FACTCOALITION
Financial Accountability & Corporate Transparency

March 18, 2020

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Submitted electronically via rule-comments@sec.gov

RE: Proposed Rule on "Disclosure of Payments by Resource Extraction Issuers", File Number S7-24-19

Dear Secretary Countryman:

On behalf of the Financial Accountability and Corporate Transparency (FACT) Coalition, I appreciate the opportunity to comment on the Securities and Exchange Commission's (SEC) proposed rule on "Disclosure of Payments by Resource Extraction Issuers" (File Number S7-24-19). While the FACT Coalition is supportive of Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, we write to express our disappointment that the proposed SEC rule does not currently align itself with the emerging global standards around transparency of tax and payments to governments.

The Financial Accountability and Corporate Transparency (FACT) Coalition is a non-partisan alliance of more than 100 state, national, and international organizations in the United States. working toward a fair tax system that addresses the challenges of a global economy and promoting policies to combat the harmful impacts of corrupt financial practices.[1]

For the better part of the last decade, the Coalition and our partners have researched and written extensively on international corporate tax policy, profit shifting, and the role of low- and no-tax jurisdictions in corporate tax planning. We have engaged with experts and various market constituents — including investors, financial analysts, members of the accounting sector, academics in the field, policymakers, large companies, small businesses, and other constituencies — to ensure all stakeholders have the tax and financial information they say is necessary for functioning capital markets.

A Global Trend Toward Transparency Across All Sectors

For many years, open and transparent capital markets have made the U.S. system a model for the world. The combination of the Financial Accounting Standards Board's (FASB) accounting principles and the SEC's additional shareholder disclosures have provided both unprecedented opportunities and reasonable protections for investors and other stakeholders.

While certain aspects of the proposed rule are commendable, if the SEC finalizes it as drafted, the U.S. will be stepping back from its historic leadership role. Global trends are moving toward transparency. In 2014, PricewaterhouseCoopers conducted a survey of more than 1,300 CEOs around the world, and

[1] A full list of FACT members is available at http://thefactcoalition.org/about/coalition-members-and-supporters/.

59 percent stated that they believe multinational corporations should be required to publicly disclose basic financial information, such as revenues, profits, and taxes on a country-by-country basis.[2] Just one year later, a survey of the Financial Times Stock Exchange (FTSE) 100 conducted by the UK-based charity Christian Aid found little staunch opposition when asked about whether public country-by-country reporting (CBCR) should be implemented.[3] Many multinational corporations — including Vodafone, Unilever, BHP Billiton, and Rio Tinto — already publicly disclose, in varying degrees, country-by-country reports of tax and payment information. These are just a few of the examples highlighted in an April 2019 paper produced by the FACT Coalition that examined the advancements in transparency.[4] The report is attached to the end of this submission.

As of March 2020, the tax authorities of the United States and 90 countries collect and privately exchange disaggregated country-by-country tax and financial reports for all large multinational enterprises, according to a standard set by the Organization for Economic Cooperation and Development (OECD) in 2015.[5]

In December 2019, the Global Reporting Initiative (GRI) finalized the first global standard around public disclosure of taxes and payments to government.[6] The new GRI Tax Standard, which takes effect in one year, was negotiated with a diverse set of constituencies — including representatives from major multinational corporations, investment firms, accounting firms, academia, and non-governmental organizations. While GRI's standards are technically voluntary, 75 percent of the world's largest companies that report their sustainability results use the GRI Sustainability Reporting Standards. Internationally, 62 countries have policies that reference or require the use of the GRI Standards for sustainability reporting — which includes capital market regulations in 45 countries. In the United States, 78 percent of the companies on the Dow Jones Industrial Average use GRI Standards for ESG disclosure. Following publication of the GRI Tax Standard, Royal Dutch Shell became the latest company to voluntarily disclose its disaggregated country-by-country reports — leading *The Wall Street Journal* to call it "The Beginning of the End of Tax Secrecy."[7] It is prudent to assume that thousands of additional companies will soon follow in Shell's footsteps.

Moreover, the FASB continues to consider mandating disaggregated tax and financial disclosures in its Generally Accepted Accounting Principles (GAAP). After 100 percent of the fifty investors (managing assets in excess of $2 trillion) that commented on FASB's earlier tax disclosure draft called for full country-by-country tax transparency, the FASB Chairman indicated that he supported jurisdiction-by-

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2 *PricewaterhouseCoopers*. "17th Annual Global CEO Survey: Tax strategy, corporate reputation and a changing international tax system," 2014, https://www.pwc.com/gx/en/tax/publications/assets/ceo-survey-tax-perspectives.pdf.

3 Christian Aid surveyed dozens of FTSE100 companies and found that only a small minority were wholly opposed to the idea of reporting on a country-by-country basis, while many others were indifferent or even supported more disclosure. See more: https://endsecrecy.eu/files/2015_09_country-by-country-survey.pdf.

4 Freymeyer, Christian, "Trending Toward Transparency: The Rise of Public Country-by-Country Reporting", *The FACT Coalition*, April 2019, https://thefactcoalition.org/wp-content/uploads/2019/04/Trending-Toward-Transparency-April-2019-FINAL.pdf.

5 Webpage, "Country-by-Country reporting," Organization for Economic Cooperation and Development, http://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/country-by-country-reporting.htm.

6 *See:* GRI 207: TAX 2019, https://www.globalreporting.org/standards/gri-standards-download-center/gri-207-tax-2019/.

7 Rochelle Toplensky, "The Beginning of the End of Tax Secrecy," *The Wall Street Journal*, December 20, 2019, https://www.wsj.com/articles/the-beginning-of-the-end-of-tax-secrecy-11576837708.

jurisdiction tax disclosures at FASB's February 2020 board meeting. FASB is now redrafting its rule to strengthen its tax disclosures. [8]

Finally, in addition to the OECD, GRI and FASB disclosure regimes, companies active in the extractive industries are already subject to disclosure requirements under laws promulgated by European Union member countries, the United Kingdom, Canada, and Norway, and under the voluntary disclosure standards issued by the Extractive Industries Transparency Initiative (EITI). Notably, due to the specific nature of the oil, gas, and mining industries, these regimes require project-level payment reporting. If the SEC were fulfilling its historic leadership role, its proposed rule should match or exceed, not fall behind or below, the standards set by those other disclosure regimes.

Public Disclosure Should be Maintained and Proposed Exemption Dropped

The FACT Coalition is supportive of the SEC proposal's provisions that would generally make the information on payments to governments available to investors and the public. Public disclosure is critical to ensuring that current and prospective investors have the necessary information to appropriately value issuers and gauge the riskiness of various investment options. Tax and payments to governments often amount to 20 to 30 percent of a multinational corporation's global pre-tax profits, and tax rates, policies, and enforcement vary widely between different jurisdictions — underscoring the materiality of this disaggregated information. At the same time, public disclosure will also give policymakers, academics, and others a better understanding of how tax and payment policies impact differing constituencies.

