



MINISTRY OF MINING

REPORTING OF MINING AND MINERAL RELATED ACTIVITIES 2016

MEMORANDUM

Introduction

Mineral resource development involves a complex web of relationships among mining companies, government officials and institutions as well as the citizens. Therefore, to ensure that all parties in the process of management participate effectively, information about the resource must be readily available as a first step towards good governance and transparency.

One of the main causes of the “resource curse” in resource-rich countries is the absence of transparency and accountability, thereby providing room for corrupt and unfair deals or contracts. Transparency and accountability across the entire mining value is of particular importance in seeking to achieve good governance in Africa.

Transparency and accountability are also strong anti-corruption tools. A lack of transparency is said to increase the risks of corruption and embezzlement. Transparency also helps to provide accurate figures on which stakeholders can negotiate, plan and ensure accountability.

In most jurisdictions, the disclosure of information relating to extractives tends to focus on either contract or revenue transparency. For example, the United States, Timor-Leste and Peru disclose oil and gas contracts publicly, and other countries allow disclosure under freedom of information laws and policies, including Columbia and to some extent Mexico.

Contract transparency has also made significant progress in Africa. Liberia, DRC, Guinea and Sierra Leone have all published their mining contracts or agreements. In other jurisdictions, such as Ghana, contract disclosures are purely voluntary. In 2014, Sierra Leone also took a voluntary step towards public disclosure of its mining contracts which can be found at the website of the national Minerals Agency.

All in all, the rationale for making such data available is to enable the citizens to hold companies and the government accountable when determining whether the government secured a fair deal for the exploitation of the minerals.

Legal Basis for the Draft Regulations

The legal basis for these regulations is provided for by section 119(3) of the Mining Act, 2016 which states: “The Cabinet Secretary shall make regulations to provide for accountable and transparent mechanisms of reporting mining and mineral related activities, including:

- (a) Revenues paid to the government by mineral right holders;
- (b) Production volumes under each Licence or permit.”

Application of the Draft Regulations

The provision of section 119(3) as stated above is very broad. Unlike other jurisdictions where the focus is on contract and/or revenue transparency or disclosure, section 119(3) could be interpreted broadly following the use of the term “mining and mineral related activities” to cover revenues, payments, production volumes, contract disclosure, beneficial ownership, types and number of licences or permits granted among several others. Accordingly, the regulations have been drafted to apply to all of the above.

Key Features/Issues of the Draft Regulations

The key features/issues considered in the draft regulations are:

- (a) The mining and mineral related activities that may be covered under the Regulations. An interpretation has been provided as to the meaning of mining and mineral related activities;
- (b) The obligation on the Cabinet Secretary to prepare reports on all the mining and mineral related activities;
- (c) The content of a report; and
- (d) The publication of the report.

Compliance with the Constitution of Kenya

Article 35(1)(a) of the Constitution states that every citizen of Kenya has the right of access to information and 35(3) further provides that the State shall publish and publicise any important information affecting the nation.

Additionally, transparency and accountability constitute two of the key national values and principles of governance as stipulated under Article 10(2) of the Constitution. Section 119(3) of the Mining Act, which mandates the Cabinet Secretary to make regulations on how mining and mineral related activities must be reported in a transparent and accountable manner, clearly satisfies the requirements of the Constitution.

Comparison (Lessons from other Jurisdictions)

As noted earlier, a number of countries, particularly in Africa, have adopted measures to disclose information relating to mining activities. Some of these measures are mandatory as they are embedded in legislation and others are voluntary. The commonest practice is the publication of agreements and/or revenue disclosure. A reading of sections 119(1) and 119(3) of the Mining Act indicates that these provisions not only relate to contract and revenue

transparency but could be interpreted more widely to cover potentially any or all activities that relate to mining and minerals. Kenya's Mining Act therefore offers some of the most comprehensive transparency and accountability mechanisms that deal with mining activities.

