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## *Extractive Sector Transparency Measures Act*

# Guidance





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Version 2.1 - July 2018

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Cat No. M34-28/2-2016E-PDF

ISBN 978-0-660-04478-1

*Aussi disponible en français sous le titre :*  
*Loi sur les mesures de transparence dans le secteur extractif –*  
*Lignes directrices*

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## Introduction

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This *Guidance* has been developed to help stakeholders understand the requirements of the [Extractive Sector Transparency Measures Act](#) (ESTMA or the Act).

The *Guidance* provides general information on areas such as:

- What is the commercial development of oil, gas and minerals?
- What Entities are subject to the Act?
- What payments must be reported under the Act?
- To whom must a payment be made in order for it to be reportable under the Act?

This *Guidance* is not intended to be prescriptive, but rather practical and illustrative. Examples provided are not intended to be exhaustive. Users are responsible for determining whether and how the Act's provisions apply to them and for ensuring compliance in light of the facts and circumstances of their operations.

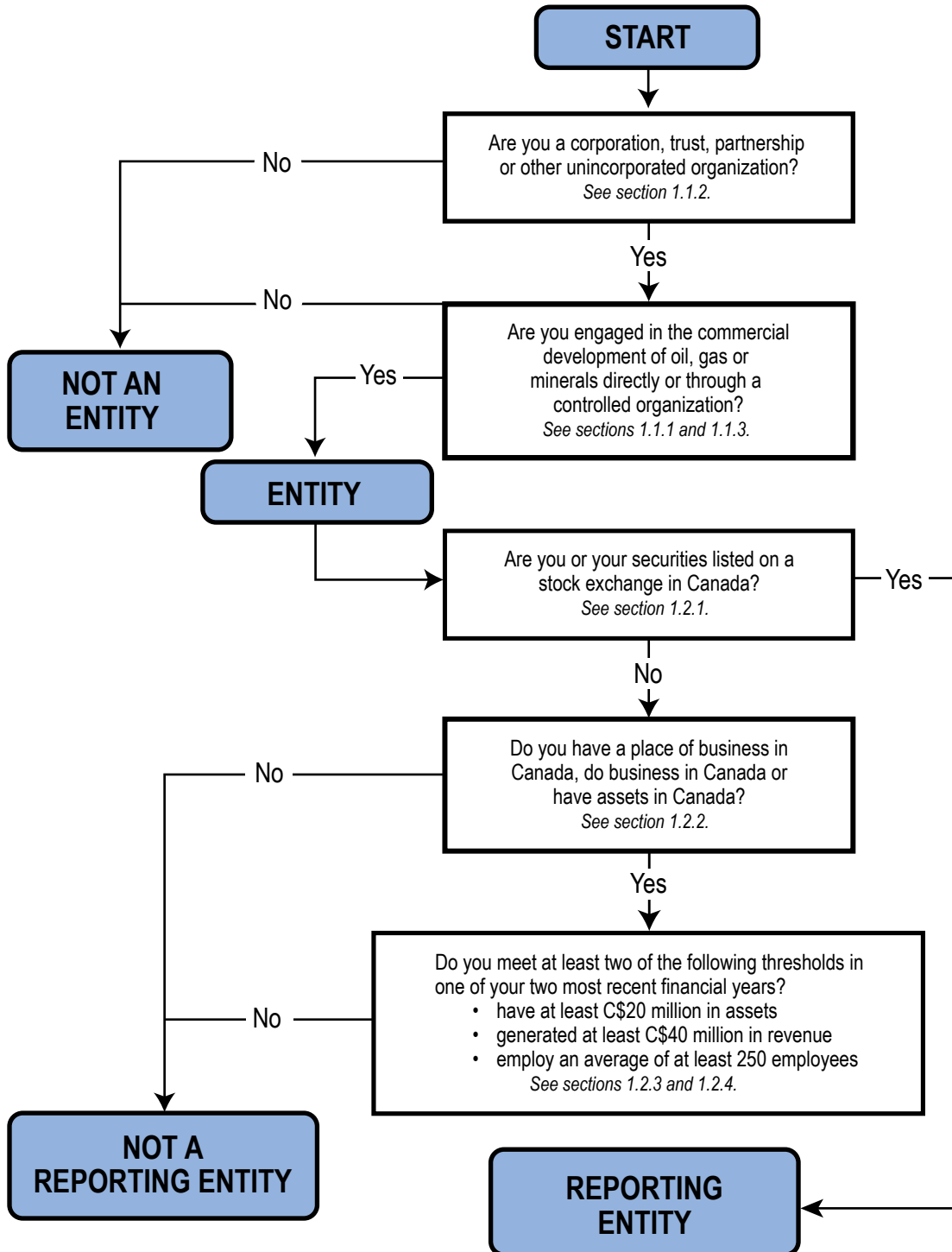
This *Guidance* is not intended to replace legal advice. For the purposes of interpreting and applying the law, users are encouraged to consult the [Extractive Sector Transparency Measures Act](#) and the legally binding [Technical Reporting Specifications](#) that set out the mandatory form and manner of reporting. More reference materials, such as [frequently asked questions](#), are also available at the [ESTMA website](#) and are updated on a regular basis.

