

Finance Releases Draft Legislation on the Critical Mineral Exploration Tax Credit but "Critical" Details Remain Outstanding

Zahra Nurmohamed, Tera Li Parizeau, Neil Burnside

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Introduction

On August 9, 2022, the Department of Finance released draft legislation (Draft Legislation) to implement the 30 percent Critical Mineral Exploration Tax Credit (CMETC) that was introduced on April 7, 2022 (Budget Day).¹ While the structure of the CMETC Draft Legislation is generally similar to the framework under the existing 15 percent Mineral Exploration Tax Credit (METC), there are a number of new requirements that must be satisfied in order to qualify for the CMETC.

Although the Draft Legislation states that the CMETC will apply to expenditures renounced under eligible flow-through share agreements entered into after Budget Day (and on or before March 31, 2027), mining companies planning to undertake flow-through share financings in 2022 that may be eligible for the CMETC should seek guidance on these new requirements as important details are still missing from the Draft Legislation.

Comparing the METC with the CMETC

Like the METC, the CMETC will only be available to *individuals* who enter into flow-through share agreements with issuers who agree to renounce specified surface "grass-roots" mineral exploration expenses to such individuals. The Draft Legislation confirms that a taxpayer can only deduct the METC or CMETC in respect of the same expense, and that they cannot use the METC as a 'fallback': if a taxpayer claims the CMETC and the claim is subsequently disallowed by the Canada Revenue Agency, the taxpayer cannot then claim the METC.

Unlike the METC, the CMETC will only apply to specified minerals defined in the Draft Legislation as "critical minerals" — namely copper, nickel, lithium, cobalt, graphite, rare earth elements, scandium, titanium, gallium, vanadium, tellurium, magnesium, zinc, platinum group metals, and uranium. Additionally, a "qualified engineer or geoscientist" must certify that the expenses will be incurred pursuant to an exploration plan that primarily (i.e., more than 50%) targets these critical minerals.

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The certification is to be done in a prescribed manner and form and must be completed no more than 12 months *before* the time the flow-through share agreement is made. Furthermore, the Draft Legislation requires the qualified engineer or geoscientist to act reasonably, in their professional capacity, in completing the certification.

The definition of "qualified engineer or geoscientist" is largely based on the "qualified person" definition provided in National Instrument 43-101 "Standards of Disclosure for Mineral Projects" published by the Canadian Securities Administrators as of Budget Day. However, the "qualified engineer or geoscientist" definition in the Draft Legislation does not extend to engineers or geoscientists who are regulated by, or members of, a professional association outside of Canada. The explanatory notes to the Draft Legislation state that the "qualified engineer or geoscientist" may be an employee of the issuer corporation; provided that such employee satisfies the definition of "qualified engineer or geoscientist."

So, What's Missing?

The Canada Revenue Agency has not released the prescribed form or manner of the certification process by the qualified engineer or geoscientist or provided any guidance on what an acceptable certification may look like despite the fact that issuers have been able to enter into flow-through share agreements targeting critical minerals since Budget Day. Accordingly, we do not know how onerous the certification process will be. We understand that the Canada Revenue Agency is planning to produce the form, along with reporting updates associated with the CMETC as soon as possible.

Mining companies engaged in mineral exploration that primarily targets critical minerals should take action now to ensure that certification takes place during the exploration plan phase and well in advance of entering into any flow-through share agreements.

¹ For more information regarding the Budget, please see our Tax Group's "2022 Federal Budget Tax Highlights."