



Canada seeks consultation on Extractive Sector Transparency Measures Act implementation tools

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On August 12, 2015, Natural Resources Canada (NRCAN) posted a [notice](#) on its website seeking public input on draft implementation tools (Implementation Tools) it has developed in respect of the [Extractive Sector Transparency Measures Act](#) (the Act). As described in our previous entries on our Canadian Securities Law blog ([here](#) and [here](#)), the stated purpose of the Act is to foster better transparency to ensure that resource extractive industries support proper development in the countries where they operate, while at the same time making it harder to conceal illicit payments.

Background

The Act was proclaimed into force on June 1, 2015, but as we have **previously noted** precise guidance on the underlying disclosure obligations has been lacking. It was hoped that regulations enacted under the Act would put meat on the legislative skeleton and provide much needed regulatory certainty. Instead, NRCAN has introduced the Implementation Tools as a practical and illustrative alternative. The Implementation Tools do not constitute prescriptive guidance with the force of law, however.

The upshot is that, while the Implementation Tools may assist a company in satisfying its obligations, companies at all times remain responsible for determining whether and how the Act's provisions apply to them. Regulations appear to be likely only if it becomes clear in practice that a more prescriptive framework is necessary.

What are the Implementation Tools?

The Implementation Tools consist of the following:

- A **guidance document**, which provides general information on who is subject to the Act, which entities must report payments under the Act, and what payments should be reported under the Act;
- A **technical reporting specifications document**, which provides information on the mechanics of reporting under the Act (including specifying accounting methods, reporting currency, and reporting in-kind payments); and
- A **template for reports** under the Act.

Clarifying the obligations of multinational organizations

The Implementation Tools shed some light on several provisions under the Act. Notably, it has been clarified how the Act applies to multinational organizations with Canadian subsidiaries. The Implementation Tools explicitly state:

Businesses that are not subject to Canadian law, but may have subsidiaries operating in Canada are not subject to the Act by virtue of their ownership of or interests in any Canadian subsidiary businesses, even if the subsidiary itself is a Reporting Entity.

A “Reporting Entity” refers to a corporation or other type of business enterprise engaged in the commercial development of oil, gas or minerals, which is also:

- listed on a stock exchange in Canada; or
- has a place of business, does business or has assets in Canada and, for at least one of its two most recent financial years, meets at least two of the three thresholds below:
 - has at least C\$ 20 million in assets;
 - has at least C\$ 40 million in revenue;
 - employs an average of at least 250 employees.

Notably, the Implementation Tools make clear that **the asset test is limited to Canadian assets**, and that the asset and revenue analysis should be focused on the entity in question and exclude global assets and revenues of a parent company.

Clarifying what counts as the “same Payee” and what constitutes a single “Project”

The reporting obligation is in respect of payments within the same category of payments to the “same Payee”, which the Implementation Tools indicate may constitute a series of departments, ministries, or other bodies and agencies. As illustration, if several fee payments are made to the National Energy Board, Environment Canada, and NRCAN, which aggregate above the C\$ 100,000 threshold, that series of payments is reportable. To the extent possible, the report should indicate the breakdown among the Canadian governmental bodies being grouped as the same payee.

In addition, as was expected, to the extent payments can be attributed to a specific project, reporting must be done on a project-level basis, as shown on the reporting template. For that purpose, a “project” has been defined as a situation in which operational activities are governed by a single contract, lease, license, concession or similar agreement, or multiple substantially interconnected agreements, which forms the basis for the payment liability to the government. “Substantial interconnection”, in the case of multiple agreements, is determined by reference to the degree of operational and geographical integration.

Guidance on the seven categories of reportable payments

The Implementation Tools also provide some additional guidance on the seven categories of reportable payments (taxes, royalties, fees, production entitlements, bonuses, dividends and infrastructure improvements). The Implementation Tools state that companies should look to the substance, rather than the form of payments, in determining if a category is applicable. For example a voluntary or philanthropic payment that relates in some way to the commercial development of oil, gas or minerals, may be reportable. Where a payment could fall under multiple categories, companies must exercise their reasonable judgment to report the payment.

Notably, the Implementation Tools also clarify that a payment for a service which amounts to a commercial transaction with a governmental entity is not necessarily reportable under the Act, as illustrated by the following example:

Payments have been made to the foreign country's army for the provision of security at an oil extraction site. Since the army is providing a service, this payment is treated as a commercial transaction and is not required to be reported.

When a report under another jurisdiction's legislation will be accepted under the Act

Another significant issue addressed by the Implementation Tools is the substitutability of another jurisdiction's reporting requirements. NRCAN has indicated that such assessments will be done for substitute legislation as they arise. In that regard, on July 31, 2015, NRCAN [stated](#) on its website that it has been determined that the reporting requirements under the European Union's Accounting and Transparency Directives are acceptable substitutes under the Act. As a result, reports submitted to European Union and European Economic Area member states that have implemented the EU Accounting and Transparency Directives may be submitted to the Minister of Natural Resources as a substitute for a report prepared under the Act. It is generally expected that reports submitted under similar U.S. rules under Section 1504 of the Dodd-Frank Act (SEC Rules) will also be an acceptable substitute, once finalized.

Timeline for comments and initial reporting

NRCAN is accepting comments on the Implementation Tools until September 22, 2015. Following the consultation period, the final versions will be made public. The first annual reports under the Act will be in respect of financial years ending after June 1, 2016, and will be due 150 days after a financial year. As an example, companies with a December 31 year-end will be required to submit their first annual report by May 30, 2017. In addition, reporting of payments made to aboriginal governments or entities will be deferred for a two-year period until June 1, 2017.

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