Natural Resources Canada (NRCan) may amend any of the information in this *Guidance* as required. NRCan will inform stakeholders of changes via the ESTMA stakeholder mailing list. Individuals may join the mailing list by sending a request to [nrcan.estma-lmtse.nrcan@canada.ca](mailto:nrcan.estma-lmtse.nrcan@canada.ca).

# 1. Who is subject to the ESTMA (i.e., “Entities”)?

The following flow chart highlights key considerations for determining whether you are an Entity that is subject to the Act.

## DOES THE ESTMA APPLY TO YOU?



## 1.1 What type of Entities are captured by the ESTMA (Entities)?

Section 2 of [the Act](#) defines an “Entity” as 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

OR

- 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

Only Entities may be required to publish an ESTMA report. However, an important distinction should be made between an “Entity” and a “Reporting Entity.” Simply being an Entity under the Act does not automatically trigger a requirement to publish an ESTMA report. An Entity must also qualify as a Reporting Entity at any point in a given financial year to be required to report payments. More information on what constitutes a Reporting Entity is available in [section 1.2 of this Guidance](#).

### 1.1.1 What is the “commercial development of oil, gas or minerals?”

Under the Act, an Entity must be engaged, directly or indirectly, in the commercial development of oil, gas or minerals. The commercial development of oil, gas or minerals does not have to be an Entity’s primary or core activity to be subject to the Act.

For example, construction companies that own sand or gravel pits may be required to report their payments to governments related to their extractive activities. Similarly, forestry companies, municipalities, private equity firms and other businesses may have obligations to report if they are also engaged in the commercial development of oil, gas or minerals, either directly or indirectly.

Commercial development of oil, gas or minerals (“commercial development”) captures two categories of activities:

- exploration or extraction of oil, gas or minerals
- acquisition or holding of a permit, licence, lease or any other authorization to carry out any exploration or extraction of oil, gas or minerals<sup>1</sup>

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<sup>1</sup> Extractive Sector Transparency Measures Act, section 2 “commercial development of oil, gas or minerals”



Exploration and extraction refer to the key phases of commercial activity, which occur during the life cycle of an oil, gas or mineral project. These extend from prospecting and exploration for oil, gas or minerals to the closure, remediation and reclamation of a project. Exploration or extraction is not only limited to active phases of operations on the ground, but also captures temporary periods of inactivity. For instance, commercial development does not end with the completion of a seasonal exploration program and only begin again with the next seasonal program.

The acquisition or holding of a permit, licence, lease or other authorization is intended to capture the permitting process, including, for example, application for permits and undertaking of community consultations that will comprise or inform any such application.

Commercial development generally does not include post-extraction activities. Refining, smelting or processing of oil, gas or minerals, as well as the marketing, distribution, transportation or export, are generally not captured as commercial development for the purposes of the Act. However, certain initial processing activities are often integrated with extraction operations and may be part of commercial development of oil, gas or minerals.

#### **Key consideration**

Initial processing of raw natural gas from a well to separate the gas, water, solids and natural gas liquids in order to process the gas to meet pipeline shipping standards creates a “marketable product.” This stage could be considered initial processing and therefore be part of the commercial development activities as opposed to post-extraction activity. Likewise, the separation of a metal from the ore body in which it is found could be considered initial processing. As a result, these activities are likely to be in scope of the Act.

#### **1.1.2 What is a corporation, trust, partnership or other unincorporated organization?**

Corporations, trusts, partnerships or other unincorporated organizations constitute Entities under the Act. These four categories are intended to be broadly interpreted and extend both within and outside of Canada. These categories also include unlimited liability corporations, limited partnerships and royalty trusts.

#### **1.1.3 How should the notion of “control” be applied for the purposes of ESTMA reporting?**

Even if an Entity is not directly engaged in the commercial development of oil, gas or minerals, it is an Entity for purposes of the Act if it controls, directly or indirectly, a corporation, trust, partnership or other unincorporated organization that is engaged in such development and is not an Entity in its own right.

This will be the case whether the controlled Entity is engaged in commercial development in Canada or in a foreign jurisdiction.

