

## Position Paper #2

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# **Staying Ahead of the Curve: Meeting Canada's Commitment to Transparency and Good Corporate Citizenship in the Extractive Industries**

*The movement to improve governance, advance development outcomes and promote investor rights has, in recent years, focused on transparency in the extractives sector, where the disclosure of payments to governments from companies is seen as critical to improving accountability. However, new disclosure rules south of the border are leaving Canada behind.*

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Canada, a country both rich in natural resources and home to over 50% of the world's extractive companies, has been heralded as having some of the most transparent companies in the world. This is due both to company-led initiatives to improve disclosure and to provincial securities' regulation requiring relatively high levels of disclosure for all extractive sector issuers registered with a Canadian Stock Exchange (either the Toronto Stock Exchange or the Toronto Venture Exchange). However a new law passed in the U.S. this summer will dramatically improve the transparency for American and foreign companies registered with the U.S. Securities and Exchange Commission (SEC). The passage of this legislation provides an opportunity for Canada to adopt similar regulations to advance investor protections while meeting its commitments to corporate social responsibility and transparency in the extractives sector.

On July 21,<sup>st</sup> 2010, U.S. President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act. In addition to the well-publicized financial regulatory reform, this Act imposes additional disclosure requirements on public companies in the extractive sector. The law requires all American and foreign companies registered with the U.S. Securities and Exchange Commission to disclose, on a disaggregated basis, how much they pay governments for access to their oil, gas, and minerals. The law also aims to combat the exploitation and trade of conflict minerals by improving disclosure of their use in manufactured products.

There are several important differences between the Dodd-Frank legislation and that which currently exists in Canada.

### *Differences: Payments to Governments*

1. The Dodd-Frank Act requires a higher level of disclosure than that which is currently required by Canadian legislation. The Dodd-Frank Act requires more detailed payment information, specifying the type of payment and the government that received the payment.
2. The Dodd-Frank Act will provide the public with access to comprehensible, clear information about payments between companies and governments. In Canada, issuers are required to disclose some payment information; however, the information is not presented in a uniform format in one document making it difficult to locate and compare. Additionally, while some categories of disaggregated payments are disclosed, aggregate company-government payment information is not readily available.

3. The Dodd-Frank Act aims to promote transparency and accountability among companies, governments, and international and domestic stakeholders, while also protecting investor interests and enhancing U.S. energy security. Canadian legislation is solely intended to protect investors.

#### *Differences: Conflict Minerals*

1. The Dodd-Frank Act introduces transparency and accountability into the supply chain of manufacturing companies sourcing conflict minerals. The aim of the Dodd-Frank Act is to discourage manufacturing and processing companies from using conflict minerals. Additionally, the legislation aims to promote transparency and improve consumer awareness about conflict minerals. Similar legislation does not exist in Canada.

2. The Dodd-Frank Act will require mining companies operating in the DRC and neighbouring countries to demonstrate that the minerals they produce do not finance or benefit armed groups in the DRC or adjoining countries. Canadian disclosure requirements focus on political and social risk and only require companies to disclose material risks the benefits that may accrue from their production to armed groups.

The following tables show the new changes in the U.S. as compared to the current Canadian rules:

### **PAYMENTS TO HOST GOVERNMENTS**

	Canada	United States (Post Dodd-Frank Reform)
Application	Extractive sector issuers	Extractive sector issuers
Revenue Streams Disclosed	<ul style="list-style-type: none"> <li>- Royalty payments</li> <li>- Changes to royalty rates</li> <li>- Income tax payments, and other agreements or payments</li> <li>- Disclosure of the financial period in which the payments have or will be made</li> <li>- Disclosed on a country-by-country basis with some permitted exceptions.</li> <li>- In the mineral sector only disclosure is required on a project-by-project basis</li> </ul>	<ul style="list-style-type: none"> <li>- All Payments made to U.S. and foreign governments both in aggregate and by category</li> <li>- Payments include taxes, royalties, fees, production entitlements, fees, bonuses and other material benefits commonly recognized as part of the revenue stream in the extractive sector and which, when practical, are consistent with the guidelines of the Extractive Industries Transparency Initiative.</li> <li>- Disclosure of the government that received the payment and the location of that government</li> <li>- Disclosure of the currency of the payment, the business section of the extractive issuer that made the payment, the project to which the payments relate, and the financial period in which the payment was made</li> </ul>
Aim	<ul style="list-style-type: none"> <li>- Mitigate investor risk</li> </ul>	<ul style="list-style-type: none"> <li>- Mitigate investor risk</li> <li>- Support the government's commitment to international transparency promotion efforts</li> <li>- Improve the stability of U.S. energy supplies.</li> </ul>
Information Availability	<ul style="list-style-type: none"> <li>- Disclosure is available online within annual reports, annual information forms, technical reports, material change reports, and MD&amp;As.</li> </ul>	<ul style="list-style-type: none"> <li>- Disclosure to be provided in an interactive data format and included with annual reports available online</li> <li>- If practical, the commission will make a compilation of this information available online.</li> </ul>

