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Jo Swinson MP
Minister for Employment Relations and Consumer Affairs
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

5 February 2015

Dear Business Minister

**Draft industry guidance for the UK Reports on Payments to
Government Regulations 2014**

Publish What You Pay members have welcomed the opportunity to respond formally to the consultation on the draft industry guidance for the BIS Regulations being developed by an industry working group on behalf of the ICMM and IOGP. We also appreciate the openness of your department officials to further dialogue with us about the guidance.

We were encouraged to read the UK Government's statement that "Industry and civil society are working together to create guidance that will give companies the information they need to deliver accurate and meaningful reports to the Registrar of Companies" (Explanatory Memorandum, <http://www.legislation.gov.uk/uksi/2014/3209/memorandum/contents>).

However, we remain extremely concerned about two aspects of the draft guidance that we understand could still create major loopholes in reporting. Uncorrected, this would undermine the excellent progress made by the UK Government, companies and civil society in extractives transparency.

We are due to meet with industry representatives at BIS at 10.30 AM tomorrow Friday to review the latest version of the guidance, which we have not yet seen. We believe the guidance may still not be an accurate reflection of the intent or terms of the UK Regulations and EU Accounting Directive, and if so we do not think the UK Government should endorse it.

Project definition

As we pointed out in our consultation response, accompanied by a legal opinion, the draft language in the guidance incorrectly suggested that companies may artificially aggregate payments. This puts companies at risk of violating the Regulations.

The draft guidance's interpretation of the phrase "substantially interconnected" incorrectly identified two separate "bases" upon which legal agreements can be considered "substantially interconnected" and therefore used as a justification for grouping payments and reporting them as for a single project. The first basis offered by the draft guidance was that the agreements are "operationally and geographically" integrated; the second, alternative basis was that they are "related agreements with substantially similar terms".

However, the separation of these two “bases” misstates the disaggregation requirements of the Regulations and Directive, because these two criteria for agreements being “substantially interconnected” constitute one single basis. As our legal opinion puts it, under the Directive, more than one contract etc. constitute a project if they have the following characteristics: (i) they are a "set"; (ii) they are integrated both operationally and geographically; (iii) they have "substantially similar terms".

Until we see the revised guidance language we cannot judge whether our concerns on this point have been addressed. We therefore trust that the UK Government has made no decision to endorse the guidance while the language on project remains problematic. We will seek legal opinion on the reformulation of the language once we have sight of it.

Joint venture reporting

We also understand that the revised guidance may still suggest that payments made on behalf of joint venture (JV) partners need only be disclosed by the “operator”. This will create major gaps in reporting and is not compliant with the Regulations or Directive, which require companies to report payments made “in relation to the relevant activities” of themselves and any subsidiaries, whether made directly or through a JV operator.

Operator-led reporting risks exempting from disclosure any projects with non-EU operators, even where European companies are participants. In Angola, for example, 30% of oil projects fall into this category. For BP, around 46% of its global production in 2013 was from JVs where BP is not the operator.

Potentially worse, the guidance may incentivise companies and host governments to purposely structure future JVs to avoid disclosure by nominating non-EU partners as operators and channelling payments through them. Either way, UK and EU companies would not be required to disclose.

Guidance that encourages companies to submit payment reports that exclude indirect payments via JV operators would contradict the spirit and intent of the Accounting Directive and the entire purpose of this legislation. UK Government endorsement of such faulty guidelines could be an infraction issue for the European Commission.

It is wholly practicable for companies to report their share of JV payments. Tullow Oil already discloses payments made on its behalf by JV operators. Yet applying the industry guidance as drafted, payments from 13 of Tullow’s 60 African oil licences, and covering 52% of its production, would go unreported. Statoil has confirmed that it will report its share of all JV payments in its first disclosures under Norwegian law in March 2015.

Where JV participants are the licensees, they are principally liable for tax even if the nominated “operator” acts as an agent for channelling tax payments to government. These tax payments are accounted for on the participant’s own balance sheet. We believe therefore that the correct interpretation of the Regulations/Directive is that UK and EU companies must disclose their share of in-scope payments made on their behalf (whether directly or indirectly). In determining which payments are made on a company’s behalf (rather than by an operator as principal), companies should consider the underlying liability and the treatment of such payments in their financial statements.

BIS has done a tremendous job to date on extractives transparency. The effort must not weaken at this late stage. Many other parties – EU Commission and member states, Canada and the US – are watching what is agreed in the UK, which will strongly influence laws and implementation in other jurisdictions.

We urge you to ensure that the UK Government does not in any way endorse the industry guidance until all parties concerned – including civil society – are agreed that it is fully fit for purpose. Then it will be true to say (paraphrasing the Government’s Explanatory Memorandum quoted above) that “Industry and civil society have worked together to create guidance that will give companies the information they need to deliver accurate and meaningful reports to the Registrar of Companies.”

With good wishes.

Yours sincerely



Simon Taylor
Founder Director
Global Witness



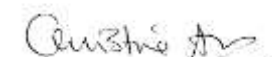
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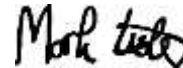
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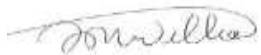
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Senior Advocacy Officer
**Natural Resource
Governance Institute**



Chris Taggart
Chief Executive
OpenCorporates



Miles Litvinoff
Coordinator
Publish What You Pay UK
mlitvinoff@pwypuk.org
tel. 01442 825060 / 07984
720103