That said, the FACT Coalition must express its strong opposition to the proposed exemption for reporting information in jurisdictions where local foreign laws forbid disclosure. Jurisdictions that enact secrecy laws forbidding disclosure of tax and payments to governments pose the highest risk for corruption, and it is therefore essential that they not be exempted from disclosure. Finalizing such an exemption would not only deny investors critical information to gauge whether they have invested in an issuer with major Foreign Corrupt Practices Act-related risks, it would also invite foreign jurisdictions to enact secrecy laws to free companies from U.S. disclosure obligations. In addition, such an exemption would push the SEC rule out of alignment with the approach of all other countries that have implemented similar disclosure regimes as well as with the GRI and EITI disclosure standards which offer no such exemption. Creating such an exemption — which has no statutory basis — would also call into question SEC compliance with the law's requirement to issue a rule that "to the extent practicable" supports "international transparency" related to "commercial development of oil, natural gas, or minerals." The Coalition urges the Commission to strike the exemption before finalizing this rule.

De Minimis Thresholds Should Be Deleted

The FACT Coalition also opposes the proposed de minimis thresholds of $150,000 (for payments) and $750,000 (for projects). Both thresholds are out of line with international standards and risk failing to provide investors with necessary information to gauge investment risks. The thresholds would lead to concealment of clearly material information for investors. For example, investors would want to know that an issuer operating in a jurisdiction has entities that record billions of dollars in revenues but pay zero dollars in taxes or fees. That is because such conduct not only incurs substantial tax enforcement

[8] Nicola M. White, "Income Tax Disclosure Rules to Get New Look From Board," *Bloomberg Tax*, February 12, 2020, https://news.bloombergtax.com/financial-accounting/income-tax-disclosure-rules-to-get-new-look-from-board.

and reputational risks, but also because both local and global tax policy changes that could lead to much higher expenses and taxes (as are currently being discussed by members of the OECD/G20 Inclusive Framework on BEPS) could, in turn, significantly impact shareholder value. Neither the OECD's country-by-country reporting framework nor the GRI Tax Standard have de minimis thresholds for payments to governments. Moreover, none of the disclosure regimes requiring the reporting of extractive industries payments to governments, nor the EITI standard, have project-level de minimis thresholds. We urge the Commission to remove the de minimis threshold altogether before finalizing the rule.

Compliance Costs for Proposed Rule Are Negligible

The cost of compliance for the SEC's proposed rule is likely to be negligible for many issuers given that:

a. Issuers operating in the mining, oil, and gas sectors in one of the more than 50 EITI-implementing countries, and issuers with subsidiaries in any of the European Union member states, the United Kingdom, Canada, or Norway already collect and disclose their payments-to-governments publicly, at the project level, with a contract-specific project definition, in line with global standards.
b. All issuers filing taxes with the Internal Revenue Service or the relevant tax authority in another OECD country already collect and report detailed tax payment information on a country-by-country basis (along with additional information on revenues, profits, and employment). Some of these companies have also voluntarily chosen to publish this information.
c. A large number of issuers will soon be publicly disclosing detailed tax payment information on a country-by-country basis (along with additional information on revenues, profits, and employment) to comply with the new GRI Tax Standard, and this standard also encourages the disclosure of sector-specific payments.
d. Of the issuers that are not subject to (a), (b), or (c), many are companies with a limited number of extractive projects in only one or a small number of countries, and this information would thus be relatively easy to compile.

Conclusion

Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 is critical to ensuring that investors can properly value assets and gauge the tax and corruption-related risks of their investment options. It is also a key tool in the broader fight against illicit finance related to corruption and other crimes. We hope the SEC will improve its proposal to ensure that the final rule achieves both of these goals.

Thank you for your consideration of these comments. Should you have any questions, please feel free to contact me at +1 (202) 810-1334 or cgascoigne@thefactcoalition.org.

Sincerely,

Clark Gascoigne
Interim Executive Director

Trending Toward Transparency

The Rise of Public Country-by-Country Reporting

By Christian Freymeyer

April 2019

FACTCOALITION
Financial Accountability & Corporate Transparency

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The Rise of Public Country-by-Country Reporting

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The recommendations are those of the FACT Coalition. The views expressed in this report are those of the Coalition and do not necessarily reflect the views of our funders or those who provided review.

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Executive Summary

There is a growing chorus of individuals and organizations speaking out on the value of tax transparency and, in particular, the public country-by-country reporting (CBCR) of certain financial information for multinational companies.

Investors and Analysts

- The United Nations' Principles for Responsible Investment, a network representing investors with more than US$70 trillion in assets under management, has called on companies to publish tax information on a country-by-country basis and to become more transparent on their overall approach to tax policy and how it interacts with their broader business and sustainability strategy.
- Norges Bank Investment Management, which manages the Norwegian sovereign wealth fund with US$915 billion in assets under management, has stated that "multinational enterprises should publish country-by-country breakdowns of how and where their business model generates economic value, where that value is taxed and the amount of tax paid."
- The Certified Financial Analysts' Institute, with 137,000 members in 150 countries, highlighted the importance of tax disclosures as a vital source of information for investors in comments to the Financial Standards Accounting Board.
- The Global Reporting Initiative, a standard-setting body that lists 75 percent of NASDAQ 250 companies and roughly 13,000 different entities as adhering to its reporting guidelines, recently proposed new tax transparency standards that include public CBCR.

Policymakers

- As of March 2019, the tax authorities of the United States and 77 countries collect and exchange country-by-country reports according to a standard set by the Organization for Economic Cooperation and Development (OECD).
- The EU Capital Requirements Directive IV (CRD IV), which was signed into law in 2013, requires large banks and other financial institutions within the European Economic Area to publicly disclose a variety of information on a country-by-country basis.
- The EU Accounting Directive, an industry-specific reporting guideline passed in 2013 and aimed at increasing transparency within designated sectors, calls for firms active in the extractive industries or logging of primary forests that meet specific firm-size thresholds to publicly report certain financial and tax information.
- The Canadian government enacted the Extractive Sector Transparency Measures Act (ESTMA), which brings Canadian companies in the oil, gas, and mineral sectors under CBCR-type requirements.
- The UK Parliament gave the UK's tax agency, HM Revenue & Customs, the authority to compel multinationals to publish country-by-country reports, upon request.
- The European Parliament and European Commission have approved different versions of a proposal mandating public CBCR for large companies doing business in Europe; the Council of the European Union has yet to pronounce itself on the issue.

Businesses and CEOs

- In 2014, PwC conducted a survey of more than 1,300 CEOs around the world, and 59% stated that they believe multinational corporations should be required to disclose basic financial information, such as revenue, taxes paid, and number of employees on a country-by-country basis. And just one year later, a survey of the Financial Times Stock Exchange (FTSE) 100 conducted by the UK-based charity Christian Aid found little staunch opposition when asked about whether public CBCR should be implemented.
- Vodafone, Unilever, BHP Billiton, and Rio Tinto are among the multinational companies that publish, in varying degrees, country-by-country reports of tax and payment information.

