CLIFFORD CHANCE

Briefing note September 2014

BIS confirms early adoption of regulations requiring extractive industries to disclose payments to governments

New European rules requiring the disclosure of payments to governments by extractive industries and loggers of primary forests were adopted in June 2013. Following a consultation in March 2014, the UK Government Department for Business, Innovation and Skills ("BIS") has now confirmed its intention to implement regulations by 1 December 2014 which will require affected undertakings to report from the start of their financial year commencing on or after 1 January 2015, well ahead of the deadline set by Europe for implementation of such rules.

Background

Under the European Accountancy Directive all large[1] limited liability companies registered in the EU and public-interest entities in extractive industries and forestry must report on an annual basis all payments made to governments globally.

In March 2014, BIS published its proposals for *The Reports on Payments to Government Regulations 2014* and invited comments on them. The consultation was by necessity limited to those areas where the approach had not already been mandated by the Accountancy Directive and focused, most notably, on the date for implementation of the regulations, the time frame for the report to be published and the penalty regime which will apply in the event of non compliance with the regulations (see our April 2014 briefing *BIS consults on the implementation of new European disclosure rules for extractive industries*). On 21 August 2014, BIS published its response to its March consultation.

Outcome of BIS consultation

Timeframe for reporting

In keeping with the government's commitment to promote transparency in the extractive industries sector, BIS has confirmed that it intends, subject to parliamentary approval, to bring the regulations into force by 1 December 2014 (ahead of the deadline set by the Accountancy Directive of 20 July 2015). The regulations will require affected UK companies to prepare their first reports for financial years commencing on or after 1 January 2015. Such companies will have 11 months from the end of their financial year to prepare and file their report at Companies House. Note however that for listed companies this timeframe will be reduced to six months (see *Listed companies – Implications of Transparency Directive changes* below).

Transitional arrangements for UK subsidiaries of parent companies registered in other EU Member States

Acknowledging that the early adoption of these rules could be problematic for UK subsidiaries of parent companies registered in other EU Member States that have not yet

Key requirements of the new regime

- Large UK extractive companies must disclose payments to governments (including government bodies at regional and local levels and their agencies)
- Reports must be prepared for financial years commencing on or after 1 January 2015
- Companies have 11 months from the relevant year end to file the report with Companies House. Note however that listed companies will have only six months from their year end to publish their reports. As such, a listed company with a 31 December year end will be required to publish its first report by not later than 30 June 2016
- EU-registered subsidiaries need not report separately if their UK parent reports on a consolidated basis under the regulations
- UK subsidiaries of a parent company registered in another EU member state will benefit from transitional relief exempting them from the requirement to prepare a report in respect of any financial year commencing prior to 1 January 2016
- Subsidiaries registered outside the EU are caught by the reports of the UK-registered parent
- All payment of money or in kind, whether made as a single payment or a series of related payments totalling £86,000 or more must be disclosed
- Reporting must be on a country-by-country and project-by-project basis and broken down by type of payment (e.g. tax, royalty, licence fee, payment for infrastructure improvements, discovery or production bonus). The disclosure of the payment must reflect the substance, rather than the form, of each payment, activity or project concerned
- There are no exemptions from reporting even where making a report would breach the laws of the country whose government is receiving the payment or the terms of the contract under which the payment is made
- Limited exemptions to reporting apply where, for example, the information cannot be obtained without disproportionate expense or undue delay or in circumstances where a subsidiary is held only with a view to onward disposal

implemented the requirements of the Accountancy Directive, BIS intends to put in place transitional arrangements which will mean that any such UK subsidiary will not be required to file payment information in the UK if they would normally report through a parent company registered in the EU. These transitional arrangements will only apply for one year. The Directive requires transposition into national law by all EU Member States by 20 July 2015 and extractive reports to be filed for financial years beginning on or after 1 January 2016. After this date it would be expected that any payments by such UK subsidiaries would be included in the consolidated report prepared by their EU-incorporated parent.

Penalties for non compliance

BIS is of the view that the late filing regime under the UK Companies Act is not appropriate for extractive industries sector reporting. The relatively low fines that apply to this regime will not, in BIS' view, be sufficient to secure compliance. As such, BIS intends to make non compliance a criminal offence and a director of a company that fails to prepare and file a report at Companies House may find himself subject to an unlimited fine and/or a prison sentence of up to two years.

The key features of the new regime as they apply to UK companies are set out in the table above.

Listed companies – Implications of Transparency Directive changes

Related changes to the European Transparency Directive will extend the extractive reporting regime to companies in the extractive and forestry industries sector whose securities are listed on an EU regulated market, such as the Main Market of the London Stock Exchange, regardless of whether that company is incorporated in an EU Member State.

Whilst EU Member States have until 27 November 2015 to implement the required regulatory changes, the FCA, at the request of BIS, are consulting on changes to the Disclosure and Transparency Rules to bring such changes into effect in respect of financial years commencing on or after 1 January 2015.

The FCA proposes to introduce a new DTR 4.3A which will require extractive and logging companies with shares admitted to trading on a regulated market in the UK and whose home state is the UK to prepare a report on payments to governments. The FCA will consider a report prepared in accordance with the regulations as satisfying the requirements of DTR 4.3A. The report must be published within six months of the end of the relevant financial year - two months after the deadline for listed companies to publish their annual financial statements. By way of example, a listed company with a 31 December year end will be required to publish its first report by not later than 30 June 2016, although it is more likely that companies will want to publish this report slightly earlier, at the same time as they publish their annual report. The report must be publicly available for at least ten years.

Under the DTRs, the report will be treated as "regulated information" and, as such, must be published by means of an RIS. Companies that fall within both the scope of the regulations and the DTRs will need to make separate filings of their reports on payments to governments in order to meet the requirements of both the regulations and the DTRs. Primarily this will affect UK-incorporated issuers with shares admitted to trading on a regulated market in the UK.

The FCA's consultation paper was published on 26 August and seeks feedback by 7 October 2014.

Further information

The BIS consultation and response, along with a copy of the draft regulations can be found at https://www.gov.uk/government/consultations/extractives-industries-reporting-implementing-the-eu-accounting-directive

FCA consultation paper CP14/17 is available at http://www.fca.org.uk/news/cp14-17

1. A company is defined as large if it fulfils two out of these three criteria at its balance sheet date: (1) a balance sheet of more than £17.8m, (2) a net turnover of more than £35.6m, (3) average number of employees during the financial year to which the balance sheet relates exceeds 250.

Authors

David Lewis
Corporate Partner

Co-Head Mining and Metals Group

T: +44 20 7006 1903
E: David.Lewis@CliffordChance.com

James Pay
Finance Partner

Co-Head Mining and Metals Group

T: +44 20 7006 2625
E: James.Pay@CliffordChance.com

Kath Roberts
Corporate Senior PSL

T: +44 20 7006 1308
E: Kathryn.Roberts@CliffordChance.com