securities) to report.[5]

We agree with NRCan that provincial securities commissions are likely the most natural and effective oversight mechanism to implement the mandatory reporting standards in Canada. This approach would take advantage of an existing reporting infrastructure and the extensive experience of the Canadian securities administrators in receiving and managing disclosure filings.[6] Use of securities regulation would also extend the disclosure requirements to foreign companies that seek to raise capital in Canadian markets.

However, requiring securities commissions to oversee reporting by large and medium private companies would likely require significant changes to the current securities regulatory regime in Canada. It would also likely involve considerable time, consultation and resources on the part of the securities commissions.

While we agree that the proposed standards should cover the broadest possible number of extractive companies to create a level playing field, it is also not clear from the consultation materials the number of private companies that would be regulated by the proposed standards. By

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2 Under this approach, medium and large companies operating in Canada would be required to report if they met or exceeded two of the following thresholds: (i) $20 million CAD in assets; (ii) $40 million CAD in net turnover; and (iii) 250 employees.

3 EU Directive 2013/34/EU of 23 June 2013 on annual financial statements, consolidated financial statements and related reports of certain types of undertakings, [2013] OJ, L182/9.

4 US Securities and Exchange Commission, *Disclosure of Payments by Resource Extraction Issuers* (Washington, DC: US Government Printing Office, 2013).

5 The SEC disclosure rules were vacated by the US District Court for the District of Columbia in July 2013. As a result, the SEC has indicated that it will redraft the disclosure rules.

6 Even using provincial securities regulations to regulate public companies will require harmonization efforts to ensure consistent standards.

requiring publicly-listed companies to report, we assume that most large oil, gas and mining companies would be covered by the proposed standards.

Given the complexity of amending Canada's current securities regulatory regime, we believe that additional consultations are required to fully understand whether the number of private companies that would have to report under the proposed standards is large enough and important enough to warrant amending the securities regulatory regime. As a result, we recommend that NRCan consider – as an interim step – requiring only publicly-listed companies to report.

What is Reported?

The proposed standards deviate from reporting requirements of the US and the EU by expressly requiring Canadian extractive companies to disclose payments to "Aboriginal entities" (in Canada and abroad), including relevant payments under Impact Benefit Agreements (IBAs).[7] The proposed standards also state that companies would not be required to disclose "social payments" to Aboriginal entities (e.g., funding for arenas, training programs or community centres).

"Aboriginal entities" is still to be defined and company payments to the following types of "Aboriginal entities" would be included:

- Aboriginal organizations or groups with law-making power and/or governance mechanisms related to the extractive sector;
- provincially or federally incorporated Aboriginal organizations that undertake activities in the extractive sector on behalf of their beneficiaries; and
- Aboriginal organizations or groups that are empowered to negotiate legally binding agreements on behalf of their members.

Requiring extractive companies to disclose payments to Aboriginal entities raises significant and complex issues that require further review and consultation. In particular for foreign Aboriginal entities,[8] considering the diversity of Indigenous peoples around the world, we are not aware of a universally accepted definition of "Indigenous". Instead, the approach to identifying Indigenous peoples is generally based on a consideration of a number of factors including self-identification as Indigenous peoples, strong links to territories and surrounding natural resources, distinct social, economic and political systems, etc. As a result, providing an appropriate statutory definition of Aboriginal entities will likely pose a significant drafting challenge with respect to foreign Aboriginal entities. This challenge appears to have been acknowledged in drafting the SEC disclosure rules. Commentary suggests that SEC staff considered the treatment of Aboriginal entities outside the US, but did not ultimately provide guidance, as it appears the SEC staff thought it was inappropriate to express a view on a question outside their expertise and a matter of foreign law. As a result, resource extraction issuers in the US were advised to consult their local counsel to determine if the

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7 IBA-type agreements are now commonplace around the world as a mechanism for building and maintaining respectful relationships with Aboriginal communities and implementing the principle of "Free, Prior and Informed Consent" throughout the lifecycle of a natural resource project. IBAs have expanded significantly over the years from a limited list of socio-economic matters (e.g., employment, training and limited annual payments) to comprehensive and complex financial, environmental and social commitments.

8 Public companies are already required to disclose IBAs in securities regulatory filings to the extent that they include material information.

Aboriginal groups or entities would be considered a foreign government or a sub-national government for purposes of the SEC disclosure rules.[9] We also question the ability of extractive companies to clearly distinguish between "social payments" to Aboriginal entities and various other regulated IBA payments.

Further, to date, there does not appear to have been robust consultation on the proposed standards with Aboriginal peoples in Canada. While the proposed standards do not require direct reporting by domestic Aboriginal entities, they will have a significant impact on Canada's Aboriginal peoples and their relationship with extractive companies that operate in their respective territories, particularly for the negotiation of IBAs. Aboriginal peoples should be included in further consultation on the proposed standards.

For these reasons, we recommend that NRCan consider addressing payments to Aboriginal entities as a second phase of implementing mandatory reporting standards, to allow adequate consultation to assess, among other matters, how foreign "Aboriginal entities" would be defined and how the proposed standards will affect Canada's Aboriginal peoples.

We appreciate the opportunity to provide comments to NRCan and would be pleased to discuss any further issues.

Yours truly,

(original signed by Rebecca Bromwich for Sarah Powell)

Sarah Powell
Chair, National Environmental, Energy and Resources Law Section

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[9] Based on the US approach, we understand that payments to Indian tribes recognized by the US as governments were not covered by SEC disclosure rules, because they are neither "federal" nor "foreign" governments. Similarly, payments made to Alaska Native corporations would not require disclosure under the SEC disclosure rules.