Top Recommendations

Multinational companies should disclose the following information publicly on a country-by-country basis:

- Number of entities;
- Names of principle entities;
- Primary activities of entities;
- Number of employees;
- Total revenues broken out by third-party sales and intra-group transactions of the tax jurisdiction and other tax jurisdictions;
- Profit/loss before tax;
- Tangible assets other than cash and cash equivalents;
- Corporate tax paid on a cash basis;
- Corporate tax accrued on profit/loss;
- Reasons for any difference between corporate tax accrued on profit/loss and: (a) the tax due if the statutory tax rate is applied to profit/loss, and (b) the tax due if the statutory tax rate is applied to profit/loss before tax; and
- Significant tax incentives.

The numbers in each of the above categories should reconcile with the global totals to limit the opportunity for accounting gimmicks to obscure an accurate representation of the data.

These enhanced disclosures are essential for investors to effectively value and assess the risks related to the public companies in which they have invested.

I. Introduction

Just ten years ago, the mention of public disclosure of corporate tax information on a country-by-country basis was met with deep skepticism amongst policymakers and the business community. While there's still opposition in some corners, a scandal-ridden decade — which saw numerous cases of aggressive tax avoidance come to light — and growing calls from various stakeholders for more transparency have significantly moved the needle on the issue.

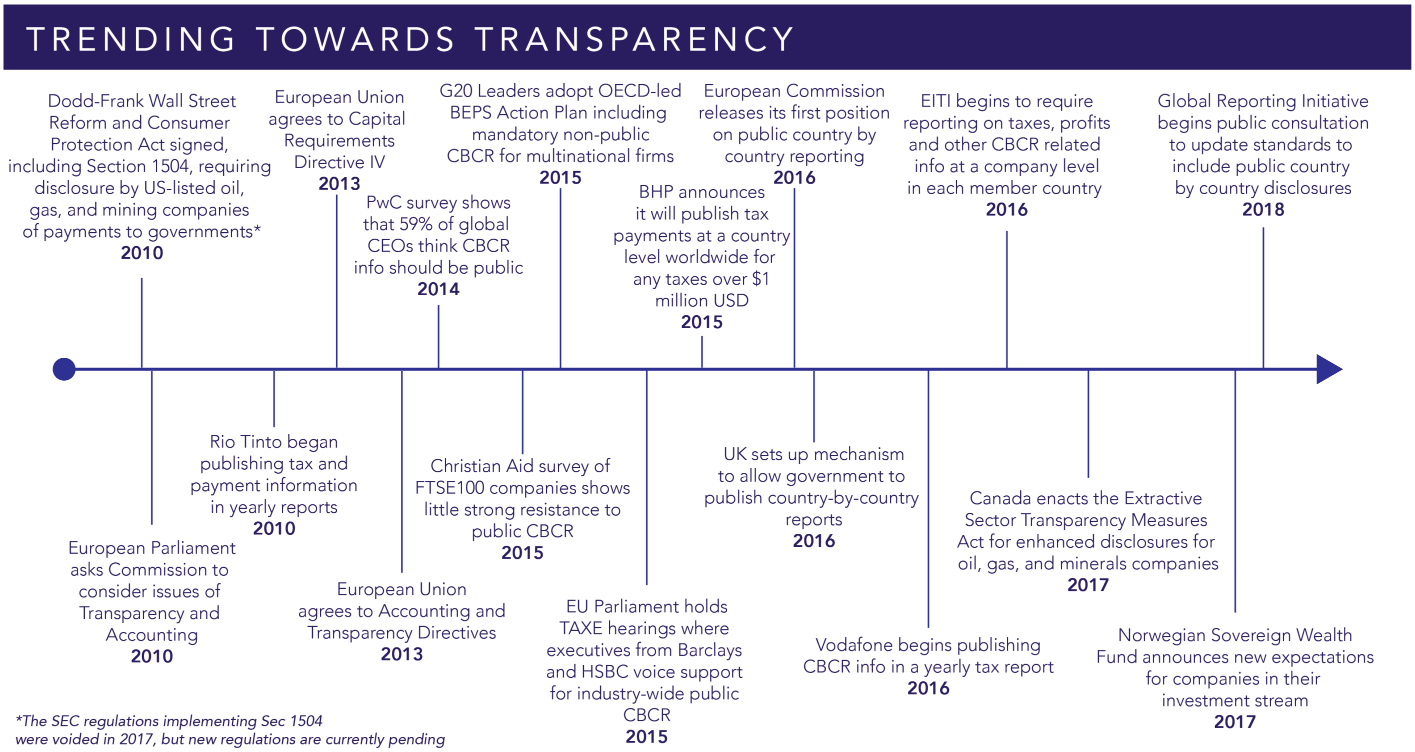
The beginnings for today's move towards transparency began with the evidence discovered in the hearings in the Senate's Permanent Subcommittee on Investigations between 1997 and 2013.[1] More recent revelations, including 2014's Lux Leaks[2] scandal, 2016's Panama Papers[3] exposé, and 2017's Paradise Papers[4] revelations, have only shifted the climate further towards transparency. Public country-by-country reporting (CBCR), once an ambitious (but outlier) policy recommendation, is now seen as a commonsense tool to help investors and other stakeholders understand the risks involved with aggressive multinational tax strategies. An executive with PricewaterhouseCoopers (PwC) UK recently noted that public CBCR is swiftly becoming the norm for many firms and that the trend is bending heavily towards transparency.[5]

In today's global economy, the cross-border financial flows of multinational corporations (MNCs) are common and opaque. The lack of clear and transparent information about these operations raises public policy concerns and previously undisclosed risks for investors. Currently, MNCs are not required to publicly disclose basic information, such as profits, revenues, taxes paid, and number of employees on a country-by-country basis.[6] Instead, their reports to shareholders and the public usually provide data on a regional or global level, making it difficult for investors, policymakers, and others to assess if the taxes paid are consistent with public policy. How that gets reconciled is important — through legislation, regulatory changes, or lawsuits resulting in fees, fines, and claw backs. Public country-by-country reporting would require MNCs to share this information for each country in which they operate, providing a holistic look at what has been a murky guessing game.

There is good reason for investors to be concerned about changes in tax policy and aggressive crackdowns on tax avoidance schemes, given the amounts of money involved. While estimates vary, due to the inherently secret nature of profit shifting methods, tax avoidance costs governments hundreds of billions of dollars annually. A conservative estimate from the Organization for Economic Cooperation and Development (OECD) pegged annual losses between US$100 billion and US$240 billion.[7] Another study examining U.S. multinational corporations showed that profit shifting is on the rise — up from 5-10% in the 1990s to 25-30% in 2012.[8] A third academic analysis suggests that profit shifting worldwide could even amount to 40% of multinationals' foreign profits.[9] In the United States alone, profit shifting amounts to an estimated US$300 billion, which costs the American taxpayer an estimated US$60 billion.[10]

In light of more institutions seeing public country-by-country reporting as a sensible inevitability, this report outlines the global trends on public disclosure of country-by-country reporting. The report highlights both the institutions where the issue is actively being discussed and others where it has already been put into practice.

Figure 1. Timeline of Advancements towards Increased Transparency.



