

Final guidance on Extractive Sector Transparency Measures Act – Get ready to enrol and report

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The Canadian *Extractive Sector Transparency Measures Act* (the ESTMA) was proclaimed into force on June 1, 2015 and requires businesses involved in the resource exploration and extractive sector in Canada or elsewhere to file and publish reports on certain types of payments made to both domestic and foreign governments. For a discussion of the reporting obligations under the ESTMA and the types of payments required to be detailed in the report, please refer to our [February 25, 2015](#) and [June 1, 2015](#) Osler Updates.

On March 1, 2016, the Department of Natural Resources (NRCan) issued its finalized implementation tools for businesses required to comply with the ESTMA:

- [Guidance \[PDF\]](#) on the reporting requirements under the ESTMA;
- [Technical Reporting Specifications \[PDF\]](#) to provide the form and manner of reporting under the ESTMA;
- Reporting Template in both [XLS](#) and [PDF](#) formats; and
- [Contact Form \[PDF\]](#) for businesses to enrol with NRCan as reporting entities.

As discussed in our September 9, 2015 Osler Update, NRCan issued draft versions of these implementation tools for public comment last September.

The one key substantive difference between the draft and final implementation tools is the requirement to enrol with NRCan as an 'ESTMA Reporting Entity.' Reporting entities must enrol prior to submitting a report under the ESTMA, although NRCan is encouraging enrolment by June 30, 2016.

To enrol, a reporting entity must complete and submit to NRCan a Contact Form which sets out basic information relating the reporting entity (i.e. its legal name, operating name, business number, address and dates of its financial year) and the names and contact information for its primary and alternate contacts. Following receipt of a completed Contact Form, NRCan will assign to the reporting entity a unique 'ESTMA ID' which must be referenced in all future correspondence between NRCan and that reporting entity, including on the ESTMA report submitted by the reporting entity to NRCan each year.

The final version of the Guidance also added further clarification regarding whether payments made to state-owned enterprises (SOEs) are reportable under the ESTMA. The Guidance directs reporting entities to examine the facts and circumstances of payments made to SOEs to determine whether they are reportable; payments are only reportable if the SOE is exercising or performing a power, duty or function of government and therefore constitutes a "payee" under the ESTMA, and not if the SOE is engaging in a commercial activity. The Guidance indicates that it is less likely that an SOE operating outside of its home

jurisdiction would be exercising or performing a power, duty or function of government.

NRCan has also published an [information sheet \[PDF\]](#) on payments made to Indigenous governments. The requirement to report payments made to Indigenous governments in Canada under the ESTMA is deferred until June 1, 2017 and NRCan will continue its engagement with Indigenous peoples on the implementation of the ESTMA during this deferral period. The ESTMA requires the disclosure of certain payments made to Indigenous governments but NRCan has confirmed that it does not require the disclosure of an impact and benefits agreement between a reporting entity and an Indigenous government although payments made under this agreement may be reportable.

Companies subject to the reporting obligations under the ESTMA should enrol with NRCan to receive timely notifications and updates from NRCan on the reporting obligations, implementation tools and substitution determinations, and ensure that they have implemented proper systems, policies and procedures to track payments to governments so they are able to complete and file their annual reports in compliance with the ESTMA.

Entities required to report under the ESTMA should also consider whether the potentially reportable amounts are in fact being made to the government or government officials, as in many foreign countries such a distinction can be difficult to draw. This distinction is critically important in determining whether the bribery as well as accurate record keeping provisions of the Canadian *Corruption of Foreign Public Officials Act* (see our [Osler Update](#)) are implicated by such payments if they are in fact being made to government officials rather than the government.