Control for purposes of the Act is not limited to direct control. It also extends to indirectly controlled Entities down an organizational chain (e.g. an Entity that is controlled by another controlled Entity).

The term “control” should be applied broadly in a manner consistent with the purposes of the Act. Where one Entity controls another under the accounting standards applicable to it, that will generally be sufficient evidence of control for purposes of the Act. These standards could include International Financial Reporting Standards (IFRS) or Generally Accepted Accounting Principles (United States) (GAAP).

The definition of control is, however, not limited to the above-mentioned accounting standards. Control should be considered in substance over form and may include situations in which an Entity exercises joint control of an operation (see [section 3.4](#) of this Guidance for more information on joint control).

### **Examples**

- A corporation that is subject to Canadian law controls an Australian subsidiary that is engaged in the commercial development of minerals in Australia but is not a Reporting Entity in its own right. The controlling Canadian corporation is an Entity for purposes of the Act by virtue of its control over the Australian subsidiary.
- A private equity firm that is subject to Canadian law controls Sub A that is not engaged in the commercial development of oil, gas or minerals. Sub A, however, controls Sub B, which is engaged in the commercial development of oil. Despite the fact that the private equity firm is not engaged in the commercial development of oil, gas or minerals itself and does not directly control Sub B, it is an Entity for the purposes of the Act because of its indirect control of Sub B by way of Sub A. The private equity firm must therefore account for Sub B's Reportable Payments in an ESTMA report.

## **1.2 Who must publish an ESTMA report (i.e., “Reporting Entities”)?**

A Reporting Entity is any Entity that meets one of the following two criteria from [subsection 8 \(1\) of the Act](#):

- The Entity or its securities are listed on a stock exchange in Canada.
- OR

- The Entity has a place of business in Canada, does business in Canada or has assets in Canada **AND** meets two of the three following minimum thresholds for **size-related criteria** in one of its two most recent financial years:
  - has at least C\$20 million in assets
  - generated at least C\$40 million in revenue
  - employs an average of at least 250 employees

The two aforementioned tests are exclusive of one another. For example, an Entity with common shares listed on the TSX Venture Exchange will be a Reporting Entity, even if it does not meet any of the size-related criteria.

### 1.2.1 Are you or your securities listed on a stock exchange in Canada?

An Entity's securities, for purposes of the Act, are to be broadly construed and will include any security as defined under Canadian provincial and territorial securities legislation.

For the purposes of the Act, a "stock exchange in Canada" includes any exchange in Canada that is recognized or exempted under Canadian provincial securities legislation and that is regulated under National Instrument 21-101 - Marketplace Operation or National Instrument 23-101 - Trading Rules.

### 1.2.2 Do you have a place of business, do business or have assets in Canada?

Entities whose securities are not listed on a stock exchange in Canada must still report under the Act if they have a place of business in Canada, do business in Canada or have assets in Canada and meet two of the three size-related criteria from [section 1.2 of this Guidance](#) in one of their two most recent financial years.

### 1.2.3 Applying the size-related criteria – Calculation of assets and revenue

In applying the size-related criteria, the following approaches should be taken:

- **Based on financial statements:** C\$20 million in assets and C\$40 million in revenue tests are based on figures reported in an Entity's consolidated financial statements in one of its two most recent financial years.

#### **Example**

An Entity has a January 1 to December 31 financial year. To determine if it had to submit a report for 2016, following December 31, 2016, the Entity had to determine whether they met the size criteria in either the year ending December 31, 2016, or December 31, 2015.

- **Gross basis:** Assets should be calculated on a gross basis, not net.
- **Global assets and revenues:** Assets and revenue in the size-related criteria are not restricted to assets or revenue in Canada or to assets and revenue from the commercial development of oil, gas or minerals. An Entity should include all global assets and revenues in determining whether the size-related criteria are met.
- **Exclude parent entities:** Global assets and revenues for the size-related criteria analysis only relate to the Entity itself and its global operations based on its consolidated financial statements. They do not include the global assets and revenues of a parent company.
- **Currency:** Where the currency of the consolidated financial statements is not Canadian dollars, assets and revenues should be converted into Canadian dollars for purposes of these tests using the Entity's method of reporting transactions in foreign currencies in its financial statements.

#### 1.2.4 Calculating the number of employees

For purposes of the size-related criteria, the 250 employees test should be based on the average of all employees of the Entity over each of its two most recent financial years. Employees include people residing or employed in Canada as well as in any other jurisdiction. Employees also include full-time, part-time and temporary employees. Independent contractors, however, do not constitute employees. Entities should refer to the Canadian common law definition of an employee for purposes of applying the size-related criteria. Employees of a parent company should not be included in this calculation.

