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September 22, 2015

Via email: estma@NRCan.gc.ca

Mr. David Fuss
Deputy Director, International Affairs
Natural Resources Canada
580 Booth Street
Ottawa, ON K1A 0E4

Dear Mr. Fuss:

Re: Consultation on the *Extractive Sector Transparency Measures Act* Implementation Tools

We write on behalf of the Canadian Bar Association's Anti-Corruption Team (CBA-ACT) to comment on the consultation on the *Extractive Sector Transparency Measures Act* (ESTMA) implementation tools released in August 2015.

The CBA is a national association of 37,000 lawyers, Québec notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. Building on over a decade of CBA's work in the area of anti-corruption, CBA-ACT is a joint committee that comprises members from the International, Business, Charities & Not-for-Profit, Competition, Criminal Justice and Construction and Infrastructure Law Sections as well as the Canadian Corporate Counsel Association of the CBA.

In November 2014, we commented on Bill C-43 that enacted the ESTMA and stated our support for the government's commitment to raise global standards for transparency and calling for the harmonization of the reporting requirements with the US, EU and UK regimes. Our comments below address issues of application, definitions, and clarity that we have examined in the Guidance document to the ESTMA (Guidance).

Application of the Act

The concept of the lifecycle of exploration and extractive activities in the commercial development of oil, gas and minerals is well-articulated in the Guidance. It is unclear, however, why construction of extraction sites would not give rise to reporting obligations. The construction of mine sites and oil and gas extraction infrastructure is often one of the most permit-intensive stages of the extraction lifecycle. No rationale is given for excluding these activities from the ESTMA, especially given the encompassing breadth of commercial development elsewhere.

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The determination of whether an entity controls a business enterprise engaged in the commercial development of oil, gas or minerals is ambiguous. The guidance should provide a clear definition of "control" rather than stating that "control" under the applicable accounting standards will "generally be sufficient evidence of control". Incorporating these definitions into the Guidance (or using the definitions found in business corporations' legislation) would add certainty.

Section 11 of the ESTMA allows parties to report for their wholly owned subsidiaries, but not affiliates that are not wholly owned. Guidance should be provided to allow firms that "control" others (for example, if they are consolidated for financial reporting purposes) to report on behalf of the controlled entities, even if ownership is not 100 percent.

Sections 3.5 and 3.6 of the Guidance on joint ventures (JVs) and co-ownership structures would benefit from clarification and examples on when payments made by an entity on behalf of another entity must be reported. JVs are a common arrangement for the extractive sector yet it is unclear if the JV itself, as an unincorporated organization, would constitute an entity under the ESTMA. This could lead to reporting challenges as a JV would rarely have its own websites on which the reports must be filed. If JVs are not considered an entity, the reporting requirement appears to belong to the entity that controls the JV. However, parties often enter into JVs with equal control, and it is unclear from the Guidance whether a 50 percent ownership would be sufficient to constitute control and make it a reporting entity. The concept of control and the payment attribution principles under the ESTMA are confusing in this context, and the lack of clarity could result in either double counting or a failure to report if no one controls the JV, partnership or entity.

In the UK, payments are reported only by the paying entity, generally the operator. The UK Guidance takes this position to avoid double counting and difficulties where information is not available to non-operators. The ESTMA should adopt this approach. To do otherwise could create a significant disparity under Canadian legislation and could impose substantial challenges for non-operators.

Similar scenarios will also arise in partnerships or private corporations with equally weighted owners. These scenarios should be considered and explained more fully in the Guidance.

Proceeding Without Regulations

Paragraph 2 of the foreword in the Guidance document should be given more emphasis to highlight that regulations are not currently being implemented, as the wording in the Act expressly refers to regulations. That paragraph could be moved to the beginning of the introduction or given its own heading.

