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RE: Comments on Draft EITI Rules

Dear Jonas,

We very much appreciate the opportunity to provide comments to the draft of the new EITI global standard. We are extremely grateful for all of the hard work of the Secretariat and the Board.

We commend your effort to streamline the rules into seven requirements, and to revise the validation process and provide more detail into what constitutes meaningful progress. We acknowledge and recognize that this was no easy task. We also welcome the inclusion of requirements around improving the usability of reports and data, including that countries share EITI data files and that Multi-stakeholder Groups build the capacity of civil society to leverage the EITI reports and data.

As is expected, we also commend and welcome the inclusion of a project reporting requirement that aligns with the SEC rules and upcoming EU reporting standards. We look forward to working with the Secretariat, the Board and EITI Implementing Countries in the future to identify practical ways that the US and EU disclosures can complement and enhance EITI reporting.

However, we are very concerned that the draft rules are weak in some key areas, including 1) contract transparency; 2) beneficial ownership; 3) civil society participation; and, 4) adapted implementation (i.e. exemptions). For this reason, we wish to provide further comment on those specific areas in the following pages. These largely align with comments you will receive from other PWYP coalitions, but where possible, we elaborate additional justification and rationale for these positions.

It is important that these recommendations be adopted to ensure a robust and relevant EITI standard. This is crucial to protect the integrity of the EITI brand.

We thank you in advance for your consideration and would appreciate clarification on how these comments will be addressed before the Sydney meeting. Please do not hesitate to contact us with any questions.

Many thanks again for your continued hard work.

With best regards,

Isabel Munilla  
Director, Publish What You Pay US

Kady Seguin  
Interim Director, Publish What You Pay Canada
Comments on Draft EITI Rules – Version 14 March 2013

1. Contract Transparency – 3.11
As is clear from formal Publish What You Pay submissions from around the world, it has been our position that contract transparency should be required for countries that choose to sign up to the EITI. We are, therefore, very disappointed that the new draft rules only encourage contract transparency.

It must be noted that if adopted as such, the EITI standard on contract transparency would be inconsistent with International Monetary Fund’s Guide on Resource Revenue Transparency, the standards of the International Finance Corporation of the World Bank Group, and best practice within EITI countries. It would also be inconsistent with the majority of implementing country respondents (17/20) to the contracts disclosure survey.

As you know, contract disclosure is increasingly being required through both government policy and legislation. The government of Guinea recently joined the DRC, Iraq, Afghanistan, Indonesia, Ghana, Liberia, and Peru, as countries which have published their oil, gas and mining contracts online. Furthermore, contract transparency is increasingly being required through securities disclosure requirements. For example, a 2008 amendment to Canadian securities disclosure requirements requires full disclosure of all contracts upon which a business is substantially dependent (over 50%) for oil, gas and mining companies. As the global standard for transparency in the extractive sector, the EITI must promote emerging best practice, and should require this type of transparent practice for EITI implementing countries.

At a minimum, the EITI should require that Multi-Stakeholder Groups conduct and document a robust analysis of the extent of, and potential for, contract disclosure. The MSG should provide the analysis and explanation of its rationale for its position regarding contract transparency in their report to the public. This should include documentation of a discussion of the applicable national legal and regulatory frameworks, and relevant global normative frameworks and best practice. At minimum, this would be a useful, concrete contribution to informed public discussion. As we understand, such language was included in a previous draft of the rules, and was removed without opportunity for full consideration. We ask that this be reinserted into the rules.

2. Beneficial Ownership - 3.10
As with contract transparency, the issue of beneficial ownership provides the EITI with an opportunity to lead on an issue which is gaining significant traction globally. It is very likely that the G8 will address this issue in a substantive way, therefore new EITI rules that incorporate strong beneficial ownership reporting requirements will allow EITI supporters to emphasize its relevance to the global transparency and good governance movement. It would also provide important political space to those pushing national efforts to adopt disclosure laws. Leadership from EITI here would be strongly welcomed.

To increase efficiency and ease the information uptake from EITI reports, we do not believe that providing guidance to other sources of beneficial ownership information, as is proposed in the current draft, is efficient. We recommend that companies include this information in a few lines within their existing reports to the MSG. This information is easily available to accountants providing other EITI data, so therefore, does not pose a significant reporting burden.

We therefore endorse the suggested language below for inclusion under 3.10. You have likely received this from other PWYP coordinators, as well as member organizations. We include it here for your reference:
Companies that bid for, operate or invest in an extractive asset are required to provide the reconciler with the identity(ies) of their beneficial owner(s), and the value of each owner's interest in the asset, expressed as a percentage, subject to the exceptions listed below. This information must be included in full in the EITI report and the MSG is required to ensure that all companies provide it.

Publicly listed companies are not required to disclose information on their beneficial owner(s).

Implementing countries are not required to verify the beneficial ownership information provided by the corporate vehicles that bid for, operate or invest in extractive assets.

Implementing countries are required to maintain a public list of the beneficial owners of the corporate vehicles that bid for, operate or invest in extractive assets, as obtained from the EITI reports in section A above.

Where companies are failing to provide this information, the multi-stakeholder group must agree a way of addressing this, for example by developing a time-bound action plan for ensuring that all companies meet this requirement.

Definitions
Beneficial ownership is defined as the natural person(s) who directly or indirectly ultimately own or control more than 10% of the corporate vehicle.