## **2. Who receives Reportable Payments (i.e., "Payees")?**

The Act defines a Payee as:

- 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 other 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

Payees include governments at any level, including national, regional, state/provincial/territorial or local/municipal levels. The term "government" is not defined in the Act and should be applied broadly to capture the various scenarios that may exist across the globe.

Reporting Entities will need to consider facts and circumstances to determine whether a particular organization or institution meets the criteria of a Payee, as set out in the Act. For instance, companies should consider how a particular payment relates to the powers, duties and functions of a particular government. If a body is responsible for enforcing a bylaw that necessitates levying a fee, tax or other type of payment, it is likely exercising a power, duty or function of government and may qualify as a Payee.

## 2.1 Same Payee (Payee aggregation)

Reporting Entities must identify and aggregate all the payments made within one of the payment categories to a single Payee. If that amount meets or exceeds C\$100,000, it must be included in an ESTMA report. More information on the payment categories is available under [section 3 of this Guidance](#).

For the purposes of determining whether a series of payments constitute payments to the “same Payee” under the Act, 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 behalf of a government. For example, payments to multiple federal departments would be aggregated to the federal government to determine if the \$100,000 threshold is met.

Payments must always be reported for a single Payee and not grouped together at the level of government. For example, each payment to a municipal government Payee must be reported separately in the ESTMA report from payments to other municipal government Payees.

Entities must also consult the [Technical Reporting Specifications](#) for the mandatory form and manner for reporting.

## 2.2 Crown corporations and other state-owned enterprises

Payees include Crown corporations and other state-owned enterprises that are exercising or performing a power, duty or function of government. It is less likely that a state-owned enterprise operating outside its home jurisdiction would be exercising or performing a power, duty or function of government and levy payments on Reporting Entities.

### Best practice

For greater transparency, Reporting Entities are encouraged, where practical, to list the department or agency within the Payee that received the payment. More information on how to report payments at the department or agency level is available in the [Report Validation Checklist](#).

However, Reporting Entities will have to examine the facts and circumstances of payments made to state-owned enterprises to determine whether they may constitute a Reportable Payment based on what role the state-owned enterprise is playing (i.e. business partner versus government representative).

### **2.3 Reporting payments to trusts, boards and commissions**

The definition of a Payee includes 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 a government for a government. Any payment made to this type of a Payee is to be reported as if the payment was made to the government for which it exercises a power, duty or function of government.

Payees that may qualify include universities, school boards and certain not-for-profit organizations funded by a Payee when these are exercising a power, duty or function of government.

#### **Example**

The Alberta Boilers Safety Association (ABSA) is an example of a Payee that exercises the power, duty or function of government. ABSA, a not-for-profit organization, administers Alberta's pressure equipment safety programs under the Safety Codes Act (Alberta) and has the authority to enforce pressure equipment safety as set out in the legislation. As a result, payments made to the ABSA should be included with payments reported to the Government of Alberta. More information for how to report payments at the department or agency level is available in the [Report Validation Checklist](#).

### **2.4 Reporting payments to Indigenous Payees in Canada**

The Act deferred the requirement for Reporting Entities to report payments made to Indigenous Payees in Canada until June 1, 2017. All Reportable Payments to Indigenous Payees made on or after that date must be included in subsequent ESTMA reports.

Reporting Entities should use the same analyses and considerations when determining when and how to report payments to Indigenous governments as they would with any other government in Canada or abroad. The Act defines Payee but does not specifically define an Indigenous Payee (see examples a, b and c).

The following are general examples:

#### **a. any government in Canada or in a foreign state**

This could include any Indigenous group or organization that exercises or performs the power, duty or function of government. For instance, this could include, but is not limited to,

any group or organization with power to make laws (including bylaws) in relation to natural resources or the management and exploitation of those resources. It can also include a government that has been recognized in federal, provincial or territorial legislation.

**b. a body that is established by two or more governments**

This could include, but is not limited to, a treaty association, tribal council or Chiefs' council that is established by a government as defined in paragraph a.

**c. any trust, board, commission, corporation or body or other authority that is established to exercise or perform, or that exercises or performs, a power, duty or function of government for a government referred in paragraph a or a body referred to in paragraph b.**

This could include, but is not limited to, a treaty association, tribal council or Chiefs' council that is established by a government as defined in paragraph a or a body as defined in paragraph b.

### **3. What payments must be disclosed in ESTMA reports (i.e., "Reportable Payments")?**

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A Reportable Payment under the Act is one that, in a reporting period, meets all the following criteria:

- is made to a Payee (see section 2 of this Guidance for more information on what is a "Payee")
- is made in relation to the commercial development of oil, gas or minerals
- totals, as one or more payments, at least C\$100,000 within one of seven categories:
  - 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 shares)
  - infrastructure improvement payments

Only payments that are attributable to one of the previous payment categories are reportable under the Act. It is the responsibility of the Reporting Entity to determine under which payment categories their payments fall.

