

*This note has been issued by the EITI International Secretariat to provide guidance to implementing countries on meeting the requirements in the EITI Standard. Readers are advised to refer to the EITI Standard directly, and to contact the International Secretariat to seek further clarification. Contact details can be found at [www.eiti.org](http://www.eiti.org)*

Please note that this guidance refers to the 2013 Standard. In most cases, the requirements remain the same and the guidance valid. An updated version reflecting the 2016 Standard will follow soon.

# Guidance note 11: Addressing taxpayer confidentiality in EITI reporting

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## Summary

Government entities participating in the EITI may be subject to restrictions on the disclosure of taxpayer information due to constitutional or legal taxpayer confidentiality and privacy provisions. This guidance note sets out options for addressing this issue, drawing on experience from EITI implementing countries.

## Background

The EITI requires government agencies to provide a comprehensive statement on tax revenues raised from the extractive industries. All government entities receiving material revenues are required to comprehensively disclose these revenues in accordance with the agreed scope (Requirement 4.2a).

Government entities participating in the EITI may be subject to restrictions on the disclosure of taxpayer information due to taxpayer confidentiality and privacy laws. Taxpayer confidentiality and privacy laws typically provide that taxpayer information is confidential, and can only be used by the authority to administer the tax system, except as otherwise specified by law.

In some cases the government may have entered into contracts with oil, gas and mining companies that prohibit disclosure of any commercially sensitive information they contain.

## Guidance

There is no one way of dealing with this issue – countries will have various legal frameworks and other agreements that may affect implementation, and will have to respond to these in different ways. Where contracts prohibit disclosure of information about tax payments, the contracting parties may be able, by mutual agreement, to amend the contract to accommodate disclosure of tax payments, or find other ways for this information to be disclosed for the purpose of the EITI process.

**It is recommended that the multi-stakeholder group (MSG) conducts a review of the legal and regulatory framework to determine the specific barriers that may affect implementation of the EITI, and to explore options for resolving these issues.**

In some implementing countries, tax authorities may release information in some prescribed circumstances. This may include discretionary powers subject to “public interest”, and other similar tests. The MSG should engage

directly with these agencies to explore options for accessing the necessary data. The MSG should document the options considered and the agreed approach for addressing this.

Drawing on experience from EITI implementing countries, it is suggested that the assessment considers the following options:

### **1. Enacting or modifying legislation and regulations**

Several implementing countries have used executive orders, presidential, ministerial or similar decrees to mandate disclosure to the extent required to meet the requirements of EITI. Others have adopted or amended legislation and regulations, for example, by specifying participation in the EITI as an exemption from the usual provisions relating to taxpayer confidentiality and privacy. This has proven to be an effective approach, although the legislative process may be time consuming and may significantly delay EITI implementation.

### **2. Access through intermediaries / third parties**

It may be possible to access the necessary data through intermediaries/third parties. A government statistical agency, auditor general, parliamentary committee, ombudsman, or other similar body may be empowered to request the necessary data and to make it available to the Independent Administrator (and to the public) with greater flexibility than the tax authority. For example, the Independent Administrator could be contracted by the government statistical agency or the auditor general, enabling the Independent Administrator to make use of that agency's access to data.

### **3. Data room**

Government agencies may be able to make use of a "data room" (or virtual data room) for the purposes of the EITI process. Data rooms are often used by government agencies to disclose a large volume of confidential data. A traditional data room is a physically secure room (normally in the office of the organisation disclosing the data), which authorised parties (such as the EITI Independent Administrator) may visit in order to inspect and report on the various documents and other data made available. A virtual data room employs the same procedure, via a secure online portal. The EITI Independent Administrator would be bound by confidentiality provisions, and there would be restrictions on his ability to release detailed information to third parties by forwarding, copying or printing. Detailed auditing may be required for legal reasons (i.e., a record of who has seen which version of each document).

### **4. Taxpayer waiver**

In some cases the taxpayer may choose to waive its rights to confidentiality and privacy. Several implementing countries have asked each participating company to write to the tax authority/ies requesting that their data is made available to the Independent Administrator. If this option is feasible, it has proved useful to develop a template letter with standardised language for this purpose.

### **5. Taxpayer waiver "work around"**

In some countries, the tax authorities may still be prevented from releasing data to the Independent Administrator, even if the taxpayer authorises the agency to do so, due to constitutional and/or legislative restrictions. In these cases, a "work around" has been employed, whereby the taxpayer requests that the agency provides the taxpayer with a copy of their records, which the taxpayer then makes available to the Independent

Administrator. This approach is based on the premise that the tax payer is entitled to access a copy of their records. To safeguard the reconciliation procedure, the process may be sequenced so that the companies first provide their data to the Independent Administrator before requesting the government data. A procedure is also needed to verify that the government data has not been altered. The Australian EITI pilot utilises an electronic exchange of data using password protected files.

## Case Study - Peru

The Constitution of Peru (Article 2(5)) provides for citizens' right of access to information from public entities. This is reflected in the Transparency Law No. 27806. However, the constitutional mandate provides an exception regarding information concerning taxes, as reflected in Article 85 in the Tax Code (Supreme Decree No. 135-99-EF)<sup>1</sup>. This provides that "the amount and source of income, expenses, taxable or any other data" related to a tax payer is confidential and cannot be disclosed except for certain listed purposes (none of which apply to the EITI).

This made it challenging to access government data on income tax paid by oil, gas and mining companies. These ultimately represented 74% of total government revenues in the 2010 EITI Report. Other revenue streams such as royalties and the validity rights are considered as non-fiscal payments (pagos no-tributarios) and as a consequence no challenges were encountered in disclosing and reconciling those figures.

To address this issue, the Peruvian MSG developed a voluntary procedure whereby the companies would waive their right to confidentiality. Drawing on production data, 50 companies were identified as material and targeted for the participation in the EITI Report. Considerable time was spent working to reach out to these companies and explain the EITI process. The companies which elected to participate were invited to sign a binding legal form in which they:

1. Committed to reporting applicable revenue and tax payments;
2. Waived their confidentiality right and authorised the tax agency (SUNAT) to disclose relevant revenues; and
3. Indicated whether they elect to disclose on an aggregated or disaggregated basis.

33 companies agreed to participate in the first report. Coverage improved significantly in the second report, and Peru achieved Compliance, having demonstrated coverage of all material payments and revenues.

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<sup>1</sup> Available (automatically translated into English)

<http://www.microsofttranslator.com/bv.aspx?from=&to=en&a=http://www.sunat.gob.pe/legislacion/codigo/libro2/titulo3.htm>