II. Voices of Transparency: Who Is Saying What?

There is a growing chorus of individuals and organizations speaking out on the value of country-by-country reporting of certain financial information for multinational companies. This section of the report highlights several of the most prominent voices calling for increased transparency for multinationals.

> **"With companies engaging in high-risk tax avoidance, the investing public needs more information, clearly expressed. Investors should, at a minimum, be given a list of all countries in which a company operates, the revenue and earnings attributed to each country, and the amount of taxes paid in each."[11]**
>
> – Morris Pearl
> Former Managing Director
> BlackRock Inc.
> Sept. 21, 2016

A. Principles for Responsible Investment

The Principles for Responsible Investment (PRI) is an independent network of investors, sponsored by the United Nations, working to promote responsible investment practices, while helping investors better understand the effects investing can have on the environment, society, and governance.[12] The group commands legitimacy with its over 1,800 signatories who have more than US$70 trillion in assets under their management.[13] Among other transparency initiatives, PRI supports significant reforms of corporate reporting requirements and divides their recommendations into three main categories: policy, governance and risk management, and performance. The organization would like to see companies become more transparent on their overall approach to tax policy, and how it interacts with the company's broader business and sustainability strategy. Among other information, a comprehensive policy disclosure would include things like an overview of a firm's tax structure and tax strategies used. Additionally, PRI calls upon companies to provide information on how their tax policies might hurt the brand and its reputation and whistleblowing systems for individuals that wish to report tax-related grievances.[14] Lastly, PRI calls on firms to become more transparent on their tax strategies currently in place in their global operations. Chiefly, they believe this should translate into country-by-country reporting details, including a list of all subsidiaries and their business nature, in line with what is disclosed in OECD BEPS reports.[15]

B. Norwegian Sovereign Wealth Fund

Investors are increasingly interested in increased tax disclosures in light of the stepped-up scrutiny of aggressive corporate tax planning. There is a growing consensus that this information is necessary to properly assess risk. One of the most recent investors to step up support for transparency is Norges Bank Investment Management (NBIM), one of the world's largest investors. In 2017, NBIM, which operates the estimated US$915 billion Norwegian sovereign wealth fund, announced a new set of guidelines for its investments in multinational corporations.[16] Among them is an expectation that "multinational enterprises should publish country-by-country breakdowns of how and where their business model generates economic value, where that value is taxed and the amount of tax paid." The bank goes further by saying that companies who do not engage in public CBCR should "be ready publicly to state why."[17]

While the fund has not yet begun a mandatory requirement for such reporting, their declaration sends a strong signal to both the investor community and multinational corporations seeking investment on the priorities of one of the world's largest sovereign wealth funds.

C. Chartered Financial Analyst Institute

The Chartered Financial Analyst Institute (CFA Institute) is a worldwide non-profit professional association with more than 137,000 members from over 150 countries. The membership includes a wide range of members from the financial industry, including investment analysts, portfolio managers, and financial advisors. In 2016, as part of recommendations from its Corporate Disclosure Policy Council, the CFA Institute called on the Financial Accounting Standards Board (FASB) to make changes to the way in which firms should disclose income tax information.[18] The CFA Institute highlighted the importance of tax disclosures as a vital source of information for investors.

D. Global Reporting Initiative

The Global Reporting Initiative (GRI) is an international standard-setting body that specifically focuses on sustainability reporting. The organization has international recognition, and many firms in the private sector utilize its reporting standards. In 2017, a KPMG survey revealed that 63% of NASDAQ 100 companies and 75% of NASDAQ 250 companies adhered to GRI reporting guidelines.[19] In total, roughly 13,000 different organizations report using GRI guidelines.[20] Furthermore, some influential industry associations require their members to comply with GRI reporting. The International Council on Mining and Metals, which includes some of the world's largest mining companies, has required its members to report on their sustainable development performance in line with GRI guidelines since 2008.[21]

In December 2018, GRI — working with numerous outside stakeholders, including MFS Investment Management, PricewaterhouseCoopers, the Tax Justice Network, and Vodafone[22] — published draft transparency reporting requirements that call for further disclosure of tax and other payments to governments. The new standards would require companies to disaggregate key tax information on a country-by-country basis, including:

- Revenues;
    - By third-party sales; and
    - Intra-group transactions of the tax jurisdiction with other tax jurisdictions;
- Profits/losses before tax;
- Corporate tax paid on a cash basis;
- Corporate tax accrued on profit/loss;
- Tangible assets other than cash and cash equivalents; and
- Number of employees.

In addition to the country-by-country details, companies would be required to provide narrative reports on their tax governance structure and the firm's general approach to taxes and tax strategy. GRI accepted public comments on its new standards through March 2019 and will begin reviewing and assessing changes to the proposed standards through 2019.[23]

E. International Monetary Fund

In its most recent revision to its Fiscal Transparency Code, the International Monetary Fund (IMF) has stated that public contract disclosure and project-level payment disclosures for the extractive industries are international norms.[24] These issues have been integrated into the Fund's evaluation of government performance based on the Code.

In a recent paper laying out avenues to reform the international corporate tax system, the IMF states that "[r]esearch and data gaps continue to hamper […] the appropriate tailoring of international tax arrangements. […] The information that will be obtained from country-by-country reporting can clearly be helpful in this regard. More generally, increased access to and use of micro-level tax administration data, including in the wider academic community, is critical" to further advance the policy debate about international corporate taxation.[25]

F. FTSE 100 and CEOs

More and more voices in the financial and auditing world seem to be lining up behind public country-by-country reporting, either due to its inevitability, or due to the positive aspects such increased disclosure could bring to the business world.

Years ago, evidence was already beginning to mount that crucial private sector actors had begun to see the positives of tax transparency. A 2013 report from Ernst & Young states: "[w]e feel that a tipping point has been reached with many organizations now sensing that greater tax transparency reporting will become expected and more routine." [27]

"We feel that a tipping point has been reached with many organizations now sensing that greater tax transparency reporting will become expected and more routine."[26]

– Ernst & Young
Tax Transparency: Seizing the Initiative

In 2014, PwC conducted a survey of more than 1,300 Chief Executive Officers (CEOs) around the world, and 59% stated that they believe multinational corporations should be required to disclose basic financial information, such as revenue, taxes paid, and number of employees on a country-by-country basis.[28] And just one year later, a survey of the Financial Times Stock Exchange (FTSE) 100 conducted by the UK-based charity Christian Aid found little staunch opposition when asked about whether public CBCR should be implemented.[29]

In 2014, PwC conducted a survey of more than 1,300 Chief Executive Officers (CEOs) around the globe, and 59% stated that they believe multinational corporations should be required to disclose basic financial information, such as revenue, taxes paid, and number of employees on a country-by-country basis.

III. Going Global: Where Is the Movement on Public Reporting?

As of March 2019, over 77 countries — including the U.S. — have implemented standards created by the Organization for Economic Cooperation and Development (OECD) that require country-by-country tax reporting privately to tax authorities.[30] But countries — including OECD members — are taking different approaches to public disclosures.

As of March 2019, over 77 countries — including the U.S. — have implemented standards … that require country-by-country tax reporting privately to tax authorities.