In some cases, it may be unclear whether a payment should be reported under one category or another. Reporting Entities should consider the substance, rather than the form, of payments in determining which category is applicable.

For example, a payment made to extract minerals may be considered a tax, a royalty or perhaps both. In these cases, Reporting Entities should use their reasonable judgement in determining under which category the payment should be reported based on its substance.

Note that Reporting Entities that artificially structure their payments to avoid reporting under the ESTMA are in violation of the Act and may be subject to enforcement actions. Reporting Entities are encouraged to document their analyses and decision-making processes when determining which payments are in and out of scope as part of demonstrating their efforts made in complying with the Act.

### **Rebates, refunds and credits**

When a Reporting Entity receives a rebate, refund or credit from the Payee on a payment made in one of the categories, the rebate, refund or credit is not reported unless it was applied prior to the payment being made. Reporting Entities must always report the full amount of the payments they make to Payees, regardless of whether they received credits at a later date. In situations where past rebates, refunds or credits are applied to future payments, only the amount paid after the deductions should be reported. Context on rebates, refunds or credits and how they may or may not have affected the amounts reported can be included in the Notes column of the report.

#### **Best practice**

For greater transparency, Reporting Entities are encouraged to use the Notes column in their ESTMA report to provide a description and/or value of any rebate, refund or credit related to a reported payment.

#### **Example**

A Reporting Entity receives a tax refund midway through their financial year. The refund was not deducted from a tax payment, and therefore should not be included as part of the Reporting Entity's ESTMA reporting.

### Taxes

The tax category is intended to capture income, profit and production tax payments of a Reporting Entity in relation to the commercial development of oil, gas or minerals. This does not include consumption and personal income taxes. Withholding taxes (i.e. taxes remitted to a government by a Reporting Entity on behalf of a third party) do not have to be reported, as these would not constitute a tax liability of the Reporting Entity.



The term “tax” generally means any type of government charge that is enforceable by law, imposed under statutory authority, levied by a public body, and intended for a public purpose. Any government charge that meets these requirements is a tax.

Examples of taxes, which would be reportable under the Act include:

- income and profit taxes
- capital gains taxes
- capital taxes
- property taxes
- mining taxes
- windfall profits taxes
- resource surcharges
- petroleum revenue taxes

In addition to considering the characteristics of the tax, it is also necessary for Reporting Entities to keep in mind whether the tax was paid in relation to the commercial development of oil, gas or minerals.

For instance, it is unlikely that a tax levied on interest income would be considered to be paid for commercial development activities. On the other hand, a tax that was directly calculated with references to levels of gas production is likely to be classified as a production tax.

Another example is a Reporting Entity that leases office space in a city that is not related to its commercial development of oil, gas or minerals and pays property tax to that municipality. Since that payment, while a tax, does not relate to commercial development activities, it would not be required to be reported. However, property taxes on a building on an extraction site, for instance, would be a Reportable Payment.

Where a Payee grants an Entity tax credits or refunds, these credits or refunds would only be included in an ESTMA report if they were applied prior to the tax payment being made by the Entity to the Payee (see [Rebates, refunds or credits section](#) for more information).

#### **Example**

A Reporting Entity pays taxes to the Government of Canada, the Government of Alberta and a foreign government. The total of all reportable taxes paid to the Government of Canada and the foreign government exceeds C\$100,000 in a reporting year, while the total of all reportable taxes paid to the Government of Alberta falls below C\$100,000 in that year. The Reporting Entity would be required to report their reportable tax payments to both the Government of Canada and the foreign government in their ESTMA report.

## Taxes that are likely not reportable under the ESTMA

A **consumption tax** is a tax on the consumption or use of goods or services. Examples include sales tax, goods and services tax, harmonized sales tax, motor fuel tax, value-added tax and use tax. Consumption taxes, even if they relate to the commercial development of oil, gas or minerals, are not Reportable Payments.

**Custom taxes and carbon taxes**, depending on their design, could be seen as a consumption tax, and if so, would not be reportable.

**Payroll deductions** are out of scope of the Act if they are not directly related to the commercial development of oil, gas or minerals. In the Canadian context, the employer portion of payroll deductions for Employment Insurance and the Canada Pension Plan, for instance, are not considered directly related to the commercial development of oil, gas or minerals and are therefore not reportable under the Act.

Reporting Entities must always consider the facts and circumstances of their operations and of the jurisdiction under which they are operating when determining whether any of these taxes are reportable. based on substance over form.

