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In force since June 1, 2015: The Extractive Sector Transparency Meadures Act (Canada)

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In keeping with trends in other jurisdictions, Canada has brought into force federal rules requiring businesses in the extractive sector to publish annual reports on payments of $100,000 or more made to governments in Canada and abroad. Payments to Aboriginal governments will be covered by these rules starting in 2017.

The purpose of the legislation – for which many regulations remain to be published - is to implement Canada's international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities.

WHO MUST REPORT?

The Extractive Sector Transparency Measures Act[1] **(ESTMA)** applies to

1. any corporation or trust, partnership or other unincorporated organization that is engaged in the commercial development of oil, gas or minerals in Canada or elsewhere or that controls a corporation or a trust, partnership or other unincorporated organization that is engaged in the commercial development of oil, gas or minerals in Canada or elsewhere, and
2. is listed on a stock exchange in Canada or has a place of business in Canada, does business in Canada or has assets in Canada and that, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years: (i) it has at least $20 million in assets, (ii) it has generated at least $40 million in revenue, (iii) it employs an average of at least 250 employees; or is an entity listed by regulation, and
3. has made payments of $100,000 or more to governments in Canada and/or abroad in a financial year.

WHEN MUST THE REPORT BE FILED?

The report must be filed with the federal minister (to be designated) annually, within one hundred and fifty (150) days of the end of the entity's financial year. ESTMA's transitional provisions specify that reporting is required for the first full financial year of an entity following the coming into force of the Act (June 1, 2015). The report must be made public in a manner to be prescribed by regulations and it must remain available to the public for at least five years.

WHAT MUST BE REPORTED?

Entities must report on payments to payees.

Payments can be in cash or in kind (value is equal to the cost to the entity — or, if the cost cannot

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be determined, the fair market value — of the goods or services that it provided), and the threshold for reporting ($100,000 in the aggregate, or an amount prescribed by regulation) is calculated by payment category:

> taxes, other than consumption taxes and personal income taxes;
> royalties;
> fees, including rental fees, entry fees and regulatory charges as well as fees or other consideration for licences, permits or concessions;
> production entitlements;
> bonuses, including signature, discovery and production bonuses;
> dividends other than dividends paid as ordinary shareholders;
> infrastructure improvement payments; or
> any other prescribed category of payment.

Payments need to have been made in relation to the commercial development of oil, gas or minerals. Commercial development of oil, gas or minerals is defined as meaning (*a*) the exploration or extraction of oil, gas or minerals ("exploration" and "extraction" to be defined by regulation); (*b*) the acquisition or holding of a permit, licence, lease or any other authorization to carry out any of the activities referred to in paragraph (*a*); or (*c*) any other prescribed activities in relation to oil, gas or minerals.

Oil is defined to mean crude petroleum, bitumen and oil shale; gas is defined as natural gas, including all substances, other than oil, that are produced in association with natural gas; and minerals are defined as all naturally occurring metallic and non-metallic minerals, including coal, salt, quarry and pit material, and all rare and precious minerals and metals.

Payee means:

a. any government in Canada or in a foreign state;
b. a body that is established by two or more governments;
c. any trust, board, commission, corporation or body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government referred to in paragraph (*a*) or a body referred to in paragraph (*b*); or
d. any other prescribed payee.

Beginning in June 2017, "payee" will include the following:

a. an Aboriginal government in Canada;
b. a body established by two or more Aboriginal governments in Canada; and
c. any trust, board, commission, corporation or body or authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government referred to in paragraph (*a*) or a body referred to in paragraph (*b*).

DEEMING PROVISIONS

The reach of the Act is expansive, and it contains many deeming provisions. For example, note that for the purposes of the Act,

> a payment that is made to an employee or public office holder of a payee is deemed to have been made to the payee;
> a payment that is due to a payee and that is received by a body that is not a payee for the payee is deemed to have been made to the payee;
> a payment that is made by an entity that is controlled by another entity is deemed to have been made by the controlling entity; and
> a payment that is made for an entity is deemed to have been made by the entity.

Subject to the regulations, an entity is controlled by another entity if it is controlled by the other

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entity, directly or indirectly, in any manner. An entity that controls another entity is deemed to control any entity that is controlled, or deemed to be controlled, by the other entity.

DETAILS ON REPORTING

The responsible minister may issue instructions on how to present information that is required to be included in reports. Reports must include an attestation made by a director or officer of the entity, or an independent auditor or accountant, that the information in the report is true, accurate and complete. The responsible minister may accept substitute reports from other jurisdictions after consideration of equivalency requirements. Subsidiaries can obtain permission not to report in those cases where the parent company files a consolidated report. Data contained in reports must be retained for seven years or the period prescribed by regulation.

ENFORCEMENT

The responsible minister will have search and seizure powers, as well as order powers. Failure to file a report, failure to comply with an order, structuring payments to avoid reporting or providing false or misleading information are offences punishable on summary conviction by a fine of up to $250,000 per day, for each day the offence continues. Any officer, director or agent or mandatary of a person or entity that commits an offence who directed, authorized, assented to, acquiesced in or participated in its commission is a party to and guilty of the offence and liable on conviction to the punishment provided for the offence, whether or not the person or entity has been prosecuted or convicted. Due diligence is available as a defence to persons and entities.

GETTING STARTED

ESTMA has arrived. It will be important for reporting entities to start thinking about the possibility of report substitution (from other jurisdictions), reporting exemptions (for subsidiaries), or data collection, storage and retrieval options (pending receipt of instructions from the government on reporting format). Stay tuned for important information that will become available as the federal government rolls out the regulations, for example, respecting the circumstances in which any of the provisions of the Act do not apply to entities, payments or payees, and prescribing the rate of exchange for the conversion of payments into Canadian dollars.

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[1] S.C. 2014, c. 39, s. 376.

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