The following section summarizes the rules currently in practice that provide for certain, public country-by-country tax reporting for various industries and jurisdictions, while summarizing the increasing global political movement toward broader public disclosure.

A. Enacted Laws and Regulations

The EU Capital Requirement Directive IV

As the debate around public country-by-country reporting continues to play out across various institutions in Europe, and elsewhere, some business interests continue to attempt to paint a grim picture of what a more transparent corporate sector would look like.[32] Those opposed to public CBCR claim that the increased disclosure would hinder economic output and decrease the competitiveness of firms that are subject to the new measures. But public country-by-country reporting has been in place for certain EU companies for years without experiencing the harm imagined by transparency opponents.

The EU Capital Requirements Directive IV (CRD IV), which was signed into law in 2013, required large banks and other financial institutions within the European Economic Area to publicly disclose a variety of information on a country-by-country basis, including[33]:

- Name(s), nature of activities, and geographical location;
- Turnover;
- Number of employees on a full-time equivalent basis;
- Profit or loss before tax;
- Tax on profit or loss; and
- Public subsidies received.

This disclosure requirement has been active for nearly five years, and there has been no discernable negative impact to businesses now required to report. This result is consistent with the conclusion of PwC,[34] which was contracted to assess the potential economic impact of the new disclosure for the European Commission.[35]

"At this stage, the public country-by-country reporting of information under Article 89 of Directive 2013/36/EU is not expected to have a significant negative economic impact, in particular on competitiveness, investment, credit availability or the stability of the financial system. On the contrary, it seems that there could be some limited positive impact"[31]

— 2016 report by PwC, which assessed the potential economic impacts of public CBCR on behalf of the European Commission.

Now that transparency has become the norm for large banks and other financial institutions, some of the industry's highest-level executives have turned into advocates for implementing the same type of transparency across other industry sectors in the EU. During European Parliament hearings to discuss the introduction of public CBCR across all sectors in the EU, top executives from HSBC and Barclays voiced their support for legislation that would increase reporting to all MNCs.[36] While the CRD IV is still a relatively new law, one thing has become clear in its nearly five years since enactment: public country-by-country reporting has no evident negative economic implications for firms complying with the requirement.

EU Directives on Accounting and Transparency

Much like the Capital Requirements Directive, the EU Accounting Directive is an industry-specific reporting guideline aimed at increasing transparency within designated sectors. The legislation, passed in 2013, calls for firms active in the extractive industries or logging of primary forests that meet specific firm-size thresholds to publicly report certain financial and tax information.[37] Firms that meet the size and industry characteristics are required by the directive to publish disaggregated information on payments made to governments in their countries of operation.

The EU Transparency Directive was then amended to expand the scope of these requirements to all extractive or logging companies that are listed on stock exchanges within the EU, whether or not they are incorporated in the EU.[38] Payments that must be reported, on both a country-by-country and project-by-project basis, include:

- Production Entitlements;
- Taxes on income, production, or profits of companies;
- Royalties;
- Dividends;
- Signature, discovery, and production bonuses;
- License fees, rental fees, entry fees, or other payments; and
- Payments for infrastructure improvements.

Member states were required to transpose the EU Accounting Directive into national level legislation by July 2015, while they had until November 2015 to transpose updates to the EU Transparency Directive.[39]

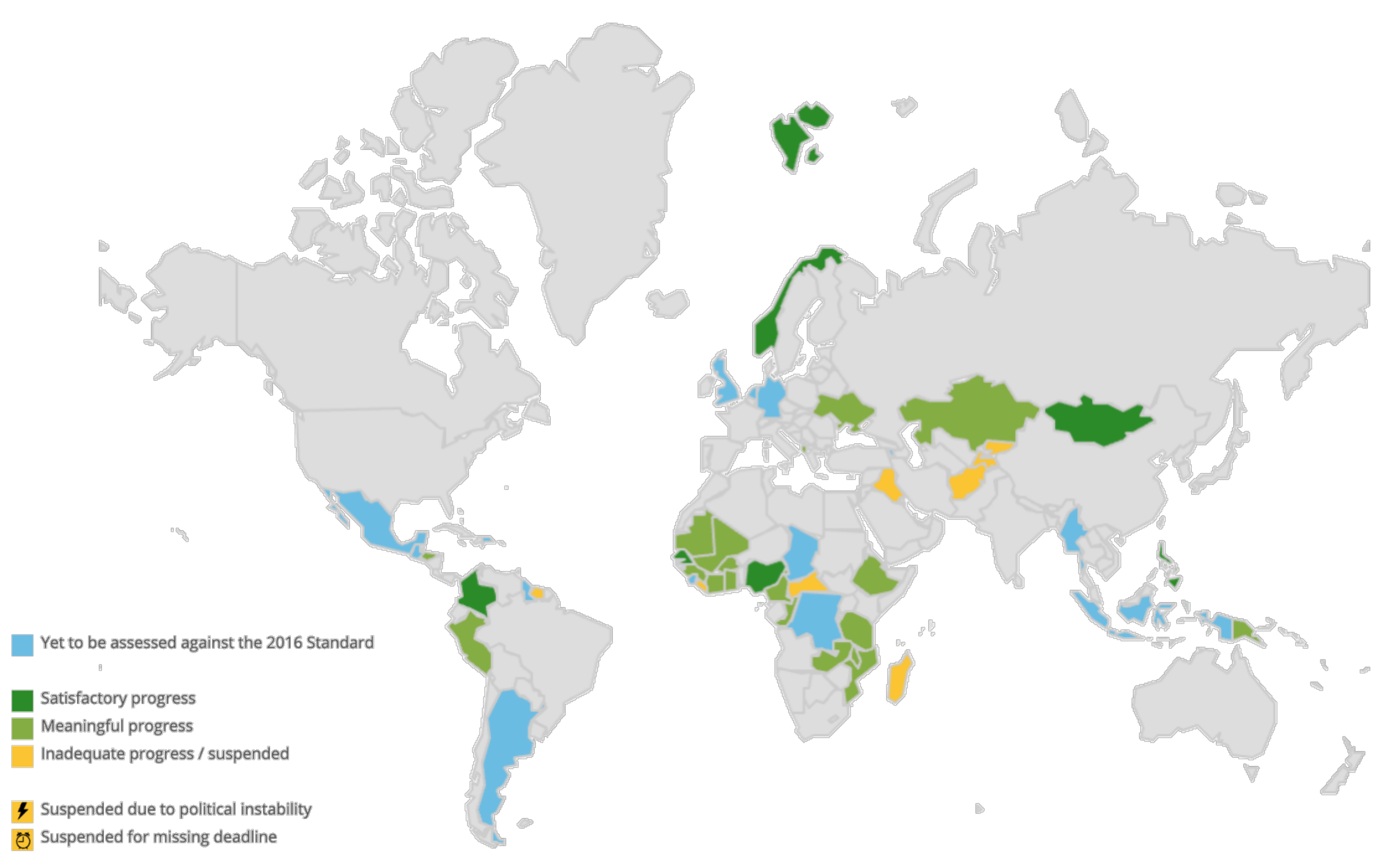
Extractive Industries Transparency Initiative (EITI)

The Extractives Industries Transparency Initiative is a multi-stakeholder organization that was first launched in 2003. The initiative includes multinational corporations, governments, civil society organizations, and other private sector actors to address ways in which transparency can be enhanced in the extractive industries.[40] The voluntary initiative currently has 52 member governments, including more than 15 across Sub-Saharan Africa (See *Figure 2*).