Definition of Payee

Local and Indigenous Governments

Clarification and examples should be added in section 3.2 of the Guidance on when a local or indigenous body constitutes a government and how that analysis should be completed. The analysis and challenge to make these determinations will vary from country to country and for different indigenous bodies. This involves reviewing and interpreting foreign constitutions and laws to determine the status of indigenous tribes, bands, local governments and other organized groups. For example, a regional tribe may be a recognized government body in a particular country, but a local village tribe may not be. These questions can be difficult to

decipher and can change frequently depending on the jurisdiction. We expect that applying these provisions to local and subnational level governments may impose a significant burden on multinational companies. It would be helpful to have guidance and examples on how the reporting requirements will apply in this context.

There appears to be a lack of harmonization on this topic, as the original Dodd-Frank rules excluded subnational and local governments in the US, but appeared to require disclosure of payments made at the subnational level for other countries. The EU, UK and Canadian legislation cover indigenous governments "to the extent they constitute a government".

State-Owned Enterprises

It would be helpful to have additional guidance in Section 3.2 of the Guidance on the application of the reporting rules for state-owned enterprises (SOEs). The Guidance states that SOEs may constitute a payee to the extent they perform a power, duty or function of government. Clarification on when an SOE is performing such a function would be useful. Legislation in other jurisdictions have different tests: the EU and UK legislation has a government control test to determine whether a SOE is captured, and the original Dodd-Frank rules captured companies majority-owned by a foreign government.

The ESTMA Guidance should reflect the UK guidance, which states that payments made to SOEs operating outside their home jurisdiction in respect of the interests and assets jointly held in other countries need not be reported. Similarly, payments made to the SOE as operators that represent reimbursement of ordinary capital and operating costs need not be disclosed.

Payments

Similar to the UK guidance, it would be useful to include a specific statement in Section 3 of the Guidance that payments be reported on a cash basis (i.e., when paid), not an accrual basis that may be used for financial statement purposes.

Section 3.4 of the Guidance has helpful examples of how various payments will be treated and which are reportable. Further guidance and examples would be helpful on how services and in-kind payments will be valued and reported, including how and when to value, quantify and report CSR commitments, training, community contributions or indigenous benefits (which may occur over the life of the project).

Substitution

The Guidance describes the function and timing of filing for substitute reports. Additional clarification on whether the full report of a parent organization will be filed as the substitute or whether modifications would likely be required for substitution purposes would be helpful.

Section 10 of the ESTMA refers to additional conditions that the Minister may impose in the determination that the reporting requirements in another jurisdiction are an acceptable substitute. We believe further guidance is necessary on the use of substitute reports when certain aspects of legislation are not harmonized between jurisdictions. For example, how will substitution work if legislation does not require reporting at the subnational government level (e.g., the prior Dodd-Frank rules required reporting of only federal US government payments, not reporting of payments in the US at the subnational or indigenous level)? Will reports

submitted in Canada need to be supplemented to include information that was not included in the report from another jurisdiction when there are material differences?

Attestation

Section 9(4) of the ESTMA requires an attestation that the report is true, accurate and complete by an officer or director, or an independent auditor or accountant. It is helpful that the sample attestation language refers to a threshold in all material respects. Clarification on whether the auditor's same materiality threshold used for purposes of its audit of the financial statements is acceptable for determining materiality would be helpful. Clarification should be added on what reasonable diligence may entail for attestation by an officer or director. For example, will compliance with customary financial reporting controls and procedures in accordance with the Committee of Sponsoring Organizations (COSO) framework suffice?

Other Considerations

Confidentiality and Conflicts of Law

We support the government's commitment to raise global standards for transparency and appreciate the importance of not including broad exceptions for confidentiality and conflict of law provisions which could circumvent the purpose of the legislation. However, we would like to see harmonization among the Canadian, US, UK and EU legislation on how they ultimately decide to address conflicts of law and confidentiality matters.

We thank you for opportunity to comment on the consultation and would be pleased to assist Natural Resources Canada in the further development of the ESTMA in any way possible.

Yours truly,

(original letter signed by Noah Arshinoff for Graham Erion)

Graham Erion
Member, CBA Anti-Corruption Team