Arrangement of Regulations

1. Citation
2. Interpretation
3. Application of Regulations
4. Obligation to Submit Reports
5. Obligation to Prepare Reports
6. Content of Report
7. Publication of Report
8. Obligation to Publish Mineral Agreements and Mineral Rights

IN EXERCISE of the powers conferred by section 223(1) and pursuant to section 119(3) of the Mining Act, 2016, the Cabinet Secretary makes the following regulations.

REPORTING OF MINING AND MINERAL RELATED ACTIVITIES REGULATIONS, 2016.

1. Citation

These regulations may be cited as the Reporting of Mining and Mineral Related Activities Regulations, 2016 and shall come into force on the date of their publication in the Kenya Gazette.

2. Interpretation

In these regulations, unless the context otherwise requires-

“Act” means the Mining Act, 2016.

“beneficial owner” means any natural person who, directly or indirectly, ultimately owns, exercises control over or has a substantial economic interest in an entity that holds a mining licence, or receives substantial economic benefit from such entity or a company or person that holds a mining licence or any operations associated with a mining licence.

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to mining.

“Cap 306” means Chapter 306 of the Laws of Kenya as repealed by the Mining Act, 2016.

“community” means the community as defined in the Act and the regulations made under the Act.

“County Government” means the County Government provided for under Article 176 of the Constitution of Kenya.

“dealer’s licence” means a mineral dealer’s licence or diamond dealer’s licence under the Act.

“dealer’s permit” means a mineral dealer’s permit under the Act.

“holder” means a holder of a mining licence, mining permit, dealer’s licence or permit.

“mineral related activities” means any activity involving the reconnaissance and prospecting of minerals or dealings in minerals under the Act or any regulations made thereunder.

“mining related activities” means any activity associated with mining operations as defined in the Act.

“National Mining Corporation” means the National Mining Corporation established pursuant to the Act.

“payment” means an amount paid, whether in money or in kind for any mining or mineral related activities, where the payment is of the following categories:-

- (a) corporate tax or net profit tax of a holder, excluding taxes levied on consumption such as value added taxes and personal income taxes;
- (b) royalties;

(c) dividends paid to the state as a shareholder or holder of a free-carried equity interest pursuant to the Act; or

(d) application fees, licence fees, permit fees, ground rent, cess, levies, charges, penalties or other considerations as may be prescribed by the Cabinet Secretary or under any law.

3. Application of Regulations

These regulations shall apply to-

(1) holders of mineral rights, dealers' licences or permits under the Act; and

(2) all mining and mineral related activities and all mineral rights, mineral dealers' licences or permits and diamond dealers' licences granted under Cap 306 and which are valid subsisting after coming into force of the Act and these regulations.

4. Obligation to submit reports

(1) A holder including the National Mining Corporation shall, not later than sixty (60) days after the end of every year, submit to the Cabinet Secretary a report on:

(a) detailed payments disaggregated by mineral type, made to the national government, a county government, the community or any government agency;

(b) quantity of ore extracted, processed and disaggregated production volumes of all minerals;

(c) sale volumes disaggregated for all dealings in minerals;

(d) gross revenue from the sale of minerals, disaggregated by mineral;

(e) total number of persons directly employed by the holder including expatriates if any; and

(f) the beneficial ownership of holders of licences of privately owned reporting companies or persons.

(2) The report under sub regulation (1) is to include an attestation made by a Director or Chief Executive or any authorised officer of the holder, that the information in the report is true, accurate and complete.

(3) Every holder, including the National Mining Corporation shall, not later than thirty (30) days after the end of every quarter calendar month, submit to the Cabinet Secretary a report on:

(a) detailed payments disaggregated by mineral type made to the national government, a County Government or the community;

(b) sale volumes disaggregated of all dealings in minerals; and

(c) gross revenue from the sale of minerals.

The report is to include an attestation made by a director or authorised officer of the entity or holder.

(4) The Cabinet Secretary may specify, in writing, the way in which payments are to be organised or broken down in the annual and monthly reports, including on a project basis and the form and manner in which a report is to be submitted.