EITI's chief mission is to increase the levels of accountability and transparency surrounding payments made from multinationals to resource-rich governments. The United States is no longer an EITI participant. EITI covers all companies operating in the member country which engage in the extraction of natural resources.

The EITI includes both recommended and required reporting guidelines to give some flexibility, while ensuring that reports include robust and useful information. In addition to other metrics such as legal frameworks and spending on social good by companies operating in the extractives industry, the most pertinent in regards to tax transparency is the requirement surrounding government revenue collection. Prior to the reporting process, each country's Multi-

Figure 2. Members of the Extractive Industries Transparency Initiative (EITI).[41]



Jurisdictions

- Afghanistan
- Albania
- Argentina
- Armenia
- Burkina Faso
- Cameroon
- Central African Republic
- Chad
- Colombia
- Côte d'Ivoire
- Democratic Republic of Congo
- Dominican Republic
- Ethiopia
- Germany
- Ghana
- Guatemala
- Guinea
- Guyana
- Honduras
- Indonesia
- Iraq
- Kazakhstan
- Kyrgyz Republic
- Liberia
- Madagascar
- Malawi
- Mali
- Mauritania
- Mexico
- Mongolia
- Mozambique
- Myanmar
- Netherlands
- Nigeria
- Norway
- Papua New Guinea
- Peru
- Philippines
- Republic of the Congo
- Sao Tome and Principe
- Senegal
- Seychelles
- Sierra Leone
- Suriname
- Tajikistan
- Tanzania
- Timor-Leste
- Togo
- Trinidad and Tobago
- Ukraine
- United Kingdom
- Zambia

Source: https://eiti.org/countries

Stakeholder Group (MSG), which is made up of various private and public sector organizations, must agree to a set list of reportable payments and revenue streams that are considered 'material'.[42]

Among the payment types considered material for disclosure are:

- The host government's production entitlement (such as profit oil);
- National state-owned company production entitlement;
- Profits and taxes paid;
- Royalties;
- Dividends;
- Bonuses, such as signature, discovery, and production bonuses;
- License fees, rental fees, entry fees, and other considerations for licenses and/or concessions; and
- Any other significant payments and material benefit to the government.

EITI and public CBCR are different initiatives but share both core principles and some common information. Including an EITI requirement to report on taxes paid to governments disclosed at an individual company level, allowing for insights into corporate tax practices within resource-rich countries.[43] Given that EITI standards are implemented for any multinational company operating within a member state's borders, the Initiative provides transparency even when the government would not be privy to the information by other reporting mechanisms.

Beyond disclosure of payments to governments, EITI has encouraged contract disclosure since 2013, and in March 2019 its Board agreed to require its 52 member countries to disclose contracts signed or amended after January 1, 2021.[44]

To date, over 30 EITI countries have disclosed contracts. Along with a contract, payment disclosures are essential tools to follow the money and ensure that legal obligations of companies and governments are monitored and held to account by government oversight agencies, policymakers, and civil society.

The Extractive Sector Transparency Measures Act (Canada)

In line with other commitments such as EITI and the EU Accounting Directive, the government of Canada enacted the Extractive Sector Transparency Measures Act (ESTMA), which brings Canadian companies in the oil, gas, and mineral sectors under similar public reporting requirements. Starting in 2015, the legislation captures any firm that:

- Is listed on a stock exchange in Canada; and
- Has a place of business in Canada, does business in Canada, or has assets in Canada and meets two of the below size criteria:
  - Has CAD$20 million or more in assets;
  - Has generated CAD$40 million or more in revenue; or
  - Employs an average of 250 or more employees.

Companies that fall under the ESTMA reporting regime are required to disclose payments made that total CAD$100,000 or more in seven different categories:

- Bonuses, including signature, discovery, and production bonuses;
- Dividends, other than those paid to ordinary shareholders;

- Government fees, such as payments for licenses, permits, or concessions;
- Infrastructure improvements payments;
- Production entitlements;
- Royalties; and
- Taxes, other than value-added or personal income taxes.

Companies required to report must publish this information in the form of a report on the internet, while also providing a copy to the Canadian government 150 days from the end of their financial year.[45]

Overall, corporate payment disclosures by oil, gas, and mining companies produced by mandatory reporting rules in the EU, Canada, and Norway have disclosed over US$540 billion in payments made to 150 countries by over 750 companies.[46]

UK Law

In September 2016, shortly after the European Commission's landmark ruling forcing Apple to pay €13 billion in avoided taxes to the Irish government, the UK government passed an amendment to its annual Finance Bill that gave government tax inspectors increased leverage to tackle tax avoidance. The amendment, introduced by Labour MP Caroline Flint, gave the UK's tax agency, HM Revenue & Customs, the authority to compel multinationals to publish country-by-country reports, upon request.[47]

The first government legislation to set up a public country-by-country reporting mechanism across all industries, the amendment received wide-ranging support from both major parties signing onto its adoption. The law has not yet been used as negotiations continue at EU level.

B. Proposed Laws and Regulations

Public CBCR Across the EU

The introduction of the CRD IV was the European Union's first foray into public country-by-country reporting. The legislation was quickly followed by the introduction of a proposed law to bring similar reporting to all MNCs operating in the European Union, regardless of industry sector.[48] The European Commission introduced a proposal to amend the standard in April 2016,[49] but the proposal fell short of complete country-by-country reporting. Instead of requiring disclosure for all jurisdictions where a firm operates, MNCs would only be required to report on their operations in EU member states and a still-to-be determined number of other jurisdictions that were to appear on an EU tax haven blacklist.[50] Aside from the politically charged nature of creating blacklists — and the EU's difficulty in creating such concrete lists in the past[51] — the Commission's proposal would also leave stakeholders in the dark as they would not know the activities of MNCs in numerous jurisdictions in the world.

Meanwhile, the European Parliament, one of the two other EU decision makers, has staked out a more comprehensive proposal. In June 2017, the Parliament passed a proposal (534 votes to 98 votes, with 62 abstentions) to require firms to report on their tax payments in every country where they do business. [52] The third decision-maker, the Council of the European Union, which represents member-states, has not yet pronounced itself on the issue. While negotiations are still ongoing,[53] full public country-by-country reporting enjoys support from lawmakers, Members of the European Parliament, and EU member states including the Netherlands, who spoke out as recently as March 2018 in support of the measure.[54]

One of the most common arguments in the case against public CBCR is that it will be detrimental to the competitiveness of businesses operating in jurisdictions where the rules would be in place.[55] Those opposed to public disclosure have claimed that there would be negative economic impacts to such transparency measures, as well.