## CONFLICT MINERALS

	Canada	United States (post Dodd-Frank reform)
Application	<ul style="list-style-type: none"> <li>- All Extractive Sector Issuers are only required to report material risks and uncertainties</li> </ul>	<ul style="list-style-type: none"> <li>- All issuers for whom a conflict mineral is necessary to the functionality or production of a product manufactured by that issuer</li> <li>- Focus is primarily on manufacturing companies with an expected trickle-down effect to mining companies</li> </ul>
Disclosure Requirements	<ul style="list-style-type: none"> <li>- None pertaining specifically to conflict minerals</li> </ul>	<ul style="list-style-type: none"> <li>- Produce an independently audited report disclosing the measures taken to exercise due diligence on the source and chain of custody of the conflict mineral</li> <li>- A conflict mineral, such as coltan, is determined by the Secretary of State to be financing conflict in the DRC or in a neighbouring country</li> </ul>
Aim	<ul style="list-style-type: none"> <li>- Mitigate investor risk</li> </ul>	<ul style="list-style-type: none"> <li>- Discourage the exploitation and trade of conflict minerals</li> </ul>
Information Availability	<ul style="list-style-type: none"> <li>- Included within company filings</li> </ul>	<ul style="list-style-type: none"> <li>- Posted on the company website and included within SEC filings</li> </ul>

### Regulatory Harmonization

The passage of the Dodd-Frank Act provides an opportunity for Canadian legislators and securities regulators to improve transparency of their listed companies operating in developing countries. Harmonizing Canadian securities regulation with the transparency provisions in the Dodd-Frank Act will streamline reporting for issuers listed in both jurisdictions and ensure adequate investor protections are taken on both sides of the border. It is for this reason that many securities regulators in Canada have adopted similar provisions to those passed in the United States, such as accounting independence rules in the Sarbanes-Oxley Act of 2002, and most recently, with the Canadian Securities Administrators' October 2010 release of guidance on environmental reporting following the SEC's guidance on climate change reporting earlier this year. Additionally, harmonizing the legislation would benefit some of the larger extractive sector issuers listed on both the TSX and American exchanges. These companies will need to comply with American regulations and may support similar amendments to Canadian regulations.

While adopting legislation similar to the Dodd-Frank Act would be beneficial, Canada's system of provincial securities regulation and focus on junior companies presents some unique challenges. First, junior extractives companies dominate the Canadian exchanges and as a result American-style regulations are often deemed too cumbersome for the Canadian market. Second, Canada has thirteen securities regulators in comparison to the United States which has one regulator, the SEC. Although, securities regulations are coordinated at the national level by the Canadian Securities Administrators, significant differences in provincial regulation remain. Without the creation of a national regulator, federal legislators cannot pass legislation pertaining to securities regulation. The use of securities regulation to advance foreign policy objectives, as has been seen in the Dodd-Frank Act, is much more difficult in the Canadian context.

However, even without the harmonization of Canadian and American regulations, Canadian citizens, governments and investors will benefit from the introduction of the Dodd-Frank Act. First, there will be specific information available about payments made to Canadian governments by companies operating in Canada and

listed on American exchanges, such as EnCana Corporation. Second, companies listed on both Canadian and American exchanges will need to comply with the provisions in the Dodd-Frank Act, thus there will be a dramatic improvement in the level of transparency among a small but important subset of Canadian issuers, including, for example, Barrick Gold Corporation.

## **PWYP Position**

The new law is a major success for Publish What You Pay (PWYP), a global coalition of 600 development, environmental, faith-based and human rights organizations operating in over 50 countries. The adoption of the Dodd-Frank Act adds to a growing list of mandatory and voluntary initiatives that are part of a global push for corporate accountability. Canada is a global leader in the energy and mining sectors, but more can be done to demonstrate corporate openness. It's time Canada lived up to its commitment to promote transparency in extractive industries by adopting rules similar to those of our largest trading partner.

To enable federal legislators to table similar legislation to that seen in the U.S., Canada requires the creation of a national securities regulator. Numerous commissions and panels have determined that a national securities regulator would enhance Canada's international competitiveness and would increase enforcement and enhance investor protection. In 2009, the Government of Canada established the Canadian Securities Transition Office ([www.csto.ca](http://www.csto.ca)) to assist in establishing a Canadian regulator, all the provinces and territories except Manitoba, Alberta and Quebec are participating in the process as advisory board members. In the absence of a federal regulator, similar legislation could be tabled by the Ontario provincial government, which would affect the actions of the Ontario Securities Commission, one of the most influential securities regulators in Canada.

In addition, Bill C-571 was recently tabled in the House of Commons. The Bill calls for requirements that would compel Canadian companies to exercise due diligence before purchasing minerals that originate from the Great Lakes Region of Africa to ensure that no illegal armed group has benefited from any transaction involving those minerals. This bill attempts to strengthen the role of the Canadian CSR Counsellor to provide oversight of Canadian mineral companies operating in the Great Lakes Region of Africa. In the wake of the Dodd-Frank Act, the Canadian government is likely to experience pressure to harmonize regulations from both stakeholders and shareholders, but also from legislators, Bill C-571 is an example of this.

## **The Next Step**

The Dodd-Frank Act has yet to be translated into regulations. By April 17, 2011 the SEC will have developed and enacted regulations implementing the Dodd-Frank reforms. At this time, the pressure for harmonization will be even greater, as the differences in Canadian and American securities regulation move from policy to practice.