### Royalties

Cash royalties to Payees should not be difficult to categorize or calculate. Royalties paid in-kind, however, should be treated in the same manner as other in-kind payments.

Where the Payee grants an Entity credits and cost allowances as a standard part of its royalty framework, these credits and cost allowances would be included in an ESTMA report if they were applied prior to the royalty payment being made by the Entity to the Payee (see [Rebates, refunds or credits section](#) for more information).

### Fees

The category of fees is substantively broad as set out in the Act. It does not matter whether a payment, in cash or in-kind, is characterized as a fee or not. If the payment accomplishes the same purpose in substance as a fee, it should be reported as a fee.

#### **Best practice**

For greater transparency, Reporting Entities may explain in the Notes column what goods and services were procured for a reported fee, as well as their value.

### Examples

- A Reporting Entity has several lease holdings in western Canada. For one lease holding, the local government charges a quarterly fee of \$30,000. The Reporting Entity aggregates all of the payments it made within its financial year and reports a fee payment to the local government of \$120,000 in its report. If this payment is attributable to a specific project, the Reporting Entity must disclose this payment at the project level, as well as at the Payee level.
- A Reporting Entity only paid claim renewal fees to the Government of Quebec in a reporting year. The numerous claim renewal fees range from C\$300 to C\$20,000 per project in the Reporting Entity's portfolio. Once aggregated, the fees total C\$120,000 paid within the reporting year. Since these fees are related to the commercial development of minerals and total C\$100,000 or more to a single Payee (the Government of Quebec) in a single payment category (fees), they must be included in the Reporting Entity's ESTMA report. In addition to reporting the fees in the Payee table of the ESTMA report, the Reporting Entity would have to consider whether the claim renewal fees consist of one or more projects and report them in the Project table. Reporting Entities have the option to round payments to the nearest \$10,000 for reporting payments. However, rounding is not to be used for calculating and determining Reportable Payments.

This category is not meant to include amounts paid in commercial transactions undertaken in the ordinary course of business to governments or government-owned entities in exchange for goods and services that are essential for the commercial development of oil, gas or minerals.

For example, payments made to a state-owned utility for electricity used by its extraction operations are not likely to be a Reportable Payment. In addition, Reporting Entities are not required to report payments to a state-owned provider for goods and services if the state-owned provider is the only available option and the amount paid represents fair market value.

However, when a Reporting Entity must pay for non-essential goods and services provided by a Payee as a condition of commercial development, such payments should be reported as a fee.

## Examples

- A Reporting Entity decides that it requires security services. Payments have been made to the foreign country's army for the provision of security at an oil extraction site. The required security services were provided effectively. Since the army is providing a service, this payment is treated as a commercial transaction and is not required to be reported.
- Consider a situation in which the Payee had required the Reporting Entity to hire its army for security purposes, but the service was not provided adequately. If the Reporting Entity needed to hire alternative security services, it may be that the substance of the required payment was actually a fee for access to the site and not a fee for a service. In this scenario, the payment could be reportable under the Act.

## Overcharging

Commercial transactions undertaken in the ordinary course of business in exchange for goods or services provided by governments or government-owned entities are generally out of scope of the Act. However, Reporting Entities may be required to report such payments in instances where a Payee overcharges for a service rendered as a condition of the commercial development.

Similarly, if the cost of a good or service is significantly in excess of its fair market value, the payment, or a portion thereof, in excess of fair market value, could be reportable under the Act. Reporting Entities must make best efforts to ascertain whether goods/services required by a Payee are provided at greater than fair market value and are encouraged to document their methodology for establishing the value.

## Production entitlements

A Payee's share of oil, gas or mineral production under a production sharing agreement or similar contractual or legislated arrangement should be categorized as a production entitlement under the Act. Often production entitlements are paid on an in-kind basis. More information on how to report in-kind payments is available in the [Technical Reporting Specifications](#). Reporting Entities should report the cash value of the production entitlements received by a Payee during the relevant financial period.

### **Best practice**

For greater transparency, Reporting Entities may consider reporting volumes of production entitlements paid in-kind in addition to the cash value. More information may be included in the Notes column in the ESTMA reporting template.

## Bonuses

Signing, discovery, production and any other type of bonuses paid to a Payee in relation to the commercial development of oil, gas or minerals must be reported under the Act. A payment that is not termed a “bonus,” but which in substance is a bonus payment, is reportable.

Share issuances by a Reporting Entity to a Payee that are required by law or as consideration for the issuance of a license, permit or concession, are a typical example of an in-kind bonus.

### **Example**

A one-time payment, referred to as a “bonus” and paid to the Government of Alberta at a Crown land auction for lands that will be used in the commercial development of oil and gas, is a typical example of a reportable bonus payment.