However, when PricewaterhouseCoopers studied this issue for the European Commission, they instead found that public country-by-country reporting for banks and other financial sector firms was "unlikely to have significant negative economic impact".[56] In fact, the study even concluded that disclosure could have a small positive economic impact on the European Union.[57] This was confirmed by the EU Commission's own cost-benefit analysis of CBCR.[58]

A PwC analysis concluded that disclosure could have a small positive economic impact on the European Union.

U.S. SEC Regulations on Section 1504 of the Dodd-Frank Act

In June 2016, the U.S. Securities and Exchange Commission (SEC) approved the adoption of regulations that would implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, also known as the Cardin-Lugar Amendment.[59] The amendment was aimed at increasing transparency in the oil, gas, and mining sector by requiring any company listed on U.S. stock exchanges to provide more information regarding payments made to governments.

On an annual basis, companies subject to the rule would disclose:

- Type and total amount of payments made for each project;
- Type and total amount of payments made to each government;
- Total amount of payments made by category;
- Which government received payments; and
- The project to which each payment relates.

Reportable payments included taxes on corporate profits, income, and production, as well as royalty-based payments, licensing and concession fees, bonuses, and production entitlements.[60] In 2017, the U.S. Congress voted to strike the rule, but the underlying law remains in statute, and a new rule is forthcoming.[61]

Proposed Legislation in U.S. Congress

A few measures have been proposed in the U.S. Congress in recent years to require public country-by-country reporting.

The Corporate Transparency and Accountability Act (H.R.6126, 114th Congress), sponsored by Rep. Mark Pocan (D-WI) would require that all companies registered with the SEC publicly disclose certain tax and financial information on a country-by-country basis.

Additionally, sections of the Tax Fairness and Transparency Act (H.R.2057, 115th Congress), also sponsored by Rep. Mark Pocan (D-WI), and the Stop Tax Haven Abuse Act (H.R.1712 / S.779, 116th Congress), sponsored by Rep. Lloyd Doggett (D-TX) and Sen. Sheldon Whitehouse (D-RI), would likewise require that all companies registered with the SEC publicly disclose CBCR information.

Sen. Tina Smith (D-MN) proposed another bill, the Disclosing Pharmaceutical Company Windfall Profits Act of 2018 (S.2885, 115th Congress), which would apply public country-by-country reporting to the pharmaceutical industry.

IV. Voluntary Corporate Disclosure

As noted above, in a 2014 survey of 1,300 global CEOs carried out by PwC, 59% said that multinational firms should publish country-by-country reports.[62] And, while jurisdictions are still moving towards enacting such reporting requirements, some corporations have taken it upon themselves to be first movers in the tax transparency arena.

A survey of 1,139 companies from around the world and across industries carried out in 2016 by the consultancy Vigeo Eiris shows that 9% of them publish no tax information at all, 44% publish only gross taxes paid with no geographic breakdown, another 44% publish tax and operational data with some degree of geographical breakdown, and 2.5% of them publish comprehensive information in line with a CBCR standard.[63] That report features vignettes for some companies, and we present three other cases below.

A. Vodafone

Vodafone, a British multinational telecommunications firm that operates in more than 150 countries around the world, has recently begun posting public country-by-country reports on its website. The company has more than 100,000 employees worldwide and yearly revenues of more than US$52 billion. Despite such a complex global presence, Vodafone began publicly disclosing detailed country-level tax information.[64]

Housed on a dedicated website, the company breaks down various tax-related information (See *Figure 3*), including:

- Revenue;
- Profit before tax (PBT);
- Direct revenue contribution (tax);
- Direct revenue (non-tax);
- Indirect revenue contribution;
- Capital investment; and
- Direct employment.

In addition to this data, the company includes information on the subsidiaries operating in each country, and a supplementary description of Vodafone’s presence in the country.

Figure 3: Country-by-Country Report from Vodafone.[65]

	Revenue		PBT (ex dividends)		Direct revenue contributions: Total	Split between: Direct taxes	Corporate tax	Total	Direct revenue contribution: Non-tax		Indirect revenue contribution		Capital investment		Direct employment	
	FY16–17 €m	FY15–16 €m	FY16–17 €m	FY15–16 €m	FY16–17 €m			FY15–16 €m	FY16–17 €m	FY15–16 €m	FY16–17 €m	FY15–16 €m	FY16–17 €m	FY15–16 €m	FY16–17	FY15–16
Angola	4	4	1	<1	<1	<1	-	<1	-	-	<1	<1	9	9	42	69
Argentina	-	n/a	<1	n/a	-	-	-	n/a	-	n/a	<1	n/a				
Austria	<1	<1	<1	<1	<1	<1	-	<1	<1	-	-	-				
Bahrain	<1	n/a	<1	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a				
Belgium	1	1	2	(2)	1	1	<1	1	<1	-	<1	<1				
Brazil	12	<1	(3)	(1)	<1	<1	-	<1	-	-	<1	<1				
Cameroon	7	7	1	2	<1	<1	<1	<1	-	<1	<1	<1				
Canada	-	-	<1	<1	<1	<1	<1	<1	-	-	<1	-				
Chile	-	n/a	-	n/a	-	-	-	n/a	-	n/a	<1	n/a				
China	6	8	<1	<1	<1	<1	<1	<1	<1	-	2	1				
Côte d'Ivoire	3	2	1	<1	<1	<1	<1	-	<1	-	<1	-				
Denmark	-	-	<1	<1	<1	<1	<1	<1	-	-	<1	<1				
France	14	24	<1	10	2	1	1	2	<1	-	<1	<1				
Hong Kong	60	63	(14)	(9)	1	1	-	<1	<1	<1	-	-	-	-	84	78
Japan	6	4	2	2	1	<1	<1	<1	-	-	1	1	-	-	18	21
Malaysia	1	n/a	1	n/a	<1	-	<1	n/a	-	n/a	<1	n/a	-	n/a	-	n/a
Mexico	-	-	1	<1	<1	-	<1	-	-	-	<1	-	-	-	2	3
Nigeria	35	44	(17)	(4)	2	2	1	6	2	1	3	5	2	6	188	196
Russian Federation	1	1	<1	<1	<1	<1	<1	<1	<1	<1	-	<1	-	<1	4	8
Sierra Leone	<1	<1	<1	<1	-	-	-	-	-	-	-	-	-	<1	-	3
Singapore	72	64	(3)	3	2	1	1	2	<1	<1	1	<1	9	8	208	238
South Korea	12	17	(1)	<1	<1	<1	<1	<1	-	<1	<1	<1	-	-	12	14
Sweden	<1	<1	1	<1	<1	<1	<1	<1	<1	-	<1	<1	-	<1	3	2
Switzerland	31	41	(3)	<1	1	<1	1	1	<1	<1	1	1	-	<1	7	20
Taiwan	-	-	<1	-	<1	<1	<1	<1	<1	<1	-	-	-	-	-	-
Ukraine	<1	<1	1	(1)	<1	<1	-	<1	-	-	-	-	-	<1	-	-
United States of America	59	59	(37)	(17)	(63)	5	(68)	(33)	1	1	25	24	20	16	445	579
Zambia	11	12	(3)	(2)	<1	<1	<1	<1	<1	-	1	-	1	3	182	180
TOTAL	333	355	(70)	(19)	(52)	11	(64)	(21)	4	2	34	33	43	44	1,287	1,503

Source: https://www.vodafone.com/content/dam/sustainability/pdfs/vodafone_2017_tax_country_by_country.pdf

B. BHP Billiton

BHP Billiton is a global leader in the oil, gas, and minerals industry, with more than 62,000 employees and contractors around the world. BHP began disclosing aggregate payments of taxes and royalties in 2000, and has increased the level and detail of their disclosures since then. Their current disclosures are published yearly in an Economic Contribution Report, which includes various types of payments on a country-by-country and project-by-project basis. In addition, they include total direct economic contributions at a country-level.[66]

The report highlights detailed information on:

- Payments to suppliers;
- Wages and benefits to employees and contractors;
- Dividend payments; and
- Tax and royalty payments.

