

# Goodmans<sup>LLP</sup> Update

## Natural Resources Canada Releases Revised Guidance on Compliance with *Extractive Sector Transparency Measures Act*

After reviewing the first reporting cycle under the *Extractive Sector Transparency Measures Act* (ESTMA) and following stakeholder consultations, Natural Resources Canada (“NRCan”) released a revised ESTMA guidance document (the “**Guidance**”) along with a revised ESTMA reporting template and verification checklist (collectively, the “**Guidance Documents**”). ESTMA imposes reporting obligations for payments made by certain entities engaged in the commercial development of oil, gas or minerals to all levels of government in Canada, including Indigenous governments, and governments abroad.

The Guidance Documents are intended to help companies better understand their reporting obligations. The Guidance clarifies several areas of confusion among stakeholders, including, among others, what payments to Indigenous groups or other social payments are captured by ESTMA and how joint venture entities and payee aggregation should be treated for reporting purposes.

### Background to ESTMA

ESTMA came into force on June 1, 2015, with the stated purpose of advancing Canada’s international commitment to deter corruption in the extractive sector globally by increasing transparency. ESTMA imposes reporting obligations on Canadian entities that meet certain criteria for payments made to all levels of government in Canada, including Indigenous governments, and governments abroad in relation to the development of oil, gas and minerals.

Companies must publish their ESTMA reports within 150 days following the end of their financial year and the ESTMA reports are publicly available on the NRCan website for at least five years. For further information on ESTMA, see our [Practical Guide to Reporting Under the Extractive Sector Transparency Measures Act](#).

### Revised ESTMA Guidance

#### *Reporting Payments to Indigenous Payees*

Reportable payments to Indigenous payees made on or after June 1, 2017, must be included in ESTMA reports. The Guidance and corresponding information sheet on payments to Indigenous payees in Canada provide necessary clarification on what payments and payees are captured by ESTMA. One particular area of clarification is with regards to payments made under Impact and Benefit Agreements (IBAs). While IBAs are not reportable under ESTMA and remain confidential to the extent required by the contracting parties, certain payments made under an IBA may be reportable.

The information sheet provides helpful examples of what payments may be captured by ESTMA. For example, it provides that the building of a community centre for an Indigenous group pursuant to an IBA entered into with an Indigenous government to gain access to a mineral deposit may be reportable under ESTMA. Whereas, the purchase of equipment from a local Indigenous corporation at fair market value required for the commercial operation of a company would not be a reportable payment under ESTMA, as it would constitute a commercial transaction.

#### *Social Payments to Payees*

The Guidance provides that where social payments are required for the commercial development of oil, gas or minerals, they are likely reportable. Further, where the payee controls one or more of the nature, timing or extent of a payment, it is likely the payment is reportable. The Guidance gives examples of reportable social payments, including (i) a signing bonus paid in exchange for a payee not objecting to the project, and (ii) a payee agreeing to allow an extractive activity if the reporting entity constructs certain local infrastructure. An example of a non-reportable social payment is a voluntary donation to a payee’s community youth sports team if the nature, timing and extent of the donation is at the company’s discretion and is not a condition of the company’s operations in the area.

## ***Test for Control for Reporting Entities***

Entities that are not directly engaged in the commercial development of oil, gas or minerals may still be subject to ESTMA if they control, directly or indirectly, another entity engaged in such development. The Guidance indicates that the determination of “control” should be construed broadly in a manner consistent with the purpose of ESTMA and should be considered in substance over form. For example, ESTMA may apply to an entity if it has effective authority over an entity through contractual or other arrangements.

## ***Treatment of Joint Ventures***

Where two or more companies carry on a joint venture arrangement, the parties to the joint venture must coordinate to ensure all reportable payments are in fact being reported. The Guidance provides that reporting entities must determine what entity will report the payments in relation to the joint venture and may consider factors such as control, certain attribution rules and whether ESTMA’s purpose is being met.

## ***Payee Aggregation***

A reporting entity must identify and aggregate all payments made to a single payee and if that amount is equal to or greater than \$100,000, it must be included in an ESTMA report. For the purposes of determining whether a series of payments constitutes payments to the “same payee”, reporting entities must group together departments, ministries, trusts, boards, commissions, corporations, bodies or authorities that perform or are established to perform a power, duty or function on a government’s behalf. While not required, the Guidance encourages reporting entities to list the department or agency within the payee that received the payment.

## ***Overcharging by a Payee***

The Guidance provides that while commercial transactions between companies and government are generally outside the scope of ESTMA, where a company is required to hire government to provide goods and services as a condition of the commercial development of oil, gas or minerals and is charged an amount greater than fair market value for such goods and services, the excess amount paid by the company may be reportable under ESTMA.

## **Additional Information**

The Guidance Documents will be available on the NRCan website shortly or can be accessed by contacting any member of our Mining and Natural Resources Group.

For more information on ESTMA and its reporting requirements, contact any member of our [\*Mining and Natural Resources Group\*](#).

## **Goodmans Mining and Natural Resources Group**

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Our group is international in scope, and our involvement stretches beyond North America to Asia, Africa, Australia and countries of the former Soviet Union. With our strength in corporate, commercial, securities, environmental, tax and regulatory areas, our mining and natural resources lawyers draw upon a strong mix of skills to provide a seamless network of services to North American and international clients.

## **Authors**



Kate Lyons  
clyons@goodmans.ca  
416.597.4183



Grant McGlaughlin  
gmcgloughlin@goodmans.ca  
416.597.4199



Sophie Langlois  
slanglois@goodmans.ca  
416.849.6925

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