## Dividends

Dividends paid to a Payee as an ordinary shareholder do not need to be reported under the Act, if the following criteria apply:

- The shares have been acquired by the Payee for consideration on the same terms as were available at the time of acquisition to other shareholders.
- The dividends are paid to the Payee on the same terms as to other shareholders.

Dividends that are paid to a Payee on shares received in lieu of a bonus, production entitlements, royalties or any other payment category, on the basis of concessional terms, for example, are likely to be reportable.

## Infrastructure improvement payments

Reporting Entities that make infrastructure improvement payments to a Payee, whether under contractual obligations or otherwise, should report such payments. For instance, if the Entity is compelled by a Payee to build a road or a sewage system, other than in circumstances where the road or sewage system is expected to be primarily dedicated to operational activities throughout its useful life, it may be required to disclose the cost of building the road or sewage systems as a payment to the Payee.

The Reporting Entity will need to identify the appropriate period in which to report the infrastructure improvement payment: (a) the period in which that payment was made by the Reporting Entity or (b) when the infrastructure is handed over to the government or (c) when the infrastructure is brought into use. Such considerations should be based on the facts and circumstances of the payment.

It may be the case that infrastructure is handed over to a Payee following its use by a Reporting Entity for its operations. In such situations, the infrastructure improvement payment may be considered an in-kind payment. Information on how to report in-kind payments is available in the *Technical Reporting Specifications*.

### **Examples**

- A Reporting Entity builds a lease access road for its own use. The road is decommissioned at the end of the lease term. The road is related primarily to the Reporting Entity's operational use during its useful lifetime, and there is no payment made to a government since the road no longer exists when the lease is concluded.
- The Reporting Entity also builds a permanent electrical supply and distribution system. At the end of the 30-year lease term, the ownership of the electrical supply and distribution system is to be transferred to the local municipal government. This should be reported as an infrastructure improvement payment at the time of the transfer and follow the in-kind payment requirements under the Act.

### **3.1 Social payments**

Certain social payments may fall under one of the seven payment categories based on substance over form and, therefore, may be reportable. One question Reporting Entities may consider when determining whether a social payment was made as part of the commercial development of oil, gas or minerals may be, "Would the exploration or extraction activity be allowed to proceed if the social payment was not made?" If the activities could not proceed without the social payment, it is likely an indication that the social payment is part of the commercial development of oil, gas and/or minerals and should be reported.

Similarly, if a Reporting Entity makes a payment to a Payee in exchange for no opposition to a project, that payment would likely be reportable.

In determining whether a social payment is reportable, the Reporting Entity may consider the nature, timing or extent of a payment. If one or more of these criteria are controlled by the Payee or if the criteria must be negotiated between the Reporting Entity and a Payee, it is likely that the payment is reportable.

Social payments must be attributed to one of the seven payment categories based on substance over form and will usually fall under the fee, bonus or infrastructure improvement payment categories, depending on the facts and circumstances of the situation.

## **Examples**

### **Reportable social payments**

- A Reporting Entity has provided a local municipal government with an endowment of \$3 million to run a scholarship program for local youth, as well as \$4 million to build a community centre. The nature, timing or extent of these payments are at the discretion of the local municipal government or are a condition of the Reporting Entity's operations in the municipality. These payments are related to the Reporting Entity's commercial development of oil and gas and are reportable. The Reporting Entity includes these payments under the bonus payment category in their report.
- A signing bonus of \$500,000 is paid by a Reporting Entity to an Indigenous band council in Alberta for not objecting to the access to resources on traditional land. As of June 1, 2017, the payment must be reported in the Reporting Entity's ESTMA report.

### **Non-reportable social payments**

- A Reporting Entity has provided a donation to a First Nations community youth hockey team located in a First Nation community where the Reporting Entity has nearby oil and gas operations. The nature, timing and extent of the donation is at the Reporting Entity's discretion and is not a condition of the Reporting Entity's operations in the area. This social payment would not be reportable.
- A Payee only permits a Reporting Entity to conduct an extractive activity if the Reporting Entity builds an arena for the local community. Since building the arena is a condition of the commercial development of oil, gas or minerals, it would likely be in scope of the Act.

## **3.2 Attribution of payments**

[Section 3 of the Act](#) sets out rules regarding situations in which a Reporting Entity does not make a payment directly to a Payee. Reporting Entities should carefully consider these rules when determining which payments made to a Payee must be included in their report.