In addition to disaggregated payments information, BHP includes an assessment of their approach to tax strategy, and their global tax principles. While BHP does include the number of employees for some key jurisdictions, they do not provide this information on a country-by-country basis.[67]

C. Rio Tinto

Rio Tinto Group is one of the world's largest mining and metals companies, with revenues of more than US$40 billion in 2017. Their footprint is global, with more than 50,000 employees across dozens of countries around the world.[68] The company has disclosed some level of transparency on its tax payments since 2010, but has become a leader in the field in more recent years. Though the group has suffered from allegations of corruption in the past, including off-the-books payoffs to government officials, they are now one of the world's leaders on tax payment transparency.[69] In 2016, the head of EITI even lauded the company for its leadership on transparency.[70]

The company currently releases a yearly "taxes paid" report, which goes into detail on a country-by-country basis on a wide range of payments, including:

- Corporate income tax;
- Government royalties;
- Fees, dividends, and other extractive-related payments;
- Employer payroll taxes;
- Other taxes and payments;
- Total tax payments; and
- Employee payroll taxes.

The company also includes a section of the report on its presence in jurisdictions commonly thought to be tax havens to further explain the nature of their tax strategy. In addition to the section on its tax haven presence, Rio Tinto also includes an assessment of its inter-company trading to provide context for how its subsidiaries interact with each other. However, in the taxes paid report, the company only lists information for countries in which it earns a 'significant' amount of profit. Because of this, countries in which they operate, but incur losses or minimal profits, are not included in the report.[71] Nor does the report disaggregate other important metrics for assessing tax avoidance and profit shifting, like number of employees.

D. Unilever

In addition to more robust embraces of disclosure from companies like Vodafone, Rio Tinto, and BHP, there has been an increase in the number of companies willing to discuss their tax payments more openly, even if they haven't yet reached similar transparency levels.

Unilever, a British-Dutch consumer goods multinational firm with revenues of more than US$62 billion and a product footprint in nearly 190 countries, recently published detailed tax information on a dedicated page on its company website.[72]

While the disclosures fall short of full CBCR, the company provides a detailed explanation of its effective tax rate, as well as breakdowns of taxes paid by type of tax (corporate, payroll, etc.), by region, and a further breakdown for the three largest countries in each region.[73]

V. Conclusion

A. Policy Recommendations

A growing number of stakeholders, including investors, private sector companies, and policymakers, are beginning to understand the benefits of tax payment transparency. Public country-by-country reporting is an effective and workable tool for companies to increase trust among the public, while providing key stakeholders with the information needed to better assess risks associated with aggressive corporate tax planning and profit shifting.

Lawmakers in Congress, regulators at the Securities and Exchange Commission, or policymakers at the Financial Accounting Standards Board should mandate public country-by-country reporting. At a minimum, to effectively identify and appreciate the impacts of international tax-related information on a company's performance and valuation, investors need the following information:

- Number of entities;
- Names of principle entities;
- Primary activities of entities;
- Number of employees;
- Total revenues broken out by third-party sales and intra-group transactions of the tax jurisdiction and other tax jurisdictions;
- Profit/loss before tax;
- Tangible assets other than cash and cash equivalents;
- Corporate tax paid on a cash basis;
- Corporate tax accrued on profit/loss;
- Reasons for any difference between corporate tax accrued on profit/loss and: (a) the tax due if the statutory tax rate is applied to profit/loss, and (b) the tax due if the statutory tax rate is applied to profit/loss before tax; and
- Significant tax incentives.

The numbers in each of the above categories should reconcile with the global totals to limit the opportunity for accounting gimmicks to obscure an accurate representation of the data.

In addition to country-by-country reporting, investors would have a much greater ability to understand a company's international tax strategy and risk profile if U.S. regulators further specified in modest rules changes or, if appropriate, guidance that public companies should:

- divide their domestic U.S. income tax into current, deferred, and cash paid to federal and state governments;
- explain any effective tax rate that is significantly lower than the statutory rate in the countries in which they do business;
- use the company's weighted average statutory rate based on geographic revenue mix instead of home country statutory rate in the tax rate reconciliation schedule (which would help explain the likely effective tax rate, especially as worldwide rules change);
- explain any large or increasing Unrecognized Tax Benefit (UTB) balance and delineate the cost of specific significant benefits in the UTB reconciliation;

- disclose for all non-de minimis intracompany debt transactions, the countries where the debt is held, the amount of the debt, and the average interest rate "paid" by the relevant subsidiary on that debt;
- disclose and explain any material tax incentives or benefits provided by a foreign jurisdiction, including the estimated tax savings, any conditions attached to the incentive or benefit, and the likelihood that the incentive or benefit may be lost; and
- disclose of any legal proceedings by foreign governments related to taxes paid to any such government, regardless of whether such matter is material to the financial position of the corporation.

Collectively, these enhanced disclosures are essential for investors to effectively value and assess the risks related to the public companies in which they have invested.

B. The Way Forward

As detailed above, there is a clear trend towards transparency of tax payments of multinational corporations. CEOs of multinational firms, standard-setting bodies, and legislators increasingly accept and encourage tax transparency measures like public country-by-country reporting. It has become the logical next step in the growing push for transparency.

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About the FACT Coalition

The Financial Accountability and Corporate Transparency (FACT) Coalition is a non-partisan alliance of more than 100 state, national, and international organizations working toward a fair tax system that addresses the challenges of a global economy and promoting policies to combat the harmful impacts of corrupt financial practices.

The Coalition calls for an end to corrupt financial practices that prop up autocratic regimes and undermine democratic institutions, allow for and foster human rights abuses, and is a leading contributor to global poverty. The underlying problems are global in scope and require multilateral cooperation. While a growing number of nations are stepping up to address these issues, the U.S. needs to lead on the international stage and fight to eliminate roadblocks to effective reform.

FACT works closely with our international partners while focusing on educating U.S. policymakers on internal reform measures — encouraging those policymakers to provide positive leadership internationally.

Long term, through transparency and accountable international agreements, we seek to create stable funding sources for development and incentivize future investment that measurably reduces global poverty.

For more information, please visit thefactcoalition.org.

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