Exceptions from licensing and ultimate beneficial ownership disclosure requirement for significant barriers
Where sub-national entities issue licenses there can be significant practical barriers to the disclosures set out in sections XXXX above. If this is the case, it is required that the multi-stakeholder group agrees an approach for engaging and phasing-in disclosure of license information [and beneficial ownership information] by these entities. Any significant barriers preventing disclosure of this information by sub-national entities should be documented by the multi-stakeholder group and be clearly indicated in the workplan (ref. 1.5 on adapted implementation). Note: The wording of this section is identical to the version circulated at the board meeting, except for the addition of the words in brackets.

3. Civil Society Participation
As described in Requirement 6 in the draft, disclosure is of little practical use without public debate about how resource revenues can be put to good use. Likewise, disclosure is of little practical use in countries where citizens are not free to criticize the government, and face harassment or prosecution if they do so, and are not free to raise resources to support their work to analyze EITI disclosures and conduct advocacy to promote accountability.

The theory of change of the EITI—that disclosure will lead to greater public debate and accountability for the use of natural resources and their revenues—is built on the assumption that citizens in EITI countries are free to foster that debate and push for greater accountability. When a country without these essential ingredients for accountability in place joins EITI, the initiative significantly loses its leverage to press the country for reforms. Strong civil society participation requirements in the rules gives EITI (and its supporters) the leverage needed to press for these essential reforms before and after candidacy, in order for the initiative to be able to deliver on its theory of change. The inclusion of such strong requirements also keeps faith with citizens and civil society groups in these countries, who can point to EITI standards as a tool to make the business case for these reforms. They can also point to these standards to create the political space to make reform proposals without fear of retribution. Citizens in EITI countries are the key drivers of accountability and reform, so it is essential to ensure their
confidence and buy-in to the EITI. Ensuring that strong civil society participation requirements are included in the new standard is fundamental to that aim.

Conversely, it is clear that without these reforms in place, in many countries the EITI could inadvertently give legitimacy, insulate or accommodate a regime that does not allow civil society to operate freely or in a way that would enable the EITI’s theory of change to take root. Azerbaijan appears to be such a country. The political support received via EITI participation may in some cases, reduce the international pressure on a regime to reform, as some donors assume that EITI participation equates with respect for the rights of citizens to demand accountability. This then reduces the leverage of citizen reformers, parliamentarians and journalists to speak out against waste, fraud and abuse. Ultimately, EITI success and its brand is placed at risk in every EITI country that does not respect civil society protections.

We therefore endorse the proposal you have likely received from other PWYP coordinators, as well as member organizations that 1) Policy Note #6 should be incorporated into the new standard, and 2) that elements related to civil society participation in the 2011 Rules that were omitted in the new standard, should be reincorporated. We list these below:

1) Policy Note #6 has been approved by the board, so the specific principles referenced for inclusion below should not be controversial or onerous to approve. The new standard should specify that “obstacles to civil society participation” (which Section 1.3(a) of the new standard says must be removed) include, but are not limited to:
   o Lack of “civil society representatives substantively involved in the EITI process enjoy[ing] internationally-recognised fundamental rights outlined in the Universal Declaration of Human Rights.”
   o "[A]ctions that have restricted public debate about revenue transparency and the use to which resource revenues are put.
   o "Harassment and intimidation of civil society representatives participating in the implementation of the EITI.
   o "Denials of travel permits sought by civil society representatives to attend related meetings.
   o "Legal, administrative, procedural and other obstacles to the registration and operation of independent civil society.
   o "Impediments to the free selection of civil society representation.
   o "The inclusion among the “civil society” representatives of members of parliament from the ruling party or other political parties aligned with the Government..."
   o "Resource and capacity constraints."

2) Elements of the 2011 Rules that should be re-incorporated:
   o 1.3.a.i: Language protecting civil society participation – see 2011 rule 6.g-h-i.
   o 1.3.b.ii: “Civil society”; add: “(including independent civil society groups and other civil society, such as the media and parliamentarians)”.
   o 1.3.b.4: Include from 2011 rule 4.b: “EITI implementation requires an inclusive decision-making process throughout implementation, with each constituency being treated as a partner.”

4. Adapted Implementation
It is crucial that the language of the new rules do not include any loopholes that undermine the standard itself. It stands to reason that a country would select to be part of an initiative, then ask for exemptions from its requirements. If a country would like to sign up to the EITI, it should do so on the understanding
that it must comply with the requirements involved. This is not onerous, given that the intent is to establish a global standard for transparency. This is critical to the protection of the EITI brand. The ad hoc process used previously should be avoided and issues should be addressed prior to submitting a candidacy application.

We therefore endorse the recommendations below to address under 1.5:

1) The MSG must get the approval of the EITI for any adapted implementation. Legal obstacles cannot be treated as a justification for exemptions from reporting, since this would be inconsistent with the treatment of existing Candidate countries which have been made to work around their own laws (e.g. on confidentiality).

2) To decide whether the board should grant an extension, the language must be clarified to avoid the risk that this is interpreted too broadly. We recommend: “The Board will only allow such adaptations in cases where it can be convincingly demonstrated that there would otherwise be insurmountable constitutional or practical obstacles to a country reaching Compliance within the Maximum Candidacy Period, and that the country will seek to include any areas exempted from reporting are covered in the shortest reasonable time after Compliance.”

3) Adaptations must be requested, and can only be granted by the Board, during the Sign-up phase of Candidacy. Requests for adaptations should not be considered at any other time.