A Reporting Entity must report on all payments:

- made by the Reporting Entity itself
- made by any business that is not a Reporting Entity in its own right, but that is controlled by the Reporting Entity
- made for, or on behalf of, the Reporting Entity
- made to an employee or public office holder of a Payee, which is deemed to have been made to the Payee
- due to a Payee and that is received by a body that is not a Payee for the Payee, which is deemed to have been made to the Payee

### Example

A Reporting Entity contracts the operation of a mine to a service provider. The service provider pays taxes levied on the mine to the government. These payments relate to the extraction activity of the Reporting Entity, and so the Reporting Entity would be required to report the payments made for them by the service provider.

### 3.3 Reporting payments made in situations of joint operating agreements and joint ventures

In situations where two or more companies engage in a joint operating agreement with complex partnership stakes between operators and non-operators, Reporting Entities must consider the broad application of “control” in the Act, the attribution rules and whether the purpose of the Act is being met:

- ✓ If the operator is a Reporting Entity in its own right, it should report all of the payments it makes on behalf of non-operator members, depending on the facts and circumstances of the situation. Non-operator members must still ensure that they report any payments they make directly to a Payee, as well as any payments made for them that are not reported by the operator.
- ✓ If the operator is not a Reporting Entity in its own right, the non-operator members that are Reporting Entities would be required to report all of the payments made for them by the operator, in addition to any payments they make directly to the Payee.

More information on how to report in such situations is available in the [frequently asked questions](#) section of the NRCan website.

Non-operators must make efforts to determine whether the operator is reporting Reportable Payments made by the joint venture or under the joint operating agreement. Reporting Entities are encouraged to document their due diligence in determining their reporting obligations under the Act, including their analysis of the facts and circumstances of specific situations.

Whereas information on previously existing joint operating agreements and joint ventures may not be currently available to joint operating agreement and joint venture members despite efforts to obtain the information, reporting requirements should be considered when establishing or amending joint operating agreements/joint ventures following the ESTMA's coming into force on June 1, 2015, to facilitate information sharing for reporting purposes.

It may also be possible for a joint venture to qualify as an Entity in its own right if it meets [section 2 of the Act](#) (see section 1 of this Guidance for more information on [Entities and Reporting Entities](#)). Joint ventures that qualify as Reporting Entities in their own right may submit their own ESTMA report.



### 3.4 Reporting payments made in situations of joint control

There may be situations where joint control exists; that is, where no business solely controls a business arrangement that includes two or more partners. As stated in [section 1.1.3](#), the term “control” should be applied broadly, in a manner consistent with the purpose of the Act.

In situations of joint control, Reporting Entities involved should consider the key requirements of the Act, as they would with regard to any payment:

- If a Reporting Entity makes a payment to a Payee (of at least C\$100,000 in one of the payment categories), it must report it. This could be a payment made as an operator of a joint arrangement or as a member of a joint arrangement.
- If a payment is made by a business that is not subject to the Act but is controlled by a Reporting Entity, the Reporting Entity must report the payment. Again, the business (not subject to the Act) may be making the payment as an operator or may be making the payment as a member of a joint arrangement, and therefore, the attribution rule may apply.

Reporting Entities have some flexibility in determining how to report these payments in a manner that achieves the purpose of the Act, which is to make the Reportable Payments transparent to the public. More information on how to report in such situations is available in the [frequently asked questions](#) section of the NRCan website.

## 4. Substitution

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Subsection 10 (1) of the [Act](#) allows the Minister of Natural Resources to determine that the reporting requirements of another jurisdiction are an acceptable substitute for those of the ESTMA.

NRCan assesses if a jurisdiction’s legislation or other measure:

- achieves the purpose of the reporting requirements under the Act
- addresses a similar scope of the reporting requirements in the Act

Once a determination has been issued, a Reporting Entity may provide the same report that was submitted to a substitutable jurisdiction to meet the reporting obligations under the Act. The Minister of Natural Resources may impose more conditions, which would be included in the substitution determination.

All substitution determinations, as well as the mandatory process for submitting a substituted report, are available at the [Substitution Process and Determination section of the ESTMA website](#).

## **5. Additional considerations**

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Reporting Entities have the responsibility to meet the obligations set out in the Act and are encouraged to document the efforts and analyses that they have conducted to comply with the Act.

NRCan continues to monitor risks of potential conflict between the Act and laws or other measures in foreign jurisdictions that may hinder reporting. While no such laws have been identified to date, Canada has held discussions with countries of interest to signal that, like other major economies, it has adopted legally binding requirements to report payments.

Should Reporting Entities encounter challenges in meeting the reporting requirements, they are encouraged to provide details of these circumstances to NRCan by email: [nrcan.estma-lmtse.nrcan@canada.ca](mailto:nrcan.estma-lmtse.nrcan@canada.ca).

NRCan will continue to assess any risks and engage directly with jurisdictions where measures exist that may raise concerns regarding the application of the ESTMA.