(5) For the purpose of verifying compliance with these regulations, the Cabinet Secretary may, by a written request, require a holder to provide within the period specified in the request, with any information or documents, including an explanation of how the holder has treated a payment in a report referred to in sub-regulations (1) and (3) of this part or order an audit of its report or of the records of payments for the year to which the report relates.

(6) Any audit that the Cabinet Secretary may order under sub-regulation (5) shall be carried out in accordance with the International Auditing Standards.

(7) The Cabinet Secretary may appoint an independent administrator to reconcile all disclosed company or individual payments and government revenues and to highlight any significant unreconciled discrepancies in the data.

(8) A holder who fails to comply with any requirement under sub regulation (5), or who submits a report or any other document and knowingly makes a false statement, commits an offence and is liable on summary conviction to a fine of not less than one million Kenya Shillings (KSh 1000,000) or to a term of imprisonment not exceeding two (24) months or to both.

5. Obligation to prepare reports

The Cabinet Secretary shall prepare an annual report on:

(1) all payments made to the National Government or any of its agency, a County Government or the community by the National Mining Corporation and by every holder of:-

(a) a large scale mineral right;

(b) a small scale mineral right; and

(c) a mineral dealer's licence or permit and a diamond dealer's licence.

(2) quantity of ore extracted, processed and production volumes of all minerals;

(3) sale volumes of all dealings in minerals; and

(4) gross revenue from the sale of minerals.

6. Content of report

(1) For each year, the report shall include but not be limited to the following information:-

(a) the total amount paid to the National Government, a County Government and the Community;

(b) payment disaggregated by type of mineral right, by licence and all categories of payment;

(c) production volumes disaggregated by type of licence, permit and mineral;

(d) gross revenue from the sale of all minerals by holders of mining licences and permits disaggregated by type of mineral;

(e) gross revenue and sales volume of dealings in minerals disaggregated by type of licence, permit and mineral;

(f) number of each category of mineral right applied for during year, together with number granted and number rejected;

- (g) total land area (or blocks) for each category of mineral right held at end of the reporting year;
- (h) total land area (or blocks) held under mineral rights;
- (i) total area (or blocks) surrendered during the year;
- (j) total number of each type of mineral right in force at end of the year;
- (k) number of mineral agreements entered into during the year;
- (l) number of mineral agreements in force at end of the year;
- (m) number of new operating large scale mines that commenced production during the year;
- (n) number of operating mines;
- (o) number of community development agreements entered into during the year;
- (p) total number of community agreements in force at end of the year;
- (q) beneficial ownership; and
- (r) any other statistics or information that the Cabinet Secretary may deem necessary.

(2) Where payments in kind are made to the National Government, a County Government or community, the report shall state the value of such payments in kind and, where applicable, the volume of those payments in kind, and shall include supporting notes to explain how the value has been determined.

(3) The Cabinet Secretary may and from time to time, publish in the Kenya Gazette, guidelines for disclosing the identities of beneficial owners of licences.

7. Publication of reports

(1) The Cabinet Secretary shall ensure that a comprehensive and detailed report, prepared in accordance with regulations 5 and 6 above, is published annually by way of publication on the official website of the Ministry of Mining.

(2) The report shall be published not later than three (3) months after the end of the year.

(3) The first report under these regulations shall be published not later than six (6) months after these regulations come into force.

(4) Quarterly reports, as defined under regulation 4(3) above, shall be published on the official website of the Ministry of Mining not later than sixty (60) days after the end of every quarter.

8. Obligation to publish mineral agreements and mineral rights

(1) All mineral agreements shall be published by the Cabinet Secretary on the official website of the Ministry of Mining within thirty days after ratification by Parliament.

(2) The Cabinet Secretary shall ensure that all mineral rights that are granted are made available to the public on the online mining cadastre within thirty (30) days from the date of grant.

(3) Without limiting the scope of sub- regulation (2), all mineral rights that were granted before the commencement of the Mining Act, 2016 and are still valid and subsisting after

coming into force of the Act shall be made available to the public on the online mining cadastre within six (6) months after the coming into force of these regulations.